# For The Defense™

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The magazine for defense, insurance and corporate counsel

November & December 2024

## Employment and Labor Law, Trucking Law, and Insurance Law

Including . . .

**Ethical Considerations for Attorneys in Conducting Workplace Investigations**

Also in This Issue . . .

**Anchors Away! Beating Plaintiffs at Their Own Game**

**AI and Claims Handling: Navigating the Next Wave of Bad Faith Suits**

And More!

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# A Unified Vision for DRI

DRI President **Anne M. Talcott** is an Industry Group Leader at Schwabe, Williamson & Wyatt based in Portland, Oregon.

Dear DRI members,

It is with great excitement and deep gratitude that I address you for the first time as President of DRI. At the conclusion of our 2024 Annual Meeting in Seattle, I officially stepped into this role, deeply inspired by the theme that guided our gathering: *Where Relationships Build Business*. In a world where our professional lives are becoming increasingly digitized and complex, this theme is a powerful reminder of the value of human connections in shaping not only our careers but also the future of our legal profession.

The opportunity to lead DRI is one I embrace with enthusiasm and a clear vision for where we can go together. Our organization, with its deep history, diverse membership, and commitment to excellence, plays a critical role in the civil defense space. It's not just about defending clients; it's about shaping the legal landscape for businesses, fostering the next generation of defense attorneys, and supporting each other through the ups and downs of our professional journeys.

## Building Business through Relationships

This year's Annual Meeting was a testament to the power of relationships in our industry. From mainstage programming featuring keynote speakers Bill Bradley and Rick Steves to the numerous networking events, educational sessions, and leadership discussions in which hundreds of our members participated, the theme resonated throughout every aspect of the event. I witnessed firsthand the many connections being forged and strengthened—relationships that will undoubtedly lead to new opportunities, referrals, collaborations, and the collective growth of our members and their firms.

In our field, success is built on trust, collaboration, and shared commitment to excellence and professionalism. The personal connections we form with our colleagues, clients, and peers are what fuel that success. As we move forward, DRI will continue to be the premier space for fostering these relationships, providing our members with unparalleled access to a network that truly builds business and a platform to build a career.

## A Historic Time for Women in the Legal Profession

One aspect of my presidency that fills me with particular pride is the powerful leadership of women in the civil defense bar at this moment in time. Following last month's DRI election, not only are DRI's Executive Committee and Board of Directors now half female, the presidents of all DRI's Sister Organizations, the Association of Defense Trial Attorneys (ADTA), the Federation of Defense & Corporate Counsel (FDCC), and the International Association of Defense Counsel (IADC) are all women. Additionally, the American Board of Trial Advocates (ABOTA) and the American Association for Justice (AAJ) have women at the helm, making this a truly historic moment—not only for our organizations but for the legal profession at large.

This leadership milestone reflects the progress we have made toward greater gender diversity and inclusivity in law, a field traditionally dominated by men. However, this is not just about celebrating gender diversity; it's about recognizing the broader implications of having diverse leadership guiding the future of our profession. Diverse leadership leads to diverse perspectives, which results in better decision-making, more innovative solutions, and a legal profession that more accurately reflects the world in which we live.

As women leaders, we are united by a shared commitment to ensuring that the legal profession continues to evolve, that opportunities are accessible to all, and that our organizations are equipped to meet the challenges of the future. This moment is not just symbolic; it is a catalyst for lasting change, and I am thrilled to be part of this evolution.

As DRI President, I will continue to prioritize inclusive initiatives across all levels of our organization. This means expanding opportunities for women, people of color, LGBTQ+ individuals, and those from other underrepresented groups in law. It also means creating spaces where all voices are heard, respected, and valued.

## Looking Ahead: Innovation and Education

While relationships are at the core of our success, we must also keep pace with the rapid changes reshaping our profession. Technological advancements, evolving client expectations, and the increasing complexity of the legal landscape require that we stay ahead of the curve. DRI is committed to providing members with the resources, education, and support they need to not only keep up with these changes but to lead the way.

Our educational programs, publications, seminars, and webinars are second to none. We will continue to offer cutting-edge content that empowers our members to excel in their practices.

From AI's role in legal research to navigating the complexities of cybersecurity, our goal is to ensure that every DRI member has access to the knowledge and tools necessary to thrive.

Additionally, we are committed to fostering the next generation of legal talent. As a former Young Lawyers Committee Chair (many, many years ago), I used DRI's platform to build my knowledge, my skills, my network and my career. Mentorship and professional development will be key focus areas during my tenure. I encourage each of you to take an active role in these initiatives—whether as a mentor to a younger attorney or by seeking out opportunities for growth within DRI's many committees and leadership roles.

## Gratitude and the Road Ahead

As I step into this role, I want to express my deep gratitude to all of you—our members, leaders, and staff—who make DRI the extraordinary organization that it is. It is your dedication, passion, and commitment that fuel our success. I also want to thank my predecessors, whose leadership has paved the way for me and so many others. Their vision has brought us to this point, and it is my responsibility to build on that legacy.

*Pictured with Anne (above, L to R): FDCC President Heidi G. Goebel, IADC President Donna M. Lamontagne, ABOTA President-Elect Jennifer H. Doan, ADTA President Dyan J. Ebert*

The road ahead is full of opportunity. Together, we will strengthen our community, grow our businesses, and continue to shape the future of the legal profession. I am excited to work alongside all of you as we embark on this journey.

Thank you for your trust, your engagement, and your commitment to DRI. I look forward to all we will accomplish together in the year ahead.

**Anne M. Talcott**
President, DRI

*Pictured with Anne (right, L to R): DRI Second Vice President Sara M. Turner and First Vice President Jill Cranston Rice*

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## ON THE RECORD

3 ***A Unified Vision for DRI***
By Anne M. Talcot

## EMPLOYMENT AND LABOR LAW

8 **Letter from the Chair**
By Gordon Hill

9 **Ethical Considerations for Attorneys in Conducting Workplace Investigations**
By Sarah Sloan Batson and Jean Back

14 Protecting Business Information
**Trade Secret, Confidential, or Generally Known**
By Scott F. Gibson

19 **Pragmatic Strategies to Consider When Defending Wage and Hour Class or Collective Actions for Multi-State Employers**
By Madeleine K. Lee

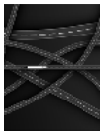
## TRUCKING LAW

24 **Letter from the Chair**
By Terrence L. Graves

25 We're Not Gonna Take It
**New Developments in the Battle to Expose the Dark Side of Lien-Based Medical Care Arrangements**
By Whitney Lay Greene & Amanda Nardi

31 FAAAA Preemption Gains Ground
**Freight Brokers Could Be Shielded from State Law Tort Claims**
By Devin Bembnister and Alyssa Pijanowski

33 **Mock Trials and Jury Focus Groups—What Are They and How Do You Use Them to Your Best Advantage?**
By Terrence L. Graves, Paul Greene and Ross Suter



38 Wabash's $462M Verdict
**A Landmark Case and Its Implications for the Trucking Industry**
By Patrick E. Foppe

41 Anchors Away!
**Beating Plaintiffs at Their Own Game**
By Marc Jaskolka and Meg F. Hogan

## INSURANCE LAW

48 Letter from the Chair
**Who Are We And What Do We Do**
By Joanna M. Roberto

49 Think Outside the Box
**New & Creative Strategies for Managing Extra-Contractual Exposures**
By Kayla Scroggins-Uptigrove

55 AI and Claims Handling
**Navigating the Next Wave of Bad Faith Suits**
By Chris Johnson

60 Competing Courts
**Determining Jurisdiction in International Cross-border Coverage Litigation**
By Christine Viney and Marcus Snowden

## LITIGATION SKILLS

69 Working the Crowd
**Why Defense Attorneys Must Get Jurors Talking in Voir Dire**
By Nick Polavin

72 The Future Is Now
**Preparing for Today's and Tomorrow's AI Litigation**
By David Metz and Jorge Monroy

## COMMERCIAL LITIGATION

76 An Illustrative Tale
**Rule 702 Trumps Predominance in Class Action**
By Jeff Warren

## COMMERCIAL LITIGATION

81 **Defending Benzoyl Peroxide Acne Product/Benzene Litigation**
By Abbie Eliasberg Fuchs, Marni Weiner Arlia, and Daniel R. Strecker

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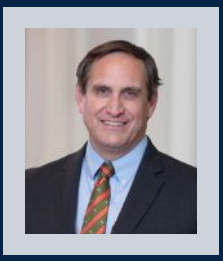


# Letter from the Chair

**Gordon Hill** of Hill Ward Henderson is the Immediate Past Chair of the Employment and Labor Law Committee.

I have had the honor of serving as the Chair of the ***Employment and Labor Law Committee*** for the past two years. It seems like forever ago when I received the (pre-pandemic) invitation from Stan Graham and Dessi Day asking if I would be interested in serving as Committee Vice Chair, and yet my time as Vice Chair and then Chair has flown. As the saying goes, time flies when you're having fun. And our committee has had a lot of fun.

In 2023, we hosted several happy hours and webinars, including two lengthy "boot camps" on Labor Law and the Occupational Safety and Health Act (OSHA). Our crescendo moment was our annual seminar in New Orleans followed by the city's famous *Jazz Fest* (my first but definitely not last).

This year has been another incredibly successful year. We kicked things off with a webinar on the application of Artificial Intelligence in our field (thank you Christy Dunn) and hosted another CLE on AI at the ***DRI Annual Meeting*** in Seattle. Also, our committee planning team consisting of David Renner (Program Chair) and Sandy Morris (Vice) put on another outstanding ***Employment and Labor Law Seminar*** in Washington, D.C. We were blessed to have near record attendance (including many non-members and first-time attendees), and our young lawyers brought some incredible energy and fresh ideas to our networking events (thank you Courtlin Bond, Hannah Black, and Rachel Overlander).

Our committee's success is truly a team effort, and I want to thank the countless members who have contributed. There are far too many to list here, so I will simply focus on my successor Helen Holden. Helen has been an incredible leadership partner over the last two years–bringing her energy and unwavering commitment to serve our community, helping to navigate some of the challenges we have faced, and generally keeping me on track. The committee is going to be in incredible hands with you as Chair, and I look forward to seeing what you have in store for us next year.

Finally, I will do a final shameless plug to encourage those who may be interested to ***become more involved in our committee.*** There are many different opportunities, including membership, writing and editing articles, online/webinar planning, speaking opportunities, networking, our e-community and more. If your practice involves employment or labor law in any way, we invite you to join us and get involved!

Best,

Gordon Hill

# Ethical Considerations for Attorneys in Conducting Workplace Investigations

By Sarah Sloan Batson and Jean Back

It is vital for attorneys to take steps to eliminate any bases that may discredit their qualifications to conduct the investigation...

Worrying about ethical considerations before conducting a workplace investigation is more than an academic issue. It is vital for attorneys to take steps to eliminate any bases that may discredit their qualifications to conduct the investigation, especially those that may be questioned after the fact and undermine the investigation as a whole. And some of those reasons can be addressed at the very outset.

## Ensuring There Is No Conflict of Interest

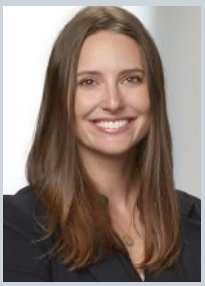
Under the Model Rules, a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 1983) ("Model Rules").

Prior to engaging in investigatory steps, attorneys should be on the lookout for perceived or actual conflicts of interest. The investigator cannot be too closely related to the facts of the complaint itself, or the individuals involved in the matter. To avoid the appearance of bias, investigators should not "soften the blow" if evidence of misconduct is discovered, or if a high-ranking officer is involved. It is imperative that investigators be neutral, professional, candid, and clear when presenting information – especially if the investigating attorney is in-house and conducting an investigation of an executive or director.

Additionally, Rule 3.7 prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness. The Comment to Rule 3.7 states: "A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof." Model Rules r. 3.7 cmt. If you determine that it is likely that the investigation may lead to litigation, inform your client that you could be asked to serve as a fact-witness if they waive the attorney-client privilege over the investigation or if a court compels you to testify. In that case, you cannot be both a fact witness and an advocate. Further, opposing counsel may move to disqualify the investigating attorney on this basis or even allege that they have a conflict of interest in representing the client. Before investigating, be mindful of the potential need for separate counsel to the investigators.

## Have a Clear Scope of Investigation

After analyzing conflicts of interest to decide whether an attorney can perform the investigation, the next step is to determine



**Sarah Sloan Batson** of Maynard Nexsen is an experienced litigator and employment attorney who helps employers navigate complex disputes and compliance issues. She practices in federal and state court in North and South Carolina. Sarah is skilled in internal investigations, compliance advice, and advising schools and universities on education law matters. She is a trusted advisor, providing advice and counsel to employers on a variety of legal matters. **Jean Back** of Schwabe, Williamson & Wyatt is an experienced attorney with more than 30 years of employment law experience, who assists employers solve problems to complicated employment scenarios. Jean has broad expertise in litigation, mediation, and settlement of employment and business tort claims. As a regular part of her practice, Jean conducts employee and manager trainings, and assists in investigating workplace complaints. Jean speaks widely on how to conduct workplace investigations.

the scope of the investigation and to obtain the client's authorization regarding the scope of representation. The best way to determine the scope of the investigation is to create a written investigation plan that will provide the following answers:

- What are issues raised by the complaint;
- What policies or other company rules are at issue;
- Who are the witnesses;
- What is the demonstrative evidence;
- Will there be public relations concerns;
- What resources do you need;
- Will there be legal issues that require another attorney to provide legal advice.

Once there is an investigative plan, the attorney investigator is ready to communicate with their client about the scope of representation for this engagement. Just as with any new legal matter that an attorney undertakes, the next step is to draft an engagement letter. This is necessary so that the attorney investigator can provide their client with the best possible information about what they intend to do and regarding the cost of the investigation. The Model Rules address the scope of representation in Rule 1.2 which provides that "the lawyer shall abide by a client's decisions concerning the objectives of the relationship * * * and may take such action on behalf of the client as is impliedly authorized to carry out the representation." Model Rules r.1.2. In addition, Rule 1.2(c) authorizes a lawyer to "limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent." *Id.* To communicate the scope of representation and to obtain the client's authorization for the scope of work, the formal written engagement letter should provide the following information:

- Identify the client;
- State who is not represented (for example, shareholders, affiliates, subsidiaries, parents, stakeholders, people, or entities);
- State the initial scope of the investigation (for example, investigation of anti-harassment complaint initially thought to involve five witnesses);
- Provide that you will update this engagement letter if the scope of the investigation changes;
- State what you will not be doing, if this is appropriate. (For example, in my capacity as an investigator, I will be providing my opinion about violations of policy or the law. I will not be providing legal advice about actions that the company should take to remedy the harassment or policy violation. The company should consult its legal counsel for this information.)
- Provide information about your fees;
- Distinguish between your role as an investigator and the role of the client's legal advisor.

As attorney investigators move through the investigation, they should be prepared to be flexible. If the scope expands during the engagement, or if the investigator needs to limit the scope, then the attorney should follow this up with another scope engagement letter to reflect the change and obtain client consent for this expansion or limitation to the scope of work.

## Being Alert to Issues Involving Privileges & Waiver

### Attorney-Client Privilege

The attorney-client privilege is one that has developed at common law to encourage free and unfettered communication between a client and their attorney, with the goal of promoting informed representation. Over time, courts have provided guidelines as to how this privilege applies, with the following being a general overview: (A) a communication, (B) made between privileged persons (i.e., attorney, client or agent), (C) in confidence, (D) for the purpose of obtaining or providing legal assistance for the client. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2022); *In re Grand Jury*, 13 F.4th 710 (9th Cir. 2021).

Critically, this privilege applies only to confidential communications between privileged parties – the client or prospective client, the attorney, and the agents of the client and lawyer. This is especially important to remember during investigative interviews, as often, the interviewee is *not* the client. Generally, the client is defined as the intended and immediate beneficiary of the legal services, with the following criteria: (1) the client must communicate with the attorney to obtain legal advice, and (2) the client must interact with the attorney to advance the client's own interests. *See, e.g., Wylie v. Marley Co.*, 891 F.2d 1463, 1471-72 (10th Cir. 1989); *Schilling v. Mid-Am. Apartment Comtys., Inc.*, No. A-14-CV-1049-LY, 2016 WL 3211992, at *3 (W.D. Tex. June 9, 2016); *Total Recall Techs. v. Luckey*, No. 15- cv-02281, 2016 WL 2866177, at *3 (N.D. Cal. May 17, 2016); *EEOC v. Johnson & Higgins, Inc.*, No. 93 Civ. 5481, 1998 WL 778369, at *5 (S.D.N.Y. Nov. 6, 1998). This definition for corporate clients was altered by the Supreme Court's opinion in *Upjohn*, which provides additional guidance for communications between legal counsel and lower-echelon employees – namely that the information was necessary to supply the basis for legal advice or was ordered to be communicated by senior officers; the information was not available from control group management; it concerned matters within the scope of the employees' duties; there was awareness the questioning was for the purpose of the corporation seeking legal advice; and the communications were considered and kept confidential. *Upjohn Co. v. United States*, 449 U.S. 383, 394-95 (1981).

**Once there is an investigative plan, the attorney investigator is ready to communicate with their client about the scope of representation for this engagement.**

Prior to commencing an investigation, be clear whether your role is one of a neutral investigator who is simply fact-finding or whether you are being engaged to conduct an investigation to identify facts and apply them to render privileged legal advice. Ensure that you clearly identify the scope of your investigation and the purpose of rendering legal advice from the

outset. Appropriately document in your work papers that they contain your mental impressions for purposes of rendering legal advice.

As part of an investigation, you may need to engage non-lawyer auditors, consultants or other professionals to assist in your analysis and rendering legal advice. In a privileged investigation, the scope of the engagement of these nonlawyers should be clearly identified, and it should expressly provide that they work at the direction of counsel. *See Crabtree v. Experian Info. Sols., Inc.*, No. 1:16-CV-10706, 2017 WL 4740662, at *2 (N.D. Ill. Oct. 20, 2017) (quoting *Heriot v. Byrne*, 257 F.R.D. 645, 666 (N.D. Ill. 2009) ("Although direct lawyer involvement is not required for the privilege to attach, a lawyer must have 'some relationship to the communication such that the communication(s) between the non-lawyer employees would 'reveal, directly or indirectly, the substance of a confidential attorney-client communication.'"). Keep in mind that attorneys may be accountable for investigators they supervise. Model Rule 5.3(b) provides that "a lawyer having

direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." Model Rules r. 5.3(b).

Even with these other considerations, attorneys should be reminded that the general ethical duty of confidentiality still applies. Specifically, lawyers shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or falls under permitted disclosures enumerated by the rule. Model Rules r. 1.6.

#### Work Product Doctrine

Another privilege that exists to keep information confidential is the product doctrine. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). Fed. R. Civ. P. 26(b)(3). While this is a widely invoked privilege, it does come with narrowly construed requirements. For example, even the rule itself provides a caveat for production if the documents at issue are otherwise discoverable, or the requesting party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain the documents or substantial equivalents by other means. *Id.* at 26(b)(3)(A)(i) and (ii).

Importantly, for this privilege to apply, the primary purpose of the preparation of the documents or materials *must be in anticipated of litigation*. In this context, if an investigatory report is prepared as part of regulatory law or corporate policy instead, the work product doctrine privilege will not apply and the document – at least the factual, non-advisory portions—will be discoverable.

This is demonstrated in *United States ex rel. Barko v. Halliburton Co.*, 37 F. Supp. 3d 1 (D.D.C. 2014), in which the plaintiff realtor brought a motion to compel to produce documents relating to the defendant's Code of Business Conduct investigations under his False Claims Act *qui tam* suit. While the defendants asserted that the investigation materials were protected, the court held that the attorney-client privilege and work product doctrines do *not* protect the documents because the investigations were undertaken pursuant to regulatory law and corporate policy rather than for the primary purpose of obtaining legal advice or in preparation for litigation. The court further suggested that this primary purpose test only can be satisfied if the investigations would not have occurred "but for" the purpose of obtaining legal advice or preparing for trial. Accordingly, the motion to compel was granted.

While attorneys should be generally aware of privilege within the course of practice, it is important to remember the application of attorney-client privilege and the work product doctrine within the lens of conducting investigations. Remember: if no legal advice is involved in the scope of investigation, avoid "crossing over" to providing legal advice on the issue at a later time.

### Witness Interviews – Ethical Considerations

Ethical considerations abound for attorneys who are conducting witness interviews. There are five basic rules of thumb that will help attorneys conduct lawful and ethical interviews: (1) Be upfront with witnesses about your role in the investigation; (2) Be honest and avoid making false statements of material law or fact; (3) Provide *Upjohn* warnings to unrepresented witnesses and consider confidentiality issues; (4) Avoid embarrassment and confinement; (5) Avoid conduct that could be construed to violate a witness's legal rights.

#### Be Upfront with Witnesses about Your Role

At the beginning of an interview, attorney investigators should make it a habit of explaining their role. If the investigator represents the company, then the attorney should provide this information at the outset.

It is important that attorneys are clear with witnesses about their role and that the attorney correct any misunderstandings. Model Rule 4.3 prohibits an attorney who is dealing with an unrepresented witness from stating or implying that they are disinterested, and if it appears that the individual misunderstands the attorney's role, the attorney shall make reasonable efforts to correct the misunderstanding. Model Rules r. 4.3. If an attorney ascertains that a witnesses' interests are or have a reasonable possibility of being in conflict with the interests of the client, Model Rule 4.3 also prohibits a lawyer from giving legal advice to an unrepresented person other than the advice to secure counsel. *Id.* The reasoning behind this rule is that some witnesses may assume that a company attorney also represents the employees of the company, or the witness may believe that the attorney is disinterested in the matter, even though they represent the employer. *Id.*

Model Rule 2.4 sets out ethical expectations for attorneys who act as a third-party neutral, and while this rule applies primarily to attorneys who act as mediators or arbitrators, it can also apply to an attorney who is hired by a company to provide a third-party investigation to a complaint. Model Rule r. 2.4. This rule requires that neutrals inform unrepresented parties that the attorney is not representing them, and when the attorney knows or reasonably should know that a party does not understand the attorney's role, the attorney must explain the difference between the attorney's role as a third party neutral and an attorney's role as one who represents a client. *Id.*

#### Be Honest

When an investigating attorney is interviewing witnesses, the model rules provide common sense provisos for an attorney's behavior.

Model Rule 4.1 requires that attorneys shall not knowingly make false statements to individuals who are not their clients. Model Rule r. 4.1. This rule requires that attorneys be mindful of confirming a statement that they know to be false. The broader catchall in the model rules relating to honesty and integrity appears in Model Rule 8.4, which provides that "it is unprofessional for a lawyer to * * * (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Model Rule r. 8.4.

**Provide Upjohn Warnings**

Model Rule 1.13(f) provides that:

> In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Model Rule r. 1.13(f). This rule, along with the warning derived from *Upjohn Co. v. United States*, 449 U.S. 383, 394-95 (1981), require that an attorney who is representing a company ensure that the witnesses (if a company employee) understands that the attorney does not represent the witness. The warning includes the following elements: (1) The lawyer represents the corporation and not the employee individually; (2) a description of the nature of the investigation; (3) the interview's purpose is to provide legal advice to the corporation; (4) the employee's statements will be shared with corporate decision-makers; (5) the interview communications are covered by the attorney-client privilege, but that privileged is owned by the corporation, which can waive the privilege without the employee's consent, and the company reserves the right to disclose the substance of the interview to third parties, including the government without any notice to the employee.

The *Upjohn* warning also typically included a warning that the employee could not share the information from the interview with third parties, but this practice has been called into question based on the NLRB's cases regarding concerted right activities under the NLRA. Employers will want to evaluate their confidentiality rule under the standards of the 2023 decision in *Stericycle*, 372 NLRB No. 113 (Aug. 2, 2023).

In addition, if the SEC applies to an investigation, then it is a violation of Rule 21F-17 under Dodd Frank to threaten discipline to a witness in an internal investigation if they discuss matters with outside parties prior to getting approval.

While witness confidentiality may not be compelled under all situations, the attorney investigator has confidentiality concerns of their own. Model Rule 1.6 prohibits attorneys from revealing information related to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). Model Rules r. 1.6. Attorney investigators should be careful not to promise complete confidentiality to witnesses as their statements may be disclosed as part of the investigation.

**Avoid Embarrassment and Confinement**

Model Rule 4.4(a) provides that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." Model Rules r. 4.4(a). This is a clear mandate for attorney investigators to do the right thing and try to limit embarrassment to the extent possible when conducting an investigation. The subject matter of many workplace investigations may be embarrassing for the accused person and for some witnesses. While it is impossible to control a witness's reaction, an attorney can control their empathy and the method of performing the investigation and asking the questions.

In addition, attorney investigators should take care about the time and place for witness interviews. Interviewing a witness in an open space, or in an office with windows to the rest of the office could embarrass a witness. Further, never lock a door or prevent a witness from leaving a room when conducting an investigation as this could lead to a claim of false imprisonment. *See, e.g. MacKenzie v. Linehan*, 969 A.2d 385 (N.H. 2009) (recognizing false imprisonment claim arising from employee's supervisor blocking the exit door for thirty seconds).

**Do Not Forget Witness Rights**

Attorneys should be mindful of witness rights as you are planning and conducting the investigation. For example, an attorney investigator should evaluate privacy rights when conducting an investigation that involves surveillance. With the increase in privacy laws across the country, attorney investigators should be very careful in conducting searches to uncover information about witnesses. For example, in *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 872 F. Supp. 2d 369 (D.N.J. 2012), the court found that an employee may have had an expectation of privacy in her Facebook page that was accessible only to invited employees. This claimed expectation was sufficient to plead a plausible claim for invasion of privacy when a supervisor compelled another employee with access to the Plaintiff's Facebook page to view it in front of the supervisor.

Be mindful that employees involved in investigations may have confidential communications with their attorneys such that a forensic examination to recover files stored on a computer used by the employee could reveal privileged information. *See, e.g. Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (N.J. 2010).

In addition, some witnesses may be represented. Ensure that before speaking with a witness you are sure that they are not represented by counsel.

Finally, consider whether the witnesses have the right to representation during an investigatory interview, otherwise known as "Weingarten rights." Although the NLRB has gone back and forth on this over the years, currently employees in a non-union setting do not have Weingarten rights. When an employee requests a representative during an investigatory interview, the employer may (1) grant the request and delay the interview until a representative is available, (2) deny the request and end the interview, or (3) allow the employee to choose to proceed without the representative or end the interview.

Protecting Business Information

# Trade Secret, Confidential, or Generally Known

**By Scott F. Gibson**

**The law protects trade secrets. Other types of confidential information can be protected through narrowly drafted contracts.**

*The intercom beeps, followed closely by the cheery voice of your firm's receptionist. "Good morning, Counselor," she says. "Jasper Wilde is in the west conference room. He's anxious to talk to you."*

*After a few minutes of chitchat, Jasper takes a sip of coffee and turns to the reason for his visit.*

*"You've been hounding me for years to implement a plan to protect my business information. I'm finally ready to do something."*

*"I was nervous when the Federal Trade Commission decided to abolish noncompete agreements," he continues. "But I'm breathing easier now that the judge in Texas threw out the FTC rule. So now we've got nothing to worry about. I need you to update my noncompete agreements so that I can keep my employees from competing if they stop working for me."*

*"Not so fast," you say. "It's not quite that simple."*

*You explain that although employers may have dodged the proverbial bullet when Judge Ada Brown struck down the FTC rule banning noncompete agreements, the battle over noncompetes is just starting to heat up. First, her decision needs to survive appellate review.*

*But even if the courts ultimately uphold the ban, restrictive covenants are still in peril. The outrage toward restrictive covenants did not originate with President Biden's direction to the FTC. State legislatures have been rewriting the law of restrictive covenants for years making it increasingly more difficult to restrict former employees from competing.*

*If that weren't enough, the National Labor Relations Board asserts that noncompetes and other restrictive covenants violate the National Labor Relations Act. And Congress – on both sides of the aisle – regularly threatens to "do something" about noncompete agreements.*

*"Change is coming," you note. "You need to increase the likelihood that your restrictive covenants will survive by narrowing the scope of those restrictions. We can help you do that. But we also need to talk about what you can do to protect your business information without using a noncompete agreement."*

*"Tell me what you mean."*

*"Some business information belongs exclusively to the Company. We can implement protocols and procedures to safeguard that information. Other information cannot be protected because it belongs in the public arena. We need to talk about how the law classifies business information and how those classifications apply to your business."*

*"I'm listening, Counselor."*

## Trade Secrets

A company's ability to protect business information depends in large part on how the law classifies that information. The law protects trade secrets. Other types of confidential information can be protected through narrowly drafted contracts. But companies cannot lay claim to the lion's share of their business information, as that information is general known in the industry.

Most clients are familiar with the concept of trade secrets, the highest level of protection afforded business information. Both state and federal statutes prohibit misappropriation (think "unauthorized use") of trade secrets.

Every state except New York has adopted some version of the Uniform Trade Secrets Act, which defines a trade secret as

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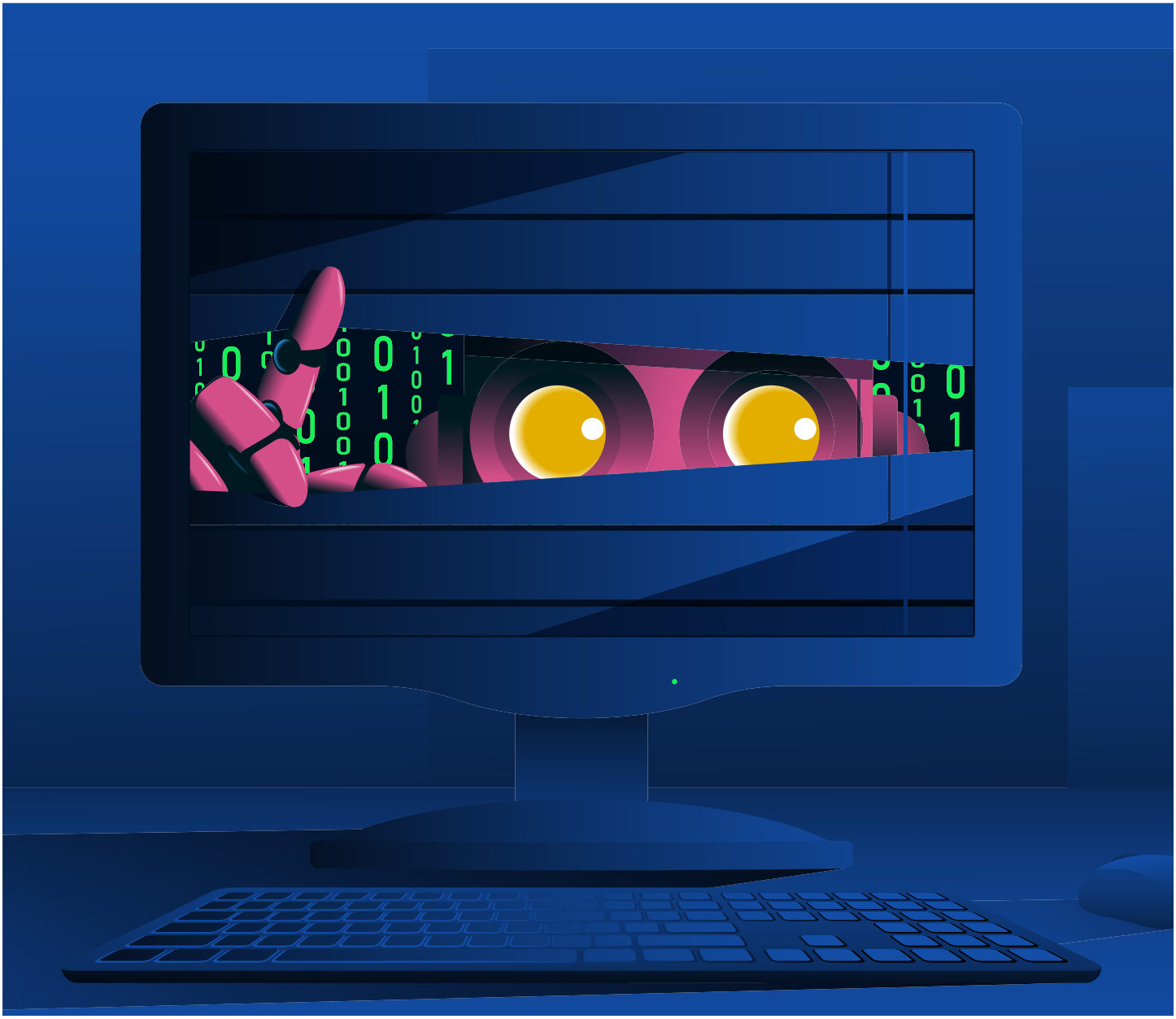

information, including a formula, pattern, compilation, program, device, method, technique or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Uniform Trade Secrets Act § 1(4). (New York relies on the common law to protect trade secrets, with similar, though not necessarily identical, results. *Ashland Mgmt. v. Janien*, 82 N.Y.2d 395, 407 (N.Y. 1993)).

In a claim alleging misappropriation, the owner of the alleged trade secret "bears the burden of proving the existence and ownership of a trade secret." Restatement (Third) of Unfair Competition § 42 *comment d*. Meeting that burden is no easy task, as a trade secret is "one of the most elusive and difficult concepts in the law to define." *Lear Siegler, Inc. v. Ark Ell Springs, Inc.*, 569 F.2d 286, 288 (5th Cir. 1978).

That elusiveness arises in part because the law defines trade secrets broadly. The definition needs to be broad enough to encompass existing technologies, while still leaving room to technologies and ideas yet to be discovered.

Because a trade secret may consist of any type of information, "[a]n exact definition of a trade secret is not possible." Restatement of Torts § 757 *comment b* (1939). A trade secret is not limited solely to emerging technologies but may exist in any field.

The modern concept of trade secrets was first discussed in the Restatement of Contracts in 1939. Although the definition of a trade secret has evolved over the years, courts still look to six factors identified by

the Restatement in determining whether information constitutes a trade secret:

1. the extent to which the information is known outside of his business;
2. the extent to which it is known by employees and others involved in his business;
3. the extent of the measures taken by him to guard the secrecy of the information;
4. the value of the information to him and to his competitors;
5. the amount of effort or money expended by him in developing the information;
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts § 757 *comment b* (1939).

*Jasper looks confused.*

*"That analysis sounds complicated. Please tell me there's a simple way to determine whether something is or isn't a trade secret," he says.*

*"I wish I could. But the analysis is based on a number of moving parts. If we're going to protect your information as a trade secret, we need to be prepared to show why it is a trade secret well before anyone has a chance to misappropriate your information."*

While government authorities establish the existence of other types of intellectual property, no governmental agency "validates" the existence of trade secrets. The owner simply proclaims that the information is a trade secret, and the proclamation goes unchallenged unless and until litigation arises over the trade secret status.

**Many trade secret owners never critically consider the trade secret status of their information until they find themselves in court...**

This lack of governmental oversight creates a practical problem. "The only way to validate a trade secret is through litigation. Absent a court finding that trade secret property rights in information exist, the trade secret status of the information remains alleged but unproven." R. Mark Halligan, Richard F. Weyand, *Trade Secret Asset Management 2018*, 17 (Weyand Associates, Inc. 2018). Indeed, as one court noted, "the question of whether certain information constitutes a trade secret ordinarily is best 'resolved by a fact finder after full presentation of evidence from each side.'" *Carbo Ceramics, Inc. v. Keefe*, 166 F. App'x 714, 718 n. 1 (5th Cir. 2006)(quoting *Lear Siegler*, 569 F.2d at 289).

Many trade secret owners never critically consider the trade secret status of their information until they find themselves in court frantically seeking to prevent the "misappropriation" of that information. Once in court, the owner must prove both that the information is in fact a trade secret and that the defendant misappropriated the trade secret.

> A person claiming rights in a trade secret bears the burden of defining the information for which protection is sought *with sufficient definiteness to permit a court to apply the criteria for protection . . . and to determine the fact of an appropriation.*

Restatement (Third) of Unfair Competition § 39 *comment d* (1995) (emphasis added).

The plaintiff must establish "each of [the] statutory elements [of a trade secret] as to each claimed trade secret." *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1158 (11th Cir. 2004). This burden requires that "a plaintiff who seeks relief for misappropriation of trade secrets [to] identify the trade secrets and carry the burden of showing that they exist." *Rent Info. Tech., Inc. v. Home Depot USA, Inc.*, 268 F. App'x 555, 557 (9th Cir. 2008).

The owner must typically identify the trade secret with reasonable specificity at the inception of the case, before any discovery occurs. Highly innovative and revolutionary information may be adequately described with a low degree of specificity. On the other hand, "a court may require *greater specificity* when the plaintiff's claim involves information that is closely integrated with the *general skill and knowledge* that is properly retained by former employees." Restatement (Third) of Unfair Competition § 39 *comment d* (1995) (emphasis added).

For a more detailed discussion of a plaintiff's burden of identifying its trade secrets in litigation, *see* Scott F. Gibson, *Identifying Trade Secrets in Litigation*, 60 Arizona Attorney 28 (March 2024).

## Confidential Information

*"Let me see if I understand," Jasper says. "I don't have to do register my information with the government for it to be a trade secret. But the information must be generally unknown to others in my industry and must be valuable because others don't know it. And I've got to take reasonable steps – whatever that means – to make sure the information remains a secret."*

*"That's right."*

*Jasper pauses and considers what you have discussed.*

*"A lot of people in my industry talk about protecting their 'proprietary information.' Is proprietary information the same as a trade secret?"*

*"All trade secrets are confidential and proprietary," you say, "but not all proprietary information is a trade secret."*

Even if some business information does not rise to the level of a trade secret, a company may prevent its employees from using the information through a narrowly tailored nondisclosure agreement. A properly drafted non-disclosure agreement can "clarify and extend the scope of an employer's rights" beyond the scope of protections arising under trade secret law. Restatement (Third) of Unfair Competition § 42 *comment g.*

The non-disclosure obligation must be narrow and precise. A non-disclosure agreement is an unreasonable restraint of trade if it seeks to protect "information that is generally known or in which the [employer] has no protectable interest." Restatement (Third) of Unfair Competition § 41 *comment d.*

"[T]he rules governing trade secrets are still relevant in analyzing the reasonableness and enforceability of non-disclosure provisions because, in order to justify the contractual restraint, information subject to non-disclosure

provisions must share at least some characteristics with information protected by trade secret statutes." *Orthofix, Inc. v. Hunter*, 630 F. App'x 566, 567 (6th Cir. 2016).

*"In many ways, 'confidential information' under an NDA is both 'trade secret like' and 'trade secret lite,'" you explain. "A company can't wave a magic wand and transform common knowledge into 'confidential information,' no matter what the NDA says. If it wasn't confidential before the employee signed the NDA, it didn't suddenly become confidential because she signed an agreement."*

## General Skills and Knowledge

*"That makes sense," Jasper says. "Confidential information is information that is like a trade secret, but falls short of the legal definition. If I have a valid contract with my employees, I can protect that information as well."*

*"That's right."*

*"So if I have a 'narrowly tailored' NDA, I can keep my employees from competing against me," Jasper says.*

*"Hold your horses, cowboy. While fair competition allows you to protect your trade secrets and other 'trade-secret-like' confidential information, you can't prevent your employees from using the skills and knowledge that are generally known in your industry."*

*Jasper looks puzzled. "What do you mean?"*

Many companies vastly overestimate the confidentiality and importance of the information used in their businesses. In the same way that grandparents believe their grandchildren are the most exceptional children roaming the earth, business owners often believe that everything about their business is extraordinary, original, and unique. In reality, however, it is not.

Most information used in a business is neither a trade secret nor otherwise proprietary and protectable. Although that information is important in the operation of the business, it does not belong to the employer, but rather constitutes part of the general base of information used in the industry.

"Information that forms the general skill, knowledge, training, and experience of an employee cannot be claimed as a trade secret by a former employer even when the information is directly attributable to an investment of resources by the employer in the employee." Restatement (Third) of Unfair Competition § 42 *comment d* (1995).

Specialized knowledge is the gateway to success in any industry. Farmers need to understand how and when to sow, fertilize, and irrigate their crops. Doctors need to master anatomy, physiology, and pharmacology. Plumbers must understand water pressure, building codes, and blueprints. Every industry has its own set of general skills and knowledge.

"General skill is an employee's personal knowledge based upon his education, ability and experience." *GTI Corp. v. Calhoon*, 309 F.Supp. 762 (S.D. Ohio 1969). Defined broadly, general skills and knowledge consist of the items that a competent practitioner in the industry holds: the skills taught to any person embarking in the field.

No occupation can function without its base of common knowledge. And because that knowledge base belongs to the industry in general, no employer can claim a proprietary interest in the general skills and knowledge common to the industry.

Rather, general industry knowledge belongs to anyone who takes the initiative to learn the information, whether through formal schooling, training, apprenticeship, or the school of hard knocks. And because the knowledge in every industry is constantly growing, the "general knowledge" in the industry likewise continues to grow.

No matter how long it took the employee to acquire the general skills and knowledge of the industry, an employer *"cannot preclude [a former employee] from exercising the skill and general knowledge he has acquired or increased through experience or even instructions while in the employment."* *Lessner Dental Laboratories, inc. v. Kidney*, 492 P.2d 39, 42 (Ariz. App. Ct. App. 1971) (quoting *Roy v. Bolduc*, 34 A.2d 479 (Me. 1943)(emphasis in the original).

"The distinction between trade secrets and general skill, knowledge, training, and experience is intended to achieve a reasonable balance between the protection of confidential information and the mobility of employees." Restatement (Third) of Unfair Competition § 42 *comment d.*

**The non-disclosure obligation must be narrow and precise.**

*Jasper sighs and downs the last swig of his coffee.*

*'That doesn't seem fair," he says. "I teach them everything I know about the industry and they can go out and compete against me? Where's the justice in that?"*

*"It's the price we pay for a free economy," you say. "And remember how you got your start in the industry. You worked for MegaTech for 15 years before going out on your own. If you hadn't learned the business there, you never could have started the Company. Fair competition improves the quality of our lives and makes the economy grow."*

The freedom to compete is fundamental to free enterprise:

> The freedom to engage in business and to compete for the patronage of prospective customers is a fundamental premise of the free enterprise system. Competition in the marketing of goods and services creates incentives to offer quality products at reasonable prices and fosters the general welfare by promoting the efficient allocation of economic resources. The freedom to compete necessarily contemplates the probability of harm to the commercial relations of other participants in the market.

Restatement (Third) of Unfair Competition § 1 *comment a*.

While the law protects trade secrets from misappropriation, information cannot be a trade secret unless it is outside the general skills and knowledge of the industry. "Trade secret rights are more likely to be recognized in specialized information unique to the employer's business than in information more widely known in the industry or derived from skills generally possessed by persons employed in the

industry." Restatement (Third) of Unfair Competition § 42 *comment d* (1995)

In many ways, general skills and knowledge are a type of "anti-trade secret." Trade secrets are valuable because they are *unknown* to other practitioners in the industry; general skills and knowledge are valuable because they are *known* by all competent practitioners. Without that base of common knowledge, the industry would not exist.

We have airlines because pilots have the skills and knowledge needed to safely take off and land a jet. General aviation skills belong to all pilots. And the rest of us gladly pay to have pilots exercise those skills to take us from Point A to Point B regardless of who they work for and would want those skills going from employer to employer.

### What Does This All Mean?

*"Your explanation is fascinating, Counselor," Jasper says, "but it's also quite academic. I'm a practical man who runs a practical business. Why should I care about how the law classifies my information?"*

*"I can give you 72 million reasons why," you reply.*

The founders at Zunum Aero envisioned a future with hybrid and electric air craft providing a green alternative to travel. But funding a green future is an expensive endeavor, so Zunum sought funding from various investors, including aviation behemoth Boeing.

After $9 million of loans, Boeing pulled the plug. Without any sources of revenue, Zunum shuttered its doors.

Zunum sued Boeing under multiple legal theories, including misappropriation of trade secrets. And the jury agreed, awarding Zunum $72 million in damages.

The victory was short lived, however, as the trial judge granted Boeing's motion for judgment as a matter of law and vacated the jury award for a simple reason: "Zunum failed to identify any of its alleged trade secrets with sufficient particularity or prove by substantial evidence that its alleged trade secrets derived value from not being generally known to or readily ascertainable by others." *Zunum Aero., Inc. v. Boeing*, 2024 U.S. Dist. LEXIS 144978, *14 (W.D. Wash. 2024).

Zunum had in fact presented expert testimony stating that its information was a trade secret. But its case failed because those experts never explained *why* the information was a trade secret. Rather, the witnesses simply proclaimed that the information was a trade secret.

Zunum ignored the fundamental rule all aspiring authors know: *show, don't tell.*

The court vacated the jury award because Zunum did not "provide the jury with any means of reasonably determining the metes and bounds" of its trade secrets. Zunum "failed to provide any non-conclusory testimony or other evidence that [the alleged trade secret] derived value from not being generally known to or readily ascertainable by proper means by other persons." Zunum simply proclaimed that certain information was "novel, valuable, [and] kept secret," but did not explain *why* it was novel or valuable or *what efforts* Zunum took to keep the information secret.

In writing parlance, Zunum did a lot of *telling* and very little *showing.* And the court properly noted that conclusory testimony cannot meet the owner's burden of proving the existence of a trade secret.

*Jasper shakes his head. "Seventy-two million dollars," he says pausing for dramatic effect. "That's a lot of dough."*

*"And it all could have been prevented if Zunum had shown the jury why its information met the legal definition of a trade secret. But instead of doing that, it simply had its witnesses recite the elements of a trade secret without explanation. And because Zunum didn't present evidence showing that its information was outside the general knowledge of the industry, the trial court held that the information was unprotectable general knowledge."*

*"What can we do to avoid that problem?" Jasper asks.*

*"Lawyers and judges are smart people who don't understand math or science. We need to prepare a smart, articulate witness who can both describe what your technology is and explain why it differs from the knowledge commonly available in the industry. We need to prepare a witness who is a good teacher – someone who can explain your technology so clearly that even a lawyer can understand."*

*"That's a perfect description of Minerva, our chief engineer," Jasper exclaims. "She can explain complex engineering concepts in ways that our investors can understand."*

*You explain how the Company will need to hold regular trade secret audits to identify, describe, and segregate its trade secrets. The ongoing audits will enable the Company to draft non-disclosure agreements that narrowly identify the "confidential information" they seek to protect. Those audits will set the foundation for ongoing training on how to protect the Company's most valuable intangible assets.*

*"As part of that first audit, we can help Minerva refine her descriptions so that she can show that your information is a trade secret," you say. "I hope that we never need to go into court to protect your trade secrets. But if we do, we'll have Minerva ready to testify. Her descriptions need to be vivid and specific so that even if the judge doesn't understand how the technology works, she can understand why the information is a trade secret."*

*"Show, don't tell. I get it," he says with a smile.*

*Suddenly, the theme from Mission Impossible blares from Jasper's cell phone. He answers the call and listens intently to a frantic engineer describing the latest crisis at the office.*

*"I'll be right there," he says as he concludes the call.*

*Jasper grabs his backpack and makes his way toward the door of the conference room.*

*"It's great to see you again, Counselor," he says. "Thanks for your advice. I'll have Margo call to schedule our next meeting so that we can stop talking and start implementing our plan."*

# Pragmatic Strategies to Consider When Defending Wage and Hour Class or Collective Actions for Multi-State Employers

By Madeleine K. Lee

This article will overview proactive techniques that can be implemented outside of litigation and during litigation to mitigate risk from such claims.

Wage and hour litigation remains an evergreen and prolific area for employers operating in the US. Although some areas can be state-specific, there are common, proactive strategies employers operating in multiple jurisdictions and their counsel can take to mitigate exposure and place the employer in a strong position when faced with class, collective, and representative wage and hour litigation. Reactive approaches to wage and hour litigation often mean the litigation will last longer, with higher litigation expenses, missed opportunities to correct or prevent problems, a failure to learn from mistakes, and a poorer outcome for the client. This article will overview proactive techniques that can be implemented outside of litigation and during litigation to mitigate risk from such claims.

## Implementing Defense Tools

### Maintaining an Arbitration Program

The arbitration process is not necessarily a panacea, at the very least because it can be costly with high arbitration fee retainers that can be six-figures, a slow process, and potential for a neutral to grant an award to the employee that results in significant attorneys' fees. Nevertheless, an enforceable arbitration agreement with a class action waiver that eliminates class action risk cannot be denied as having significant upside. Generally, as of this writing, arbitration programs for wage and hour claims can be mandatory even in employee-friendly venues such as California (with certain caveats noted below). If an employer opts for a mandatory program, an employer will want to be prepared to enforce the mandatory implementation from the outset of an employment relationship, even as early as the application process, to avoid an argument that the employer waived the arbitration agreement by permitting a new employee to continue employment without executing an arbitration agreement.

The employer will also want to maintain the program and update agreements for current and new employees as the law surrounding arbitration agreements under the Federal Arbitration Act ("FAA") and state laws continues to evolve. Generally, arbitration agreements will include the following aspects: a carve out for sexual harassment and assault claims, bifurcation or severance of claims that cannot be arbitrated, stay of claims and litigation that cannot be arbitrated pending arbitration of arbitrable claims, a class action waiver, and (for employers that conduct business in California) a carefully crafted representative action waiver that handles the delicate situation of California's Private Attorneys General Act. The sooner arbitration agreements are implemented in the employment relationship the better, as it can be complicated to implement amongst the workforce population when litigation is pending. It is also ideal to work closely with traditional labor relations lawyers and labor relations professionals early to navigate the implementation of arbitration and grievance

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programs in an organization with a unionized workforce where specialized defenses and exemptions might be raised.

Oftentimes the challenges to the enforceability of arbitration agreements are basics that can be overlooked in practice such as: keeping the electronic chain of custody as to electronic signatures; failing to present arbitration agreements or to update arbitration agreements for employees that transfer between jurisdictions; implementing and documenting a review and execution procedure to defend procedural unconscionability challenges as years pass; presenting the document in the employee's native language; and avoiding employer actions inconsistent with the intent to arbitrate. The failure to consider the foregoing and to update arbitration agreements may invalidate a class action or jury trial waiver.

### Wage and Hour Audits

Although potentially burdensome and costly, wage and hour audits can be powerful tools to prevent, mitigate, and defend litigation and may become more expected by the trier of fact for larger employers. Particularly for employers operating in multiple jurisdictions, audits can help identify and fine tune practices that may need to be adjusted based on the locality. Plaintiffs' theories of liability are fast-evolving and constantly being tested against employers' operational practices and realities.

One of the most burdensome phases during the process of defending a claim is the

**One of the most burdensome phases during the process of defending a claim is the retrieval of information and data beyond basic payroll and timekeeping records...**

retrieval of information and data beyond basic payroll and timekeeping records (e.g. security records, badge swipes, security records, computer/tech login records, temporary worker/independent contractor records). Audits can position the employer to organize the data and information in usable, easily retrievable formats. This helps to avoid being at a disadvantage once the litigation is filed and the consequent sudden rush to produce data for mediation or discovery purposes. It is also advantageous for defense purposes, if the employer's counsel (ideally at the counseling phase) queries the quality and format of the data to guide the employer in adjusting payroll or timekeeping formats with third party vendors outside of the pressures and limitations of litigation.

Key areas to consider covering during internal audits to test compliance include: meal break records; attestation response data; timekeeping audit trail; employee complaints and recorded resolutions; training records; and methods of compensation calculations (including any rounding, regular rate calculations, commission, and bonus details). As time passes and personnel change, the details on how payroll/human resources calculated or determined the non-discretionary or discretionary nature of bonuses/incentives and the periods covered by the bonuses/incentive pay may become less available.

For nondiscretionary bonuses, an employer may want to draft a narrative that describes the nature, purpose and period covered by the bonus program, and requirements.

Additional (potential) audit areas may be:

(1) Exempt status/overtime exemptions because some states have their own overtime exemption tests more stringent than the Fair Labor Standards Act ("FLSA"), and the fact that many states have varying exemption tests for white collar exemptions;
(2) Minimum wage because several states and cities have minimum wages higher than the federal minimum wage;
(3) Overtime and premium pay given some states have daily hour thresholds that require overtime beyond the federal weekly thresholds and the regular rate of pay for calculating overtime premium pay involves various forms of compensation that can be complicated by shift differentials, bonuses, and commissions;
(4) Deductions from pay which varies between states;
(5) Meal and rest periods/breaks which can vary between states;
(6) Business expense reimbursement which is required in some states;
(7) Final Pay Upon Termination which is regulated in the majority of states;
(8) Frequency of Pay which varies by job positions and is usually regulated by state law; and
(9) Pay statements, which are required by most states.

As technology and the theories of liability evolve, a lot of strife can be avoided if the employer has defense counsel examine their business operations for potential adjustments. This proactive approach can make huge differences in defending a variety of claims that are now trending, such as: donning and doffing (e.g., placement/location of the personal protective equipment/uniforms relative to timeclocks within the facility); and off the clock claims (cell phone and mobile device usage for workplace purposes, timeclock placement within the facilities, security checks, pre-shift and post-shift activities). Often the defense to these technical claims is in semantics that the employer would likely not realize when focused on running a business until attacked by creative Plaintiffs' counsel. Also, variations between facilities and employee roles can be beneficial to class and collective action defense and can be strategically designed with defense counsel.

Audits and remedial actions taken might also permit the employer to invoke the good faith defense under FLSA and potentially reduce penalties in onerous jurisdictions such as California.

Defense counsel can tailor the employer's objectives and risk tolerance in presenting options following identification of vulnerable practices. An employer might consider a voluntary remediation program by proactively paying employees in exchange for releases if the releases can be realistically obtained and will be effective in mitigating or resolving the exposure. Such direct settlement programs are privately negotiated releases without court approval. They can be effective before class certification and are authorized in many states. However, direct settlement programs are likely not effective against FLSA claims which generally need court or US Department of Labor ("DOL") approval. There is conflicting case law on this. For decades, employers and employees in most jurisdictions have been obligated to obtain either DOL or court approval to settle FLSA disputes for those settlements to be binding without question. More courts are beginning to challenge that obligation. They are also not effective against California's PAGA claims.

### Attestations & Training

Properly implementing an attestation program for hourly employees can be an effective defense tool. Attestation programs collect responses from employees to confirm aspects of their shift for compliance. For example, whether they were provided with an opportunity for required breaks and whether their time records for the shift reflect all time worked. They can be effective for showing compliance for meal break, rest break, and timekeeping practices (off the clock claims).

The programs do require ongoing management as employers will need to respond to any claims of non-compliance by an employee through the programs. The key is to create an individualized reporting, investigation, and response process to support future class certification defenses.

The attestations would need to be customized per jurisdiction and the technological limitations of the timekeeping/timeclock vendors' modules. The attestations ideally would be dynamic. That is, the query presented to an employee will result in a series of questions depending on the response input from the employee. The key is the employer would want to make sure that the responses are saved and can be traced back to a particular shift.

Moreover, regular training of employees, managers, supervisors, human resources, payroll, and operations on timekeeping and break policies and any attestation program can be a great defense tool. The training would ideally be provided at least once a year and from the outset of the employment relationship. The training should provide examples in plain language so everyone understands what the requirements mean, the internal reporting process, and the process to address any non-compliant instances timely. The key is to retain documentation of the training including training materials and written acknowledgment from employees that the training was received.

The managers/supervisors can send more frequent reminders to employees reaffirming the training and those communications should be retained as potential future defense evidence. The training can be reinforced by testing the employees, supervisors, and managers on the rules as part of regular employee training, obtaining written commitments of compliance and enforcement, and emphasizing to employees that there can be no retaliation against employees for any complaints regarding non-compliance with wage and hour laws.

## Defense Approaches after the Litigation Has Been Filed

Depending on the jurisdiction and the type of litigation – FLSA, Rule 23 class action, or state-specific action (e.g., California's PAGA), there are various strategies that can be deployed to limit liability and the scope of claims.

### Motions

From the outset, there may be options to remove the matter to federal court under the Class Action Fairness Act ("CAFA"). Additionally, defense counsel should carefully consider a variety of potential motions, including: to compel arbitration; to stay the action; to dismiss/strike/demurrer/challenge the sufficiency of pleadings; to challenge the venue; to challenge whether proper parties have been named; a motion for early summary judgment/judgment on the pleadings. Motion practice may facilitate early mediation and limit the scope of issues and claims to be defended.

### Potential Individual Settlement Offers

Potentially direct individual settlement offers and offers of judgment to the named plaintiffs can be options depending on the jurisdiction and type of case. Generally, prior to certification, the employer may attempt individual settlements with employees who are potential members of the class/collective action. Contacting members of the class after certification has ethical issues because the entire class is considered represented by the named plaintiff's counsel.

## Discovery

Certification of Rule 23 class actions and conditional certification of FLSA collective actions have been trending upwards in recent times. The strategy is to position your early discovery efforts to oppose certification. Ideally, defense counsel has been working with the employer pre-litigation to implement tools, processes, and structures that make certification more difficult. Nevertheless, there needs to be a backup plan.

The backup plan is to position your discovery on opt-in plaintiffs for decertification. This begins with seeking bifurcation of class certification/merits discovery and propounding written discovery on opt-in plaintiffs.

To oppose class certification and bring dispositive motions, declaration gathering campaigns are an option to establish evidence from putative class members. The key is to obtain a cross-sampling from the putative class members that illustrates the differences, including the ideal and less than perfect situations in the putative class to defeat class certification. Contacting putative class members may trigger ethical issues in some states where putative class members are considered represented.

## Experts

Additionally, seasoned experts are key in defending class or collective actions. Experts can help the defense present its own narrative and affirmative case by highlighting differences among putative class members, challenging the statistical certainty of a sampling, deconstructing the theories of liability, and even, potentially, preparing alternative damages models.

**For nondiscretionary bonuses, an employer may want to draft a narrative that describes the nature, purpose and period covered by the bonus program, and requirements.**

## Data Analytics

Utilizing data analytics tools are invaluable in defending class action lawsuits. The data tells a story and makes abstract concepts more tangible. Analytics can help with the following: evaluating judges; the jurisdiction; plaintiffs' counsel; navigating the expectations of business decisionmakers; gauging the probability of certain events and outcomes; making informed decisions regarding case strategy, exposure calculations and modeling; evaluating arguments that may work with a particular jurisdiction, judge, or plaintiffs' counsel; preparing settlement authority based on settlement history in a particular jurisdiction/venue with a plaintiffs' counsel, before a particular judge, using a particular mediator for the same claims; evaluating whether to appeal; and in conducting jury selection. The costs associated with using data analytics may be outweighed by the return on investment.

If the employer is utilizing a data analytics specialist to model exposure analysis

**Data analytics and factual investigation complement each other. Investigation of the employer's payroll and operations helps to gauge what you'd expect or not expect to see in the data.**

and analyze payroll/timekeeping records the key is to investigate and cross-reference why any observed issues in the data are occurring. For example, if the issue is a significant cluster of employees are clocking in for meal breaks early - is it because they are under the impression that they will receive attendance points if they clock in a bit later than 30 minutes? Is there a timeclock equipment technical issue? Is there a timeclock location/configuration issue? Is there a misconception amongst employees inconsistent with actual company policy?

Data analytics and factual investigation complement each other. Investigation of the employer's payroll and operations helps to gauge what you'd expect or not expect to see in the data. In turn, understanding the employer helps to validate and interpret the data from the client. Defense counsel can then design the exposure analysis to develop defenses and to support a resolution strategy.

## Conclusion

By implementing such tools and techniques, the employer can position itself to defend against wage and hour litigation across the country.

# Letter from the Chair

**Terrence L. Graves** is the Chair of DRI's Trucking Law Committee.

As I'm writing this, I'm in attendance at the ***2024 DRI Annual Meeting*** in Seattle, Washington, enjoying all that the meeting has to offer. So far, the meeting has been everything I anticipated and more. It is always fun catching up with old friends, making new friends and learning something along the way.

In this issue of *For The Defense*, the ***Trucking Law Committee*** ("TLC") is proud to offer great articles that we believe will enhance the skills that our membership utilize each and every day in the representation of our clients.

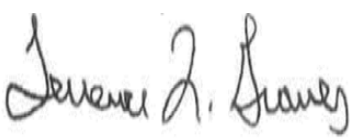
Patrick E. Foppe has written an article that explores the recent $462 million dollar verdict against Wabash Trailers titled "Wabash's $462M Verdict: A Landmark Case and Its Implications for the Trucking Industry." Devin Bembnister and Alyssa Pijanowski have authored an article titled "FAAAA Preemption Gains Ground: Freight Brokers Could Be Shielded from State Law Tort Claims." We have an article from Whitney Lay Greene and Amanda Nardi titled "We're Not Gonna Take It: New Developments in the Battle to Expose the Dark Side of Lien-Based Medical Care Arrangements." Marc Jaskolka and Meg Hogan provided an article titled "Anchors Away! Beating Plaintiffs at Their Own Game." Last, but not least, yours truly, Paul Greene, and Ross Suter contributed an article that offers advice on the use of focus groups and mock trials titled "Mock Trials and Jury Focus Groups—What Are They and How Do You Use Them to Your Best Advantage?"

Thanks to each of our contributing authors and our Publications Chair Shane O'Dell and his committee of outstanding editors for this great issue. Similarly, I want to thank all of the great people who presented at any of our seminars or webinars during the course of the year. I offer a very hearty thank you to Vice Chair Brad Hughes for his excellent service in that role during my tenure as Chair. Also, thanks to each member of our Steering Committee for your continued help and guidance in all aspects of what we do.

If you are interested in joining our committee, just reach out and we'll get you in a position to be of assistance in what we do. We are a committee that works hard and plays hard. We are passionate about the industry that we serve and we'd love to have anyone that takes that seriously join us.

As a final item, I would like to say that I have been extremely privileged and blessed to serve as the Chair of the TLC over the past two years. As far as I'm concerned, the members of this Committee are among the best that DRI has to offer. I look forward to seeing and working with many of you in the future. Thanks to each of you for your support and your contributions to the success of the TLC.

Best regards,



We're Not Gonna Take It

# New Developments in the Battle to Expose the Dark Side of Lien-Based Medical Care Arrangements

**By Whitney Lay Greene and Amanda Nardi**

**While skepticism about the secrecy surrounding lien-based care continues to grow, so does the list of ways to expose the truth so that decision-makers... can consider all of the information necessary to fairly evaluate the reasonable amount of the medical bills incurred by a personal injury claimant.**

The complex web of relationships between plaintiffs' lawyers, medical providers, and third-party funding companies is becoming increasingly more convoluted. By now, most defense lawyers are familiar with the practices of medical funding companies, lien-based care providers, and plaintiffs' attorneys (known as the "funding triangle") utilizing lien-based care arrangements to significantly pad their pockets in personal injury lawsuits. These questionable relationships lead to inflated medical bills and can reward the members of the funding triangle at the expense of the injured parties they are supposed to help. Lien-based care and litigation funding are one of the myriad factors and by-products of the social inflation fueling nuclear verdicts and settlements across the country. What is more, outside of the funding triangle, there is another type of lien-based care driving up medical expenses and making cases more difficult to resolve: hospital liens. While these types of liens typically do not involve attorney-directed care, they do involve inflated medical bills which do not represent the reasonable value of the care provided.

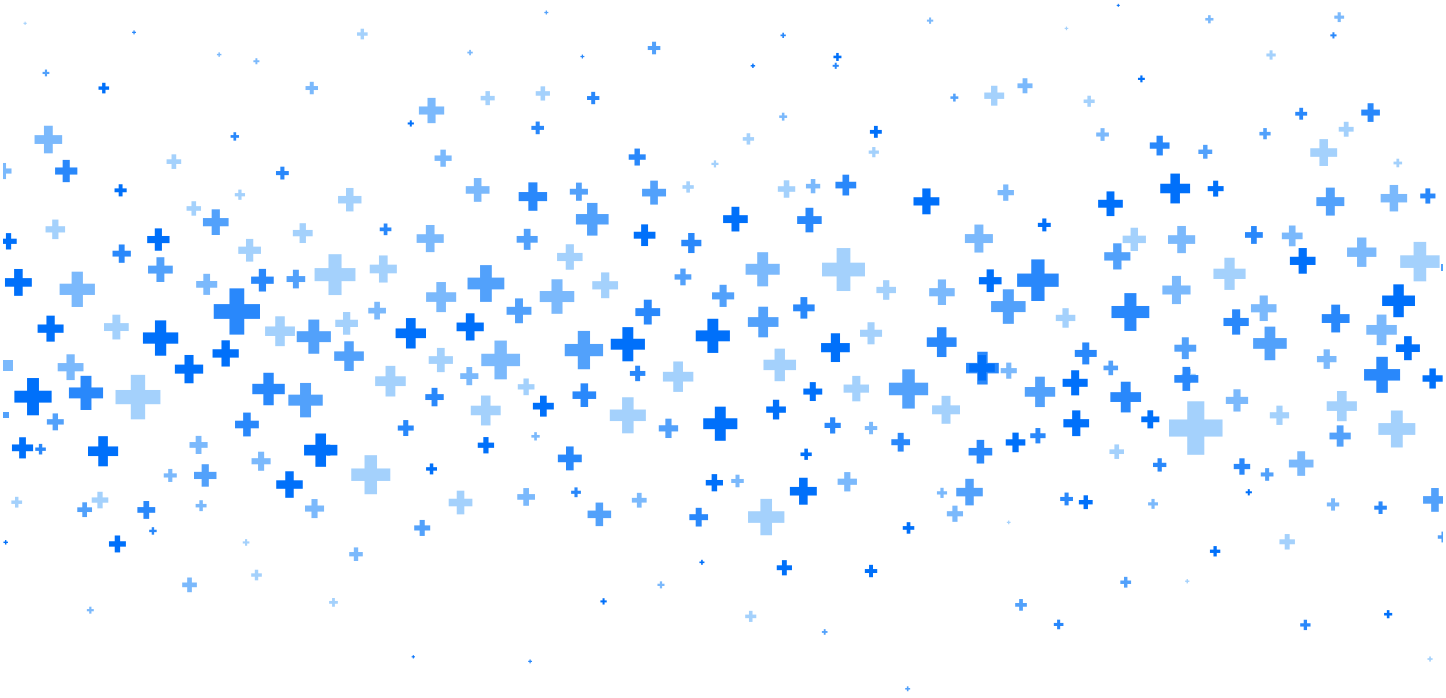
While skepticism about the secrecy surrounding lien-based care continues to grow, so does the list of ways to expose the truth so that decision-makers (whether a client making a settlement decision or a judge or jury determining an award) can consider all of the information necessary to fairly evaluate the reasonable amount of the medical bills incurred by a personal injury claimant. This article highlights the nationwide shift in attitude toward third-party medical funding disclosures, offers updates on new strategies to expose lien-based care arrangements and attorney-directed treatment and use the evidence at trial, and offers a glimpse into the often looked-over lien-based billing practices of hospitals – a provider that most defense attorneys and medical experts look at and say, "that's legitimate."

More and more organizations are calling for reform concerning requiring the disclosure of third-party litigation funding sources at the outset of litigation. These players have been working together to fight the disclosure of certain funding information for years, but with recent developments in federal legislation and court rooms across the nation, those on the defense side fighting for the disclosure of this information are saying, "we're not gonna take it!"

## Federal Legislation Seeking Transparency

In 2019, a proposed amendment to Federal Rule of Civil Procedure 26(a)(1)(A), would require initial disclosures to include the disclosure of any third-party litiga-

**Whitney Lay Greene** is a partner in Chartwell Law's Atlanta office and an experienced trial attorney. She handles a broad spectrum of matters in the fields of commercial transportation, ride-share/gig economy liability, premises liability, and product liability. Whitney routinely performs emergency response and on-scene investigation services in the wake of catastrophic losses and focuses her practice on matters involving complex liability and medical causation issues. Whitney has specific experience dealing with the unique problems created by lien-based medical care and litigation funding. **Amanda Nardi** is an associate in Chartwell Law's Atlanta office, where she focuses on general liability matters, handling each case from start to finish. From pre-suit investigations through resolutions, including depositions, settlements, and mediation, Amanda seeks to minimize exposure while preserving her clients' interests.



tion funding agreement in *all* civil actions filed in federal court. However, despite the efforts of a number of groups across the country, the amendment failed to make any headway. *ILR Urges Advisory Committee to Adopt Mandatory Uniform Disclosure of TPLF*, May 9, 2023. Also in 2019, four members of the Senate Judiciary Committee, led by Republican Senator Chuck Grassley, proposed the *Litigation Funding Transparency Act*. Among other things, the Act sought to require the disclosure of litigation funding agreements at the outset of any class action filed in federal courts, or in any claim that is aggregated into a federal multi-district litigation proceeding. The bill stalled in committee in 2019, and again in 2021 when the bill was reintroduced. *Bill Overviews*, Congress.gov.

However, the tides appear to be shifting once again. On October 7, 2024, U.S. Republican Representative Darrell Issa introduced the *Litigation Transparency Act of 2024* into the U.S. House of Representatives, which would mandate the disclosure of third-party funding in civil lawsuits. The Act would apply to all civil litigation in federal court – including individual personal injury. The Act would require the disclosure of any party who stands to receive proceeds from the lawsuit within 10 days of filing the lawsuit or 10 days of making the agreement with the funder, whichever comes later. It would also require the production of any agreements with the litigation funder. Since the introduction of the bill, multiple organizations have submitted statements in support of the bill, including the National Association of Mutual Insurance Companies, The U.S. Chamber of Commerce, the American Property Casualty Insurance Association, High Tech Inventors Alliance, and US Made. The Act is co-sponsored by Republican Representative Scott Fitzgerald. H.R. 9922, the *Litigation Transparency Act of 2024*.

## State Legislation Seeking Transparency

In addition to the legislative change proposed at the federal level, some states have recently enacted laws to include measures surrounding third-party litigation funding. For example, on March 13, 2024, Indiana passed House Bill 1160, which mandates that commercial litigation financing agreements are subject to discovery. Indiana House Bill 1160 (H.B. 1160), March 13, 2024. In Louisiana, a Bill signed into law by Governor Jeff Landry on August 1, 2024 bars outside funders from controlling civil cases in which they invest, including decisions surrounding settlement. The Bill further makes litigation finance contracts subject to discovery in civil cases. Louisiana Senate Bill 355 (S.B. 355), August 1, 2024.

In May 2023, Montana signed into law Bill 269 which requires litigation funders to register with the Montana Secretary of State, makes litigation funders jointly liable for costs, establishes a 25 percent "cap" on the amount a litigation funder can recover from relief obtained through a lawsuit, and requires disclosure of litigation funding agreements before the court. Montana Senate Bill 269 (S.B. 269), May 2, 2023.

West Virginia passed a more comprehensive bill in 2019, which imposes extensive requirements on litigation funders, requires registration with the state's attorney general, and mandates disclosure of the terms of their agreements—*regardless of whether they are requested in discovery*. In April 2024, West Virginia then passed Bill 850, which expanded the scope of its existing laws by extending the protections to large-scale litigation funding models, particularly those with foreign influence. West Virginia Senate Bill 850 (S.B. 850), April 23, 2024.

In addition, Maine, Utah, and Oklahoma have devised regulatory schemes for third-party litigation funding. Florida and Kansas recently considered similar bills, but they stalled in committee. These

developments highlight the importance for defense lawyers and industry stakeholders to be proactive in lobbying efforts to create change state and nation-wide—rather than counting on the court system to create ad-hoc (and potentially inconsistent) solutions.

### Case Law Developments Favoring Transparency

In 2018, the 11th Circuit held that evidence of a funding company's payment arrangement with the plaintiff's doctors was admissible to show bias on the part of treating physicians. *ML Healthcare Services v. Publix Supermarkets, Inc.*, 881 F.3d 1293 (11th Cir. 2018). The Court did not rule on whether the evidence could also be introduced to challenge the reasonableness of the plaintiff's medical bills as it determined that defense counsel did not introduce the evidence for that purpose at trial. This decision, which held that evidence of medical litigation funding arrangements was not only *discoverable*, but *admissible* created a watershed moment for defense attorneys who had long-struggled to both *obtain* litigation funding documents and *introduce* them into evidence at trial.

**Since the *ML Healthcare* decision, dozens of both state and federal trial courts in Georgia have entered orders compelling the production of lien-based care and litigation funding documents.**

Since the *ML Healthcare* decision, dozens of both state and federal trial courts in Georgia have entered orders compelling the production of lien-based care and litigation funding documents. In *Stephens v. Castano-Castano*, 814 S.E.2d 434 (Ga. App. 2018), the trial court initially excluded evidence of the treating physician's financial interest. The Georgia Court of Appeals reversed the trial court's decision, holding that the treating physician's interest was "highly relevant" and even going as far as to call the physician an "investor of sorts" in the lawsuit. Echoing the language of the *ML Health Care* and *Stephens* courts, a different Georgia-based District Court also permitted the payment evidence to be used to challenge the reasonableness of the medical treatments performed and the value of the services provided. *Rangel v. Anderson*, 202 F.Supp.3d. 1361 (S.D. Ga. 2016).

Most recently, trial courts have compelled the production of spreadsheets maintained by the providers' practice management software which tracks referral sources and also shows the "billed" charges for the patients as well as the amount "accepted" to satisfy the lien. *See Lowe v. Difei Transport et. al*, No. 1:20-cv-05224-CAP (N.D. Ga. 2021); *Goins v. Mark Seagraves, et. al*, No. 1:23-cv-02951-SDG (N.D. Ga. 2024). In the *Lowe* case, the spreadsheet revealed that a single medical practice in Atlanta had gross revenue of $101,000,000 in a *single* year. Referrals for one well-known, high volume personal injury firm accounted for $12,000,000.00 in billed charges over a three-year period and accounted for 10% of the practice's overall revenue. *Id.* Of significance, the spreadsheet was admitted into evidence at trial. *Id.*

Other courts across the nation have also followed suit. In March 2024, a Mississippi Southern District Court, granted a motion to compel the production of documents from a lien-based care provider relating to financial interests and their relationship with the plaintiff's attorney, as well as documents depicting patients referred to the provider by that particular plaintiff's attorney. *Jones v. Henderson*, No. 3:23-CV-23-HTW-ASH, 2024 U.S. Dist. LEXIS 48104 at *7-8 (March 19, 2024). Similarly, a federal district court in Indiana held that healthcare financing agreements may be relevant to the question of damages or the value of medical services provided and, thus, should be discoverable. In so doing, the court noted that the discoverability of healthcare financing or litigation funding agreements in federal court is an unsettled area of law in the Seventh Circuit, but that case law from other circuits and jurisdictions generally favor disclosure. *Hobbs v. Am. Commercial Barge Line, LLC*, No. 4:22-cv-00063-TWP-KMB, 2023 U.S. Dist. LEXIS 171310 at *11 (Sept. 26, 2023). The court granted a motion to compel funding documents, noting the documents were not shielded from discovery by the collateral source rule.

Judges across the nation have also implemented standing orders requiring the disclosure of funding information. The Northern District of California implemented standing orders which require the disclosure of third-party funding information (although the Order only applies to class-action suits). In June 2021, The District of New Jersey also adopted a local rule expressly requiring the disclosure of third-party litigation funding information at the outset of a case. Furthermore, in April 2022, Chief Judge Colm F. Connolly of the District of Delaware recently issued a standing order requiring "[a] brief description of the nature of the financial interest" held by any non-party investor in the matters before him.

### The Lien-Based Care Paper Trail

The arrangements between the funding triangle of plaintiffs' attorneys, providers, and funding companies exist to ensure that all players make money and incentivizes providers to perform (and bill) for as much treatment as possible *and* to connect all of their treatment of a patient to the accident at issue in the lawsuit. The joint efforts to increase the likelihood of a positive return are frequently documented in a variety of contracts and other documents which are invaluable as evidence to show bias on the part of the treating physician and/or to challenge the reasonableness of the plaintiff's medical bills. Unsurprisingly, none of the parties to the "funding triangle" are eager to reveal the existence or nature of litigation funding—or to provide defense attorneys with the documents that evidence them. Thus, defense attorneys must

be savvy in obtaining these documents, which are further described below.

### Electronic Medical Records and Practice Management Software

Now that the use of electronic medical records is virtually ubiquitous within the medical community, the same is true for the use of practice management software, which incorporates virtually all aspects of the management of a provider's medical practice into a single software platform. Three of the more common software programs are Care Cloud, E-clinical Works, and Centricity. Each of these programs allow providers to input electronic "notes" and other information in a patient's medical file which (importantly) do not become a part of the patient's electronic medical record. Although the specific set-up varies by software, these typically contain notes specifically reflecting the involvement of litigation funding and/or direct communications with plaintiffs' attorneys and include: patient notes, patient alert notes, scheduling notes, or notes from billing. The practice management software can also produce a report which shows all referral sources for the practice and paid vs. billed charges for lien-based care accounts.

### Contracts and Funding Agreements

Regardless of the funding model involved in a particular case, there is bound to be a contract or financing agreement of some sort memorializing the terms. At a minimum, the financing agreement will identify the third-party funding company involved and the start date for the agreement. These agreements also frequently contain clauses dictating that the medical provider is the sole contact with the plaintiffs' attorneys and requiring that the provider use her "best efforts" to settle each account for as high an amount as possible. In addition, frequently the schedule will show that the same attorney or law firm refers patients to the same provider(s) repeatedly. Individual patients are also typically required to complete a letter of protection on behalf of the provider which establishes a lien on any litigation proceeds. These letters may also include other language indicating that the patient is expressly foregoing the use of personal health insurance in favor of lien-based treatment and may even require that the plaintiffs' attorney obtain approval before settling any case below the total amount of services rendered.

### Referral Forms, Periodic Case Updates, and Emails

Unlike the traditional physician-patient relationship, medical providers involved in medical litigation funding must also assess whether accepting and treating a particular patient is a good investment. Because they only receive payment out of the litigation proceeds, they must necessarily determine whether "proceeds" are likely to be received. Some of these providers even have "personal injury departments" equipped with legal assistants, paralegals, and employees whose sole job is to serve as personal injury case managers. In order for providers and their staff to make an accurate assessment of whether a case is, in essence, a good bet, they frequently require a potential patient's attorney to complete an intake or referral form prior to scheduling an appointment. These forms seek not only basic details about the patient's accident, but also whether there were any witnesses, whether cameras were present or absent, the name of the insurance company involved, and any applicable insurance limits. As with the information contained in the practice management software, these documents are not included in the patient's medical records and would never be produced in response to a traditional non-party request, but they provide further evidence of the unique business relationship between these treating physicians and plaintiffs' attorneys.

### Marketing Materials

In order for the medical litigation funding system to work financially for the medical providers, they require a steady stream of personal injury patients. With this requirement comes the need to market their services to other medical providers (frequently chiropractors) and plaintiffs' attorneys. The marketing materials used in furtherance of this effort can provide additional evidence of the high levels of coordination between providers and their referral sources in the medical litigation funding context. These marketing materials include everything from brochures sent to plaintiffs' attorneys advertising the provider's "personal injury team" and relationships with "friendly chiropractors" to invitations to provider-hosted "networking" dinners for plaintiffs' attorney and chiropractors.

**While not shrouded in the same cloak of questionable relationships with plaintiff attorneys and potentially unnecessary care, many of the most reputable hospitals also engage in a different kind of lucrative lien-based care model.**

### New Frontier: Hospital Liens

While not shrouded in the same cloak of questionable relationships with plaintiff attorneys and potentially unnecessary care, many of the most reputable hospitals also engage in a different kind of lucrative lien-based care model. A number of states provide hospitals with the statutory right to assert a lien on any verdict or settlement proceeds in a personal injury case. Frequently, the bills associated with these liens are exponentially higher than what any insurer or self-pay patient would ever pay. Further, some hospitals even refuse to submit the bills to the patient's health insurance because the contractual reimbursement rates with insurance providers are much lower than what the hospital can claim against a third-party tort-feasor in a lien.

As with most things, the specific rules related to the enforcement and satisfaction of hospital liens are state-specific and vary widely. In some states, like Texas and Georgia, the hospital can claim a portion or most of a personal injury settlement and

the injured party's attorney can negotiate the amount of the lien with the hospital directly. Because hospitals have a statutory right of recovery on the lien, it has little incentive to negotiate, which can create significant difficulties in resolving cases. Hospitals have long taken the position that information about the rates it accepts from other payers are not discoverable and resisted efforts to obtain the production of those documents. However, recent court decisions favoring disclosure provide a hopeful beacon for obtain and using this information at trial similar to the use of documents for attorney-directed lien-based care.

In 2018, the Texas Supreme Court ordered the production of documents establishing reimbursement rates from insurers and government payers in a declaratory judgment action filed by a personal injury plaintiff against the hospital seeking to invalidate its lien. *See In re N. Cypress Med. Ctr. Operating Co., 559 S.W.3d 128, 129 (Tex. 2018). The T*exas Supreme Court subsequently extended its earlier holding regarding discoverability to include the negotiated rates medical providers charge to private insurers and public payors in personal injury cases. *In Re K & L Auto Crushers, LLC*, 627 S.W.3d 239 (Tex. 2021). Defense lawyers should draw on the developments in Texas to push for disclosure of negotiated rates in cases involving hospital liens across the country.

## Forcing Transparency – Best Discovery and Litigation Practices for Obtaining Lien-Based Care Information

### Stop Sending Boilerplate Discovery Requests and Follow Through on What You Ask For.

Now that we know a wealth of information and evidence regarding litigation funding relationships exists and how it will help in the defense of our case, the question becomes: how do we get it? The first step in developing a comprehensive discovery strategy is to stop using boilerplate non-party requests. As shown above, most of the documents and information vital to fighting the inflated medical bills and unnecessary medical treatment associated with litigation funding are *intentionally* left out of a patient's chart and billing records. The truth is physicians, plaintiff's attorneys, and funding companies involved in medical litigation funding do not want you to see what is on the other side and they certainly are not going to happily turn over the documents you most want to see.

Accordingly, the first step is to develop comprehensive, targeted subpoenas or non-party requests which specifically lay out the categories of documents you are seeking. Since most defense lawyers practicing in the personal injury sphere become accustomed to seeing the same plaintiff-oriented physicians repeatedly, a best practice is to develop provider-specific requests for those physicians. Below are a few of the non-traditional documents which should be requested from a medical provider in the medical litigation funding context:

- Information from the applicable practice management software. The request should identify the specific software used by the provider (if known) and list example types of software (i.e. CareCloud, Centricity) if unknown. The specific "tabs" sought should also be listed and the request should include referral tracking reports.
  •Communications with the plaintiff and/or plaintiff's attorney and/or any funding company. The request should include the plaintiff's attorney, medical provider, their respective staff members, and any employee of any funding company. Common job titles for physician staff members involved in case management and/or litigation funding issues are: Physician Liaison, Personal Injury Clerk, Personal Injury Client Relations, Funding Liaison, and Legal Assistant.
- Internal Communications. This request should cover internal emails, chat room logs, text messages or other communications in any way related to the plaintiff, his lawsuit, and/or his bills.
- Marketing materials. This request should also include *communications* regarding marketing sent to or from the practice's employees. Common job titles for provider employees typically involved in marketing for personal injury cases are: Marketing Team Coordinator, Chiropractic Network Liaison, Public Relations Consultant.
- Referral Documents. This request should include any and all documents or communications related to how a specific patient was referred to the provider.
- Contracts, Agreements, and/or Assignments of Rights. This request should include any and all contracts, liens, assignments of rights, agreements to pay, or other legal instruments potentially giving the provider and/or her practice group a financial interest in the outcome of the litigation.

Obviously, these categories are not intended to be all-inclusive. However, the more tailored and detailed the request, the more difficult it becomes for the provider to fail to produce documents under the guise of not being aware specific documents were intended to be covered under the request. Where applicable, the same documents should also be sought from the Plaintiff and any funding company in discovery so that the productions can be compared for completeness. Specific requests should also be sent to the funding company, such a request should include:

- Contracts or other written agreements entered into between the funding company, plaintiff, and/or her attorney;
- Contracts or other written agreements entered into between the funding company, and any medical provider who treated the plaintiff;
- All documentation related to the funding company's purchase of an account receivable from any medical provider who treated the plaintiff;
- Any intake forms, questionnaires, or other documentation created by, or provided to, the funding company which describes the accident at issue in the lawsuit or the plaintiff's injuries;
- Any progress notes, treatment notes or status reports regarding the plaintiff s medical treatment exchanged by the funding company with any medical provider;
- Documentation evidencing payments made between the funding company and the plaintiff's medical providers;
- All correspondence between the funding company and the plaintiff's medical providers;
- Documents related to any fee arrangement or negotiated rate between the

funding company and plaintiff's medical providers;
- All documents exchanged between the funding company and plaintiff's attorney; and,
- A listing of all cases in which any member, employee or agent of the funding company has worked for Plaintiff's counsel in the past ten years.

While developing strong discovery requests is first step to discovering key medical litigation funding information, follow-through on those requests is even more important. Given the damage this type of evidence can do to a plaintiff's damages claim and the enormously profitable nature of the litigation funding model, none of the players in the process are likely to eagerly open their files to discovery. Rarely are any requested documents initially produced. As a result, any response or objection to the non-party request should be carefully reviewed and promptly responded to with an appropriate good faith letter pursuant to Rule 37.

Often, providers and funding companies will employ a series of delay tactics following the issuance of a Rule 37 letter, to prolong the process to obtain the requested documents. The hope is that the requesting party will either give up, move on to another more pressing matter, or that the case will settle before a court ever hears the discovery dispute. Knowing this, defense attorneys cannot wait for months of back and forth with these entities. Instead, make the good faith effort to resolve the discovery dispute and promptly take the appropriate next steps, whether that be a motion to compel or a more informal discovery conference with the presiding judge.

### Depositions of Providers, Billing Managers, and Corporate Representatives

Aside from re-thinking the traditional approach to non-party requests, defense lawyers must also re-think our approach to treating physician depositions. Providers should be questioned about which practice management software the practice utilizes, including the name of the software, the various "tabs" or input sections within the software utilized by the practice, the kinds of information recorded within those tabs, and the employees (or employee job titles) responsible for entering the various pieces of information. If the information from the software has not been produced before the deposition, ask the provider to show you the software and the more important information contained therein (i.e. the "pencil notes" or "patient alert notes").

It is also important to find out about the practice's billing procedures and protocols and the provider's knowledge of the various billing practices. Most often, providers will allege they have no knowledge of billing practices. Accordingly, it is vital to find out which employees within practice do have the necessary information (i.e. a billing or office manager). Last, ask the necessary questions to evaluate whether you have grounds to seek the exclusion of the treating physician on the basis that he or she was not properly disclosed as an expert witness under Rule 26. In particular, determine whether the provider received any payment from the plaintiff's attorney for medical narratives, meetings, or the review of documents outside the medical records. Second, make sure each and every document reviewed and relied upon by the physician in reaching his or her opinions is identified (to investigate whether the physician relied on documents outside their treatment of the plaintiff).

In instances where the treating physician testified they have no knowledge of billing practices, payment arrangements, or referral sources, it is vital to proceed with the deposition of the practice's corporate representative, pursuant to Rule 30(b)(6). The corporate representative can then be questioned on billing practices and referral methods of the practice. Assuming these topics are properly identified in the Rule 30(b)(6) notice, the corporate representative cannot simply claim they have no knowledge of the issues in the same way a provider can. These depositions also provide the opportunity to have a representative with binding authority admit that certain billing practices (frequently utilized in cases where medical litigation funding is involved) are improper.

### Takeaways

In just a few short years, the discovery of documents surrounding lien-based care arrangements, medical litigation funding, and attorney-directed medical care has gone from "cutting edge" strategy employed by a few, to a critical step in the defense of any personal injury case. Fortunately, both judicial and legislative branches at the state and federal level are beginning to see that these arrangements are inapposite to traditional health insurance arrangements or the fair administration of justice. Instead, they are fraught with questionable motives and incentives which turn medical providers into investors and can leave funding companies determining the result and direction of litigation. Defense lawyers must continue to be aggressive in seeking the disclosure of these types of care arrangements and learn the skills to use them effectively. Most importantly, defense lawyers must collaborate with one another and share the knowledge learned, rather than keeping it secret to gain a perceived competitive advantage over other lawyers. Now more than ever is the time to say, "we're not gonna take it", and work together to continue to push for the disclosure of information long kept in the shadows and to fight unnecessary care and inflated medical bills.

**...ask the necessary questions to evaluate whether you have grounds to seek the exclusion of the treating physician on the basis that he or she was not properly disclosed as an expert witness under Rule 26.**

FAAAA Preemption Gains Ground

# Freight Brokers Could Be Shielded from State Law Tort Claims

**By Devin Bembnister and Alyssa D. Pijanowski**

**Freight brokers are not without a defense.**

In recent years, freight brokers have been at the forefront of trucking litigation, particularly in personal injury and wrongful death lawsuits. When a motor vehicle accident occurs involving a motor carrier, plaintiff's attorneys are frequently targeting freight brokers and shippers who are "upstream" in the transportation chain. This provides plaintiffs an opportunity to recover from other "deep pockets" separate from the motor carrier. Generally, the plaintiff alleges that the freight broker failed to properly vet the motor carrier who transported the load, so the freight broker is liable for negligently hiring or selecting the incompetent motor carrier who caused the accident. Freight brokers, however, are not without a defense.

If a freight broker is sued based on state law tort claims, the broker should file an early dispositive motion arguing federal preemption of those claims pursuant to the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. § 14501(c)(1).

The FAAAA was part of a larger effort by the U.S. Congress to de-regulate the transportation industry, including trucking. At the time when the FAAAA as enacted, Congress saw state-based regulations presenting a "huge problem" for national and regional transportation companies "attempting to conduct a standard way of doing business." Because the state of affairs at the time imposed an "unreasonable burden" on interstate commerce, it placed an "unreasonable cost on the American consumers." Pub. L. No. 103-305, 601(a), 108 Stat 1605; *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440 (2002).

In order to unify the "patchwork of state service-determining laws, rules, and regulations," Congress incorporated a preemption provision through the enactment of the FAAAA. The specific language of the FAAAA provides that:

> Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1) (emphasis added).

The words "related to" under the FAAAA are broad. Although this does not mean "the sky is the limit," the Supreme Court of the United States has explained that such preemption language must be read broadly. *Lee v. Werner Enterprises, Inc.*, 2022 WL 16695207 at *4 (N.D.Ohio Nov. 3, 2022) *citing, Dan's City Used Cars, Inc.*, 569 U.S. at 260; *Rowe*, 552 U.S. at 370.

Given this interpretation of the preemption language, there is a growing trend with federal courts across the country finding that the FAAAA preempts a plaintiff's state law tort claims brought against a freight broker. This includes three circuit courts that have addressed the issue. *See, Aspen Am. Ins. Co. v. Landstar Ranger, Inc.*, 65 F.4th 1261 (11th Cir. 2023); *Ye v. GlobalTranz Enterprises, Inc.*, 74 F.4th 453 (7th

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Cir. 2023); *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016 (9th Cir. 2020).

Courts are split, however, on whether the FAAAA's so called "safety exception" applies, thereby overriding the preemption provision. This narrow exception implies that the FAAAA may "save" a cause of action from preemption under certain circumstances. The exception states:

> [The FAAAA preemption provision] shall not restrict *the safety regulatory authority of a State with respect to motor vehicles*, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle, or the authority of a State to regulate carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

49 U.S.C. § 14501(c)(2)(A) (emphasis added).

**Courts are split, however, on whether the FAAAA's so called "safety exception" applies, thereby overriding the preemption provision.**

In 2020, the Ninth Circuit Court of Appeals led the charge by holding that while freight brokers were preempted from suit by the FAAAA, the safety exception applied and saved a plaintiff's negligence claim against a freight broker from dismissal. *See, Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016 (9th Cir. 2020).

But since the *Miller* decision, the Seventh Circuit and Eleventh Circuit have each held that a freight broker is shielded from a plaintiff's state law tort claim because the FAAAA preempts those claims, and those claims are not saved by the statute's "safety exception." *See, Aspen Am. Ins. Co. v. Landstar Ranger, Inc.*, 65 F.4th 1261 (11th Cir. 2023); *Ye v. GlobalTranz Enterprises, Inc.*, 74 F.4th 453 (7th Cir. 2023).

Following the decisions of these three circuit courts, numerous federal district courts have sided with the majority view that a plaintiff's state law tort claims are preempted by the FAAAA and are not saved by the "safety exception." For instance, the United States District Court for the Middle District of Pennsylvania recently held that plaintiffs' claims for vicarious liability, joint venture, and negligent hiring/selection/entrustment against a freight broker were preempted by the FAAAA and were not saved by the exception. *See Lee v. Golf Transp., Inc.*, No. 3:21-CV-01948 (M.D. Pa. Nov. 7, 2023); *see also, Montgomery v. Caribe Transport II, LLC*, No. 19-CV-1300-SMY, 2024 WL 129181 (S.D. Ill. Jan. 11, 2024); *Cox v. Total Quality Logistics, Inc.*, No. 1:22-cv-00026-CI-00476, ECF No. 29 (S.D.Ohio, June 12, 2024); *Schriner v. Gerard, et al.*, 2024 WL 3824800 (W.D. Okla. August 14, 2024).

FAAAA preemption is not limited to federal courts, as state courts throughout the country are also applying the FAAAA preemption provision. *See, Payne v. Platinum Roadlines, Inc.*, Case No. 21CECG01118, (Cal. Sup. Ct., Aug. 9, 2024); *see also, Williams v. Mila Transp., LLC*, Franklin C.P. Nos. 23 CV 007722, 23 CV 007859 (Jun. 14, 2024).

In summary, the tides appear to favor the trucking industry. Given that appeals are being filed in both state and federal courts, it is likely the Supreme Court of the United States may finally accept a writ of certiorari or decide to review a state court decision. Accordingly, we continue to recommend that freight brokers assert the FAAAA preemption defense early, file dispositive motions, and consider filing appeals where appropriate so that other federal circuit courts can decide this issue.

**In summary, the tides appear to favor the trucking industry.**

# Mock Trials and Jury Focus Groups—What Are They and How Do You Use Them to Your Best Advantage?

By Terrence L. Graves, Paul Greene and Ross Suter

**Mock juries and focus groups provide critical insights, helping attorneys navigate the nuances of juror perceptions.**

Today's litigation involves high stakes decisions about everything from the appropriate theme for your case to what type of juror do you want to serve on your juror at trial. These decisions can make or break your case and should be approached with the utmost care.

The typical juror will have no knowledge about the facts of your case. In fact, that is a requirement for serving on a jury. That juror will also bring with her whatever biases she may have due to her life experiences. Those biases can affect how they see the world and your case, including the evidence introduced and the way that the evidence is introduced. Those biases will also affect how the juror interacts with others and those group dynamics can have a large impact on any verdict that a jury provides.

Most courts provide parties with basic identifying information about potential jurors, which can be used to try to size up the jurors in order to make a decision about whether that person is the type of person you want on your jury. However, this information doesn't necessarily tell you how this type of juror thinks or reacts in a group setting such as a jury.

So, you may ask yourself, "How do I figure that out?" One way is to use a focus group and/or a mock trial to give you and your client insight into the best way to resolve those issues and to provide some direction.

## What Are Focus Groups and Mock Juries?

A focus group consists of a small, demographically diverse group of individuals who discuss and consider a lawsuit or a specific set of facts with the guidance of a facilitator. These groups provide a platform for open discussions about case-related issues, allowing attorneys to gauge initial reactions and potential biases.

A mock jury is a panel of individuals who participate in a simulated trial experience. These individuals, listen to arguments presented by both the plaintiff and defense. The goal is to replicate the dynamics of an actual trial, allowing attorneys to practice their case presentations and identify strengths and weaknesses of themes, evidence, evidence presentation, and arguments.

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Both focus groups and mock juries are typically recruited from the community where the case is pending. Many litigants utilize jury consultants or trial services providers to do this. There are also law firms that do this on their own. They can take place in person or entirely online depending on how you choose to structure the exercise based upon preferences for direct contact and interaction with members of the focus group or mock jury and the amount of money budgeted for these exercises.

**Both focus groups and mock juries are typically recruited from the community where the case is pending.**

Ideally, you want to replicate the venire as closely as possible in order to determine the overall attitudes, biases, socio-economic, and cultural drivers that might influence individual jurors and those jurors collectively as a group for your particular venue. It is preferable to "seat" more than one panel, which will allow you to collect data, impressions, and feedback from different groups that although they hear the same evidence, their responses to that evidence will be slightly different by virtue of the fact that the group will typically shape the evidence in a different way through the medium of their discussions and deliberations.

## Which Is Best for You?

The answer to this question depends on what you and your client are trying to achieve. If your purpose is to explore the facts of the case and potential overarching themes, then a focus group is where you want to start. Focus groups are generally used to re **Purpose**: Focus groups are primarily **exploratory** in nature. They are used when very little is initially known about the case.

Typically, a facilitator will ask the members of the focus group a series of questions or pose scenarios based upon the facts of a case. The materials may include fact patterns, arguments, interactions between legal standards and facts, expected evidence and/or testimony obtained during depositions. Ideally, the focus group members will apply their own understanding of the law to the situation presented and provide feedback in a somewhat structured fashion. The entire process is frequently recorded via audio/visual means and in many cases the attorneys are able to observe the process in real time.

If your goal is to hone your trial presentation while getting feedback on how a jury reacts to the presentation, including the themes, arguments, and evidence, then a mock trial is what you will want to utilize. A mock trial is just what it sounds like—It is a process in which recruited jurors will form one or more jury panels to consider evidence presented in much the same way you would if you were really in court, albeit in a more abbreviated and less formal fashion in most instances. Even though the process and introduction of evidence might be abbreviated, the point is to simulate trial conditions as closely as practical in order to get valid responses from the jury panels.

Mock trials will generally include opening statements, introduction of evidence including highly detailed exhibits, and closing arguments that use real jury instructions. The parties will present their cases in chief and rebuttal

evidence. Although many don't go this far, some mock trials will have someone serve as a judge to rule on evidentiary issues and to instruct the jury on what law applies. Many mock trials will incorporate the use of verdict forms and jury interrogatories if they are typically used in the subject venue.

The primary point of a mock trial is to try to predict as closely as possible how a jury will respond to the case as presented. Because of this, you will generally want to try to come up with what you believe the best theme, and presentation of evidence specific to your case. The same is true for your opening and closing arguments. If your budget will support it, you can potentially make alternative presentations of arguments and themes to different panels. This will allow you the luxury of getting feedback on what works best. It is also possible to ask your mock jurors for feedback after the verdict has been rendered on what they liked and disliked about your presentation and how your client was perceived. This predictive validity will hopefully allow you to have some ability to better determine the outcome of the trial under different parameters.

**The primary point of a mock trial is to try to predict as closely as possible how a jury will respond to the case as presented.**

Perhaps the best attribute of a mock trial is the ability to watch the jury panels engage in deliberations following the introduction of evidence. Similar to focus groups, mock trial jury deliberations are typically recorded via audio/visual means. The attorneys are able in most instances to watch the deliberations in real time. Observing these deliberations provides invaluable information about jury and group dynamics.

Depending upon how much money and time you have, a party would potentially be able to utilize a focus group near the beginning of the litigation process that would be used to determine the focus of discovery, damages themes, liability themes, and the overall concept of the case and supplemented by a mock trial closer to the actual trial which would allow you to test out the themes and concepts prior to having to put on your case for real.

## What Are the Pros and Cons of Each Format?

There are going to be good things and bad things about just about anything. Let's explore them for both focus groups and mock trials.

The pros of focus groups include:

- The ability to determine areas where potential jurors can either easily understand the concepts being presented or where there may be more opportunities for misconceptions or misunderstanding to take place.
- The ability to identify strengths and weaknesses in your case early in the process and therefore to evaluate the overall case.
- Using this evaluation, you have the ability to correct problem areas and further build up strengths.
- Opportunities to present demonstrative evidence at an early stage and determine their effectiveness.
- Determine how witnesses will be perceived by potential jurors.
- The ability to determine overarching themes for presentation of your case.
- You can gain insight into different personality types, biases, experiences, socioeconomic information that can be used later to help choose the most likely jurors that will receive the message you are trying to convey at trial. Collecting this information will help attorneys to customize their arguments and how the evidence is presented in order to get the best reaction from the jurors.
- Presenting your case to a focus group will allow you to determine which themes allow you to reach the jurors. This will allow you to focus on your stronger themes and arguments during trial.
- The ability to record the focus group and listen to the discussions in real time allows attorneys to learn what works and what doesn't at a much higher level.

The cons of focus groups include:

- Focus groups don't really predict trial outcomes. They can provide limited insight into themes and small insight into juror reactions and perceptions, but don't give you a real- world view of how a true jury would react.
- Group discussions are more likely to be influenced by one or two dominant personalities in the group which may affect the quality of the feedback.
- The timing of a focus group may not be ideal, particularly if you are doing one early in the litigation process. You may not have all of the necessary pieces to present to a focus group and this could affect the quality of the feedback you receive.
- Focus groups typically don't receive jury instructions, so they aren't advised of what the law provides. Because of this they will typically use their own perceptions of what the law requires, which may skew the results.
- Although the focus group will discuss the case as presented to them, they will not truly deliberate as a jury would.
- Depending on how the focus groups are recruited and the groups are structured, the cost can be prohibitive for use on all but the cases with an exposure high enough to merit the expense, however, this can often be mitigated by a trial services firm if you provide them with sufficient direction on what you really need.
- Non-verbal responses by members may be difficult to interpret.
- Moderators/facilitators can cause response to questions to vary depending upon how they ask the questions.

The pros of mock trials include:

- Mock juries provide attorneys with valuable feedback on their case. By observing how jurors react to evidence, witness testimony, and legal arguments, attorneys can fine-tune their strategies and their presentations.
- Understanding how jurors emotionally connect with a case is crucial. A compelling presentation backed by evidence is essential, but engaging the jury's emo-

tions is equally important. Presenting your case to a mock jury allows attorneys to fine tune the case so that you offer the most engaging evidence and arguments tailored to be as convincing as possible.
- Mock jury deliberations are recorded and analyzed. This allows attorneys to identify patterns, assess juror biases, and adapt their approaches accordingly.
- The ability to record deliberations and listen to them in real time allows attorneys to learn and understand what worked and what doesn't work in terms of their presentations and also how group dynamics play a role in ultimately arriving at a verdict.
- The mock jury actually deliberates and therefore provides attorneys with insight into the process utilized by juries to reach a decision.
- Mock trials allow attorneys to get practice standing on their feet and presenting evidence to jurors.
- Because of the complexity of mock trials, typically you can involve a number of attorneys in the process, thus allowing them the opportunity to hone their trial skills.
- Mock trials are more predictive of actual trial outcomes.
- A mock trial can utilize more than one jury panel which can allow you to watch the differing deliberations, which will offer invaluable insight into group dynamics and how that could potentially affect the trial outcome.

The cons of mock trials include:
- Organizing mock trials can be expensive and time-consuming. They typically take several weeks to put together, so it is best to plan to do this early and not wait until the last minute. You may be able to mitigate some of the cost involved by working with the client and a consultant to set parameters in place that will make it less expensive in the long run, if your case doesn't merit the highest possible spend.
- Depending upon how and where you have to recruit, mock juries can be smaller than actual juries, which may affect the representativeness of the feedback you receive.
- Despite efforts to simulate a real trial, the controlled environment of a mock jury may not fully replicate the emotional intensity of a courtroom and may affect the feedback you receive.
- Although you strive to recruit jurors that are fully representative of the community in which your case is located, this might not happen for a number of reasons. Failure to do this may provide you with a result that is not representative of what you would truly get with a real jury.
- If you don't hold the mock trial virtually or on-line, you will need to obtain a place big enough to hold a trial in. This means a hotel or other facility with multiple conference rooms that can be rented.
- It is always difficult to interpret nonverbal responses by mock jurors without the need for additional follow up, which may not be possible depending on your chosen format.

## How Are Focus Groups and Mock Trials Used?

Trial lawyers will often use focus groups and mock trials as part of trial preparation. Either format will allow attorneys to obtain invaluable information on how potential jurors will view their case, identify strengths and weaknesses in their arguments, and test different trial strategies.

Mock trials allow attorneys to assess juror reactions, uncover biases, and refine trial presentations through presenting case facts, evidence, and arguments. By presenting case facts, evidence, and arguments to a group of mock jurors, trial lawyers can assess juror reactions, uncover biases, and refine their trial presentation.

Focus groups provide a valuable opportunity for trial attorneys to fine-tune their trial strategy and improve their chances of success in court by asking tailored questions that are designed to explore specific facts, themes, and evidentiary issues in a case. A specially trained moderator or facilitator is often utilized to pose the questions to the focus group members. Focus groups allow attorneys to have a better understanding of what ingrained biases and ideas potential jurors may have early in the process.

## How Do You Put on a Mock Trial?

Putting on a mock trial can be a daunting endeavor, however, most, if not all of them follow the same basic steps. You will want to select a representative and unbiased panel or panels from the same venire where your case is pending. You will need to create a presentation tailored to convey the facts and law applicable to your case. Make sure that your presentation is narrowed down to be sufficiently understood and presented within the applicable time frame. The presentation format needs to be adequately considered. Each of these areas is covered in more detail below.

### Choosing an Unbiased Panel

The key to the effectiveness of any mock jury is obtaining a panel of individuals from the same venue where the case is pending. This can be done by advertising for people interested in sitting on a jury for a nominal fee. This process will include a questionnaire that tests the knowledge of prospective jurors to make sure they don't have any knowledge of the facts and circumstances of the case. You will want to have a target number of jurors in mind. Once you have the correct number of jurors selected, you advise them when and where to show up.

### Creating the Presentation

There are any number of ways to craft a presentation for a mock trial. Some lawyers prefer a format that uses "clopenings" in which the opening statements and closing arguments are combined together followed by abbreviated presentations of evidence that can consist of video deposition clips, reading deposition excerpts, or presentation of evidence summaries. This testimonial evidence is also typically supplemented by documentation evidence such as photographs of the scene, vehicles, injuries, contracts, discovery responses, and other evidence.

Others prefer a more traditional approach to presenting a mock trial. That approach entails both sides making abbreviated opening statements, presenting their case in chief, and wrapping up with closing arguments. The evidence introduced during the cases in chief is typically abbreviated and condensed down to the bare minimum to convey the most cogent information. This approach will also include introduction of documentation evidence as described above.

No matter which format you utilize, most, if not all of the testimony you introduce should be via video or very brief deposition excerpts. If you choose to bring live witnesses, you bring a certain level of uncertainty to the proceedings that may affect the validity and your ability to stay on schedule. The format that is chosen may affect your results, so you should be careful to consider the pros and cons of each way in order to get the desired validity for your case.

Team up with colleagues from your firm to play the different roles in the case. If you are the lead defense counsel and will try the case, you should take the role of defense counsel in the mock trial. Have an associate or another partner play the role of the plaintiff's counsel. Although everyone should give the best possible effort and presentation, the ultimate goal is to get valid feedback from the mock jury, not to win the case.

### Streamline the Facts

It is very easy to get caught up in preparing for a mock trial and including too much detail. There should be a focus on presenting just what's necessary to convey the operable facts without overloading the case. Remember that you only have a few hours at best to present both sides of the case, therefore, it is important to be extremely picky about what you include in the presentation.

You want your jurors to focus on those issues that are of utmost importance to the case. Lawyers tend to want to overprepare and over-include. Doing that will not put you in the best situation for having a successful and useful mock trial.

### Pick the Best Format for Your Purposes

If you can afford to do so, presenting the case to multiple jury panels is an optimal way to get the best bang for your buck. Having multiple panels will give you insight into how different group dynamics affect the potential outcome of the trial.

Each panel should have someone assigned to be the "bailiff" who will answer questions, bring in evidence, and ensure that the deliberations are proceeding in an orderly fashion. The panels should have separate rooms for deliberations. Each panel should also be set up with a live CCTV feed and/or videotaped so the deliberations can be watched in real time or later by counsel. This will give you an opportunity to see what facts, arguments, and issues were of the utmost importance to the juries. Although it might be tempting to sit in the rooms with the panels while they deliberate, this should be avoided in order to make sure that there is no undue influence on the jurors while they deliberate. The jurors may be unwilling to deliberate or express their opinions on issues fully if attorneys are present.

## Conclusion

In our era of polarized opinions and complex legal battles, many firms and clients are investing more in trial preparation. Mock juries and focus groups provide critical insights, helping attorneys navigate the nuances of juror perceptions. While these tools are fantastic for theme/storyline development and witness feedback they are generally not verdict or damages centric exercises. They will provide a sense of where a jury may go in terms of low, high, or medium verdict ranges; the sample size is generally too small (i.e. 24.-48 jurors) to be that sensitive. By combining emotional appeal with solid evidence, legal teams can build compelling narratives that resonate with juries and allow for the best possible results.

Wabash's $462M Verdict

# A Landmark Case and Its Implications for the Trucking Industry

By Patrick E. Foppe

**The $462 million verdict against Wabash represents a landmark case in trucking litigation.**

A $462 million verdict against Wabash National Corporation in a St. Louis courtroom has sent shockwaves through the trucking and trailer manufacturing industries. The decision, which stemmed from a 2019 underride crash, is one of the largest in recent years against a trailer manufacturer. With $12 million awarded in compensatory damages and an unprecedented $450 million in punitive damages, this case raises serious questions about compliance with federal regulations, the use of historical evidence, the potential risks faced by manufacturers going forward, and the impact overall on the trucking industry.

The case involved a crash on Interstate 55 in Missouri, where a Volkswagen, driven by Taron Tailor, collided with the rear of a nearly stopped Wabash trailer. The crash resulted in an underride accident, killing Tailor and his passenger, Nicholas Perkins. According to Wabash, the car was traveling at about 55 mph, but the plaintiffs contended the actual speed was closer to 42 to 47 mph. The focus of the lawsuit was on the trailer's rear impact guard (RIG), which plaintiffs argued failed to prevent the car from sliding under the trailer. Although the guard met federal safety standards at the time of manufacture, the jury found that Wabash liable for not adopting stronger safety measures to prevent underride accidents.

## Punitive Damages: Industry Evidence vs. Compliance with Regulations

A critical part of the plaintiffs' case involved evidence that Wabash had allegedly known about the risks of underride accidents for years but did not act on this knowledge. According to the plaintiffs, Wabash had the capacity to design stronger rear impact guards, such as those used in Canada, which were twice as strong as the U.S. RIG involved in this case. Plaintiffs argued that Wabash, however, continued to sell trailers with the weaker guard in the U.S. market, choosing not to implement the stronger option, which would have provided more protection at higher speeds.

Plaintiffs presented decades of industry documents showing Wabash's involvement in the Truck Trailer Manufacturers Association (TTMA) and their role in industry-wide efforts to maintain minimal federal standards for RIGs. Although no conspiracy claim was submitted to the jury, industry evidence was presented to show that Wabash had opportunities to enhance safety but prioritized cost savings over stronger protections.

Despite Wabash's compliance with federal safety regulations, the trial judge reasoned that punitive damages were submissible to the jury because compliance with industry standards and federal regulations is only one factor to consider when determining the appropriateness of punitive damages under Missouri law. According to the trial judge, it does not automatically preclude punitive damages

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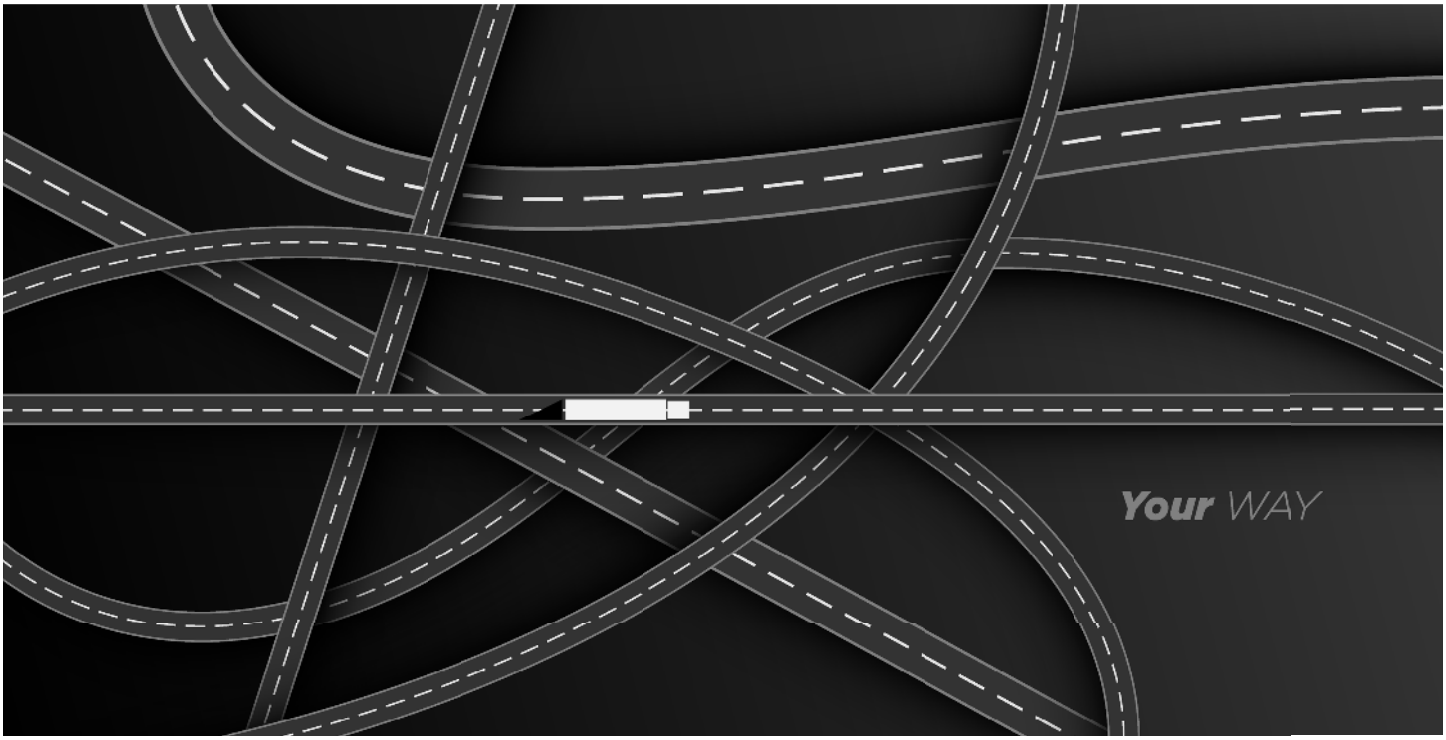


if the jury finds that the defendant acted with reckless disregard or conscious indifference to the safety of others. Wabash's adherence to federal standards evidently did not outweigh the plaintiffs' assertion that Wabash had knowingly chosen not to implement stronger, safer RIG designs despite allegedly being aware of the risks.

**In complex litigation, the exclusion of key evidence can have a profound effect on the outcome of a case.**

This rationale played a key role in the jury's decision to award $450 million in punitive damages, reflecting their belief that Wabash had consciously prioritized cost-saving measures over safety improvements.

### Wabash's Response and Likely Appeal

In response to the staggering verdict, Wabash filed an official statement with the U.S. Securities and Exchange Commission (SEC), where it disclosed the details of the jury's decision and signaled its intent to challenge the ruling. Wabash expressed its disappointment with the outcome, noting that that it "is not supported by the evidence or the law." Wabash indicated that it plans to pursue all available legal options, including post-trial motions and a potential appeal.

In a post-trial motion filed in September 2024, Wabash contended that the $450 million punitive damages award was grossly excessive and violated the Due Process Clause of the Fourteenth Amendment and the Missouri Constitution. Wabash argued that the punitive damages award, which was 37.5 times the $12 million compensatory damages, far exceeded the single-digit ratio between compensatory and punitive damages that the U.S. Supreme Court and Missouri courts have suggested as a due process safeguard. Wabash asserted that the jury's punitive award was clearly out of proportion and urged the court to reduce the punitive damages to a constitutionally acceptable level.

Of note, the Missouri's new punitive damages law, enacted through Senate Bill 591 and effective as of August 28, 2020, was not applied in this case because the lawsuit was filed before the law went into effect. Under Senate Bill 591, punitive damages in Missouri are subject to stricter standards and punitive damages in wrongful death actions are arguably capped at either $500,000 or five times the net amount of the judgment awarded to the plaintiff, whichever is greater. The law also requires plaintiffs to present "clear and convincing evidence" that the defendant intentionally harmed them without just cause or acted with deliberate and flagrant disregard for the safety of others.

Furthermore, Wabash argued in its post-trial motion that the plaintiffs had failed to establish a submissible case for punitive damages. The company emphasized that the trailer complied with all relevant regulations for underride guards. Wabash's legal team stressed that the company's actions were in line with industry norms and that it had not acted with malice or reckless disregard.

### Exclusion of Blood Alcohol and Seatbelt Evidence

In complex litigation, the exclusion of key evidence can have a profound effect on the outcome of a case. In this instance, the court's decision to exclude evidence regarding the driver's blood alcohol content and the use of seatbelts became a central issue

that Wabash is also expected to raise in post-trial motions and appeals.

Wabash argued that this evidence was critical to understanding the true cause of the accident and should have been submitted to the jury. According to Wabash's defense, Tailor's blood alcohol content was 0.081, slightly over the legal limit, which they argued could have impaired his judgment and reaction time, contributing to the accident. Additionally, neither Tailor nor Perkins was wearing a seatbelt, which Wabash contended would have significantly increased the likelihood of their deaths in the crash. The fact that neither the driver nor his passenger was wearing a seatbelt was also kept from the jury, even though plaintiffs argued both would have survived a 55-mile-per-hour collision had the vehicle not broken through the trailer's rear impact guard. Wabash sought to introduce this evidence to demonstrate that factors unrelated to the performance of the trailer's rear guard were at play.

However, the court ruled to exclude this evidence, finding that it was not directly relevant to the issue of whether Wabash's rear guard was adequately designed. The exclusion of these factors, Wabash will likely argue, had a substantial impact on the jury's ability to fairly assess liability and the appropriateness of punitive damages.

## Legal Implications for the Trucking Industry

This case serves as a warning for trailer manufacturers and the trucking industry. First, the fact that punitive damages were awarded despite compliance with federal safety standards indicates a shift in how courts and juries evaluate corporate liability. Companies can no longer rely solely on regulatory compliance; historical evidence of industry behavior, if unfavorable, could sway juries toward significant punitive damages.

Second, the exclusion of key evidence, such as blood alcohol content and seatbelt usage, raises concerns for defense attorneys. If courts continue to limit the evidence juries can consider, manufacturers could find themselves increasingly vulnerable in complex litigation.

Finally, this case may lead to more trailer manufacturers being sued in underride cases, especially where trucking companies involved in accidents have only minimum insurance limits. Adding manufacturers as defendants in these already complex cases will likely increase litigation costs and make early settlements more difficult. As plaintiffs look to maximize recovery by involving all potential parties, defense attorneys must be prepared to navigate these increasingly multifaceted claims.

## Conclusion

The $462 million verdict against Wabash represents a landmark case in trucking litigation. While Wabash will likely file post-trial motions and appeal, the broader implications of the case remain significant. This verdict serves as a reminder that compliance with federal safety standards may not be enough to shield companies from punitive damages claims, especially when historical evidence of industry behavior is introduced. Defense attorneys must adapt to this evolving legal landscape and prepare for more nuanced and complex defenses when facing similar claims.

Anchors Away!

# Beating Plaintiffs at Their Own Game

**By Marc Jaskolka and Meg Hogan**

...defense counsel not only needs to be able to identify when plaintiffs use an unreasonable anchor, but also be prepared to counter it and that preparation should begin early on in the case.

Throughout the United States, plaintiff's attorneys in civil suits are using anchoring as a strategy to secure higher verdicts. What is anchoring? Plaintiff's attorneys engaged in anchoring when they give a value or a number to a jury, which "anchors" a reference point for the jury to begin in its assessment of noneconomic damages (pain and suffering). Often, the anchored reference point is an arbitrarily high baseline amount which nevertheless provides the jury with an unsubstantiated starting point in assessing noneconomic damages in a case often leading to excessive awards. To counter this, defense counsel not only needs to be able to identify when plaintiffs use an unreasonable anchor, but also be prepared to counter it and that preparation should begin early on in the case. This article will discuss both how to identify and counter the plaintiff's anchor.

## What is Anchoring?

"Jurors report being deeply challenged by the task of arriving at damage awards." John Campbell, Bernard Chao, and Christopher Robertson, *Time is Money: An Empirical Assessment of Non-Economic Damages Arguments*, Wash. U. L. Rev, 95 (2017), *citing Beagle v. Vasold, 417 P.2d 673, 675* (Cal. 1966) (citing C. McCormick, McCormick on Damages § 88, pp. 318-319 (1935)). Noneconomic damages are particularly difficult for jurors because they are not tied to bills, lost income, or future healthcare costs. *Id.* (*citing* Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 Ariz. L. Rev. 849, 881-84 (1998). Instead, non-economic damages are used to quantify human suffering (i.e., a plaintiff who may have no economic loss but might suffer from severe pain and suffering the rest of his or her life). *Id.*

**Anchoring strategies are effective because they appeal to individuals conscious or subconscious bias when it comes to decision making.**

Anchoring strategies are effective because they appeal to individuals conscious or subconscious bias when it comes to decision making. Studies show a "human tendency to cast disproportionate weight on the first piece of information [one] receives" when the subject has no background or experience with the information. *Reconsidering Fictitious Pricing*, 100 Minn. L. Rev. 921, 934 (2016). Said another

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way, decision makers evaluate outcomes based on initial reference points. *Id.* People estimate by starting from an initial value and adjusting until they reach their answer, but these adjustments are typically insufficient and people have a tendency to assimilate towards the value at which they started. Christopher T. Stein, *Cognitive Bias in the Courtroom: Combating the Anchoring Effect in Criminal Sentencing* (June 23, 2017). Different starting points can therefore lead to different results. *Id.* In civil cases, especially those involving personal injury, the initial amount used in determining damage awards is typically provided by the plaintiff who requests a specific amount in damages. Nicholas Rauch, *Reversing the Tide: Counter Anchoring and Reverse Reptile*, For The Defense (January 20, 2021). *See also*, Gretchen B. Chapman, Brian H. Bornstein, *The More You Ask for, the More you Get: Anchoring in Personal Injury Verdicts*, Applied Cognitive Psychology, Vol 10, 519-540 (1996). Understanding jurors are without background and experience in valuing injury or loss, plaintiffs' counsels use a large anchor in an effort to draw a high verdict. *Id.* Plaintiffs threshold anchor provides the jury – who typically have little to no experience in the legal field or with similar injuries or damages – a number to move up or down from. *Id.* As plaintiffs anchor is, more often than not, set arbitrarily high, it becomes difficult for an inexperienced lay person to properly assess or provide a fair valuation of non-economic damages after first being confronted by a disproportionately arbitrary amount. *Id.*

### Empirical Studies Show Anchoring is an Effective Strategy

Empirical research proves the effectiveness of anchoring. Mark Behrens, Cary Silverman, Christopher E. Appel, *Summation Anchoring: Is it Time to Cast Away Inflated Requests for Noneconomic Damages?*, American Journal of Trial Advocacy,. Volume 44.2 (2021). *See also* Christopher T. Stein & Michelle Drouin, *Cognitive Bias in the Courtroom: Combating the Anchoring Effect Through Tactical Debiasing*, 52 USF. L. REV. 393, 396-97 (2018).

- A 2016 study published in the Iowa Law Review, *Countering the Plaintiff's Anchor*, legal professors at the University of Denver and the University of Arizona performed a randomized controlled experiment in which mock jurors were presented with a medical malpractice trial, manipulated with six different sets of damages arguments in a factorial design. John Campbell, Bernard Chao, Christopher Robertson & David Yokum, *Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments*, 101 Iowa L. Rev. 543 (2016). The plaintiff demanded either $250,000 or $5 million in non-economic damages. *Id.* The study confirmed that anchoring has a powerful effect on damages; damages were 823% *higher* when the plaintiff requested $5 million as opposed to $250,000. *Id.*
- A 2017 study published in the Washington University Law Review, *Time is Money: An Empirical Assessment of Non-Economic Damages Arguments*, had participants watch one of two medical malpractice mock trial videos. Tanya Albert Henry, *Why "Anchoring" Practices that Push up Jury Awards Must End*, Wash Univ. L. Rev. (March 3, 2021) (citing John Campbell, Bernard Chao, and Christopher Robertson, *Time is Money: An Empirical Assessment of Non-Economic Damages Arguments*, Wash. U. L. Rev, 95 (2017)).In one video, mock jurors decided the noneconomic damage award without influence. *Id.* In the other, the plaintiff's counsel asked for $5 million in noneconomic damages. *Id.* The first group awarded an average $473,489; the second group's award averaged $1.9 million. *Id.*

### Anchoring is Leading to Nuclear Verdicts

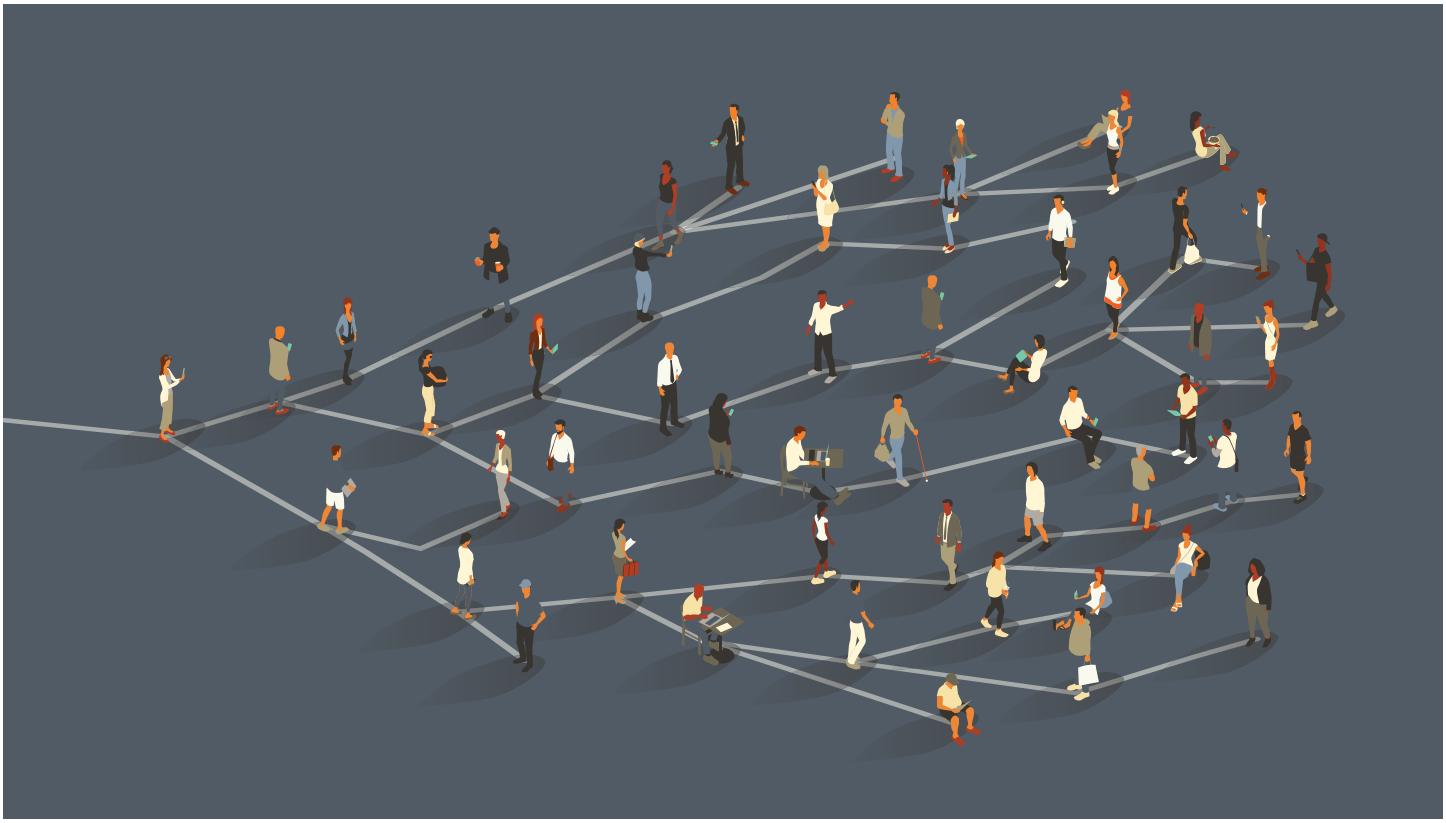
Anchoring tactics are leading to nuclear verdicts across the US. Empirical evidence has demonstrated that the more you ask for, the more you get. Gretchen B. Chapman, Brian H. Bornstein, *The More You Ask for, the More you Get: Anchoring in Personal Injury Verdicts*, Applied Cognitive Psychology, Vol 10, 519-540 (1996). Plaintiffs are well aware of this tactic and the public has become accustomed to viewing advertisements on television and social media suggesting that it is normal for plaintiffs to receive verdicts and settlements in the hundreds or millions or billions of dollars. *Nuclear Verdicts: Trends, Causes, and Solutions*, US Chamber Inst. For Legal Reform (September 2022). The publicity and advertising of nuclear verdicts is desensitizing the public to astronomical amounts. *Id.* This may lead jurors to believe that awards at these levels are normal and legally sound, when they are not. *Id.* Which, in turn, continues a cycle of unreasonable damage demands and unstainable nuclear verdicts. *Id.*

## How to Counter Plaintiffs Novel Anchoring Strategies

### How to Counter Plaintiffs Anchoring Strategy Prior to Trial

#### *Know Your Jurisdiction*

At trial, plaintiffs may set the "anchor" by quantifying noneconomic damages as a lump sum, a per diem calculation, or both. However, some states have made attempts to limit anchoring. John Campbell, Bernard Chao, Christopher Robertson & David Yokum, *Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments*, 101 Iowa L. Rev. 543 (2016). For example, following a 2017 survey, the following states allow lump sum demands *and per diem* calculations to support them: Alabama, Alaska, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, New Mexico, North Carolina, Ohio, Oregon, Rhode Island and Vermont. *Id.* The following states prohibit per diem calculations but allow lump sum demands: Illinois, Maine, Missouri, New Hampshire, New York, North Dakota, South Carolina, Virginia, and Wisconsin. *Id.* States that allow some form of per diem, but that do not allow lump sum demands are: New Jersey and Massachusetts. *Id.* States that prohibit both lump sum and per diem are: Delaware, Pennsylvania, West Virginia, and Wyoming. *Id.* States that defy categorization are: Arizona, Arkansas, Maryland, Montana, Nebraska, Nevada, Utah, and Washington. *Id.* States without final decisions from the court of final resort include Tennessee, Texas, Oklahoma, and South Dakota. *Id.* You need to know what your state allows in order to take meaningful and effect steps early on to counter future anchoring tactics.



***Examples of Plaintiffs Tactics***

Defense counsel should prepare for the pain and suffering only case by anticipating the possibility that medical bills will not be offered and that plaintiff's counsel will attempt to utilize a new anchor. Likewise, if the subrogation or collateral source payments are not introduced or allowed at trial, the defense must work to create an alternative anchor or show that the plaintiff's anchor is not reasonable or supported by the evidence.

Large verdicts are a result of the impact made on the jury. This is accomplished by making it "personal." In the pain and suffering only case, plaintiff counsel will not focus on the wreck or even the resulting injuries so much as they will on the many ways in which the plaintiff's life has been dramatically and negatively impacted since the wreck.

For example, Ms. Jones loved to do yard work or garden, play golf, volunteer at her church, and now she cannot do those things, or cannot do them as often, and when she tries to (and I think this is the better argument for pain and suffering only cases) she can no longer do these activities without paying a physical and mental price that results in pain, discomfort, and frustration. The goal, of course, is to illustrate that the plaintiff's overall quality and enjoyment in life's simple pleasures has been dramatically affected. A jury can relate to these things. It makes it personal for them.

In closing argument, plaintiff's counsel will argue dollar figures that seem reasonable under the circumstances but add up to a significant amount to compensate the plaintiff for pain and suffering due to her inability, or diminished capacity to participate in these activities as she used to. The plaintiff's tactic is to argue that she has pain every hour of every day, and especially when she engages in the activities that used to bring her joy. Then they ask the jury to apply a "reasonable" number to each hour – like the minimum wage. It's not hard to see how this can result in large verdicts. They will ask the jury questions like, what is it worth to not be able to garden, play golf, hike, walk around the block, and countless other simple activities that everyone does and takes for granted daily. $1,000 a day? $15, $30, $50 an hour?

Defense counsel must acknowledge that the idea that juries punish plaintiffs who overreach and ask for too big of a number is no longer true in some cases. Younger jurors especially have become desensitized to the value of the dollar. If this tactic is not countered by defense counsel, the jury is left thinking that the accident has substantially altered the plaintiff's life – by hampering and possibly outright preventing her from enjoying life through the simple activities she did pre-crash. It does not have to be physical either. The complaints

**Defense counsel must acknowledge that the idea that juries punish plaintiffs who overreach and ask for too big of a number is no longer true in some cases.**

can be cognitive in nature – TBI/PTSD claims. The plaintiff may testify that she can no longer play chess, board games with her family, cards, enjoy other pastimes like reading – because she has difficulty focusing, loses her train of thought, suffers headaches, anxiety lack of sleep and overall frustration in life. None of these examples involve the wreck or even the resulting injuries. Instead, the focus is on the resulting impact on the person.

Plaintiff may testify that if she drops a fork on the kitchen floor, it's not that she can't pick it up, but rather, she must really think about how she will pick it up so as not to aggravate her pain or discomfort. Before the accident, she did not have to give that simple task any thought. If she is older, she may testify as to how her limitations have affected her marriage and quality of life in retirement and that now, she must consider how to modify her life daily to limit pain. Again, these are all things that make the "impact" of the accident more personal and all things that a jury can easily relate to.

It is not hard to see that plaintiff's counsel can easily paint a picture that her life has not only been altered, but dramatically impacted by the plaintiff's inability to engage in life's simple pleasures that we often take for granted. This is subtle and indirect but impacts the jury in a more personal way. When this tactic is employed effectively, it has a dramatic impact on the jury and juries can award very large verdicts based on pain and suffering alone.

### *Written Discovery and Depositions*

To counter this, we must target our discovery early in litigation to learn what the plaintiff's lawyer will focus on to attempt to create an alternative anchor. Resist form discovery and the strategy to simply "poke holes" in the plaintiff' case. Interrogatories should be targeted to discover what specific pastimes, hobbies, activities, social/community involvement the plaintiff has done in the past. Tailor specific written discovery questions and lines of questioning for depositions to get the details of each activity. Let the plaintiff know you are digging. It makes them nervous and has the potential to deter overreaching. Questions should be designed to fully flesh out how the plaintiff claims her life has been changed because of the accident. What specific kinds of experiences did the plaintiff seek out and enjoy before the incident? With whom did she engage in these activities with? How has that changed since the accident?

It is not good enough to simply ask what? We must go further and ask – what? – how often? – who with? – where? – for how long? – etc. Then ask for names of individuals and their phone numbers and contact information. Send subpoenas to third parties like social and athletic clubs, gyms, and other organizations to discover membership information and activity.

Deposition questioning should be similarly targeted and tailored to discover specific information about the plaintiff's pastimes, activities, and community involvement. If the plaintiff gardens, where does she buy her potting soil? What nursery does she purchase her plants and flowers from? Often times, the plaintiff will not be able to answer these specific questions.

Once you have the full picture of the plaintiff's pre-accident activities, you can then attempt to identify where plaintiff's counsel will focus and begin to discover and identify evidence that may refute the plaintiff's story or at least show that the accident has not negatively impacted the plaintiff's life to the extent claimed. If that can be shown, you have now called her credibility into question which never sits well with the jury.

### *Surveillance*

We tend to think of surveillance in an isolated moment of time wherein we catch the plaintiff in the act. That rarely happens. Instead, focus on obtaining surveillance over a longer period of time in an effort to establish a pattern of activity that may contradict the plaintiff's testimony. Have conversations with your client, your claims representative and determine if your case warrants extend surveillance and activities checks. For example, a plaintiff may testify that he used to jog and run 5Ks regularly but that he can no longer do so since the accident. Perhaps the testimony is true – that he doesn't run the races anymore, but what if surveillance establishes that he routinely jogs several times every week. While he may not be running in races, the surveillance tells the rest of the story. The video footage can give the testimony proper context by demonstrating that he still runs. This will allow you to argue at trial that you are showing the jury the real story and that the plaintiff's life was not impacted to the extent claimed. It shows the jury that your assessment of the impact that the accident has had on the plaintiff's life is accurate, reasonable, and supported by the evidence. It gives you credibility as defense counsel and takes credibility away from the plaintiff and his lawyer.

### *Wearables and Fitness Trackers*

Devices contain a wealth of information about our lives, activity, health, and whereabouts. If the case warrants, consider a request to have the plaintiff's phone, Apple watch, Fitbit, etc. forensically examined. These requests, though more common, are still not made enough by the defense bar. We need to get more aggressive and send preservation letters for phones and other devices early in litigation or pre-suit. We often think of this type of discovery in the context of liability. That is, devices may prove location, distracted driving or some other information related to the accident itself and relative fault. However, the information contained on these devices in the months prior to the accident and in the months after, may end up being the most important evidence in the case if it can be used to show a pattern of activity that has not changed post-accident.

## How to Counter Plaintiffs Anchoring at Trial

### *Know Your Trial Judge*

Judges generally have broad discretion to bar or limit courtroom arguments that are inflammatory, misleading, or unsupported by evidence. Going into your trial, you should be familiar with your trial judge and the arguments he/she will entertain to limit any anchoring tactics.

How has your judge ruled on the issue of anchoring tactics? More specifically, you may encounter the argument in a plaintiff's motion in limine to exclude comment by defense counsel that the lack of evidence of medical bills should not be mentioned in front of the jury because they are not being claimed as an element of damages, and therefore reference to them is irrelevant and highly prejudicial. Be prepared to counter this argument and know how

your judge has ruled on the issue in other cases. Just because the Plaintiff does not offer the medical bills as evidence does not mean that reference to them by defense counsel as having been paid is not relevant or should not be allowed due to the plaintiff not claiming them as damages. Medical bills are relevant to illustrate the nature, extent, and severity of the injuries. Do not give up on the need to articulate a reason for their relevance – one of which is to assist the trier of fact in determining the nature and severity of the claimed injuries.

### *Motions in Limine*

Defense counsel should carefully consider appropriate motions in limine. Some anchoring tactics are closely aligned with improper "Golden Rule" arguments and reptile theory strategies employed by plaintiff's counsel. Every effort should be made by defense counsel to prevent this.

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"Golden rule" arguments by plaintiff's lawyers invite jurors to put themselves into the shoes of the plaintiff and are improper. *Allen v. Mobile Interstate Piledrivers*, 475 So. 2d 530, 537 (Ala. 1985). ("A request that the jurors put themselves in the place of the Plaintiff is an improper argument."). They are improper because they invade juror objectivity – rather than encouraging jurors to decide the case based upon an analysis of the facts controlled by applicable law. As such, arguments of this sort are improper, and the courts should not allow arguments or comments that:

1. Invite jurors to imagine how they would feel if they couldn't do a certain activity
2. Intimate that jurors would react in a particular way identifiable with the plaintiff, or
3. Imply that jurors should make a decision based upon hypothetical situations that trivialize or demean the defendants, the applicable defenses, or the arguments being made by the Defense in the case.
4. Invite jurors to "step into the shoes" of plaintiff.
5. Invite jurors to pretend or imagine that pain is "like a job."

This list is certainly not all-inclusive but is offered as examples of the type of arguments that plaintiff counsel will make and the court should disallow because they are "jury nullification" invitations, "personal opinion" arguments, or "golden rule" arguments.

### *Know Your Opponent*

Use any means available to discover how your opponent has made arguments in similar cases at trial. Research your jurisdiction's jury verdict reporter. Order trial transcripts. This information will give you invaluable insight into the tactics you will likely encounter in your case.

There are numerous large plaintiff's firm that aggressively advertises. They tend to stick to a script in the pain and suffering only case. They argue that pain and suffering is like a job to their client and in closing they ask that the plaintiff be paid hourly for that "job." This is not allowed in some jurisdictions, but it is in Alabama. Be prepared to counter these types of arguments if not successful in keeping them out altogether in motions in limine.

### *Voir Dire*

Each case implicitly involves a defendant's liability for damages and request for damages. Selecting a good jury is critical, therefore, it is important to identify juror bias towards damages early on. Asking pointed questions of potential jurors during voir dire and paying attention to plaintiffs questioning on damages can help you identify biased jurors early on. Although defense attorneys hesitate to ask jurors questions about damages attitudes early on, if your jurisdiction allows, here are some written questions that you can use to flush out high damages jurors:

- Do you think that civil damage awards today are: too high, about right, too low? (High damages jurors say too low, about right)
- How do you feel about the large awards given recently in tobacco lawsuits? (High damages jurors strongly favor them)
- It is more important to compensate an injured party than to figure out who is at fault. (High damages jurors strongly agree)

*Strategies for Minimizing Damages: Evolving Juror Attitudes and Strategies for Uncovering Bias*, Trial Behavior Consulting (July 6, 2015).

If your jurisdiction allows, some effective damages questions to ask in open court voir dire include:

- Do you think giving large damage awards is the best way to punish a company you feel has done something wrong?
- Knowing that the plaintiff in this case is (dead, disabled, likely to die shortly), do you start off with some number in your head that is a reasonable amount to award for that kind of damage?
- Who here believes that most people do not take emotional distress and suffering seriously enough?
- Is there any number that in your mind is too low?
- Would you be able to go home and look your union buddy in the eye and say that you voted to send a fellow union member home with no money at all?
- Do you feel that it might be hard for you to set sympathy aside in making this decision?

*Strategies for Minimizing Damages: Evolving Juror Attitudes and Strategies for Uncovering Bias*, Trial Behavior Consulting (July 6, 2015).

Focusing on anti-corporate attitudes and sympathy for the plaintiff will help identify high damages jurors and elicit grounds for challenges. *Id.*

Plaintiffs questioning on damages may also help you identify jurors who are willing to use money to send a message. Sarah E. Horbrook and Jill M. Leibold, *Top Strategies for Voir Dire and Jury De-Selection*, Commercial Litigation (October 2008). Be cognizant of plaintiffs' attorneys use of anchoring techniques to numb jurors to high damages. *Id.* Note jurors' responses to

plaintiffs attorneys' damages questions as their responses may be used in cause challenge arguments. *Id.*

If the case is a "pain and suffering" only case, use voir dire to explore potential jurors' understanding of how damages are assessed at trial. Do as much as the judge will allow you to do. Explain non-economic damages and how they differ from medical expenses.

## Should You Counter Plaintiff's Anchor?

Many defense attorneys hesitate on whether or not they should offer a counter anchor out of fear that doing so would be a concession to liability. However, a study conducted by legal professors at the University of Denver and the University of Arizona ("the Campbell study") presented mock jurors with a medical malpractice trial. John Campbell, Bernard Chao, Christopher Robertson & David Yokum, *Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments*, 101 Iowa L. Rev. 543 (2016). The plaintiff demanded either $250,000 or $5 million in non-economic damages. The defendant responded in one of three ways: (1) offering the counter-anchor that, if any damages are awarded, they should only be $50,000; (2) ignoring the plaintiff's damage demand; or (3) attacking the plaintiff's demand as outrageous. Christina Marinalas, JD, PsyD, *How to Counteract the Anchoring Effects of a Plaintiff's Damages Request* (May 5, 2022). Mock jurors were then asked to render a decision on both liability and damages. *Id.* The study confirmed that anchoring has a powerful effect on damages; damages were 823% *higher* when the plaintiff requested $5 million as opposed to $250,000. *Id.* In addition to showing that anchoring is an effective strategy, the study established that offering a counter-anchor was effective. *Id.* In fact, more effective that when the defense ignored the anchor. *Id.* (stating when the plaintiff's demand was high, jurors awarded 41% *less* when the defendant offered a counter-anchor than when the defense merely ignored the request or attacked it as unreasonable). *Id. See also* Nicholas Rauch, *Reversing the Tide: Counter Anchoring and Reverse Reptile*, For The Defense (January 20, 2021)(stating in general, the "ignore" strategy is the least effective at neutralizing a plaintiff's use of the anchoring effect.").

Overall, the Campbell study establishes that not only does anchoring work, but it also challenges the conventional wisdom that juries will interpret a defendant's proffer of a lower counter-anchor as a concession of liability. *Id.* Ultimately, the Campbell study suggests that although no defense strategy may completely counteract the anchoring effect, but offering a counter anchor would have the largest effect on lowering the total damages award in general. John Campbell, Bernard Chao, Christopher Robertson & David Yokum, *Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments*, 101 Iowa L. Rev. 543 (2016); *see also*, Nicholas Rauch, *Reversing the Tide: Counter Anchoring and Reverse Reptile*, For The Defense (January 20, 2021). In the end, however, whether to counter plaintiff's anchor will have to be made on a case-by-case basis after a close analysis of the relevant facts, liability, and jurisdiction.

The decision to counter anchor is necessarily tied to how good the liability defenses are. If liability arguments are very strong, you might opt not to counter anchor. If liability is questionable, you likely want to give the jury an option to measure damages tied to a lower anchor. If liability is established, quite clearly your focus will be on limiting damages at trial and it will be necessary to provide the jury with counter anchors.

## If Anchoring, Anchor Away!

If you cannot anchor traditionally because the plaintiff does not introduce the medical bills at trial and therefore, you cannot take advantage of the lower collateral source subrogation number, then anchor by any other means available. Point out in voir dire, and especially in opening, what the plaintiff is *not* claiming. After you tell the jury what you expect the evidence to be, tell them what it will *not* be. For example, "members of the jury, you will not hear any testimony about medical bills today." No doctor is going to testify about medical bills or the cost of medical treatment because the plaintiff is not even claiming them." Predispose the jury to be skeptical as to why they will not hear about the medical bills – because often, that is one of the first things several jurors will want to know. If not presented, the jury will likely believe that the medical bills were insignificant or that they were already paid. Pointing out that medical bills are not being claimed or framing questions in a way that suggests that the jury will not hear any information about them will operate to anchor the jury to a lower figure relative to the damages that are being claimed.

Ask in voir dire if there is a minimum amount that anyone thinks they have to award simply because the plaintiff was in an accident and injured as a result. If plaintiff's counsel questions if anyone would have a problem awarding tens of millions of dollars or hundreds of thousands of dollars, counter by asking if anyone would have a problem awarding a few thousand dollars if the evidence supports it. Would sympathy prevent them from being able to do so? These kinds of questions can create skepticism and alert the jury to pay attention to the key facts that refute the plaintiff's claim for outrageous non-economic damages.

Another practice pointer to consider when the Plaintiff does not introduce medical bills is to focus on the medical treatment – or lack thereof. Jurors understand the cost of medical treatment. They know it is expensive. If you cannot anchor to lower medical bills or low subrogation numbers from collateral source payments, frame your questions and evidence to highlight "nuggets" in the medical records themselves. Medical treatment records contain a plethora of information. Defense counsel would be wise to dig into the details.

Delays in initial treatment or follow-up care can be highlighted. Significant gaps in treatment can likewise serve to counter the plaintiff's claims of significant life-altering impact from the accident and resulting injuries. Often, the plaintiff will testify that they have undergone certain treatment or that they understand their injuries are permanent and that they will have to deal with it for the rest of their lives. In fact, medical treatment records regularly contain information that is inconsistent with the plaintiff's version of life-altering impact. Use these gems at trial to point out that the plaintiff is over-reaching and that the treatment records illustrate the real picture. If a plaintiff has testified that she

has low-back pain as a result of the accident and that it has significantly altered her life to the point that she can no longer engage in certain activities that brought her enjoyment in the past, point out that she has only treated three times in the last year and half, or that she has not treated for low back pain in over two years. Show that she has been to the doctor for several other things in that time frame and not once is it mentioned that she complained of back pain. Anchor to the number of visits. Point out the number of physical therapy visits that she missed, was late for, or cancelled altogether. All these examples give the jury an opportunity to anchor to a lower more reasonable number. Or stated another way, the evidence can be used to show that the plaintiff's anchor is outrageous and not supported by the actual evidence.

For example, if the plaintiff testifies that she can no longer do yard work, do not let that go unaddressed. Did she do yard work before the accident? If not, who did? How paid? Plaintiff's counsel may argue that not being able to do yard work and other activities is worth an hourly or weekly dollar amount that will seem reasonable ("$50 a day") but will result in a large number. $50 multiplied by 365 days a year equals $18,250 multiplied by a life expectancy of 20 years equals $365,000, not adjusted for inflation, or reduced to present value. This is just one example of one activity. Consider getting quotes for similar size yards and average cost of lawn care for the months of the year that lawn care is needed. $75 dollars a week for 7 to 8 months of the year is $2,100 to $2,400 a year for lawn care. In our example, we have given the jury a more realistic and reasonable number to anchor to – and a tangible counter anchor that is based on the evidence. A juror can relate to realistic lawn care cost. $2,100 per year for the same life expectancy equals $42,000 – a lot less than the emotionally charged $365,000 number which is not supported by any evidence.

These are just a few examples of countering the anchor suggested by plaintiff's counsel. As Plaintiffs' lawyers tactics change, defense counsel must strive to not only identify potential anchors well ahead of trial but also be prepared to provide creative and sensible anchors supported by the evidence when appropriate.

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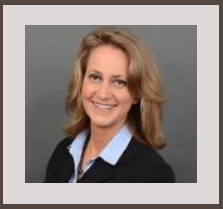
# Letter from the Chair



## Who Are We And What Do We Do

**Joanna M. Roberto** of Gerber Ciano Kelly Brady is the chair of the Insurance Law Committee.

My involvement with DRI started when I was at a point in my career where I wanted to be part of an organization that would help me grow both professionally and proficiently. For me, joining an organization meant I wanted to dedicate time towards leadership. Fast forward a few years, and here we are today. I found it. I'm here.

Not only is the ***Insurance Law Committee*** ("ILC") a resource for industry trends—it provides a platform for networking that reaches people beyond familiar borders. The ILC brings people with common interests together to promote our industry's mission. Regardless of which city we find ourselves in, we advance relationships throughout the ILC which leads us to connect, have fun, and socialize with one another.

I am fortunate because the path to a successful committee has been paved by previous leaders, including immediate past Chair Jonathan Schwartz who has dedicated time and talent to the ILC, as well as others like Kathy Maus, Lane Finch, and so many more who have become friends and mentors. I am especially excited to introduce and welcome Brandon McCullough as the Vice Chair of ILC.

ILC is an active committee. 2024 marks one of the fullest and most memorable years for ILC's programming events. We started with Chicago in March with the ***Insurance Coverage and Claims Institute***, followed by the ***Insurance Bad Faith and Extra-Contractual Liability Seminar***, which took place in Nashville, Tennessee, and was a celebrated event that had exceptional speakers and active attendees making the most of the Music City. To close the year and fully capture the season, ILC hosts its annual ***Insurance Coverage and Practice Symposium*** in New York from December 4-6.

ILC takes pride in helping its members grow their professional footprint. We are an active community. We offer publication opportunities that reach a broad base of readers as well as numerous specialized subcommittees that range from Bad Faith to General Liability to Canadian Law & Cross Border issue and lots more. We have a robust presence in publications within *For The Defense*, which is DRI's leading publication that features articles discussing key developments. There are other publications in which ILC members actively publish that garner national attention including *The Voice* (a monthly e-newsletter) and *The Brief Case: DRI Committee News* (reaches a targeted audience interested in substantive legal news).

One of the most important goals for ILC will be to focus on building upon our growing foundation of leaders and ensuring opportunities of all kinds are available and exist for Committee members. 2025 promises to be a dynamic year for the ILC with coveted programming, specialized publications, and educational webinars. Unique to the ILC is that its flagship seminars garner the attention of so many including the judicial branch, insurance industry professionals, attorneys, experts, and academia. The opportunities are available for those interested in growing their professional footprint, whether you want to plan, present or attend. We welcome new ideas and ask everyone to share them with us so we can implement and incorporate them into our committee.

I encourage everyone reading this article to contact me and Brandon to learn more about the ILC and see how you can get more actively involved in our mission. Feel free to reach out to me, ***jroberto@gerberciano.com***, and our Vice Chair ***mcculloughb@hh-law.com*** and we will make sure that your interests are integrated and your voices are heard.

Joining an organization means the ability to gain a competitive advantage in your field. Why wouldn't you do it if the opportunity is right there waiting for you?

Best,

Joanna M. Roberto

Think Outside the Box

# New & Creative Strategies for Managing Extra-Contractual Exposures

By Kayla Scroggins-Uptigrove

This article provides insurers and their counsel with practical steps to develop strong defenses to bad faith claims to increase the chances of success at trial or position the case favorably for settlement.

The stakes for bad faith litigation have never been higher for the insurance industry. Insurers are facing strong headwinds from state legislatures passing laws imposing costly penalties and multiplied damages for bad faith verdicts. State courts are erecting roadblocks for insurers to raise certain defenses or rely on certain evidence against the insured. State regulatory agencies are issuing guidelines imposing obligations on insurers during claim handling nowhere found in their insurance policies.

In light of this, defense counsel may ask whether it is possible to still win at trial as an insurance-company defendant facing a bad faith claim. ***The answer is yes***—if we stop doing litigation the same way we always have and start implementing new and creative strategies for managing, litigating, and defending extra-contractual exposure from bad faith claims. This article provides insurers and their counsel with practical steps to develop strong defenses to bad faith claims to increase the chances of success at trial or position the case favorably for settlement.

## Handling Plaintiff's Counsel and Plaintiff's Case

### Breaking the Business Model

In general, plaintiff's counsel's business model is always the same—settle early, settle often, settle for as much as possible. Knowing this, how can we use their business model to best serve our client's goals? ***Make them work the case at every stage.***

Analyze the sufficiency of all allegations and claims in the pleadings. You should request the factual basis for allegations where there is no obvious basis. Consider filing motions to strike certain allegations (F.R.C.P. 12(f)), motions to dismiss portions of claims or certain claims altogether (F.R.C.P. 12(b)), motions for judgment on the pleadings (F.R.C.P. 12(c)), and early motions for summary judgment (F.R.C.P. 56). You may not be able to get the entire case dismissed, but you can narrow the scope of discovery, dismiss portions of claims or allegations, gain momentum in your client's favor, and, almost just as importantly, set the tone from the beginning of the case that you will hold the opposing side to their obligations. The message will be clear: plaintiff's counsel is going to have to work the case and work it properly.

It is particularly important to perform this work on the front end of the case. The policyholders' and claimants' cases are evolving. Plaintiffs' complaints, now more than ever, are including allegations on "other claims" evidence, insurers' use of artificial intelligence, underinsured allegations, and litigation conduct, as just a few examples. But many jurisdictions do not allow bad faith claims to be based on such allegations as a matter of law, such as litigation conduct absent a showing of extraordinary facts. *See Ultra Res., Inc. v. Hartman*, 226 P.3d 889, 921 (Wyo. 2010); *Nies v. Nat'l Auto. & Cas. Ins. Co.*, 199 Cal. App. 3d 1192, 1202 (1988); *Genesis Ins. Co. v. Magma Design Automation, Inc.*, 2016 WL 3057375,

**Kayla Scroggins-Uptigrove** is a trial lawyer and partner at Spencer Fane LLP in Denver, Colorado. She specializes in complex and high-exposure insurance bad faith and coverage disputes at both the trial and appellate levels. Kayla has significant litigation and trial experience in disputes involving commercial and condo property claims, excess judgments and failure-to-settle cases, UIM benefits, insurance appraisals, insurance fraud and misrepresentations, and commercial general liability policies. Kayla also defends insureds in high-exposure third-party liability cases as well as businesses in complex commercial litigation.

at *3 (N.D. Cal. May 31, 2016); *Timberlake Const. Co. v. U.S. Fid. & Guar. Co.*, 71 F.3d 335, 340 (10th Cir. 1995); *Sims v. Travelers Ins. Co.*, 16 P.3d 468, 471 (Okla. App. 2000). Similarly, many jurisdictions do not allow discovery into other insurance claims to prove bad faith for the claims at bar. *See, e.g., N. River Ins. Co. v. Mayor & City Council of Balt.*, 680 A.2d 480, 497 (Md. 1996); In *re Nat'l Lloyds Ins. Co.*, 449 S.W.3d 486, 489-90 (Tex. 2014) (per curiam); *Leksi, Inc. v. Fed. Ins. Co.*, 129 F.R.D. 99, 106 (D.N.J. 1989); *Santer v. Teachers Ins. & Annuity Ass'n*, No. 06-CV-1863, 2008 WL 755774, at *3 (E.D. Pa. Mar. 18, 2008); *Retail Ventures, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. 2:06-cv-443, 2007 WL 3376831, at *5 (S.D. Ohio Nov. 9, 2007). Such allegations are vulnerable to motions practice and the viability of dismissing them should be analyzed as soon as alleged.

Do your due diligence in discovery. Serve written discovery and scrutinize the responses and document productions you receive in return. The plaintiffs' discovery responses rarely, if ever, are sufficient on the first round. Push back to ensure compliance with your requests. Perform robust conferral on whether there are any text messages, instant messages, social media messages, or social media posts. Take the plaintiff's deposition. Take depositions of the public adjuster, contractors, or treating providers. Subpoena the public adjuster's and contractor's files. Subpoena the prior medical records. Do not simply rely on the other side's expert disclosures. Depose their experts and pin them down on what they did not review and did not consider, as well as their bias issues. Not only are these sources gold mines of information that frequently make your client's case better, but they require the other side to work.

### Knowledge and Deterrence are Priceless

There are multiple advantages to working the case this way and making the plaintiff's counsel work. First, it wrecks plaintiff's counsel business model. The more hours they put into the case, the less money they effectively recover for their time. And, because of this, that plaintiff's counsel will be deterred in the future from asserting baseless allegations or lawsuits against your client. It is an ideal litigation strategy particularly for "frequent flyers" (i.e., lawyers who file serial suits against your client). Insurers who "go to bat" to defend their claim handling will not be seen as easy targets for lawsuits and high settlement pay-outs. This strategy often results in earlier and lower settlement overtures.

Second, you and your client will learn more about the case up front. Your case will either get better or get worse through discovery. By testing allegations upfront and pushing discovery forward, you will learn the strengths and weaknesses of plaintiff's claims and your defenses earlier rather than later in the litigation life cycle. You can then make informed recommendations on settlement valuation or trial recommendations earlier in the process as well. For cases that should be settled, this process facilitates settlement earlier on to save your client further attorney fees and costs. Improving your ability to spot problem cases up front and resolve them promptly improves your credibility with your clients.

### Does the Plaintiff's Case Have Merit?

As you are implementing the process above, you should always be asking yourself: is the plaintiff's case actually any good? How strong are the claims? Scrutinize their bad faith allegations. Are the claims about procedural nitpicking or about the actual substance and outcome of the claim? In my experience, the former does not resonate with everyday jurors.

For example, plaintiffs will frequently complain about lack of documentation in a claim file—particularly, inadequacy of the claim notes. We've all heard "if it's not in the claim notes, it didn't happen." Although it is a phrase commonly used by plaintiff's lawyers to try to trip up claims adjusters at deposition, it is not accurate. Claim notes are internal resources for the insurance company's employees to review and assist them in handling the claim. They are not a play-by-play accounting system for plaintiffs to use in litigation.

Instead, the primary question is whether the alleged "lack" of documentation somehow adversely affected the outcome of the claim. Is the claim decision correct and reasonably timely? Does the coverage decision have a reasonable basis in the policy language and facts of the claim? Did the lack of documentation adversely affect the policyholder in some way? The correct claim decision at the end of the day goes a long way towards shifting jurors' views on "bad faith." Procedural nitpicking can turn jurors off when the ultimate claim decision is correct. Such jurors see it as the plaintiff's attorney criticizing a normal person just trying to do their job the best they can.

As another example, if it is an insurance claim based on personal injury claims, is the policyholder or claimant actually injured? Are they exaggerating their injuries? Are they being untruthful or evasive about their prior medical conditions? If the answer to these questions is yes, then a plaintiff's complaints about lack of documentation or inadequate communication generally fall flat.

The bottom line is to direct more focus towards the substantive aspects of the claim and claim handling, as opposed to plaintiff's nitpicking, to determine whether the plaintiff's case has merit. The correct claim outcome can go a long way with jurors towards negating these procedural nitpicks.

## Uniquely Utilizing Experts

Insurance carriers and their defense counsel should also rethink their use of litigation experts. Many insurance defense experts are overused these days. Consider searching for and retaining industry-experienced experts as opposed to attorney experts. Insurance standard-of-care experts with a legal background are fantastic options, but so is the claims manager of twenty years. Jurors relate to everyday people.

Further, although there is nothing inherently wrong with using the same expert on multiple cases, be prepared to rebut the cross-examination on bias that the expert will inevitably be confronted with at trial. Jurors know a hired gun when they see it. Think critically about the reasons you repeatedly hire the expert. Does he or she have special expertise that is unique to your case? Is the expert more widely published or educated in the subject matter than other experts? Does he or she have more trial testifying experience? Is there a lack of experts in your location and you wanted a local expert for a specific reason? Have these reasons ready to go to explain to the jury at trial why this expert was the perfect fit for the case.

Consider "flipping the script" with which expert you retain. Research who your opposing counsel has used as experts. Research which experts perform work on both sides. Although many of these experts may be unsuitable because they are plaintiff-oriented, that is not the case with every expert retained by plaintiffs. Is there an expert your opponent has used that you think would be suitable for the case? You will eliminate almost all lines of cross examination on bias by using this retention strategy.

In developing your strategy for experts, think outside the box. For example, in *Cope v. Auto-Owners Insurance Co.*, No. 18-cv-0051-WJM-SKC, 2023 WL 8482587 (D. Colo.), the carrier there retained a well-known and long-time plaintiff's attorney as one of its experts in an underinsured motorist ("UIM") benefits bad faith case. In the underlying tort action, the insureds recovered $1.4 million out of the $1.5 million liability limits through a settlement with the alleged tortfeasor. The plaintiff then brought a bad faith action against his employer's UIM insurer seeking the $1 million UIM policy limits and double statutory damages, presenting over $3 million in exposure.

In the subsequent bad faith action, the plaintiff-attorney expert retained by the carrier opined (i) on the risks and issues the plaintiff faced in prosecuting the underlying liability action, (ii) on what a great result the plaintiff's attorneys obtained in the underlying lawsuit with a $1.4 million settlement in the face of those risks and factors, and (iii) that the plaintiff was fully compensated by the underlying settlement. The plaintiff in the bad faith action had no effective rebuttal to these opinions, because doing so would mean challenging the notion that his attorneys obtained an outstanding settlement that still left $100,000 in liability limits on the table. The case resulted in a complete walk-away in which the carrier paid nothing.

### Finding the Fraud

Anyone who has tried an insurance bad faith case as defense counsel for the insurer has inevitably heard the saying "no one likes insurance companies," referring to jurors. However accurate that saying may or may not be, there is one response to focus on when developing a carrier's defense: juries dislike cheaters, fraudsters, and liars ***more***. Take the time to investigate the claim in discovery and determine whether the other side's hands are clean. Often, they aren't.

For personal injury claims, did the insured make misrepresentations about his or her injuries, treatment, prior conditions or injuries, earning capacity, or the acci-

dent's effect on his or her daily life? For property claims, did the insured or the public adjuster submit inflated repair costs or inappropriate scopes of repair? Did the insured's public adjuster make material misrepresentations to inflate the claim and increase their contingency fee? Does the conduct warrant amending your affirmative defenses or even potentially bringing affirmative counterclaims?

The best defense to a bad faith claim is to go on the offense. Many plaintiffs mistakenly believe they have "everything to gain, nothing to lose" by filing a lawsuit against an insurer. Asserting legitimate affirmative defenses or counterclaims flips the power dynamic and requires the plaintiff to critically assess his or her own conduct and the potential negative impact on the case as a result, including the potential of facing a costs judgment. This results in strong settlement leverage and defenses at trial.

*GSL Group, Inc. v. The Travelers Indemnity Co.*, No. 18-cv-00746-MSK-SKC, 2021 WL 4245372 (D. Colo.) is illustrative of this approach. *GSL* involved an insurance claim where the policyholder claimed damage to a commercial building from a hail and rainstorm. The insurer originally denied coverage for the claim, reconsidered its denial after subsequent engineering reports and inspections, and paid roughly $800,000 in benefits. The insured then demanded appraisal. The appraisal resulted in a $1.6 million award (roughly doubling what the insurer had paid pre-appraisal) in which both appraisers agreed to and signed off on the award without resorting to an umpire.

A subsequent bad faith action followed in federal court. The plaintiff believed it had a strong case against the carrier. Nevertheless, because of the carrier's diligent and offensive discovery in the bad faith action, it was revealed that the policyholder's appraiser committed fraud during the appraisal by fabricating a fake construction bid for over $600,000 in roof repairs. Discovery also revealed the policyholder's attorneys and public adjuster had a longstanding business referral relationship with the policyholder's appraiser—evidence indicating the appraiser was anything but "impartial" like the policy required. Travelers successfully moved to vacate the $1.6 million appraisal award in the federal action for the policyholder's failure to appoint an impartial appraiser. *Id.* at *5. Travelers then brought a separate state-court common law fraud action against the policyholder's appraiser in *The Travelers Indemnity Co. v. Juan Cartaya, et al.*, No. 2020cv32891 (Denver County Dist. Ct., Colo.). In March 2022, *Cartaya* proceeded to trial where a Denver County jury returned a verdict of fraud against Cartaya and in favor of Travelers, finding $603,864 in damages—the amount of the fabricated bid. A division of the Colorado Court of Appeals affirmed. *Travelers Indemnity Co. v. Cartaya*, No. 2022CA739 (Colo. App. Oct. 5, 2023).

GSL is only one of numerous cases where the insurer, by taking an appropriately aggressive approach to discovery in the bad faith action, was able to marshal evidence to support defenses and affirmative claims to put the policyholder on the defense and undermine the policyholder's bad faith claim as a result. *See, e.g., Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, No. 14-cv-03417-LTB, 2016 WL 1321507, at *6 (D. Colo. Apr. 5, 2016), *aff'd*, 886 F.3d 852 (10th Cir. 2018).

## Flipping the Bad Faith Set-up

In bodily injury liability claims, the claimant's attorney will frequently make a time-limited demand for the carrier's policy limits. Depending on the carrier's response to the demand, a failure-to-settle bad faith action may follow in the event a judgment exceeding the policy limits is subsequently obtained in the lawsuit against the carrier's insured.

### Flipping the Bad Faith Set-up in Excess Judgment Cases

When defending the failure-to-settle bad faith case, one issue to determine upfront is whether the claimant legitimately intended to attempt to settle his or her claim or whether the time-limited demand was simply a bad faith set-up with the hope to bust the insurer's policy limits in the subsequent bad faith case. Frequently, bodily injury claimants have no intention of settling for limits when they send the purported policy-limits demand. Instead, the demand is being sent with the hopes the insurer will falter in its response and potentially expose itself to being liable in tort for amounts higher than its policy limits.

Red flags that indicate the claimant may be attempting to manufacture a bad faith claim instead of legitimately settle the liability claim include, but are not limited to: (i) serious personal injuries with high medical bills and state-minimum or other low liability coverage limits; (ii) a short timetable to accept the claimant's settlement demand; (iii) imposition of multiple conditions the insurer cannot unilaterally resolve to accept the demand as is; (iv) arbitrary deadlines to accept the demand, send a proposed release, or perform some other settlement task; and (v) refusal to accept the proposed settlement or release after the arbitrary deadline has passed without any change in circumstance to warrant refusal of the release.

If these or other red flags are present, consider developing the carrier's defense to the subsequent failure-to-settle bad faith action with a focus on the claimant's (or his or her attorney's) conduct that contributed to or caused the failure to settle. Generally, the bad faith plaintiff will be required to prove the insurance company ***caused*** the claim not to settle. *See Wade v. EMASCO Ins. Co.*, 483 F.3d 657, 674 (10th Cir. 2007). Successful prosecution of the bad faith claim will require proof that any failure to settle was the "natural and probable consequence" of the insurer's "earlier unreasonable actions." *Bernhard v. Farmers Ins. Exch.*, 885 P.2d 265, 270 (Colo. App. 1994). That "causal link is broken," however, "when an injured party manufactures a lawsuit in an effort to recover a larger award and thereby causes the insurance company's delay in accepting the settlement offer." *Roberts v. Printup*, 595 F.3d 1181, 1187 (10th Cir. 2010); *see also Wade*, 483 F.3d at 674 ("But if a claimant arbitrarily withdraws an initial settlement offer and later rejects an identical proposal from the insurer, the claimant's conduct is the legal cause of the failure to settle.").

Courts have widely held that evidence showing that the claimant is to blame for a claim not settling or that the claimant was unwilling to settle can defeat a failure-to-settle bad faith claim. *See, e.g., Adduci v. Vigilant Ins. Co., Inc.*, 424 N.E.2d 645, 649 (Ill. App. Ct. 1981) (holding that the court could not "fairly place the blame for the failure of settlement"' on the insurer when the plaintiff did "not show why the

**Courts have widely held that evidence showing that the claimant is to blame for a claim not settling or that the claimant was unwilling to settle can defeat a failure-to-settle bad faith claim.**

offer would have been good on May 7, 1976 but was not acceptable on June 18, 1976"); *Baton v. Transamerica Ins. Co.*, 584 F.2d 907, 914 (9th Cir. 1978) ("The record strongly suggests that the real cause of Carpenter's inability to settle with the Baton estate was the conduct of the Batons' lawyer."); *Pavia v. State Farm Mut. Auto. Ins. Co.*, 626 N.E.2d 24, 28-29 (N.Y. 1993); *Peckham v. Cont'l Cas. Ins. Co.*, 895 F.2d 830, 835 (1st Cir. 1990); *DeLaune v. Liberty Mut. Ins. Co.*, 314 So. 2d 601, 603 (Fla. Dist. Ct. App. 1975).

To develop this defense, be sure to extensively question the claimant at deposition on his or her willingness to settle, including why he or she was willing to settle for minimum limits in light of the amount of their medical bills; why he or she was no longer willing to settle once the offer was rejected; what changed in circumstances, if anything, to necessitate the rejection; whether the claimant was even aware that a policy limits demand was made; and whether the claimant knew at the time of the settlement demand that a successful failure-to-settle bad faith claim could result in a judgment over policy limits.

#### Focus On the Other Side's Conduct, Not Just Defending Your Own Side's Conduct

Further, to the extent that the claimant had legal counsel involved for the settlement demand or negotiations (which is often the case for these types of liability claims), consider seeking counsel's fee agreement during discovery. Such fee agreements commonly contain provisions that provide financial incentives for the claim not to settle out of court, such as contingency-fee escalation provisions, control of settlement by the attorneys, and other terms that are relevant to which party actually caused the claim not to settle. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Goddard*, 484 P.3d 765, 779 (Colo. App. 2021) (affirming admission of claimant's law firm's fee agreement where State Farm "argued that the agreement financially incentivized the [law firm] to prevent an out-of-court settlement of [the claimant's] claim and gave the [law firm] the power to do so," finding the "agreement was relevant to the causation element of [the claimant's] counterclaim for bad faith breach of insurance contract").

Focusing on the plaintiff's attorney's conduct can be very effective particularly where you may have a sympathetic plaintiff. Although jurors may feel sympathy towards the plaintiff personally, jurors generally do not respect or appreciate a plaintiff's lawyers attempting to set up the insurer for bad faith. Exposing the set-up—i.e., to bust the limits to recover more money—allows the jury to understand what is really at issue in the case. With the right facts, this defense highlights the "bad actor" on the other side without directly attacking a sympathetic plaintiff.

#### Flipping the bad faith set-up in other contexts

Consider appropriately aggressive defenses in other bad faith set-up cases beyond the failure-to-settle context. In jurisdictions that allow the trebling or doubling of insurance benefits upon a finding of bad faith in first-party cases, like in Colorado (*see* Colo. Rev. Stat. §§ 10-3-1115 and -1116), investigate whether the insured delayed his or her own insurance claim to seek these multiplied benefits. Such evidence provides a strong argument for the insurer that the jury should be made aware that the plaintiff is seeking double or multiplied benefits, which again, generally will not resonate with jurors absent extraordinary facts of bad faith. *See Cribari v. Allstate Fire & Cas. Ins. Co.*, No. 16-cv-02450-NRN, 2019 WL 2436045, at *3 (D. Colo. June 11, 2019), *aff'd*, No. 19-1270, 2021 WL 2255008 (10th Cir. June 3, 2021) (affirming trial court's finding that there is "relevance to the issue of the statutory [double] damages because it goes to the motive the Plaintiff might have to withhold information and not cooperate in [the insurer's] investigation").

Consider raising defenses based on the insured's failure to cooperate or breach of the covenant of good faith and fair dealing. Multiple states have enacted legislation codifying the insured's duty to cooperate and permitting lack of cooperation to be used as evidence, such as Montana and Florida. Other states allow failure-to-cooperate as a defense but have placed procedural hurdles that must be met by the insurer prior to pleading the defense. *See* Colo. Rev. Stat. § 10-3-1118. Ensure that you advise the carrier on the steps necessary to preserve and assert such defenses to avoid waiver.

Finally, pairing defenses that focus on the conduct of the insured, claimant, or his or her attorney, with expert testimony on ***why*** insurers must be allowed to resist meritless, inflated, or fraudulent insurance claims—i.e., that paying meritless claims imposes increased costs on honest and rule-abiding premium payers and burdens the insurance system as a whole—resonates with jurors and is a strong rebuttal to the general themes plaintiff's attorneys raise at trial (such as corporate profits and greed).

### Trial Preparation

When litigating a bad faith insurance claim, defense counsel should always begin with the end in mind: ***the trial***. At every stage, you should be developing your defenses, your deposition questions, your discovery requests, and your pre-trial and summary judgment briefing with the assumption that you are working the case up for trial. Most cases will settle prior to trial; however, this approach is also the best way to posture the case for settlement. It is the most effective way to expose the weaknesses on the other side and strengthen your own case.

The first step in litigating the case as if it is going to trial is to ***develop your defense theme*** as early as possible. Your defense theme should be crafted to the facts of the case. It should be a theme that can be

woven through every stage of litigation. It should be memorable and relatable for the jury. It should help you prepare your fact and expert witnesses for deposition and trial testimony. And spoiler alert: "we did not act in bad faith" is not a good theme and neither is the "claim was complicated."

To develop your theme, analyze which party had the most knowledge and control over the insurance claim or situation. It is easy to make the knee-jerk reaction that the insurer has more knowledge and control but that is rarely the case. Most of the time, it is the insured who knows the most about his or her property in a property-damage case. It is the insured or claimant who knows most about his or her prior injuries or current medical conditions in a UIM or liability case. It is the plaintiff's or claimant's attorney who is controlling access to the information. The more your theme pushes knowledge and control to the other party, the more effective it will be at trial.

In the lead-up to trial, consider how you approach mock juries or mock trials. Is the case suitable for smaller groups to test-run smaller, discrete issues in the case? Would a peer-mock jury be more effective? Ensure you know and understand the opposing side's case so you can accurately present it to the mock jury. Finally, be open to testing both potentially good and bad evidence at the mock trial. It is just as important to gauge how a jury will respond to what you believe are the good parts of your case as it is to test the weak or bad parts of the case.

When it comes time for the trial itself, embrace preparation and presentation. Implement your trial theme and what resonated during the mock jury exercises. Take the time to prepare your company witnesses. Far from seeming staged or rehearsed, the jury will appreciate that your witnesses know the file and can testify intelligently to the facts of the case. This generally stands in stark contrast to witness preparation on the other side. Consider retaining jury consultants and trial techs. These professionals are excellent resources for selecting the most appropriate and impartial jury panel you can and presenting a professional and streamlined trial presentation, which the jurors will appreciate. Further, depending on your jurisdiction, these professionals' costs may be recoverable in the event you prevail at trial.

**Trial presentation is everything, from opening to closing and everything in between.**

Trial presentation is everything, from opening to closing and everything in between. Openings and closings should include organized PowerPoint slides using actual evidence, not just text on a screen. Use screenshots of the actual evidence—letters, emails, policy language, photos, medical records, and other documents. This is the most effective form of presentation for the jury. You won't need to tell them to trust you or what you say, because you are showing them, not telling them. Do not shy away from "high tech" trial presentation. In my experience, the jury appreciates an organized and easy-to-follow presentation of the evidence. It boosts your credibility, confirms you know the facts of the case, and assures the jury you are not there to waste their time.

## Efficiently Utilizing Resources

Finally, consider how efficiently you are utilizing your resources, both within and outside your firm. A major difference between the plaintiffs' bar and defense bar is that the plaintiffs' bar shares information on a firm-to-firm basis far more than the defense bar does. The defense bar and insurers understandably are fearful of this type of sharing and losing their competitive edge. However, just like the plaintiffs' bar says that one big verdict helps them all, a defense verdict or effective defense strategy helps us all, too. Consider as carriers being more open to sharing deposition transcripts of both sides' experts among firms or scheduling calls with your extra-contractual counsel to share recent trends and discuss ideas, defense themes, new tactics on the plaintiff's side, and recent victories. As defense counsel, be open to constructive criticism and inviting your peers and colleagues to give feedback.

Regarding resources internally, leverage specialty or niche experience available at your firm. Does your bad faith case require unique expertise in areas that are not traditionally bad faith or insurance-oriented, such as bankruptcy, probate, tax, default judgment, collection, or appellate issues? Consider bringing in the additional expertise to assist you. The additional expertise will be able to service your clients more efficiently than your efforts to wade into and learn a new area of law. Further, you establish credibility with your clients by recommending when additional, specialty counsel should be consulted.

## Conclusion

In summary, defending against insurance bad faith claims is not easy. But by implementing the strategies above, you can go on the offensive, develop strong defenses, deter meritless lawsuits, and ultimately, increase your client's chances of winning at trial and vindicating the insurer's claim handling and conduct.

**...by implementing the strategies above, you can go on the offensive, develop strong defenses, deter meritless lawsuits, and ultimately, increase your client's chances of winning at trial and vindicating the insurer's claim handling and conduct.**

AI and Claims Handling

# Navigating the Next Wave of Bad Faith Suits

By Chris Johnson

**When AI-related bad faith cases go to trial, overcoming juror skepticism about both AI and insurance companies will be critical to winning.**

Artificial intelligence ("AI") is revolutionizing industries, and the claim handling world is no exception. However, with innovation comes a wave of legal challenges. Headlines about AI range from sensational predictions of job takeovers to dire warnings of machines gone rogue. And as AI changes the way some insurance companies handle claims, it has become a significant target for bad faith litigation. A growing number of lawsuits accuse insurers of using AI systems to systematically and improperly deny claims or to make "lowball" settlement offers, with a current wave of high-profile cases targeting health insurance providers. However, the themes plaintiffs' attorneys are espousing in AI-related bad faith litigation are not entirely new; they are building on themes and strategies from earlier lawsuits involving software-driven claim handling practices. As the insurance industry continues to innovate, both insurers and plaintiffs are preparing for the next wave of litigation, where the transparency and fairness of AI decision-making will take center stage. When AI-related bad faith cases go to trial, overcoming juror skepticism about both AI and insurance companies will be critical to winning.

## What is AI?

AI has no uniform definition; however, it is generally defined as software that enables computers and digital devices to learn, read, write, create and analyze. One legal definition of AI in a non-insurance context is "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions." 15 US Code § 9401. Essentially, AI is a system capable of performing complex tasks that historically only a human could do, such as reasoning, making decisions, or solving problems. Whatever definition one uses, when discussed in a bad faith context AI essentially is a system and/or computer software programmed to execute algorithms with instructions to perform specific tasks, often taking over the more rote and mundane duties traditionally handled by claims specialists.

## AI in Claims Handling

A myriad of "AI" claims handling systems and products have permeated the market, often purporting to be able to automate routine, administrative claims handling tasks and reduce related costs. Some seek to replace data entry functions and handle initial claim intake, often using chatbots that get initial claim information. These systems attempt to automatically categorize and prioritize claims based on urgency and complexity. Some systems go a step further by searching for "red flags" and, where none are found, quickly and automatically resolve and pay simple claims. In complex claims, they recommend outcomes to claims specialists.

Those promoting partially automated claims systems purport to help make the claims process easier and faster for both claims handlers and the insureds by providing real-time data and instant access to analytics. They tout that such systems create transparency and, if done correctly, help eliminate human bias and error.

## One Recent Wave of Suits Related to AI and Automated Claims Handling

Like many groups, the plaintiffs' bar is vigorously discussing the role AI has on the insurance industry, and more specifically, on claims handling. Many bad faith plaintiffs' attorneys view the use of AI in claims handling as a large target for the next gen-

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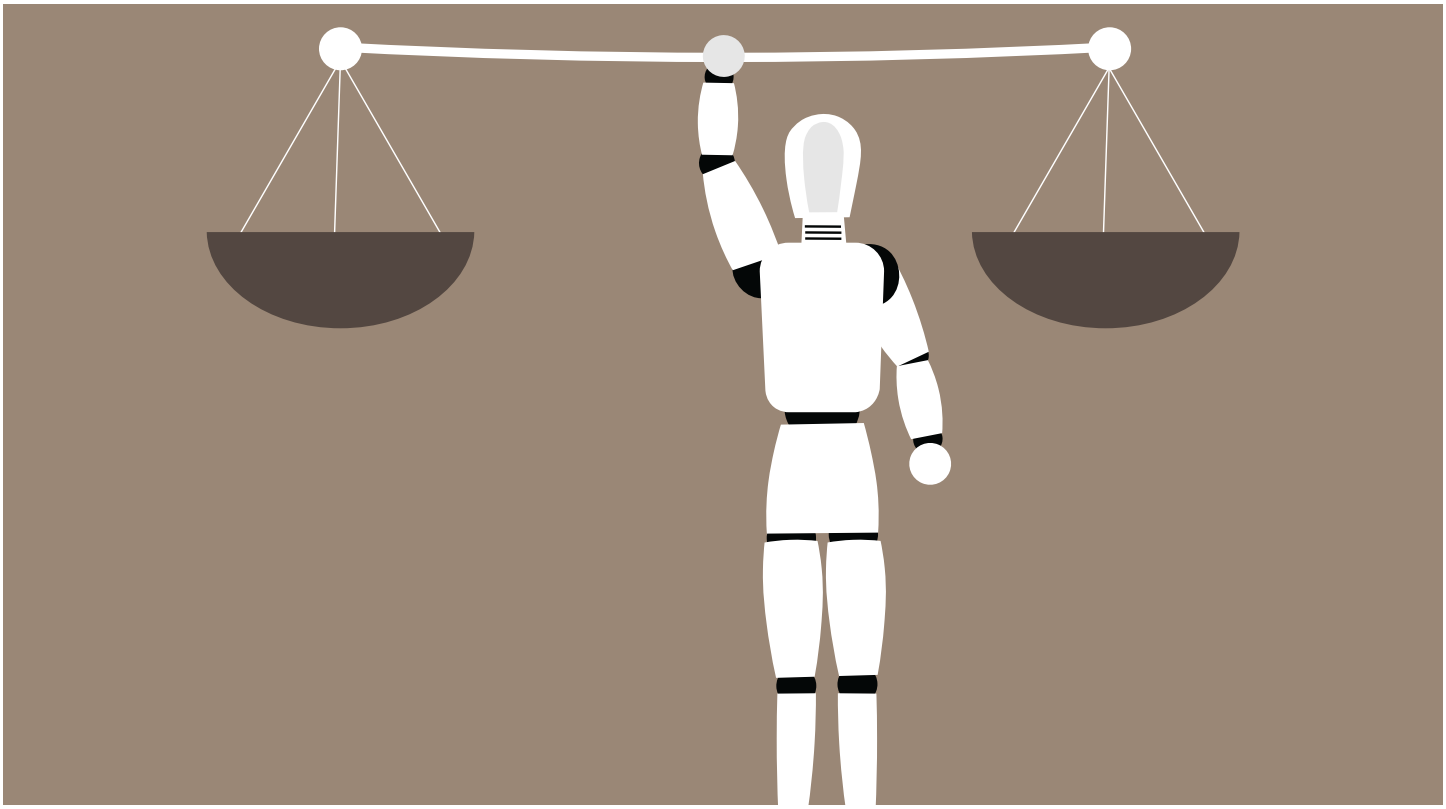

eration of extracontractual claims they plan to file against carriers. Using focus-group tested themes such as 'bots gone bad,' 'garbage in, garbage out,' and 'figures don't lie but liars can figure,' charismatic policyholders' attorneys argue that data used to train AI models, and the complex algorithms they use, were trained and programmed to reduce costs at the expense of coverage.

The most recent wave of AI-related lawsuits target health insurance providers, alleging they use various AI tools to improperly deny claims against elderly and chronically ill patients who are less likely than other groups to appeal claim denials.

For example, putative class action suits have been filed against Humana in the US District Court for the Western District of Kentucky and against United Healthcare in the US District Court for Southern District of Minnesota. Both purport that AI software was used by the carriers to improperly deny extended care claims for elderly patients, alleging that the AI claim handling systems at issue have error rates exceeding 90%. *Barrows et. al. vs. Humana et. al.*, case no. 3:23-cv-00654-RGJ, First Amended Complaint, filed Apr. 22, 2024; *Estate of Lokken et. al. vs. Unitedhealth Group, Inc. et. al.*, case no. 0:23-cv-03514, Complaint, filed Nov. 14, 2023. Of course, a very strong argument can be made that the 90% figure – which closely tracks claims made by various media reports – is based on a flawed methodology and considers only a skewed and cherry-picked sample size. For example, it appears that some such figures appear to be derived by focusing only on the ultimate results of a self-selected subset of disputed claims that are ultimately appealed, but fail to take into account the vast majority of claims that are not disputed. However, claimants and policyholder attorneys may only be appealing the more extreme outliers of the claims denied. Many of those claims may be settled and ultimately approved, not because there was a claim handling error, but to avoid fees and costs associated with ultimately defending legal claims. The plaintiffs' claims are susceptible to dozens of other lines of attack as well, both substantive and procedural, which are beyond the scope of this article.

Another class action suit – filed against Cigna in the US District Court for Eastern District of California – is focused on the AI algorithm known as PxDx. Plaintiffs claim that Cigna improperly and routinely denies plaintiffs' claims and believe it is a flawed AI model, adding that Cigna "knows that only a tiny minority of policyholders (roughly 0.2%) will appeal denied claims, and the vast majority will either pay out-of-pocket costs or forgo the at-issue procedure." *Kisting-Leung et. al. vs. Cigna Corp. et. al.*, case no. 2:23-cv-01477-DAD-CSK, Third Amended Complaint, filed June 14, 2024, at 4-6. This suit is largely based upon, and even cites, a ProPublica article which claims that three doctors rejected roughly 264,000 claims (121,000, 80,000 and 63,000, respectively) claims in a period of two months. *See How Cigna Saves Millions by Having Its Doctors Reject Claims Without Reading Them*, ProPublica, by Patrick Rucker, updated April 14, 2023; ***https://www.propublica.org/article/cigna-pxdx-medical-health-insurance-rejection-claims***. The article further claims to have internal Cigna documents showing that Cigna doctors spent an average of only 1.2 seconds looking at each claim. *Id.*

Plaintiffs in the above-mentioned suits paint alleged AI claims handling software as an opaque system that arbitrarily cuts the follow-up care patients can receive (e.g., the length of stay in assisted living facilities or hospitals) based on algorithms

calculating what the stay should be. Their attorneys argue that these elderly plaintiffs cannot spend years appealing because they do not have years. They allege their clients do not understand how the claim handling systems were used and were not given sufficient or specific explanations for how the claims were made. They try and paint AI claim handling software as arbitrary.

Cigna is vigorously defending against these claims, and is certain to raise numerous compelling defenses. "Based on our initial research, we cannot confirm that these individuals were impacted by PxDx at all," the carrier told CBS news. *Cigna accused of using an algorithm to reject patients' health insurance claims*, by Aimee Picchi, July 26, 2023, ***https://www.cbsnews.com/news/cigna-algorithm-patient-claims-lawsuit/***. "To be clear, Cigna uses technology to verify that the codes on some of the most common, low-cost procedures are submitted correctly based on our publicly available coverage policies, and this is done to help expedite physician reimbursement." *Id.*

## New, But Not New

Although future AI-related cases are expected to have a new flavor to them, in many instances plaintiffs' counsel are regurgitating arguments and themes from other high-profile cases focused on automated claims handling. For example, policyholders have accused homeowners' carriers of using software they claim was "improperly programed" with algorithms permitting carriers to intentionally "lowball" offers by underestimating material and labor costs. In some instances, carriers have obtained summary judgment arguing, in part, that the programs like Xactimate are commonly used in the insurance industry, and carriers do not lack a reasonable basis for using such programs when determining depreciation. *Sands v. State Farm*, No. 5:17-cv-4160, 2018 WL 1693387 (E.D. Pa. 2018). And, in *Sheahan v. State Farm General Ins. Co.*, the Court dismissed various extracontractual claims based on allegations that State Farm improperly relied upon valuations from programs like Xactimate and 360 which purportedly "undervalued the replacement costs of Plaintiffs' homes." 394 F. Supp. 3d 997, 1014 (N.D. Cal. 2019); 442 F. Supp. 3d 1178, 1182 (N.D. Cal. 2020.) In other cases, however, Courts have denied summary judgment, finding that issues of fact exist as to whether a carrier acted in bad faith or was negligent in allegedly "rely[ing] solely on its computer system to determine policy limits, limits that current estimates of the cost of rebuilding suggest to be inadequate." *Lewis v. Allstate Ins. Co.*, 2016 WL 5408332, No. 3:15-cv-8074-HRH (D. Ariz. Sept. 28, 2016).

Moreover, arguments in forthcoming extracontractual lawsuits expected to be filed soon in the auto insurance space are will likely echo well-known allegations made in years past. In *Strawn v. Farmers Ins. Co. of Oregon*, 350 Or. 336 (2011), automobile insureds brought a class action against Farmers alleging breach of contract, breach of the covenant of good faith and fair dealing, and fraud. The Plaintiffs argued that Farmers used a "cost containment software program" to improperly reduce PIP/no fault payments by automatically rejecting bills above the 80th percentile "as the cutoff point for reasonable expenses[.]" *Strawn v. Farmers Ins. Co. of Oregon*, 258 P.3d 1199, 1203 (Or. 2011). Plaintiffs argued that, instead, claims adjusters should have "review[ed] each medical bill to determine whether the bill was reasonable" as had been done prior to the implementation of the software. *Id.* Oregon's Supreme Court upheld a $900,000 compensatory damages award and reinstated an $8 million punitive damages award. Plaintiffs are currently turning the page in this playbook and planning similar suits, but re-packaged in the new language of generative AI software and programs that some carriers are using.

## Both Sides of the Coin

Plaintiffs' attorneys claim that AI claims handling system processes violate several provisions of most states' Unfair Claims Settlement Practices Acts, including alleged refusal to pay claims without conducting a reasonable investigation; failure to attempt to effectuate prompt, fair and equitable payment of claims which are owed; failure to adopt and implement reasonable standards related to claim investigations, and compelling insureds to institute litigation to recover amounts owing under policies. They argue that AI systems can be opaque and may not adequately consider individual circumstances, and raise questions about fairness, transparency, and accountability when AI is used in the claims handling process. The alleged lack of transparency can be problematic where, as a practical matter, insurers will likely need to convince judges and jurors that their proprietary and complex AI systems used in the claims handling process are not unreasonable.

Carriers, on the other hand, defend their use of AI by highlighting its ability to process claims efficiently and consistently. They contend that AI systems are designed to follow the guidelines and coverage criteria set forth in the policy and that any decisions made are consistent with these terms. Insurers point out that AI is merely a tool that aids in decision-making and is not the sole arbiter of claims. They posit that AI helps to eliminate human error and bias, leading to more consistent and objective outcomes. Carriers point to administrative cost savings of using AI that can be passed on to customers in the form of lower premiums. According to a McKinsey study, "AI-enabled [prior authorization processes] can automate 50 to 75 percent of manual tasks" when adjusting routine health insurance claims, which can help and free up carriers/payors to focus on more complex cases. *Healthcare Payers Recognize that Prior Authorization (PA) is Ripe for Improvement. AI-enabled PA Design may Deliver Substantial Financial, User-Experience, and Care*, McKinsey & Company, April 19, 2022, ***https://www.mckinsey.com/industries/healthcare/our-insights/ai-ushers-in-next-gen-prior-authorization-in-healthcare***. For example, some AI systems can automate obtaining and cross-validating medical records, resulting in faster turnaround times that may benefit policyholders. *Id.* If used correctly, analytical AI models can be used to root out fraudulent claims, the cost of which would otherwise be borne by other policyholders. *Id.* Carriers also point to gains in speed and efficiency of approving and paying routine claims, with policyholders receiving the benefits of faster claim payments and lower premiums.

While it is impossible to predict the exact direction AI-related bad faith litigation will take, early waves of AI-related litigation focus heavily on the amount of control and

actual oversight humans have on claims denials. Carriers are taking steps to make such claims more defensible. For example, several property and casualty carriers have developed, or are developing, systems where AI products can be used to handle routine administrative tasks and even "approve" routine claims, but a human claims handler makes the decision whether to deny claims and a proper investigation.

In sum, the insurance industry is faced with the challenge of balancing the technological advancements that AI systems offer with carriers' commitment to fair claims handling, while also keeping an eye on the risk of potential bad faith exposure. The level of human involvement and reasonableness of AI decision making will likely be the deciding factors in how Courts view AI claims handling software.

## Juror Perceptions of AI, Insurance, and the Use of Technology in Claims Handling

Savvy litigation consultants have, for years, researched jurors' views on insurance companies, and have more recently turned their attention to jurors' views on AI or automated claims handling. For example, Michelle Rey LaRocca, of *Decision Analysis*, and Gent Silberkleit, PhD of Blueprint Trial Consulting have studied these issues in depth. The remainder of this article discusses some of the jury research they have performed on the use of various technology tools in the claims handling process; it restates text and ideas from materials Silberkleit and Rey LaRocca co-authored (along with this author) for a presentation at DRI's Bad Faith Seminar. *See* Johnson, Silberkleit and Rey LaRocca, *A Jury's Perspective: Use of Artificial Intelligence in Claims Handling*, Materials, DRI bad Faith and Extra-Contractual Liability Conference (June 13, 2024).

Rey LaRocca and Silberkleit have found that jurors are wary of algorithms or unfamiliar technology handling claims. Jurors want a human involved in evaluating and investigating claims. They also want to understand *how* and *why* the technology is being used. Is it being used to summarize documents, suggest whether to accept or deny a claim, or suggest settlement values? How much input does the claims handler have? Jurors are particularly critical of technology that appears to prioritize insurer savings over insured interests, viewing such practices as potentially indicative of bad faith.

Their findings align with common plaintiff arguments: that technological tools fail to assess claims on their individual merits and are primarily employed to reduce company costs. They also point out that the context and the type of claim can influence juror attitudes. For instance, jurors might be more receptive to the use of AI and other sophisticated technology in a commercial/business case than in a personal insurance case. In personal insurance cases where jurors are naturally prone to put themselves in the shoes of the policyholder plaintiff, the challenge attorneys face is to adequately explain technology's use to evaluate bodily injury and medical claims.

### Jurors Are Worried About AI

Daily news headlines that warn of the effects AI will have on our society have certainly exacerbated many people's concerns about this new frontier. Recent opinion polls have confirmed that most Americans are worried about how AI will affect them personally and affect our society at large. For example, global communication firm, Edelman, recently published their 2023-2024 Edelman Trust Barometer, in which they polled over 32,000 people from around the world, including 1,150 in the US. *2024 Edelman Trust Barometer*, Edelman Trust Institute, presented on January 14, 2024, ***https://www.edelman.com/trust/2024/trust-barometer***. One of the top-line results from this large-scale opinion survey is that respondents distrust AI.

According to the Edelman report, 76% of all respondents expressed trust in the tech industry, but trust in AI was 25 points lower, at 50%. *Id.* Moreover, the data suggest that trust in AI companies has declined from 61% to 53% in the past 5 years. *Id.* Another interesting result is that 74% percent of respondents indicated that they trust scientists and their peers equally for the truth about novel technologies such as AI. *Id.* Moreover, those who reported the impression that innovation is poorly managed reported more trust in their peers than in scientists. *Id.*

Specific to the US, the Edelman survey revealed that 63% of respondents felt that "government regulators lack adequate understanding of emerging technologies to regulate them effectively," *Id.* Additionally, over half of respondents reported the opinion that "innovation is poorly managed" (56%), rather than "well managed" (22%), and the other 39% selected "Neither." *Id.* One of the most interesting results of the Edelman survey is the *lack of* substantial differences by political ideology. Americans on the right and left are both skeptical of AI: 59% of right-leaning respondents and 51% of left-leaning respondents reported that they reject the use of AI. In contrast, the survey identified huge differences between the portion of right-leaning versus left-leaning respondents who rejected other innovations like green energy, gene-based medicine, and GMO foods. *Id.*

**Daily news headlines that warn of the effects AI will have on our society have certainly exacerbated many people's concerns about this new frontier.**

One can speculate that these latter innovations have been more politicized for a longer period of time than AI has, but these other innovations could serve as examples of how political polarization could significantly influence impressions of AI and drive a wedge between progressives and conservatives on this topic. It will be critical for attorneys, claims professionals, and litigation consultants working on AI-related cases to keep their finger on the pulse of Americans' -- and therefore potential jurors' -- evolving attitudes towards AI.

Another noteworthy opinion poll was conducted in May 2023 by Gallup, and

those results largely comport with the findings by Edelman. A 2023 Bentley-Gallup Business in Society Study found that 40% of Americans believed that AI "does more harm than good," whereas only 10% believed that AI "does more good than harm" (50% reported that AI "does equal amounts of harm and good"). *Americans Express Real Concerns About Artificial Intelligence*, August 27, 2024, Gallup, ***https://news.gallup.com/poll/648953/americans-express-real-concerns-artificial-intelligence.aspx***. Moreover, when polled, "In general, how much do you trust businesses to use artificial intelligence responsibly?" A substantial 79% majority of respondents reported either "Not at all" (38%) or "Not much" (41%). *Id.*

While the public's current concerns about AI's influence on their lives may not be wholly unfounded, their worries may also be overblown by substantial media coverage about the dangers of AI combined with their little actual knowledge of the subject. Jurors are likely to be biased against AI without being fully informed about the technology. Litigators who can properly explain the role of AI in the claim handling process may be able to disabuse jurors of certain misconceptions around the technology.

### Jurors' Views of Insurance Companies

Rey LaRocca and Silberkleit have also found that most Americans, and therefore most jurors, tend to believe that insurance companies operate only in the company's own best interest. They hear mock jurors comment to this effect almost weekly. Sometimes mock jurors voice their general impressions of the insurance industry and other times they recount personal experiences where they or a loved one were denied coverage or denied (what they thought was) fair compensation. Accordingly, a May 2020 survey of jury-eligible Americans by Decision Analysis, Inc. found that 70% of respondents believed that "insurance companies would do anything to avoid paying even legitimate claims," *General Attitudes Towards Insurance Companies*, DecisionQuest, ***https://www.decisionquest.com/research/general-attitudes-towards-insurance-companies/***. Silberkleit and Rey LaRocca believe that most jurors will be hard-pressed to give insurance companies the benefit of the doubt when it comes to fair and ethical use of AI. Furthermore, it is plausible that there would be an additive effect here—jurors' distrust of AI and their distrust of insurance companies will converge to make many jurors even more suspicious of insurance companies' use of AI than they are of either AI or insurance companies separately.

## Practical Advice for Jury Trials Involving AI and Insurance

In bad faith cases where complex systems or claims handling is at issue, just as important as persuasion -- if not more important -- is educating the jury. Because jurors today are disenchanted with governments and institutions, highly polarized politically, and deeply skeptical, many jurors are inherently resistant to persuasion. Jurors want to learn more than they want to be persuaded. Instead of the role of the advocate at trial being to forcefully argue the case to persuade jurors to find for their clients, the role of the advocate should be to help jurors understand the entire context of the case and let them step into your shoes to learn, investigate, and solve the case or handle the claim with you. Self-persuasion is more powerful than presenter persuasion.

Indeed, the trial team that does a better job of teaching the jury to understand their positions is the one that often prevails. Especially when dealing with complex or technical issues—like explaining how AI works—it is invaluable to test and refine your strategy for educating the jury on key concepts.

If the case goes to trial, selecting a receptive jury will be key. Jury selection is really jury de-selection: your goal should be to identify and eliminate negative and risky jurors. Start by identifying the problematic issues in your case and how the opposing side will likely present their case before designing a juror questionnaire and voir dire questions. You will also want to create a jury selection plan well in advance of trial that includes a meaningful jury profile, dealing with court procedures, processing questionnaires and internet research, voir dire goals and procedures, developing cause challenges, and strike strategies. A good litigation/jury consultant, like Rey LaRocca or Silkbert, can help tremendously with this, and/or can also help with analyzing juror questionnaires, creating profiles of jurors in a particular pool, and even helping select specific jurors at trial.

When questioning potential jurors during voir dire, you should seek to create a conversational tone which makes jurors feel safe to have a meaningful conversation about important and difficult issues. You want them to feel comfortable expressing negative attitudes. You also want the jurors talking as much as possible, so ask them open-ended questions and ask them to elaborate on their answers.

In a nutshell, the intersection of AI, insurance, and jury trials presents both challenges and opportunities for insurers. The key to success lies in carefully managing how AI tools are explained and perceived by jurors, who are often skeptical of both the technology and insurance companies. Through thoughtful jury selection, clear and transparent explanations, and a focus on education over persuasion, defense counsel handling bad faith claims can help disarm biases and frame AI – or automated claims systems – as a tool for fairness and efficiency rather than a faceless algorithm driven by cost-cutting measures. Navigating these complexities effectively will be critical as AI becomes more central to claims handling and as it increasingly finds itself under scrutiny in the courtroom.

## Conclusion

Nobody seems to know what the future of AI holds; only that it is here, and it is here to stay. As AI continues to assume a more prominent role in claim handling, it becomes increasingly crucial for insurance companies and legal professionals to update their strategies for navigating the complex landscape of bad faith litigation. The key to success in future bad faith trials may lie in effectively communicating the benefits and safeguards of AI technologies, addressing judges' and jurors' fears, and dispelling misconceptions about AI's role in decision-making processes.

Competing Courts

# Determining Jurisdiction in International Cross-border Coverage Litigation

**By Christine Viney and Marcus Snowden**

**D**oes "home court" advantage rule the roost? Does "first to file" mean exclusive jurisdiction? What is the "true center of gravity" in a cross-border, multi-national commercial primary and excess liability program?

Between 2021 and 2023, the first steps in coverage litigation arising from long tail, multi-policy year exposures to environmental liabilities took place in the province of Ontario, Canada and in the US state of New York, along with arbitral proceedings in London, UK In both North American venues, competing motions on jurisdiction were argued to the appellate level, with the court in each venue deciding that the litigation in its own jurisdiction should continue. In reaching these parallel decisions, the courts took similar but not identical approaches to assessing jurisdiction. These approaches are introduced below through a comparative view of jurisdiction decisions impacting a commercial policyholder, its primary and excess insurers, and their respective policies litigated in the courts of Canada/Ontario and the United States/New York. The article concludes with some practical observations on the implications of these decisions for counsel advising a party to such litigation.

## Background

Vale Canada Limited ("Vale") is a mining company based in the Canadian province of Ontario. Vale's predecessor, International Nickel Company of Canada Limited ("Inco") was and remains a major Canadian mining company that has maintained its head office in Toronto (Ontario's capital) for the past 80 years. Inco became Vale Canada Limited after being purchased by Vale S.A.

For decades before the coverage litigation began, Vale incurred significant environmental remediation expenses in relation to 26 sites globally: 22 in Canada (with 19 of these in Ontario), 1 in New Jersey, 1 in Japan, 1 in Indonesia and 1 in Wales.

Vale also faced individual and class action claims alleging bodily injury and property damage caused by its operations. For example, in 2010, Vale was found liable for $36 million in a class action brought on behalf of owners of residential properties near a refinery in Port Colborne, Ontario, alleging that emissions from Vale's refinery had contaminated the soil. (*Smith v Inco*, 2010 ONSC 3790) Although reversed on appeal, Vale incurred significant costs in defending the claim. (*Smith v Inco Limited*, 2011 ONCA 628; *Smith v Inco Limited*, 2013 ONCA 724) This was just one of a number of class action and environmental regulatory proceedings Vale faced in Ontario, and it incurred defence costs for each.

Throughout the years in which the events underlying these claims occurred, Vale was insured. Indeed, Vale had identified 92 primary and excess insurance policies from 24 insurers which it contended covered the types of liabilities created by these environmental claims as part of a Canadian-based tower of insurance. These

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were occurrence-based policies responding to losses due to events that occurred during their respective policy terms, even if the claims for such losses were not made until many years later. The insurers who underwrote these policies were domiciled in Canada, the US and the UK

By their nature, occurrence-based policies give rise to the possibility of so called "long tail" claims. In such claims, an insurer faces liabilities for its time on risk when they surface many years after the expiry of the policy period. The potential issues to be determined are compounded where an insured faces claims alleging injury or damages suffered or incurred over multiple policy periods – the very situation facing Vale and its insurers. Eventually, disagreements and failed settlement negotiations amongst Vale and its multinational insurers led to a jurisdictional contest over litigation venue.

### Coverage Negotiation and Litigation

Between 2018 and 2021, with the benefit of tolling agreements, Vale and its insurers were in negotiations about the coverage available under these policies. In 2021, Travelers Insurance Company of Canada ("Travelers") brought its tolling agreement to an end and filed a declaratory judgment action in New York regarding the scope of its obligations to Vale (the "New York Action").

North of the 49th parallel, three separate coverage actions were initiated in rapid succession.

The first was a claim "commenced quickly" by Vale in response to the New York Action that was later subsumed into its broader action described below. (*Vale Canada Limited v Royal & Sun Alliance,* 2022 ONSC 12 ("Vale 2022 ONSC") at paras 3 and 6)

Ontario-based Royal & Sun Alliance Insurance Company of Canada ("RSA"), one of Vale's two primary insurers, started a separate action against Vale and Vale's other insurers. In this action, RSA sought a ruling on the relative degrees of responsibility of the insurers amongst themselves (the "RSA Action"). (*Vale* 2022 ONSC at para 2)

In the third Canadian coverage action, Vale sued all 22 of its insurers for coverage for the environmental liabilities established against it, the bulk of which arose out of its operations in Ontario. (*Vale* 2022 ONSC at para 16) Vale included claims for indemnification of the defence costs incurred in litigating the many environmental claims against it (the "Vale Action").

Thirteen of the 22 defendant insurers in the Vale Action and the RSA Action (together, the "Canadian Actions") attorned to the jurisdiction of the Ontario courts. (*Vale* 2022 ONSC at para 4; *Vale Canada Limited v Royal & Sun Alliance*, 2022 ONSC 348 at para 2. Two of the insurers who agreed the Ontario courts had jurisdiction joined in the request for a stay in favour of the New York Action) The other nine insurers brought a motion challenging jurisdiction and, in the alternative, seeking a stay of the Canadian Actions in favour of the New York Action, or, in the case of two of the insurers, in favour of arbitration that was underway in the UK under the terms of their policies (the "Canadian Jurisdiction Motion").

### The Canadian Court's View on the Race to the Courthouse

The relative timing of the coverage actions was not in question: the New York Action was filed first, followed by the Canadian Actions, creating a classic "race to the courthouse" scenario.

As a preliminary to the Canadian Jurisdiction Motion, Vale asked the Ontario Superior Court of Justice (the "ONSC") to order a deadline for delivery of responses by insurers who had not delivered defence pleadings within the time allowed under Ontario's *Rules of Civil Procedure. (Vale Canada Limited v Royal & Sun Alliance*, 2021 ONSC 6377 ("Vale 2021 ONSC") at paras 7 and 8) The defendant insurers sought additional time to either defend or challenge jurisdiction.

In considering this request, the ONSC commented on the potential for mischief if parties were permitted to control the relative pace of parallel actions. The specific concern was that with parallel actions in different venues, the question of which action was commenced first and the relative progress of each is a factor (albeit a small one) in the Canadian *forum non conveniens* analysis. (*Vale* 2021 ONSC at para 30 citing *Club Resorts Ltd. v Van Breda*, 2012 SCC 17 at para 110) In light of this factor, it could be to a party's advantage to move quickly in its chosen forum while delaying in the forum it wished to avoid, thereby increasing the chances that its preferred forum would be found "convenient."

**The relative timing of the coverage actions was not in question: the New York Action was filed first, followed by the Canadian Actions, creating a classic "race to the courthouse" scenario.**

The ONSC expressed concerns about the relative urgency with which some of the insurers approached the Vale Action, noting that the same insurers who were seeking more time to respond to the Vale Action had seemingly "been able to deliver all necessary pleadings and proceedings in the US case for an early motion and for discovery to be ready to go this fall." (*Vale* 2021 ONSC at para 26) The ONSC also found that as large, sophisticated corporate parties, the insurers were "capable of defending on a timely basis if they chose to do so" and that it seemed "more than coincidental that many defendants are currently in default of procedural timelines and seek yet more time only here." (*Vale* 2021 ONSC at para 32)

In discussing the effects of the "race to the courthouse" on assessment of jurisdiction, the ONSC rejected the suggestion that there was a "competition" with the US court. (*Vale* 2021 ONSC at para 26) At the same time, the ONSC declined the request to defer its decision on jurisdiction until the jurisdiction motion in the New York Action was decided, finding that it would be inappropriate for a Canadian court to wait for a US court to determine whether

matters should proceed in Canada. (*Vale* 2021 ONSC at para 28) In essence, the ONSC treated the two proceedings as independent, stating:

> *The US Court will deal with its proceedings as it sees fit and can expect the same full faith and credit from this court as we always receive from our neighbour. Similarly, this court will exercise jurisdiction in accordance with our law and will deal with convenient forum arguments likewise. (Vale 2021 ONSC at para 27.)*

Having found that there was no prejudice to the defendants in requiring them to respond to the Vale Action in a timely manner, the ONSC directed the insurers to deliver defence pleadings or challenge jurisdiction within 10 days of the Court's decision.

## Canadian Approach to Jurisdiction

As background to the Canadian decisions in Vale, the following is a brief overview of how Canada's courts approach jurisdiction.

Canadian courts follow a two-step approach when considering jurisdiction: first, determining whether the court has jurisdiction *simpliciter*; and second, determining whether the court should decline to exercise its jurisdiction based on *forum non conveniens*, as compared to other potential venues in which the dispute could be litigated.

### Jurisdiction Simpliciter

Jurisdiction *simpliciter* is, on its face, a basic but somewhat circular concept: a court has jurisdiction *simpliciter* if there is some basis that makes it appropriate for the court to assume jurisdiction over the dispute and, by extension, the parties to the dispute.

The Supreme Court of Canada (the "SCC") set out the Canadian test for jurisdiction *simpliciter* in companion decisions, released consecutively, in which the Canadian court's jurisdiction over foreign defendants was key. The *Club Resorts Ltd v Van Breda*, 2012 SCC 17 case involved a Canadian plaintiff who suffered catastrophic injuries while on a trip to a resort in Cuba managed by Club Resorts. The plaintiff's trip had been arranged through a Canadian-based travel agent. The ensuing claim was initiated in Ontario.

The *Charron Estate v Bel Air Travel Group Ltd.* case also concerned a Canadian on vacation in Cuba. In *Charron*, the deceased and his wife had booked a vacation package through an Ontario travel agent which took them to a Cuban resort, again managed by Club Resorts. During the trip, the plaintiff drowned while scuba diving. The resulting claim was also brought in Ontario.

Club Resorts moved to dismiss both *Van Breda* and *Charron* on the grounds that the Ontario courts did not have jurisdiction *simpliciter.*

Ontario's trial and appellate courts held that they had jurisdiction *simpliciter.* The SCC agreed.

As the SCC confirmed, jurisdiction *simpliciter* is automatic if a defendant is present in the court's territory when the claim is served or if the defendant consents to the court's jurisdiction.

Beyond these traditional bases for jurisdiction, however, a court can assume jurisdiction *simpliciter* if there is a "real and substantial connection" between the forum and the subject matter of the dispute, the forum and the defendants, or both. To help Canadian provincial courts determine whether the requisite "real and substantial connection" exists, the SCC set out four connecting factors that presumptively ground jurisdiction in the context of tort claims: (1) whether the defendant

is domiciled or resident in the province; (2) whether the defendant carries on business in the province; (3) whether the tort was committed in the province; or (4) whether a contract connected with the dispute was made in the province. The SCC allowed for flexibility in this test, holding that the list is not closed and that new presumptive connecting factors can be identified based on "connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors." (*Van Breda* at para 91)

In *Van Breda*, it was the contract with the travel agency, which had been entered into in Ontario, which grounded the jurisdiction of the Ontario court through the fourth presumptive connecting factor. On the *Charron* facts, the finding that Club Resorts was carrying on business in Ontario and had a physical presence in the form of an office in Ontario was sufficient to establish jurisdiction through the first and third presumptive connecting factors.

### Forum Non Conveniens

Once jurisdiction is established – or assumed – a Canadian court may still decline to exercise that jurisdiction if an alternative forum is clearly more appropriate, i.e., based on *forum non conveniens*. (*Van Breda* at para 108) Canada's *forum non conveniens* test is based in part on policy considerations, including concerns about fairness to parties on both sides of the dispute and about efficiency in litigation. (*Van Breda* at para 108) Practical factors also play into the analysis, including:

- The location of parties, witnesses and evidence;
- The costs associated with the litigation as shaped by the jurisdiction decision;
- The effect of jurisdiction on the conduct of the litigation or related or parallel proceedings;
- The potential for conflicting judgments;
- Problems about judgment recognition and enforcement; and
- The relative strengths of the connections between the opposing parties and the forum.

The *Van Breda* framework has been well established in Canadian law since 2012. However, questions remained as to whether that framework applied to contract claims, including disputes about insurance policies such as the Canadian Actions.

### The US Approach to Jurisdiction seen through the Canadian Lens

As often happens when there is little or no precedent in Canadian law, the Ontario courts looked to other jurisdictions, including the US, for guidance. At the appellate level, the Ontario Court of Appeal (the "ONCA") conducted a detailed review of "the private international law of other legal systems with a shared commitment to order, fairness and comity", including the US, to determine whether those systems had recognized specific connecting factors between insurance contracts and the jurisdiction in which litigation was underway.

The ONCA's review of the US approach started with constitutional guarantees including the due process guarantee, which results in recognition of personal jurisdiction over a defendant that has purposefully established "minimum contacts" with the forum state. (*Vale Canada Limited v. Royal & Sun Alliance Insurance Company of Canada*, 2022 862 ("*Vale* ONCA") at para 50) Personal jurisdiction can be established on a general basis, if a foreign corporation has such "constant and pervasive affiliations" with a state that the court is satisfied the corporation is essentially at home in the state, or on a claim specific basis, if the foreign defendant has contact with the forum state out of which the claim arises. (*Vale* ONCA at paras 51 and 52) With respect to insurers specifically, in *Domtar, Inc. v. Niagara Fire Insurance Co.*, 553 N.W. 2d 25 (Minn) at p. 31 (1995), cert. denied, 516 US 1017 (1995)), the Supreme Court of Minnesota held that:

> *A court may assert specific personal jurisdiction over a nonresident insurer when (1) the insurer knows of its insureds contact with the forum; (2) the risk insured against transpires in the forum state; and (3) the forum state is not excluded from the geographic coverage of the insurance policy.* (*Vale* ONCA at para 53 citing *Domtar.*)

From the point of view of the Minnesota court, this approach appropriately emphasized the "future consequences contemplated by the parties when executing the (insurance) contract." (*Vale* ONCA at para 56, citing *Domtar*) This meant looking to where the parties expected coverage under the policy to be triggered and where the parties expected the obligations in the policy to be performed.

In evaluating the location of consequences the insurer had in mind when it executed the policy, the ONCA observed that in *Domtar*, the Court accepted that the insurer would likely have considered the extent of the prospective insured's operations in the US as part of its underwriting process and would have learned that it had operated the site in Minnesota at which the environmental damage that was the subject of the coverage dispute had allegedly occurred. Based on this, the *Domtar* Court concluded that by issuing the policy, the insurer "purposefully established the required minimum contacts with Minnesota" to establish specific personal jurisdiction over the insurer. (*Vale* ONCA at para 58)

If personal jurisdiction is established, US courts consider the reasonableness of the assumption of jurisdiction, based on factors such as the burden on the defendant in litigating in the forum, the unique burden a foreign defendant could face in a foreign legal system, the forum state's interest in adjudicating the dispute and the plaintiff's interest in securing convenient and effective relief. (*Vale* ONCA at para 60)

The "reasonableness" assessment also includes policy considerations. The court is required to ensure that taking jurisdiction accords with the principles of "fair play and substantial justice" as otherwise the assumption of jurisdiction would not be reasonable. (*Vale* ONCA at para 59, citing *International Shoe Co. v Washington*, 326 US 310, at p 316 (1945)) Other considerations as to the "reasonableness" of jurisdiction include efficiency in resolution and the interest in avoiding "piecemeal and fragmented litigation." (*Vale* ONCA at para 61, quoting *Domtar* at para 34) The ONCA observed that in *Domtar*, these considerations led the Supreme Court of Minnesota to conclude that it was reasonable to assume jurisdiction over a foreign insurer, since having the insurer present in Minnesota promoted the efficient resolution of the action and allowed the insured and the other insurers named as defendants to avoid proceedings in multiple jurisdictions.

### Jurisdiction Decisions

The competing motions on jurisdiction proceeded in parallel, with decisions from the Canadian and US courts, informed by the analytical frameworks outlined above, overlaying one another. The ONSC decision on the Canadian Jurisdiction Motion was released first, followed by the jurisdiction decision from the Supreme Court of New York ("NYSC") in the New York Action. The appellate decisions followed in the same order, with each new decision awaited in the insurance bar with the kind of anticipation usually associated with a new episode of a popular drama.

#### ONSC Decision

The ONSC's decision on the jurisdiction motion was released on January 4, 2022, as *Vale Canada Limited v. Royal & Sun Alliance Insurance Company of Canada*, 2022 ONSC 12 (the "ONSC Decision"), with mixed results for the nine insurers who challenged jurisdiction.

For all but one of the insurers, the ONSC concluded that it had jurisdiction. As for the outlier, North River Insurance Company ("North River"), the Court held that the only connection to Ontario was the sale of a policy to Vale, a company based in Ontario, which the Court found was not sufficient to ground jurisdiction.

Further, while the Court asserted jurisdiction over eight of the nine insurers, two successfully argued that the Vale Action should be stayed as against them, while they engaged in arbitration in the UK under their particular policies. The ONSC found, however that this stay should not extend to the RSA Action, as it was not subject to that arbitration agreement. (*Vale* 2022 ONSC at paras 6 and 7)

In brief, for the Vale Action, the ONSC accepted that it did not have jurisdiction based on consent or on the presence of the insurers in Ontario at the time the Canadian Actions were served. In addition, the ONSC rejected most of the *Van Breda* presumptive connecting factors, finding that:

- The policies issued by the insurers challenging jurisdiction were made in either the US or the UK, rather than in Ontario, so the location of contract formation did not connect the claim for coverage to Ontario. (*Vale* 2022 ONSC at paras 25 – 31)
- The losses Vale claimed from its insurers were not for damage to Vale's property in Ontario, but for liabilities, including litigation costs, covered under third-party liability policies, meaning that the location of the physical damage underlying the claims did not connect the loss to Ontario. (*Vale* 2022 ONSC at para 32)
- The location of the potential breach of contract, in the form of non-payment by the insurers, is "amorphous" and could be either where the payment was due (Ontario) or where the decision not to make the payment was taken (the US or the UK). Using the place that the plaintiff sustains damages through not being paid as the place the contract is breached, and then treating that as a connecting factor for the purpose of jurisdiction, would improperly extend the court's jurisdiction to any claim by an Ontario resident against anyone, anywhere. (*Vale* 2022 ONSC at paras 33 and 34)

With respect to the RSA Action, the ONSC accepted that it was "efficient and desirable for all of the claims of all of the relevant insurers to be heard together." (*Vale* 2022 ONSC at para 38) The Court also considered the breadth of the RSA Action, which named all of Vale's excess insurers, including those who covered Vale globally, as defendants. Given the magnitude of Vale's claims, the Court accepted that issues of exhaustion of limits, allocation between policies and insurers and aggregation of claims and limits, including how much coverage remained available to Vale, other claims in other jurisdictions were considered. (*Vale* 2022 ONSC at paras 35 and 36) From the ONSC's point of view, this made having all insurers before the court the most efficient overall approach.

Following an earlier decision of the ONSC (*Century Indemnity Co. v Viridian Inc.*, 2013 ONSC 4412), the Court first considered which action was the "centre of gravity for the entire cluster of litigation." (*Vale* 2022 ONSC at para 38. The SCC described this a useful metaphor for jurisdiction in *Haaretz.com v Goldhar*, 2018 SCC 28.) In finding that the RSA Action was the "centre of gravity," the ONSC took into account that most of the policies in question had been issued in the US and that the negotiations between Vale and its insurers from 2018 and 2021 were centered in the US (*Vale* 2022 ONSC at para 41) The Court also noted that the insurers challenging jurisdiction all sold policies to Ontario-based Vale and had undertaken coverage in a "predominantly Ontario-based global insurance program", with some "plainly" carrying on business in Ontario through advertising and sales in the province and through the physical presence of subsidiaries. (*Vale* 2022 ONSC at paras 40 and 46)

The determining factor in the ONSC's "centre of gravity" analysis, however, was that the RSA Action was "the only one that names all of the relevant insurers." (*Vale* 2022 ONSC at para 43) In comparison, the New York Action involved fewer defendant insurers, and the potential for adding other insurers in future was irrelevant. (*Vale* 2022 ONSC at paras 43 and 45) Similarly, the Vale Action could not "have 100% of the insurers … before the court regardless of the desirability of doing so", because of the ongoing arbitration in the UK (*Vale* 2022 ONSC at para 44)

The ONSC then turned to the final presumptive connecting factor established in *Van Breda* – whether the insurers were "carrying on business" in Ontario. In *Van Breda*, the SCC cautioned that "carrying on business" as a presumptive connecting factor was not intended to create a form of "universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity." (*Van Breda* at para 87, in *Vale* 2022 ONSC at para 60) In applying this direction to jurisdiction over the contract claims before it, the ONSC found that it was not enough to "say simply that they are all connected insurers in a global insurance scheme that ought to be interpreted by one court" and therefore assessed the facts in relation to each of the insurers separately. (*Vale* 2022 ONSC at para 61)

As a preliminary finding, the Court distinguished between: (a) "carrying on business" in the sense of being present in the jurisdiction when served, which is enough to ground presence-based jurisdiction under Canadian common law; and (b) "carrying on business" as part of the *Van Breda* presumptive connecting factors. (*Vale* 2022 ONSC at para 54) The Court accepted that as a presumptive connecting factor, "carrying on business" has

a less onerous temporal standard than the traditional presence-based test. (*Vale* 2022 ONSC at paras 54 and 55) While presence-based jurisdiction requires the defendant be present in Ontario when a claim is served, assessing whether a defendant is "carrying on business" as part of the *Van Breda* analysis is an historical exercise turning on whether "there is a real and substantial connection between the defendants, the substance of the lawsuit, and the jurisdiction of Ontario." (*Vale* 2022 ONSC at para 56)

As part of determining whether the requisite "real and substantial" connection existed, the ONSC considered the insurers' reasonable expectations. The Court found that the insurers knew their policies carried long tail liabilities and were part of a global insurance program for a Canadian multi-national company that would ultimately be received and acted on in Ontario. (*Vale* 2022 ONSC at paras 63 and 65) The ONSC also noted that, having sold insurance to an Ontario resident in relation to Ontario liabilities, the insurers had – or should have had – a reasonable expectation that they would be "called to account" in Ontario, further grounding a real and substantial connection to the province. (*Vale* 2022 ONSC at para 75)

Based on these considerations and the factors that played into its "centre of gravity" analysis, including advertising and sales in the province, physical presence of subsidiaries and related entities, and licensing and registration status under Canadian law, the ONSC concluded that it had jurisdiction over all the insurers save North River.

Finally, the ONSC did not agree that New York was a "clearly more appropriate" forum. In its *forum non conveniens* analysis, the Court reprised its comments on the status of the RSA Action as the "centre of gravity" and the most inclusive of the competing actions on either side of the border. The Court acknowledged that the New York courts would be able to manage the litigation well and resolve it justly. However, the underlying liabilities and regulatory actions arose in Ontario litigation and evidence supporting the claims was in Ontario. In this context, the Court considered the Vale Action too "tightly tied" to the "natural forum" of the Ontario courts to be displaced in favour of litigation in New York. (*Vale* 2022 ONSC at para 75)

**NYSC Decision**

In June 2021, Travelers filed the New York Action, through which it sought a declaratory judgment as to the scope of coverage, if any, that it was obliged afford Vale. In addition to Vale, the New York Action named RSA and another of Vale's insurers as defendants.

Vale and RSA brought a motion before the NYSC to either dismiss or stay the New York Action on a number of alternative bases, including that:

- it was "in the interest of substantial justice that the action should be heard in another forum." (New York Civil Practice Law and Rules ("CPLR") subsection 327(a)); and that
- "there is another action pending between the same parties for the same cause of action in a court of any state or the United States." (CPLR subsection 3211(a)(4))

On May 10, 2022, in reasons that take the ONSC Decision into account, the NYSC dismissed Vale's motion to dismiss or stay the New York Action.

For the NYSC, the critical issue was whether "based on the totality of the circumstances New York is an inconvenient forum and whether another forum is available which best serves the ends of justice." (Reasons of Borrok JSC, quoted in Vale ONCA at para 18) The Court's decision focused on the policies, noting they were "procured in New York, underwritten in New York, issued in New York [and] delivered to [Vale's] New York Office." (Reasons of Borrok JSC, quoted in Vale ONCA at para 18) The NYSC also noted the ONSC's finding that it did not have jurisdiction over North River, which informed the NYSC's conclusion that the Canadian Actions were not more comprehensive than the New York Action.

On the balance of convenience, the NYSC considered the relative burdens on Court and the defendants. (This is slightly different from the Canadian approach, which typically considers the relative burden on the parties that would arise from litigating in each of the prospective venues, and looks to the burden of the courts as a whole only through the lens of the overall interest in avoiding a multiplicity of proceedings.) Relying in part on its own jurisdictional mandate, which includes adjudicating insurance coverage disputes where the events underlying coverage occur out of state, and its experience in interpreting foreign law, the NYSC concluded that the burden on the Court arising from the New York Action would be small. It also concluded that given the physical proximity between Canada and New York, the burden on Vale and RSA in litigating in New York was not significant. (Reasons of Borrok JSC, quoted in Vale ONCA at para 18)

**ONCA Decision**

Meanwhile, on the Canadian front, the insurers appealed the ONSC's finding of jurisdiction over them and Vale appealed in respect of the refusal to extend jurisdiction to North River. The ONCA's decision was released on December 9, 2022, as *Vale Canada Limited v Royal & Sun Alliance Insurance Company of Canada*, 2022 ONCA 862 ("Vale ONCA").

The ONCA succinctly summarized its ultimate decision:

> *A comprehensive general liability insurer, underwriting primary or excess insurance coverage for Ontario risks, connects itself to Ontario for jurisdictional purposes and thus commits itself to defending, in Ontario, claims arising out of those risks.* (*Vale* 2022 ONCA para 6.)

Put in practical terms, the ONCA found that Ontario courts have jurisdiction over

**...on the Canadian front, the insurers appealed the ONSC's finding of jurisdiction over them and Vale appealed in respect of the refusal to extend jurisdiction to North River.**

all the insurers, including North River, and that no forum is clearly more appropriate than Ontario.

In considering jurisdiction, the ONCA looked to the "natural" structure of a liability insurance claim. This was described as involving an insured receiving a claim and tendering it on the insurer for defence and indemnity. The defence would then be conducted by either the insured or insurer, with coverage issues to be determined separately and the insurer engaging excess carriers as required. In the ensuing coverage litigation, the "insurer's defence would be rooted in the pertinent factual details of the insured's liability, the conduct of the insured and the language of the insurance policy." According to the Court, the "rootedness" of the insurer's defence to coverage in the factual circumstances underpinning the insurer's indemnity obligation to the insured was key to assessing jurisdiction. (*Vale* ONCA at para 6) The ONCA viewed the roles in this structure as follows: the insured was the "natural" plaintiff and the insurer the "natural" defendant as between them. The primary insurer was the "natural" plaintiff in litigation against any excess insurers.

Within this framework, the ONCA began its analysis with a discussion of international comity. Described as at the root of the jurisdiction analysis, the Court saw comity as attenuating the principle of territoriality based on the customs of mutual deference and respect between nations. (*Vale* ONCA at paras 22 and 23) The comity principle has sometimes led Canadian courts to decline to exercise jurisdiction when a foreign court has assumed jurisdiction. However, that is not always the case.

For example, in *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, the SCC considered facts much like the Vale situation. Like Vale, Teck was a Canadian mining company. Teck found itself facing a US class action alleging environmental damage arising out of its operations in British Columbia, Canada. Teck sued its insurers in Washington State, seeking confirmation that they had a duty to defend. The insurers then started a parallel proceeding in British Columbia in which they asked the court to clarify their obligations. In *Teck*, motions to stay were brought on both sides of the border. By the time the British Columbia Supreme Court considered Teck's stay application, the Washington State court had asserted its jurisdiction over the US action. Nonetheless, the British Columbia Court also chose to exercise jurisdiction. This decision was upheld, with both the British Columbia Court of Appeal and the SCC agreeing that assertion of jurisdiction by a US court was not determinative of whether a Canadian court should exercise jurisdiction.

Turning to the Vale facts, the ONCA considered the question of jurisdiction simpliciter based on the *Van Breda* framework, noting that the "real and substantial connection" test is disjunctive and requires courts to consider whether there is a link between the forum and the subject matter of the litigation or between the forum and the defendant or both. (*Vale* ONCA at para 38) If there is such a link, the relationship between the forum and the subject matter of the litigation is such that it would be "reasonable to expect that the defendant would be called to answer legal proceedings in that forum." (*Vale* ONCA at para 43, citing *Van Breda* at para 92) Further, where one of these links exist, the court needs to assume jurisdiction over all aspects of the case, meaning over the entire action. (*Vale* ONCA Sat para 40, citing *Van Breda* at para 99)

The ONCA first considered whether the *Van Breda* framework, which was developed by the SCC in the context of tort claims, applied to a contractual dispute about insurance policies. The ONCA began this analysis by noting the "striking" parallels between the Vale scenario and situation before the Minnesota court in *Domtar*, finding that the:

> *insurers insuring Vale sites in Ontario with long-tail policies have purposefully established minimum contacts with Ontario, and would have expected and intended that they would be called on to indemnify Vale for liabilities arising from damage caused by activities on those sites and to defend claims for indemnity in Ontario.* (*Vale* ONCA at para 63.)

The Court concluded that these "minimum contacts" were sufficient to meet the threshold for a new potential presumptive connecting factor. (*Vale* ONCA at para 64) Although the ONCA did not rely on this connection as establishing the jurisdiction of the Ontario courts over the Canadian Actions, the Court commented that all the potential connecting factors, including the potential new "minimum contacts" factor, must be assessed together to determine whether the connections between Ontario, the insurers and the Canadian Actions make it reasonable for the Ontario courts to assume jurisdiction. (*Vale* ONCA at para 66)

The Court then turned to the existing *Van Breda* factors. In accepting the general application of *Van Breda* to contract cases, the ONCA rejected the suggestion that in a contract case, without consent or presence-based jurisdiction, a court should assume jurisdiction over a foreign defendant only if the relevant contract was made in Ontario. (*Vale* ONCA at para 73) The Court instead concluded that "carrying on business" in the province could be a "factual situation" that links the defendant and subject matter of litigation to the forum, depending on "the relationship between the business activities, the contract, and what the contract and the claim are about." (*Vale* ONCA at paras 77 and 78) Put differently, carrying on business may - or may not - be a presumptive connecting factor in contract cases, depending on the substance of the contract and the claim, even though what constitutes "carrying on business" might be different in tort and contract cases.

The ONCA commented that the "carrying on business" connection will be:

> *especially strong where the business activities give rise to or are reflected in a contract that in whole or in part relates to property, interests, or activities in Ontario, that contemplates some aspect of contractual performance in Ontario, or that is aimed at protecting a person from harm that might otherwise be suffered in Ontario.* (*Vale* ONCA at para 78.)

This strongly foreshadows the eventual conclusion that the insurers were "carrying on business" in Ontario in a way that makes it grounds appropriate for the Ontario courts to assume jurisdiction. Although framed by the Court as a disjunctive list, the factual circumstances in *Vale* manifest all of these connections: the policies related to property, interests and activities in Ontario; some aspects of performance of the policies (payment) would take place

in Ontario; and the policies were aimed at protecting Vale from harm it might otherwise suffer in Ontario.

Finally, the Court held that a defendant need not have been "carrying on business" when the action against it was commenced, finding that imposing this temporal requirement would make "carrying on business" redundant with presence-based jurisdiction. (*Vale* ONCA at para 85) The ONCA commented that if a defendant was "carrying on business" when the contract was entered into, or when the contract was to be performed, the defendant and the subject matter would have a meaningful connection to the forum that would not necessarily be lost because the defendant later ceased carrying on business in Ontario. (*Vale* ONCA at para 86)

Although not made explicit by the ONCA, this conclusion reflects the long tail nature of the liabilities covered by the policies and the Court's comments regarding "reasonable expectations". While the "reasonable expectations" of the parties are not in themselves sufficient to ground jurisdiction, the ONCA confirmed that "reasonable expectations", and particularly whether based on the contract it would be reasonable to expect the defendant would be called to answer proceedings in the jurisdiction, are a factor in the *Van Breda* analysis. (*Vale* ONCA at para 88) As the insurers had issued occurrence based policies which inherently admit of the possibility of claims many years after issuance, it would be reasonable for an insurer issuing such a policy to an Ontario entity to expect to respond to an action in Ontario, even if in the intervening years the insurer left the jurisdiction.

From a practical point of view, the ONCA treated "carrying on business" as contextual, with the answer dependent on the nature of the business. (*Vale* ONCA at para 96) The Court identified the following factual elements as relevant to determining whether an insurer was "carrying on business" in Ontario (*Vale* ONCA at paras 102 and 106):

- insurer registrations and licenses in Ontario;
- location of underwriting & policy issuance;
- location of the insured object;
- location where performance by the insurer (claim investigation, defence or indemnity payment) or by the insured (premium payment and claim notice) is contemplated.

In *Vale*, the policies in dispute were not made in Ontario, and although the ONCA accepted that the insurers' registration and licensing related to Ontario-based insurance activities was relevant, that was not determinative. In the Court's view, the more important consideration for determining where the insurers were carrying on business was the subject matter of the policies, particularly the location of the object of insurance and the contemplated performance under the policies. (*Vale* ONCA at para 110) In the end, the ONCA accepted that the insurers knew the policies would be received and acted on in Ontario, regardless of where they were negotiated or delivered, and that the policies related to Ontario liabilities in respect of which Vale was suing the insurers.

The ONCA ultimately concluded that the insurers had been carrying on business in Ontario when they issued policies to Vale, creating a "real and substantial connection" to Ontario. The ONCA found this sufficient to ground jurisdiction against all of the insurers, including North River (*Vale* ONCA at para 113), with the Court remarking that this was reinforced by reference to US law, as the insurers' purposeful conduct established minimum contacts and, on that basis, the court had specific personal jurisdiction over the insurers. (*Vale* ONCA at para 114) With respect to North River, which was not licensed or registered in Ontario when it sold the Vale polices, the Court highlighted the issuance of a policy covering Ontario operations against liabilities that might be incurred by an Ontario corporation as sufficient grounds for jurisdiction. (*Vale* ONCA at paras 142 and 143)

Having concluded that it had jurisdiction *simpliciter*, the ONCA moved on to consider *forum non conveniens*. In Canada, the moving defendant must establish that the alternative forum is "clearly more appropriate" before a court will decline to exercise its jurisdiction.

The ONCA rejected the "first to file" primacy argument: that because the New York Action was already underway the Canadian Actions must not proceed. The Court found that deferring to the New York Action on this basis would have "perverse effects", preventing Vale, an Ontario entity, from using the Ontario courts to litigate Ontario-based liabilities under Ontario-based insurance policies. The ONCA refused to oust these "natural" claims from Ontario, even though the NYSC had assumed jurisdiction by the time the ONCA released its decision.

**From a practical point of view, the ONCA treated "carrying on business" as contextual, with the answer dependent on the nature of the business.**

The ONCA also rejected the argument that New York was the "clearly more appropriate" forum because New York was the true centre of gravity for the insurance tower as a whole. The tower was largely comprised of excess insurance purchased on the international insurance market in New York, but from the point of view of the ONCA, focusing the *forum non conveniens* analysis on the location of the excess insurers was inappropriate as this would have the "excess insurance 'tail' wagging the proverbial primary liability 'dog'." (*Vale* ONCA at para 164)

While the ONCA agreed that a multiplicity of actions was far from ideal, it confirmed that a foreign court assuming jurisdiction does not in it itself mean that a Canadian court should automatically defer and decline to assert its own jurisdiction. The ONCA was alive to the NYSC's decision and, while accepting that the NYSC decision was a factor in the *forum non conveniens* assessment, concluded it was not determinative. Indeed, the ONCA noted that the ONSC's decision came ahead of the NYSC decision. In these circumstances, the fact that the New York Action had been

filed first carried no weight in the Ontario analysis.

In the end, the ONCA found that all factors considered in the *forum non conveniens* analysis favoured Ontario as the "clearly more appropriate" forum, with none favouring New York. Accordingly, the ONCA upheld the decision of the ONSC assuming jurisdiction over the Canadian Actions and the parties to those actions, including the insurers, varying the ONSC decision to include North River.

### NYCA Decision

In the US proceedings, Vale and RSA appealed the NYSC's dismissal of the stay motion to the New York Action to the Appellate Division of the NYSC ("NYCA"). On January 17, 2023, the NYCA released its decision on the appeal, unanimously affirming the conclusion reached by the NYSC ("NYCA Decision"). On April 18, 2023, the NYCA recalled and vacated the decision it had issued on January 17, 2023, as well as the corresponding Order. The decision was reissued in substantially the same form on April 18, 2023.

The NYCA found that Vale and RSA had not discharged the "heavy burden" of establishing that the selection of New York as the forum for the New York Action was not in the interest of substantial justice. In reaching this conclusion, the NYCA treated the status of the policies as issued, brokered or negotiated in New York, as establishing a "substantial nexus" between the litigation and the state of New York. (NYCA Decision at 3 - 4)

The NYCA also noted that the witnesses and documents relevant to the New York Action were not located just in Ontario. On the record before it, the NYCA concluded that neither Vale nor RSA had shown they would face significant hardship if required to litigate in New York rather than Ontario. (NYCA Decision at 5) Finally, the NYCA noted that while the order in which the claims had arisen was not determinative, the New York Action had been filed first and the New York court had been the first to take jurisdiction. (NYCA Decision at 5) In its April 18, 2023, re-issued decision, the NYCA noted that the ONCA jurisdiction decision had been released two days before arguments were presented in the NYCA. The revised decision acknowledged awareness of the change in the Ontario court's position on jurisdiction over North River. The NYCA nonetheless concluded that the court below had appropriately considered and weighed the relevant factors in denying the Vale stay motion.

### Practical Observations

In *Vale* ONCA, the ONCA described the result in *Teck* as "not ideal because the parties were compelled to litigate in two jurisdictions." (*Vale* ONCA at para 31) As can be seen from the outcome in *Vale*, this same less than ideal result followed in the Vale scenario. All parties remain mired in competing coverage litigation on both sides of the border, and with arbitration proceedings pending in the UK

Looked at from the perspective of legal success:

- Vale and its primary insurer RSA "won," in that their selection of Ontario as the forum for the litigation was upheld by the Ontario courts.
- For its part, Travelers also won, as its selection of New York as the forum for the coverage litigation was upheld by the New York courts.
- North River did not escape the quagmire, even though its contracts provided for arbitration.

From a practical perspective, these legal outcomes arguably resulted in no overall advantage for any of the parties – which one might chalk up to "the cost of doing business" in a global economy. It may be tempting to view insurers as well-financed litigants who can afford such a luxury. Actuaries measuring reserve adequacy for uncertain long tail exposures to underwriting bottom lines might take a different view. Their different view might be shared by the policyholder's financial executives setting budgets, measuring the cost of litigating against uncertain returns for the effort, all as charged against current and future earnings.

As with any litigation, cross-border coverage disputes are never a sure thing. The jurisdiction fight at the local courthouse – whether won or lost – may only be the first battle in a long, drawn-out war. Larger financial interests will eventually determine whether the art of war or the art of compromise wins the day. For those counselling the client, whether insurer or policyholder in this context, a step back to consider long-term strategic and financial options will inform the best advice.

**From a practical perspective, these legal outcomes arguably resulted in no overall advantage for any of the parties – which one might chalk up to "the cost of doing business" in a global economy.**

Some takeaways to consider for those advising or considering cross-border litigation and arbitration strategies:

1. While a "first to file" approach might govern at home, consider how the "race to the courthouse" may be perceived in the competing jurisdiction.
2. While the place of contracting approach might govern at home, consider the weight this will be given in the competing jurisdiction, as compared to other elements of "carrying on business."
3. While a perceived "center of gravity" might govern at home, consider how this factor will be assessed and whether it will be determinative determine in the competing jurisdiction.

Finally, exercising arbitration rights under a contract can have an advantage in isolation. However, if arbitrating finite issues when competing litigation is ongoing in a larger context, consider if any advantages follow. This can be particularly complicated when other courts may be determining key factual and legal issues that impact on what the parties have asked the arbitral tribunal to determine.

Working the Crowd

# Why Defense Attorneys Must Get Jurors Talking in Voir Dire

By Nick Polavin, PhD

## Openers set the tone

Picture this: defense counsel sits at the ready, voir dire gameplan in hand—a list of 40+ questions and their follow-ups—to identify the worst jurors and maximize cause challenges. It is a very plaintiff-friendly venue; they expect prospective jurors to raise their hands, talk about their opinions and experiences, and pave the way for cause challenges. But first, it is the plaintiff's turn.

### A Tough Room

The plaintiff attorney proceeds to ask a few awkward, imprecise questions. They are not well-received. Very few jurors raise their hands; even fewer are willing to talk. The attorney presents some preconditioning questions, but again there is very little juror participation. After asking about 20 questions to the group, the attorney sits down.

The defense attorney heads to the podium with his list, along with sticky notes for two jurors to rehabilitate and three to follow up on for potential cause issues. Because the judge and plaintiff counsel already asked jurors about basic background information, the defense attorney jumps right into his first issue-specific question: "Who here has a negative opinion of corporations?" He hears crickets.

He then thinks, "Nobody copped to having a negative opinion of corporations, so I may as well skip the rest of these 'anti-corporate attitude' questions." He jumps down to case-related experiences: "Have you or anyone close to you ever been harmed by a product?" This gets a bit more response, but still not as much as expected. The voir dire continues, touching on some high-level issues but skipping swaths of questions along the way.

With how silent the jurors are being, the defense attorney eventually feels uncomfortable and turns to his sticky notes for the handful of rehab and cause jurors from the plaintiff's voir dire. He successfully rehabs the two jurors and gets all three cause jurors to admit they cannot be fair to the defense.

He moves to the wrap-up question: "It is every attorney's worst nightmare that we failed to ask the right question, and we miss something important that a juror thought they should have shared. Is there anything that was not asked today that you think we should know about? Anything at all—an opinion or experience, whether related to this case or not?" Not a single hand goes up.

And with that, the defense attorney sits down. Voir dire is over.

### A Defeat That Looks Like a Victory

The defense gets three cause challenges granted, and the plaintiff gets none. The jurors in the strike zone (i.e., those who are in the box or can end up there if all strikes are exercised) seem mostly bad, but there is not much information to go on. Regardless, after deciding on their strikes, and with jury selection now over, the defense team feels pretty good. At least they got a few cause challenges.

What is the problem with this "victory"? The venire was a plaintiff's paradise to begin with. The defense *should* be getting more cause challenges than the plaintiff. The question is *how many* more. Three is often not nearly enough to level such an uneven playing field.

As a senior jury consultant with IMS Legal Strategies, **Nick Polavin, PhD** assists clients with focus groups and mock trials, statistical analysis for creating juror profiles, crafting trial themes and voir dire questions, and jury selection. He has presented at multiple DRI seminars, including Toxic Torts and Environmental Law (2024), Litigation Skills (2024, 2022), and Young Lawyers (2022).

## A New Plaintiff Strategy?

Far from a one-off, this situation has become somewhat of a trend. The plaintiff flies through their voir dire, and in doing so, sets the "norms" for jury selection: that the attorney asks questions, and only those with the most extreme opinions speak up; that the attorney does most of the talking, and only a handful of jurors participate. Remember, many potential jurors believe that jurors are *selected* to sit on the jury. Combine this belief with the plaintiff attorney sapping energy from the room in their questioning, and many jurors could start to think that staying quiet is how they will stay off the jury.

So, when the defense starts its voir dire, counsel may be armed with all the right questions, but the jurors are not willing to raise their hands or speak up. A shy juror might start to raise their hand, look around, see nobody else coming forward, and then decide otherwise (which can easily be missed).

Plaintiff attorneys are strategic in decisions about where to file a lawsuit—we have all seen that. But those decisions also affect the importance of voir dire for each side. In plaintiff-friendly venues, plaintiffs may not need to generate a lot of juror participation, because they may not need many cause challenges. The handful of strong defense jurors are easy to identify, and they strike them. The rest of the questions can be devoted to preconditioning jurors, which does not require much in the way of participation.

It is hard to say whether this apparent plaintiff trend is purposeful or due to a lack of experience and/or comfort. Regardless, in many venues, a plaintiff flop in voir dire will not affect their case. On the other hand, the defense *needs* to have strong juror participation to get cause challenges granted and identify the "worst" from the merely "bad"—those you must strike versus those you can live with.

## Ways to Work the Crowd

Faced with a cold crowd of jurors, fresh off a plaintiff attorney who let them settle into their silence, what is the defense to do? Several techniques can help warm the room back up:

1. **Start your voir dire as though the plaintiff never went.**
   Give your introduction: why it is so important to speak the truth, that this is the only chance we get to have a conversation, and that we need to hear from everyone, even if they are not sure they should say something. You can go as far as acknowledging that many people falsely believe they will not be picked if they stay quiet. You could even bluntly say, "Those who talk tend to walk,"—or, more subtly, "That's not exactly how juries are picked, so we really need everyone to speak up, especially if you have an experience or opinion that may affect you in this case."
2. **Give jurors some softballs to set an inviting tone.**
   Your softball questions could be as simple as, "Can you tell me about your job? What does a ["fruit rescuer"] do? And what makes you good at your job?" These should break the ice and open the door to jurors sharing more personal details and beliefs.
3. **Speak naturally. If you appear uncomfortable asking, jurors will be uncomfortable answering.**
   Beyond getting plenty of practice, it is worth discussing with your colleagues and/or consultants if there are any questions that do not feel like "you." Although specific word choices are important considerations when drafting targeted voir dire questions, they can usually be tweaked to obtain the same key information while making you seem more natural.
4. **Nod your head as jurors answer—even if they are critical of your client.**
   Your body language reinforces that giving full and honest feedback is exactly what jurors are supposed to be doing. Especially if a juror is highly critical, inviting them to elaborate through your non-verbal reactions helps encourage them (and others) to share their negative attitudes rather than fear they are saying something wrong or impolite, thus giving you fodder for cause challenges.
5. **When someone shares an opinion or experience, thank them and open the floor.**
   To build on the response momentum, say, "Thank you for sharing that with us. That's exactly the type of information we need to know. Who else [has a negative opinion of corporations]?" And if the experience was something like a severe injury, death in the family, or being discriminated against, be human—empathize with the juror, apologize that they had to go through that, and thank them for being willing to share it in front of the court.

**Faced with a cold crowd of jurors, fresh off a plaintiff attorney who let them settle into their silence, what is the defense to do? Several techniques can help warm the room back up**

Remember, even if the plaintiff sets the expectation that only jurors with extreme opinions should speak up, those who have opinions but do not consider them "extreme" still need to be identified. In a recent voir dire, when jurors were asked who had a negative opinion of insurance companies, the room was silent until one juror slowly raised her hand and said, "Well, I mean, yeah, I do a bit. But doesn't everyone?" This type of response provides the perfect opportunity to emphasize, "That's exactly what we need to know. We need to hear from everyone who has an opinion, even if you think it isn't strong. Knowing that, who here also has a negative opinion of insurance companies?"

Then, if time permits, follow up with each juror to determine the strength of those opinions. If time is short, ask instead, "Who has that negative opinion based on a personal experience?" and follow up with those jurors. (Personal experiences are more likely to create strong opinions.)

6. **Be prepared to pivot your questioning if you get no responses.**
   If nobody responds to a question when you expect to see at least a few hands up, try one of these three options:
   - **Ask a more specific question that jurors will likely realize they believe.** If asking, "How many of you have a negative opinion of large corporations?" gets you nowhere, then try, "Who believes that corporations put profits over safety?" or "Who believes that corporations are always motivated by greed?" or "Who does not trust corporations to keep consumers safe?"
   - **Back it down a level.** For instance, say, "Okay, so nobody has a strong negative opinion of corporations, but does anyone have even a moderately negative opinion?" If there are still no hands, pull back more: "Even a slightly negative opinion of corporations?"
   - **Call a spade a spade.** When it *is* surprising that nobody responded, recognize it: "Really? Nobody here has any negative opinions of corporations?" If needed, call on a few people personally until someone admits they have an unfavorable view. Then, use that opening: "Who feels the same as Juror #4?" (While not an advisable method for every question, this should be done as needed for key questions that can generate cause challenges, such as anti-corporate bias, sympathy for the plaintiff, and distrust of the defendant/the defendant's industry.)

## In Conclusion

Headliners appoint opening acts for a number of reasons. Perhaps above all, it is because openers set the tone. They put the audience in the right mood for what is to come, allowing the headliner to pick up that momentum and carry it forward. So, when an opening act bombs, the next performer must work that much harder to shift the mood.

Thankfully, even if the plaintiff attorney ahead of you tanks in voir dire—and even if it was deliberate—a showman with the right techniques can still turn things around for the defense.

The Future Is Now

# Preparing for Today's and Tomorrow's AI Litigation

By David Metz and Jorge Monroy

**While the metaphorical jury is still out on AI's precise place in humanity's future, new laws, case filings, and rulings make it crystal clear: AI-related litigation is already upon us.**

Recent developments in artificial intelligence (AI) have taken the world by storm, with many industry leaders and technology optimists eagerly anticipating its integration into processes and solutions across nearly every aspect of our lives and professions. Others show a more skeptical approach, offering critiques, thought pieces, and calls to action to prevent AI's potential misuse. And while the metaphorical jury is still out on AI's precise place in humanity's future, new laws, case filings, and rulings make it crystal clear: AI-related litigation is already upon us.

## Modern AI Cases Are Here

Unsurprisingly, AI's foray into human resources has spawned claims of algorithmic bias discrimination—an early sign of things to come. In one recent case, involving allegations that the defendant company's job-applicant screening tool allowed its customer-employers to make discriminatory judgments in their hiring practices, the United States District Court for the Northern District of California held in part that "third-party vendors who furnish AI-screening tools to employers may be held liable as 'agents' of those employers." It is also noteworthy that the U.S. Equal Employment Opportunity Commission currently maintains that employers, too, can face liability for using software tools found to discriminate, "*even if* the tool is designed or administered by another entity" (Gigante, E., Young, E., & Morris, H. (2024, July 25). *Job Applicant's Algorithmic Bias Discrimination Lawsuit Survives Motion to Dismiss*. Law and the Workplace; Proskauer Rose LLP. ***https://www.lawandtheworkplace.com/2024/07/job-applicants-algorithmic-bias-discrimination-lawsuit-survives-motion-to-dismiss/***).

Some state legislatures also have begun drafting or adopting measures to protect citizens against employers who may use AI to make employment decisions. Mere weeks ago, Illinois formalized an amendment to its Human Rights Act to regulate employers' use of artificial intelligence "that has the effect of subjecting employees to discrimination on the basis of protected classes … or to use zip codes as a proxy for protected classes"—in an effort to head off AI-facilitated discrimination (*Full Text of HB3773*. (2024). Ilga.gov; Illinois General Assembly. ***https://ilga.gov/legislation/103/HB/PDF/10300HB3773lv.pdf***).

In the legal arena, we have heard much discussion regarding the admissibility of AI-generated evidence, jurors' trust in said evidence, and its current and future uses in attorney preparations and courtroom proceedings. However, less focus has been placed on what AI used in business settings will do to the fact patterns and evidence in corporate litigation. With AI–employment lawsuits like these already sprouting up, one might do well to imagine lawsuits in the not-so-distant future concerning product liability, antitrust, and intellectual property, to name a few, that implicate businesses' use of AI—an immensely powerful but largely obscure technology—in their fateful actions.

**David Metz** brings a marketing and storytelling perspective to his role as an associate jury consultant at IMS, helping lawyers understand the juror audience and the messaging required to reach them. Clients benefit from his ability to develop themes and strategic recommendations based on rigorous jury research analysis.IMS jury consultant **Jorge Monroy** specializes in advanced quantitative statistical methods, leveraging data from jury research exercises and community attitude surveys to inform and enhance counsel's trial strategies. He particularly enjoys developing juror profiles for voir dire and crafting supplemental juror questionnaires.A version of this article first appeared in the Summer 2024 issue of USLAW Magazine; published with permission.).

### When Could AI's Use in Business Lead to Litigation?

Authors and other creatives are already up in arms about the dubious way AI systems have been "trained"—the process of feeding vast amounts of data to the algorithm, analyzing the results, and iterating accordingly—on mountains of their copyrighted work (Reisner, A. (2023, August 19). *Revealed: The Authors Whose Pirated Books Are Powering Generative AI*. The Atlantic. ***https://www.theatlantic.com/technology/archive/2023/08/books3-ai-meta-llama-pirated-books/675063/***). And although it is impossible to predict every permutation AI will take as it further integrates with businesses, be it expanded or limited for specific needs, a slew of plaintiff claims could be just around the corner, including:

- AI logistics software calculates an unsafe trucking route, schedule, or load size, resulting in a tragic accident.
- AI diagnostics software fails to recommend a test that would have caught a patient's fatal condition.
- AI sets anti-competitive pricing, develops a defective design, infringes a patent, or violates consumer data privacy. (We asked ChatGPT to supplement our brainstorming, and it kindly offered these last few ideas.)

**As consultants who track trends in juror attitudes and overall decision-making, we have a keen interest in determining how AI's inclusion in these classic litigation genres will interact with jurors' views, biases, and, ultimately, verdicts.**

As consultants who track trends in juror attitudes and overall decision-making, we have a keen interest in determining how AI's inclusion in these classic litigation genres will interact with jurors' views, biases, and, ultimately, verdicts. The first step to answering this question will be to carefully analyze the attitudes and experiences they develop concerning AI. In the coming years, we will see fewer jurors who have *never* used it and more whose lives have been changed or utterly transformed by it—for better or for worse.

### How Does the Current Jury Pool Feel About AI?

Public views about AI and its implications have garnered much inquiry in recent years, with the Pew Research Center diligently tracking relevant attitudes since 2021 (Faverio, M., & Tyson, A. (2023, November 21). *What the Data Says about Americans' Views of Artificial Intelligence*. Pew Research Center. ***https://www.pewresearch.org/short-reads/2023/11/21/what-the-data-says-about-americans-views-of-artificial-intelligence/***). To get a pulse on where jurors stand now, arguably at the dawn of the AI revolution, IMS Legal Strategies also surveyed a national sample of 210 jury-eligible citizens from late 2023 to early 2024 to gauge their experiences and attitudes toward artificial intelligence.

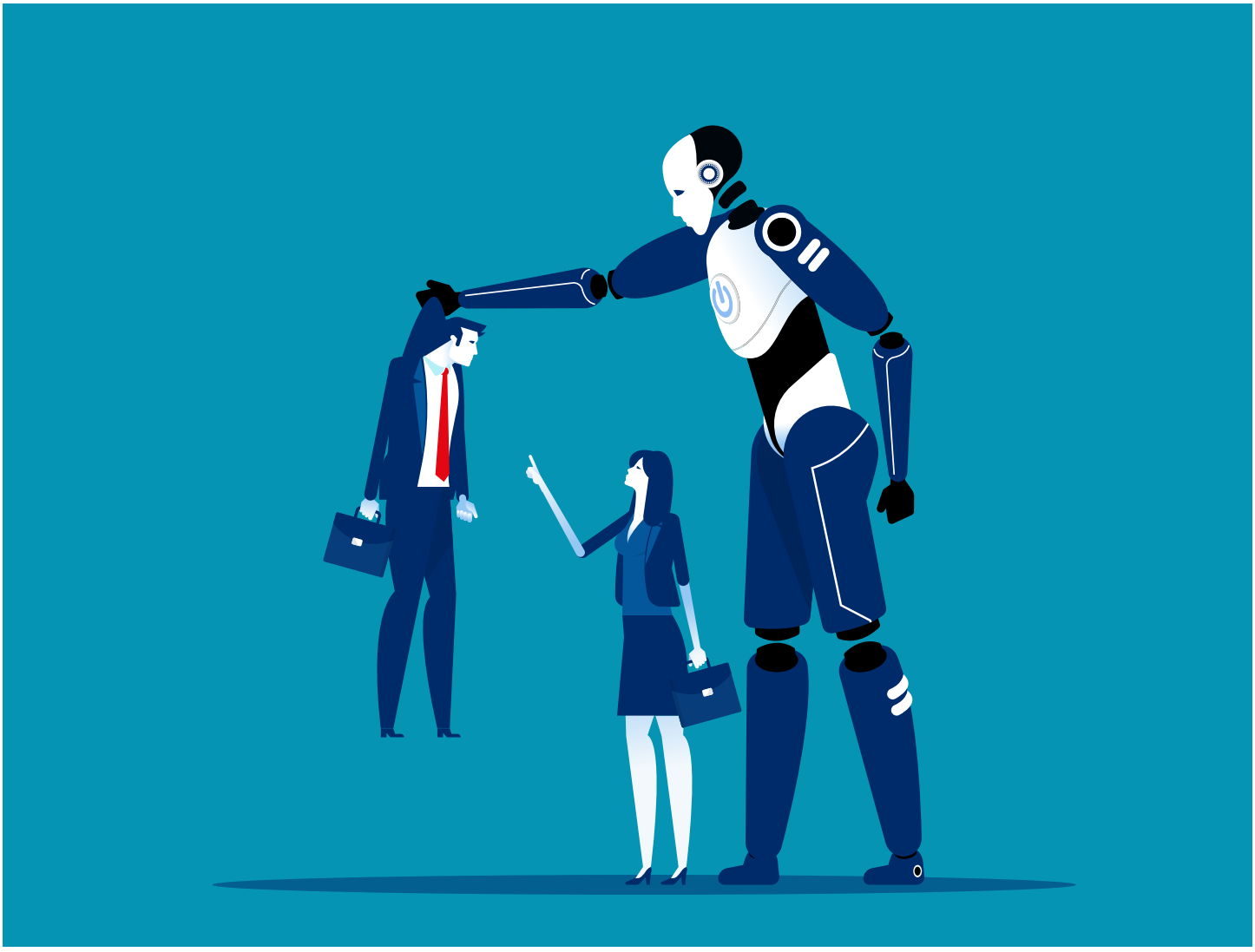
Echoing the findings of Pew's 2023 poll, our sample of jury-eligible individuals exhibited a solid baseline of familiarity with AI. Pew reported that 90 percent of its respondents have heard of AI; our own research indicated that 74 percent of jury-eligible respondents are somewhat (56 percent) or very (28 percent) familiar with AI and its applications. The introduction of chatbot services such as ChatGPT has undoubtedly driven much of that familiarity. Although both surveys revealed that most people have heard of ChatGPT (58 percent of the Pew sample and 68 percent of our sample), our research found that a considerably smaller percentage of people (38 percent) have actually used it or similar chatbot services. Granted, these numbers will likely rise, and associated attitudes will evolve, as media attention, industry adoption, and the surfacing of AI in jurors' own workplaces continue to increase awareness and access.

At the same time, apprehension about the growing use of artificial intelligence in our daily lives has seen a surge. In Pew's 2023 poll, 52 percent of respondents expressed being "more concerned than excited" about AI, compared to 37 percent in 2021 and 38 percent in 2022. Our own poll landed at 41 percent on that measure—though, perhaps more notably, both our poll and Pew's 2023 poll found that a mere 10 percent of respondents were "more excited than concerned" (the remainder reported both emotions in equal parts).

Where is this unease coming from? A portion surely stems from various reports highlighting AI's current shortcomings, such as its willingness to present falsities as fact—generously dubbed "hallucinations"—or its potential for discrimination (Wolf, Z.B. (2023, March 18). *AI can be racist, sexist and creepy. What should we do about it?* CNN. ***https://www.cnn.com/2023/03/18/politics/ai-chatgpt-racist-what-matters/index.html***). Further anxiety emerges from fears that it might kill jobs or otherwise encroach on employees in the workplace. Indeed, coinciding with the developments in employment litigation, Pew found that individuals already have strong opposition to AI being involved in hiring practices, such as reviewing job applications (41 percent oppose, 28 percent favor, 30 percent unsure), and an even larger proportion of individuals oppose AI making final hiring decisions (71 percent oppose, 7 percent favor, 22 percent unsure). Though there were some areas where opposition to AI was less pronounced—including monitoring workers' driving behavior, analyzing how retail workers interact with customers, or evaluating how well people are doing in their jobs—a negative sentiment prevails, particularly when it comes to employers' ability to surveil employees. How corporations elect to use AI moving forward will greatly impact this outlook by shaping employees' individual experiences and resulting attitudes.

### What Does AI Mean for Defendant Corporations?

Unknowns abound as businesses consider incorporating these new technologies into their day-to-day practices. Given we are still in the nascent stages of modern-AI's



rollout, a daunting variety of questions awaits companies that face litigation in the future. For example:

- What role will experts play in educating the jury on the inner workings of artificial intelligence? In arguing the reasonableness of AI's decision-making and its role in causation or a defendant's negligence? How much credence will jurors lend to these types of experts? Their ability to simplify the processes and capabilities of artificial intelligence to the layperson juror may prove paramount to the defense's position. Of course, if AI developers themselves often cannot fully account for how the systems work, how can experts? Heaven, W.D. (2024, March 4). *Large language models can do jaw-dropping things. But nobody knows exactly why.* MIT Technology Review. ***https://www.technologyreview.com/2024/03/04/1089403/large-language-models-amazing-but-nobody-knows-why/***)
- If a human has been removed from the equation, who will jurors believe is most responsible when an AI "fails?" Will every AI-led decision, no matter how small, require a human to sign off and shoulder responsibility for it? Who will jurors perceive as the chief "decision-maker" when it comes to liability? The company as a whole? The executive or technologist who instated the technology? The tech who oversees it (if any)? Jury psychology suggests that blaming an AI alone would not be a cognitively satisfying outcome—AI cannot be punished or face justice. Yet, in a future where the involved AI might have its own "thought" processes, rationales, and ability to respond to questioning, what if that AI is the most conversant party about key case issues and decisions?
- Might the original developer of the AI system in question, or at least the party

**Given we are still in the nascent stages of modern-AI's rollout, a daunting variety of questions awaits companies that face litigation in the future.**

who "trained" it, serve as a convincing "empty chair" to help mitigate a defendant's perceived fault? What contracts will we see formed between the AI developer and business customer to address potential liability?

- Will the prevalence of powerful AI tools exacerbate juror hindsight bias issues regarding what companies could or should have done or known? To what extent will attorneys and experts, more than ever, need to help jurors keep track of what features were and were not available "at the time"?
- And, of course, how will juror risk profiles change for purposes of jury selection?

## In Conclusion

The questions above may only be the tip of the iceberg, reflecting the magnitude of changes at our doorstep. At this point, we cannot even know all the questions we should be asking about our shared future with AI, let alone have all the answers. Barring widespread regulation regarding its use or its role in litigation, however, it is safe to say that jurors' evolving views will set the tone as we begin a novel generation of lawsuits. As the profuse considerations about its effect on corporate litigation come into focus, we plan to conduct periodic follow-up studies for a deeper dive into how jurors might evaluate these hazy new issues of AI-related liability.

An Illustrative Tale

# Rule 702 Trumps Predominance in Class Action

By Jeff Warren

**Defense attorneys should continue to monitor emerging trends concerning the admissibility of expert testimony at the class certification stage.**

Sometimes class certification hinges on an opinion reached by a single expert. A recent decision by the United States District Court for the Northern District of Illinois in *Series 17-03-615 v. Express Scripts, Inc.*, No. 3:20-CV-50056, 2024 WL 1834311 (N.D. Ill. Apr. 26, 2024), provides a cautionary tale for plaintiffs, and further authority for defendants, underscoring the importance of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in the context of class action litigation.

In recent years, a circuit split has emerged on whether a full *Daubert* analysis is required at the class certification stage. In 2010, the Seventh Circuit became the first to expressly hold that *Daubert* applies at class certification. *Honda Motor Co. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010). The following year, the Eleventh Circuit followed suit, holding that a district court's "refus[al] to conduct a *Daubert*-like critique of the proffered experts's [sic] qualifications" was erroneous and warranted vacatur. *Sher v. Raytheon Co.*, 419 F. App'x 887, 890–91 (11th Cir. 2011) (unpublished). Meanwhile, that same year, the Eighth Circuit "explicitly rejected a request for a full *Daubert* inquiry at the class certification stage" for the second time. *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 612 (8th Cir. 2011). In 2015, the Third Circuit joined the Eleventh and Seventh, endorsing a full *Daubert* analysis at class certification. *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015). Siding with the Eighth Circuit, however, the Ninth Circuit rejected a strict *Daubert* application at class certification. *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1005 (9th Cir. 2018). More recently, the Fifth Circuit joined the Third, Seventh, and Eleventh, directing a district court to apply a full *Daubert* analysis at class certification. *Prantil v. Arkema Inc.*, 986 F.3d 570 (5th Cir. 2021).

In the midst of this emerging circuit split, in 2017, MSP Recovery Claims, Series LLC (MSP) commenced a putative class action that, over the following six years, became "infamous" in the United States District Court for the Northern District of Illinois. Amending its complaint four times and generating 709 discrete docket entries in the court's electronic filing system before moving for class certification—including *sua sponte* orders from the court criticizing the "tone and tactics in [the] action" and instructing the parties to "stop [their unprofessional conduct] immediately"—MSP's efforts to obtain class certification ultimately rested on the opinions of a single expert who had been excluded at least eight times in similar cases.

While most class action practitioners are familiar with Rules 23(a) and (b) of the Federal Rules of Civil Procedure, it is less common (though certainly not unheard of) for class certification to hinge on an analysis under *Daubert*. Under *Daubert*, an expert's opinion must be the product of reliable principles and methods, which, in turn, must be reliably applied to the facts of the case. Generally, a party offering expert testimony at trial bears the burden of establishing its admissibility by a preponderance of the evidence.

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For factual context, MSP is the assignee of recovery rights originally held by various Medicare Advantage Organizations (MAOs), which are private health insurers that entered into contracts with the Centers for Medicare and Medicaid Services (CMS) to provide certain Medicare benefits to Medicare beneficiaries. In 2017, MSP filed an action asserting that several MAOs were overcharged for Acthar, an adrenocorticotropic hormone (ACTH) drug used to treat certain autoimmune conditions.

Acthar was the only ACTH drug sold in the United States for decades. MSP claimed that Questcor Pharmaceuticals purchased Acthar and its only viable alternative, Synacthen, and chose not to bring the latter to market, thereby artificially inflating the price of Acthar. The Federal Trade Commission brought an action against Questcor for this conduct, which Questcor settled for $100 million. MSP alleged that Questcor's conduct caused the price of Acthar to remain over $34,000 per vial, thereby harming its MAOs. MSP further claimed that Express Scripts Inc. conspired with Questcor to artificially inflate the price of Acthar by entering into exclusive distribution contracts and anticompetitive pricing agreements.

After five years of remarkably contentious litigation, MSP moved for certification of two classes:

1. Direct Purchaser Class: All third-party payers (TPP) who, at any time from August 27, 2007, to the present, on behalf of the TPPs' Medicare Advantage Plan beneficiaries and Medicare Part D Prescription Drug Plan beneficiaries, through Express Scripts as Pharmacy Benefit Manager (PBM), paid some or all of the purchase price of Acthar (or later provided reimbursement for the same under a legal obligation to do so).

2. Indirect Purchaser Class: All third-party payers (TPP) who, at any time from August 27, 2007, to the present, on behalf of the TPPs' medical and/or pharmacy benefit plan beneficiaries, and through a Pharmacy Benefit Manager (PBM) other than Express Scripts, paid some or all of the purchase price of Acthar (or later provided reimbursement for the same under a legal obligation to do so).

*Series 17-03-615*, 2024 WL 1834311, at *1.

Both proposed classes sought damages and thus certification under Rule 23(b)(3). This required a showing that (1) the questions of law or fact common to the members of the proposed class predominate over questions affecting only individual class members, and (2) a class action is superior to other available methods of resolving the controversy. Because the ability to prove damages on a class-wide basis is important to the predominance inquiry, *see Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013), MSP offered two damages models prepared by Dr. Russell W. Mangum III, an economist, in support of its motion for class certification.

The first model, known as the "legacy approach," calculated the "but-for prices" (i.e., "those that would have obtained in the absence of illegal conduct by Express Scripts") using a procedure where the "first step is the inflation of the wholesale acquisition cost (WAC) of Acthar at the beginning of the alleged conspiracy by 8% per year through 2022." *Series 17-03-615*, 2024 WL 1834311, at *1. The second model, known as the "benchmark approach," calculated the "but-for prices" by inflating the "pre-conspiracy WAC by the growth in the pharmaceutical producer price index (PPI)," which Dr. Mangum argued served as a counterfactual proxy for the Acthar market. *Id.*

With its opposition to class certification, Express Scripts brought a Rule 702 motion to exclude Dr. Mangum's opinions, arguing they were insufficiently reliable. In a short order, the court agreed with Express Scripts, and accordingly denied MSP's motion for class certification.

First, the court explained, Dr. Mangum's "legacy approach" did not identify—and therefore did not "empirically validate"—any of the conditional assumptions underlying his decision to select an 8% inflation rate. *Id.* at *3. Without so much as "identify[ing] any of the conditional assumptions underlying the 8% plan," any assessment of the reliability of the 8% inflation rate was precluded. *Id.*

The "legacy approach" was deficient for another reason. Although Dr. Mangum calculated an 8% price increase from the beginning of the conspiracy—starting in 2006—until 2022, Dr. Mangum offered no explanation for why this steady price increase would persist uninterrupted for sixteen years. *Id.* at *4. Questcor's internal documentation only forecasted price increases until 2011, and there was no competent evidence connecting the logic of this five-year forecast to a period three times as long except the "*ipse dixit* of the expert." Id.

The "benchmark approach" was similarly deficient. While Dr. Mangum asserted that the "demand and the availability and cost of therapeutic substitutes" are the prime determinants of pharmaceutical prices, he failed to establish that the characteristics of the drugs composing the PPI bear "a rough similarity to Acthar with respect to those characteristics for the PPI to be a reliable proxy for Acthar's but-for prices throughout the alleged conspiracy." *Id.*

The "benchmark approach" was further deficient because Dr. Mangum failed to establish that other likely, "nonconspiratorial determinants of price—like market power, for instance—were irrelevant or, if not, that they were somehow accounted for, by a regression or otherwise." Id. Instead, Dr. Mangum "neither employed any analytically rigorous methods nor explained why he hadn't." *Id.*

Without Dr. Mangum's models, MSP could not demonstrate that its damages were measurable on a class-wide basis. Individual damages calculations would therefore "overwhelm questions common to the class," rendering certification of MSP's classes under Rule 23(b)(3) inappropriate. *Id.*

MSP's efforts in the Northern District of Illinois highlight the relevance and importance of *Daubert* in the class action context, and underscore the importance of *reliable* opinions at class certification. The outcome of MSP's motion for class certification provides a cautionary tale for similarly situated plaintiffs and bolsters the arguments of defendants looking to Evidence Rule 702 to defeat class certification.

**In recent years, a circuit split has emerged on whether a full Daubert analysis is required at the class certification stage.**

Defense attorneys should continue to monitor emerging trends concerning the admissibility of expert testimony at the class certification stage. A consensus has not yet emerged. In December 2021, however, the U.S. District Court for the Northern District of Ohio applied a full *Daubert* analysis at class certification and found that the plaintiffs failed to satisfy Rule 23's requirements. *Desai v. Geico Cas. Co.*, 574 F. Supp. 3d 507 (N.D. Ohio 2021). Whether other circuits will join the Third, Fifth, Seventh, and Eleventh Circuit remains to be seen.

# Defending Benzoyl Peroxide Acne Product/ Benzene Litigation

By Abbie Eliasberg Fuchs, Daniel R. Strecker and Marni Weiner Arlia

In defending these personal injury lawsuits, defendants should understand the flaws in the laboratory's findings and assumptions, appreciate the body of scientific literature that undermines causation theories, and employ the legal defenses available to them.

This year, a laboratory issued a report wherein it claims to have tested over-the-counter and prescription acne products containing benzoyl peroxide and found what it deemed to be "unacceptably high" levels of benzene. In certain doses and circumstances, benzene can be carcinogenic. Shortly thereafter, dozens of class action lawsuits, alleging consumer-protection, misrepresentation, and similar theories were filed in federal courts in multiple states against manufacturers and suppliers of these products. More such claims can be expected, as well as personal injury lawsuits alleging these products caused cancer. In defending these personal injury lawsuits, defendants should understand the flaws in the laboratory's findings and assumptions, appreciate the body of scientific literature that undermines causation theories, and employ the legal defenses available to them.

## Benzene Litigation Claims

The laboratory, Valisure, claims to have discovered that out of 99 benzoyl peroxide acne products tested (83 over the counter), 94 contained benzene at room temperature, "many" above the 2 parts per million ("ppm") concentration limit set by the FDA. Additionally, Valisure performed "incubation testing" on a subset of the products. After heating to 37 degrees Celsius (98.6 degrees Fahrenheit), over time the benzene levels generally increased above the 2 ppm limit, with some exceeding 40 ppm after 28 days. Valisure attributed the increase to breakdown of the benzoyl peroxide into its molecular components, including benzene. After heating to 50 degrees Celsius (122 degrees Fahrenheit), benzene levels increased much higher, with levels in some products exceeding 800 ppm after 21 days. Valisure heated some of the more "stable" products (those that showed less or no increase at lower temperatures) to 70 degrees Celsius (158 degrees Fahrenheit, the "temperature of a hot car"). These products also showed increased benzene concentrations, with some exceeding 2 ppm and two exceeding 8 ppm after 18 days. Valisure estimated that in a hot car, resulting airborne benzene levels (distinguishable from the liquid concentrations already

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discussed) could be 400 parts per billion ("ppb") (0.4 ppm).

## Potential Personal Injury Litigation

Valisure promptly filed a citizen petition asking the FDA to investigate and recall these benzoyl peroxide acne products. The class-action litigation, all citing Valisure's findings, followed. In a victory for the defense, the Judicial Panel on Multidistrict Litigation recently denied plaintiffs' request to establish an MDL consolidating the class-actions, which are currently pending in federal district court in California, New York, Illinois, and elsewhere.

Valisure has resorted to similar tactics in the past after purporting to find benzene in antiperspirants, aerosol dry shampoo, antifungal products and sunscreen. These actions gave rise to personal injury litigation. For example, a plaintiff claimed in Georgia federal court that benzene in sunscreen tested by Valisure caused her to develop acute lymphoblastic leukemia ("ALL"). See Cascio v. Johnson & Johnson, et al., 2024 WL 693489 (N.D. Ga. Feb. 20, 2024). In August 2024, it was announced that a North Carolina District Court personal injury lawsuit, wherein a father alleged his 14-year old son died from acute myeloid leukemia ("AML") caused by benzene in defendant's sunscreen, would be settled. Personal injury claims arising from Valisure's report on benzoyl peroxide acne products can be expected.

## Defenses of Benzene Litigation

It takes more than the mere presence of benzene to establish causation. It must also be established that (1) the type of cancer in question can actually be caused by benzene (general causation) and (2) the benzene exposures in question were sufficient to, and did cause, that cancer (specific causation). For example, the literature supporting the theory that benzene is capable of causing ALL, the alleged disease in Cascio, is vastly different than that supporting benzene's ability to cause AML, the alleged disease in the North Carolina suit. Valisure's statements espouse scientifically flawed theories advocated by the plaintiff bar and their experts (and cite at least one well-traveled plaintiff expert), claiming there is "no safe dose," and "any" benzene exposure increases the risk of cancer. But there is overwhelming scientific evidence to the contrary. That evidence indicates that these levels, trace in the original products and arguably still trace even after exposure to abnormal temperatures for extended periods of time, do not pose a human health risk.

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Indeed, peer-reviewed literature has already cast doubt on the notion that the type of benzene exposure that might result

from these products is significant from a health and safety perspective. In a research letter published in the peer-reviewed Journal of Academic Dermatology, the authors observed that in general, transdermal benzene absorption is thought to be minimal. The authors analyzed blood-benzene levels in persons reporting use of these products and compared them to blood-benzene levels in persons who did not use these products. The authors found no difference in blood-benzene levels.

Other assertions that might be made by plaintiffs can be challenged. For example, Valisure estimates that in a hot car (158 degrees Fahrenheit) containing benzoyl peroxide acne products, benzene levels could reach 400 ppb (0.4 ppm), then compares that to the EPA estimate that lifetime exposure of 0.4 ppb for a lifetime "can lead" to one additional cancer case in 100,000 persons. Valisure states that therefore, these products could cause "1,000 times this US EPA limit." Among other ready criticisms, Valisure's assertion obscures the fact that virtually no person would ever experience these conditions — proximity to benzoyl peroxide acne products at an extraordinarily high, presumably fatal air temperature for 18 days — let alone for a lifetime.

Also of note, Valisure published some of its findings in a peer-reviewed journal. But not all of Valisure's claims appear in the peer-vetted study — for example, the claims about and detail pertaining to the allegedly elevated benzene content at room temperature. Likewise, Valisure cites the plaintiff expert in its citizen petition, not the peer-reviewed study. An opinion piece published in the same dermatology journal criticized Valisure, citing published concerns about Valisure's methodology and the opacity of Valisure's data, and called on Valisure to release additional data to allow its claims to be adequately evaluated. The piece did not recommend clinicians stop prescribing these products.

Moreover, the Valisure findings may not be representative of the product generally, or the product at points in time prior to, or after, the Valisure study, when a given plaintiff may claim to have allegedly used it. In other words, merely finding "elevated" benzene levels in one container of a product does not indicate that other containers of that product have or had similar amounts of benzene.

The court in Cascio, the sunscreen case, used this reasoning in its opinion granting the defendant's motion to dismiss. The court held plaintiffs failed to plausibly allege causation because they did not show the batches of sunscreen they claimed to have used actually contained benzene. The court reasoned that the mere presence of benzene in one batch of defendant's sunscreen products did not extend to the batches plaintiffs allegedly used. The court also held that the existence of a recall does not establish a defect. Defendants in current and future lawsuits can leverage similar arguments.

## Conclusion

Careful, critical reading of the laboratory's reports, understanding the scientific literature, and familiarity with causation defenses will be valuable tools in defending any personal injury litigation that may arise from the report on benzene content of benzoyl peroxide acne products. Scientifically, general and/or specific causation may be readily disputable. Understanding the flawed assumptions made by the laboratory — and litigants relying on the laboratory — will be critical. And challenging causation theories as early as the pleading stage could lead to dismissals.