EAGLE™
INTERNATIONAL ASSOCIATES

Presents

SUCCESSFULLY NAVIGATING THE WINDS OF CHANGE

March 20, 2024

The Jefferson Hotel
RICHMOND

EAGLE INTERNATIONAL ASSOCIATES

MISSION STATEMENT

Eagle International Associates is an international network of independent law firms, adjusters and claims related service providers throughout the United States, Canada and Europe. Eagle members are dedicated to providing insurance companies and self-insureds with the highest quality legal and adjusting services for competitive and fair compensation. As members, we are committed to the highest ethical standards and act with professionalism and civility in all our endeavors. Eagle members exceed their clients' expectations for quality and service. At every opportunity, we promote the use of Eagle and its members and refer existing relationships through active participation in Eagle's meetings, programs and seminars.

DIVERSITY POLICY

Eagle International Associates, Inc. is of the strong belief that our organization is stronger, more valuable, and more effective through the inclusion of adjustors and attorneys of diverse gender, sexual orientation, racial, ethnic, cultural backgrounds, and all religious or non-religious affiliations. Eagle recognizes that the inclusion of such diversity is vital in order to achieve excellence and to serve its clientele effectively. Eagle is committed to a further understanding of its cultural filters and the absolute need to accept each person as a valued, talented, unique individual, which, when working with other Eagle members, will bring the organization and all its members genuine benefits and competitive advantage in the marketplace.

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March 20, 2024

PROGRAM

Grand Ballroom

11:45 am **Registration and Lunch**

12:30 pm **Welcoming Remarks**
Stephen J. Fields, Esq., Brinker & Doyen, LLP
Chair, Eagle International Associates

Introduction of Sponsor Young & Associates
Wade Wilson, Vice President, Accident Reconstruction

Program Introduction
Debra S. Stafford, Esq., Hudgins Law Firm, P.C.
Program Chair

12:45 pm **Keeping Cool During Global Warming and Climate Change Litigation**
Moderators:
Drake W. Hudgins, Esq., Hudgins Law Firm, P.C.
Carrie A. Moss, Esq., Bendin Sumrall & Ladner, LLC

Panelists:
John Bernier, Chief Meteorologist, WRIC-TV
Marc Mayerson, Esq., The Mayerson Firm PLLC
Vickie L. Story, Litigation Specialist, Allianz Global Corporate and Specialty Insurance Company

1:45 pm **Navigating Claims in the Growing Common Carrier Industry**
Moderators:
Paul M. Finamore, Esq., Pessin Katz Law, P.A.
Lyle Robinson, Esq., Taylor Wellons Politz Duhe

Panelists:
Kelly Bradley, Claim Specialist – Major Case Unit, West Bend Insurance
Max Brusky, Director, Claims Management, Bulkmatic, LLC

2:45 pm **BREAK**

3:00 pm **A Legal Horror Story: Pro Se Litigants**
Moderators:
Melvin J. Davis, Esq., Reminger Co., LPA
William F. Gogoel, Esq., Hudgins Law Firm, P.C.

Panelists:
Jonathan Roth, Assistant Director, Virginia Division of Risk Management
Jessie Smith, Claims Counsel, Kinsale Insurance

4:00 pm **"Anchors Aweigh": Thoughts on How to Re-Moor an Adversary Who Has Pulled Away From the Dock and Set Sail for the Moon**
Moderators:
David V. Hayes, Esq., Bendin Sumrall & Ladner, LLC
Barry S. Rothman, Esq., Strongin Rothman & Abrams, LLP

Panelists:
Sanjay Shivpuri, Director & Senior Counsel, Complex Claims, Casualty Claims, Markel
Jeff Trueman, Esq., LL.M, Mediator & Arbitrator
Michael K. Woolley, Director, Legal Counsel, XPO

5:00 pm **Reception**

6:00 pm **Dinner**

APPROVED CE / CLE CREDITS

ADJUSTER
Florida 4.0
North Carolina 4.0
Texas 3.0

LEGAL
Illinois 4.0
Virginia 4.0 (pending)
Wisconsin 4.5

THE OPINIONS AND VIEWS OF THE PANELISTS ARE THOSE OF THE PANELISTS ONLY, AND NOT THOSE OF THE PANELISTS' EMPLOYERS

SUCCESSFULLY NAVIGATING THE WINDS OF CHANGE

TABLE OF CONTENTS

SUCCESSFULLY NAVIGATING THE WINDS OF CHANGE
RICHMOND 2024
PRESENTERS

John Bernier
Chief Meteorologist
WRIC-TV
301 Arboretum Place
Richmond, VA 23236
804-330-8844
JBernier@wric.com
www.wric.com

John Bernier has been the chief meteorologist for WRIC-TV since 1984. Additionally, John has been an adjunct faculty member of the Center for Environmental Studies at Virginia Commonwealth University in Richmond, VA since 2003. John holds a B.S. degree in Meteorology from the University of Lowell, Massachusetts, Magna Cum Laude. He is an American Meteorological Society's Certified Broadcast Meteorologist and the most experienced active holder of the National Weather Association's Certification of Television Weathercasting.

John is also the recipient of a Special Service Award from the National Weather Service for work done concerning severe weather and multiple AP awards for Best Weathercast/Weathercaster. He won the 1993 Emmy for the best weathercaster in the mid-Atlantic region.

John is the former Media Editor for the National Weather Association's Quarterly Digest. He is also a founding member of the National Weather Association's Committee on radio and television weathercasting. John is married, has two children, and resides in Mechanicsville, Virginia.

Kelly L. Bradley
Claims Specialist, Major Case Unit
West Bend Insurance
1900 South 18th Avenue
West Bend, WI 53095
608-410-3685
kbradley@wbmi.com
www.wbmi.com

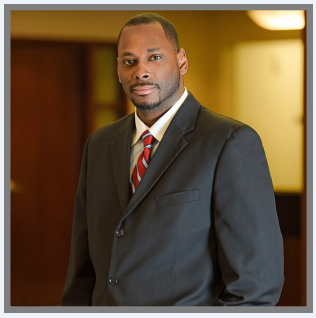
Kelly Bradley is a Claims Specialist with the Major Case Unit for West Bend Insurance. She manages large exposure and specialty coverage claims. Kelly has 25 years of experience as an insurance professional which includes personal lines, commercial, and excess surplus specialty carriers. Beginning with managing simple auto PD claims, liability disputes, total loss teams and subrogation teams she eventually transitioned into a large trucking with general liability specialist and construction defects matters. Kelly participated in the Arbitration Forum as a panelist and as a trainer. As a specialist, Kelly consulted with the Arizona Department of Insurance to rewrite and design the adjuster licensing test. She strives for reasonable evaluations and resolution, with a strong passion for virtuous ethics. Kelly enjoys her family, grandchildren, traveling and giving back to her community.

Maxwell Brusky
Director, Claims Management
Bulkmatic LLC
2001 N. Cline Ave.
Griffith, IN 46319-1008
219-218-1920
mbrusky@bulkmatic.com
www.bulkmatic.com

Maxwell (Max) Brusky is currently Director, Claims Management for Bulkmatic, LLC, the largest dry bulk goods carrier in the U.S. Based in Griffith, IN, Bulkmatic, LLC operates in 20 states from the upper Midwest to eastern Pennsylvania and New Jersey and south to Texas, Alabama, Georgia, the Carolinas, and Florida. In this role, Max is responsible for managing the variety of claims exposures to the company, including auto liability, workers compensation, equipment physical damage, and cargo/freight, as well implementation of the company's insurance, safety, compliance, and risk management programs. He is also currently a Vice Chair in the Federation of Defense and Corporate Counsel (FDCC)'s Transportation Section, an Advisory Board member of ClaimsXchange, and an immediate past Client Advisory Board member of American Law Firm Association, International (ALFAI).

Prior to joining Bulkmatic, Max was an Assistant Branch Manager of Gallagher Bassett Specialty's Transportation Practice Major Case Unit following its establishment in 2020. Prior to joining GB, he was the Director, Claims Management for Hub Group's Trucking subsidiary for 4.5 years. Before joining Hub Group, Max owned and operated a solo litigation practice specializing in insurance defense, subrogation, and coverage for nearly 8 years, and was an associate with 2 Chicago defense firms before that. Max began his legal career with the Chicago Transit Authority Law Department's Tort Section, where handled trials and appeals. Originally from Racine, Wisconsin, he is a 1995 graduate of the University of Wisconsin-Madison, and a 2000 J.D. graduate of the DePaul University College of Law.

Melvin J. Davis, Esq.
Reminger Co., LPA
200 Civic Center Drive, Ste. 800
Columbus, OH 43215
614-232-2630
Mdavis@reminger.com
www.reminger.com



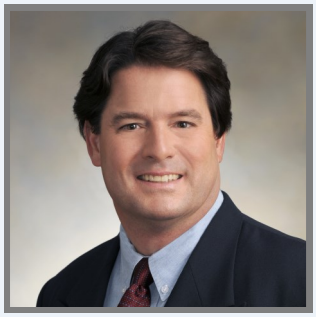
Melvin J. Davis is a shareholder at the law firm of Reminger Co. LPA., focusing his legal practice in several areas including, employment, government liability and professional negligence. Additionally, Melvin has extensive experience representing long-term care facilities including trial experience. Melvin has also developed an appellate practice representing clients before Appellate Courts throughout Ohio, the Ohio Supreme Court and the U.S. Sixth Circuit. Melvin was rated by Super Lawyers' as a Rising Star.

Melvin's talents go beyond the courtroom, as he previously served on the Executive Board as Legal Counsel for Kids Voting of Central Ohio, a non-profit organization dedicated to creating lifelong, informed voters among today's youth. He was also appointed by the Columbus City Council to the Columbus Records Commission. In addition, he currently serves on the Alumni Advisory Board of his alma matter, Capital University. Due to his accomplishments, Melvin was recognized in Who's Who in Black Columbus, which celebrates the accomplishments of African Americans in the community.

Stephen J. Fields, Esq.
Brinker & Doyen, LLP
34 North Meramec Avenue, 5th Fl.
St. Louis MO 63105
314-719-1617
sfields@brinkerdoyen.com
www.brinkerdoyen.com

Stephen J. Fields is a partner in the law firm of Brinker & Doyen, L.L.P. He is a graduate of the University of Illinois at Champaign-Urbana and The John Marshall Law School. He is licensed to practice law in Missouri and Illinois. He practices in the areas of personal injury defense, professional liability, restaurant liability, medical malpractice, products liability, securities liability and insurance fraud. He has tried cases in Missouri and Illinois. He has completed several arbitrations in various matters. He has provided numerous presentations to clients and industry professionals on a variety of topics. He is a member of the Missouri Bar Association, the Illinois State Bar Association, the Bar Association of Metropolitan St. Louis, Defense Research Institute, Claims Litigation Management, The Risk and Insurance Management Society, Inc., and the Missouri Organization of Defense Lawyers (board member). Steve is the current Chair of Eagle International Associates. When he is not working, he enjoys spending time with his wife and two boys riding bikes, hiking, and golfing.

Paul M. Finamore, Esq.
Pessin Katz Law, P.A.
10500 Little Patuxent Parkway, Suite 650
Columbia, MD 21044
410-371-7880
pfinamore@pklaw.com
www.pklaw.com



Paul M. Finamore is a member of the Maryland firm, Pessin Katz Law, P.A. He is an experienced trial lawyer who has practiced in state and federal courts throughout Maryland and the District of Columbia for over 30 years. His experience includes litigation of general and professional liability matters, including first and third party claims, as well as employment law.

Mr. Finamore has been recognized in Best Lawyers in America in the areas of Insurance Law as well as in Litigation – Insurance. He has an AV- preeminent peer rating in Litigation, Insurance, and Labor and Employment. He has also been recognized as a top attorney by Maryland SuperLawyers magazine annually from 2008 through the present. He is a three-time recipient of the Golden Gavel Award from the Westfield Group of Insurance Companies. He is also a member of the Federation of Defense and Corporate Counsel.

William F. Gogoel, Esq.
Hudgins Law Firm, P.C.
2331 Mill Road, Suite 100
Alexandria VA 22314
703-837-3219
wgogoel@hudginslawfirm.com
www.hudginslawfirm.com

William Francis Gogoel is an associate at Hudgins Law Firm, P.C., a litigation, business, and insurance practice in Alexandria, Virginia. Mr. Gogoel is licensed in Virginia, Washington, D.C., the United States District Court for the Eastern District of Virginia, and the United States District Court for the District of Columbia. For his undergraduate studies, Will attended James Madison University where he majored in Philosophy, primarily focusing on logic and argumentation, and earned a minor in Humanitarian Affairs in 2015. He went on to obtain his Juris Doctorate from the George Washington University Law School. He started working for Hudgins Law Firm as a law clerk in 2015, and joined Hudgins Law Firm after graduating in 2019. His primary areas of practice include defense of general liability, personal injury, products liability, wrongful death, premises liability, and professional liability matters, as well as defense of state constitutional officers and employees. He also advises clients on issues surrounding employment litigation, contracts, and leases.

Will is a member of the Alexandria and Fairfax Bar Associations, and the Virginia Association of Defense Attorneys. He currently resides with his fiancé in Clifton, Virginia. He has a deep connection with the Northern Virginia area, being born and raised here. His hobbies include reading, chess, movies, and hiking.

David V. Hayes, Esq.
Bendin Sumrall & Ladner LLC
1360 Peachtree Street, NE, Suite 800
Atlanta, GA 30309
404-671-3100
dhayes@bsllaw.net
www.bsllaw.net

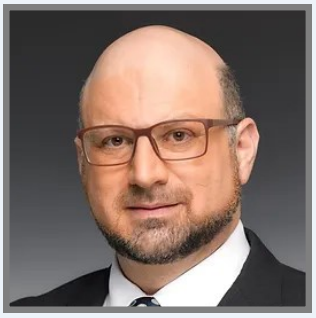
David V. Hayes is a partner at Bendin, Sumrall & Ladner, LLC, in Atlanta. David represents and advises insurers, medical professionals, product manufacturers, businesses and governmental entities in state and federal courts across the Southeast. David is licensed to practice law in Alabama, Georgia and Tennessee. David's practice is widespread from premises liability to products liability to professional liability. He received his undergraduate degree from Samford University, in Birmingham, Alabama, and graduated from the Cumberland School of Law at Samford University.

Drake W. Hudgins, Esq.
Hudgins Law Firm, P.C.
2331 Mill Road, Suite 100
Alexandria VA 22314
703- 837-3218
drake@hudginslawfirm.com
www.hudginslawfirm.com

Drake Hudgins' main practice areas include general liability, personal injury, wrongful death, premises liability, and professional malpractice. Mr. Hudgins also devotes a substantial portion of his time advising clients regarding business litigation, property disputes, contracts, leases, and employment issues. Born and raised in Northern Virginia, Mr. Hudgins values the ideal of the "Citizen Lawyer" who possesses a broad liberal education, practices experiential learning, and is capable of using knowledge of the law to promote the public good and general welfare of the community.

Before joining the firm, Mr. Hudgins received his Juris Doctor from the George Washington University Law School where he served on the Academic Integrity Committee and worked as student attorney advocating for the civil needs of low-income residents of Washington D.C. Prior to law school, Mr. Hudgins attended Hampden-Sydney College where he majored in Psychology and earned a minor through the College's nationally renowned Rhetoric Program for writing and public speaking. Mr. Hudgins currently resides in Alexandria, Virginia and enjoys golf, fishing, and volunteering for local charities in his spare time.

Marc Mayerson
The Mayerson Firm PLLC
611 Pennsylvania Ave SE #225
Washington, District of Columbia 20003
202-517-6607
marc@mayersonfirm.com
www.mayersonfirm.com



Marc Mayerson is a lawyer, arbitrator, mediator, law professor, and expert. He is the principal of The Mayerson Firm PLLC, in Washington, DC. www.mayersonfirm.com

For more than 35 years, Marc has specialized in complex insurance-coverage disputes and advice on behalf of policyholders, such as businesses, nonprofits, directors, executives, fiduciaries, and individuals. He has appeared as lead counsel in many jurisdictions across the country (both at the trial and appellate levels) and has participated in arbitrations in the US and abroad. For more than a decade, Marc has served as an attorney-fees arbitrator for the DC Bar. Marc was a mediator for Superstorm Sandy claims per NY Insurance regulation.

In addition to his national private legal practice focused on insurance recovery, Marc is a frequent author and speaker on insurance-law topics and for more than 20 years Marc has taught the insurance-law course at George Washington University School of Law. He is the co-editor of *New Appleman Insurance Law Practice Guide*, the most widely used practice guide in the field and used by lawyers and claims people throughout the United States.

Routinely recognized as one of the preeminent lawyers in insurance, Marc was identified as one of the ten "Leading Lawyers" in Insurance by *LegalTimes* (Feb. 26, 2007); his selections include ChambersUSA *America's Leading Business Lawyers*, the *BestLawyers in America*, *SuperLawyers*, and in Experts' Guide to the *World's Leading Insurance & Reinsurance Lawyers*. Marc has testified to a Senate Subcommittee on liability and insurance issues for non-profits and to the Department of Labor's ERISA Advisory Council on bond/fidelity and fiduciary-liability insurance regarding pension and welfare fund fiduciaries. Marc also presented at the annual meeting of the American Property Casualty Insurance Association and separately to a conference of its general-counsels' committee.

Marc Mayerson attended Harvard Law School (*magna cum laude* 1986), where he was a member of The Harvard Law Review. He obtained his undergraduate degree from the University of Michigan (1983), with *Highest Distinction*, High Honors, and *Phi Beta Kappa.* After law school, he served as a judicial clerk for The Honorable Stephen R. Reinhardt of the United States Court of Appeals for the Ninth Circuit. He entered private practice in 1987.

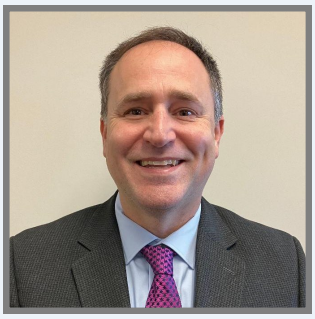
Carrie A. Moss, Esq.
Bendin Sumrall & Ladner, LLC
1360 Peachtree St. N.E., Suite 800
Atlanta, GA 30309
(404) 671-3113
cmoss@bsllaw.net
www.bsllaw.net

Carrie Moss is a Partner at Bendin Sumrall & Ladner, LLC located in Atlanta, GA. Carrie practices in the areas of construction and environmental litigation and general liability and has experience in both Georgia state and federal courts. She earned her J.D. from the University of Georgia School of Law in 2015, where she graduated cum laude. She studied international and comparative law through UGA's Oxford Program at St. Anne's College, Oxford University during Spring 2014. Carrie received her undergraduate degree from The University of North Carolina at Chapel Hill in 2012. As Captain and Vice President, she helped lead the women's rugby team to a national tournament appearance during all four years of college. Carrie is a member of the Eagle International Associates, Georgia Defense Lawyers Association, American Bar Association, and Atlanta Bar Association. With a passion for health and wellness, she is also an active member of the State Bar of Georgia Attorney Wellness Committee. Carrie represents clients in the resolution of various issues involved in residential and commercial construction defect claims, construction accidents, sedimentation and erosion, mold exposure, moisture intrusion, and storm water related claims. Carrie also represents corporations, commercial property owners, retailers, and apartment and condominium management companies in premises liability, negligent security, personal injury, and mold exposure cases. She was named as a Georgia Super Lawyers Rising Star for 2020-2024.

B. Lyle Robinson, Esq.
Taylor Wellons Politz & Duhe
100 Webster Circle, Suite 104
Madison, MS 39110
769-300-2988
lrobinson@twpdlaw.com
www.twpdlaw.com

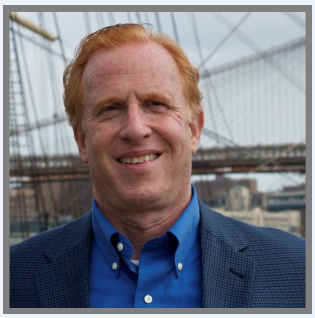
Lyle Robinson is a partner with Taylor Wellons Politz Duhe in Madison, Mississippi. He received a Bachelor of Business Administration in Risk Management and Insurance from the University of Georgia in 1992. He received his Juris Doctor magna cum laude from Mississippi College School of Law in 2000. While in law school, he served as the Managing Editor of the Law Review. In addition, Lyle received AmJur Awards in Insurance Law and Secured Transactions, and was awarded an academic scholarship. He is an experienced litigator who specializes in matters that involve complex commercial and tort litigation, insurance coverage disputes, bad faith claims and products liability. Lyle is admitted to practice in all state and federal courts in the state of Mississippi, as well as the United States Courts of Appeals for the Fifth and Eleventh Circuits.

Jonathan Roth
Assistant Director
Division of Risk Management
Virginia Department of the Treasury
101 North 14th Street
Richmond, VA 23219
804-786-4159
Jonathan.roth@trs.virginia.gov
www.trs.virginia.gov



Jonathan Roth is originally from El Paso, Texas. He received his BA from the University of Texas in Austin, majoring in Government. Jonathan then attended law school at the University of Richmond, gaining his J.D. After law school, he was a Supervising Assistant Public Defender for the City of Richmond for four years. He then went to the Virginia Department of Professional and Occupational Regulation to be an Investigations Supervisor. For the past ten years he has been with the Virginia Department of Treasury, Division of Risk Management and is currently the Assistant Director. DRM provides liability protection for Virginia state agencies, state employees, regional jails and constitutionally elected officials, such as sheriffs and commonwealth's attorneys.

Barry S. Rothman, Esq.
Strongin Rothman & Abrams, LLP
80 Pine Street, 10th Fl.
New York, NY 10005
212-931-8302
brothman@sralawfirm.com
www.sralawfirm.com



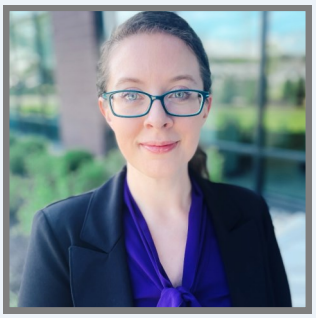
Barry S. Rothman has over 35 years of experience in civil litigation, with concentrations in transportation/ trucking, construction, premises liability, crime prevention/security and food product liability. In the transportation/logistics field, he represents long and short haul carriers, and warehouse/distribution facility owners/managers, in personal injury, wrongful death and cargo-related matters. In the area of construction litigation, he has represented owners, contractors and engineering concerns in accident and construction defect cases. He has also litigated premises liability and security matters, on behalf of shopping center and mall owners/managers, retailers, hotel chains, residential and commercial property owners and security contractors. In food industry litigation, Mr. Rothman has represented manufacturers, distributors and retailers in contamination, foreign object and food packaging claims.

He has tried to verdict numerous cases in the State and Federal courts and has been the attorney of record on a number of reported cases reaching the appellate courts.

Barry has also represented clients in commercial and employment matters, including contract and brokerage disputes, discrimination claims, ADA, ADEA, harassment and wrongful termination claims, wage/hour disputes and employee/independent contractor classification matters.

Barry is a graduate of Brooklyn Law School and Brooklyn College of the City University of New York, and is active in his Essex County, New Jersey, community.

Jessie Smith
Senior Claims Counsel
Kinsale Insurance Company
2035 Maywill Street
Richmond VA 23230
804-289-1309
Jessie.smith@kinsaleins.com
www.kinsaleins.com



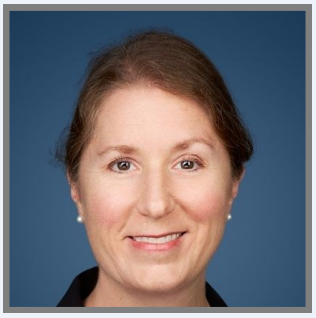
Jessie Smith first encountered insurance while working in sales for Allianz Travel Insurance and held a Property & Casualty Producer license in Virginia and limited lines licenses in all states. Inspired by her experience in insurance, Jessie attended law school at William and Mary, with a focus in business law, cybersecurity, and insurance. She graduated from law school and was admitted to practice law in Virginia in 2020. After law school, Jessie worked in electronic discovery doing document review for several large international tort and regulatory cases for the law firm McGuire Woods before accepting a position with Kinsale Insurance Company. She currently holds the position of Senior Claims Counsel and has been with Kinsale since 2021 working in Specialty Lines claims, which includes Professional Liability, Management Liability, Public Entity, Health Care, Allied Health, and, previously, Products Liability.

Sanjay Shivpuri
Director and Senior Counsel
Markel
10275 West Higgins Road, #750
Rosemont, IL 60018
847-572-6318
Sanjay.shivpuri@markel.com
www.markel.com

Sanjay Shivpuri is a Director and Senior Counsel for Markel Service, Incorporated, a division of Markel Corporation (NYSE: MKL). Headquartered in Richmond, Virginia, and founded in 1930, Markel is a Fortune 500 company with insurance, reinsurance, and investment operations around the world.

Sanjay is on the Casualty Complex Claims team and handles the highest exposure casualty claims at Markel, including class actions, products liability, construction accidents, and trucking accidents. He has worked in the insurance industry since 2018. Before joining Markel, he practiced law for 19 years, including as a partner and first-chair trial attorney at a Chicago commercial litigation law firm. He graduated from Purdue University with a degree in Civil Engineering, and then went to law school at Chicago-Kent College of Law where he graduated with honors. He is based in Chicago, Illinois.

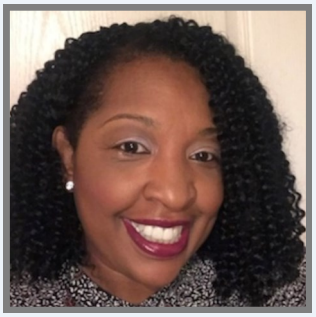
Debra S. Stafford, Esq.
Hudgins Law Firm, P.C.
2331 Mill Road, Suite 100
Alexandria VA 22314
703- 837-3204
dstafford@hudginslawfirm.com
www.hudginslawfirm.com



Debra Schneider Stafford is a partner at Hudgins Law Firm, P.C., a litigation, business, and insurance practice in Alexandria, Virginia. Deb is licensed in state and federal courts in Virginia and Washington, D.C. She earned her B.A. cum laude in Classics & Political Science from Randolph-Macon College in 1994 and was inducted into Phi Beta Kappa. During college, she studied archaeology and classics in Rome, Italy for four months. Deb earned her J.D. in 1998 from the University of Richmond, where she was also a member, web editor, and note author for the Richmond Public Interest Law Review. During law school, Deb served as a summer law clerk/intern at the U.S. House of Representatives Commerce Committee (Majority) and at the U.S. Department of Justice, Environmental Enforcement Section. After graduation, she became a staff attorney for the prosecutor training affiliate of the National District Attorneys Association. Deb joined Hudgins Law Firm as an associate in 1999 and became a partner in 2006. Over the years, she has successfully represented many businesses, individuals, and insureds. Her current practice focuses on defending professional and general liability matters, including defending claims against Virginia constitutional officers and employees, and advising individuals and businesses on transactional matters. Deb is a member of FDCC and is rated AV-Preeminent by Martindale. She lives in Fairfax County with her two children. Deb volunteers as a member of the events committee for her neighborhood which is a unique adaptive reuse of the former D.C. prison site.

Vickie L. Story

Litigation Specialist
Allianz Global Corporate and Specialty
Insurance Company
11475 Great Oaks Way, Suite 200
Alpharetta GA 30022
678-393-4139
vickie.story@agcs.allianz.com
www.agcs.allianz.com



Vickie Lynn Story is a litigation specialist for Allianz Global Corporate and Specialty Insurance Company. She is a graduate of Jacksonville State University, where she received a BS in Criminal Justice/Social Work. After graduation, Vickie launched her career in Birmingham, Alabama, where she began working with a plaintiff firm specializing in auto accidents. That eventually led Vickie into attending Miles Law School where she graduated cum laude. Vickie is a silver star member of Alpha Kappa Alpha Sorority, Inc. Over the last 25 years she has dedicated her time to mentoring young at-risk kids with foster parents of Jefferson County, Alabama. She currently resides in Atlanta, Georgia.

Jeff Trueman, Esq., LL.M

Mediator Arbitrator
PO Box 38434
Baltimore, MD 21231
410-608-2463
jt@jefftrueman.com
www.jefftrueman.com

Jeff Trueman is a full-time mediator and arbitrator with twenty years of experience helping parties resolve litigated and pre-suit disputes concerning wrongful death, catastrophic injuries, professional malpractice, employment, and business dissolutions. He is a Distinguished Fellow of the International Academy of

Mediators and the National Association of Distinguished Neutrals, invitation-only membership organizations consisting of some of the most successful commercial mediators in the country and the world. His writings have appeared in the Washington University Journal of Law and Policy, the International Institute for Conflict Prevention and Resolution, Claims Litigation Management Alliance Magazine, the Maryland Daily Record, the Maryland State Bar Journal, the University of Baltimore Law Review, and elsewhere. He holds an LL.M in dispute resolution from the Stratus Institute for Dispute Resolution at the Pepperdine Caruso School of Law. He is an adjunct professor at the University of Maryland Francis King Carey School of Law and Pepperdine Caruso School of Law.

Michael K. Woolley
Director, Legal Counsel
XPO
Five American Lane
Greenwich, CT 06831
804-213-6168
Michael.woolley@xpo.com
www.xpo.com

Mike Woolley is an experienced transportation lawyer. Mike currently works for XPO, a leading provider of freight transportation services, primarily less-than-truckload (LTL) and truck brokerage services. XPO also provides dedicated, managed transportation, drayage, intermodal, expedited, and other services. Mike has worked as the General Counsel of Cardinal Logistics, AGC with C.R. England, and for an niche insurer that insures small trucking enterprises. He was a shareholder with the Salt Lake City law firm of Richards, Brandt, Miller & Nelson, where he litigated, among other things, tractor-trailer accidents. He served as a judicial law clerk to the Utah Supreme Court and the U.S. District Court in Nevada. He is a graduate of the University of Utah College of Law and Brigham Young University.

THE LEGAL STORM SURROUNDING GLOBAL WARMING AND CLIMATE CHANGE

Drake W. Hudgins, Esq.
Hudgins Law Firm, P.C.
Alexandria, VA
703- 837-3218
drake@hudginslawfirm.com
www.hudginslawfirm.com

The Legal Storm Surrounding Global Warming and Climate Change

By: Drake W. Hudgins, Hudgins Law Firm, P.C.

There is an emerging – rapidly growing – body of climate change litigation in the U.S. Beginning in the 19th century, science demonstrates human activities have been the main driver of long-term shifts in temperatures and weather patterns primarily due to the burning of fossil fuels like coal, oil and gas.[1] Now plaintiffs are bringing climate change actions on various grounds to hold governments and high emitting corporations responsible. As of December 15, 2023, the Columbia Law School Sabin Center's U.S. Climate Change database has 1,687 cases, with 114 of these cases filed in 2023.[2]

U.S. climate change litigation is only expected to grow in the coming years after several "groundbreaking" decisions in 2023.[3] Most notably, a group of youth plaintiffs in Montana won at trial on the issue of whether a state's failure to consider climate change violated their constitutional right to a healthy and clean environment.[4] In Hawaii, another group of youth plaintiffs have been allowed to proceed to trial on similar claims against the state's fossil fuel-based transportation system.[5] On December 29, 2023, a federal district judge in Oregon denied a motion to dismiss allowing a young group of plaintiffs known as the "Juliana 21" to proceed with their climate-related claims against the federal government for the first time since the case was brought in 2015.[6]

Since 2017, eight states, dozens of municipalities, and the District of Columbia have sued major fossil fuel companies under state common law seeking compensation for damages related to climate change.[7] On April 24, 2023, the U.S. Supreme Court dealt a major blow to the

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[1] United Nations, "What is Climate Change?" United Nations, https://www.un.org/en/climatechange/what-is-climate-change. (last visited Feb. 20, 2024, 12:31 p.m.).

[2] Maria Antonia Tigre & Margaret Barry, Climate Change in the Courts: A 2023 Retrospective (Sabin Center for Climate Change Law, December 2023), available at: https://scholarship.law.columbia.edu/sabin_climate_change/212.

[3] Id.

[4] Held v. Montana, No. CDV-2020-307 (1st Dist. Ct. Mont., August 14, 2023). The decision can be found online at: https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230814_docket-CDV-2020-307_order.pdf.

[5] N.F., a Minor v., Dept. of Transportation, et al., No. 1CCV-22-0000631 (JPC) (1st Cir. Ct. Haw, April 6, 2023). The decision can be found online at: https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230406_docket-1CCV-22-0000631_ruling.pdf.

[6] Juliana, *et al*. v. United States, No. 6:15-cv-0517-AA (D. Or. Dec. 29, 2023). The decision can be found online at: https://climatecasechart.com/wp-content/uploads/case-documents/2023/20231229_docket-615-cv-01517_opinion-and-order-1.pdf.

[7] See Center for Climate Integrity, Climate Liability Litigation, https://climateintegrity.org/cases (Feb. 20, 2024 at 12:54 p.m.); A database of such cases is maintained by Columbia Law School. *See U.S. Climate Change Litigation*, Sabin Ctr. for Climate Change L., https://climatecasechart.com/case-category/common-law-claims/ (last visited Feb. 20, 2024 at 1:01 p.m.).

defendant companies by refusing to hear their bids to remove these cases from state to federal court.[8] Now state courts around the country will begin to hear arguments on motions to dismiss. If the plaintiff governments are successful, the cases will proceed towards discovery and trial.

The decision in *Held* is primarily important for being the first climate action that went to trial. The win now offers a model for future litigants to overcome previous burdens of standing and causation in climate liability cases. Environmental damage allegedly caused by climate change is now the subject of a growing number of lawsuits against companies in the fossil fuel energy sector.[9] Stakeholders in insurance and their defensive counsel would be wise to consider their potential exposure to these types of suits sooner rather than later.

I. What Is Climate Change Litigation?

These cases refer to any type of litigation that involves climate in its subject matter. Public and private plaintiffs bring these cases in order to spur climate mitigation efforts or receive adaptation funding. Mitigation means anticipating and taking appropriate action to prevent or minimize the threat or damage.[10] Adaptation means preventing or reducing the emissions of greenhouse gases (GHG) into the atmosphere to make the impacts of climate change less severe.[11]

There are many ways to mitigate or adapt to the threat of a rapidly warming planet gradually unleashing a host of natural disasters like wildfires and floods. For example, individuals can plant more trees or use less heat in their homes. Businesses can make "sustainability" their mission by installing on-site energy generating facilities and sourcing more recyclable, renewable materials for their production lines. Communities can reduce the source of GHG emissions by increasing renewable energy supplies and establishing greener mobility systems. Cities, counties, and states can initiate their own climate action plans to organize these efforts.[12] On a larger

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[8] Suncor Energy, Inc., *et al*. v. Bd. Comm'rs Boulder Cty., *et al*., 22-1550; BP P.L.C., *et al*. v. Mayor and City Council Baltimore, 22-361; Chevron Corp., *et al*. v. San Mateo County, CA, *et al*., 22-495; Sunoco LP, *et al*. v. Honolulu, HI, *et al*., 22-532; Shell Oil Products Co., *et al*. v. Rhode Island, 22-524, Order List: 598 (U.S. April 24, 2023). The decision can online at: https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230424_docket-21-1550_order-list-1.pdf.

[9] Douglas J. Steinke and Erica R. Sanders, "Monitoring a Growing Storm: The Implications of Climate Change Litigations on Insurers," American Bar Association, https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2022-23/winter/monitoring-growing-storm-implications-climate-change-litigation-insurers/?login (Feb. 20, 2024 at 1:18 p.m.); A database of such cases is maintained by Columbia Law School. *See U.S. Climate Change Litigation*, Sabin Ctr. for Climate Change L., https://climatecasechart.com/us-climate-change-litigation/ (last visited Feb. 20, 2024 at 1:20 p.m.).

[10] National Aeronautics and Space Administration, "Adaptation and Mitigation," NASA, https://climate.nasa.gov/solutions/adaptation-mitigation/ (Feb. 20, 2024 at 1:24 p.m.).

[11] Id.

[12] City of Richmond RVAgreen 20250, "Equitable Climate Action for a healthy and resilient Richmond," https://www.rvagreen2050.com/ (Feb. 20, 2024 at 1:27 p.m.).

scale, countries can jointly commit to build resilience and reduce vulnerability to the effects of climate change.

But will sparse promises and commitments be enough to make a difference? Many climate change activists do not think so which is why more of these legal cases are being brought.

II. Who are the plaintiffs and what legal theories are they using?

In theory, one who is guilty of causing pollution should have to pay damages in the form of compensation for necessary restoration of the environment and ecology. Currently, many public and private entities like governments and environmental advocacy organizations anticipate near-term disaster or massive costs associated with adapting to climate change.[13] For the most part, governments and environmental advocacy organizations are suing to recover money to support these adaptation needs.[14] In other cases, allegedly injured parties are suing to recover damages directly associated with climate change and/or for purposes of mitigating further damage.[15] The consistent issue plaintiffs have faced is the lack of legislation to guide their claims causing a variety of novel legal theories to emerge. Other issues of standing (i.e. redressability) have historically prevented many claims from surviving the pleadings stage. This paper cannot possibly cover every type of climate change lawsuit and will only focus on state common law claims that are directly relevant to businesses and their insurers.[16]

A. State Common Law Claims

In recent years, states and local governments have played a major role in bringing climate change-related actions against large fossil fuel companies ("the carbon majors") under state common law seeking compensation for damages related to climate change.[17] These types of claims include nuisance, negligence, strict liability, and trespass, as well as claims under local and state fraud, consumer protection and unfair practice statutes.[18] Beginning in 2017, this ongoing "Big Oil" litigation has centered on whether the cases belong in federal or state courts, raising the broader issue of a state court's authority to address climate issues. Indeed, every court that has issued decisions to date has found that, because the cases seek to impose liability based on

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[13] Yale University, "Yale Experts Explain Climate Lawsuits," Yale Sustainability, https://sustainability.yale.edu/explainers/yale-experts-explain-climate-lawsuits (Feb. 20, 2024 at 1:31 p.m.).
[14] A database of such cases is maintained by Columbia Law School. *See U.S. Climate Change Litigation*, Sabin Ctr. for Climate Change L., https://climatecasechart.com/us-climate-change-litigation/ (last visited Feb. 20, 2024 at 1:20 p.m.).
[15] Id.
[16] A database of such cases in maintained by Columbia Law School. See U.S. Climate Change Litigation, Sabin Ctr. For Climate Change L., https://climatecasechart.com/case-category/common-law-claims/ (last visited Feb. 20, 2024 at 1:01 p.m.).
[17] See Center for Climate Integrity, Climate Liability Litigation, https://climateintegrity.org/cases (Feb. 20, 2024 at 12:54 p.m.); A database of such cases is maintained by Columbia Law School. *See U.S. Climate Change Litigation*, Sabin Ctr. for Climate Change L., https://climatecasechart.com/case-category/common-law-claims/ (last visited Feb. 20, 2024 at 1:01 p.m.).
[18] Id.

companies' deceptive marketing practices, historical disinformation campaigns and failure to warn consumers and not the mere production of fossil fuels, it has been ruled that these cases should be allowed to proceed in state court. [19]

In Hawaii, the city and county of Honolulu have filed suit against Shell, Exxon, BP, and ConocoPhillips alleging defendants knew for decades that burning fossil fuels would lead to climate change but worked to conceal that fact from the public.[20] On October 31, 2023, the Hawaii Supreme Court rejected defendants' argument that federal law barred the state lawsuit filed against them, saying instead the case focused on allegedly misleading statements the companies made led to climate change related property and infrastructure damage.[21] Chief Justice Mark Recktenwald wrote in his order "[*t*]*his case concerns torts committed in Hawaii that caused alleged injuries in Hawaii*" allowing the case to proceed towards discovery and trial.[22]

In 2022, a private group of landowners in West Virginia filed a class action lawsuit against regional oil and gas companies alleging they promptly failed to promptly plug abandoned gas wells causing injuries.[23] A third amended complaint in that case is currently pending in the Northern District of West Virginia, which serves as an example of litigants utilizing common law theories to try to hold private companies liable for the effects of climate change.[24]

B. Greenwashing and Climate-Washing Claims

In addition to lawsuits targeting businesses in the fossil-fuel energy sector, private plaintiffs have started to bring climate change-focused "greenwashing" cases against public major corporations under common law theories of fraud, unjust enrichment, and negligent misrepresentation.[25] In 2023, commercial airlines KLM, Delta, and United were sued separately in federal district court for alleged misrepresentations regarding emissions reductions commitments, the effectiveness of carbon offsets, and overstated claims regarding the use of sustainable aviation fuel.[26] Most notably, a consumer who purchased "Nike's "Sustainability"

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[19] City of Oakland v. BP P.L.C. *et al.*, 2022; Mayor & City Council of Baltimore v. BP P.L.C. *et al.*, 2023; City & County of Honolulu v. Sunoco LP, *et al*., 2023; Rhode Island v. Shell Oil Products Co. *et al.*, 2023; County of San Mateo v. Chevron Corp., *et al.*, 2022; Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc., *et al.*, 2023.; See https://climatecasechart.com/case-category/common-law-claims/ (last visited Feb. 20, 2024 at 1:01 p.m.).

[20] City & County of Honolulu v. Sunoco LP, *et al.*, No. SCAP-22-0000429 (Haw. 2023).

[21] Id. The Oct. 31, 2023 decision can be found online at: https://climatecasechart.com/wp-content/uploads/case-documents/2023/20231031_docket-SCAP-22-0000429_opinion.pdf.

[22] Id. at 4 (emphasis added).

[23] McEvoy, *et al*. v. Diversified Energy Co., *et al.*, No. 5:22-cv-00171 (N.D.W. Va. 2022).

[24] Id. The Third Amended Complaint can be found online at: https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230616_docket-522-cv-00171_complaint.pdf.

[25] Maria Antonia Tigre & Margaret Barry, Climate Change in the Courts: A 2023 Retrospective (Sabin Center for Climate Change Law, December 2023), available at: https://scholarship.law.columbia.edu/sabin_climate_change/212

[26] Long v. K.L.M, No. 3:23-cv-00435 (E.D. Va. 2023); Simijanovic v. K.L.M., No. 2:23-cv-12882 (E.D. Mich 2023); Berrin v. Delta Air Lines Inc., No 2:23-cv-04150 (C.D. Cal 2023); Zajac v. United Airlines, Inc., No. 8:23-cv-03145 (D. Md.

Collection Products filed a class action complaint in the federal district court for the Eastern District of Missouri asserting that Nike falsely and misleadingly represented that the products were sustainable, made with sustainable materials, and environmentally friendly.[27] These cases are expected to face motions to dismiss in the coming year.[28]

On August 11, 2023, the state of California reached a settlement with a privately owned gas utility company in lawsuit alleging the entity has misled consumers with statements that its natural gas was "renewable."[29] On August 28, 2023, California consumers filed a class-action lawsuit against a company called Avocado Mattress alleging its latex mattresses, pillows, and topper contain harmful substances, accusing the company of using synthetic, toxic chemicals to create it products, which contravene the claims the company make in its "green" promotional materials.[30] The case has since been dismissed but represents the type of claim that is likely to emerge more frequently as companies begin to pledge more commitments to take the environment seriously. After all, it is hard to believe that a mattress can be considered a "green" product.

C. Other Non-Delegable Duty, Strict Liability and "Foreseeable Failure" Claims

While much of climate change litigation to date has focused on allegations that companies have contributed to greenhouse gas emissions, plaintiffs are also beginning to target businesses based on tort theories of failing to prepare or foresee the effects of climate change. In 2018, a fishing trade group sued fossil fuel companies for climate change damages alleging defendants knew that use of their products could be "catastrophic" and that they took actions to obscure the harms and avoid regulation while still acknowledging and plaining for climate change's consequences internally.[31] In 2019, Malibu residents filed suit to recover damages caused by the Woolsey fire asserting utility defendants had a non-delegable duty to safely maintain their electrical equipment but failed to do so. Plaintiffs further contended that

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2023). A database of such cases is maintained by Columbia Law School. *See U.S. Climate Change Litigation*, Sabin Ctr. for Climate Change L. https://climatecasechart.com/us-climate-change-litigation/.

[27] Ellis, *et al*. v. Nike USA, Inc. and Nike Retail Services, Inc., No. 4:23-cv-00632 (E.D. Mo. 2023). A copy of the Complaint can be found online at: https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230510_docket-423-cv-00632_complaint.pdf.

[28] See Blackburn v. Etsy, Inc., No. 2:23-cv-05711 (C.D. Ca., Oct. 12, 2023) (Motion to dismiss granted with leave to amend statutory claims). A copy of the Court's Order re: Motion to Dismiss can be found online at: https://climatecasechart.com/wp-content/uploads/case-documents/2023/20231012_docket-223-cv-05711_order.pdf.

[29] People v. Southern California Gas Co., No. 23CV040344 (Cal. Super. Ct. August 11, 2023). A copy of the Consent Decree can be found online at: https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230811_docket-23CV040344_consent-decree-1.pdf.

[30] Pina, et al. v. Avocado Mattress, L.L.C., No. 3:23-cv-02072-AGT, N.D. Ca. 2023). A copy of the Complaint can be found online at: https://www.classaction.org/media/pina-et-al-v-avocado-mattress-llc.pdf.

[31] See Pacific Coast Federation of Fisherman's Associations, Inc. v., Chevron Corp, et al., No. 3:18-cv-07477 (N.D. Cal. 2018) (Notice of voluntary dismissed filed on Dec. 14, 2023).

defendants were aware of the high risk of wildfire and knew that their equipment was not properly maintained or safe.[32]

In 2021, property owners, lessees, and occupants of four parishes in Louisiana filed a class action against Entergy Corporation and related defendants for damages sustained as a result of a "foreseeable failure" of Entergy's distribution and transmission equipment and systems during Hurricane Ida.[33] The plaintiffs alleged the failure had occurred "despite evidence which demonstrated the weakness of [defendants'] equipment" and that Entergy "has become aware that climate change around the world is changing."[34] In support of these claims, plaintiffs cited a 2007 "Hardening Study" they contend put Entergy on notice of the deficiencies in its systems, but that instead of taking action in response, the company had cut funding for operations and maintenance expenses.[35] These claims were based on theories of negligence and strict liability, as well as breaches of express and implied contracts.[36]

Each of these claims center around the theory that larger corporate defendants have greater knowledge of the risks associated with climate change thereby imposing a heightened duty of care to prepare for its effects to take appropriate action in response.

D. International Tort Theories Related to Climate Change

Lliuya v. RWE AG gained recognition as the first case endeavoring to hold fossil fuel companies directly liable in tort for damages related to climate change.[37] There, a farmer from the city of Huraz, Peru sued RWE, Germany's largest electric company, alleging it knowingly contributed to climate change by emitting greenhouse gases partially causing the melting of mountain glaciers near his town.[38] Specifically, the plaintiff claimed the emissions were a nuisance under German Civil Code, BGB §1004, and that RWE should reimburse a portion of costs incurred to establish flood protection.[39]

In 2017, the Upper State Court in Germany allowed the claim to proceed, and that it would go to an evidentiary phase on whether plaintiffs home was (a) threatened by floods or

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[32] See Von Oeyen v. Southern California Edison Co., et al., No. 19STCV04409 (Cal. Super. Ct. 2019). A copy of the Complaint can be found online at: https://climatecasechart.com/wp-content/uploads/case-documents/2019/20190208_docket-19STCV04409_complaint.pdf.

[33] See Stewart v. Entergy Corp., et al., No. 2021-07365 (La. Dist. Ct. 2021)(5th Circuit recently affirmed remand order to state court). A copy of the 5th Circuit's May 27, 2022 Order can be found online at: https://climatecasechart.com/wp-content/uploads/case-documents/2022/20220527_docket-22-30177_opinion.pdf.

[34] Stewart v. Entergy Corp, et al. A copy of the Complaint can be found online at: https://climatecasechart.com/wp-content/uploads/case-documents/2021/20210918_docket-2021-07365_complaint.pdf.

[35] Id.

[36] Id.

[37] Luciano Lliyua v. RWE AG, No. 2 O 285/15 Essen Regional Court (Status: On Appeal). A database of for all filings in this case is maintained by Columbia Law School. *See U.S. Climate Change Litigation*, Sabin Ctr. for Climate Change L. https://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/

[38] Id.

[39] Id.

mudslides and (b) how RWE contributed.[40] Plaintiff's experts estimate RWE's calculated share of historic greenhouse gases emissions to be around 0.47%. RWE would therefore be liable for around 0.47% of the costs to mitigate the flood risks (i.e. around 20,000 euros).[41]

This sample case study shows how evolving climate attribution science – i.e. establishing likely causes of detected climate change – could be increasingly applied to common law tort theories of liability. Seeking direct civil liability against companies responsible for climate change would skip over the politically challenging route of pursuing legislation and regulation. Plaintiff's bars may start bringing more of these claims in the U.S. exposing businesses in a variety of different sectors.

IV. Applying Modern Defense Strategies to Climate Change Litigation

A global sense of urgency and public awareness around climate change is driving this new class of litigation surrounding climate change.[42] Although many plaintiffs continue to face substantial hurdles to mounting successful cases, insurance claims professionals and defense lawyers should be prepared to defend against future claims that may arise.

i. Plaintiff's *Prima Facie* Climate Change Case

Because plaintiffs chose the forum, the same basic structure of defense applies. In common law systems, various categories of tort can apply in the context of climate change litigation. The essential elements of duty, breach, causation, and damages apply to all common law negligence claims. Depending on various statutory laws, non-delegable duties may be imposed on entities to warn or act. Ordinary nuisance claims require proof of one's substantial interference with the enjoyment and use of another's property rights. Consumer protection laws safeguard purchasers of goods and services while fraud and deception claims relating to marketing and advertising speak for themselves.

ii. Challenging Plaintiff's Claims of Duty, Breach, or Allegedly Harmful Acts

Assuming a plaintiff can overcome the initial hurdle of standing, the defense should look to challenge each element of the plaintiff's *prima facie* case. In the context of climate change litigation, scientific expert evidence will almost always be required for plaintiffs to meet their burden of proof. Proffered industry standards are likely to continue evolving as more data on climate science is collected. On balance, regulations are certain to become stricter if modern

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[40] Id. A copy of the Court's November 30, 2017 can be found online at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2017/20171130_Case-No.-2-O-28515-Essen-Regional-Court_order.pdf.
[41] Luciano Lliyua v. RWE AG, No. 2 O 285/15 Essen Regional Court (Status: On Appeal). A database of for all filings in this case is maintained by Columbia Law School. *See U.S. Climate Change Litigation*, Sabin Ctr. for Climate Change L. https://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/.
[42] Joana Setzer and Catherine Higham, "Global Trends in Climate Change Litigation: 2021 Snapshot," Policy Report (July 2021). https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf (last visited Feb. 20, 2024 at 3:11 p.m.).

climate scientist predictions prove to be accurate. For these reasons, defendants will want to carefully choose their own competent experts to counter the plaintiff's narrative.

Other general defense strategies will often depend on the jurisdiction and the facts specific to each case. In public nuisance cases, what qualifies as an "unreasonable interference" with public rights? In failure-to-warn cases, what "intervening factors" exist to potentially limit liability? Identifying gaps in research relevant to climate change may also be impactful towards mounting a successful defense. In general, pollution is considered to be a civil wrong, and by its very nature, a tort committed against the community as a whole. In 2007, the U.S. Supreme Court affirmed this proposition by holding greenhouse gases were "pollutants" for purposes of deciding whether they should be regulated by the executive branch.[43] But in the context of common law tort claims, will there be favorable studies that show a particular defendant's actions in emitting these gases were reasonable under specified circumstances? Will other forward-looking studies exploring decarbonization options for a particular defendant that absolve it from liability? In cases involving the issue of "foreseeability," plaintiffs may struggle to meet their burden of proof to establish a defendant's state of knowledge at the time a wrong was committed, versus what their actual knowledge is later when hindsight is 20/20.

iii. Defending Causation and Damages

Likely the most prominent issue underlying climate change litigation will involve proving/disproving the element of causation. Indeed, the evidentiary requirements for causation will depend on the jurisdiction and the type of claim.[44] For tort claims like public nuisance, a plaintiff has the burden to show that defendant's conduct was a "substantial factor" in causing harm.[45] In cases alleging violations of consumer protection statutes, a plaintiff typically must establish the defendant made a "material" misrepresentation that is capable of influencing consumers.[46]

One key defense strategy will be to attack the credibility of plaintiff's experts or proffered research in order to complicate the causation analysis. Factual issues might arise when the evidence tends to show the alleged injury suffered by a plaintiff might have been due to multiple causes. In common law jurisdictions like Virginia, a plaintiff often has the burden to show "probability, more than mere possibility" or else their claim fails.[47]

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[43] See Massachusetts v. EPA, 549 U.S. 497 (2007).

[44] Jessica A. Wentz and Benjamin Franta, "Liability for Public Deception: Linking Fossil Fuel Disinformation to Climate Damages," (December 2022). https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1196&context=sabin_climate_change (last visited Feb. 20, 2024 at 3:41 p.m.).

[45] Id.

[46] Id.

[47] *See* Bussey v. E.S.C. Rest., Inc., 270 Va. 531, 536 (2005)(quoting S. States Coop. v. Doggett, 223 Va. 650, 657 (1982)); see also Elliot v. Anderson, 208 Va. 753, 757 (1968) (holding that inferences "must be based on facts, not on presumptions"); Cape Charles Flying Service v. Nottingham, 187 Va. 444 (1948) (holding plaintiff's claims shall fail if the jury is unable to determine which of the [multiple] causes occasioned the injury complained of).

The recent *Held v. Montana* decision provides us with some insight on how the issue of causation may play out if the defense is unprepared. There, the court relied on an extensive scientific record presented at trial which was uncontested by the state and confirmed the reality of global warming caused by "anthropogenic changes in the environment, not natural variability."[48] In response, Montana's top experts – state employees who are responsible for permitting fossil fuel projects – fumbled with the terminology and admitted they were not well versed in the relevant science.[49] The state further elected not to call its most high-profile expert witness whose work had previously been championed by skeptics of anthropogenic climate change.[50] Ultimately, the state made no attempt to argue the science is not real, or human-caused – something many observers expected them to do.[51] This led the Court to only hear testimony that there was "*no doubt*" climate change is altering Montana by increasing wildfires and reducing snowfall.[52]

With regards to the element of "damages", defense strategies may focus on disputing plaintiff's evidence, either through minimizing the claim or affirmatively showing the cost of similar remedial, reparative, or preventative measures. Counter-claims and third-party complaints based on theories of indemnity and contribution may also be common practice. How courts will apportion liability will remain a question until more climate liability cases proceed to trial on the merits.

iv. Available Affirmative Defenses?

As with any tort claim, affirmative defenses may be raised in climate change claims. For example, raising preemption or compliance depending on what regulatory standards of care apply. There may also be laws that provide safe harbor to certain defendants in the specific context of carbon foot printing. We already see these types of safe harbor provisions in a number of state laws in other types of environmental claims, and in many contracts. In 1980, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The Act contained a secured creditor "safe harbor" exemption that eliminated owner/operator liability for lenders who hold ownership in a CERCLA facility, provided that that they "do not participate in the management of the facility."[53] Similar safe harbor provisions can be found in the context of real estate transactions protecting a new owner if in the future, contamination caused by a prior owner is found.[54] In the context of climate liability cases, forms of safe harbor

[48] Held *supra* note 4 at 17-26.
[49] Lesley Clark, "5 Takeaways from the Montana Climate Trial as We Await a Historic Ruling," Scientific American (June 23, 2023). https://www.scientificamerican.com/article/5-takeaways-from-the-montana-climate-trial-as-we-await-a-historic-ruling/ (last visited Feb. 20, 2024 at 3:23 p.m.).
[50] Id.
[51] Id.
[52] Id.
[53] 42 U.S.C. § 9601(20)(A).
[54] Robert W. Whetzel and Todd A. Coomes, Practical Law Company, "Commercial Real Estate Loans: Lender's Environmental Liability." https://www.rlf.com/wp-content/uploads/2020/05/6992_Commercial-Real-Estate-Loans-Lenders-Environmental-Liability-3-520-7824.pdf (last visited Feb. 20, 2024 at 3:29 p.m.).

provisions may be extended to businesses in various sectors that serve as intermediaries to fossil fuel production or other greenhouse gas emitters. Other businesses may be protected on the condition they maintain an appropriate net-zero carbon emissions score (i.e. the amount of GHG that is produced versus the amount that is removed from the atmosphere). In light of the above, stakeholders in the insurance industry and defense counsel should be monitoring these emerging trends that implicate multiple lines of insurance.

V. Does Defendant's Insurance Apply?

In general, the duty to defend climate liability cases will depend on a number of factors. But it is important to note these types of claims likely will take significant time to report and/or settle. Therefore, any issues raised by these claims are likely to mirror those seen in claims involving asbestos, lead paint, and other general environmental losses. In such cases, policyholders are seeking coverage under years-old policies similar to the way climate change plaintiffs are alleging conduct or damages that has spanned over extended periods of time. In addition, issues may arise with certain occurrence-based general liability policies, leaving a select category of defendants that are deemed effectively insurable. *See* *AES Corp. v. Steadfast Ins. Co.*, 283 Va. 609 (2012) (holding no duty to defend climate change related claims resulting from insured's intentional release of carbon dioxide and other greenhouse gases). With regards to categorical exclusions, some may be so clear as to preclude the insurer's duty to defend. *But See* *Wesco Ins. Co. v. Brad Ingram Construction*, 607 F. Supp.3d 958 (N.D. Cal. 2022) (holding ambiguous pollution exclusion means the insurer has the duty to defend). For these reasons, future issues concerning the issue of allocation should be on everyone's radar.

VI. Conclusion

Global warming and climate change litigation is becoming a global phenomenon that is beginning to creep its way into the U.S. court-system. Litigants are increasingly overcoming the burdens of standing and causation they once faced. The August 2023 landmark decision in *Held v. Montana* and the court's finding of fact further paint a clear causal pathway from fossil fuel production to the concrete injuries suffered by individuals. As a result, plaintiffs are likely to continue seeking to recover damages allegedly caused by climate change under common law theories of liability exposing businesses in all sectors to liability. Monitoring this growing storm of climate litigation should be the focus of claims world to prepare for what's coming next.

CURRENT ISSUES IN TRANSPORTATION LITIGATION

B. Lyle Robinson, Esq.
Taylor Wellons Politz Duhe
Madison, MS
601-212-9714
lrobinson@twpdlaw.com
www.twpdlaw.com

CURRENT ISSUES IN TRANSPORTATION LITIGATION

BROKER LIABILITY

The Federal Motor Carrier Safety Act defines a "freight broker" as "[a] person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier." When an accident occurs during the shipment, each party faces varying levels of exposure for any resulting injuries. In recent years, freight brokers have increasingly found themselves targets despite their generally limited connection to the shipment.

The theories of liability plaintiffs most commonly levy against a freight broker are: (1) the motor carrier was the "statutory employee" of the freight broker; (2) the motor carrier was an agent of the freight broker; and (3) the freight broker negligently selected and/or retained the motor carrier. Courts nationwide have been hesitant to impose liability against a freight broker, absent a substantial connection between the motor carrier and the freight broker.

A. The Federal Aviation Administration Authorization Action (FAAA)

Congress enacted the FAAAA in 1994, to which freight brokers have since clung for protection from tort liability. The Act provides that states may not enforce laws "having the force and effect of law related to" the services of a freight broker. 49 U.S.C. § 14501(c)(1). However, an exception referred to by courts as the "safety exception" exists to this pre-emption, in that the FAAAA "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A). Substantial disagreement among federal courts has arisen about whether the FAAAA's pre-emptive quality, and the safety exception, apply to direct tort actions against freight brokers for their selection of motor carriers whose drivers are then involved in an accident with a plaintiff.

B. *Miller v. Robinson* and FAAAA Pre-Emption

Much of the discussion surrounding broker liability now centers on the Ninth Circuit's decision *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F. 3d 1016 (9th Cir. 2020), and the circuit split that arose afterwards from the Seventh and Eleventh Circuits. In *Miller v. Robinson*, the plaintiff suffered serious injuries in an accident with a semi-tractor trailer delivering goods for Costco that was brokered by C.H. Robinson. Miller sued C.H. Robinson under a theory of negligent selection. The district court in Arizona dismissed the claim against the broker, finding the FAAAA pre-empts state laws that are "related to a price, route, or service of any . . . broker,"

unless one of the FAAAA's exceptions applies. The district court found the claim was "related to" C.H. Robinson's services and did not fall within the exception for "the safety regulatory authority of a State with respect to motor vehicles." On appeal, the Ninth Circuit agreed that FAAAA pre-empted the claim, but found the safety exception did apply to the broker. Specifically, the Court explained that Congress intended for the exception to preserve states' broad powers over safety within its borders, which includes the use of common law damages. C.H. Robinson appealed to the Supreme Court, but the Court denied review.

C. Seventh and Eleventh Circuits

The Seventh and Eleventh Circuits have taken a different approach. The Eleventh Circuit held in *Aspen American Insurance Co. v. Landstar Ranger, Inc*., 65 F. 4th 1261 (11th Cir. 2023) that the FAAAA expressly pre-empted direct negligent hiring and selection claims against the broker, and the "safety exception" did not apply because Congress's specific intent to pre-empt claims against brokers trumps a state's generalized authority to control safety.

In *Ye v. Globaltranz Enterprises, Inc.,* No. 22-1906, 2022 WL 17081057 (7th Cir. May 27, 2022),Ye sought to recover against GlobalTranz, a freight broker, for its negligent selection of the motor carrier, Sunrise, following the death of her husband in an accident. The Seventh Circuit, like the Eleventh Circuit, interpreted the safety exception narrowly, holding that a direct negligence claim brought against a freight broker is not a law "with respect to motor vehicles." Therefore, the Seventh Circuit reasoned the FAAAA's pre-emptive effect does not restrict a state's ability to regulate safety in that regard.

D. No Reconciliation by the Supreme Court

The Supreme Court has recently shown its disinterest in settling the split, as it rejected review of the Seventh Circuit's *GlobalTranz* case. Luckily for brokers, it appears the majority of lower courts are now adopting the approach of the Seventh and Eleventh Circuits and distancing themselves from the *Miller* decision, and the law is trending away from broker liability.

PREDATORY TOWING

The term "predatory towing," refers to tow service providers who use illegal or unethical methods to maximize their profits. Some of the more common predatory towing tactics include "satellite" towing, in which the tow provider removes cars illegally parked on private property.

Usually, the company also has a "spotter" at that location who calls the tow company when they see a potential tow.

A. Overview of the Problem

In recent years, the trucking industry has faced a growing problem with predatory towing bills that have put a significant financial strain on motor carriers. Predatory towing refers to the exploitative practices employed by certain towing companies, taking advantage of nonconsensual tows and billing motor carriers excessively for towing, recovery, and storage services.

Nonconsensual tows are those performed at the direction of law enforcement agencies without the consent or authorization of the vehicle owner or operator. Following commercial motor vehicle accidents or incidents involving traffic violations or obstructions, motor carriers are often held responsible for the cleanup and towing costs. However, the lack of rate regulations in many jurisdictions has created an opportunity for unscrupulous towing companies to engage in predatory practices that are borderline extortionary.

One of the key issues contributing to excessive towing bills is the shift in billing practices within the towing industry. Traditionally, towing services were billed on an hourly basis, considering the equipment used and the number of personnel required. However, some towing companies have adopted per-pound billing, where charges are based on the weight of the vehicle and cargo. While this may seem reasonable at first, it has opened the door for abuse.

Predatory towing companies have exploited per-pound billing by setting exorbitant rates that bear no reasonable relation to the services provided. Motor carriers have witnessed shocking increases in their towing bills, often several times higher than what would be considered fair and reasonable. This predatory pricing tactic has put immense financial pressure on motor carriers, impacting their profitability and disrupting their operations.The issue of predatory towing bills is not confined to a specific jurisdiction or region; it is a nationwide concern within the trucking industry. Motor carriers are grappling with the financial repercussions of unfair billing practices, and it is imperative that proactive measures are taken to address this issue.

B. Effect on Motor Carriers

The issue of predatory towing bills in the trucking industry demands immediate attention and concerted efforts to protect the rights and financial well-being of motor carriers. The

implications of excessive towing bills extend beyond individual companies, affecting the entire trucking ecosystem and the economy at large. Addressing this problem is crucial for several reasons:

(1) Financial burden on motor carriers. Predatory towing practices have imposed an enormous financial burden on motor carriers. Excessive towing bills can severely impact their profitability, disrupt their cash flow, and undermine their ability to remain competitive. This, in turn, hampers investment, job creation, and economic growth within the trucking industry.

(2) Operational disruptions. When motor carriers are confronted with exorbitant towing bills, it diverts valuable resources away from their core operations. Funds that could have been used for fleet maintenance, employee wages, or business expansion are instead diverted to pay unfair charges. This not only hampers the growth and efficiency of individual motor carriers but also has a ripple effect throughout the supply chain, affecting businesses and consumers relying on the timely delivery of goods.

(3) Unfair business practices. Predatory towing bills are a symptom of wider issues related to unethical business practices within the towing industry. Towing companies that engage in exploitative tactics erode trust, tarnish the reputation of the industry, and hinder its overall development. Addressing the problem is essential to foster a fair and transparent business environment that encourages professionalism, accountability, and ethical conduct.

(4) Legal compliance and protection. Motor carriers should not be subjected to unlawful practices by towing companies. It is important to ensure that motor carriers are protected by existing laws and regulations, which prohibit the unauthorized holding of vehicles and cargo. By addressing predatory towing bills, the industry can safeguard the rights of motor carriers, promote compliance with legal requirements, and foster a culture of respect and fairness.

(5) Collaborative solutions and industry reputation. The trucking industry thrives on collaboration and partnerships among its stakeholders. By joining forces to address the issue of predatory towing bills, industry associations, law enforcement agencies, government bodies, and motor carriers can work towards viable solutions. This collective

action not only protects the interests of motor carriers but also enhances the reputation of the trucking industry as a whole, promoting its credibility and reliability.

C. Best Practices to Avoid Excessive Towing and Recovery Bills

Because predatory towing has the potential to financially cripple some motor carriers, it is imperative to not only be aware of the issue but for motor carriers to implement practices to avoid falling prey. Such practices include:

(1) Documenting and gathering evidence at accident scenes. Take photographs of the accident scene, the positioning of the vehicles, and any damage; collect witness statements to use as independent corroboration for claims of inflated towing prices; obtain accident reports to build case against excessive towing charges; and record the actions of the tow company at each step of the process.

(2) Reviewing contracts and agreements with towing companies. Ensure the contract includes an agreed-upon rate structure for nonconsensual tows and has established guidelines for determining charges based on reasonable factors; verify the contract has billing transparency and mechanisms for dispute resolution.

(3) Communicating effectively with towing companies. Open and effective communication with towing companies is key to avoiding misunderstandings, minimizing unnecessary expenses, and addressing any concerns promptly.

(4) Consulting with legal counsel for guidance and support. Seek guidance from attorneys for contract review, dispute resolution, legal and regulatory compliance, contractual enforcement, and advocacy.

(5) Advocacy for regulatory changes and reporting abuses. Motor carriers, industry associations, and concerned stakeholders should play an active role in pushing for legislative reforms and raising awareness about the issue.

D. Advocating for Change

Motor carriers should advocate for regulatory changes. Several states have taken or attempted proactive measures to address the issue of predatory towing practices:

- Maryland: Maryland has implemented legislation to regulate nonconsensual towing. The state has established permissible rates for nonconsensual tows in

some jurisdictions and has guidelines for towing companies operating within the state.

- California: Assembly Bill 2210 was introduced in California to regulate nonconsensual towing and address predatory billing practices. The proposed legislation aimed to provide transparency in pricing and prevent excessive charges for motor carriers.
- Texas: Section 86.1 *et seq.* of the Texas Administrative Code places restrictions on nonconsensual towing fees and creates financial penalties for tow companies that violate these regulations.
- Missouri: Senate Ball No. 147 passed in 2019 to establish a "Towing Task Force," to make recommendations relating to a process for the adjudication of consumer complaints regarding nonconsensual tow charges. Unfortunately, Governor Michael Parson vetoed the bill on July 11, 2019, finding that "adequate protections already exist to address these matters[.]"
- Arizona: HB2603 went into effect in 2019, which prohibits towing companies from charging without providing a list of fees, towing vehicles unnecessary distances, and count storage days unfairly, among other protections.

By raising awareness, advocating for regulatory reforms, and sharing best practices, motor carriers can protect themselves from predatory towing practices and ensure the integrity and financial well-being of the trucking industry as a whole. The collaborative efforts of industry stakeholders, along with government agencies and law enforcement, are essential to rectifying this problem and establishing a fair and transparent system of towing billing that supports a sustainable and equitable trucking ecosystem.

AUTONOMOUS VEHICLES

While there are no trucks that are fully autonomous as of right now, companies are testing self-driving trucks with varying degrees of autonomy. A human driver may be positioned in an autonomous truck in case something happens, or a human-driven truck may lead a group of autonomous trucks. Autonomous trucks work by using sensing technologies like LiDAR (a sensing technology that uses light to determine distance), radar and optical cameras to gather visual data from the surrounding area, delivering that information to a computer loaded with maps

and algorithms that analyzes the information and makes decisions. Similar to how a brain uses what a human eye feeds it to decide when it's safe to change lanes or make a left turn.

Autonomous trucking companies to know:

- TuSimple: operates out of Arizona with its Autonomous Freight Network focusing on a Phoenix-Tucson route and its goal to expand the network to Texas, Oklahoma and continental south. The company's vehicles currently operate with a driver onboard but are equipped with perception technology and LiDAR sensors for added security.
- Embark: software company developing self-driving technology exclusively for the trucking industry. Its software is compatible with any trucking platflorm with all the original equipment manufacturers.
- Kodiak Robotics: autonomous truck company that has created an advanced trucking platform called "Kodiak Driver." The platform consists of a suite of sensors, computer-controlled safety features and a simple map system that makes navigation seamless for self-driving trucks.
- Einride: Swedish autonomous truck company whose trucks are electric and operate in the U.S. and various spots in Europe. Einride was the first company to be approved to operate one of its trucks without a safety driver on a public road in the United States.
- Aurora: created the Horizon trucking suite real-world data, simulations and training. It is meant to be easily integrated by any logistics company. Businesses use the platform to schedule loads, which are dropped off and processed at an Aurora terminal. Leveraging a system of terminals, autonomous trucks can then complete long-distance deliveries in a timely manner.
- Gatik: focuses its efforts on making regional distribution networks more efficient with autonomous trucking, with its trucks using shorter, repetitive routes to limit the number of variables at play. Gatik also conducts rigorous testing and has

outfitted its trucks with Goodyear's smart tires. Its customers include Walmart, Kroger, and Tyson.

"It was assumed that long haul trucking would be the first autonomous delivery use case to commercialize, and it since proved out that it's somewhat more challenging than was originally expected," Richard Steiner, head of policy and communications at Gatik, an autonomous truck company focused on middle-mile deliveries between businesses, told Built In. Aurora is slated to create a Houston-Dallas autonomous truck route in 2024, and Kodiak Robotics also aims to release its autonomous trucks this year.

DRIVER QUALIFICATIONS

The federal motor carrier safety regulations, specifically 49 CFR 391.41(b), set out the minimum physical requirements that one must meet. But those requirements only establish the floor. Often times situations arise where a driver meets the requirements of 49 CFR 391.41(b) and obtains a medical examiner's certificate, but the motor carrier is aware of some other physical/medical condition of the driver that gives pause to putting that driver on the road. Those situations are difficult to navigate, particularly in pre-empting potential liability as an employer if handled poorly.

While a driver may satisfy the regulatory requirements, attention must be given to potential red flags in their personal history, such as criminal records, substance abuse problems, or past accidents that may not disqualify them under FMCSA guidelines but could significantly impact the defense strategy in a future litigation scenario. The balancing act becomes quite precarious in juggling adherence to FMCSA regulations with a comprehensive evaluation of a driver's overall suitability, while also making reasonable accommodations under the ADA. Below are considerations when addressing potential liability related to a driver's fitness:

(1) Federal Regulations: Motor carriers are subject to various federal regulations administered by the Federal Motor Carrier Safety Administration (FMCSA). These regulations set standards for driver qualifications, including physical qualifications, which are designed to ensure that drivers can safely operate commercial motor vehicles.

If a driver meets the FMCSA's physical qualifications, they are considered fit to drive under federal regulations.

(2) General Duty of Care: Motor carriers have a duty of care to hire and retain drivers who are capable of safely operating commercial vehicles. This duty includes ensuring that drivers do not pose an undue risk to public safety due to factors such as disabilities or medical conditions. Even if a driver meets the FMCSA's physical qualifications, the motor carrier may still have a duty to assess whether the driver's disability poses a safety risk that cannot be adequately mitigated.

(3) Reasonable Accommodations: Under the Americans with Disabilities Act (ADA), employers, including motor carriers, are required to provide reasonable accommodations to employees with disabilities, unless doing so would impose an undue hardship on the employer. If a trucking driver has a disability that affects their ability to perform certain job functions, the motor carrier may be required to provide accommodations, such as modified job duties or additional training, to enable the driver to safely perform their job.

(4) Negligence: If a motor carrier fails to take reasonable steps to ensure that a driver with a known disability can safely operate a commercial vehicle, and this failure results in an accident or injury, the motor carrier could be held liable for negligence. This liability could extend to damages for injuries sustained by other motorists, passengers, or pedestrians, as well as property damage.

(5) Negligent Hiring or Retention: Even if a motor carrier did not know about a driver's disability, they could still be held liable if they failed to exercise reasonable care in hiring or retaining the driver. For example, if a motor carrier hires a driver without conducting a thorough background check or fails to monitor the driver's performance for signs of impairment, they could be held liable if the driver's disability contributes to an accident.

Overall, while motor carriers are required to comply with federal regulations regarding driver qualifications, they also have a broader duty to ensure that their drivers are capable of safely

operating commercial vehicles. This duty includes assessing the potential risks associated with disabilities and taking appropriate steps to mitigate those risks, such as providing reasonable accommodations or reassigning drivers to non-driving positions, if necessary. Failure to meet this duty could result in liability for accidents or injuries caused by drivers with disabilities.

TELEMATICS

As every transportation professional knows, telematics plays a crucial role in the world of transportation defense litigation by providing valuable data and evidence for operations and compliance for the carrier and as evidence and resources in litigation. But in motor carriers' well-intentioned mission to lead safer operations, these ever-expanding troves of data carriers are creating will continue to be weaponized against them by plaintiffs' attorneys who become more creative by the day. For instance, Samsara is the current leading all-in-one cloud-based telematics software on the market. The type and volume of data that Samsara generates is astounding. Most significant perhaps is its safety score generated for every driver in the company, which measures items such as crashes, harsh driving, policy violations, collision risk, distracted driving, traffic signs & signals, and speeding, etc. While this information is clearly invaluable in daily operations, regulatory compliance, and quality assurance, the depth of data retrieval and storage of which new technology is capable can be, and has been, weaponized by smart plaintiffs' attorneys in litigation against motor carriers.

A. Expansiveness of Current Telematics

Samsara offers a comprehensive telematics platform tailored for motor carriers, providing a wide range of features and abilities to enhance fleet management, safety, and efficiency. The key abilities and features of Samsara telematics include:

- Real-Time GPS Tracking: Samsara provides real-time tracking of vehicles within a fleet, allowing motor carriers to monitor the location and status of their assets at any time. This feature enables dispatchers to optimize routing, monitor driver progress, and respond quickly to changes or emergencies.
- Driver Safety Monitoring: Samsara includes features for monitoring driver behavior and promoting safety on the road. This may include tools for detecting harsh braking, acceleration, and cornering, as well as monitoring vehicle speed and

seatbelt usage. By identifying risky driving behavior, motor carriers can take proactive steps to address safety concerns and reduce the risk of accidents.

- Vehicle Diagnostics: Samsara's telematics platform provides access to real-time vehicle diagnostics data, including engine health, fuel efficiency, and maintenance alerts. By monitoring the health of their vehicles, motor carriers can identify issues early, schedule preventive maintenance, and reduce downtime.
- Electronic Logging Device (ELD) Compliance: Samsara offers ELD solutions to help motor carriers comply with federal regulations governing hours of service (HOS) for commercial drivers. Samsara's ELD solution automates the logging and reporting of driver hours, streamlining compliance and reducing the risk of violations.
- Asset Tracking: In addition to tracking vehicles, Samsara's telematics platform can also monitor other assets, such as trailers or equipment. This feature enables motor carriers to track the location and status of all their assets from a single dashboard, improving visibility and asset management.
- Route Optimization: Samsara's telematics platform may include features for optimizing routes and schedules to improve efficiency and reduce fuel costs. By analyzing historical data and real-time traffic conditions, motor carriers can identify the most efficient routes for their drivers and make adjustments as needed to minimize delays and improve delivery times.
- Integrated Dashboard and Reporting: Samsara provides a user-friendly dashboard and reporting interface that allows motor carriers to access and analyze telematics data easily. Customizable reports and analytics tools enable motor carriers to track key performance metrics, identify trends, and make data-driven decisions to optimize fleet operations.
- Integration with Third-Party Systems: Samsara's telematics platform may offer integration with third-party systems and software, such as dispatch management systems or fuel card programs. This integration enables motor carriers to streamline workflows, improve data accuracy, and leverage existing investments in technology.

Many carriers are storing this data indefinitely, and it is likely all discoverable. Plaintiffs are finding new ways to abuse the process, particularly when incorporating telematics into their Reptilian tactics.

B. Telematics as a Weapon in the Reptilian Arsenal

The "reptile theory" is a legal strategy used by plaintiffs' attorneys to frame their case in a way that appeals to the jury's primal instincts for safety and self-preservation. The theory suggests that jurors should be guided to empathize with the plaintiff's sense of vulnerability and to view the defendant's conduct as a threat to the community's safety, akin to a primitive reptilian response to danger. Plaintiffs may use the reptile theory in combination with telematics data in several ways:

(1) Establishing Negligence: Demonstrating past instances of "unsafe" driving or non-compliance with safety regulations by the motor carrier or its drivers, particularly driver scores. By presenting this data within the framework of the reptile theory, they can argue that the defendant's conduct posed a significant risk to public safety, thus framing the case as a broader threat to the community.

(2) Highlighting Dangerous Practices: Telematics data can reveal patterns of behavior such as speeding, aggressive driving, or failure to maintain proper distance, which can be portrayed as inherently dangerous behaviors that activate the reptilian response in jurors. By emphasizing the potential harm caused by these behaviors, plaintiffs can seek to evoke a strong emotional reaction from the jury, further supporting their case.

(3) Establishing Causation: Telematics data can also be used to establish causation by showing a direct link between the defendant's actions, as evidenced by the data, and the plaintiff's injuries or damages. When contorted through the lens of the reptile theory, this evidence can reinforce the argument that the defendant's conduct endangered not only the plaintiff but also the broader community, making a compelling case for liability.

B. Lyle Robinson, Esq.
Taylor Wellson Politz Duhe
769-300-2988
lrobinson@twpdlaw.com

A LEGAL HORROR STORY:

Pro se Litigants

Melvin J. Davis, Esq.
Reminger Co., LPA
Columbus, OH
614-232-2630
mdavis@reminger.com
www.reminger.com

A Legal Horror Story: *Pro se* Litigants

By: Melvin J. Davis, Reminger Co., LPA

Let's get this out of the way. *Pro se* litigants file a lot of lawsuits. A lot**.** Between 2000 and 2019, twenty-seven percent of all civil cases had at least one *pro se* plaintiff or defendant.[1] In 2022, forty-six percent of filings in federal courts of appeals were *pro se*.[2]

And many of the *pro se* complaints that are filed in federal court are filed by prisoners with nothing but time on their hands and an infatuation with the law. From 2000 to 2019, in ninety-one percent of prisoner petition filings, the plaintiffs were self-represented.[3] Most of those filings included constitutional claims.

Pro se litigants are known for their failures to follow the traditional rules of litigation, including mandated procedural rules, either out of ignorance, defiance, or both. But though *pro se* litigants are about as annoying as the fly in your house that you just cannot seem to get rid of, they should not be taken lightly. Remember Goliath?

I. The Right of Self-Representation

A. The Source of the Right

You may recall a time when you were sitting at your desk and had a fleeting thought that the Founders got it wrong when they decided that people should be able to represent themselves in a court of law. You may have exclaimed: That pesky Constitution! But did you know that although the Sixth Amendment guarantees a defendant the right to represent himself in criminal matters, there is no constitutional right to do so civilly?

Historically, the right of self-representation was guaranteed in many colonial charters and declarations of rights that gave the colonist a right to choose between pleading through a lawyer and representing oneself.[4] That right has been protected by statute since the beginning of our Nation. Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92, was enacted by the First Congress and signed by President George Washington one day *before* the Sixth Amendment was proposed

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[1] Just the Facts: Trends In Pro Se Civil Litigation From 2000 to 2019 (Feb. 11, 2021), https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019#figures_map

[2] Chief Justice John G. Roberts, Jr., U.S. Sup. Ct., 2022 Year-End Report On The Federal Judiciary 6 (2022)

[3] U.S. Courts, Statistical Tables for Federal Judiciary.

[4] *Faretta v. California,* 422 U.S. 806, 828, 95 S. Ct. 2525, 45 L. Ed.2d, 562 (1975).

and provided that "in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of …counsel….[5]

The right is currently codified in 28 U.S.C. §1654, which provides in relevant part, that "in all courts of the United States the parties may plead and conduct their own cases personally or by counsel….."[6] Because the statute only applies to Federal Courts, the right of *pro se* litigants varies from state to state depending on the state's constitution and statutes.

B. Limitations of *Pro Se* Litigation

Although the right to self-representation is a fundamental part of our history, for many of us—judges included—it has become a nuisance. *Pro se* litigants flood the courts' dockets and can be a drain on judicial resources. In an attempt to damn the floodgates, pursuant to 28 U.S.C. §1915(e)(2), proceedings in *forma pauperis* are subject to screening by federal courts to limit claims that are frivolous, malicious, or otherwise fails to state a claim upon which relief may be granted.

The right of self-representation also has limits. Although a party may represent himself *pro se*, a non-attorney may not represent other parties in federal court.[7] For instance, under § 1654, a litigant may not proceed *pro se* on behalf of an estate when the estate has additional beneficiaries, other than the executor or personal representatives, and/or where the estate has creditors. The rule against a non-attorney *pro se* party representing another party applies even if the non-attorney who is seeking to represent another has obtained a general power of attorney.[8]

But the right to proceed *pro se* under § 1654 is not limited to cases where the *pro se* party is a named plaintiff. Rather, the statute provides for *pro se* representation in any case that is a party's "own."[9] The relevant query then becomes what cases are considered a party's "own"? Courts have tackled this question when determining whether a parent can represent their children because taken by itself § 1654 does not say when a child's case belongs to the parent.[10] To answer this question, federal courts consider whether federal or state law designates a child's

[5] Sec. 35 of the Judiciary Act of 1789, 1 Stat. 73, 92.
[6] 28 U.S.C. §1654
[7] *Devine v. Indian River Cnty. Sch. Bd.,* 121 F.3d 576, 581-82 (11th Cir. 1997)
[8] *See e.g. Johns v. Cty of San Diego*, 114 F.3d 874, 876 (9th Cir. 1997)
[9] 42 U.S.C. § 1654
[10] *See e.g. Sprague v. Dep't of Fam. & Protective Servs.,* 547 F. App'x 507, 508 (5th Cir. 2013)

claim as belonging to the parent. For example, parents may litigate *pro se* if their minor child is denied social security benefits.[11]

II. Popular Constitutional Claims

A. Section 1983 Litigation

If you handle constitutional violations claims, you are intimately familiar with 42 U.S.C. § 1983. Section 1983 is the primary remedial statute for asserting federal civil rights claims against local public entities, officers, and employees. But how did §1983 come to be codified? Like many of our rights that are cemented by statute, it has historical underpinnings.

The Civil Rights Act of 1871, also known as the Ku Klux Klan Act, is an Act of the United States Congress that empowered the President to suspend the *writ of habeas corpus* to combat the Ku Klux Klan and empower the President to use military force to protect African Americans.[12] Several of the Act's provisions exist as codified statues; the most important being § 1983. Section 1983 allows individuals to sue in federal court when state and local officials violate federal law.

To succeed on a § 1983 claim, a plaintiff must prove that his constitutional rights were violated, and that the violation was caused by a person acting under color of law. Only claims against "state actors" are eligible for relief under the statute.[13] A plaintiff bringing a § 1983 claim must start by identifying the constitutional right that was violated. Section 1983 itself is not a source of substantive rights but rather a vehicle for obtaining relief.

I have not personally conducted a survey but if I was in Las Vegas and forced to place a bet on which statute is most commonly known amongst prisoners, I am placing all of my money on "§1983."

B. First Amendment Claims

Claims asserting a violation of First Amendment rights are popular amongst *pro se* litigants. After all, the freedom of religion and speech are considered the most cherished values in America. Even when unpopular or looked down upon to do so, freedom of speech provides

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[11] *Crozier for A.C. v. Westside Cmty. Sch. Dist.*, 973 F.3d 882, 887 (8th Cir. 2020)
[12] U.S. Senate: "The Enforcement Acts of 1870 and 1871" www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm.
[13] *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 940, 102 S.Ct. 2744,73 L. Ed.2d 482 (1982)

the right to not salute the flag, to use offensive words and phrases, and to burn the flag in protest.[14] Those who assert their First Amendment rights are also protected from retaliation. More specifically, the First Amendment prohibits retaliation by public officials.

To state a colorable First Amendment retaliation claim under §1983, the plaintiff must establish that he (1) engaged in protected First Amendment activities, (2) the defendant took some action that adversely affected his First Amendment right, and (3) there was a causal relationship between his protected activity and the defendant's conduct.[15] Inmates have a "First Amendment right to be free from retaliation for filing a grievance" that is "clearly established."[16]

In some circuits, such as the Fourth Circuit, courts are cautioned they should treat an inmate's claim of retaliation by prison officials "with skepticism."[17] Courts also defer to prison administrators when considering restrictions on prisoners' speech.[18] In *Jones v. North Carolina Prisoner's Union,* the North Carolina Department of Corrections prohibited inmates from soliciting other inmates to join the North Carolina Prisoners Union and barred Union meetings and bulk mailings concerning the Union from outside sources. Delivering the opinion for the majority, Justice William H. Rehnquist, wrote that because realities of running a penal institution are complex and difficult, it was necessary to recognize the wide-ranging deference to be accorded the decisions of prison administrators.[19]

Another common basis for asserting First Amendment violation claims is the right to religious exercise. Federal courts have held that while prisoners have the right to religious exercise under the First Amendment, the right "may be subjected to reasonable restrictions and limitations" by prison officials.[20] As such a prisoner bringing a claim that prison officials violated his right to exercise his religion must first establish that "the belief or practice asserted is religious

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[14] *See West Virginia Board of Education v. Barnette,* 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943); *see also Cohen v. California,* 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971); *see also Texas v. Johnson,* 491 U. S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989); *see also United States v. Eichman,* 496 U.S. 310, 110 S. Ct. 2404, 110 L. Ed. 2d 287 (1990)

[15] *Martin v. Duffy* 858 F.3d 239, 249(4th Cir.2017).

[16] *Booker v. S.C. Dep't of Corr.,* 855 F.3d 533, 546 (4th Cir. 2017).

[17] *Stevens v. Morris,* 73 F.3d 1310, 1317 (4th Cir. 1996).

[18] *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 97 S. Ct. 2532, 53 L. Ed. 2d 629 (1977).

[19] *Id*. at 126

[20] *Abdur -Rahman v. Mich. Dept. of Corr.*, 65 F.3d 489, 491(6th Cir, 1995)

in the person's own sceheme of things and is sincerely held."[21] Then, the plaintiff must also establish that the defendant's behaviour infringes upon this practice or belief." [22]

Because of the high bar for *pro se* prisoners to properly plead and prevail on claims asserting a violation of the First Amendment, you should always look for opportunities to file early dispositive motions. Even if a complaint makes it past the federal courts' initial screening, do not give up hope of getting the complaint dismissed on the pleadings.

C. Fourth Amendment Claims

Although the famous rapper Jay-Z has "99 Problems," a violation of his Fourth Amendment right to be free from unreasonable searches and seizures is not one of them.[23] In the song "99 Problems", the rapper describes his encounter with a police officer asking to search the rapper's vehicle without a warrant. Paraphrasing, the rapper politely declines and explains that although he did not pass the bar, he knew enough about his rights that he would not allow an illegal search to occur. Whoever thought a rap verse would be taught in constitutional law classes?

The Constitution, through the Fourth Amendment, protects people from searches and seizures, but only those that are deemed unreasonable under the law.[24] Whether a particular type of search is considered reasonable in the eyes of the law, is determined by balancing two important interests.[25] First is the intrusion on an individual's Fourth Amendment rights. Second is the government's legitimate interest, such as public safety. As you can imagine, the Fourth Amendment prohibition of unreasonable searches does not apply to prison cells, although prisoners have tried.[26]

Another type of claim arising under the Fourth Amendment rights is based on the protections provided from the use of excessive force. Under the Fourth Amendment, a police officer may use only such force as is objectively reasonable under the circumstances.[27] Notably, while the Fourth Amendment prohibition against excessive seizures bars excessive force against free citizens, the Eighth Amendment's ban on cruel and unusual punishment bars excessive force

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[21] *Barhite v. Caruso*, 377 F.App'x 508, 510 (6th Cir. 2010).
[22] *Kent v. Johnson,* 821 F.2d.1220, 1224 -25 (6th Cir. 1987).
[23] *Caleb Mason, Jay-Z's 99 Problems, Verse 2: A Close Reading With Fourth Amendment Guidance for Cops and Perps,* 56 St. Louis U. L.J. (2012), available at: https://scholarship.law.slu.edu/lj/vol56/iss2/7/
[24] *See, e.g., Carroll v. United States*, 267 U.S. 132, 147, 69 L. Ed. 543, 45 S. Ct. 280 (1925)
[25] *United States v. Knights* , 534 U.S. 112, 122 S. Ct. 587, 592, 151 L. Ed. 2d 497 (2001)
[26] *Hudson v. Palmer,* 468 U.S. 517, 530, 104 S.Ct. 3194, 82 L.ed.2d393 (1984).
[27] *Graham v. Connor,* 490 U.S. 386, 397,109 S. Ct. 1865, 104, L.ed.2d443 (1989).

against convicted persons.[28] Consequently, you are more likely to encounter excessive force claims by *pro se* litigants that arise under the Eighth than the Fourth Amendment.

D. Eighth Amendment Claims

Prison officials have a legal duty under the Eighth Amendment to refrain from using excessive force and to protect prisoners from assault by other prisoners. Prison officials may violate the Eighth Amendment if they knew about a risk of assault by other prisoners for failure to respond, or if prison conditions or practices create an unreasonable risk of assault.[29]

To prevail on an excessive use of force claim under the Eighth Amendment, a plaintiff must show the defendant officer used force "maliciously and sadistically for the purpose of inflicting pain."[30] The Eighth Amendment only prohibits "cruel and unusual" punishment, but not uncomfortable or even harsh ones.[31] Thus, a prisoner's road to prevailing on an excessive force claim is a long and arduous one.

A prison official, however, need not physically strike a prisoner or allow an assault to occur to violate the Eighth Amendment protection from cruel and unusual punishment. The deliberate indifference to a prisoner's serious medical needs constitutes cruel and unusual punishment and is therefore prohibited.[32] The Supreme Court has concluded that the deliberate indifference to serious medical needs of prisoners constitutes unnecessary and wanton infliction of pain.[33] The Supreme Court has defined deliberate indifference for Eighth Amendment purposes as when a defendant "knows of and disregards an excessive risk to inmate health or safety."[34]

If you encounter an Eighth Amendment deliberate indifference claim, make sure you read the complaint carefully. If the complaint includes an allegation that a medial professional provided treatment to the prisoner, there must be an allegation that the prison official acted with the mental state equivalent to criminal recklessness to establish the subjective component of the claim.[35] Therefore, if there are allegations that the prisoner received treatment but disagrees with the proper course of the treatment, you could get the complaint dismissed on the pleadings.

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[28] *Id*. at 388; *See also Whitley v. Albers,* 475 U.S. 312, 318-19, 106 S.Ct. 1078, 89L.ed.2d. 251 (1986)
[29] See?e¡g¡?Farmer.v¡.Brennan, 511 U.S. 825, 828, 843, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994); see.also. *Howard v. Waide,* 534 F.ed 1227, 1235-41 (10 Cir. 2008)
[30] Hudson.v¡.McMillian?❶69.U¡S¡7?❸?778.S¡Ct¡❺❺❶?77❸L¡Ed¡8d7❶❷(7❺❺8)¡
[31] Rhodes.v¡.Chapman, 452 U.S. 337, 347, 101S.Ct. 2392, 69L.Ed. 2d59 (1981).
[32] Estelle.v¡.Gamble?429 U. S. 97, 103, 97, S. Ct. 285, 50L.Ed. 2d251 (1976)
[33] *Id.*
[34] Farmer v. Brennan, 511 U.S. 825, 837,114 S.Ct. 1970 128L.Ed. 2d 811 (1994)
[35] Griffith.v¡.Franklin.Cty¡.Kentucky, 975 f.3d.554, 568 (6th Cir. 2020)

III. Managing the Challenges of *Pro Se* Claims

Pro se litigation poses inherent problems for courts, attorneys, and claims professionals. *Pro se* litigants are more likely to file frivolous claims, numerous and lengthy pleadings, and making sense of incoherent arguments can take a lot of time, resulting in increased litigation fees.

Another problem is that settling claims with *pro se* litigants can be difficult. They lack perspective as to what constitutes a reasonable settlement and may be reluctant to even make a demand. Settling a claim is even more difficult, if not impossible, when money is not the *pro se* litigant's ultimate objective. The use of a mediator to resolve claims with *pro se* litigants may be invaluable. A *pro se* litigant is more likely to listen to someone they perceive as being neutral when deciding whether, and for how much, they should settle their case.

When dealing with *pro se* litigants it also is important to maintain professionalism as challenging as that may be. Under all circumstances, you must refrain from providing a *pro se* litigant with advice. Be careful when speaking with *pro se* litigants because anything you say, can and will be used against you.

To manage some of these challenges, especially costs, you should always evaluate the chance of obtaining a dismissal on the pleadings. Another tactic to posture a case for a dispositive motion is to utilize requests for admissions. Under Rule 36(a)(3) of the Federal Rules of Civil Procedure, requests for admissions are automatically deemed admitted if the opponent fails to timely respond or object.

Although courts have noted their disinclination to strictly apply Rule 36(a)(3) against a *pro se* party, the longer the requests go unanswered, the greater chance you have of getting a case dismissed without incurring extensive litigation costs. But whatever you do, do not take *pro se* litigants lightly because they can be dangerous. Remember, *pro se* prisoners have nothing but time on their hands.

IV. Conclusion

Though challenging, *pro se* litigation can be fun (or at least you may have a laugh or two). But the constitutional can be complex and there are too many to address in this essay. So, if you are dealing with a *pro se* litigant, even pre-suit, please remember that Eagles are always willing to assist.

ANCHORS AWEIGH:

Thoughts on How to Re-Moor an Adversary Who Has Pulled Away From the Dock and Set Sail for the Moon

Barry S. Rothman, Esq.
Sarah Schwartz
Strongin Rothman & Abrams, LLP
New York, NY
973-769-6765
brothman@sralawfirm.com
sschwartz@sralawfirm.com
www.sralawfirm.com
www.waldeckpa.com

'Anchors Aweigh': Thoughts on How to Re-Moor an Adversary Who Has Pulled Away From the Dock and Set Sail For the Moon[1]

Moderators: Barry S. Rothman, Esq., Strongin Rothman & Abrams, LLP (NYC/NJ) and David V. Hayes, Esq., Bendin Sumrall & Ladner, LLC (Atlanta, GA)

INTRODUCTION

Social inflation and anchoring are not new ideas in the legal world; however, they continue to pose an increasingly large threat to the economy and court system. This paper will define both social inflation and anchoring in the context of litigation, describe their legal, social, and economic effects, and provide guidance on how to combat those effects.

SOCIAL INFLATION

I. What is social inflation?

Social inflation describes how insurers' claim costs are increasing above the rate of general economic inflation due to non-economic factors increasing the expense of liability litigation. The primary drivers of social inflation include "nuclear" jury verdicts (verdicts awarding $10 million or more in non-economic damages), public distrust of large corporations, third-party litigation funding (TPLF), plaintiff attorney courtroom techniques used to manipulate jurors, and shifting cultural attitudes concerning the allocation of liability among defendants and their insurers.

II. What are the effects of social inflation?

a. Legal

TPLF has the long-term potential to mar the reputation of the legal profession, undermining the attorney-client relationship by raising doubt as to the attorney's loyalties. As a result of the potential for increasingly large returns on investments, the third-party litigation financing industry is rapidly growing. In 2020, financiers invested $17 billion into litigation funding globally, with more than half of that amount directed to litigation in the United States.[2] Opponents to TPLF have raised concerns that financial incentives give litigation funders too much control over cases in which they only have a monetary stake.

Nuclear verdicts inflate legal expenses related to litigating the case and place additional strain on the court system. Whereas the jury may award enormous damages to the plaintiff, plaintiffs recover only a fraction of that amount. In a study conducted by the New York Law

[1] The moderators would like to acknowledge the significant contribution of Sally Schwartz, law clerk (and admittee-in-waiting in New York and New Jersey) at Strongin Rothman & Abrams, LLP, in authoring this paper. We are grateful for her efforts.

[2] Swiss Re Report

Journal, cases where juries delivered nuclear verdicts had a median reduction of 77%.[3] Even though the defense can achieve significant reductions, the process to get to the reduced award is extremely inefficient. The reduced awards are still inflated enough to frustrate settlements creating more trials and appeals that drive up legal fees and worsen the courts' COVID-19 backlog.[4]

b. Insurance

The baseline issue is that the "soft" social factors driving social inflation are difficult to quantify and predict. This lack of predictability creates a greater probability of inaccurate projections for social inflation causing liability insurers to under-reserve, which would lead to an increased risk of insolvency.[5] To compensate for the uncertainty in potential litigation costs, insurers must price their products to account for those increased expenses.[6] The lines of business social inflation has influenced the most include commercial auto liability, professional liability, product liability, and directors and officers liability.[7]

c. Consumer

Ultimately social inflation is borne by the consumer. Businesses will need to account for increased insurance premiums or self-insurance, which will be reflected in an increase in the prices of consumer goods and services.

III. Proposals to slow social inflation.

a. Legislative

As more fully discussed below, one proposed strategy to combat social inflation is for the state and federal legislatures to revise and enact legislation curbing plaintiff counsel's ability to use psychologically manipulative strategies at trial.

Another strategy is calling for policymakers to increase regulations on the TPLF industry. At present TPLF is largely unregulated and without national requirements for transparency and disclosure of third-party litigation funders in lawsuits.[8] While the Litigation Funding Transparency Act of 2021 was introduced to the Senate and referred to the Senate Judiciary Committee in March of 2021, no further actions have been taken at the federal level.[9]

b. Defense Bar

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[3] NYLJ: Anchoring Away
[4] AMA: Why "anchoring" practices that push up jury awards must end
[5] NAIC Social Inflation
[6] CIPR Report Social Inflation
[7] Id.
[8] NAIC Social Inflation
[9] Cosponsors - S.840 - 117th Congress (2021-2022): Litigation Funding Transparency Act of 2021 | Congress.gov | Library of Congress

Defense attorneys should become familiar with the psychological tactics plaintiff's counsel uses to manipulate jurors, such as anchoring, and use strategies proven effective in countering the impact of those tactics.[10] The defense bar should also be scrupulously citing violations of the Rules of Evidence and other rules meant to place safeguards on non-economic damages.

c. Industry

Nuclear verdicts are often the result of jurors buying into the public perception of big businesses as untrustworthy and having resources readily able to cover immense awards. To counteract anti-corporate sentiment, NAIC recommends corporations implement robust local corporate social responsibility campaigns that build positive relationships in communities where the corporation operates.[11] NAIC also suggests that industry make efforts to raise public awareness on how social inflation affects the price of insurance premiums and consumer goods.[12]

ANCHORING

I. What is anchoring?

Anchoring is the phenomenon where a person will use a first reference point, or "anchor," in making subsequent estimates and appraisals. As demonstrated in various studies discussed in Daniel Kahneman's book *Thinking, Fast and Slow*, the reference point needs to come first. For example, in one study discussed by Kahneman, researchers had two groups of real estate agents visit a house for sale and study an informational booklet that included an asking price. The booklets were edited so that half the booklets showed a price substantially higher than the actual listed price and the other half of the booklets showed a price substantially lower than the listed price. The agents were then asked to estimate the house's value and explain their valuations. While the agents claimed they were not influenced by the price stated in the booklet, the results showed a 41% spread between the two groups of agents. This phenomenon occurs because the brain is wired to "anchor" onto whatever reference points are readily available when evaluating new circumstances and situations.

II. What effect does anchoring have on civil litigation?

In the context of liability litigation, most jurors have little, if any, prior experience appraising the monetary value of a person's subjective suffering. Thus, most jurors lack the reference points to make an accurate valuation. Taking advantage of the jurors' lack of experience, plaintiff's counsel might request an unjustifiably high award that, unless countered, arbitrarily anchors the jury's damages deliberation.[13] Jurors and potential jurors are frequently operating under the false assumption that the lawyers know everything about the law, including what are

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[10] Counter-Anchoring & Reverse Reptile provides valuable insight into some approaches to counter emotional appeals and anchoring by plaintiff counsel.

[11] NAIC Social Inflation

[12] Id.

[13] In almost 50% of cases reviewed by NYLJ, the jury met or exceeded the anchor set by plaintiff's counsel.

appropriate damages, and assume a plaintiff's attorney would only ask for an amount that some previous jury awarded.[14] As a result, jurors are especially vulnerable to the anchoring effect.

III. Proposals to counter the effects of anchoring.

To counter the trend of nuclear verdicts achieved, in large part, via anchoring, policy makers and attorneys must make a coordinated effort to reduce opposing counsel's motivation and opportunity to do so.

a. Legislative

Policy makers can reduce opposing counsel's motivation to anchor by regulating the factors driving counsel to seek inflated awards. For example, the growth of the TPLF industry has decreased the portion of damages awards plaintiffs take home. To compensate for the percentage of awards allocated to third-party litigation funding, opposing counsel is incentivized to use whatever tactics available (i.e., anchoring) to reach for larger awards. Policy makers should place more regulations on the TPLF industry including mandatory disclosure of its use to all involved parties.

Policy makers can also minimize the opportunity to and efficacy of anchoring by enacting and amending rules of civil procedure to prohibit the use of specific dollar figures for non-economic damages. In a study conducted by the *New York Law Journal*, jury awards for non-economic damages trended lower in New York district courts than in New York state courts.[15] Differences in procedural rules regulating anchoring non-economic damages produced the spread. New York district courts prohibit plaintiff's counsel from assigning a definite dollar amount to non-economic damages. In contrast, New York CPLR 4016(b) expressly permits plaintiff's counsel to request a certain dollar amount for non-economic damages, which figure is limited by CPLR 5501(c) to "reasonable compensation" as determined by its relationship to prior appellate awards in comparable cases. In practice, the "reasonable compensation" safeguard has been eroded, lending support to the more effective practice of prohibiting dollar figures.

b. Defense Bar

Independent of legislative intervention, the defense bar can disincentivize opposing counsel's use of anchoring by employing techniques proven to reduce anchoring's efficacy. The results of the central Campbell study suggest that while there is no strategy that can completely neutralize anchoring's effects, drawing attention to the anchor and offering a counter anchor is the most effective strategy for minimizing the impact of opposing counsel's anchor.[16]

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[14] Nat Law Rev: How to Counteract the Anchoring Effects of a Plaintiff's Damages Request

[15] NYLJ *Anchoring Away*

[16] John Campbell et al*., Countering The Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments, 101* IOWA L. REV. 543; Litigation Skills Counter-Anchoring & Reverse Reptile

Draw attention to the anchor.

As previously stated, jurors often make the false assumption that opposing counsel's non-economic damages request is binding and/or justified. Defense counsel's role is to reframe opposing counsel's non-economic damages figure as a mere suggestion for the jury. Drawing attention to the anchor should also involve a simple statement identifying opposing counsel's request as an anchor and informing jurors how anchoring affects their judgment. A person who is aware a psychological technique is being used and how it will impact their thinking will be less susceptible to that technique's effects.[17] When drawing attention to the anchor, counsel should take care not to ridicule opposing counsel for requesting non-economic damages, especially with claims with large demand amounts, and/or expressly challenging opposing counsel's credibility.[18] Such attacks diminish counsel's own credibility and result in jury awards that skew higher than awards in cases where counsel ignored the anchor.[19]

Offer a counter anchor.

Many defense attorneys do not offer a counter anchor because they think making such counter anchor will be perceived by jurors as an admission of liability and set a floor on damages. Most of the time, this is a mistake.[20] If counsel emphasizes that there is no liability and the alternative calculation is meant to provide guidance if the jury happens to disagree with the defense position, offering the counter anchor has no influence on a jury finding the defendant liable.[21]

In terms of setting a floor for damages, the cost of potentially setting a floor for damages is far outweighed by the benefit of avoiding the unchecked anchor influencing the jury to award a nuclear verdict. If defense counsel draws attention to opposing counsel's anchor without offering an alternative, jurors will still use opposing counsel's figure as a starting point.[22] A counter anchor functions the same as opposition counsel's anchor with the result of diluting the effect of opposing counsel's anchor by providing an alternative reference point grounding the jury's analysis.[23] A better method of addressing the issue of setting a floor on damages is to anchor low. Defense counsel's anchor should be lowered significantly below the settlement value of the case to balance the inflated value of the opposition's anchor.[24] Even if defense counsel overshoots,

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[17] John Campbell et al*., Countering The Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments, 101* IOWA L. REV. 543

[18] Litigation Skills Counter-Anchoring & Reverse Reptile

[19] Id.

[20] The exception is when the defense's case is especially strong, jurors are more likely to find liability if the defense counter anchored. National Law Review: How to Counteract the Anchoring Effects of a Plaintiff's Damages Request.

[21] Id.

[22] Id.

[23] Litigation Skills Counter-Anchoring & Reverse Reptile

[24] Id.

offers a shockingly low counter anchor, and loses some credibility with the jury, the anchor with damaged credibility still has the effect of lowering damages.[25]

Across the board, anchors are most effective when the figure relates back to some rationally related metric, such as using the listing price of a home as an anchor for estimating a house's value. When defense counsel drops their counter anchor, rather than presenting the jury with a bare number, defense counsel should describe how they arrived at the dollar amount based on what tangible benefits the plaintiff could derive from the award such as the price of one year's tuition at a state university or the cost of physical therapy sessions.[26] Defense counsel should stress that the purpose of non-economic awards is to make the plaintiff whole, not to turn plaintiff's misfortune into a winning lottery ticket.[27] Defense counsel should compare opposing counsel's requested award against the same metrics to detract from the credibility of opposing counsel's anchor and short circuiting a person's instinct to rationalize that number.[28]

Perhaps most importantly, defense counsel should not wait to discuss damages amounts until their summation. Ideally, defense counsel needs to make a concerted effort to drop anchor first, discussing damages amounts as early as *voir dire* and/or opening statements.[29] If defense counsel anchors first, the burden of unmooring that anchor falls on opposing counsel.

CONCLUSION

In summary, social inflation increases the cost of doing business and overburdens our courts. To combat social inflation is to confront its driving forces. As members of the defense bar, we can take action now by enforcing current procedural safeguards against anchoring at the trial stage and using the above strategy to guide juries away from nuclear verdicts.

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[25] Id.
[26] Unveiling the Power Dynamics in Anchoring Damages (Pub. 1/29/2024)
[27] Nat Law Rev
[28] Unveiling the Power Dynamics in Anchoring Damages
[29] Wisconsin Lawyer: 101 Understanding Anchoring (pub. 5/10/2022)