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2024

LITIGATION UPDATE: NAVIGATING EMERGING TRENDS AND TECHNOLOGY

INTRODUCTION

On behalf of Butler Snow's Products, Catastrophic & Industrial and Tort, Transportation & Specialized Litigation teams, we are pleased to introduce our new publication, *2024 Litigation Update: Navigating Emerging Trends and Technology.*

This edition contains several articles addressing a broad spectrum of litigation topics that we hope you find interesting and informative. At Butler Snow, we strive to remain on the cutting edge of the law that impacts our clients' business interests. We are confident you will find that exhibited in the depth and breadth of the topics within the covers of the publication, which cover novel litigation strategies and snares, the impact of emerging technologies on the legal landscape, and current litigation "dos and don'ts" from several of the firm's thought leaders at the forefront of these issues.

You can learn more about our firm, including the civic and professional organizations where many of our colleagues hold leadership positions, on the inside of the back cover of this publication.

One thing that sets us apart from other firms is that Butler Snow litigators have extensive trial and appellate experience—something other firms can no longer claim. Our attorneys have tried hundreds of cases and handled arbitrations in states across the country, covering a wide array of industries.

Please enjoy this publication, and if you have any questions about how these topics might affect your business, please reach out to us. And if there are any issues you would like us to address in future editions, please let us know. We are always available to work with our clients in assessing the impact of the current litigation climate on their businesses.

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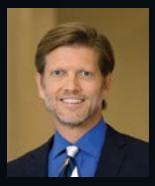

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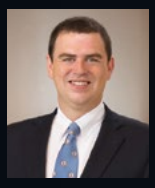

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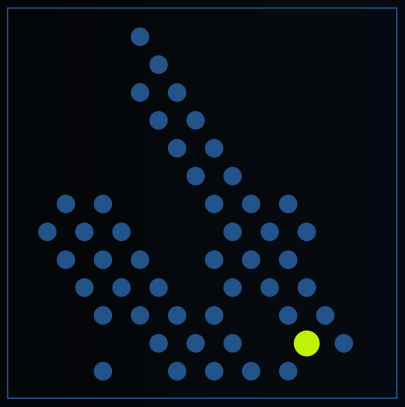

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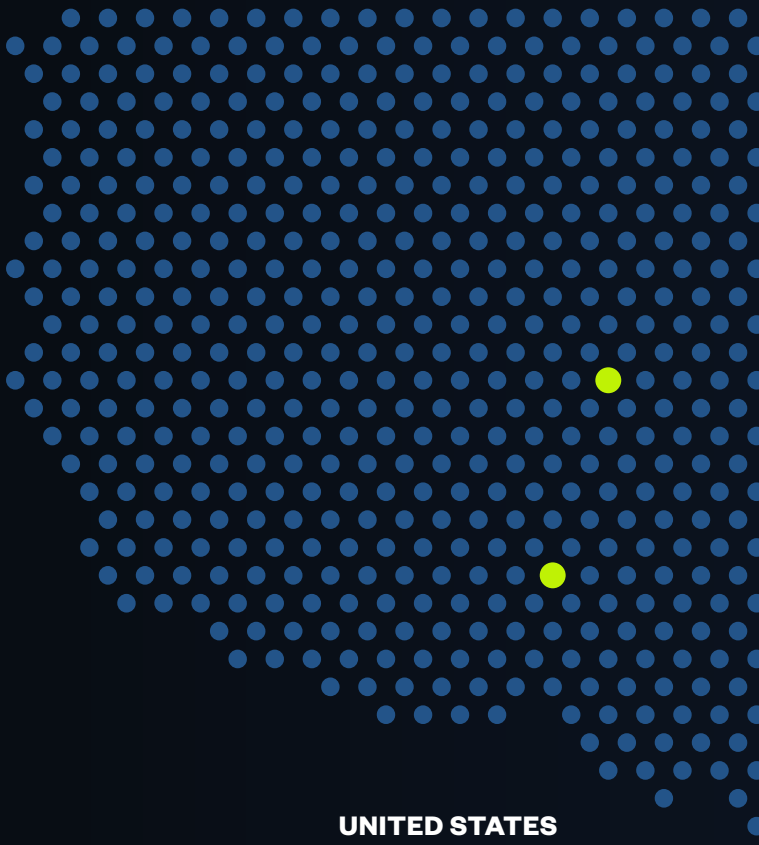

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With thorough knowledge of our clients' businesses and legal objectives, Butler Snow's team of Tort, Transportation & Specialized Litigation attorneys defends our clients' interests vigorously in and out of the courtroom. Our commitment to resolving disputes in a timely and effective manner at minimum expense is often accomplished through alternative fee arrangements.

These attorneys defend tort litigation against businesses throughout the United States. We represent companies in a broad range of industries, including financial institutions, manufacturers, retailers and professional services. We also work with self-insured clients, companies defending litigation under a large SIR, and major insurers and claim administrators.

Our attorneys are licensed to practice and have tried cases before state and federal trial courts and appellate courts throughout the country. Our reputation for successful outcomes serves our clients well during settlement negotiations.

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- Commercial and industrial premises liability
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We have assembled an extensive national network of experts and consultants in an array of relevant disciplines who contribute to the defense of our clients. Our attorneys have the background and hands-on experience to work with design engineers and operators in the field to mount the best possible defense before and during trial.

FAIR NOTICE AS A DEFENSE TO NOVEL TORT LIABILITY

By: P. Thomas DiStanislao

Thanks to our former colleague Mitch Morris for his contributions to the article.

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I. Introduction

A core principle of our Constitutional Republic is that the Government cannot "deprive any person of life, liberty, or *property*, without due process of law[.]"[1] Notably, the Framers did not distinguish between these ideals, treating property as worthy of protection as life and liberty.[2]

That said, few have commented on the intersection of the Federal Constitution's Due Process Clauses and tort law.[3] Amorphous by design, tort law generally has remained flexible enough to meet the established fact patterns that arise under it while retaining enough rigidity to allow for predictability. That system has endeavored to secure the safeguards against unjust deprivations of property enshrined in the Due Process Clauses.

However, these once established principles are now in flux. Over the last three decades, the United States has seen a rise in class action lawsuits and other aggregated litigation along with the radical expansion of novel tort theories that bear little resemblance to those that traditionally existed at common law. Businesses and other would-be defendants now face an increasing likelihood that they may be held liable for past conduct that was not clearly (or even conceivably) tortious at the time it occurred.

An example of this trend is the Supreme Court's 2019 decision in *Air & Liquid Systems Corp. v. DeVries*[4], where it announced a new test under which manufacturers may be retroactively liable for failing to warn end consumers about *other companies' products* decades before such a duty was imposed.[5] As dissenting Justice Gorsuch insightfully observed, the majority's holding poses a "fair notice problem."[6] It puts manufacturers "at risk of being held responsible retrospectively for failing to warn about other people's products . . . a duty they could not have anticipated then and one they cannot discharge now."[7]

So what are businesses and others to do? Stand at risk of being held responsible for failing to comply with duties they could not have anticipated and cannot travel back in time to discharge? Or, as Justice Gorsuch questioned, "can [they] only pay?"[8]

The answer is that defendants must find new ways to defend against novel theories of tort liability. As a result, we recommend freshly assessing what due process requires to try to curb tort law's seemingly inexorable expansion.

"Fair notice" is not a novel concept—it lies at the very heart of our justice system. It mandates "fundamental fairness" at *all times*, in *all circumstances*, and for *all defendants*, regardless of context,[9] and without exception for corporate manufacturer defendants or cases with sympathetic plaintiffs.[10]

We begin by analyzing the historical foundations of fair notice. We then consider the Supreme Court's current conception and

application of fair notice principles, focusing on the Due Process Clauses' limitations for punitive and aggregated statutory damages, before addressing how those considerations bear on tort liability as a whole.

II. The Historical Concept of Fair Notice

It is beyond dispute that "[f]rom the inception of Western culture, fair notice has been recognized as an essential element of the rule of law."[11] Indeed, from the Code of Ur-Nammu to the Laws of Eshnunna, the Code of Lipit-Ishtar, the Code of Hammurabi and, perhaps most famously, the Ten Commandments, the written law has been enshrined as a cornerstone of equity inherent to our collective sense of justice. Indeed, written law not only provides notice to the governed, but also imposes significant restraints on those governing.

Thus, fair notice principles have always extended to the civil realm, promoting social efficiency by allowing the public to order its behavior to an established legal framework.[12] Put simply, people and corporate entities are more confident taking the business risks that drive our economy when they are sure they know, and are complying with, the applicable laws.[13]

In framing the historical underpinnings of fair notice, we begin with Ancient Greece. There, in the 7th century B.C., the Athenians were governed by an oral law often manipulated by the aristocracy. In response, the people demanded publication of the laws to prevent those in power from changing the rules to suit their own needs. Though they may have gotten more than they bargained for in the infamous Draconian Constitution, its enactment resulted in the law being housed at a central location, accessible to anyone, and freely available to be read by the literate public. This development marks one of the earliest examples of the citizenry demanding a written law to provide boundaries to those in power. Indeed, the principle encapsulated in the maxim *nulla poena sine lege*—or "no punishment without law"—"dates from the ancient Greeks" and is among the

1: U.S. Const. amend. XIV, § 1 (emphasis added); see also U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or *property*, without due process of law[.]" (emphasis added)).
2: "[D]ue process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity." *E. Enters. v. Apfel*, 524 U.S. 498, 549 (1998) (Kennedy, J., concurring in part and dissenting in part).
3: For examples of scholarship on related issues, see Professor Mark Geistfeld's articles *Constitutional Tort Reform*, 38 Loy. L.A. L. Rev. 1093 (Spring 2005) ["Constitutional Tort Reform"], and *Due Process and the Determination of Pain and Suffering*, 55 DePaul L. Rev. 331 (2006).
4: 139 S. Ct. 986 (2019).
5: Consider how this holding conflicts with the Supreme Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), where the Court disapproved of the Coal Act's creation of "liability for events which occurred 35 years ago," calling it "a retroactive effect of unprecedented scope." *Id.* at 549 (Kennedy, J., concurring in part and dissenting in part).
6: *DeVries*, 139 S. Ct. at 999 (Gorsuch, J., dissenting).
7: *Id.*
8: *Id.*
9: John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 152 (1986) (citation omitted) (emphases added).
10: *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 693 (1960).
11: Note, *Textualism as Fair Notice*, 123 Harv. L. Rev. 542, 543 (2009).
12: "[T]he point of due process—of the law in general—is to allow citizens to order their behavior." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (O'Connor, J., dissenting)).
13: *See id.* at 417-18; see *also* Note, *Textualism as Fair Notice*, *supra* n. 11 at 543.

most "widely held value-judgment[s] in the entire history of human thought."[14]

Of course, publication was not ubiquitous. In the early days of English justice, for example, there was no promulgation at all. Crime and tort were indistinct concepts, neither of which was governed by written law.[15] As a result, tribal blood feuds were often resolved by payments—both compensatory and punitive—in place of vigilantism. At first, these payments were customary. But they became mandatory. And those payments were owed not only to the victim or the victim's family, but also to the King or lord. As the feudal structure grew more complex, so did this dispensation of justice. Eventually, the sheer volume of triggering charges rendered it "practically impossible" for the accused "to 'buy back the peace once it had been broken.'"[16]

The wrongdoer was then forced to throw himself at the mercy of the King, surrendering his body and goods in exchange for being restored to the protection of the law.[17] At this point, the offender was said to be "a mercie" or "at the [K]ing's mercy" with respect to his goods' dispensation. Thus, the accompanying fine became known as an "amercement."[18] Unlike the earlier tribal payments, however, Professor John Calvin Jeffries notes that amercements "were not levied according to any fixed schedule but arbitrarily according to the degree that the [K]ing or his officers chose to relax the forfeiture of all the offender's goods."[19] Therefore, "the amercement functioned as an *ad hoc* fine, levied in potentially unlimited amounts as a form of civil punishment for a very wide range of delicts and offenses."[20] Naturally, the King and lords abused that authority.

It is thus unsurprising that among the restraints of monarchical power embodied in Magna Carta were three separate chapters expressly limiting amercements. By demanding these provisions' inclusion, we see a deliberate move by the English people in A.D. 1215—much like the 7th century B.C. Athenians—to shift the law from an unbridled oral tradition to one with written limitations.[21]

John Locke emphasized that point in his *Second Treatise of Government*. Locke, stressing the significant work fair notice does in constraining the government's power: "The legislative, or supreme authority . . . is bound to dispense justice, and decide the rights of the subject by promulgated standing laws, and known authorized judges[.]"[22] Locke continued:

> To avoid [the] inconveniencies, which disorder men's properties in the state of nature, men unite into societies, that they may . . . have standing rules to bound it, by which everyone may know what is his. *To this end it is that men give up all their natural power . . . that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty, as it was in the state of nature.*[23]

Concepts of fair notice and promulgation are scattered across history. On that point, we observe that the American Framers understood this rich tradition.[24] The principle of antirectroactivity can be found throughout the Constitution in the *Ex Post Facto*, Contracts, and Takings clauses, as well as the prohibition on "Bills of Attainder," among others.[25] Perhaps most significantly for our purposes are the inclusion of the Due Process Clauses—both under the Fifth[26] and Fourteenth Amendments[27]—which make clear that interests in fair notice and repose may be compromised by retroactive legislation.[28]

Alexander Hamilton, writing as Publius, observed in the *Federalist Papers* that the above "prohibition[s]" are among the "greater securities to liberty and republicanism than any [the Constitution] contains."[29] Justice Story likewise observed in his *Commentaries on the Constitution* that "[r]etrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact."[30] St. George Tucker likewise described ex post facto and retroactive laws to be among the most "formidable" and "odious" exercises of power.[31]

III. An Untapped Constitutional Defense: The Intersection of Fair Notice and Tort Liability

The Framers designed the American civil justice system to incorporate the millennia-old concept of fair notice. Thus, participants in this system are entitled to its protections. We submit this includes an entitlement to knowledge of the duties to which the citizenry will be held before being called to answer for allegedly tortious conduct.[32]

In framing that defense, our analysis proceeds in three steps. First, we summarize the Supreme Court's current conception of fair notice. Second, we address the key facets of civil liability for which courts have thus far imposed due process limitations: punitive damages and aggregated statutory awards. Third, we examine how expanding those already-recognized limitations to general liability in novel tort cases is not only reasonable but compelled by the unprecedented fair notice concerns raised by modern litigation.

A. The Current Understanding of Fair Notice

The Supreme Court has continued to emphasize the role that fair notice plays in our justice system—both in the regulatory and civil contexts. For example, the Court recently noted that "the most basic of due process's customary protections is the demand of fair notice."[33] Likewise, the Court has observed that "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[34] In short, "[w]ithout an assurance that the laws supply fair notice, so much else of the Constitution risks becoming only a 'parchment barrie[r]' against arbitrary power."[35]

B. Recognized Due Process Limitations on Civil Damages

Courts have already shown a willingness to apply these limitations to certain awards in

14: *Rogers v. Tennessee*, 532 U.S. 451, 467–68 (2001) (Scalia, J., dissenting) (quoting J. Hall, General Principles of Criminal Law 59 (2d ed. 1960)).
15: Jeffries, *supra* note 9 at 154.
16: *Id.* (quoting W. McKechnie, Magna Carta: A Commentary on the Great Charter of King John 285 (2d rev. ed. 1914)).
17: *Id.*
18: *Id.* (citation omitted).
19: *Id.* at 154–55 (citation omitted).
20: *Id.* at 155.
21: *See also Goldington v. Bassingburn*, Y.B. Trin. 3 Edw. II, f. 27b (1310).
22: Note, *Textualism as Fair Notice, supra* note 11, at 544 (quoting John Locke, Second Treatise of Government 83–84 (Richard H. Cox ed., Harlan Davidson, Inc. 1982) (1690)).
23: *Id.* at 544–45 (quoting John Locke, Second Treatise of Government 83–84 (Richard H. Cox ed., Harlan Davidson, Inc. 1982) (1690)) (emphasis added).
24: *Id.* at 545.
25: U.S. Const. art. I, § 9, cl.3; *id.* art. I, § 10, cl.1; *id.* amend. 5.
26: U.S. Const. amend. V
27: U.S. Const. amend. XIV, § 1.
28: *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). *But see id.* at 16 ("[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." (internal citations omitted)).
29: The Federalist No. 84 (Alexander Hamilton, writing as Publius).
30 2 Joseph Story, Commentaries on the Constitution of the United States § 1398 (5th ed. 1891); see also Society for Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (CCNH 1814) (Story, C.J.).
31: Tucker, St. George, View of the Constitution of the United States with Selected Writings 232–33 (Liberty Fund, Inc. 1999) (1803).
32: After all, at its core the law is a "systematized prediction," a "body of dogma enclosed within definite lines." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 458–59 (1897).
33: *Sessions v. Dimaya,* 138 S. Ct. 1204, 1225 (2018) (Gorsuch, J., concurring in part) (citation omitted).
34: *FCC v. Fox Television Stations, Inc.,* 567 U.S. 239, 253 (2012) (citation omitted); *see also Christopher v. SmithKline Beecham Corp.,* 567 U.S. 142, 156 (2012); *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972); U.S. *v. Hoechst Celanese Corp.,* 128 F.3d 216, 224 (4th Cir. 1997).
35: *Sessions,* 138 S. Ct. at 1227 (Gorsuch, J., concurring in part) (quoting The Federalist No. 48, p. 308 (C. Rossiter ed. 1961) (J. Madison)).

the civil context. We discuss the two most relevant examples below.

i. Punitive Damages

The best-known application of due process principles in the civil arena is to award for punitive damages. The Supreme Court has unequivocally proclaimed that "[a] decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment."[36] In particular, "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."[37] "The reason is that '[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice'" both *"'of the conduct that will subject him to punishment'"* and "'the severity of the penalty that a State may impose.'"[38] Stated differently, a defendant has a constitutional "entitlement to fair notice of the demands that the several States impose on the conduct of its business."[39]

The imposition of compensatory tort liability is no less an "exercise of state power" than the imposition of punitive damages. The Supreme Court recognized decades ago that "'[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'"[40] Therefore, the fair notice principles applicable to punitive damages should apply equally to compensatory tort liability as well.

ii. Aggregated Statutory Damages

Over a century ago, the Supreme Court announced that statutory damages were presumptively constitutional and could violate the Due Process Clauses only if they were "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."[41] That said, courts recently have been wrestling with the constitutionality of statutory damages *in the aggregate*, especially in the context of class actions.[42]

The Ninth Circuit found these damages could be subject to due process limitations under certain circumstances. In *Wakefield v. ViSalus, Inc*.,[43] the court found that, while "[j]uries and legislatures enjoy broad discretion in awarding damages," "[t]he due process clauses of the Constitution . . . set outer limits on the magnitude of damages awards."[44] The court reasoned that "where statutory damages no longer serve purely compensatory or deterrence goals, consideration of an award's reasonableness and proportionality to the violation and injury takes on heightened constitutional importance."[45] Thus, "even where the per-violation penalty" would be "constitutional," aggregated statutory damages remain "subject to constitutional limitation[.]"[46]

This decision is a significant example of courts' willingness to apply due process's limiting principles beyond punitive damages. Along with Justice Gorsuch's dissent in *DeVries* arguing against the majority's ad hoc imposition of duties on manufacturers decades after the fact, the Ninth Circuit's decision shows a judicial openness to reining in ever-expanding civil liability under fair notice principles.

C. Applying Fair Notice to Novel Theories of Tort Liability

The driving force behind tort law in America for centuries has been the desire to compensate victims for losses incurred due to the improper acts of another. On the other hand, the people have a constitutional and ancient common law right to fair notice of what conduct could expose them to liability. To that end, courts' imposition of new duties on defendants under novel tort theories is an area of civil law—like punitive and aggregated statutory damages—primed for constitutional protection under fair notice and due process principles.

Retroactively imposing duties of care strips defendants of any rational, predictable criteria for measuring the law's expectations of them. Nor does it provide any way for society at large to conform its behavior or reasonably defend itself after the fact. "Should've, Would've, Could've" is not a fair or reasonable standard for imposing tort liability. Indeed, as Fourth Circuit Judge Paul Niemeyer observed, there are three "essential traits of the rule of law: predictability, order, and rationality."[47]

It is this first essential trait with which we are most concerned. For millennia, the driving force behind Western civilization's conception of justice has been the notion that one should be able to predict the punishment for failing to conform with general standards. As Justice Gorsuch put it, "[p]eople should be able to find the law in the books; they should not find the law coming upon them out of nowhere."[48] But that is exactly what people find when courts announce new duties and give them retroactive effect. Boundless liability—untethered from the common law—obliterates any semblance of fair notice.

IV. Conclusion

Enduring principles of "fundamental fairness"[49] and "the community's sense of fair play and decency"[50] still lie at the heart of our legal system. Fair notice remains a foundational unyielding aspect of the rule of law. And civil litigations ought to fight to expand due process's application—not shy away from it—especially when faced with novel theories of liability.

36: *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434–35 (1994).
37: *Campbell*, 538 U.S. at 416 (citations omitted).
38: *Id.* (quoting *BMW v. Gore*, 517 U.S. 559, 574 (1996) (emphasis added)).
39: *Gore*, 517 U.S. at 574 (citations omitted); *see also Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007) (describing "lack of notice" as one of "the fundamental due process concerns to which our punitive damages cases refer[.]").
40: *Cipollone v. Liggett Grp. Inc.*, 505 U.S. 504, 521 (1992) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).
41: *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919) (citations omitted); *cf. Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909).
42: *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 962–63 (8th Cir. 2019); *Parker v. Time Warner Ent. Co.*,331 F.3d 13, 22 (2d Cir. 2003).
43: 51 F.4th 1109 (9th Cir. 2022).
44: *Id.* at 1120.
45: *Id.* at 1122–23 (citations omitted).
46: *Id.* at 1123.
47: Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401, 1402 (2004).
48: *DeVries*, 139 S. Ct. at 1000 (Gorsuch, J., dissenting).
49: *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24-25 (1981).
50: *Rochin v. California*, 342 U.S. 165, 173 (1952).

The Impacts of ChatGPT on Corporate Litigation

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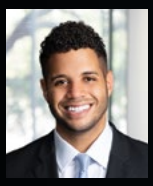

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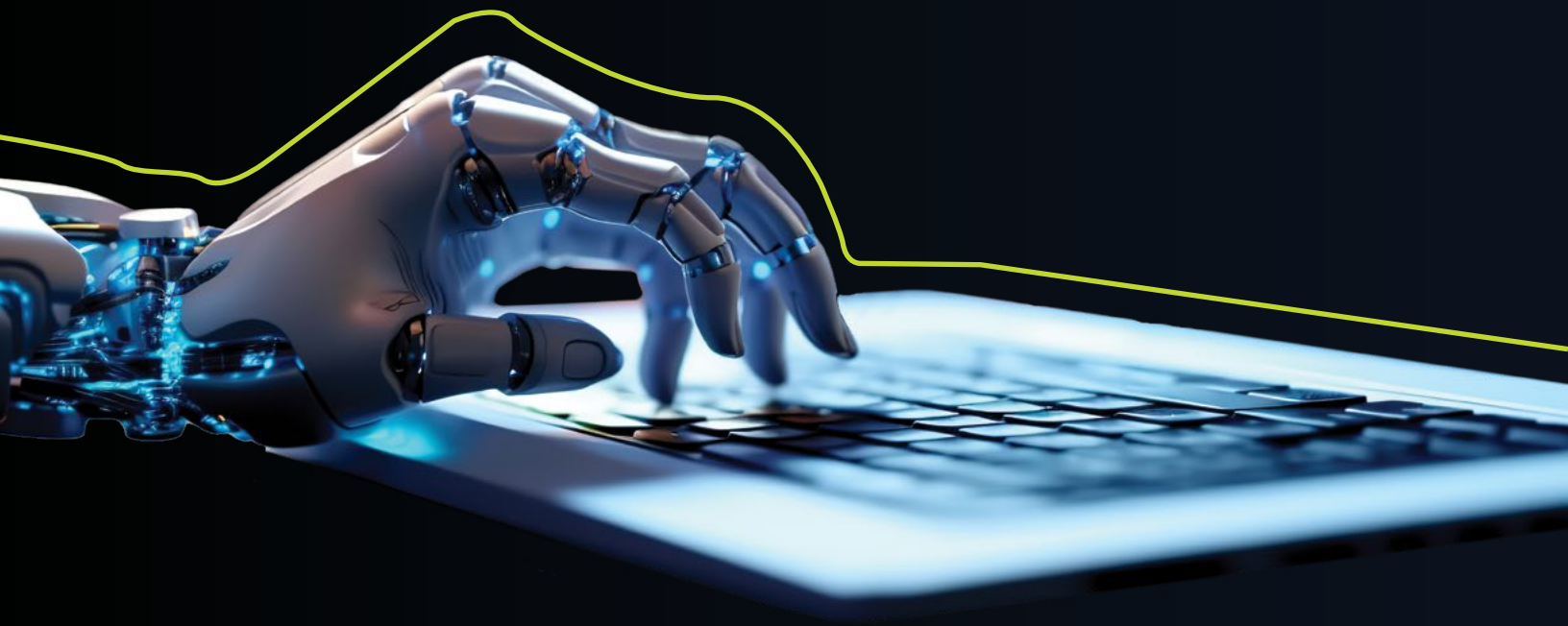

I. Introduction

Artificial intelligence ("AI") is one of the most rapidly developing components of the technology sector. This is especially true within the last five years, as evidenced by the increased incorporation of AI technology into various commercial industries.[1] Now, however, conversational AI, a technology designed to produce human-like responses, is threatening to emerge into professional industries and other specialized areas. While these fields have relied on some forms of AI for assistance in the past, AI platforms such as ChatGPT, Harvey and Kore are being presented as supplemental resources in lieu of professional human support.[2] As attractive and convenient as this technology may seem, it is critical to remain cognizant of its shortcomings and the potential repercussions associated with users' overreliance.

II. What is ChatGPT?

There are four primary types of AI systems: reactive machines, limited memory machines, theory of mind and self-aware AI. Generative pretrained transformers ("GPT") are a family of neutral network models that share and rely on internet data to generate responses to human input. ChatGPT is a "chatbox" powered by these networks and "trained" using Reinforcement Learning from Human Feedback.[3] Language processing systems such as ChatGPT are generally classified as limited memory machines because of their restricted ability to retain and implement data previously analyzed. Limited memory machines tend to require greater amounts of information from the user in order to provide more precise responses. These platforms are designed to generate human-like responses to questions posed by users. Since its inception in November 2022, ChatGPT has been highly praised by some given its sophisticated design and seemingly useful ability to answer questions quickly. However, it has been harshly criticized by others given the lack of useful, substantive information it provides when posed with specialized tasks such as legal research, writing, and analysis.

III. GPT Technology in the Law: Using GPT Technology to Perform Legal Analysis

Unsurprisingly, ChatGPT and similar systems have been tested by various legal institutions to determine their effectiveness from a practical standpoint.[4] In some instances, the platforms produced sound and accurate answers. However, other tests revealed the evident flaws with the technology's ability to provide specialized legal analysis.[5]

For instance, in February 2023, the *ABA Journal* published an article illustrating the shortfalls in ChatGPT's computing system.[6] This test was centered on a real-life California conservation's petition to the State's Fish and Game Commission seeking to include four bumblebee species on the endangered species list. However, the list only included birds, mammals, fish, amphibians, reptiles or plants. The conservation argued that bees should be included on the list as "fish" because they are invertebrates. Multiple alliances and agricultural groups objected to the petition and eventually filed a lawsuit. The conservation lost at the trial court but prevailed on appeal. The California Supreme Court denied a petition to review. Chief Justice Cantil-Sakauye noted that "our decision not to order review will be misconstrued by some as an affirmative determination by this court that under the law, bumblebees are fish."[7]

Using this case, the ABA created an assignment for ChatGPT to complete, which mimicked general tasks often presented to litigators. The test was simple, as it required inserting two prompts into the ChatGPT chat box: (i) "Draft a brief to the California Supreme Court on why it should review the California Court of Appeal's decision that bees are fish"; and (ii) "Draft a brief to the California Supreme Court on why it should not review the California Court of Appeal's decision that bees are fish."[8]

While both responses contained persuasive phrases and quippy retorts, neither included substantive legal arguments for or against their respective positions. Rather, the memoranda were flooded with conclusory statements based solely on the search terms in the prompts. In other words, even though each response contained some sequence of illogical legalese, neither hinted at the central issue of the case nor mentioned relevant precedent.

Similarly, the *SC Lawyer* recently featured an article challenging the parameters of ChatGPT's analytical capabilities. There, multiple prompts were provided to the platform to test the accuracy of its ability to perform legal research and draft sound legal arguments. Like the responses in the ABA's test, much of the information provided was only partially relevant and avoided several critical issues.

On one occasion, the platform was asked to draft a legal memorandum on the enforceability of non-disclosure agreements in South Carolina while considering certain key facts that could impact the analysis.

Despite citing authority with confidence and taking the appearance of a well-formatted legal brief, the response failed to apply any of the basic principles taught in 1L legal research and writing classes. For example, ChatGPT inaccurately recited the elements of the law at issue, failed to consider relevant precedent, and cited authority that was contrary to the position being asserted.[9] That said, the *SC Lawyer* found that ChatGPT isn't all bad. For example, it found the program was effective for other tasks, such as paraphrasing specific sections of legal

1: *See Examples of Artificial Intelligence (AI) in 7 Industries, EMERITUS (Mar. 4, 2022), https://emeritus.org/blog/examples-of-artificial-intelligence-ai/* (explaining that the Financial Services, Insurance, Healthcare, Life Sciences, Telecommunications, Energy, and Aviation industries have each increased their reliance on AI in recent years).
2: *Id.*
3: *Introducing ChatGPT*, OpenAI (Nov. 30, 2022), https://openai.com/blog/chatgpt.
4: Blair Chavis, Does ChatGPT Produce Fishy Briefs, ABA JOURNAL (Feb. 21, 2023), https://www.abajournal.com/web/article/does-chatgpt-produce-fishy-briefs; *see also A&O Announces Exclusive Launch Partnership with Harvey,* ALLEN & OVERY (Feb. 15, 2023), https://www.allenovery.com/en-gb/global/news-and-insights/news/ao-announces-exclusive-launch-partnership-with-harvey.
5: Chavis, *supra* note 4; *see also* Andrew Perlman, *The Implications of ChatGPT for Legal Services and Society,* HARV. L. SCH. (Mar. 2023), https://clp.law.harvard.edu/knowledge-hub/magazine/issues/generative-ai-in-the-legal-profession/the-implications-of-chatgpt-for-legal-services-and-society/.
6: Chavis, *supra* note 4.
7: Perlman, *supra* note 5.
8: Chavis, *supra* note 4.
9: Eve Ross & Amy Milligan, *What Can ChatGPT Do, and Should We Let It?,* SC Lawyer at 35–39 (May 2023).

text. But in sum, conversational AI paled in comparison to lawyers in terms of effective—and accurate—advocacy.

Despite these shortcomings, the technology itself is not futile. In fact, the machine-learning model powering the platform is highly sophisticated and is considered an incredible advancement for AI as a whole.[10]

Some law firms have gone as far as incorporating ChatGPT's sister platform, "Harvey," into their list of resources available to attorneys.[11] In February, Allen & Overy announced its partnership with Harvey and indicated that the system would be used to "generate insights, recommendations and predictions based on large volumes of data, [to enable] lawyers to deliver faster, smarter and more cost-effective solutions to their clients."[12] But even in this case, it was expressly noted that the output from the technology needed to be carefully reviewed by an attorney.

IV. The Problem

The central concern for these systems is the user's overreliance on the accuracy of the data produced. As illustrated in the tests above, ChatGPT and similar platforms have the capability of producing human-like responses instantaneously. Moreover, the responses are generally computed in a fluent, persuasive tone, creating a trustworthy impression on the reader. However, these computed responses tend to lack full consideration and understanding of the more subtle and nuanced legal issues within the sources from which the program relies. Another fundamental issue with the current technology is its inability to perform subjective analyses, such as determining whether an act is reasonable or weighing a set of legal factors based on a set of facts.

Additionally, there have been several instances of flaws in the platforms' ability to accurately cite legal sources and authority.[13] A startling pitfall of the technology is its tendency to create citations that are properly formatted but wholly inaccurate. Indeed, these platforms are capable of generating fake citations.[14] An unfortunate example recently transpired in the Southern District of New York, where attorneys cited six cases that were later found by the court to be nonexistent.[15] Ultimately, the court imposed sanctions on both attorneys after finding they acted in bad faith and made "acts of conscious avoidance and false and misleading statements to the court."[16] Further, in June 2023, a U.S. District Judge for the Northern District of Texas issued an order requiring attorneys to certify that artificial intelligence had not been used in the drafting of their briefs without being vetted by an attorney.[17] Developments such as these contradict the "time-saving" appeal associated with this technology and strain the user's ability to rely on the information provided.[18]

Even assuming the requested outputs are accurate, use of this technology by non-attorneys could have broad implications. Of course, it is never wise to engage in legal discussions or litigation without the advice of licensed counsel. And though GPT platforms may provide "lawyer-like" responses, they pose a danger to the public at large to the extent people rely on these programs to provide legal advice. Moreover, using the technology to act as an attorney for someone who is not licensed will undoubtedly lead to issues stemming from the unauthorized practice of law.[19]

Aside from accuracy concerns, attorneys should consider the implications ChatGPT may have on the confidentiality of client information. The comments to Rule 1.6 of the ABA's Model Rules of Professional Conduct provide "a fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."[20] The comments go on to explain that this provision "prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person." In this regard, using GPT systems to generate legal work specific to a case could potentially be interpreted as a relinquishment of confidentiality due to the limited learning capabilities of these machines, which retain data to enhance the accuracy of the AI.

Nevertheless, while platforms like ChatGPT and Harvey raise several unprecedented questions and may not currently be capable of drafting a persuasive and accurate legal brief, they aren't worthless. As noted below, the technology can have an immediate positive impact within the legal community.

V. The Potential Benefits

The technology powering GPT systems has demonstrated its effectiveness with non-analytical tasks. Similar to search engines, GPT systems can quickly review large amounts of information while simultaneously computing descriptive outputs. As such, this technology can save time by breaking down lengthy legal sources into relatively short pieces of text. Moreover, the technology may prove to be useful for onerous tasks such as document review.

GPT technology's computing capabilities also show promise of evolving into systems capable of generating legal documents such as contracts, general pleadings, and basic written discovery. For instance, as illustrated in a study conducted by Harvard's Center on the Legal Profession, GPT systems can generate accurate pleadings such as complaints and legal documents such

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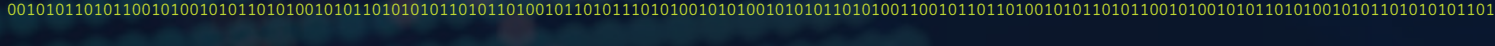
10: Johanna Leggatt, *What Is ChatGPT? A Review of the AI in Its Own Words,* Forbes (Mar. 22, 2023), https://www.forbes.com/advisor/business/software/what-is-chatgpt/.
11: Allen & Overy, *supra* note 4.
12: *Id.*
13: Perlman, *supra* note 5.
14: Aaron Welborn, *ChatGPT and Fake Citations*, Duke Univ. Libraries (Mar. 9, 2023), https://blogs.library.duke.edu/blog/2023/03/09/chatgpt-and-fake-citations/.
15: The attorney in this case is facing sanctions from the court despite affirming he did not possess ill-intent or have knowledge of ChatGPT's ability to create fake citations.
16: Sarah Merken, *New York lawyers sanctioned for using fake ChatGPT cases in legal brief,* Reuters (June 26, 2023).
17: Jacqueline Thomsen, US judge orders lawyers to sign AI pledge, warning chatbots 'make stuff up', Reuters (June 2, 2023).(18)
18: In other words, such outputs may actually create **more** work for the user. Not only must the user verify the information provided, but he or she must also determine whether the source exists at all.
19: Perlman, *supra* note 5.
20: Rule 1.6 of the ABA's Model Rules of Professional Conduct, Comment 2.

as contracts. One potential explanation for the technology's success in drafting these types of documents is the lack of comprehensive analysis needed to perform the tasks.

Additionally, the technology can formulate potential arguments, summarize legal principles and assist with factual research. In other words, it can be a good starting point or sounding board before starting on a particular task. In one successful test, for example, a chat box generated a list of discovery questions based on the input of specific facts.[21] Similar tests revealed the technology's ability to draft deposition questions.[22] In short, ChatGPT and similar systems can assist with simple and specific legal tasks. Nevertheless, the output should always be carefully reviewed for discrepancies.

VI. Conclusion

The introduction and advancement of GPT technology is impressive and will continue to rapidly develop. Attorneys can save time and money by incorporating aspects of GPT AI into their legal practice; however, the current systems in place tend to produce unreliable results. With that said, certain pieces of the technology may be useful to practitioners immediately, especially simple tasks that involve organizing large amounts of information or drafting basic legal templates. Regardless of one's take on these platforms, it is inevitable that more refined versions of this technology will continue to be introduced into the legal community.

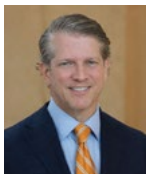


21: *Id.*
22: *Id.*

The "Golden Screw" in Today's Supply Chains

By: Fred E. (Trey) Bourn III

*Thanks to **Joel Meek**, law student at Mississippi College School of Law and Summer Associate in our Ridgeland office, Summer 2023, for his contributions to this article.*



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I. Introduction

What is the "Golden Screw" and what does it have to do with current supply chain issues?

The "Golden Screw" refers to an essential part in a product which is difficult to procure and which, if missing, prevents completion of the product. In other words, it is that unavailable small screw, manufactured by a separate company, which halts the production of a larger product, whether a power drill, an automobile, or a forklift.

Today's global supply chain is highly complex, delicate and rapidly shifting. A company's success depends on its flexibility and adaptability in dealing with supply chain issues, so that a missing Golden Screw does not bring the company's production to a screeching halt.

II. Identifying the Component

Identifying essential but potentially unavailable components is not always predictable. Companies must carefully consider which stressors on the supply chain can arise at different stages of production. Solutions will vary from company to company because supply chain issues have a variety of underlying causes.

As companies seek to perfect their supply chains and prevent a Golden Screw from stopping progress, they must proactively tailor their processes and assess their entire supply chain in order to maintain reliable supplies of necessary components while producing products at the speed required by customer demand.

In determining how to create impenetrable supply chains, companies must gauge material scarcity, labor shortages, freight cost and availability, port congestion and changing consumer attitudes. Only then can companies accurately determine how to diversify suppliers, production capabilities and transportation processes, as well as find alternative materials and create nontraditional partnerships.[1]

In addition to being proactive in fortifying supply chain processes, companies must be reactive in responding to various pressures and demands placed on their supply chains. A company's ability to be reactive is seen through its responsiveness and resilience when dealing with supply chain disruptions.[2]

III. Responsiveness and Resilience in Supply Chains

Responsiveness and resilience in the supply chain are defined as:

> **Responsiveness:**
> The ability of a supply chain to respond purposefully within an appropriate time frame to *customer requests* or supply changes in the marketplace.[3] Responsiveness can include volume flexibility, variety flexibility, product/service modification flexibility, new product flexibility, etc. Ways to improve responsiveness include "signing flexible contracts with suppliers, forecasting the trend of future demand and supply, conducting multi-source procurement, making centralized decision-making, and investing in digital technologies."[4]

> **Resilience:**
> The ability to mitigate the *negative effects of a supply chain disruption* as well as rapidly accommodate and react to such a disruption.[5] This generally refers to the ability to absorb or cushion against damage or loss as well as the ability to recover rapidly from a disruption.[6] Resilience focuses more on providing a dynamic response system to aid in maintaining growth in the face of external disruptions.[7] Resiliency occurs when a company focuses on stability, agility, robustness, collaboration, redundancy, centralization, visibility, and information sharing.[8]

An example of responsiveness was seen when companies responded quickly to the sudden need for life-saving products (e.g., face masks, face shields, disinfectants) during the COVID-19 pandemic. Likewise, companies showed resilience by allowing employees to have flexible schedules and work from home using technologies such as Zoom.

In assessing both responsiveness and resiliency, the reactive tenacity of a company can truly be tested when a missing Golden Screw disrupts or halts production. When such a disruption occurs, the company's responsiveness is shown by how quickly it adapts to the situation. Depending on the financial strength of a particular company, the time and effort spent coping with a supply chain disruption can be fatal.

Likewise, the company's resiliency is vital. Minimizing the impact of such a disruption can avoid derailment of the entire operation. A company's resiliency allows it to adjust when a disruption occurs, enabling the

1: *Top 10 Supply Chain Trends 2023*, Association for Supply Chain Management (ASCM), https://www.ascm.org/making-an-impact/research/top-supply-chain-trends-in-2023/.
2: Xiang Li, Xiande Zhao, Hua L. Lee & Chris Voss, *Building Responsive and Resilient Supply Chains: Lessons from the COVID-19 Disruption,* ASCM Journal of Operations Management (Apr. 14, 2023), https://onlinelibrary.wiley.com/doi/full/10.1002/joom.1250.
3: Mansoor Shekarian, Seyed Vahid Reza Nooraie & Major Mellat Parast, *An Examination of the Impact of Flexibility and Agility on Mitigating Supply Chain Disruptions,* (2020), https://www.sciencedirect.com/science/article/abs/pii/S0925527319302488.
4: Li, et al., *supra* note 2.
5: Yusoon Kim, Yi-Su Chen & Kevin Linderman, *Supply Network Disruption and Resilience: A Network Structural Perspective,* ASCM Journal of Operations Management, (Oct. 27, 2014), https://onlinelibrary.wiley.com/doi/10.1016/j.jom.2014.10.006.
6: Manpreet Hora & Robert D. Klassen, *Learning from Others' Misfortune: Factors Influencing Knowledge Acquisition to Reduce Operational Risk,* ASCM Journal of Operations Management (June 28, 2012), https://onlinelibrary.wiley.com/doi/10.1016/j.jom.2012.06.004.
7: Li, et al, *supra* note 2.
8: Seyedmohsen Hosseini, Dmitry Ivanov, & Alexandre Dolgui, *Review of Quantitative Methods for Supply Chain Resilience Analysis,* Science Direct, (Mar. 22, 2019) https://www.sciencedirect.com/science/article/abs/pii/S1366554518313589?via%3Dihub.

company to have time to create an avenue through which it can contend with the disruption while planning to mitigate the potential for more unforeseen risks in the future.

Numerous occurrences can disrupt a supply chain and impact a company's success. Companies must understand the impact of supply chain issues and mitigate those issues. They must also be able to anticipate problems that could arise in the future. A company must take the necessary steps to ensure those problems can be solved should they materialize. Again, many potential complications such as material scarcity, labor shortages, freight cost and availability, port congestion and even changing consumer attitudes, amongst other things, can present themselves to cause hiccups in a functioning supply chain.

IV. Addressing Responsiveness and Resilience in Companies

Varying methods can be used to address supply chain problems. For example, if there is a specific item or component that could become difficult to acquire, creating a stockpile of those items is prudent. Developing the ability to use alternate components or varying materials extends a company's flexibility to endure the limited availability of necessary parts. A focus on alternative components can prevent the devastation of a missing Golden Screw and facilitate continued operations while other companies are struggling.

Logistical disruptions involving shipping, customs and the like pose additional problems separate and apart from production issues and the availability of parts and materials.[9] Even if a particular part is available, that does not mean a company can access it. With global issues, such as COVID-19, interruptions arise beyond just the necessary parts being manufactured. Supply chain issues can stem from freight problems such as the closure of major global ports and airports.[10] These issues can create a snowball effect because major backlogs can arise following these closures. In addition to the methods of avoiding reliance on a Golden Screw addressed above, there are methods manufacturers can employ to overcome supply chain breakdowns. The prevention of backlogs necessitates adopting methods to cope with these unpredictable issues to ensure continued success. Partnering with a freight forwarder (i.e., an intermediary between the company which makes the shipment and the final destination for the goods) aids in managing and tracking the shipment of goods.[11] These relationships allow companies to benefit from the extensive knowledge freight forwarders possess; they can arrange the entire process of shippers and negotiate for the best prices and routes.[12] The use of a freight forwarder can allow expert involvement, which could prevent the absence of a Golden Screw from hindering the entire supply chain.

A. Liquidity

Keeping liquidity within the business is a cornerstone in combatting supply chain issues.[13] Access to money allows companies to pay suppliers "cash" during challenging times, rather than relying on credit arrangements or other financing. Liquidity also assists companies in coping with increased freight costs as backlogs occur. Companies which have not put themselves in a financially viable position will not be able to do the same. Companies with deeper pockets can weather the storm thanks to their financial planning. Suppliers will favor the companies with financial resources available because they know they will be compensated. Such liquidity gives companies financial flexibility to receive priority treatment and come out ahead once the supply chain issues are resolved.

B. Demand Forecasting

A focus on demand forecasting can be quite valuable in preventing problems from materializing throughout the supply chain.[14] Demand forecasting, however, can be much easier said than done. Looking at historic trends assists in estimating what future demand will be. The more historical data, the greater the ability to gauge future demand. Having seen what tendencies look like in varying economic situations enables more precise formulations of future demand. Forecasting allows a company to source what is necessary to ensure that demand expectations are met. Simple steps such as keeping enough safety stock (i.e., an extra quantity of product stored in a warehouse to prevent an out-of-stock situation) enable a company to meet demand and be prepared for demand increases. Use of safety stockpiles will vary, but material surpluses protect a company when it has under-forecasted demand.

C. Diversity Sourcing

The ability to diversify sourcing within the supply chain can keep a company from running aground due to the unavailability of a Golden Screw.[15] When a company can acquire parts from multiple suppliers, it creates leverage in negotiating purchase terms. Having multiple supplier relationships is better than reliance on a single supplier. The overreliance on a limited number of third parties precludes a company from having the supply chain resilience that is fundamental to ongoing success.[16] The expected outcomes include a stronger and more flexible supply chain with greater potential for risk and cost mitigation in the future.[17] Versatility in the diversification of suppliers can prove to be the difference in a company surviving an economic downturn that disturbs supply chain flow.

D. Developing/Utilizing Manufacturing Facilities

Companies can develop their own manufacturing facilities to eliminate reliance on third party suppliers. Of course, there can be financial barriers to creating such facilities. However, the ability to manufacture in-house even a portion of the components that

9: *Six Key Trends Impacting Global Supply Chains in 2022.* KPMG (2022), https://kpmg.com/xx/en/home/insights/2021/12/six-key-trends-impacting-global-supply-chains-in-2022.html#:~:text=Driver%20shortages%2C%20logistics%20provider%20capacity,dominated%20discussions%20and%20required%20attention.
10: *Id.*
11: Ashley Brown, *Supply Chain Challenges in 2023 & How to Overcome Them,* Extensiv (Mar. 17, 2022). https://www.extensiv.com/blog/supply-chain-management/challenges
12: *Id.*
13: *Id.*
14: Cesar Brea, Sanjin Bicanic, Yue Li & Shweta Bhardwaj *Predicting Consumer Demand in an Unpredictable World,* Harvard Business Review (Nov. 26, 2020), https://hbr.org/2020/11/predicting-consumer-demand-in-an-unpredictable-world.
15: See Sarah Hippold, *Diversifying Global Supply Chains for Resilience,* Gartner, (Feb. 4, 2021), https://www.gartner.com/smarterwithgartner/diversifying-global-supply-chains-for-resilience.
16: Scott Lang & Ben Jones, *Managing Supply Chain Concentration Risk: 4 Strategies to Increase Resilience,* Prevalent, (May 22, 2023), https://www.prevalent.net/blog/supply-chain-concentration-risk/.
17: *Id.*

are prone to availability issues can substantially improve the company's position. Private facilities can ultimately save a company money and enable it to expedite the acquisition of the Golden Screw. Companies can also utilize their manufacturing facilities to supply the needs of others, which may support the growth of the company.

E. Investment in Technologies

Technological improvements aid companies by strengthening their supply chains.[18] Companies that do not implement modern technological strategies can struggle to compete. Advancements in technology can enable automation of the supply chain, including in warehouses and manufacturing facilities.[19] Currently, artificial intelligence is used to aid in analytics, such as demand forecasting. Artificial intelligence can, and will likely, be used in providing more visibility of the entire supply chain.[20] In other words, as the number of connections and companies/participants within the extended supply chain continues to grow, a company's visibility (e.g., the ability to track different goods and/or products in transit) is becoming more and more difficult. Thus, leading organizations are beginning to use artificial intelligence and other advanced technologies to better track goods in transit and likewise are becoming far more responsive to major disruption and variability within their domestic, regional and global supply chains.

Due to the sheer size of some supply chains, it can be easy for various aspects to get overlooked. Overlooking sections of the supply chain can quickly create a Golden Screw situation. The use and development of modern technology improves the necessary supply chain visibility and enables efficient responses to disruptions throughout the supply chain.[21]

V. Necessary Labor in Workforce

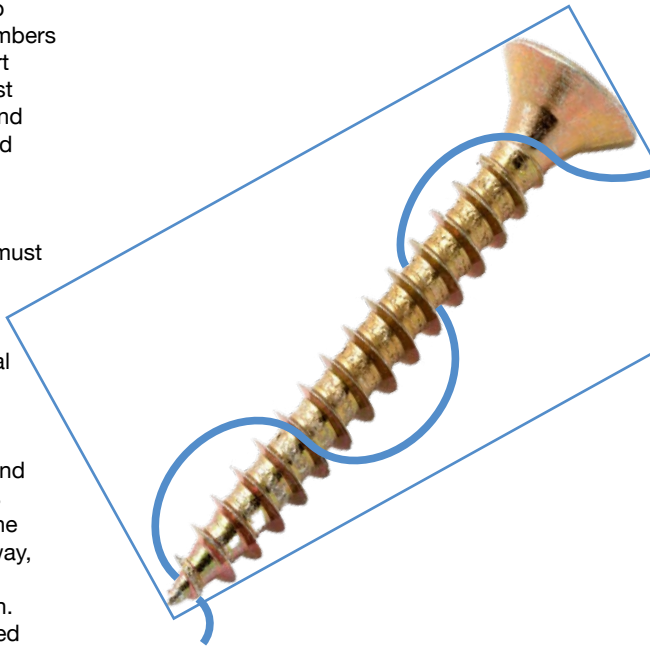
Another issue companies face centers on the workforce and having the necessary labor to continue operations.[22] COVID-19 sparked a major shift in the global work atmosphere. During COVID-19, people reassessed their needs, desires and preferences regarding the work they do, the environment they seek to work in, and the compensation they desire. Companies must adapt to these modern workforce trends in order to remain viable. Adaptation starts with creating a desirable work environment. People will quickly begin to find other employment opportunities when their current work environment is toxic, stagnant or just unsatisfactory.

A company must also be able to assess modern demographics, specifically to include a focus on Generation Z. Members of this generation are increasingly part of the workforce, and companies must implement the necessary recruiting and engagement strategies tailored toward their hiring.[23] While every generation of Americans is unique in the way it thinks and approaches life, today's companies, if they wish to succeed, must understand and successfully recruit members of the younger generation. Successful strategies include remote work, multiple means of digital communications, and emphasizing a healthy work/life balance.

Even though employees are people and not component parts, sometimes it is an individual employee who can be the missing Golden Screw. Put another way, undervaluing employees can quickly create gaping holes in an organization. Retention issues can arise when skilled employees do not desire to stay with the company and seek employment elsewhere. Undervaluing employees also hurts recruiting when it becomes perceived that the company does not value their employees. Likewise, people do not perform their best when their work is not valued. To have the "personnel component" satisfied, companies must create and maintain a desirable work environment. Finding the Golden Screw will not matter if the company lacks the workforce needed to manufacture the product and get it to market.

VI. Conclusion

A Golden Screw may be a small piece in a large, finished product, but a missing piece can cripple production: "For want of a nail, the kingdom was lost." Accordingly, a company must continually assess its supply chain process in its entirety.



18: *Ultimate Guide to Technologies That Are Transforming Supply Chains,* 6 River Systems, (Jan. 18, 2023), https://6river.com/ultimate-guide-to-technologies-that-are-transforming-supply-chains/.
19: *Id.*
20: *Id.*
21: Lang, et al., *supra* note 16.
22: *Six Key Trends Impacting Global Supply Chains in 2022*, *supra* note 9.
23: Jenny Fernandez, Kathryn Landis & Julie Lee, *Helping Gen Z Employees Find Their Place at Work,* Harvard Business Review, (Jan. 18, 2023), https://hbr.org/2023/01/helping-gen-z-employees-find-their-place-at-work.

Navigating Rough Waters:
A Pre-Litigation Compass

By: Alexander S. de Witt
& Joel W. Morgan

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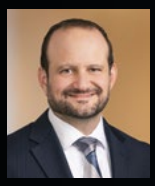

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I. Introduction

By one estimate, more than 40 million lawsuits are filed every year in the United States.[1] As noted by the English poet George Herbert, "[l]awsuits consume time, and money, and rest, and friends."[2] To be sure, lawsuits are often time-consuming, disruptive and expensive, which explains why President Abraham Lincoln famously counseled the legal profession: "Discourage litigation. Persuade your neighbor to compromise whenever you can. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."[3] Inevitably, however, accidents, catastrophes and other injury-producing events beget lawsuits. It is therefore imperative that you (or your business) implement proper measures as soon as possible to assess risk and posture yourself (or your business) for the best possible outcome.

To that end, early retention of counsel can greatly increase the likelihood of a swift, positive outcome following an accident or occurrence. Developing and implementing a proper response and plan during the pre-litigation stage of a claim can be just as critical as the response and plan developed after litigation begins. Depending on the nature of the incident and the type of claim, a proper response may include:

- An early, pre-suit investigation, including interviews of key witnesses and review of relevant documents and data;
- Reviewing all applicable contract documents, including any mandatory arbitration/mediation agreements, as well as any hold harmless/ indemnification clauses;
- Promptly notifying all liability insurers of a potential claim in accordance with the policy terms and conditions;
- Developing and implementing appropriate evidence/data preservation protocols to ensure that all relevant, discoverable facts and data (including electronically stored information ("ESI")) are identified, collected, reviewed and preserved for use in the case and/or production in discovery, if the need arises;
- Early retention of consulting experts who can assist with the pre-suit investigation and evaluation of the claim;
- Evaluating the strengths and weaknesses of the claim alongside any available affirmative defenses, depending on the laws of the relevant jurisdiction; and
- When appropriate, participating in mediation or alternative dispute resolution in an effort to resolve the claim before it proceeds to litigation.

Each case is different and may require consideration of other factors. As discussed below, the benefits of hiring an attorney soon after an accident also include the protections afforded by the attorney-client privilege and work-product doctrine as well as the attorney's knowledge of applicable laws, experience handling similar claims and ability to evaluate the strengths and weaknesses of the claim. If litigation cannot be avoided, early retention of an attorney will help ensure you have made every effort to posture the claim for the best possible outcome.

II. Attorney-Client Privilege and Work-Product Doctrine

One of the primary benefits of hiring an attorney is the attorney-client privilege, which safeguards the client's ability to engage in confidential communications with an attorney. The attorney-client privilege protects "[t]he client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney."[4] Under the Federal Rules of Civil Procedure, privileged communications between the lawyer and client are protected from disclosure in civil litigation and, unless the privilege is waived, will not be discoverable.[5]

Closely related to the attorney-client privilege is the work-product doctrine, which provides for "qualified immunity of an attorney's work product from discovery or other compelled disclosure."[6] As defined by the Federal Rules of Evidence, "work-product protection" means "the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial."[7] The Federal Rules of Civil Procedure extend this protection to "documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or its representative."[8]

These protections are by no means bulletproof. For example, in Pennsylvania (as in most jurisdictions) the "[a]ttorney-client privilege will not ordinarily attach to communications made in the presence of a third party, and disclosing privileged communications to a third party waives the privilege."[9] In Federal litigation (as in many States), privileged or protected material that is inadvertently disclosed may be "clawed back," assuming reasonable steps have been taken to prevent disclosure and to rectify the erroneous disclosure.[10]

Although the work-product protection generally shields documents and tangible things prepared in anticipation of litigation[11] by or for a party's attorney, consultant, insurer, etc., determining when something is done in anticipation of litigation involves a fact-driven analysis. While Federal Rule of Civil Procedure 26(b)(3)(A) expands the protection to include activities performed by non-attorneys, courts have found that retention of counsel is a "highly relevant" factor when determining whether an activity was performed in anticipation of litigation. The work-product doctrine is a safe haven that protects an attorney's mental process so that she or he can properly analyze and prepare the client's case.[12] There is a risk that the protection may be overcome once litigation ensues if the adversary demonstrates the information is otherwise

1: *Top Court Filing Statistics from Around the Country,* One Legal (last visited August 16, 2023), https://www.onelegal.com/blog/top-court-filing-statistics-from-around-the-country/.
2: *Limits of Litigation*, Boston Law Collaborative, LLC (last visited August 16, 2023), https://blc.law/resources/quotes/limits-of-litigation/.
3: *Abraham Lincoln's Notes for a Law Lecture,* Abraham Lincoln Online (last visited August 16, 2023), https://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm (citing The Collected Works of Abraham Lincoln (Roy P. Basler ed., 1953)).
4: *Privilege,* Black's Law Dictionary (11th ed. 2019); *see also* Fed. R. Evid. 502(g)(1).
5: *See* Fed. R. Civ. P. 26(a)(1) ("Parties may obtain discovery regarding any *nonprivileged* matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" (emphasis added)).
6: *Work-Product Rule,* Black's Law Dictionary (11th ed. 2019).
7: Fed. R. Evid. 502(g)(2).
8: Fed. R. Civ. P. 26(b)(3)(A). "Representative" includes a "party's attorney, consultant, surety, indemnitor, insurer, or agent." *Id.*
9: *Sandoz Inc. v. Lannett Co., Inc.*, 570 F. Supp. 3d 258, 265 (E.D. Pa. 2021).
10: Fed. R. Evid. 502(b).
11: *Brown v. Nicholson,* No. 06-5149, 2007 WL 1237931, at *2 (E.D. Pa. Apr. 25, 2007); *see also Garcia v. City of El Centro*, 214 F.R.D. 587, 593 (S.D. Cal. 2003) (explaining that the work product privilege is less likely to apply when "there is no evidence . . . that an attorney was hired at the time of the investigation or that an attorney requested the preparation of a document"); *Fine v. Bellefonte Underwriters Ins. Co.*, 91 F.R.D. 420, 422 (S.D.N.Y. 1981) ("The retention of counsel and his involvement in the generation of investigative reports for the insurance company is a factor in [the] determination [of when activities are performed in anticipation of litigation].").
12: *U.S. v. Nobles*, 422 U.S. 225, 238 (1975).

discoverable and "that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."[13] Demonstrating "substantial need," however, is a difficult burden to meet. As noted by the Advisory Committee when enacting Federal Rule of Civil Procedure 26(b)(3), "the substantial need inquiry 'reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently and that one side should not automatically have the benefit of the detailed preparatory work of the other side.'"[14] A party seeking disclosure of protected work-product materials "must demonstrate that its need is truly substantial, and that there is no reasonable substitute for the documents."[15] In practice, the protections afforded by the attorney-client privilege and work-product doctrine are real and courts will enforce them, subject to limited exceptions. For purposes of evaluating a claim and assessing risk at the pre-litigation stage, these protections generally afford both the attorney and client the flexibility required to properly investigate a claim, interview key witnesses, work with the client's insurers, work with consulting experts, and evaluate the strengths and weakness of a claim without running the risk that the investigation will be discoverable by an adversary. In each case, before undertaking a pre-suit investigation, consult with counsel regarding the specific laws that apply in your jurisdiction, including the protections afforded by the attorney-client privilege and work-product doctrine.

III. Review Contracts to Help Chart the Proper Course

A. Indemnification and Insurance Provisions

Depending on the type of incident and whether a contractual relationship exists between one or more of the involved parties, it is possible that the risk of financial loss (including the cost of defending a liability claim) has already been allocated to another party by an indemnification or hold-harmless clause. For example, it is common for a subcontract agreement between a contractor and subcontractor to contain indemnification language similar to the following:

> To the fullest extent permitted by law, Subcontractor shall indemnify, defend, and hold harmless Contractor, Owner and their officers, employees, consultants and agents from and against all liability, claims, damages, losses, costs, fines and expenses (including attorney's fees and disbursements) caused by, arising out of or resulting from the performance of the Work or the acts or omissions of the Subcontractor, its subsubcontractors or anyone directly or indirectly employed by the Subcontractor or any of its sub-subcontractors or for whose acts the Subcontractor or any of its sub-subcontractors may be liable; provided that any such liability, claim, damage, loss, cost, or expense is caused, in whole or in part, by [such] negligent act or omission[.][16]

The same subcontract agreement may also contain terms which require the subcontractor to maintain primary liability insurance coverage which protects the contractor, owner, etc., in the event of a loss, such as the following:

> Prior to starting Subcontract Work, Subcontractor, at its own expense, shall procure and maintain in force on all of its operations, primary insurance coverage in accordance with attached 'Exhibit B.' Subcontractor shall provide the Contractor with a Certificate of Insurance detailing the coverage referenced in 'Exhibit B' within thirty (30) days after signing this agreement or performing work on the site . . . Contractor and such additional persons and entities as may be specified . . . shall be named as additional insureds on said policies, as shall any person or entity which Contractor is required to insure by the Contract Documents[.][17]

Thus, in the event of a loss or accident, it is crucial to review all applicable contract documents early for the presence of indemnification and insurance provisions like those cited above, so that all potentially responsible parties and insurers can be notified accordingly.

13: Fed. R. Civ. P. 26(b)(3)(A)(ii).
14: *Rivera v. ALTEC, Inc.,* No. 3:21-CV-132 (GROH), 2023 WL 3097204, at *5 (N.D. W. Va. Apr. 26, 2023) (citing *Sanford v. Virginia,* No. 3:08cv835, 2009 WL 2947377, at *2 (E.D. Va. Sept. 14, 2009)).
15: *Id.* (quoting *Sanford,* 2009 WL 2947377, at *2).
16: *Sheerin v. Tutor Perini Corp.,* No. 1:18-CV-7952-ALC-SLC, 2022 WL 992917, at *3 (S.D.N.Y. Mar. 31, 2022).
17: *Id.* at *4.

B. Arbitration (Binding Dispute Resolution)

Contract documents should also be reviewed early in order to determine if arbitration may be available (or mandated) as an alternative to litigation. The United States Supreme Court has described an arbitration agreement as "a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute."[18] To illustrate, a typical arbitration agreement between parties to a construction contract may provide in part:[19]

> If the Contractor and Subcontractor have selected arbitration as the method of binding dispute resolution …, any claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of this Agreement.

As a general matter, valid agreements to arbitrate governed by the Federal Arbitration Act will be upheld and enforced, notwithstanding conflicting or contrary state laws.[20]

Compared with litigation, the benefits of arbitration may include: a faster, more efficient method of dispute resolution; a decision by an arbitrator (or panel of arbitrators) rather than a jury; the elimination of time-consuming discovery and pretrial motions practice; and ultimately significant cost savings for all parties. Questions may arise as to whether a specific arbitration agreement is valid, or whether a particular dispute or claim falls within its scope. And even where arbitration is available, the right to demand arbitration can be waived if the party who seeks to compel it fails to adhere to the terms of the agreement, or engages in conduct which is deemed inconsistent with the right to demand arbitration.[21] Counsel should be engaged as early in the process as possible to properly evaluate whether an enforceable arbitration agreement exists and applies to a particular claim and, if so, take appropriate steps to protect and preserve your right to demand arbitration.

IV. Shelter from the Storm: Insurance

Another important pre-litigation consideration is liability insurance. In the event of an accident or occurrence which may result in a claim, it is imperative that an insured promptly notify all potential liability insurers. Depending on the type of incident, this could include motor vehicle liability, business liability, commercial general liability ("CGL"), professional liability, worker's compensation and/or umbrella or excess liability insurers.[22] To illustrate, the typical CGL policy contains the following condition:

a: You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:

1: How, when and where the "occurrence" or offense took place;
2: The names and addresses of any injured persons and witnesses; and
3: The nature and location of any injury or damage arising out of the "occurrence" or offense.

b: If a claim is made or "suit" is brought against any insured, you must:

1: Immediately record the specifics of the claim or "suit" and the date received; and
2: Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or suit as soon as practicable.[23]

The obvious advantage to providing your liability insurer with prompt notice of an accident or occurrence is the financial protection afforded for covered claims—including the cost of defense counsel and indemnity payments (up to the policy limit) in the event of a settlement or (if the claim proceeds to suit) any judgment for damages. Failure to provide the insurance company with prompt notice of an accident or occurrence could jeopardize coverage and result in the loss of this protection.[24] It is therefore imperative that you review your policy and provide timely notice to your insurance company. If you have questions about reporting a loss or claim, specific policy requirements, or the coverage(s) provided by your policy, we recommend contacting your insurance professional, agent or broker and/or consulting with counsel.

V. Proceeding Above Board: Preservation of Evidence

When litigation is reasonably foreseeable or anticipated, it is critical to develop and implement appropriate pre-litigation measures to preserve evidence that may be relevant to any party's claim or defense if litigation ensues. Failure to do so could result in game-changing consequences, including the imposition of sanctions or an adverse jury instruction against the party responsible for "spoliation" of evidence.[25]

Spoliation occurs when evidence in your custody or control that is germane (or even potentially germane) to an incident is destroyed or otherwise not preserved, and the destruction or lack of preservation interferes with the adverse party's ability to establish its claim or defense.[26] Spoliation also encompasses "significant alteration of evidence."[27] A party's obligation to preserve evidence for use in litigation arises not only when litigation is pending, but also when litigation becomes "reasonably foreseeable."[28] Where "a party *intentionally* destroys evidence, the trial court may exercise its discretion to impose sanctions on the responsible party."[29] Many jurisdictions have also found spoliation can occur if a party "negligently breached its duty to preserve potentially discoverable evidence."[30] Some jurisdictions have recognized a separate cause of action for spoliation, even against a nonparty to the underlying claim.[31]

In some instances, continued preservation may not be possible. For example, a fire scene may not be able to be preserved due to the risk of a structural failure. In such a situation, all potential parties should be notified immediately and given an opportunity to inspect, if possible. Care should also be taken to document, as

18: *Viking River Cruises, Inc. v. Moriana,* 142 S. Ct. 1906, 1919 (2022).
19: *Navigators Specialty Ins. Co. v. Jangho Curtain Wall Americas Co., Ltd.,* No. A-4222-19T4, 2020 WL 7239599, at *1 (N.J. Super. Ct. Dec. 9, 2020).
20: *Viking River,* 142 S. Ct. at 1917 ("[T]he FAA preempts any state rule discriminating on its face against arbitration—for example, a law prohibiting outright the arbitration of a particular type of claim." (cleaned up)).
21: *See, e.g., Morgan v. Sundance, Inc.,* 142 S. Ct. 1708 (2022).
22: You should also determine whether the incident or occurrence must be reported to any state or federal governmental agency, such as the Occupational Safety and Health Administration (OSHA).
23: Susan J. Miller & Phillip Lefebvre, 1 Miller's Standard Insurance Policies Annotated, CG 00 01 04 13, col. I, GL-15, at 402a (6th ed. 2014).
24: *See, e.g., Mt. Hawley Ins. Co. v. E. Perimeter Pointe Apartments,* 861 F. App'x 270, 277 (11th Cir. 2021) (unpublished) ("When it comes to an insured's adherence to notice provisions, Georgia case law is quite settled. Insurance companies aren't obligated to defend an insured or provide coverage if the insured unreasonably failed to comply with a conditional notice requirement."); *Nationwide Prop. & Cas. Ins. Co. v. Hutcheson,* No. 2:20cv543, 2021 WL 5412274, at *3 (E.D. Va. Oct. 15, 2021), appeal dismissed, 2021 WL 8444873 (4th Cir. Nov. 30, 2021) ("Virginia courts have held that policy provisions that require notice of an accident or occurrence be given 'as soon as practicable' are enforceable and are construed as conditions precedent to performance of the contract" and "[a]s such, noncompliance with such a condition bars recovery.").
25: *R.F.M.A.S., Inc. v. So.,* 271 F.R.D. 13, 23 (S.D.N.Y. 2010) ("Although a party must of course preserve any evidence requested in discovery, the duty to preserve relevant evidence attaches well before this. The obligation first arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." (internal quotation marks and citation omitted)).
26: *Emerald Point, LLC v. Hawkins,* 294 Va. 544, 556, 808 S.E.2d 384, 391 (2017).
27: *Graff v. Baja Marine Corp.,* 310 F. App'x 298, 301–02 (11th Cir. 2009) (finding that removal and destructive metallurgic testing of the "critical piece of evidence" without notifying the defendant constituted spoliation).
28: *Athay v. Washington,* No. 3:22-CV-5422-JHC-DWC, 2023 WL 3892328, at *4 (W.D. Wash. June 8, 2023).
29: Coastal Bridge Co., v. Heatec, Inc., 833 F. App'x 565, 573 (5th Cir. 2020) (per curiam).
30: *E.g., Kounelis v. Sherrer,* 529 F. Supp. 2d 503, 519 (D.N.J. 2008).
31: *Gribben v. Wal-Mart Stores, Inc.,* 824 N.E.2d 349, 353–54 (Ind. 2005) ("Several jurisdictions, including West Virginia, Alaska, Montana, the District of Columbia, Illinois, New Mexico, and Ohio, recognize evidence spoliation as a cognizable tort . . . . But several other jurisdictions considering the issue, among them Florida, Mississippi, Arkansas, California, Iowa, Texas, Alabama, Georgia, Kansas, and Arizona have rejected spoliation as an independent tort.")

thoroughly as possible, all aspects of the evidence through photographs, video or other means, before the evidence is altered or destroyed. If a party subsequently asserts spoliation, the court will consider efforts made by the party attempting to preserve the evidence and the opportunity to inspect afforded to the parties in determining whether to sanction that party and the extent of any sanction.

Where litigation is reasonably anticipated, the pre-litigation duty to preserve evidence applies not only to documents and tangible things, but also to ESI. The Federal Rules of Civil Procedure provide in part:

> If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> **(1)** upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
> **(2)** only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> **(A)** presume that the lost information was unfavorable to the party;
> **(B)** instruct the jury that it may or must presume the information was unfavorable to the party; or
> **(C)** dismiss the action or enter a default judgment.[32]

Under this Rule, when deciding the threshold question of whether ESI has been "lost," courts may consider three questions: "(a) did the discoverable ESI exist at the time a duty to preserve arose, (b) did the party fail to take reasonable steps to preserve the ESI, and (c) is the evidence irreplaceably lost?"[33] If the answer to any of these questions is no, that ends the inquiry. But if the answer to each question is "yes," the court will then determine whether the loss of ESI was prejudicial to the party seeking its discovery, and whether the responsible party "acted with the intent to deprive another party of the information's use in the litigation," thereby warranting sanctions.

For anyone facing a potential lawsuit, the bottom line is that the risks associated with defending a spoliation motion can be eliminated at the pre-litigation stage of the case through early development and implementation of reasonable measures for identifying, collecting, and preserving evidence and communicating with any affected party before any potentially destructive testing is conducted. We highly recommend that counsel be retained early to assist with this important pre-litigation task.

VI. Selecting a Technical Officer: Consulting Experts

Where feasible, early involvement of consulting experts can be a critical component to properly evaluating risk and case value as well as preparing a defense in the event litigation ensues. In the typical case, the elements of a potential claim will involve such questions as breach of duty, causation, and damages, each of which may require input from a qualified expert. For example, understanding why a product failed or why a fire started may warrant early retention of an engineer or fire investigator. Likewise, assessing whether an alleged injury or disability was caused by an accident (for which you may be liable), as opposed to a pre-existing medical condition, may warrant early retention of a medical expert. Early risk assessment with input from a consulting expert can be crucial to making informed decisions regarding the proper handling of a claim, including whether a claim should be settled or defended.

Ideally, the early retention of a consulting expert is a decision that should be made following consultation with your attorney and any liability insurer. We recommend that any consulting expert be hired and consulted through counsel in order to maximize the protections afforded by the attorney-client privilege and work-product doctrine along with the trial preparation protections generally afforded to consulting experts where litigation is reasonably anticipated.[34] And where a consulting expert is retained to inspect, test or sample evidence, proper protocols should be developed and implemented to ensure that any "destructive" testing occurs in the presence of all parties and only after all interested parties, including potential litigants and their insurers, have been provided with proper advance notice and the opportunity to inspect the evidence. This will help to avoid any argument in the ensuing litigation that you are responsible for "spoliation" of evidence.

VII. Mending the Hull: Subsequent Remedial Measures

After an accident, you or your business may want to make repairs or perform other remedial measures to ensure that a similar accident does not occur again, but you may have concerns that such measures will be used as evidence against you in a lawsuit filed by the injured party. The short answer is that although evidence of subsequent remedial measures is generally inadmissible to establish liability, it may be admissible for other more limited purposes. It is important to review the specific facts of your case (and the laws of your jurisdiction) with an attorney before making repairs or taking other remedial actions.

This is a frequently litigated issue. If a manufacturer modifies the design of its product to ensure its safe use in the future *after* the product has failed and caused an accident, is the post-accident remedial measure admissible to prove a defect in the product or its design? If the owner of a store repairs an apparent tripping hazard to protect future customers from injury *after* a patron has already tripped and fallen, is the post-accident repair admissible to prove the store owner was negligent? In Federal cases, the general answer is no. As noted by one court, "[i]n general, evidence of remedial measures is not discoverable or admissible to prove culpability in negligence cases."[35] The Federal Rules of Evidence provide:

> When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:
>
> - negligence;
> - culpable conduct;
> - a defect in a product or its design; or
> - a need for a warning or instruction.
>
> But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.[36]

Again, each case is unique and must be evaluated based on its own specific facts and the law of the applicable jurisdiction.

32: Fed. R. Civ. P. 37(e).
33: Athay, 2023 WL 3892328, at *3.
34: *See* Fed. R. Civ. P. 26(b)(4).
35: *Klosin v. E.I. Du Pont De Nemours & Co.,* No. 1:19-CV-00109-EAW-MJR, 2023 WL 2851704, at *3 (W.D.N.Y. Feb. 14, 2023), report & recommendation adopted, 2023 WL 2342288 (W.D.N.Y. Mar. 3, 2023).
36: Fed. R. Evid. 407.

Early retention of counsel can be the key to minimizing the risk that subsequent remedial measures may be admitted as evidence in any future lawsuit. Additionally, as discussed in the preceding section, care should be taken to avoid "spoliation of evidence" when undertaking any post-accident repairs or other remedial measures, to the extent that litigation is reasonably anticipated, and such repairs or other measures would involve alteration or modification of potentially relevant evidence.

VIII. Pre-Litigation Communications

Another important pre-litigation consideration is communications—verbal, written, and electronic. Simply put, if relevant to a party's claim or defense, what you say before a lawsuit may be admissible (and potentially used against you) as evidence. For example, under the Federal Rules of Evidence, one party can introduce an opposing party's statement into evidence in order to prove the truth of the matter asserted.[37] Additionally, statements against interest—defined as a statement that is "so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability"—may also be admissible, even if the statement would otherwise be excluded as hearsay.[38] The point here is that after an accident, your words (and the words of your employees) may matter if litigation ensues. For this reason, early involvement of an attorney who can provide guidance and counseling regarding your post-accident response and communications is crucial.

IX. Early Case Evaluation and Settlement Opportunities

As detailed above, the pre-litigation phase of a case may involve many complexities and considerations. At bottom, the goal in each will be to assess your potential exposure (or your liability insurer's potential exposure) and minimize risk. How that will be achieved will depend on several factors, including the specific facts of the loss or incident, the laws of your particular jurisdiction, and feedback received from your attorney, insurance company and any consulting experts. Because litigation is time-consuming, expensive and can be disruptive to a business, there may be a benefit to exploring early settlement. Often, the liability insurance company has the right under the terms of the policy to make decisions regarding settlement, and therefore will handle settlement discussions with the claimant or claimant's attorney. Occasionally, it may be more prudent to handle those discussions in the context of a mediation or settlement conference, with the assistance of a third-party neutral, especially where a claim involves more complexity or higher exposure. All discussions that occur during a mediation are confidential and (with limited exceptions) cannot be used as evidence in litigation.[39] Mediation can present an opportunity to learn more about your opponent's case, evaluate the strengths and weakness of each party's position, and determine whether the benefits of a potential settlement outweigh the anticipated risks of future litigation.

X. Getting Underway

The prospect of litigation often can be overwhelming. But as Mark Twain famously counseled: "The secret of getting ahead is getting started. The secret of getting started is breaking your complex overwhelming tasks into small manageable tasks, and starting on the first one."[40] In the event of an accident which may result in a lawsuit, we recommend that you get started by consulting an attorney who can assist with developing and implementing an appropriate pre-litigation plan and response, posturing a claim for the best possible outcome.

37: Fed. R. Evid. 801(d)(2).
38: Fed. R. Evid. 804(b)(3)(A).
39: *See* Fed. R. Evid. 408.
40: *Available at* https://www.goodreads.com/quotes/219455-the-secret-of-getting-ahead-is-getting-started-the-secret.

Pre-Litigation Roadmap

1 ACCIDENT

2 EARLY RETENTION OF COUNSEL

3 REVIEW OF CONTRACTS AND INSURANCE POLICIES

- *Counsel can assist in this process*
- Notify all insurance carriers and potentially affected parties
- Is arbitration available or required?

4 PRESERVE EVIDENCE AND DATA

- Preserve all evidence and data germane or potentially germane to a lawsuit
- Provide parties or potential parties an opportunity to inspect
- Avoid alteration or destruction of the evidence
- Is there electronic data that needs to be preserved?

5 IDENTIFY WITNESSES AND CONDUCT WITNESS INTERVIEWS

- *Consideration should be given to attorney-client and work product protections*
- Who has knowledge or information relating to the accident and what knowledge or information do they possess?
- Ensure accurate and current contact information of any witness, especially non-employees

6 REVIEW OF DOCUMENTS AND DATA

- Do the documents/data reveal any information relating to liabilty or damages and, if so, what do they show?

7 RETENTION OF CONSULTING EXPERTS

- Do the facts support the retention of an expert?
- What expertise is needed (e.g. structural engineering, orthopedic physician)?
- Can the consulting expert ultimately serve as a trial expert?

8 EVALUATE AND ANALYZE THE CLAIM

- Once all the facts and data have been investigated and preserved, the claim can then be evaluated
- The laws of the particular jurisdiction should be reviewed and considered
- Should early settlement or an early mediation be considered?

Planes, Trains & Now...Drones: Aerial Delivery Services & the Developing Legal Troposphere

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I. Introduction

The year is 2033. It's thirty minutes past noon, and you just remembered that today is your aunt's birthday. Unfortunately, she lives about 100 miles away in a rural area. You quickly buy a gift from a nearby store and make your way to the local post office. At one of the kiosks, you choose "Same-Day Delivery." A few hours later, your aunt is pleasantly surprised by a drone that has delivered your package to her doorstep. Advanced drone delivery has saved the day.[1]

Of course, the future isn't now. Still, even in their relative infancy, drones have already impacted nearly every sector of our economy, ranging from healthcare to real estate, sports and news, among countless others. Since 2016, when the Federal Aviation Administration ("FAA") formally adopted regulations governing the use of small, unmanned aircraft systems, many have predicted that delivery drones will soon dominate the skies.[2] The public and private sectors have responded with significant investments in drone delivery.[3] And many private companies now hold FAA air carrier certificates.[4]

Despite its growing theoretical acceptance, advanced drone delivery continues to face legal headwinds in the United States.[5] The legal process will surely be invoked when delivery companies try to find smooth air to resolve or avoid private landowners' airspace-rights claims because an *effective* service will involve hundreds and probably thousands of private air spaces. Without permission from landowners, the entity operating the drone may be liable for trespass, nuisance, or violations of other jurisdiction-specific statutory or common law rights. Drone delivery companies may face an incalculable number of lawsuits spanning several jurisdictions, or worse, uncontrolled interdiction or disruptive acts by landowners.[6,7]

Solutions to these issues must be as nimble and efficient as the immediate problem. A key element will inevitably require the clarification and, if necessary, modification of landowners' airspace rights for drone delivery to withstand the legal turbulence. To that end, this article first analyzes the current legal landscape for low airspace rights. Next, the article explores how courts may eventually modify landowners' private rights.[8] Finally, this article explores legal "airways" for advanced drone delivery to take flight, change our economy and change our world.

II. Cleared for Takeoff?: The *Causby* Decision and Landowners' Low Airspace Rights

To understand the current legal landscape regarding drone delivery, one must begin with the seminal United States Supreme Court decision, *United States v. Causby*.[9] Mr. and Mrs. Causby owned a chicken farm in 1940s North Carolina.[10] Beginning in 1942, the United States Military began using a nearby airport.[11] Given the location of the runway, planes constantly passed over the Causbys' farm, with some flying as low as 18 feet above the highest tree.[12] The noise from the planes killed many of the chickens, which eventually led to the farming operation shutting down.[13] The Causbys brought suit, arguing that the government's use of the airport and collateral destruction of their business amounted to a compensable taking under the Fifth Amendment.

In a landmark ruling the Supreme Court disagreed, holding that landowners do not hold indefinite airspace rights in the sky above their land.[14] Instead, those rights end where navigable airspace begins.[15] After *Causby*, landowners' interests extend only to the "immediate reaches" of space directly above their land,[16] including "at least as much of the space above the ground as the[y] can occupy or use in connection with the land."[17] The Court reasoned that the age-old *ad coelum* rule had "no place in the modern world" where the public interest of commercial air travel outweighs the rights of private landowners.[18]

As expected, and intended, *Causby* cleared many of the legal hurdles facing the commercial aviation industry in the United States. Without *Causby*, airlines would have to negotiate voluntary aviation easements with thousands (or millions) of landowners to legally complete cross-country flights.[19] This would have heavily restricted the commercial aviation industry.[20]

While the Supreme Court's redefining of landowners' rights cleared the way for commercial air travel, it did not provide a functional airway for drone delivery. Small, unmanned aircraft systems, including advanced drone delivery services, fly *below* commercially navigable airspace.[21]

1: For purposes of this article, "advanced drone delivery" means commercial and government aerial delivery services and logistics networks composed of unmanned aircraft systems ("UAS").
2: See Troy A. Rule, *Drones, Airspace, and the Sharing Economy,* 84 Ohio St. L. J. 157, 157–60 (2023) (observing that powerful companies continue to push for greater utilization of drones while recognizing that existing property laws present a "major obstacle"); *see also* Agence France-Presse, FAA: *Number of US Drones Will Triple by 2020*, IndustryWeek (Mar. 25, 2016), https://www.industryweek.com/technology-and-iiot/article/21972014/faa-number-of-us-drones-will-triple-by-2020 (predicting that 2.7 million commercial drones would be operating in the United States by 2020).
3 *See* Package Delivery by Drone (Part 135), Fed. Aviation Admin., https://www.faa.gov/uas/advanced_operations/package_delivery_drone (June 21, 2022); *see also* Annie Palmer, *Amazon Wins FAA Approval for Prime Air Drone Delivery Fleet,* CNBC (Aug. 31, 2020), https://www.cnbc.com/2020/08/31/amazon-prime-now-drone-delivery-fleet-gets-faa-approval.html;Nicholas Shields, *Walmart Is Exploring Blockchain for Drone Delivery,* Bus. Insider (Sept. 5, 2018), https://www.businessinsider.com/walmart-blockchain-drone-delivery-patent-2018-9.
4: *See, e.g.,* UPS's Flight Forward®, Amazon's PRIME AIR™ and Alphabet's (Google) Wing Aviation, LLC™. Wing was the first drone delivery company to receive an Air Operator's Certificate from the FAA. Also in 2019, the United States Postal Service began exploring using of drones to deliver mail and collect data.
5: For example, as recently as February 2023, the FAA severely restricted Amazon's PRMEAIR service from engaging in drone delivery in designated beta sites in California and Texas. See Lakshmi Varanasi & Katherine Long, *Amazon's Prime Air Reportedly Has Only Made A Handful of Drone Deliveries, as FAA Restrictions Have Thwarted Widespread Use,* Bus. Insider (Feb. 2, 2023), https://www.businessinsider.com/faa-restrictions-are-curtailing-amazons-drone-delivery-program-2023-2.
6: Counter-drone technology or "C-UAS," is presently available for military use. As concerns mount around the potential security threats drones may pose, a new civilian C-UAS market is rapidly emerging. Arthur H. Michel, *Counter-Drone Systems: 2nd Edition,* Ctr. for the Study of the Drone (Dec. 2019), https://dronecenter.bard.edu/projects/counter-drone-systems-project/.
7: This article cannot address every possible obstacle, including those appearing in the underlying federal regulations. *See, e.g.,* 14 C.F.R. Pt. 107, et seq. (2021). For example, the UAS-related limitations prohibit or restrict "out-of-sight" operation, certain multi-drone operations, flights over people, and night-time operations. Further complications exist in the regulatory framework's nebulous, ill-defined waiver allowance for "most" restrictions. *Id.; see also* FAADroneZone, Fed. Aviation Admin., https:www.faadronezone.faa.gov/ (last visited Aug. 15, 2023).
8: Congressional or administrative action, including further definitions of landowners' rights, would certainly present an operating framework within which the Court might provide further guidance. This article does not explore every potential statutory or regulatory option available to Congress.
9: 328 U.S. 256 (1946).
10: *Id.* at 258.
11: *See id.*
12: *See id.* Current FAA regulations restrict UAS flight to a maximum of 400 feet above ground unless waiver is specifically granted. 14 C.F.R. § 107.51(b) (2016).
13: *See Causby,* 328 U.S. at 259.
14 *See id.* at 260–61.
15: *See id.* at 260–61. This was a departure from the centuries-old English common law rule of *cujus est solum, eius est usque ad coelum et ad inferos*, meaning that landowner own all the airspace above their property up to the heavens. *See id.* at 260–61 (citing 1 Coke, Institutes, 19th Ed. 1832, ch. 1, s 1(4a); 2 Blackstone, Commentaries, Lewis Ed. 1902, p. 18; 3 Kent, Commentaries, Gould Ed. 1896, p. 621).
16: *See id.* at 264.
17: *See id.*
18: *See id.* at 261.
19: *See* Rule, *supra* note 1 at 162–63 (citing Stuart Banner, *Who Owns the Sky?: The Struggle to Control Airspace from the Wright Brothers On* 291–93 (2008) (describing the potential transaction cost problems associated with manned aviation in navigable airspace)).
20: *See id.*
21: See *supra* note 12.

This means that drones often operate in airspaces that remain controlled by the landowners beneath them. Consequently, advanced drone delivery now faces the same conundrum as the commercial airspace industry did pre-*Causby*. Without a shift in the current legal airspace or some other congressional action, drone operators may need to purchase easements from virtually every landowner along a designated delivery route. For drone delivery to truly reach cruising altitude, another reimagining of landowners' airspace rights is necessary.[22]

III. For the Good of the Public: Judicial Co-Piloting

Though *Causby* solidified landowners' low airspace rights, it also established a framework for how courts might modify these rights to accommodate future technologies. Accordingly, the time is quickly approaching when courts will be called on again to balance landowners' rights with the public interest in commercial air travel, including low airspace.

We submit that advanced drone delivery will have a profound and positive impact on our economy. Several leading researchers posit that consumers (including your aunt) will enjoy faster delivery times for packages, which will translate to reduced shipping costs.[23] This should, in turn, result in a sales boost for retailers.[24] Drones will have a dramatic impact on so-called "last-mile delivery," or the movement of goods from a transportation hub to their final destination.[25] This is by far the most expensive leg of any package's journey.[26] Indeed, it can amount to 50% of the total costs of distribution.[27] Drones will "optimize last-mile delivery by transporting packages from nearby warehouses or distribution centers to a specific address."[28] This would affect both manufacturers and shippers. For example, UPS estimates that using drones could save the company up to $50 million by eliminating just one mile from delivery routes.[29]

Advanced drone delivery will benefit the environment as well. The World Economic Forum estimates a 36% increase of delivery vehicles on the roads by 2030,[30] with an additional estimated 6 million tons of CO_2 emissions.[31] The use of small drones instead of large gas and diesel-powered vehicles will greatly reduce greenhouse gases emitted from the freight sector.[32] Replacing many of these vehicles will presumably result in less traffic congestion, less wear and tear on road infrastructure and fewer accidents, each of which could potentially reduce burdens on the entire legal system.

IV. Legal "Airways" and Our Estimated Time of Arrival

We submit that the cumulative benefits of drone delivery are massive and far reaching. One may reason, like the Court in *Causby*, that these benefits outweigh any individual right that would inhibit them. A future Supreme Court could hold, for example, that a landowner maintains the right to exclude any aerial objects from their "immediate" airspace ***except*** for delivery drones.

Though we cannot predict what technologies public and private entities will create to provide this solution or how the Court may view those, *Causby* suggests that technological advancement and equity are not always competing interests. For example, courts may apply *Causby* and determine that existing (or future) technology allows landowners to receive notification of potential airspace encroachment by the government. Other presently existing technologies such as "geofencing"[33] and Low Altitude Authorization and Notification Capability[34] may afford government entities and/or landowners the ability to restrict airspace in novel, judicially sanctioned ways. These potential solutions will allow landowners to protect their property from "peeping Toms" or other nefarious drone users, while clearing the way for drone delivery. Balancing the public and private interests in airspace-rights suits will take time considering the number of potential constitutional challenges that arise when the government expands control over common technologies.[35]

V. Conclusion

As the benefits of advanced drone delivery become clearer, courts may be more willing to modify landowners' low airspace rights. But they can only go so far. Without congressional or administrative action, the resulting "patchwork" application of *Causby* and its progeny may ground advanced drone delivery for the time being.

22: Though the public import of liberal low airspace rights seems clear, in 2021 the Supreme Court reaffirmed *Causby's* holding protecting landowners' rights to exclude objects from the airspace immediately above their properties in *Cedar Point Nursery v. Hassid,* 141 S. Ct. 2063 (2021) (regulation giving labor organizations access to employer's land to solicit union support effected a per se physical taking). *Hassid* suggests the Court may be hesitant to place any restrictions on landowners' low airspace rights any time soon.
23: *See Delivery Drones Are Taking Off,* Supply Chain Game Changer (Mar. 28, 2023), https://supplychaingamechanger.com/delivery-drones-are-taking-off-infographic/.
24: *See id.*
25: *See id.*
26: *See id.*
27: *See id.*
28: *See id.*
29: *See id.*
30: World Economic Forum, *The Future of the Last-Mile Ecosystem* (Jan. 2020), https://www3.weforum.org/docs/WEF_Future_of_the_last_mile_ecosystem.pdf.
31: Jack Stewart, *If You Think Delivery Trucks Contribute to Road Congestion Now . . . Just Wait* (Jan. 15, 2020), https://www.marketplace.org/2020/01/15/if-you-think-delivery-trucks-contribute-to-road-congestion-now-just-wait/.
32: *See supra* note 23; see also J. Stolaroff, C. Samaras, E. O'Neill, A. Lubers, A. Mitchell, & D. Ceperley, *Energy Use and Life Cycle Greenhouse Gas Emissions of Drones for Commercial Package Delivery*, Nature Comms. (Feb. 13, 2018) (analyzing the overall net benefit of replacing gas and diesel powered vehicles with small drones on the environment), https://www.nature.com/articles/s41467-017-02411-5; Jean-Philippe Aurambout, Konstantinos Gkoumas & Biagio Ciuffo, *Last Mile Delivery by Drones: An Estimation of Viable Market Potential and Access to Citizens Across European Cities,* Eur. Transp. Res. Rev. 11, 30 (June 20, 2019) (describing potential economic and social cost advantages of using drones for "last mile delivery" services, including reduced labor, delay, and congestion costs), https://etr.springeropen.com/articles/10.1186/s12544-019-0368-2.
33: Geofencing is the enforcement of virtual restrictions on drones using a combination of Global Positioning Satellites, Wi-Fi, Radio Frequency Identification, and internal software applications.
34: Low Altitude Authorization and Notification Capability uses desktop and mobile apps designed to support the volume of drone operations conducted in proximity to FAA Air Traffic Control facilities in near real-time. Drone pilots planning to fly in controlled airspace around airports must receive pre-flight authorization.
35: *See, e.g., Barr v. American Ass'n. of Political Consultants, Inc,* 140 S. Ct. 2335 (2020) (First Amendment challenge to electronic "robocall" restrictions); *Brown v. Entertainment Merchants Ass'n.,* 564 U.S. 786 (2011) (First and Fourteenth Amendment challenge to state law prohibiting sale or rental of "violent video games" to minors).

Leveraging the UCC for Sellers

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I. Introduction

For sellers of goods, it is all but impossible to escape the reach of the Uniform Commercial Code ("UCC") because its Article 2 applies to sales of goods. The UCC contains several buyer-friendly provisions (including certain warranties that are, by default, implied with most transactions), and also provides sellers with tools to limit their exposure in commercial disputes and cases. Breach-of-warranty claims are an obvious area of liability for sellers in commercial cases, but the UCC provides sellers with many tools to restrict such liability, including limiting express warranties, disclaiming implied warranties, limiting available remedies, shortening the applicable statute of limitations, and choosing the governing law. This article describes these tools as well as the UCC's required "pre-suit notice" of an alleged breach of warranty.

II. Limiting Express Warranties

Understanding what an express warranty is and how one is created can help a seller ensure that it does not unintentionally create express warranties. An express warranty includes representations about the quality or specification of the goods. More specifically, under the UCC, a seller creates an express warranty when it:

A. Provides an affirmation of fact or a promise about the good

B. Describes the good

C. Identifies a sample or a model as representative of the good[1]

This may be a claim that a smartwatch can be worn for three days without charging or that tires will last 15,000 miles. Express warranties can go beyond just verbal representations. If a seller places a model product on its showroom floor, that model can create an express warranty that the same "off the shelf" product that is actually sold will be the same quality and type as the sample the buyer saw on the floor.

The UCC nonetheless provides that an "affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."[2] Courts distinguishing such statements of opinion from express warranties often call opinion statements "puffery."[3]

Many sellers may wonder if they can just disclaim express warranties altogether so that stray remarks about a particular product are not later deemed to be express warranties. Yes, a seller can disclaim an express warranty (so long as it is consistent with any words or conduct that created the express warranty),[4] but sellers should be mindful of the representations they are making about their goods. Courts can be skeptical of sellers invoking a general warranty disclaimer as a defense to a breach of warranty claim when a specific product representation is found elsewhere in marketing materials or on packaging.

For example, the District Court for South Dakota acknowledged that the defendant's incorporation of product specifications into a given contract meant that those specifications were express warranties.[5] The court found that, as a result, it would be unjust to allow the defendant "to escape its obligation with regard to them" by relying on a general disclaimer of warranties.[6] Because the court found "no reasonable interpretation of the disclaimer such that both the product specifications and disclaimer remain operative," the court held that the more specific provision containing the production description must be given effect over the more general disclaimer of warranties.[7] *See id.*

As this case illustrates, courts are unlikely to permit a seller to give an express warranty and then take it away with a general warranty disclaimer. Instead, sellers should be careful to select language that describes their products while still avoiding creating an undesired express warranty.

III. Disclaiming Implied Warranties

Unlike express warranties, which are created by the seller, implied warranties exist by default under the UCC. That does not mean sellers are powerless.

There are two types of implied warranties that may arise in general commercial sales. "[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."[8] And if a seller knows the buyer has a particular purpose that requires the goods and is relying on the seller's judgment to select those goods, there is an implied warranty of fitness for a particular purpose.[9]

The UCC permits a seller to disclaim those warranties, but to ensure its disclaimers are effective sellers should be mindful of the requirements the UCC imposes for such disclaimers with different types of implied warranties.

A seller can exclude or modify the implied warranty of merchantability, so long as it mentions merchantability as part of the disclaimer and, if in a writing, makes the disclaimer "conspicuous."[10] Similarly, a seller can exclude an implied warranty of fitness for a particular purpose so long as it is in a "conspicuous" writing.[11]

"Conspicuous" is defined by the UCC as something written in such a way that "a reasonable person against which it is to operate ought to have noticed it."[12] Under the UCC, "[w]hether a term is 'conspicuous' or not is a decision for the court."[13] But the UCC does suggest that size, contrasting font or color, or the space or placement of text are all to be considered in making that determination.[14]

The UCC also permits blanket disclaimers of implied warranties as a general matter, but a seller typically has to do more than simply say that "there are no implied warranties." For example, sellers can typically exclude implied warranties with language like "as is" or "with all

1: *See* UCC § 2-313.
2: *Id.*
3: *See Kovalev v. Lidl US, LLC,* CV 21-3300, 2022 WL 17858055, at *12–13 (E.D. Pa. Dec. 21, 2022) (advertising that defendants' bread was "new & improved" offered "no significant measurable value" and were "more fairly characterized as the 'opinion of the seller or commendation of the goods,'" and thus was puffery and not an express warranty), but see *Kraft v. Dr. Leonard's Healthcare Corp.,* 646 F. Supp. 2d 882, 890 (E.D. Mich. 2009) (unrebutted allegations that anti-slip carpet would "prevent falls for good" and was a "no slip ice carpet" were sufficient to enter summary judgment on plaintiff's express warranty claim).
4: UCC § 2-316(1).
5: *Dakota Style Foods, Inc. v. SunOpta Grains and Foods, Inc.,* 329 F. Supp. 3d 794, 802–03 (D.S.D. 2018). *See also Rexing Quality Eggs v. Rembrandt Enterprises, Inc.,* 360 F. Supp. 3d 817, 834-35 (S.D. Ind. 2018), aff'd, 996 F.3d 354 (7th Cir. 2021).
6: *See id.*
7: *See id.*
8: UCC § 2-314.
9: UCC § 2-315.
10: UCC § 2-316(2).
11: UCC § 2-316(2).
12: UCC § 1-201.
13: *Id.*
14: *Id.*

faults."[15] The statement that "[t]here are no warranties which extend beyond the description on the face hereof" would be effective to exclude all warranties of fitness for a particular purpose.[16] Disclaimers are an important means through which a seller can control its exposure. As described above, the UCC provisions regarding the disclaimer of warranties impose different requirements for disclaiming different implied warranties. As a result, it is wise to ensure that each disclaimer of implied warranties meets all of the requirements imposed by the UCC in order for a particular disclaimer to be effective. In other words, a seller should make sure that every disclaimer is in writing, is conspicuous, and mentions the implied warranty being disclaimed.

IV. Limiting Available Remedies

In addition to providing sellers with some control over the warranties that will attach to its goods, the UCC also permits a seller to limit the remedies a buyer may have for any breach of warranty. The UCC allows the seller to control the measure of damages by utilizing liquidated damages and by contractual modifications or limitations on recoverable damages.[17] A seller can also provide that a particular remedy is the exclusive remedy available to the buyer. For example, a purchaser's remedies may be limited to returning the goods and receiving a refund of the purchase price, or having the goods repaired or replaced.[18] In commercial cases, the seller can generally exclude the recovery of all consequential damages.[19]

V. Shortening the Statute of Limitations

The statute of limitations for breach of contract claims under the UCC is four years,[20] though states can modify the length of the statute of limitations in their jurisdiction.[21] That section goes on to provide that "[b]y the original agreement, the parties may reduce the period of limitation to not less than one year[.]"[22] And courts will uphold such a provision, as outlined below.

For example, in *Liparoto Construction v. General Shale Brick, Inc.,* the plaintiff brought an action against a brick seller for claims of breach of the implied warranty of merchantability and breach of the implied warranty for fitness for a particular purpose.[23] But the seller had shortened the statutory four-year statute of limitations to a one-year statute of limitations by way of the sales terms and conditions printed on the sales invoice.[24] As a result, plaintiff's claims, which were brought about two years after purchasing the brick, were barred.[25] This was true notwithstanding plaintiff's claims that the provision in the invoice was procedurally unconscionable, suggesting the plaintiff had no other options but to accept. The court rejected this theory, observing that plaintiff could have purchased the brick from another supplier.[26]

As a result, sellers should seriously consider including language that would shorten the limitations period.

VI. Selecting the Governing Law

Because states adopting the UCC can modify specific provisions, the seller should carefully consider which jurisdiction's laws and interpretations of the UCC are the most friendly to its interests and select the governing law accordingly when preparing a sales contract. The seller should include a choice-of-law clause requiring that any disputes arising under the contract between the seller and buyer shall be governed by the selected jurisdiction's laws. A forum selection clause mandating that disputes be brought in a particular court or venue should also be considered. While almost every state has adopted the UCC, the interpretations of its provisions vary significantly across jurisdictions. For example, there is little agreement on whether reliance is a necessary element in an express warranty claim.[27] Additionally, courts reach different conclusions on the interplay of an exclusive remedy provision and a provision that excludes consequential damages.[28] Thus, careful consideration must be given to selecting the governing law of a contract and the forum where any disputes will be heard.

Once the governing law is selected, any seller that wishes to limit its exposure must carefully consider what is required under the laws of the chosen jurisdiction and prepare the remainder of its contract document(s) accordingly.

VII. The Pre-Suit Notice Defense

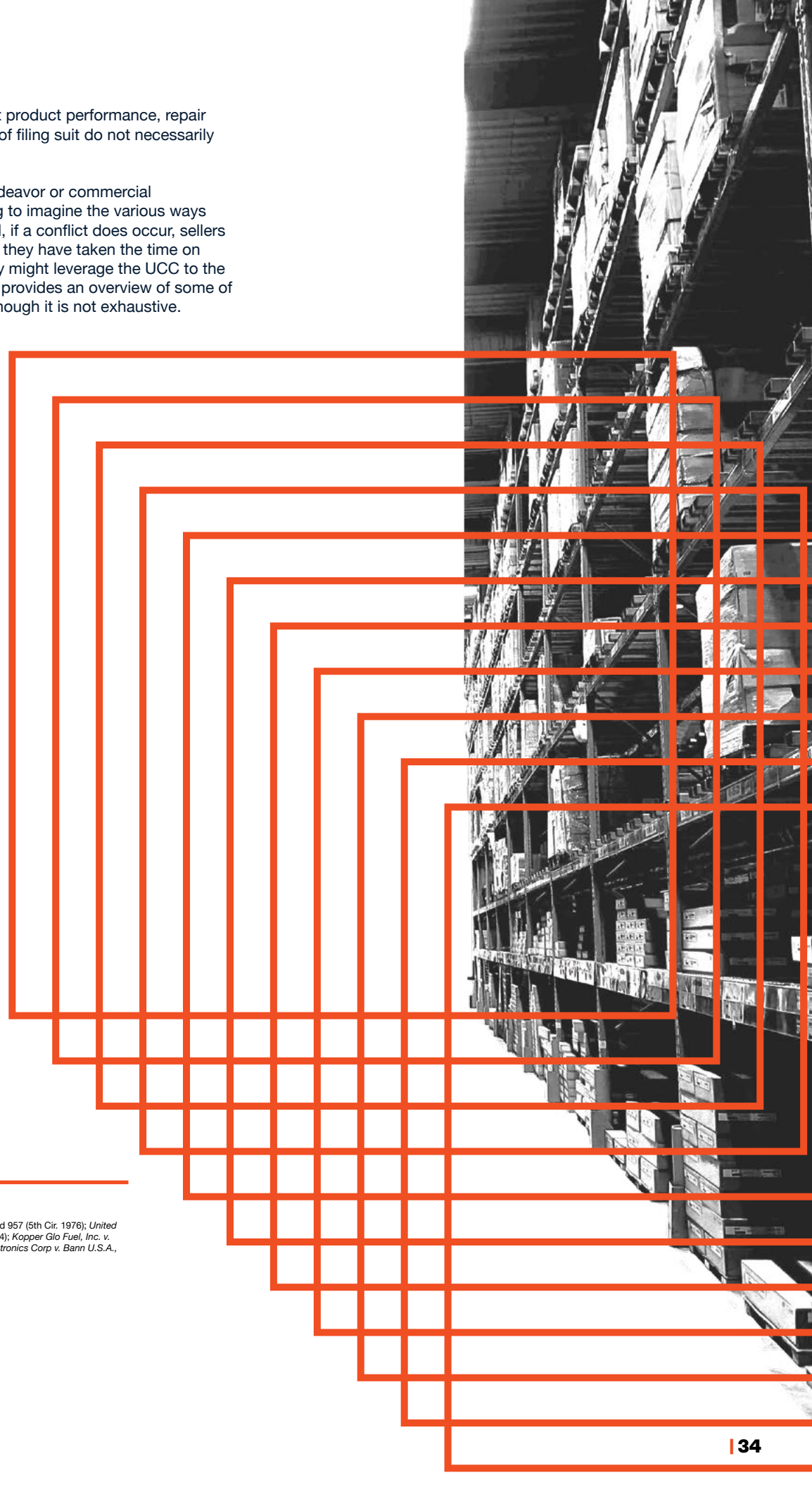
Once a manufacturer/seller is served with a suit alleging commercial damages, it should evaluate the defense of adequate notification. Before a buyer of "goods" can bring a breach of warranty claim, the buyer must, "within a reasonable time after he discovers or should have discovered any breach[,] notify the seller of breach or be barred from any remedy."[29] In other words, a buyer that has accepted goods and wants to assert a breach of warranty claim must notify the seller of the goods of any alleged breach of warranty within a reasonable time of discovering the breach; if not, the buyer's claim will be barred.

This requirement is the subject of somewhat incongruent statements found in the official guidance. On one hand, such notice may be satisfied by letting "the seller know that the transaction is still troublesome and must be watched." Later in the same comment, however, it states that notification must be "such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation."[30] Not surprisingly, jurisdictions differ on what type of pre-suit notice is sufficient to satisfy the requirement that a seller—in a commercial dispute—first receive notice of an alleged breach of warranty before any lawsuit is filed making that claim. Many courts have taken a strict interpretation approach to the adequacy of pre-suit notice, ruling

15: UCC § 2-316(3).
16: UCC § 2-316(2).
17: UCC § 2-718 (addressing liquidated damages); UCC § 2-719 (addressing modifying and limiting damages, including consequential damages).
18: UCC § 2-719.
19: U.C.C. § 2-719(3).
20: UCC § 2-725.
21: *See, e.g., In re Ricker*, 08-83110-TLS, 2014 WL 4722765, at *6 (Bankr. D. Neb. Sept. 22, 2014), *aff'd*, 8:14CV322, 2015 WL 4475852 (D. Neb. July 21, 2015) (describing difference in adoption of this provision under Colorado and Nebraska law).
22: *Id.*
23: *Liparoto Const., Inc. v. Gen. Shale Brick, Inc.,* 772 N.W.2d 801, 804–05 (Mich. App. 2009).
24: *See id.*
25: *Id.*
26: *See id.*
27: *See Michael v. Wyeth, LLC,* CIV.A. 2:04-0435, 2011 WL 2150112, at *8 (S.D.W. Va. May 25, 2011) (describing a "slim majority" of jurisdictions holding that reliance is not required to state an express warranty claim, a "number of courts" that have held it is, and "various jurisdictions" that take a middle ground).
28: *City of Imperial v. Ferguson Enterprises, Inc.,* D072737, 2019 WL 1593885, at *16 n.30 (Cal. App. 4th Dist. Apr. 15, 2019), *as modified on denial of reh'g* (May 8, 2019) (discussing split).
29: UCC §2-607(3).
30: Comment 4 to UCC § 2-607(3).

that generalized complaints about product performance, repair requests, and the like in advance of filing suit do not necessarily satisfy the standard.[31]

At the beginning of a business endeavor or commercial relationship, it can seem defeating to imagine the various ways things may go sour. With that said, if a conflict does occur, sellers will be in a much better position if they have taken the time on the front end to consider how they might leverage the UCC to the protect their interests. This article provides an overview of some of these considerations for sellers, though it is not exhaustive.



31: *See, e.g., Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F. 2d 957 (5th Cir. 1976); *United States ex rel. Conroy v. S. Contracting*, 862 F. Supp, 107 (D.S.C. 1994); *Kopper Glo Fuel, Inc. v. Island Lake Coal Co.*, 436 F. Supp. 91 (E.D. Tenn. 1977); *Peavey Electronics Corp v. Bann U.S.A., Inc.*, 10 So. 3d 945 (Miss. Ct. App. 2009).

Practice Pointers & Potential Pitfalls of a Corporate Deposition

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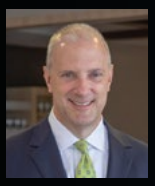

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I. Introduction

A corporate deposition authorized by Fed. R. Civ. P. 30(b)(6) and similar state rules[1] is a powerful discovery device with far-reaching implications. Entities served with such a notice face significant burdens to select and prepare the appropriate witness or witnesses to testify. This article reviews the full scope of the Federal rule, identifies some pitfalls that may occur if it is not taken seriously, and offers some practical pointers to maximize a successful defense of these depositions.

The current rule states:

> In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.[2]

The rule describes three key elements. First, the deposing party provides notice of the proposed topics. Second, the parties must confer regarding the scope of the noticed topics. Finally, the deponent entity must designate an appropriate witness and adequately prepare him to testify on behalf of the entity.

II. The Rule 30(b)(6) Procedure

A. Notice

Rule 30(b)(6) is typically used when a party seeks information from an entity but does not know the identity of the person(s) within the entity who possess the information. The rule does not preclude deposing employees of the entity who are known to the parties and/or played a significant role in the facts leading to the litigation. For example, if a plaintiff sues his former employer alleging discrimination, the supervisor(s) and colleague(s) who witnessed or perpetrated the purported discriminatory behavior would be known to the plaintiff and would be deposed under standard deposition procedures as fact witnesses.

However, the plaintiff may not know the persons in upper management who participated in any investigation relating to his complaints. As a result, he may notice a Rule 30(b)(6) deposition of the employer-defendant seeking information regarding the investigations, policies, and other matters material to his claim.[3] To that end, an employee may be deposed in both his individual capacity and as a corporate designee for the topics listed in a 30(b)(6) notice, either at the same time (which brings its own concerns and troubles) or at different points in the discovery process.

B. Duty to Confer and the 2020 Amendments

Parties have the right to conduct Rule 30(b)(6) depositions. They need only serve a notice pursuant to Rule 30(b)(6), designate the entity to be deposed, and "describe with reasonable particularity the matters for examination."[4] Prior to the 2020 amendments, the rule proved troublesome for many litigants who disagreed on the number of topics or witnesses who may be involved in responding to a notice and the overall scope and burden a single party may place on an entity for purposes of discovery. The revision now requires that the parties confer regarding the topics of examination before or promptly after the notice is sent. This mandate seeks to avoid the common scenario where parties disagree about several matters, including the number and scope of topics and the overall length and demands on an entity that any Rule 30(b)(6) notice imposes.[5] The conference also allows the parties to identify collaboratively the topics that are too broad, too narrow, or not relevant or proportional to the claims and defenses in the lawsuit and, hopefully, to reach a mutual agreement about the scope of the deposition before it occurs. Finally, the requirement of a pre-deposition conference is intended to help the parties identify core disputes regarding the matters to be discussed and give the parties an opportunity to seek the court's resolution prior to the scheduled deposition.

C. Designation and Preparation of the Deponent

Following the required conference (and court intervention, if necessary), the entity must designate one or more witnesses to testify on its behalf, and if multiple witnesses are identified, to state which topics each will address at his or her deposition. The entity is charged with a duty to prepare the witness(es) to fully testify on all designated topics on behalf of the entity—that is, each witness must prepare for and testify to all knowledge of the entity on a specific topic. This almost always requires a designated witness to "study up" on documents and information not already known to him or her in their day-to-day work for the entity.[6] The designated witness's testimony will be binding on the entity, regardless of its accuracy or completeness.

Most courts take an expansive view of the obligations of a company that receives a Rule 30(b)(6) deposition notice:

> [A Rule 30(b)(6) deponent] has an affirmative obligation to educate himself as to the matters regarding the corporation. This duty to prepare extends beyond the personal knowledge of the individual witness for the voluminous and the review of the documents would be burdensome, the deponents are still required to review them to prepare themselves to be deposed.[7]

The process of seeking out additional information for the witness and preparing the witness to testify on the breadth of topics noticed by the opposing party is the most burdensome aspect of a Rule 30(b)(6) deposition. This process is fraught with pitfalls and common mistakes, which are discussed further below. It is important to note that federal courts have endorsed and reiterated the broad duties and responsibilities of the entity to adequately prepare its witnesses to testify on its behalf. For example, though the notice must specify

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1: This article focuses on the Federal rule; considerations presented herein may or may not translate to States' varied procedural rules regarding depositions of entities.
2: Fed. R. Civ. P. 30(b)(6).
3: *See E.E.O.C. v. Thorman & Wright Corp., 243 F.R.D. 421, 426 (D. Kan. 2007)* (topics must be designated with "painstaking specificity" and relevant to the issues in dispute). While the issue of what's "relevant" in discovery is beyond the scope of this article, relevance in the context of discovery is very broad, but not without limits. F.R.C.P. 26 (b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case…").
4: Fed. R. Civ. P. 30(b)(6).
5: It is too soon to tell whether the duty to confer has made any significant impact on the frequency or severity of disputes regarding a 30(b)(6) deposition notice. Nevertheless, while parties may not resolve their disagreements over the deposition notice at the conference, this duty certainly increases communication among the parties and should narrow and clarify the dispute prior to seeking relief from the Court.
6: While the entity is free to designate as many employees as it wishes to testify on various noticed topics, there are drawbacks to designating multiple witnesses to testify. First, doing so may increase the amount of time needed to prepare. Second, there is an opportunity for a disconnect between the witnesses based on the topics and materials reviewed by each. Third, although a Rule 30(b)(6) deposition is considered a single deposition for purposes of any discovery order or limit on the number of depositions available, each designated witness may be subject to individual time limits, prolonging the amount of time that the entity is subjected to questioning. *See Infernal Technology, LLC v. Epic Games, Inc.*, 339 F.R.D. 226, 230 (E.D.N.C. 2021); *see also* Committee Note to 2000 Amendments, 192 F.R.D. 341, 395 ("For purposes of [the 7-hour limit on depositions], the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition. The presumptive duration may be extended, or otherwise altered, by agreement. Absent agreement, a court order is needed. The party seeking a court order to extend the examination, or otherwise alter the limitations, is expected to show good cause to justify such an order.") *But see E.E.O.C. v. The Vail Corp., No. 07-cv-02035-REB-KLM, 2008 WL 5104811, at *1 (D. Colo. Dec. 3, 2008)* (court declined to adopt plaintiff's claim to extend length of deposition as court noted a single, 7-hour deposition was conveyed at prior hearing and no evidence suggested deviating from that limit). Therefore, as with all other matters including the scope of questioning, the duration of the deposition should be the subject of conferrals especially if more than one witness will be offered to testify.
7: *Resolution Trust Corp. v. Southern Union Co., Inc. 985 F.2d 196, 197-98 (5th Cir. 1993); Peshlakai v. Ruiz,* 2014 WL 459650 at *22 (D.N.M. 1/9/2014) *(quoting Alexander v. FBI,* 186 F.R.D. 137, 141 (D.D.C. 1998)).

topics with reasonable particularity, courts have allowed Rule 30(b)(6) depositions to cover dozens of topics.[8] The entity must also make a conscientious, good-faith effort to designate a witness with knowledge of the topics contained in the notice and to prepare that person to answer questions fully including on matters **beyond the personal knowledge** of the witness. The Fifth Circuit has held that the entity-deponent must prepare the designated witness "to the extent matters are reasonably available, whether from documents, past employees, or other sources."[9]

These requirements emphasize the importance of preparing a witness with information, documents, policies, experiences and knowledge from throughout the entity so the witness can adequately testify on its behalf. This requires significant input and effort from the entity and cannot be delegated to outside litigation counsel, who will lack the institutional knowledge and experience to investigate, identify and educate on the noticed topics. Instead, it must be a joint effort.

III. Preparation and Presentation of Corporate Designee

A. Pitfalls to Avoid in Preparation and Testimony

Today's economic climate often requires that companies operate leaner (translation: fewer employees). Therefore, many companies may think they do not have time to select or prepare a witness or perform the necessary work required. Compounding this problem is the fact that the rule remains vague. What is "reasonable particularity"? What exactly must a witness do to prepare? How much of the prep work winds up being work product as opposed to fair game in deposition? What are the consequences of not getting this right?

The first three questions are not easily answered, but authorities cited in this article do offer a good start. One point that is clear, however, is that the consequences of not getting this right can be catastrophic. A corporate representative's testimony may be used as a corporate admission against interest in subsequent lawsuits. Rule 30(b)(6) testimony has often been played and re-played over years in products liability or other multi-district litigation involving the same or similar products or operations.[10] Thus, the risks of getting it wrong can potentially haunt a corporation for years, if not decades.

An unprepared witness can torpedo an entity's entire litigation strategy. Entities must avoid shielding a witness from relevant information within the scope of the deposition notice or risk facing a motion to compel for alleged evasive answers. In addition to monetary sanctions under Federal Rule 37 for failure to properly identify and prepare a witness, courts impose significant penalties against a party who fails to properly prepare its designated witnesses, including precluding the entity from introducing evidence at trial regarding topics on which the witness was unprepared to testify at the deposition.[11] These pitfalls demonstrate the enormous costs—to the entity and to current and future litigation—that could result from taking shortcuts in the preparation of a Rule 30(b)(6) witness.

B. Practice Pointers for Optimizing Corporate Designee Performance

How can an entity avoid these pitfalls? The following practice pointers may help optimize the performance of your witness and the outcome of the deposition itself:

- Fully engage in early, good faith conferrals on the scope and breadth of the designated topics. Attempt to reach common ground among the parties with clear boundaries for the scope and length of the deposition.

- If needed, file a motion for a protective order *before* the Rule 30(b)(6) deposition so that you have clear guidance on the scope of topics that are proportional and relevant to the claims as well as topics stated with "reasonable particularity" as the rule requires.

- Select a witness who has prior experience in depositions. It not only helps overall performance, but it reduces preparation time by not having to dwell on the basics of depositions.

- Sometimes the list of topics is too broad, or too much, for one witness to handle. Whether to designate more than one representative as a testifying witness is a case-by-case decision. Consideration should be given to whether one person is fully capable of handling the questions as well as the preparation required, or whether topics can be delegated among more than one witness.

- The Committee Notes to the 1993 Rule Amendments state that a Rule 30(b)(6) deposition is one deposition even though multiple witnesses may be designated to testify on the topics listed in the notice.[12]

- As noted above, the length of each individual deponent and the overall length of the Rule 30 (b)(6) deposition may be subject to adjustment. But if the parties do not agree, court intervention will be required.[13]

- Michael Jordan, Tom Brady, Lionel Messi and Itzhak Perlman never stopped practicing. Practice and preparation are important even for experienced witnesses. Malcolm Gladwell is quoted as saying, "Practice isn't the thing you do once you're good. It's the thing you do that makes you good." Many litigants are hesitant to prepare their witnesses as thoroughly as they should because: (1) it's expensive; (2) it's time consuming and burdensome; or (3) they've done it before, so they don't need it now. However, given the potential that this testimony can and will be used against the entity for many years, and beyond the present case, it is hard to "overprepare." Often, multiple sessions are needed in even the simplest of cases. "Mock exercises"—where a witness is videotaped, presented with anticipated questions, and later de-briefed—remain a great strategy with even the most seasoned witnesses. Underprepared witnesses present grave risks, including incorrect or incomplete testimony, poorly phrased answers (such as guesses or approximations), or creating an incorrect or incomplete record. Some jurisdictions allow answers like "I don't know" to be used against the entity.[14]

- Preparation often requires that a witness interview others and review documents or relevant data to be able to fully answer questions. Counsel must encourage and facilitate this work, though client support is of paramount importance. Witnesses, and those assisting them, should follow through on investigating the noticed topics and seeking out additional documents, employees, and information as they are identified throughout the preparation process, so that the witness can provide complete answers on each topic with reasonable particularity.

- Proper preparation of a Rule 30(b)(6) corporate representative requires that work begin as soon as topics are received, not the day or week before the deposition. A witness must thoroughly review data, meet with lawyers, and even hold several mock sessions in order to be adequately prepared.

8: *Resolution Trust Corp. supra; see also Marker v. Union Fid. Life Ins. Co., 125 F.R.D. 121, 126 (M.D. N.C. 1989); Alexander v. F.B.I., 186 F.R.D. 137, 141 (D.D.C. 1998); Wultz v. Bank of China Ltd., 298 F.R.D. 91, 99 (S.D.N.Y. 2014); Tamburri v. SunTrust Mortg. Inc.,* 2013 WL 1616106 (N.D. Cal. 4/15/13) (affirming depositions of multiple financial institutions with approximately 50 topics each); *Krasney v. Nationwide Mut. Ins. Co.,* 2007 WL 4365677 (D. Conn. 12/11/07) (upholding the majority of forty topics noticed for a 30(b)(6) deposition).

9: *Brazos River Authority v. GE Ionics, Inc.,* 469 F.3d 416 (5thCir. 2006) (citing *Bank of New York v. Meridien BIAO Bank Tanzania Ltd.,* 171 F.R.D. 135 (S.D.N.Y. 1997)); *see also Dravo Corp. v. Liberty Mut. Ins. Co.,* 164 F.R.D. 70 (D. Neb. 1995) *and Buycks-Roberson v. Citibank Fed. Sav. Bank,* 162 F.R.D. 338 (N.D. Ill. 1995).

10: Not only might an error, misstatement, or poor word choice follow the entity in future litigation, but a witness's *lack* of knowledge can be just as problematic. Because the witness is testifying on behalf of the entity, including all information known or reasonably available to the entity, a witness who testifies to not knowing a relevant fact or document could be used to show that the entity does not know a piece of relevant and important information.

11: *Spinks v. Alamo Area Council of Governments,* No. 5:15-CV-749-RP, 2016 WL 7442661, at *6 (W.D. Tex. Dec. 27, 2016); *Function Media, L.L.C. v. Google, Inc.,* No. 2:07-CV-279-CE, 2010 WL 276093, at *3 (E.D. Tex. Jan. 15, 2010).

12: 146 F.R.D. 401, 662.

13: *See supra* note 6.

14: *See QBE Insurance Corp. v. Jorda Enterprises, Inc.,* 277 F.R.D. 676, 681-85 (S.D. Fla. 2012)("It would be patently unfair to permit QBE to avoid providing a corporate deposition designee on certain topics (because its insured refuses to cooperate) yet allow it to take a position at trial on those very issues by introducing testimony which Defendant Jorda was unable to learn about during a pre-trial 30 (b)(6) deposition." Court found answers including "I don't know" would bind the company to that position later at trial); *City of Las Cruces v. United States,* 2021 WL 330062, at *5 (D.N.M. 2/1/21); *but see Monopoly Hotel Group, LLC v. Hyatt Hotels Corp.,* 1:12-CV-1250-JEC-JSA, 2013 WL 12246988, at *6 (N.D. Ga., June 4, 2013) "("The occasional 'I don't know' in the context of this massively broad deposition does not itself reveal at Rule 30 (b)(6) violation, if the witness otherwise took reasonable steps to prepare.").

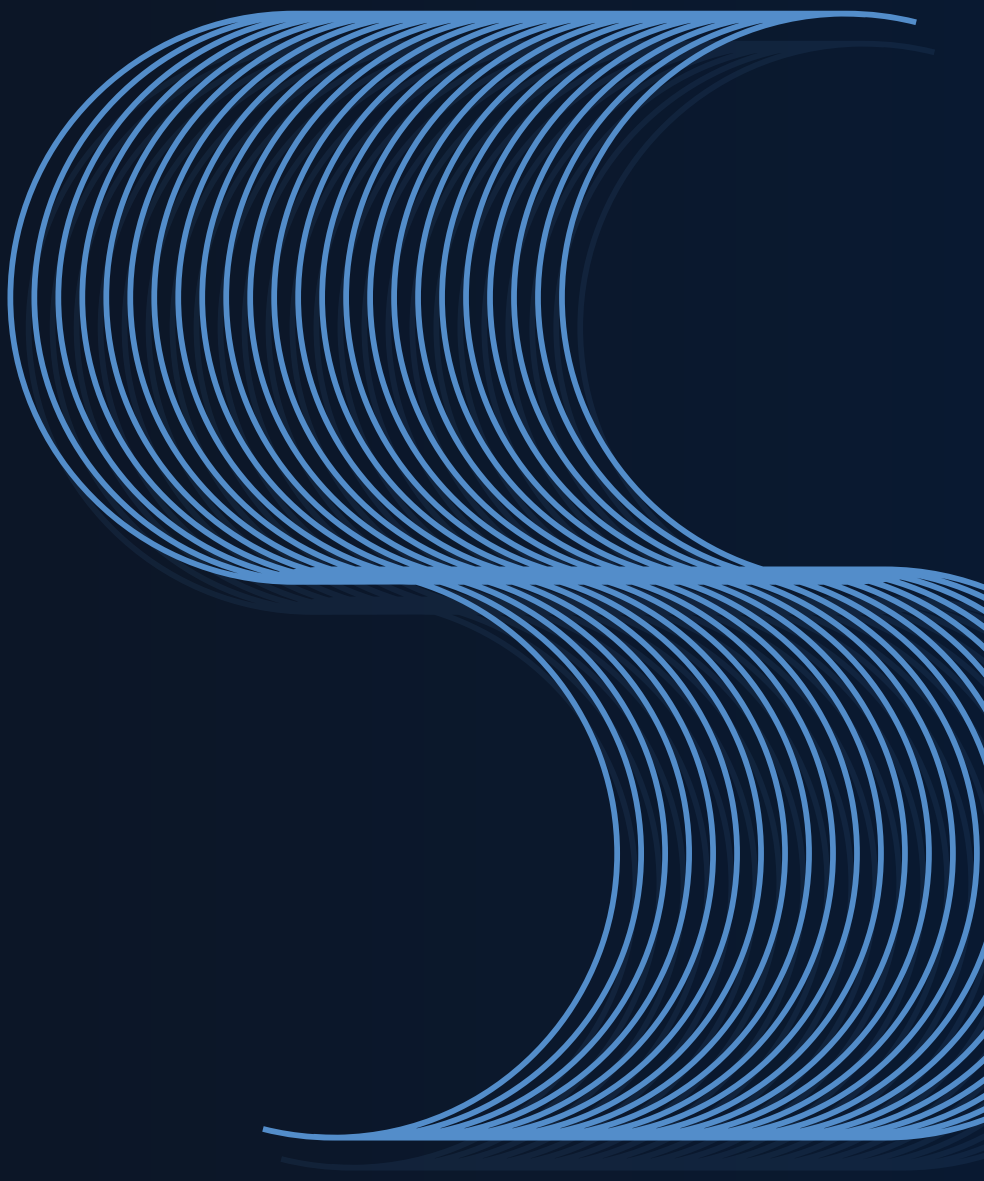
Often preparation must begin weeks or even months in advance of the actual deposition. Remember, the corporate designee is not as much speaking *about* the company; rather, the corporate designee is speaking *for* the company. Therefore, it is important the company put its best foot forward with the most knowledgeable and prepared witness on the topics in play.[15] The preparation required may be akin to that needed for an expert to properly abc review the case, investigate, and write an expert report.[16]

- Last but not least, counsel and clients defending a Rule 30(b)(6) deposition should look at this deposition as far more than fending off questions and lodging objections. Instead, view this challenge as an opportunity. A properly prepared company witness who is on the mark can provide great support for pretrial motions such as summary judgment, improve a client's standing in mediation, and send a message to opposing parties and counsel that you are prepared and you will prevail if forced to trial. Having that mindset to utilize this deposition as a sword and not only a shield can lead to a more engaged and better prepared witness, and a more successful outcome.

IV. Conclusion

A Rule 30(b)(6) deposition is a time- and resource-intensive process which is often a very burdensome and costly exercise. The current rule imposes conferral obligations on the parties but leaves other important issues unaddressed, including the absence of limits on the number of topics[17] as well as the sudden deadlines and disproportionate demands such a deposition can impose on a corporation.[18] Entities often avoid the hard yet necessary work to properly respond to a 30(b)(6) notice. Too often companies facing Rule 30(b)(6) depositions cut corners to avoid expense or to avoid time burdens on their witnesses. Proper preparation and diligence will pay significant dividends in the long run.

Conversely, failure to avoid common pitfalls and adequately prepare deponents could plague an entity for years. Despite the significant challenges and burdens placed on entities subject to the Rule 30(b)(6) deposition notice, it is crucial that companies take necessary steps to prepare witnesses on all information known or reasonably available to the entity on the noticed topics, and when parties cannot agree to the questions or the scope or length of the deposition to seek court intervention well before the deposition.



15: *See Lapenna v. Upjohn Co.*, 110 F.R.D. 15, 20 (E.D. Pa. 1986) (company designee may be asked to testify about the corporation's subjective opinions and beliefs).
16: When possible, include Rule 30(b)(6) discussions in the Rule 26(f) conference at the outset of the litigation. This allows litigants to know in advance whether the other party will seek a Rule 30(b)(6) deposition and begin steps to identify information and witnesses for that purpose.
17: Unlike interrogatories, requests for production and requests for admission, Rule 30(b)(6) does not limit the number of "topics." As noted above, the limits on the length of depositions (presumptively seven hours) and the requirement that topics be stated with "reasonable particularity" for now remain as the prime factors limiting the scope of these depositions.
18: *See Generally* Comment to the Rule 30 (b)(6) Subcommittee of the Advisory Committee on Civil Rules, Lawyers For Civil Justice, July 5, 2017 (https://www.uscourts.gov/file/22273/download).

A New Look at an Old Hot Topic: The Internet of Things

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I. Introduction

In 1999, computer scientist Kevin Ashton coined the term "the Internet of Things" ("IoT") in order to put a name to his idea of using RFID[1] chips to track items as they moved throughout a supply chain.[2] "Though there is no specific definition of IoT, the concept focuses on how computers, sensors and objects interact with each other and collect information relating to their surroundings."[3] Fast-forward twenty-four years, and the buzzword phrase now describes an interconnected network of devices ("things") linking various products we use every day. Growing at warp speed, some estimates say 14.3 billion IoT connections existed in 2022, with almost 17 billion predicted by the end of 2023.[4]

For years, attorneys have posed questions about the reach, implications and potential liability of this network, including most prominently:

- What are the privacy concerns that accompany these IoT devices?
- How will traditional products liability law apply to claims regarding these IoT devices?
- How can manufacturers minimize liability before placing IoT devices into the stream of commerce?

As with any other new technology, the legal community anticipated the plaintiffs' bar would bring a deluge of lawsuits featuring creative theories related to IoT devices. Although we have yet to see the "boom" in IoT-specific suits that we expected, we now have a fair sampling based on over twenty years of lawsuits, technological developments and analysis to review as we look towards the future of litigation in this area.

With the benefit of some amount of hindsight, how can we proactively identify issues arising with IoT devices and data, minimizing liability for manufacturers? How can we, after a lawsuit has been filed, creatively and successfully navigate the IoT legal waters? This article provides practice pointers for reducing the likelihood of lawsuits and for limiting exposure when those lawsuits inevitably arise.

II. Pre-Suit Practice Pointers

Benjamin Franklin famously advised that an ounce of prevention is worth a pound of cure.[5] This is certainly true in the case of minimizing liability before a product reaches a consumer. In the spirit of prevention, what follows are practice pointers for minimizing liability with consumers, competitors, other companies in the supply chain and the government.

A. Set Expectations with Consumers

"The distinguishing feature of today's Internet-connected devices is a continuing relationship between the product and the manufacturer."[6] IoT products are more likely to involve post-sale interactions and "communication" (including data sharing and use) between the manufacturers and consumers, distinguishing them from many traditional products. Effective communication is key in any relationship, and the ongoing relationship between a consumer and a manufacturer of an IoT device is no exception.

1. Marketing communications about the data that IoT devices collect should be clear, easily accessible and regularly updated alongside any software updates.
2. Terms and conditions, licensing agreements, and any applicable warnings should be transmitted in such a way as to maximize the likelihood that consumers will read them, and to provide a defense to failure to warn claims. Options include clickwrap[7] and scrollwrap[8] agreements, warnings on packaging or on products themselves, and written agreements certifying that the consumer has read and understood the agreement.
3. Manufacturers should clearly communicate what data they collect, how they use that data and who they will share that data with. This information should be communicated on the front end and should also be made easily accessible to purchasers who forget earlier communications or lose copies of those communications. Though it is beyond the scope of this article, many states also have data privacy laws, like the California Consumer Privacy Act, which manufacturers must also comply with.
4. Finally, the importance of an arbitration agreement that is compliant with the Federal Arbitration Act and applicable state law is not to be understated, either for IoT devices or for any other consumer agreements.

B. Stay Apprised of Patents in Your Field to Avoid Infringement

The potential for patent infringement is nothing new. However, with the ubiquity of technology that connects devices to manufacturers, the Internet, and other devices, the risk of unintentional infringement has grown all the more concerning. IoT patents involve areas that are fundamental to many products' functions and uses, such as resource management, communication, security and information retrieval. Manufacturers should be conscientious about ensuring they do not inadvertently infringe on any applicable patents. On the other hand, manufacturers should also be wary of "patent trolls," who attempt to weaponize patents in attempts to extract settlements (or sometimes judgments) from alleged infringers, regardless of the merits of any potential claims.

1: RFID, or Radio Frequency Identification, is a technology that identifies objects via radio waves that can be read remotely without need for visualization or physical contact.
2: Natalie Marchant, *What is the Internet of Things?,* World Economic Forum (Mar. 31, 2021), https://www.weforum.org/agenda/2021/03/what-is-the-internet-of-things/.
3: Antigone Peyton, *A Litigator's Guide to the Internet of Things,* 22 Rich J.L. & Tech. 1, 1 (2016).
4: Satyajit Sinha, *State of IoT 2023: Number of connected IoT devices growing 16% to 16.7 billion globally,* IoT Analytics (May 24, 2023), https://iot-analytics.com/number-connected-iot-devices/.
5: "On Protection of Towns from Fire, 4 February 1735," *Founders Online,* National Archives, https://founders.archives.gov/documents/Franklin/01-02-02-0002.
6: Robert S. Peck, *The Coming Connected-Products Liability Revolution,* 73 Hastings L.J. 1305, 1314 (2022).
7: "Clickwrap" agreements are agreements that a user accepts by clicking a button confirming that they agree to the contract.
8: "Scrollwrap" agreements are agreements that a user accepts by scrolling all the way through them before they can confirm their acceptance.

C. Preserve Supply Chain Relationships

Preserving relationships with important links in the supply chain is and has always been crucial for success. The COVID-19 pandemic highlighted both the importance and the precariousness of these relationships. Though there is little any single manufacturer can do to avoid "golden screw"[9] issues, indemnity and licensing agreements can help to preserve these all-important relationships in the event of litigation against any parties to the relationships.

Manufacturers of component parts and finished products (and any other links in the supply chain, for that matter) should have clear indemnity agreements with one another. For example, if a component device malfunctions and causes an injury, it is best for both manufacturers if the decision on liability and the cost of defense is made on the front end rather than litigated between otherwise-friendly manufacturers on the back end.

Similarly, with respect to IoT devices manufactured by one party and using software owned by another party, it is crucial to have comprehensive licensing agreements in place to ensure compliance with an agreement to the specific use of any one party's software.

D. Prepare for the Worst by Complying with Data Retention Policies

Ensuring that any important and potentially discoverable documents and data are retained can prevent many headaches in the event of litigation. Regardless of the merits of the underlying claim, a missing document that should have been retained pursuant to a document retention policy is likely to cause issues. Missing documents can generate irrelevant and unwanted questions, distract from the real issues, and inflate defense costs.

1. Despite the fact that manufacturers certainly don't need to retain all data indefinitely, to the extent there is a data retention policy in place compliance with any such policy can spell the difference between routine discovery and drawn-out and expensive spoliation claims.

2. Historical marketing communications should be retained in case there is a need to reproduce the exact statements that could have been transmitted to a plaintiff at any given time. The same is true for historical versions of any contracts that accompany a product, or that would have been shared with a customer after a purchase, as well as historical versions of contracts with other parties in the supply chain.

3. To the extent any data is collected that could relate to a lawsuit, particularly to any fatal or catastrophic injuries, separate retention policies could be useful in conducting internal investigations, determining other parties potentially at fault and avoiding spoliation claims. Consulting with outside counsel could prove helpful in determining the appropriate retention policies for various types of data.

E. Diligently Ensure Compliance with Applicable Regulations

The rapidly advancing technology used in IoT devices and the plethora of new ways that IoT devices can be used mean that manufacturers need to be aware of new regulations potentially touching on their products. For example, new privacy laws in certain states can change manufacturers' duties and responsibilities, and IoT-enabled devices can implicate federal healthcare regulations. Though in-depth practice pointers for regulatory compliance are beyond the scope of this article, manufacturers should be meticulous in ensuring that they are complying with all applicable rules and regulations by staying on top of new laws and literature, and, where needed, consulting with experienced legal counsel.

F. Protect Data with Strong Cyber Security Practices

Given the steady rise in hacking incidents, it is crucial for manufacturers who track and retain sensitive information to have strong cyber security policies in place to protect that data. Even though a complete discussion of the best cyber security practices and preventative measures is beyond the scope of this article, it is an issue that should be on every attorney and executive's radar. Hiring cyber security personnel, training employees on best cyber security practices and ensuring compliance with cyber security policies will continue to be of vital importance for all companies—manufacturers included.

III. Post-Filing Practice Pointers

Given changing products, developing law and the existence of the plaintiffs' bar, it is impossible to prevent lawsuits altogether. When lawsuits do happen, manufacturers can use the following strategies to minimize their exposure.

A. Get Creative with Using and Analyzing Plaintiffs' Data

In this day and age, it is safe to assume that almost every individual plaintiff who files a lawsuit has numerous devices collecting their data in ways that could be helpful in litigation. As Butler Snow attorneys Katelyn Ashton and Susanna Moldoveanu noted in their article "The Wearable Witness: Utilizing Apple Watch Data in Civil Litigation":

> These [IoT] devices can compile extensive information on bodily systems—including activity levels, menstruation and fertility, exercise activity and attainment, food consumption, weight, sleep, noise exposure, heart rate, skin temperature, and respiratory rate. They can compile data on location using GPS functionality. And they can even measure vital signs, stress levels, and hydration levels, as well as monitor diseases and chronic conditions. What's more, this information is compiled and exchanged with little to no user involvement—in many instances, users are not even aware this information is being tracked.
>
> **As the proliferation of these devices—and their capabilities—increases, so too does their potential for use in litigation.**[10]

Plaintiffs—and particularly, personal injury plaintiffs—are compiling data for defendants whether they realize it or not. Creative outside counsel should be actively looking for ways to use this data in litigation, both to analyze exposure and to poke holes in plaintiffs' claims.

B. Identify the At-Fault Parties

Identifying which parties (or non-parties) are *actually* at fault is part of the defense of any lawsuit. That is no different in a case involving an IoT device—though it may look slightly different:

1. It is crucial to always ask what party is legitimately at fault, i.e., what or who was the proximate cause of an injury. For example, if an IoT device is hacked, the manufacturer could argue that the criminal or tortious activities of that third party are the proximate cause of the alleged injury. Or, if there was a software malfunction that caused an injury, it is important to investigate whether the software provider should properly be held liable (or is bound by, or protected by, an indemnity agreement).

2. Just like any other product, a lawsuit involving an IoT device must involve thorough analysis and discovery of whether the plaintiff is somehow liable for their own injury, either through misuse or abuse of the product, or another theory

9: "Golden screw" refers to a critical component part necessary to produce a complete product.
10: Katelyn Ashton & Susanna Moldoveanu, *The Wearable Witness: Utilizing Apple Watch Data in Civil Litigation,* For The Defense (2022) (emphasis added), https://digitaleditions.walsworth.com/publication/?i=764267&article_id=4361412&view=articleBrowser.

of negligence. Should the plaintiff have updated the software for their IoT device? Did they use the device as directed? Did the device collect data that can corroborate or contradict their version of events? These are all important questions to ask in framing a defense of an IoT product case.

C. Hold Plaintiffs to their Agreements

The specific terms of what the plaintiff consumer agreed to with respect to the manufacturer should always factor into a defense analysis. Whenever there is an agreement between a manufacturer and a consumer of an IoT device, there is a potential for strategic use in litigation. Many, if not most, agreements between consumers and manufacturers involve arbitration agreements, which, if enforced, could have a substantial impact on the course of a consumer dispute. Also, to the extent there are terms and conditions or a licensing agreement with the plaintiff, those agreements may involve liability limitations or warranty disclaimers, or provide avenues for discovery into the plaintiff's failure to abide by their own contractual obligations, potentially resulting in a partial or complete defense.

D. Challenge "Novel" Theories of Liability

With new technologies come new theories of liability. Though there are occasions where new technologies should merit new laws, trial court judges are rarely, if ever, in the position to make decisions about what the contours of those new laws should be. Further, plaintiff attorneys are often operating with a knowledge deficit about particular products' capabilities and limitations prior to discovery. This can result in claims that do not "fit" with particular products or areas of law. Defense counsel must analyze whether theories of liability match with existing law and the facts of a case, and frame their defenses accordingly:

1. As to the law, defense attorneys should determine whether a plaintiff's theories of liability legitimately fit into the framework of existing law. Reviewing jury instructions at the outset of a case can be helpful in assessing the bounds of existing law and framing a defense that a plaintiff's claims are outside those bounds. For example, has the plaintiff pleaded a nuisance claim regarding an IoT product in a jurisdiction where nuisance law only contemplates claims involving noxious or disruptive intrusions onto real property, and is that a basis for a dispositive motion?
2. As to the facts, defense attorneys should learn as much as possible about the product's capabilities and limitations, and then determine the best time and best ways to educate opposing counsel. Plaintiffs' attorneys, particularly before discovery begins, may have a lot to learn about IoT products, their capabilities and their limitations. In a case brought by an attorney with a reputation for reasonableness and fair, early settlements, early education on the product's capabilities might increase the likelihood of a fair and early resolution. Or, education through expert discovery, with an eye to mediation or summary judgment, might be the most effective way to dispose of a lawsuit.

E. Don't Underestimate the Human Element

Even in this age of growing reliance on technology and artificial intelligence, there is never a substitute for creative thought from a diligent attorney. For example, many cases[11] involving IoT products are resolved in manufacturers' favor on the fundamental issue of lack of injury or standing. Creatively balancing potential contract-based, tort-based and third-party centered defense strategies at the outset of a case, working collaboratively with an in-house and experienced outside counsel team and conducting a thorough initial investigation are perhaps more important in the complex IoT framework than any other area of product liability law.

IV. Conclusion

Even in an increasingly automated landscape, we are anchored by this simple truth: no technology can replace what results when people think forwardly and arrive at innovative solutions as a team. This is why it is crucial to choose a legal team that is well-equipped to handle the complex IoT landscape and all the challenges that come with it.

11: *See, e.g. Cahen v. Toyota Motor Corp.*, 147 F. Supp. 3d 955, 971 (N.D. Cal. 2015) (no standing where alleged harm was potential for vehicle to be hacked); *Flynn v. FCA US LLC*, 3:15-cv-855 (S.D. Ill. Aug. 4, 2015) (same, though there was standing with respect to harm of reduced market value of vehicles).

The Wearable Revolution:

How to Use Personal Health Device Data in Litigation

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I. Introduction

Wearable technology compiles extensive information on our bodily systems—including activity levels, menstruation and fertility, exercise activity and attainment, food consumption, weight, sleep, noise exposure, heart rate, skin temperature, and respiratory rate. These devices can compile data on location using GPS functionality. They can even measure vital signs, stress levels, and hydration levels as well as monitor diseases and chronic conditions. What's more, this information is compiled and exchanged with little to no user involvement—in many instances, users are not even aware this information is being tracked. But how can it be used in litigation?

II. Wearable Device Data Used in Civil Litigation

The Fourth Amendment constrains the admissibility of wearable device data in the criminal context. The same is not true in civil litigation, however, where discovery is broader and more extensive.

One of the earliest cases involving wearable device data in civil litigation hails from Canada. There, a plaintiff's law firm called on Fitbit data to support the plaintiff's claim that her activity levels declined as a result of a car accident. The plaintiff used this data to show that her activity levels had decreased lower than is typical of someone her age and her profession.[1] One would think this is a quintessential example of why plaintiffs would be eager to turn over their wearable device data during discovery to show that their claims are indeed true. But that has not necessarily been the case.

In *Bartis v. Biomet, Inc.,* for example, the plaintiff brought product liability claims against the manufacturer of an artificial hip implant, claiming to have suffered substantial injuries, including pain and limited mobility.[2] In response to interrogatories the plaintiff admitted that he consistently wore a Fitbit, which tracked his sleep, heart rate and steps.[3] The defendants requested the production of the plaintiff's Fitbit and other wearable device data.[4] Instead of turning over the data, the plaintiff lodged a series of objections running the typical gamut: overly broad, unduly burdensome, not limited in time and scope, not calculated to lead to the discovery of admissible evidence, and potential for unreliability.[5] The court didn't buy it, finding that the plaintiff's "activity levels are relevant" and ordering that "a portion of the Fitbit data should be produced, especially given the extremely low burden of production."[6] The *Bartis* court also noted inconsistencies across the plaintiff's claims, which further supported the necessity of production.[7] For example, in his interrogatory answers—and as reflected in his experts' reports—the plaintiff claimed difficulty walking, but at his deposition he admitted that he could walk and jog without any pain or discomfort.[8] The court found the Fitbit data relevant to the plaintiff's alleged injuries.[9] It further rejected the plaintiff's complaints that the data was unreliable, as that "argument clearly goes to admissibility and weight, not discoverability."[10]

Bartis came on the heels of another federal case permitting discovery of a personal injury plaintiff's wearable device data. In *Cory v. George Carden International Circus, Inc.,* the plaintiff alleged that the defendant caused her to suffer a head injury and related injuries and damages.[11] The defendant, in turn, sought the plaintiff's wearable device data to determine whether the plaintiff performed strenuous activities, as this would be relevant to claims of injury or disability.[12] Although the plaintiff did not challenge the defendant's request, the court granted the defendant's motion and ordered the plaintiff to produce "fitness monitoring accessories," including "Fit Bits and running/walking GPS systems."[13]

III. Discoverability of Wearable Device Data

As the above cases demonstrate, much of the conversation on wearable technology in the civil litigation context to date has pertained to Fitbit data. That is largely because Fitbit was an early market leader, holding a 67% share of the activity-tracking market in 2014.[14] But, as we all know, wearable technology now extends beyond our trusty Fitbits.

Enter the Apple Watch. In 2021, surveys estimated that over *100 million people* actively use an Apple Watch.[15] That number has surely grown. Apple Watches are repositories of information stored within the cloud and on users' devices. With nearly every WatchOS update and iteration of the Apple Watch comes new features. The Series 4 model, for example, included an FDA-cleared electrocardiogram, thus rendering it a Class II medical device capable of alerting its user to abnormal heart rhythms. That same model was equipped with an accelerometer and gyroscope hardware, enabling it to detect users' hard falls by analyzing wrist trajectory and impact. Recently, the FDA cleared a technology that allows Parkinson's patients to be monitored via their Apple Watches.[17] The University of Michigan School of Public Health and Apple recently launched the "Apple Hearing Study," which will, in part, utilize the Apple Watch hearing health data to determine how environmental sound exposures impact users' hearing and stress levels.

This information has obvious relevance in personal injury and other civil litigation. Nevertheless, when it comes to discoverability of this data, "[t]here is surprisingly little precedent."[18] That is not because there is something unique or protected about the information—it's just that the technology is relatively new, and litigators are lagging behind in seeking it. It appears that, in the last decade, attorneys

1: See Parmy Olson, *Fitbit Data Now Being Used in the Courtroom,* Forbes (Nov. 16, 2014), http://onforb.es/1TSzwJJ.
2: No. 4:13-CV-00657-JAR, 2021 WL 2092785, at *1 (E.D. Mo. May 24, 2021).
3: *Id.*
4: *Id.*
5: *Id.*
6: *Id*. at *2. *But see Spoljaric v. Savarese,* 121 N.Y.S.3d 531, at *2 (N.Y. Sup. Ct. 2020) (denying a defendant's request for Fitbit records as they related to plaintiff's weight loss, finding the request overly broad and speculative).2021 WL 2092785, at *2.
7: *Id.*
9: *Id.*
10: *Id.,* at *3 (citing Fed. R. Civ. P. 26(b)(1)).
11: No. 4:13-CV-760, 2016 WL 3460781, at *1 (E.D. Tex. Feb. 5, 2016).
12: *Id.* at *1–2.
13: *Id.* at *3.
14: *See* Peter Rubin, *How Fitbit Started the Wearables Craze That Got Us All Moving,* WIRED (Sept. 15, 2018), https://www.wired.com/story/how-fitbit-got-us-all-moving/.
15: *See* Urian Buenconsejo, *Apple Watch Hits 100 Million Active Users | Over 50 Million Americans Have One,* Tech Times (Aug. 27, 2021), https://www.techtimes.com/articles/264659/20210827/apple-watch-hits-100-million-active-users-over-50-million-americans-have-one.htm.
16: *See* Stephen Nellis, *Rune Labs Gets FDA Clearance to Use Apple Watch to Track Parkinson's Symptoms,* Reuters (June 13, 2022), https://www.reuters.com/technology/rune-labs-gets-fda-clearance-use-apple-watch-track-parkinsons-symptoms-2022-06-13/.
17: *See Apple Hearing Study Shares New Insights on Hearing Health,* Apple (Mar. 2, 2021), https://www.apple.com/newsroom/2021/03/apple-hearing-study-shares-new-insights-on-hearing-health/.
18: *Bartis,* 2021 WL 2092785, at *2.

have spent more energy *writing about* the discovery of wearable technology data than actually pursuing it.

Under the familiar discovery standard, a civil litigant may obtain discovery regarding "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case."[19] Wearable technology data clearly fits the bill—it is relevant by the same reasoning that a plaintiff's medical records and other health information would be. And it is certainly "reasonably accessible."[20] It is readily available to users right on their phones.

But how do we get the data from plaintiffs' phones into the hands of defendants' counsels'?

A. Propound Targeted Written Discovery Requests for the Data

Wearable device data may be a form of "initial required disclosure" under Federal Rule of Civil Procedure 26(a)(1).[21] The data relates directly to the allegations in a personal injury complaint. As set forth above, this information could support a plaintiff's or defendant's claims or defenses by either strengthening or undermining the asserted facts pertaining to injury. The deletion of wearable technology data by a plaintiff could constitute spoliation of evidence.

Rule 34 allows parties to serve discovery requests for the inspection, copying, testing or sampling of plaintiffs' electronically stored information, or "ESI."[22] The only limit being—as mentioned—that the requested ESI is "relevant to any parties' claim or defense" and "proportional to the needs of the case."[23]

Defendants' requests for production should be targeted, accounting for the exact type of data available and the relevant time frame, to avoid being labeled a fishing expedition or invasion of privacy.[24] A blanket request for all data, at all times without regard to the plaintiff is likely to garner an objection and be deemed insufficient.

If a party were, for example, defending against a claim involving a plaintiff's heart condition, there would be a wealth of relevant information in the Apple Health app. A request for the production of all heart-related data could seek:

> All data and electronically stored information regarding your heart condition from any and all Apple Watches, smartphones, tablets, or other electronic devices from one year preceding the date of alleged injury until present, including but not limited to heart rate, heart rate variability, resting heart rate, walking heart rate average, cardio fitness, high heart rate notifications, and electrocardiograms.

Defendants can similarly request evidence of active energy, stand minutes, steps, walking and running distance, stand hours, stair speed, flights climbed, exercise minutes, step length, walking speed, and workouts to address the plaintiff's claims as to how the alleged heart condition has affected his or her lifestyle. And if one of the plaintiff's claimed injuries is that sleep is affected, the defendants can request data on the plaintiff's sleep patterns. All of this information is in the Apple Health app. Defense counsel may similarly request information from wearable devices that may have been submitted to a plaintiff's employer in conjunction with a health insurance wellness program.

B. Specify the Format for Production

Rule 34(b)(2)(E)(ii) requires production in the form in which the data is usually maintained if no other form is specified. Because plaintiffs may not be familiar with the production of Apple Watch or wearable technology data, they may object that they cannot produce the information as it is usually maintained or that doing so would improperly require them to "create" new documents that did not previously exist. But this is no different from the production of any other electronic information. We do not produce computer data by shipping our computers—we reproduce that data onto another medium. The same is true for phone data.

Because many plaintiffs' counsel lack familiarity with wearable technology data, we recommend that defense counsel identify with specificity the medium by which they want the ESI data produced.

One low-burden means of production is simply to request screenshots or printouts of certain data metrics. Anyone with a basic understanding of operating an iPhone is capable of taking screenshots of the information, which would undercut any burdensomeness objection lodged by plaintiffs. But because not everyone is familiar with screenshots or even the existence of the data, defense counsel may create a step-by-step guide for plaintiffs to follow in locating and capturing their relevant information. It should identify with specificity exactly what pages of data the defendant seeks and how to take the screenshot.

Alternatively, third-party data vendors can obtain this information. Vendors can accomplish this collection remotely without requiring plaintiffs to send in their phones, thus weakening any undue burden challenge plaintiffs may make. And the cost of this collection is relatively low, particularly in comparison to how costly electronic discovery can be as a whole (especially to defendants).

C. Backstop Document Requests with Interrogatories and Deposition Questions

Defense counsel should backstop requests for production with other types of discovery. For instance, defense counsel may ask

19: Fed. R. Civ. P. 26(b)(1).
20: Fed. R. Civ. P. 26(b)(2)(B) (providing that with respect to electronic discovery in particular, "[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost").
21: *See* Nicole Chauriye, *Wearable Devices as Admissible Evidence: Technology Is Killing Our Opportunities to Lie*, 24 Cath. U.J.L. & Tech. 495, 520 (2016).
22: Fed. R. Civ. P. 34(a)(1)(A).
23: Fed. R. Civ. P. 26(b)(1).
24: *See Bartis*, 2021 WL 2092785, at *3 (allowing for the redaction of certain Fitbit data, including information concerning the plaintiff's heart rate, sleep records, or physical location, as that information was irrelevant and implicated privacy concerns); *Spoljaric,* 121 N.Y.S.3d 531, at *2 (denying speculative request for authorization to obtain plaintiff's Fitbit records, as such would be a "fishing expedition").

plaintiffs through interrogatories whether they own and/or use an Apple Watch or similar device.[25] Counsel can also explore the plaintiff's use of wearable technology in the deposition. If the written discovery response is that no such information exists, that should be confirmed with the plaintiff in his or her deposition.

IV. Admitting Wearable Device Data at Trial

Once at trial, a defendant asking for admission of wearable device information must demonstrate the touchstone requirements of relevance, authenticity and reliability.

Relevance should be fairly straightforward. Data on activity levels may strengthen or weaken the facts establishing injury. And because some wearables can even measure emotional states or stress levels, there is a potential that data can be admitted for claims of emotional and psychological injury as well.

As for authenticity, parties can establish it through several channels.[26] Federal Rule of Evidence 901(b)(1) allows the device owner to authenticate the data through questioning on the stand. That person appropriately qualifies as a witness with knowledge under the rule. Rule 901(b)(4) can also provide for authenticity through distinctive features of the data—which may, for example, refer to a particular exercise type or location uniquely associated with the plaintiff, thus proving its tie to that individual. Rule 901(b)(9) could potentially allow evidence about the device's data collection method and accuracy rate to be presented in order to establish authenticity. Finally, Rule 901(b)(3) allows for authentication through a computer forensics expert, who could verify the data's origin.

Within the authenticity concern lies the issue of reliability. Wearable devices sometimes erroneously track steps, for example, while a user travels by car. The proponent of this evidence must show that its data collection methods are sound by presenting evidence from the manufacturer on error rates or possibly collecting information on subsequent remedial measures taken to correct earlier malfunctions in the devices.

Even if the raw data itself cannot be admitted, the proponent may still get its broad strokes admitted through the testimony of an expert witness, who need not rely on *admissible* evidence in preparing a report or testifying at trial.[27] A sure-fire way of getting wearable device data before the jury may indeed be to have an expert rely on it as the basis for his or her expert opinion. Depending on the case, an expert witness could also rely on such data to establish that the plaintiff did not suffer from an alleged condition and discredit causation based on the physical metrics shown from the data (i.e., a plaintiff claiming a particular injury would not exhibit the physical data demonstrated from such metrics).

V. Conclusion

As wearable devices continue to grow in popularity, defense counsel should realize their evidentiary value and strategically request production of this type of ESI.

25: *See, e.g., Bartis*, 2021 WL 2092785, at *1 (determining via interrogatory answers that the plaintiff used a Fitbit).
26: *See* John G. Browning, *Fitbit Data Brings Another Dimension to Evidence*, IADC Committee Newsletter: TECHNOLOGY (July 2015), https://www.iadclaw.org/assets/1/19/Technology_July_2015.pdf.
27: *See United States v. Locascio*, 6 F.3d 924, 938 (2d Cir. 1993) ("[T]he facts that form the basis for an expert's opinions or inferences need not be admissible in evidence '[i]f of a type reasonably relied upon by experts in the particular field.' . . . Thus, expert witnesses can testify to opinions based on hearsay or other inadmissible evidence if experts in the field reasonably rely on such evidence in forming their opinions." (quoting Fed. R. Evid. 703)).

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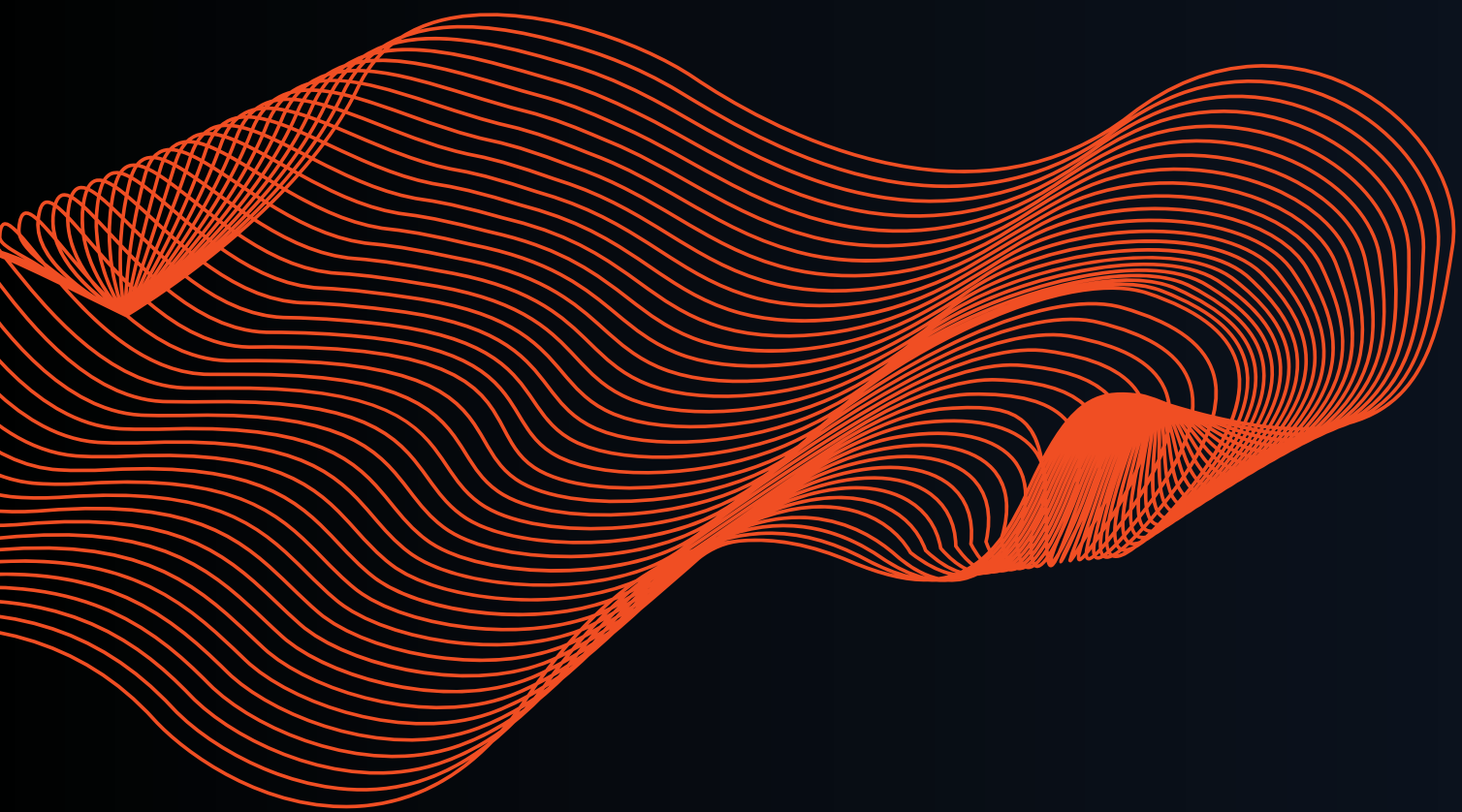

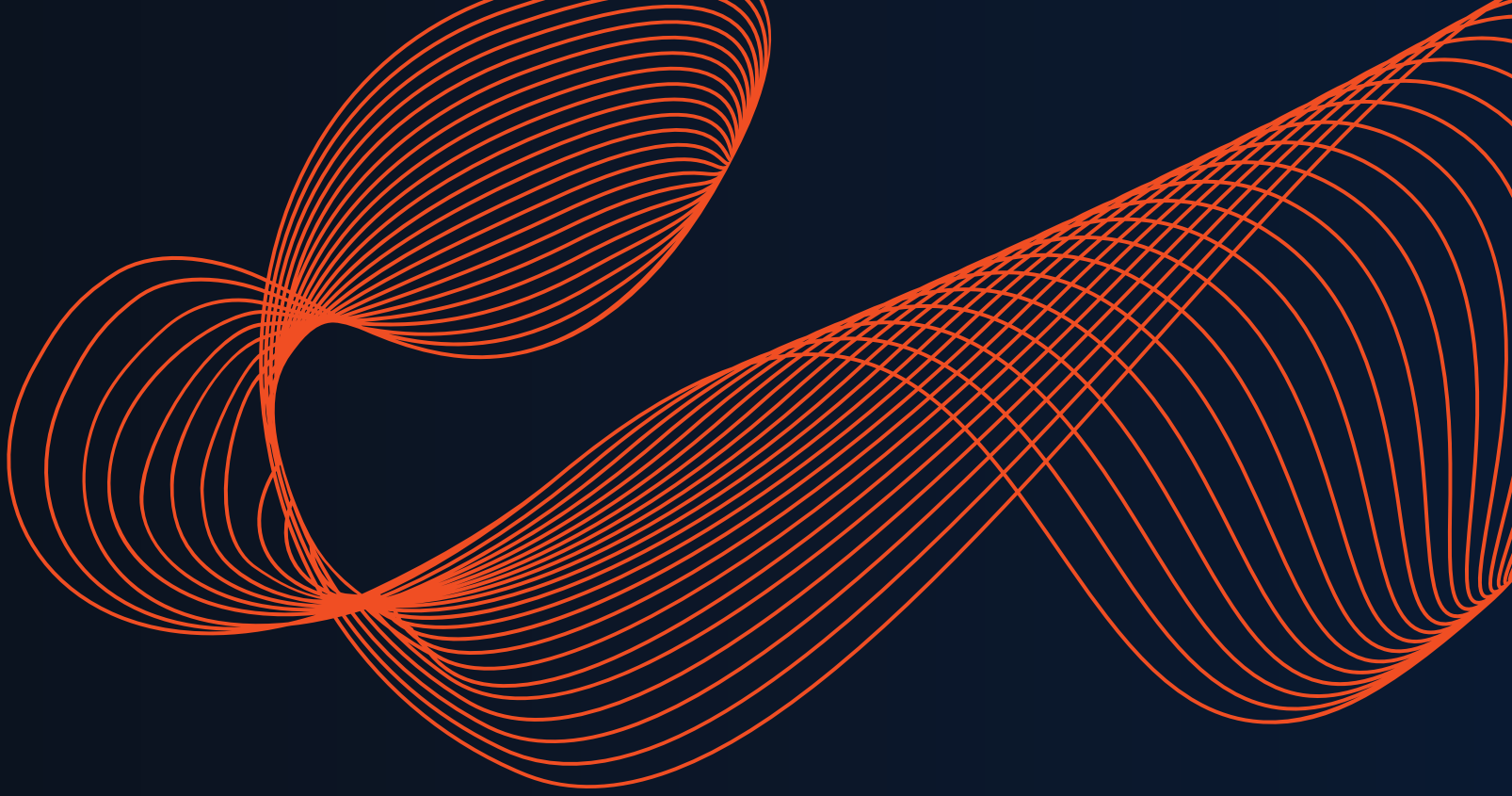

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Alan is recognized by Chambers USA (2022–23) for general commercial litigation in Alabama. He is also AV®-Preeminent™ Peer Review Rated by *Martindale-Hubbell®* (2013–22), and his work has been recognized by *The Best Lawyers in America®* (Product Liability Litigation – Defendants, 2014–24 and Commercial Litigation, 2018-24) and *Thomson Reuters, Mid-South Super Lawyers®* (Civil Litigation: Defense, 2021–22).

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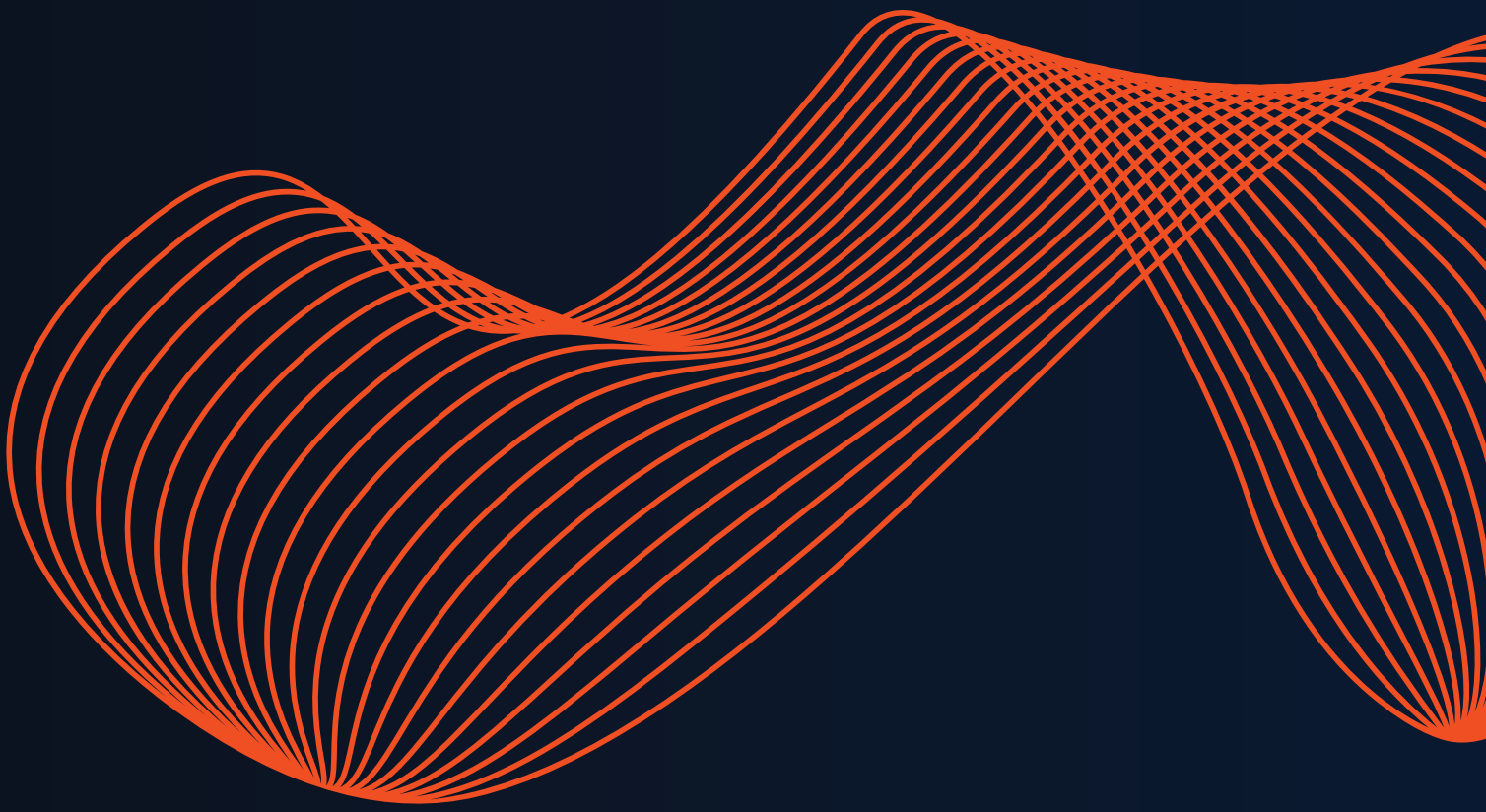
Xan Ingram Flowers – Xan is a member of the Products, Catastrophic & Industrial Litigation Group and focuses her practice on defending product manufacturers in complex litigation and mass tort cases. Xan's experience spans every stage of a case, whether that be a trial or final hearing in a litigated or arbitrated matter, or in immigration court, or seeking appellate relief via mandamus petitions, or interlocutory or secondary appeals. Xan has argued in front of the Court of Appeals for the Eleventh Circuit, regularly practices in both state and federal trial and appellate courts, and been selected to act as special appellate counsel, amicus counsel, pro bono counsel, and trial counsel. In addition to her product liability and appellate practices, Xan also has experience advocating for her clients in a wide range of commercial, insurance, bankruptcy, OSHA, and personal injury litigation, including recently achieving a defense verdict in a personal injury matter in Alabama state court.

She was recognized as a Rising Star by *Thomson Reuters, Mid-South Super Lawyers®* (Civil Litigation: Defense, 2022–23). She is admitted to the State Bar of Alabama and is a member of the Alabama Bar Association, the Defense Research Institute, and the Birmingham Bar Association as a part of the Future Leaders Forum in 2022.

Xan earned her Juris Doctor from Cumberland School of Law and received her bachelor's degree from the University of Texas at Austin. She also externed with the United States Attorney's Office for the Northern District of Alabama from January 2018 to May 2018.



Susanna M. Moldoveanu – Susanna is a member of the Pharmaceutical, Medical Device & Healthcare Group, focusing on drug and device litigation and appellate matters. She has served as a motions coordinator and legal strategy counsel in some of the largest MDLs in history. She has successfully defended drug and medical device companies in appeals in the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuit Courts of Appeal. Susanna also serves as embedded appellate counsel at trial. In the last two years, she has served as appellate counsel in the courtroom at four federal trials–all of them defense verdicts.

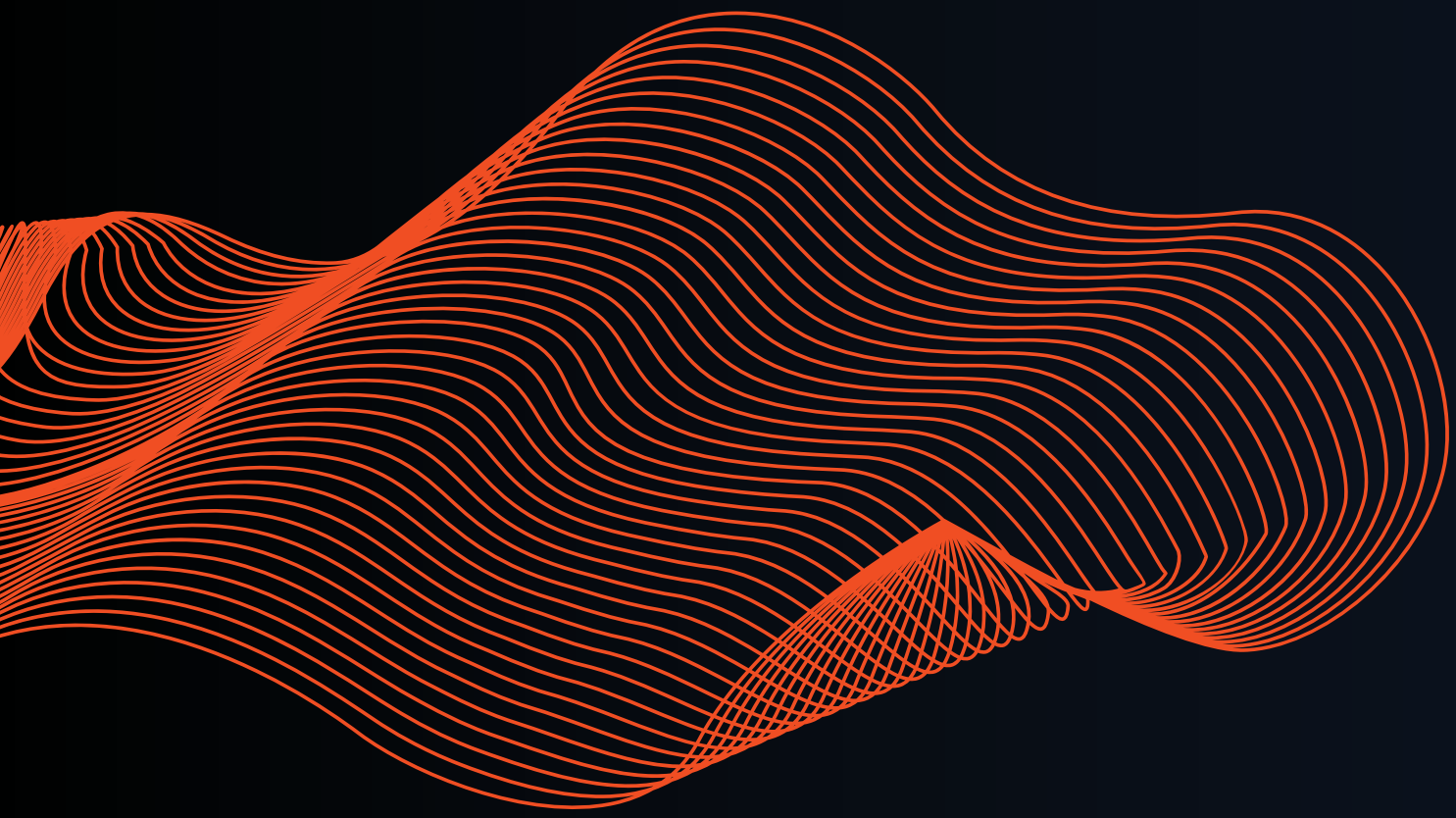
Susanna is a regular contributor to the award-winning *Drug & Device Law Blog*. She has also been recognized by *The Legal 500* (Product Liability, Mass Tort and Class Action: Pharmaceuticals and Medical Devices – Defense, 2023), *Law360* (Rising Star – Life Sciences, 2022) and *Best Lawyers in America®* (Ones to Watch, Product Liability Litigation – Defendants, 2021-24). She taught as an adjunct professor at the Mississippi College School of Law (2009-10).

Susanna obtained her Juris Doctor from the University of Mississippi and clerked for Judge Southwick of the U.S. Court of Appeals for the Fifth Circuit. She is admitted to the State Bars of Arkansas, Mississippi, Tennessee, Louisiana and New York.

Katelyn R. Ashton – Katelyn is a member of the Pharmaceutical, Medical Device & Healthcare Group. Her practice is focused on the representation and defense of manufacturers in complex products liability litigation in state and federal courts, with an emphasis on prescription drugs, medical devices, and chemicals. She was a member of the Motions Team in the largest MDL in history and also has experience drafting company discovery responses, taking plaintiff and witness depositions, and providing pre-trial and on-site trial support to lead counsel in complex medical device trials.

She has been recognized by *Thomson Reuters, Mid-South Super Lawyers®* as a Rising Star (Healthcare 2023) and by *Best Lawyers in America®* (Ones to Watch, Health Care Law, 2024 and Product Liability Litigation – Defendants, 2024).

Katelyn earned her Juris Doctor from Savannah Law School and clerked for the Honorable S. Thomas Anderson, former Chief Judge of the United States District Court for the Western District of Tennessee. She is admitted to the State Bar of Tennessee.



More About Our Firm

Our attorneys are active in countless civic and professional organizations. Those organizations include the Product Liability Advisory Council (PLAC), the International Association of Defense Counsel (IADC), the Defense Research Institute (DRI), the Federation of Defense and Corporate Counsel (FDCC), the American Board of Trial Advocates (ABOTA), the American College of Trial Lawyers (ACOTL), the Trial Attorneys of America (TAA), the International Academy of Trial Lawyers (IATL), the Trucking Industry Defense Association (TIDA), and the Transportation Lawyers' Association (TLA).

Butler Snow is a full-service law firm with over 400 attorneys collaborating across a network of more than 25 offices in the United States, Europe and Asia. Our firm has been consistently recognized for understanding our clients' businesses and anticipating their needs, as well as our attorneys' legal skills and the quality of their work. In 2023, *Chambers USA* ranked the firm for nationwide Product Liability & Mass Torts: The Elite, quoting a client in the editorial accompanying the rankings stating that our litigators simply "do a phenomenal job." Ranked as a leading firm for client relations and one of America's Top 100 law firms in the BTI Power Rankings, Butler Snow is recognized as one of the nation's top law firms for client service, including being named to the Client Service A-Team for three consecutive years. Additionally, the firm was ranked 48th out of 650 firms in the BTI Client Relationship Scorecard for understanding client business, anticipating client needs, unprompted communication, legal skills, quality and keeping clients informed. Butler Snow is also a long-time member of Lex Mundi, the world's leading network of independent law firms.

Attorneys of Products, Catastrophic & Industrial Litigation and Tort, Transportation & Specialized Litigation

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