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Tort Trial & Insurance Practice Law Journal
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RECENT DEVELOPMENTS IN ADMIRALTY AND MARITIME LAW

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I. INTRODUCTION

This article discusses noteworthy admiralty and maritime decisions involving seamen, longshoremen, passengers, maritime liens, salvage, marine insurance, marine contracts, limitation of liability, jurisdiction, and other issues that arise in the practice of maritime law. The survey period includes opinions issued by federal and state courts in the United States between October 1, 2022, and September 30, 2023.

II. SEAMAN'S CLAIMS

A. *Jones Act Negligence and Unseaworthiness*

In *In re Verplanck Fire District*, the court held a volunteer firefighter who spent 3.8% of his time on a vessel was not a seaman and his negligence claim was barred by state law.[1] Verplanck Fire District (District) provides fire protection, ambulance and EMS services. The majority of assistance is land-based, but the District also owns an approximately twenty-five-foot vessel, *MARINE 1*, used to perform services in and around the Hudson River.[2] The volunteer firefighter did not take the training to operate the vessel, but completed a boating safety class and responded to accidents on the river. The firefighter was injured on the vessel while responding to a collision when he extended his leg between two vessels to try to push the vessels apart.[3] The firefighter received benefits under the New York's Volunteer Firefighters Benefit Law (VFBL), and the District filed a limitation action in federal court, seeking to limit its liability to the value of the *MARINE 1*.[4] The firefighter sought to recover for Jones Act negligence, unseaworthiness and, alternatively, as a *Sieracki* seaman and general maritime negligence.[5] The District moved for summary judgment on all claims.

With respect to the claims as a seaman for Jones Act negligence and unseaworthiness, the court held that the firefighter's connection to the vessel was insufficient in both duration and nature because the vessel-related work resulted in 3.8% of his total activities, far below the 30% guideline to satisfy the duration element required in *Chandris*.[6] Further, in determining whether the firefighter could recover for unseaworthiness as a *Sieracki* seaman, the court detailed that, under New York law, the relationship

1. *In re* Verplanck Fire Dist., No. 21-cv-2954, 2023 U.S. Dist. LEXIS 143914 (S.D.N.Y. Aug. 17, 2023).
2. *Id.* at *2–3.
3. *Id.* at *5–6.
4. *Id.* at *6–8.
5. *Id.* at *1–2.
6. *Id.* at *11–12 (citing Chandris, Inc. v. Latsis, 515 U.S. 347, 361 (1995)).

of a volunteer firefighter and the District is statutorily defined as that of employer and employee.[7] Consequently, the court held that firefighter was not entitled to recover under *Sieracki*.[8] Finally, the court considered the District's argument that firefighter's claim for maritime negligence was barred by the exclusive remedy provision of the New York VFBL. Concluding that the exclusive remedy provision was not preempted by the maritime law, the court held that the maritime negligence claim was barred by the firefighter's receipt of benefits under the VFBL.[9]

In *Cooper v. Vigor Marine, LLC*, Plaintiff was injured while employed by IMIA to "perform industrial painting, blasting, cleaning, and other related work" aboard a vessel in port.[10] Plaintiff filed suit against multiple parties, asserting that she was a seaman entitled to damages under the Jones Act because her employer, IMIA, had "actual of constructive knowledge" of the hazard and "failed to exercise reasonable care" resulting in her injury.[11] The defendants filed a motion for summary judgment.[12]

The court first held that, because the plaintiff alleged that "IMIA" was her employer and listed three entities with the initials "IMIA," the plaintiff failed to identify with enough specificity which defendant was her employer, as there can only be one Jones Act employer.[13] Additionally, the plaintiff did not allege sufficient facts to establish an employer-employee relationship existed beyond stating that she was "in the employ" of an entity.[14]

Second, the court held the plaintiff did not establish that she was a "seaman" pursuant to the two-prong *Chandris* test.[15] The court reasoned that plaintiff's "allegations that she performed industrial painting, blasting, cleaning, and other work in a containment while the vessel was in a graving dock fail[ed] to demonstrate that [p]laintiff was a seaman for purposes of the Jones Act" because the complaint did not assert sufficient facts to demonstrate the nature and duration of her employment.[16] Therefore, the court granted defendants' motion to dismiss plaintiff's Jones Act negligence and maintenance and cure claims, and granted the plaintiff leave to amend her complaint to address the issues identified.[17]

7. *Id.* at *14–15; *see also* Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).
8. *Id.* at *15.
9. *Id.* at *15–17.
10. Cooper v. Vigor Marine, LLC, No. 22-00275, 2023 U.S. Dist. LEXIS 124428, *5 (D.Haw. July 19, 2023).
11. *Id.* at *6.
12. *Id.* at *7.
13. *Id.* at *8–9.
14. *Id.* at *9.
15. *Id.* at *10.
16. *Id.* at *12.
17. *Id.* at *13–15.

B. *Maintenance and Cure*

In *Flowers v. Magnolia Marine Transport Co.*, the Eastern District of Louisiana granted an employer's motion for partial summary judgment in part finding the employer established a *McCorpen* defense as to the injured seaman's physical injuries but not for the seaman's psychological injuries.[18] In this case, plaintiff, a Jones Act seaman, alleged he injured his back, shoulder, and neck when assisting a deckhand out of the water.[19] Plaintiff filed an action against his employer/vessel owner for, *inter alia*, maintenance and cure benefits.[20] Plaintiff had previously injured his back, shoulder, and neck in multiple car accidents and a work accident before he was hired by defendant.[21] Defendant argued plaintiff intentionally concealed these pre-employment injuries when he was hired and therefore plaintiff's maintenance and cure claims must be dismissed as a matter of law in accordance with the ruling in *McCorpen*.[22] First, the court found the concealment prong was satisfied because plaintiff did not disclose his pre-existing injuries on his pre-employment medical questionnaire requesting his medical history.[23] However, the court reasoned plaintiff did not previously experience psychological injuries and therefore did not conceal them when he was hired.[24] The court explained the materiality prong was met based on evidence the pre-existing injuries would have materially impacted the employer's decision to hire the plaintiff and the fact that questions were asked about plaintiff's prior medical conditions made the answers material for *McCorpen* purposes.[25] Finally, the court found, and plaintiff did not dispute, a causal link existed between plaintiff's pre-existing physical injuries and those alleged in the lawsuit since they were identical in nature.[26] However, the court found the third *McCorpen* element was not met as to plaintiff's psychological injuries despite plaintiff admitting the source of his depression was his inability to work before being employed by defendant, because defendant could not prove plaintiff's psychological injuries were causally linked to any withheld information and there are no records for prior psychological treatment.[27] Accordingly, the court found all three prongs of the *McCorpen* defense were satisfied as to plaintiff's physical

18. Flowers v. Magnolia Marine Transp. Co., No. 22-1209, 2023 U.S. Dist. LEXIS 159035 (E.D. La. Sep. 8, 2023).
19. *Id.* at *2.
20. *Id.*
21. *Id.* at *5.
22. *Id.* at *8–9 (citing McCorpen v. Cent. Gulf Steamship Corp., 396 F.2d 547 (5th Cir. 1968)).
23. *Id.* at *10–11.
24. *Id.* at *11.
25. *Id.* at *13.
26. *Id.* at *14–15.
27. *Id.* at *15.

injuries and dismissed plaintiff's claims related to maintenance and cure involving his physical injuries but denied defendant's motion as to plaintiff's psychological injuries.[28]

C. *Other Issues Affecting Jones Act Seamen*

In *Pritt v. John Crane Inc.*, a magistrate judge of the United States District Court for Massachusetts considered the availability of survival remedies under the general maritime law.[29] The Court granted a motion to allow the plaintiff—the widow of a veteran whose death from Mesothelioma was alleged to have been caused by exposure to asbestos-containing products while working aboard a Navy vessel—to file a second amended complaint to pursue these additional damages against the product manufacturer. Breaking with a 2015 decision by another district court of the First Circuit,[30] the magistrate judge found that survival remedies could be pursued under the reasoning that doing so was necessary to avoid creating incongruity whereby plaintiff's wrongful death damages are recognized but the rights that were afforded to the plaintiff's husband prior to his death and that she sought to exercise as executrix of his estate are not.[31]

In *Meeks v. Hard's Marine Service, Ltd.*, the Southern District of Texas found that a seaman who was terminated after complaining about COVID-19 exposure onboard a vessel did not establish a claim under the Seaman's Protection Act.[32] In this case, plaintiff boarded a vessel to start a two-week shift working as a seaman.[33] Plaintiff discovered that one of the seamen who was leaving the vessel that day showed signs of COVID-19 and at least six of his coworkers had been directly exposed to him on the vessel.[34] Plaintiff expressed his concerns of COVID-19 exposure to his supervisor who allegedly dismissed his concerns and assured him that the coworker did not have COVID-19.[35] Plaintiff later learned that the coworker tested positive.[36] Plaintiff texted his supervisor about his concerns for COVID-19 exposure

28. *Id.* at *15–16.

29. Pritt v. John Crane Inc., No. CV 20-12270-NMG, 2023 WL 4471825 (D. Mass. July 11, 2023).

30. *See* Santos v. Am. Cruise Ferries, Inc., 100, F. Supp. 3d 96, 109 (D.P.R. 2015) (finding no federal survival action rooted in general maritime law).

31. The magistrate judge's survival remedy analysis was upheld in review by a district judge in October 2023. Importantly, the magistrate judge was overruled on other issues, with the court concluding that neither loss-of-consortium damages under the general maritime law nor punitive damages for general maritime wrongful-death claims were available to the plaintiff. *See* Pritt v. John Crane Inc., No. CV 20-12270-NMG, 2023 WL 6690946 at *5 (D. Mass. Oct. 12, 2023).

32. Meeks v. Hard's Marine Serv., Ltd., No. 4:22-CV-3447, 2023 U.S. Dist. LEXIS 170786 (S.D. Tex. Aug. 15, 2023).

33. *Id.* at *2.

34. *Id.*

35. *Id.*

36. *Id.*

dockside, fear of retaliation for reporting the issue, and ultimately declined to perform his duties.[37] The supervisor advised the plaintiff that he needed to alert his captain on these issues and clarified why he would or would not fire someone.[38] Plaintiff continued to not perform his duties and was fired on the final day of his shift.[39] Plaintiff brought a retaliation and wrongful termination suit under the Seaman's Protection Act against his employer alleging he was fired in retaliation for alerting his employer about the sick coworker.[40] In granting the defendant employer's motion to dismiss, the Magistrate reasoned that the employer took sufficient corrective action to resolve plaintiff's fear of dockside exposure by allowing the plaintiff to remain on the vessel.[41] The court explained that while there are additional recommendations provided by the Center for Disease Control for COVID-19 exposure, the statute does not demand that every possible measure be taken to correct the condition, only that there is correction of the condition.[42] Further, the court found that plaintiff's text message conversation to his supervisor was not considered a formal complaint entitled to protection under the statute.[43] Finally, the court clarified that plaintiff did not provide proper notice to the vessel's owner as required under the statute because plaintiff only reported his concerns to his supervisor and defendant did not own the vessel.[44] Following the court's dismissal of the action, plaintiff filed a motion to alter the judgement which was similarly denied.[45]

III. LONGSHOREMEN CLAIMS

In *In re Ingram Barge Co.*, the Fifth Circuit affirmed the district court's orders granting summary judgment finding that (1) a semi-permanently moored cleaning barge lacked vessel status, (2) an injured barge cleaner was not a seaman under the Jones Act, and (3) the vessel owner did not owe the injured barge cleaner any duty under the Longshore Act.[46] In this case, plaintiff, a barge cleaner, was injured by caustic soda while providing cleaning services for a barge company.[47]

37. *Id.* at *3–4.
38. *Id.*
39. *Id.* at *4.
40. *Id.* at *1, *4 (citing 46 U.S.C. § 2114).
41. *Id.* at *10.
42. *Id.*
43. *Id.* at *12–13.
44. *Id.* at *14.
45. Meeks v. Hard's Marine Serv., Ltd., No. 4:22-CV-3447, 2023 U.S. Dist. LEXIS 170971 (S.D. Tex. Sep. 15, 2023).
46. Ingram Barge Co., L.L.C. v. Ratcliff (*In re* Complaint of Ingram Barge Co., L.L.C.), No. 22-30577, 2023 U.S. App. LEXIS 24808 (5th Cir. Sept. 19, 2023).
47. *Id.* at *1.

First, in evaluating vessel status, the Fifth Circuit focused its analysis on *Lozman* and *Stewart*, explaining that the Supreme Court clarified *Stewart* in *Lozman* that "'the basic difference' between a vessel's purpose and a non-vessel's purpose is whether the watercraft in question 'was regularly, but not primarily, used (and designed in part to be used) to transport workers and equipment over water.'"[48] The court, in applying *Lozman*, found that the cleaning barge at issue was not regularly used to transport workers or equipment over water because it was indefinitely attached to land by steel cables, required significant efforts to move, and was stationary at all relevant times.[49] Therefore, the court determined a reasonable observer would not consider the cleaning barge designed to a practical degree for carrying people or things over water, and as such, the district court did not err in finding that the cleaning barge lacked vessel status at summary judgment.[50]

Next, in analyzing seaman status, the Fifth Circuit evaluated whether the plaintiff had a connection to the barge he was injured on that was substantial in duration and nature using the *Sanchez* factors.[51] The court found that the first *Sanchez* factor weighed against seaman status as the plaintiff owed his allegiance to his shoreside employer and not his employer's customer whose barges he was assigned to clean.[52] The court reasoned the next factor was neutral at best as the only "seagoing" activity plaintiff participated in was allegedly riding the customer's barges roughly 200 feet between the cleaning barges which was in violation of company policy.[53] The court noted that these short rides hardly subjected plaintiff to the perils of the sea.[54] Finally, the court explained the third factor weighed against plaintiff satisfying the substantial connection requirement as plaintiff's discrete tasks ended when he finished cleaning his assigned barge and plaintiff's unsanctioned 200-foot barge rides did not constitute as sailing port to port.[55] As such, the *Sanchez* factors weighed against plaintiff satisfying the nature element of the substantial connection test. Therefore, the Fifth Circuit affirmed that plaintiff was not a Jones Act seaman.[56]

48. *Id.* at *11 (quoting Lozman v. City of Riviera Beach, 568 U.S. 115, 125 (2013) (clarifying Stewart v. Dutra Constr. Co., 543 U.S. 481 (2005)).
49. *Id.* at *11–12.
50. *Id.* at *12–13.
51. *Id.* at *14–15 (citing Sanchez v. Smart Fabricators of Tex., L.L.C., 997 F.3d 564, 574 (5th Cir. 2021) (en banc). Because the cleaning barge did not qualify as a vessel, the court focused its analysis as to plaintiff's seaman status on his connection to the barge being cleaned.
52. *Id.* at *15–16.
53. *Id.* at *16–17.
54. *Id.* at *17.
55. *Id.* at *17–18.
56. *Id.* at *18.

Finally, the Fifth Circuit found the barge owner owed no duty under the Longshore Act.[57] The Court identified the main duty at issue was the vessel owner's turnover duty.[58] The court explained that the barge owner's turnover duty hinged on the whether the danger was hidden or was instead (1) open and obvious or (2) a danger a reasonably competent stevedore should have anticipated.[59] Here, the court found the danger of the caustic soda was open and obvious because the plaintiff confirmed he saw the caustic soda on the ceiling before he entered the barge and his foreman warned him about the caustic soda before he sprayed the ceiling.[60] As such, there was no genuine issue of material fact regarding the openness and obviousness of the caustic soda that ultimately injured the plaintiff.[61] The court clarified that the openness and obviousness of the caustic soda on the ceiling negated the barge owner's turnover duty to warn.[62]

Nystrom v. Khana Marine Ltd. arose under Section 905(b) of the LHWCA after a longshoreman slipped on ice that had blanketed the hold of the vessel he was unloading.[63] The longshoreman filed a negligence claim pursuant to the LHWCA alleging the vessel owner breached two duties—the turnover duty and the active control duty—by failing to "provide a deck free from the hazards of ice despite taking on the affirmative obligation to do so."[64] The defendant vessel owner filed a motion for summary judgment.[65]

The turnover duty requires a vessel owner to provide to the stevedore the vessel in an acceptable condition and warn the stevedore of any hazards that the vessel owner should reasonably expect.[66] This duty ends when the stevedore begins unloading the vessel, or when the vessel is "turned over" to the stevedore.[67] To determine if the vessel owner exercised reasonable care to meet this duty, the court asked whether "an expert and experienced stevedore working in Dutch Harbor[, Alaska,] would be able to safely work on an icy walking surface."[68] Although the court recognized that whether a vessel owner and crew exercised reasonable care or acted negligently is usually a question for the trier of fact, the court concluded that the facts definitively established that the crewmembers were removing the ice after the vessel was turned over, and an expert stevedore would be

57. *Id.*
58. *Id.* at *19.
59. *Id.* at *20.
60. *Id.* at *20–21.
61. *Id.*
62. *Id.* at *22.
63. Nystrom v. Khana Marine Ltd., 656 F. Supp. 3d 879 (D. Alaska 2023).
64. *Id.* at 888.
65. *Id.* at 886.
66. *Id.* at 889.
67. *Id.*
68. *Id.* at 891.

able to navigate the open and obvious icy conditions on a vessel in Dutch Harbor.[69] Thus, the court granted the defendant's motion for summary judgment on the plaintiff's duty to warn claim.[70]

Under the active control duty, "a vessel must exercise reasonable care to prevent injuries to longshoremen in areas that remain under the active control of the vessel during the stevedoring operations," or if the crew actively involved itself in the stevedoring operations and negligently injures a longshoreman.[71] The court determined that the record supported an inference that "by breaking up the ice and sweeping it to the side of the hold as the longshore workers worked, the crewmembers exhibited at least concurrent control over the longshore workers' walking surface and, by extension, the ongoing stevedoring operations."[72] The court, however, could not determine whether the defendant crewmembers negligently failed to remove the ice that caused plaintiff's injuries, and so the court did not grant summary judgment for the defendants on the active control duty claim.[73]

In *Larrison v. Ocean Beauty Seafoods, LLC*, the plaintiff sued the vessel owners for injuries sustained while performing maintenance work aboard a fishing vessel during the vessel's sea trials.[74] The plaintiff brought claims against the defendants for Jones Act negligence, unseaworthiness, and maintenance and cure, and under the Longshore and Harbor Worker's Compensation Act.[75] The court denied recovery under all three theories because the plaintiff was, at most, an "expectant seaman," which did not put the plaintiff in the category of "seaman" for purposes of the Jones Act.[76] The plaintiff was hired as an hourly employee by the vessel manager to perform activities related to shipyard repairs with the promise that he would be employed to work on the vessel in the future.[77] At the time of the accident, he was not employed as a crewmember on the vessel acting in furtherance of the vessel's mission, and therefore was not a seaman.[78]

Plaintiff also asserted that the defendants violated their "turnover duty" by failing to provide a vessel with an operational crane, which required the plaintiff to manually move heavy equipment causing his injury.[79] A vessel owner has a duty to "turn over" its vessel and equipment to stevedores "in

69. *Id.* at 895.
70. *Id.*
71. *Id.* at 896 (quoting Howlett v. Birkdale Shipping Co., 512 U.S. 92, 98 (1994)) (internal quotations omitted).
72. *Id.* at 897.
73. *Id.* at 901.
74. Larrison v. Ocean Beauty Seafoods, LLC, 651 F. Supp. 3d 1214, 1216 (W.D. Wash. 2023).
75. *Id.* at 1218.
76. *Id.* at 1220.
77. *Id.* at 1219.
78. *Id.*
79. *Id.* at 1220.

such condition that an experienced stevedore can by exercising reasonable care carry on its cargo operations with reasonable care."[80] The defendants argued that their duty was not to turn over the vessel completely defect-free, but rather to deliver a vessel in a condition "where an experienced longshore worker could reasonably work around defects."[81] The court agreed with defendants, reasoning that even if the crane was defective, it was the vessel manager who employed the plaintiff that made the unsafe decision to have a single person move the equipment and single-handedly do the work of a hydraulic crane.[82] The court found no genuine issue of fact and granted the defendants' motion for summary judgement dismissing the claims.[83]

IV. PASSENGER CLAIMS

In *Susana v. NY Waterway*, the court held that a passenger's claims arising from a trip and fall on a ferry, while it was moored at the dock, were governed by state law rather than maritime law and the passenger's inconsistent versions of her fall did not establish fault of the ferry owners.[84] The sixty-seven-year-old passenger,[85] while departing the *M/V BROOKLYN* ferry, tripped and fell. Her attorney initially alleging that her fall was caused by tripping on black metal locks attached to an HVAC systems that were allegedly left open.[86] During the passenger's deposition, however, she alleged she fell at the coaming at the bottom of a door.[87] The passenger brought suit against the owners of the ferry in New York state court and the defendants removed the case to federal court based on admiralty and diversity jurisdiction[88] and the defendants moved for summary judgment on the merits.[89] The judge first outlined that the passenger's fall "is the type of incident that poses such an insignificant effect on maritime commerce that federal admiralty jurisdiction is not implicated," reasoning the a recreational visitor is not engaged in maritime employment whose injury might endanger the safety of the vessel or risk a collision.[90] Further, the court outlined testimony that the passenger tripped over the coaming did

80. *Id.* (quoting Riggs v. Scindia Steam Navigation Co., 8 F.3d 1442, 1444 (9th Cir. 1993)).
81. *Id.*
82. *Id.* at 1221.
83. *Id.*
84. Susana v. NY Waterway, No. 20-cv-455, 2023 U.S. Dist. LEXIS 46829 (S.D.N.Y. Mar. 20, 2023).
85. The passenger typically used "a walker with four wheels" and "boarded the ferry with a hand-held cane." *Id.* at *3.
86. *Id.*
87. *Id.* at *5.
88. *Id.* at *7.
89. *Id.* at *13.
90. *Id.* at *16.

not state a claim for negligence and her tripping over a piece of black metal did not generate a fact question of fault.[91] Further, the judge also found that the passenger's failure to appear for a second planned medical examination, having missed the first one, was deliberate and issued a sanction of $660.[92]

In *Barham v. Royal Caribbean Cruises, Ltd.*, the court held that the exculpatory language in Plaintiffs' passenger and shore excursion tickets barred claims against Royal Caribbean Cruises (RCCL) for injuries or incidents occurring during an off-the-boat excursion.[93] The Plaintiffs were on a cruise in New Zealand for their honeymoon and took an excursion to White Island, "one of the most active volcanos in the world."[94] During the excursion, the volcano erupted, killing 22 people and injuring 20 others.[95] Included in the injured were the two plaintiffs in this case, both requiring several surgeries in New Zealand and ongoing procedures and care at home in the United States.[96] Because the cruise did not originate in the United States or include a stop in the United States, 46 USC § 30509,[97] which would typically reduce RCCL's ability to limit its liability as to third-parties, did not apply in the present case.[98] Instead, the liability waiver included in the shore excursions clause[99] was enforceable as written. Plaintiffs attempted to argue that the clause should not be enforceable because they were not lawyers, which failed to sway the court.[100] The physical tickets that the Plaintiffs received as well as the excursion website also included disclaimers of RCCL's liability for third-party excursions.[101] Notably, the disclaimers included both assumption of the risk clauses and a

91. *Id.* at *27.
92. *Id.* at *37–38.
93. Barham v. Royal Caribbean Cruises, Ltd., No. 20-22627-CIV, 2022 WL 17987302 (S.D. Fla. Oct. 4, 2022).
94. *Id.* at *1.
95. *Id.*
96. *Id.*
97. Recodified to 46 U.S.C. § 30527 in December 2022.
98. *Id.*
99. The Shore Excursion Ticket Read: "All arrangements made for or by Passenger for transportation (other than on the Vessel) before, during or after the Cruise or CruiseTour of any kind whatsoever, as well as . . . shore excursions . . . are made *solely for Passenger's convenience and are at Passenger's risk*. The providers, owners and operators of such services, conveyances, products and facilities are *independent contractors* and are not acting as agents or representatives of Carrier. Even though carrier may collect a fee for, or otherwise profit from, making such arrangements and offers for sale shore excursions, tours, hotels, restaurants, attractions, the Land Tour and other similar activities or services taking place off the Vessel for a profit, it does not undertake to supervise or control such independent contractors or their employees, nor maintain their conveyances or facilities, and makes no representation, whether express or implied, regarding their suitability or safety. *In no event shall Carrier be liable for any loss, delay, disappointment, damage, injury, death or other harm whatsoever to Passenger which occurs on or off the Vessel or the Transport as a result of any acts, omissions or negligence of any independent contractors.*"
100. *Id.* at *4–5.
101. *Id.* at *5–6.

disclaimer of responsibility, which negated arguments by the plaintiffs that assumption of the risk clauses do not bar recovery but invoke a comparative negligence standard instead.[102] In fact, there was a specific disclaimer of liability for activities occurring off the ship.[103] Ultimately, because the cruise did not originate in or call on a port in the United States, the disclaimer of liability for shore excursions was valid and the Magistrate Judge recommended that the district court grant summary judgment in favor of defendants, RCCL.[104]

In *Wiegand v. Royal Caribbean Cruises Ltd.*,[105] the parents of an 18-month-old brought claims against Royal Caribbean Cruises (RCCL) for general negligence, negligent failure to maintain, and negligent failure to warn after their daughter slipped out of her grandfather's arms and fell through an open window on Deck 11 of a cruise ship to the dock below and died from the fall.[106] The decedent's grandfather had picked her up in his arms and held her over the guard railing and up to an open window when she fell out of his arms.[107] The decedent's grandfather pled guilty to negligent homicide in Puerto Rico.[108] RCCL brought a motion for summary judgment on all three negligence counts, and the district court granted it, with plaintiffs appealing to the Eleventh Circuit. The Eleventh Circuit reversed and remanded plaintiff's general negligence and negligent failure to maintain claims to the district court while it affirmed the granting of summary judgment on negligent failure to warn.[109] The appeals court found that there was enough evidence for a reasonable juror to believe that RCCL knew of the risk of children falling through open windows onboard its ships—the testimony of a former security office and the existence of the wooden guard railings.[110] The appeals court also found that there was enough evidence to create a question of fact regarding the foreseeability of the grandfather's actions.[111] The appeals court upheld that the window was an open and obvious danger and that "a reasonable person in [the grandfather's] shoes would have known that the window was open and would have appreciated the danger of holding a toddler near an open window 150 feet above the surface."[112] It will ultimately be up to a jury to determine RCCL's

102. *Id.* at *17–18.
103. *Id.* at *18.
104. *Id.* at *20–21.
105. Wiegand v. Royal Caribbean Cruises Ltd., No. 21-12506, 2023 WL 4445948 (11th Cir. July 11, 2023).
106. *Id.* at *1.
107. *Id.*
108. *Id.*
109. *Id.* at *7.
110. *Id.* at *3–4.
111. *Id.* at *4–5.
112. *Id.* at *6.

liability regarding general negligence and a negligent failure to maintain and if that negligence was causative in this matter.

In the *Estate of Pankey by Terry-Brown v. Carnival Corp.*,[113] the representative of the decedent's estate brought claims for negligence, negligence per se, Death on the High Seas Act, and for the application of Panamanian law through the Death on the High Seas Act. Plaintiff alleged that Carnival's crew members watched the decedent and the father of her child "engage in verbal and physical altercations," which they used as part of a comedy show instead of intervening.[114] Following the comedy show, the complaint stated that the decedent and her partner continued to fight on the way to their stateroom and in the middle of the night, the decedent is presumed to have "fallen overboard."[115] The decedent's body was never recovered and no further details are known about what led to her "falling" overboard.[116] The court dismissed plaintiff's negligence per se claims (and claims that the *Pennsylvania* Rule provided a basis for liability), finding that negligence per se is not its own claim but rather like the *Pennsylvania* Rule creates a burden shifting presumption.[117] Plaintiff's DOSHA claim was dismissed because it was duplicative of the negligence claim and because DOSHA does not create a cause of action but rather provides statutory remedies and jurisdiction to the court over deaths at sea.[118] Plaintiff's attempt to invoke Panamanian law was dismissed because it is preempted by DOSHA.[119] The court also dismissed claims for punitive damages, pre-death pain and suffering, and the individual claims of the estate's representative, leaving only the claim of negligence to be decided at trial.[120]

V. MARITIME CONTRACTS

In *Gladsky v. Frank Scobbo Contractors Inc.*, the Second Circuit affirmed the district court's award to the vessel owner against the charterer for failure to procure insurance for the oral charter of barge and the charterer's award against the owner for conversion of the charterer's property left on the barge.[121] Frank Scobbo Contractors chartered the barge NITE MOVES 11547 owned by Gladsky and Seacoast Marine Services (plaintiffs)

113. *In re* Estate of Pankey by Terry-Brown v. Carnival Corp., No. 22-CV-24004, 2023 WL 5206032 (S.D. Fla. Aug. 14, 2023).
114. *Id.* at *1.
115. *Id.*
116. *Id.*
117. *Id.* at *2–3.
118. *Id.* at *3.
119. *Id.*
120. *Id.* at *4.
121. Gladsky v. Frank Scobbo Contractors Inc., Nos. 22-1514, 22-1642, 2023 U.S. App. LEXIS 17441 (2d Cir. July 11, 2023).

without a written agreement.[122] The barge was damaged during the charter, and plaintiffs brought suit in federal court in New York against Frank Scobbo based on breach of an oral charter agreement and maritime bailment.[123] Frank Scobbo filed a counterclaim based on conversion and unjust enrichment.[124] The court awarded $75,000 to plaintiffs and $27,966 to Frank Scobbo.[125] Plaintiffs were awarded damages for defendant's failure to procure insurance, and that extended to plaintiffs as the chartering party. The court awarded the damages to Frank Scobbo based on plaintiffs' conversion of property left on the barge at the end of the charter.[126] Both sides appealed, and the Second Circuit affirmed the decision of the district court, finding sufficient evidence of the value from defendant's testimony even though there were no invoices and there was no expert testimony as to the value.[127]

In *YS GM Marfin II LLC v. Four Wood Capital Advisors, LLC*, the court held that an investment management agreement for ship finance transactions was not a maritime contract.[128] Defendants were engaged to "to provide investment management services with respect to ship finance transactions, loans or leases" under the investment management agreement.[129] Plaintiffs alleged the primary objective of the agreement "relates to maritime commerce, specifically the origination and financing of vessels to be acquired overseas, transported on navigable and international waterways, and ultimately sold for vessel deconstruction."[130] Defendants moved to dismiss, asserting that the agreement was not a maritime contract because it did not involve vessel operations. They argued that the agreement was "several steps remote from" a contract to purchase a vessel, which is not a maritime contract.[131] The court ultimately agreed with defendants, reasoning that the objective of the agreement was investment management and not maritime commerce.[132] Concluding that the agreement was not maritime, the court held that the district court lacked admiralty and subject matter jurisdiction.[133]

122. *Id.* at *2.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at *5–6.
127. *Id.* at *7.
128. YS GM Marfin II LLC v. Four Wood Cap. Advisors, LLC, No. 20-cv-3320, 2023 U.S. Dist. LEXIS 55782 (S.D.N.Y. Mar. 30, 2023).
129. *Id.* at *4.
130. *Id.*
131. *Id.* at *23.
132. *Id.* at *24.
133. *Id.* at *42–43.

VI. MARINE INSURANCE

In *Great Lakes Ins. SE v. Andersson*, a declaratory judgment action to determine coverage under a marine insurance policy with respect to a 2019 grounding, the court addressed the first and second implied warranty of seaworthiness and the policy's express warranty of seaworthiness after coverage was denied for a lack of up-to-date charts.[134] On the first warranty, the court held that a lack of up-to-date charts for all areas covered by the policy at the time it went into effect did not void the policy at its inception.[135] On the second, it held that no breach of the warranty existed where the vessel did not have charts for the location of its diversion from its planned voyage, the site of the grounding, even where that location was within the area covered by the policy.[136] The court distinguished this case from *In re Complaint of Delphinus Maritima, S.A.*,[137] asserting that the place of the grounding (the Dominican Republic) was not a point of refuge on the vessel's intended voyage (from Aruba to Sint Maarten), and thus was not a reasonably foreseeable place to end up.[138] On the express warranty of seaworthiness, the court considered that because the warranty requires the vessel to be able to "adequately to perform the particular services required of her *on the voyage she undertakes*" and the vessel indeed had up-to-date charts for its intended route, there was no breach.[139] An appeal to the First Circuit has been filed.

VII. MARITIME LIENS

In *Stokes v. Belhaven Shipyard & Marina, Inc.* the appellant appealed a bankruptcy court decision that found Belhaven Shipyard had a valid maritime lien against his sailboat.[140] The appellant had purchased the 39-foot sailboat in 2019 and dry-docked it for repairs at the Belhaven Shipyard. While dry-docked, the appellant lived on the sailboat and the shipyard provided water, sewage, and electricity. The appellant never paid the shipyard for services. In 2021, the appellant filed for Chapter 7 bankruptcy. For

134. *See* Great Lakes Ins. SE v. Andersson, No. CV 20-40020-TSH, 2023 WL 2601669 at *3 (D. Mass. Mar. 21, 2023).

135. *Id.* at *4.

136. *Id.* at *4–5.

137. *See* Complaint of Delphinus Maritima, S.A., 523 F. Supp. 583, 591 (S.D.N.Y. 1981) (expanding the category of charts required for a vessel to remain seaworthy to include those for reasonably foreseeable diversions, such as notable points of refuge along the planned voyage).

138. *Great Lakes*, 2023 WL 2601669, at *5.

139. *Id.* at *5–6.

140. Stokes v. Belhaven Shipyard & Marina, Inc., No. 4:22-CV-00066-BO, 2023 U.S. Dist. LEXIS 102125, at *2 (E.D.N.C. June 9, 2023), *available at* https://www.brownsims.com/wp-content/uploads/2023/07/LongshoreUpdateStokesv.BelhavenShipyard.pdf.

exemption purposes, the bankruptcy court found that the sailboat was the appellant's residence. However, in a "turnover order," the bankruptcy court also found that the shipyard had a valid maritime lien against the sailboat and could retain possession until the lien was paid. The appellant appealed that turnover order.

> The district court affirmed the bankruptcy court and upheld the turnover order due to Belhaven Shipyard's valid maritime lien against the sailboat. "For a party to establish a maritime lien in a vessel: (1) the good or service must qualify as a 'necessary'; (2) the good or service must have been provided to the vessel; (3) on the order of the owner or agent; and (4) the necessaries must be supplied at a reasonable price."[141] The district court held that the bankruptcy court correctly established a maritime lien because the shipyard's services (storage repairs, and utilities) were necessary, and they were provided to the sailboat, upon the appellant's request, at a reasonable price. The district court also held that an *in rem* action was not necessary to effectuate the lien because a maritime lien is properly perfected the moment the necessary services are performed. It does not require a creditor to record the lien, obtain possession of the vessel, or file a claim against the ship.[142] Additionally, because the shipyard possessed the sailboat at the time the appellant filed bankruptcy, they were permitted to continue possession as it did not disturb, the "status quo of estate property."[143]

In *Bunker Holdings Ltd. v. Yang Ming Liber. Corp.*, the plaintiff, Bunker Holdings Ltd., filed an *in rem* action against the containership the *M/V YM Success* (the "vessel") claiming a maritime lien for necessaries for bunkers (fuel) the plaintiff supplied to the vessel.[144] The vessel owner entered into a contract for the bunkers with O.W. Bunker Far East (Singapore) Pte. Ltd. ("OWB"), that provided for delivery of fuel to the vessel.[145] OWB then contracted with the plaintiff to purchase the fuel and supply it to the vessel.[146] OWB then filed for bankruptcy and the plaintiff instituted this action to collect payment via a maritime lien on the vessel.[147]

By statute, to assert a maritime lien for necessaries, the claimant must have provided "necessaries" to a "vessel" "on the order of the owner or a person authorized by the owner."[148] Here, the plaintiff met the first two requirements—it supplied fuel to a vessel—but it did not do so at the direction of

141. *Id.* at *4 (citing Barcliff LLC v. M/V DEEP BLUE, IMO No. 9215359, 876 F.3d 1063, 1068 (11th Cir. 2017)).
142. *Id.* at *6 (citing *In re* Muma Servs., Inc., 322 B.R. 541, 546 (Bankr. D. Del. 2005)).
143. *Id.* at *6–7 (citing City of Chicago, Illinois v. Fulton, 141 S. Ct. 585, 590 (2021)).
144. Bunker Holdings Ltd. v. Yang Ming Liberia Corp., 906 F.3d 843, 845 (9th Cir. 2018).
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*

the vessel owner.[149] The court applied the principle that subcontractors are not entitled to maritime liens "because they had contractual relationships only with the general contractors, and in most cases 'a general contractor does not have the authority to bind a vessel.'"[150] The vessel owner never established a contractual relationship with the plaintiff to supply bunkers to its vessel.[151] Instead, this case involved two independent transactions, one between the vessel owner and OWB, and a second between OWB and the plaintiff.[152] OWB was not acting as the vessel owner's agent and lacked authority to bind the vessel when it entered the separate contract with the plaintiff, so its contract with the plaintiff did not give rise to a maritime lien.[153]

VIII. LIMITATION OF LIABILITY

In *Matter of G&J Fisheries, Inc.*, the First Circuit Court of Appeals considered a potential claimant's failure to file a timely claim in a vessel owner's limitation of liability action. [154] The court held that a potential claimant's answer filed in response to G&J's complaint seeking exoneration did not constitute a "claim," within the meaning of Federal Rule of Civil Procedure Supplemental Rule F(4)-(5), which requires claims to be filed within a court-ordered period. [155] Further, it found that the district court did not abuse its discretion in denying the potential claimant leave to file a late claim under an excusable neglect standard, a result supported by the district court's findings that the potential claimant made no attempt to remedy his failure to file a claim for a full year since the initial filing and that his counsel "were experienced practitioners" in maritime litigation.[156]

In *In re Cheramie Marine, L.L.C.*, the Eastern District of Louisiana granted a motion for partial summary judgment finding a vessel owner and operator was not entitled to limit its liability under the Limitation Act where its vessel allided with a pipeline because its captain fell asleep at the wheel.[157] First, the court found claimants met their burden in proving the vessel owner/operator's negligence caused the accident because petitioners could not rebut the well-established presumption of fault that arises

149. *Id.*
150. *Id.* at 846.
151. *Id.*
152. *Id.*
153. *Id.*
154. Matter of G&J Fisheries, Inc., 67 F.4th 20, 28 (1st Cir. 2023).
155. *Id.* at *28–29.
156. *Id.* at *30 (quoting Matter of G&J Fisheries, Inc., 570 F. Supp. 3d 8, 11 (D. Mass. 2021)).
157. *In re* Cheramie Marine, L.L.C., No. 21-2371, 2023 U.S. Dist. LEXIS 113011, at *2 (E.D. La. June 29, 2023).

when a moving vessel strikes a stationary object.[158] The court reasoned the petitioners offered no evidence that it was without fault, that the allision was caused by an issue with the oil platform, or that there was an inevitable accident.[159] As a result, the burden shifted to petitioners to prove that it lacked privity and knowledge of the negligence or unseaworthiness.[160] Claimants argued petitioners failed to train its employees on the proximity alarm systems aboard the vessel that could have alerted the sleeping captain of objects in the vessel's path.[161] In response, petitioners argued the captains were aware of the alarm systems and chose not to use them.[162] In rejecting petitioners' argument, the court found the captain's negligence was not merely an error in navigation because the captain chose not to engage the alarm, even after he recognized that he felt groggy, because he believed the alarm was only for foggy season when the visibility is low.[163] In further support, petitioners' management were unaware of the alarms on the vessel and failed to train its captains on those alarms or include them in safety policies.[164] The court found that these combined failures indicate that petitioners could have discovered with reasonable diligence that its captains were unprepared to use the alarms on the vessel.[165] As a result, the court explained petitioners could not meet its burden of proving that it did not have constructive knowledge of the negligence at issue.[166]

Next, the court examined if petitioners met their burden in proving that they lacked privity or knowledge of why the captain might have fallen asleep. Claimants argued petitioners failed to train its employees on fatigue management and enforce a 12-hour shift limit.[167] Here, in the 24 hours preceding the incident, the captain worked from midnight to noon, then volunteered to unload groceries from noon to five, then started working again at midnight before the allision at 2:45 a.m.[168] Further, the captain worked 12-hour night shifts 28 days in a row.[169] The court reasoned the captain's work schedule violated both the 12-hour shift policy imposed by statute as well as petitioners' own fatigue management policy.[170] The court explained petitioners did not monitor or enforce their fatigue management policy and multiple crew members violated those policies, including the

158. *Id.* at *10.
159. *Id.* at *10–11.
160. *Id.* at *11.
161. *Id.* at *12.
162. *Id.* at *14.
163. *Id.* at *18.
164. *Id.* at *18–19.
165. *Id.* at *19.
166. *Id.*
167. *Id.*
168. *Id.* at *21–22.
169. *Id.* at *22.
170. *Id.*

captain at issue on the date of the allision.[171] Accordingly, the court found petitioners could not meet their burden in proving lack of privity or knowledge of why the captain might have fallen asleep.[172] As such, the vessel owner and operator were not entitled to limit its liability.[173]

In *In re Live Life Bella Vita LLC*, a ship maintenance diver was injured while he was performing maintenance on a vessel.[174] Following the injury, the defendant filed a claim in California state court for damages, and the plaintiff filed the subject case in federal court seeking exoneration from or limitation of their liability to the vessel under the Limitation of Liability Act, 46 U.S.C. § 30501, et seq. ("LOLA").[175] The defendant filed a motion to dismiss for lack of subject matter jurisdiction, arguing the court could not exercise admiralty jurisdiction over plaintiff's claims, or, in the alternative, that the court should stay the case pending the resolution of the state court case.[176]

The court held it had admiralty jurisdiction over plaintiff's claims.[177] To establish admiralty jurisdiction over a tort claim, the plaintiff must show the tort occurred over navigable waters (the situs test) and the incident had "a potentially disruptive impact on maritime commerce" and "he general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity" (the nexus test).[178] The situs test was satisfied because the accident occurred off the side of the vessel in the Pacific Ocean.[179] The court reasoned the nexus test was likewise satisfied because the question asks only whether the incident could have a potential impact on maritime commerce, and an injury to a maintenance diver could have a "detrimental effect on maritime commerce, as those incidents can affect whether other vessels are maintained and serviced and can participate in maritime commerce and other activities."[180] Additionally, the maintenance and repair of vessels is "a traditional maritime activity."[181]

The court denied the defendant's motion to dismiss, but found a stay was warranted.[182] A district court may stay a limitation action to allow a claimant to elect a state court venue under the saving to suitors clause if "(a) there is a single claimant to the limitation fund; or (b) there are

171. *Id.* at *24.
172. *Id.*
173. *Id.* at *28.
174. *In re* Live Life Bella Vita LLC, No. 22-cv-09244, 2023 U.S. Dist. LEXIS 121964, *2 (C.D. Cal. June 8, 2023).
175. *Id.*
176. *Id.* at *4.
177. *Id.* at *8.
178. *Id.* at *9.
179. *Id.* at *8.
180. *Id.* at *15.
181. *Id.*
182. *Id.* at *16.

multiple claimants, but the limitation fund is sufficient to satisfy all claims."[183] The court reasoned that the damages in the state court action will be determined by the defendant's economic and non-economic damages.[184] Any "potential and imminent filing of third parties' claims for indemnity and contribution," would not affect the amount of damages, and so the court did not take those into consideration.[185] Therefore, the court stayed the limitation action and allowed the defendant to proceed with his state court action.[186]

In *Martz v. Horazdovsky*, the United States Court of Appeals for the Ninth Circuit consolidated two limitation of liability actions in which the lower court held that the respective vessel owners failed to timely initiate a limitation of liability action within six months after receiving a letter from the victim of a maritime accident stating that the victim "the victim might be interested in pursuing litigation against the responsible parties."[187] The court considered two issues of first impression: (1) whether the six-month statute of limitations in 46 U.S.C. section 30511(a) is a jurisdictional rule, and (2) what constitutes "written notice of a claim" sufficient to start the running of the limitations period.[188] The court held the statute of limitations was not jurisdictional and each victim's letter was not a "written notice of a claim" starting the six-month clock to file a limitation action.[189]

First, the court considered whether the statute of limitations is a jurisdictional rule such that the lower court in each case properly considered it as a valid basis for dismissing the action.[190] After noting the circuit split on this issue, the Ninth Circuit agreed with those courts that have held the statute is not jurisdictional.[191] So, the untimeliness of a limitation of liability action is a merits issue appropriately raised in a motion for summary judgment.[192]

The court then considered the main issue as to what constitutes "written notice" under the Limitation of Liability Act.[193] To bring a limitation act, the vessel owner must file its action "within 6 months after a claimant gives the owner written notice of a claim."[194] The written notice of claim "must (1) be in writing, (2) clearly state that the victim intends to bring a claim or

183. *Id.* at *7.
184. *Id.* at *20.
185. *Id.*
186. *Id.*
187. Martz v. Horazdovsky, 33 F.4th 1157, 1160 (9th Cir. 2022).
188. *Id.* at 1160–61.
189. *Id.* at 1161.
190. *Id.*
191. *Id.* at 1163.
192. *Id.*
193. *Id.* at 1164.
194. *Id.*

claims against the owner, and (3) include at least one claim that is reasonably likely to be covered by the Limitation Act."[195] The district courts held that notice of "the reasonable possibility of a claim" or a "potential claim" was enough to inform the vessel owner that the claimant intended to seek damages.[196] The Ninth Circuit disagreed, explaining that, while a written letter may be a correct form, the contents of the letter must convey the claimant's "actual intent" to file a claim against the vessel owner that may exceed the value of the vessel and its freight and for which the vessel owner is allowed to limit its liability under the act.[197] Here, neither claimant's letter to the vessel owner stated the claimant intended to file suit, demanded anything from the vessel owners, or asserted any entitlement to recovery, but rather only laid out theories of liability and referenced legal concepts, none of which was sufficient to constitute a "written notice of a claim."[198]

IX. ADMIRALTY JURISDICTION

In *Matter of Silver*, the United States District Court for the District of Massachusetts concluded it had admiralty jurisdiction under both the locality and nexus test over claims regarding an explosion at a boatyard that destroyed the vessel and much of the boatyard's facilities.[199] The district court also addressed the argument that the Limitation of Liability Act provides an independent basis for jurisdiction, agreeing with the well-trodden determination by every other Circuit court to consider the issue: that the Act does not provide jurisdiction over vessel-related torts where admiralty jurisdiction is lacking.[200]

In *Thibodeaux v. Bernhard*, the court examined whether it had admiralty jurisdiction over a dispute on Lost Lake, an inland body of water that is only accessible through a canal for roughly one-third of the year during crawfish season.[201] In this case, plaintiffs were harvesting crawfish in Lost Lake when defendant, owner of the surrounding property, thwarted their efforts and took their crawfish traps.[202] Plaintiffs' filed suit in the Western District of Louisiana, invoking admiralty jurisdiction and seeking monetary damages for lost profits and conversion of their crawfish traps under

195. *Id.*
196. *Id.*
197. *Id.* at 1165–66.
198. *Id.* at 1167–68.
199. *In re* Silver, No. 1:22-CV-11833-IT, 2023 WL 5726424 at *3–4 (D. Mass. Sept. 5, 2023).
200. *Id.* at *3.
201. Thibodeaux v. Bernhard, 2023 U.S. Dist. LEXIS 100394 at *3, *13 (W.D. La. June 8, 2023).
202. *Id.* at *3–4.

28 U.S.C. § 1333.[203] Defendant filed a motion to dismiss arguing that the district court lacked admiralty jurisdiction because Lost Lake is only seasonally connected with the Atchafalaya River, an arm of the Gulf of Mexico, and therefore cannot form an interconnected highway of commerce.[204] In rejecting defendant's argument, the district court explained that seasonal accessibility does not preclude admiralty jurisdiction under Fifth Circuit precedent.[205] In support, the district court looked to a nearby body of water, virtually identical to the relevant characteristics of Lost Lake, that was similarly found to be navigable.[206] Next, the district court determined the Lake was accessible for a commercially significant period of time because the Lake's seasonal accessibility wholly coincides with crawfish season and has been historically crawfished by commercial fishermen.[207] Finally, the district court found that because the Lake is accessible from the Atchafalaya River, which connects to the Gulf to Mexico, the Lake is navigable-in-fact, and therefore, a navigable body of water for purposes of the district court's admiralty jurisdiction.[208] As such, the court denied the defendant's motion to dismiss.

In *In re D'Ancona*, a magistrate judge in the Eastern District of New York held that the district court lacked admiralty jurisdiction over a death that occurred aboard a moored vessel due to carbon monoxide poisoning.[209] The owner and a passenger of the *TALKIN TRASH* died from carbon monoxide poisoning from gas that escaped from a broken hose while the vessel was moored in Fire Island, New York.[210] The vessel owner's estate brought a cause of action in New York state against Town & Country Marina, which had previously taken possession of the vessel to conduct repairs.[211] The passenger on the vessel brought suit against both the vessel owner and Town & Country Marina.[212] The vessel owner's estate subsequently filed in the Eastern District of New York seeking limitation of vessel owner liability pursuant to the Limitation of Liability Act, 46 U.S.C. §§ 30501–30512.[213] The vessel owner's estate subsequently settled with the passenger's estate, and the vessel owner moved for summary judgement

203. *Id.* at *4.
204. *Id.* at *8–9.
205. *Id.* at *11.
206. *Id.* at *11–12 (citing Meche v. Richard, 2007 WL 634154 (W.D. La. Feb. 26, 2007)).
207. *Id.* at *13.
208. *Id.* at *14.
209. *In re* D'Ancona, No. 19-cv-5492, 2023 U.S. Dist. LEXIS 16490 (E.D.N.Y. Jan. 30, 2023).
210. *Id.* at *2–3.
211. *Id.*
212. *Id.*
213. *Id.* at *4.

in the limitation action on Town & Country's claims for contribution and indemnity.[214]

The district court reviewed the *Grubart* locus and nexus tests to determine if admiralty jurisdiction exists. The court outlined that the incident satisfied the locus or "location" test for admiralty jurisdiction, as the incident took place on a vessel that was moored on navigable waters.[215] The magistrate judge then considered the "nexus" as to whether the possibility of an emergency response when a person is injured on a moored vessel may have the potential to disrupt maritime commerce.[216] She outlined that at least three circuits have relied on the disruptive event of a maritime emergency to sustain admiralty jurisdiction even when the activities on the vessels were recreational. However, she outlined that the danger to shipping from a maritime emergency response may be more significant when the rescue is at sea than when the rescue is at the dock or a pier.[217] She therefore recommended that the action be dismissed for lack of admiralty jurisdiction.[218] However, if admiralty jurisdiction were found to exist, she recommended that the contribution and indemnity claims against the vessel owner's estate be dismissed in light of the settlement between the vessel owner and the passenger's estate.[219]

The Third Circuit held in *Bunge, S.A. v. ADM International SARL* that a London arbitration claim under English Law constituted a *prima facie* admiralty claim required to support attachment under Rule B of the Supplemental Rules of Admiralty of the Federal Rules of Civil Procedure.[220] Before filing suit in federal district court, Bunge initiated London arbitration for breach of contract.[221] Discontent with the pace of arbitration, Bunge then filed suit in the District Court of Delaware and sought attachment of ADM's property under Rule B.[222] On appeal, the Third Circuit held that to support a writ of attachment, a party must have a valid prima facie admiralty claim.[223] The Third Circuit then held that for a valid prima facie claim, (1) the claim must be ready for to be adjudicated under the relevant law and (2) the claimholder must have asserted the claim.[224] The Third Circuit analyzed Bunge's previously brought London arbitration

214. *Id.* at *5.
215. *Id.* at *7–8 (citing Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995)).
216. *Id.* at *9–12.
217. *Id.* at *11–12.
218. *Id.* at *27–28.
219. *Id.* at *28–31.
220. Bunge, S.A. v. ADM Int'l SARL, No, 22-1276, 2023 WL 3773670 (3d Cir. June 2, 2023).
221. *Id.* at *3–4.
222. *Id.* at *4.
223. *Id.* at *5.
224. *Id.* at *6.

claim against ADM under English Law for the same breach of contract and held it qualified as a prima facie admiralty claim for the purposes of Rule B.[225]

In *In re Lion Air Flight JT 610 Crash*, plaintiffs filed suit as representatives of the estates of passengers who passed away on Lion Air Flight JT 610, which crashed eighteen nautical miles off the coast of Indonesia on October 29, 2018.[226] The plane had experienced mechanical issues almost immediately after takeoff and the pilots attempted to recover normal operations while partially over land before the plane headed offshore and crashed into the sea.[227] On the defendant's motion for summary judgment, the district court rejected one plaintiff's argument that the Death on the High Sea Act (DOHSA) did not apply because the defendant's negligence occurred over land and the deceased also suffered some form of injury while the pilots attempted to recover normal flight over land.[228] The district court focused on the text of the pleadings that did not dispute that the deceased suffered a fatal injury on the high seas when the aircraft crashed into the sea.[229] The district court further held the plaintiffs' wrongful death claims under Illinois law, the Illinois Consumer Fraud and Deceptive Practices Act, and the federal Computer Fraud and Abuse Act were all preempted by DOHSA.[230] The district court lastly held that the plaintiffs were not entitled to a jury trial under federal diversity jurisdiction when the sole substantive claim existed under DOHSA.[231] However, the district court granted an interlocutory appeal on the issue of "whether a plaintiff in federal court is entitled to a jury trial under the Seventh Amendment when the plaintiff's sole claim arises under DOHSA, and the plaintiff has a concurrent basis for common law jurisdiction (such as diversity)."[232]

Sixty-two people on board, all citizens of Indonesia, died in the crash. Their heirs and beneficiaries brought wrongful death claims and survival actions alleging strict liability and negligence against Boeing, the manufacturer of the aircraft. Originally brought in Illinois, The Judicial Panel on Multidistrict Litigation (JPML) transferred those cases to the United States District Court for the Eastern District of Virginia for centralized pretrial proceedings along with 17 other actions arising from the crash. The plaintiffs challenged the removal on several basis.

225. *Id.* at *7, *12.
226. *In re* Lion Air Flight JT 610 Crash, No. 18-C-07686, 2023 WL 3653218, at *1–2 (N.D. Ill. May 25, 2023).
227. *Id.*
228. *Id.* at *3–4.
229. *Id.* at *4.
230. *Id.* at *6–7.
231. *Id.* at *7–9.
232. *Id.* at *9.

In re Air Crash into the Java Sea on January 9, 2021, involved a consolidated lawsuits arising from the 2021 crash of Sriwijaya Air Flight SJY182 into the Java Sea off the coast of Indonesia.[233] Several of the suits had been removed to federal court, and those plaintiffs challenged the court's jurisdiction. The court held that removal was proper based on admiralty jurisdiction alone.[234] In so finding, the court applied the long-held locality and connection test.[235] In applying the locality test, the court upheld the repeatedly recognized principle that product liability claims based on onshore design and manufacture of products that cause injury on or over navigable water fall within admiralty jurisdiction.[236] However, in this case, the court also held that admiralty jurisdiction is established when material failure of a product (in this case the autothrottle of the airplane) first occurs over land, but persists over water and causes the accident.[237] Therefore, the locality test was independently satisfied in this case, because the alleged wrong occurred at least in part over navigable water. In applying the connection test, the court found that, because the flight was ferrying passengers and cargo from one Indonesian island to another, it was performing actions that a boat would have performed prior to the advent of air travel. Therefore, the flight bore a substantial relationship to traditional maritime activity.[238]

In *United States v. McKee*, a decision stemming from the 2018 duck boat tragedy on Table Rock Lake in the Ozarks that resulted in the death of passengers, the U.S. Court of Appeals for the Eighth Circuit affirmed the district court and dismissed the indictment charging the defendants with seaman's manslaughter and operating a vessel in a grossly negligent manner upon finding that Table Rock Lake is not navigable in fact, and therefore not subject to admiralty jurisdiction.[239] The court reasoned that Table Rock Lake only sustains recreational activity rather than commercial activity, and as a result, admiralty jurisdiction did not apply.[240] Because the statutes criminalizing seaman's manslaughter and gross negligence in

233. *In re* Air Crash into the Java Sea on January 9, 2021, No. MDL No. 1:23-md-3072, 2023 U.S. Dist. LEXIS 152851, at *7 (E.D. Va. Aug. 25, 2023).

234. *Id. at* *9.

235. *Id.* at *16 (citing Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995); 28 U.S.C. § 1333(1)).

236. *Id.* at *17–18; *see, e.g.*, Saratoga Fishing Co. v. J.M. Martinac & Co., 520 U.S. 875 (1997); Stark v. Armstrong World Indus., 21 F. App'x 371 (6th Cir. 2001); Pavlides v. Galveston Yacht Basin, Inc., 727 F.2d 330 (5th Cir. 1984); Lewis v. Timco, Inc., 716 F.2d 1425, 1426 (5th Cir. 1983); Pan Alaska Fisheries, Inc. v. Martine Constr. & Design Co., 565 F.2d 1129 (9th Cir. 1977).

237. *Id.* at *18.

238. *Id.* at *18–19.

239. United States v. McKee, 68 F.4th 1100, 1110 (8th Cir. 2023).

240. *Id.* at 1109.

operating a vessel are defined by federal admiralty jurisdiction, dismissal of the indictments was appropriate.[241]

In *Paxton as Next Friend of Paxton v. Georgia Power Company*,[242] the representative of the decedent's estate brought state law claims for wrongful death under a negligence theory against Georgia Power after a commercial diver drowned at Oliver Dam which is owned and operated by Georgia Power on the Chattahoochee River. Georgia Power removed the case to federal court on the bases of federal question, federal officer jurisdiction, and admiralty jurisdiction.[243] The Plaintiff sought to remand back to state court. The court found that Georgia Power was entitled to removal based on federal officer jurisdiction because it operated the dam under the Federal Energy Regulatory Commission (FERC), there was a causal connection between the operation of the dam and the decedent's death, and Georgia Power was asserting a federal defense (preemption).[244] Georgia Power was also entitled to removal based on federal question.[245] The court also addressed if Georgia Power was entitled to removal based on admiralty jurisdiction. The court found that the Chattahoochee, specifically Lake Oliver, was a navigable waterbody and therefore Georgia Power satisfied the location test, however the Defendant failed to show that the death of a commercial diver at a hydroelectric dam was potentially disruptive of maritime commerce.[246] Therefore, while the Defendant had other means by which to justify the removal to federal court, admiralty jurisdiction was not one of them because the decedent's death was not something that had potential impacts on commercial maritime activities.[247] The court granted the Plaintiff's motion to remand due to a lack of admiralty jurisdiction and denied the motion to remand based on deferral officer jurisdiction and federal question jurisdiction.

X. PRACTICE, PROCEDURE, AND UNIFORMITY

In *Christie v. Ingram Barge Company, LLC*, plaintiff, a cook aboard defendant's vessels, sued her former employer for sexual harassment and hostile work environment under Title VII and asserted Jones Act negligence and unseaworthiness claims "arising largely from the same 'continuous

241. *Id.* at 1104–08.
242. Paxton as Next Friend of Paxton v. Georgia Power Co., No. 4:22-CV-00081-TES, 2022 WL 17834062 (M.D. Ga. Dec. 21, 2022).
243. *Id.* Georgia Power also noted that diversity of citizenship did exist; however, they did not rely on this for removal. *Id.*
244. *Id.* at *3–7.
245. *Id.* at *7–11.
246. *Id.* at *11–15.
247. *Id.* at *15.

harassment, retaliation, assaults and batteries' underlying the Title VII claims."[248] Plaintiff's complaint included allegations of physical and verbal threats, sexual assaults, and intentional infliction of emotional distress by her co-workers.[249] Defendant moved to dismiss plaintiff's Jones Act and general maritime law claims on the grounds that Title VII provided the exclusive remedy for sexual harassment claims against an employer and, thus, the maritime claims were preempted by plaintiff's Title VII claims.[250] The court disagreed and found that plaintiff's Title VII claims did not preempt her maritime tort claims because plaintiff's complaint sufficiently alleged colorable claims for Jones Act negligence and unseaworthiness separate and apart from the allegations supporting her Title VII claims.[251]

In *Clear Spring Property and Casualty Company v. Arch Nemesis, LLC*, the plaintiff, an insurer, filed a declaratory judgment action for insurance coverage related to the sinking of defendant's, Arch Nemesis, yacht.[252] Plaintiff elected to procced with its declaratory action in admiralty pursuant to Federal Rules of Civil Procedure 9(h) and 38(e).[253] Defendant filed counterclaims alleging wrongful denial of insurance coverage, invoked the court's diversity jurisdiction under 28 U.S.C. §1332, and requested trial by jury on its counterclaims.[254] Plaintiff moved to strike defendant's jury demand arguing that plaintiff's designation of the declaratory action to be in admiralty precluded defendant from obtaining a jury trial.[255] The court weighed plaintiff's admiralty designation against defendant's Seventh Amendment jury trial rights and concluded that plaintiff's admiralty designation did not override defendant's right to a jury on the facts presented.[256] Thus, plaintiff's motion to strike defendant's jury demand was denied.[257]

In *Gulf Island Shipyards, LLC v. Mediterranean Shipping Co. (USA), Inc.*,[258] the court declined to reconsider its decision on the package limitation defense based on the different versions of the bill of lading submitted by the carrier, condemning the carrier for its premature motion."[259] MSC moved

248. Christie v. Ingram Barge Co., LLC, 671 F. Supp. 3d 833, 834 (M.D. Tenn. May 1, 2023).
249. *Id.*
250. *Id.* at 834–35.
251. *Id.* at 838.
252. Clear Spring Prop. & Cas. Co. v. Arch Nemesis, LLC, 2023 WL 6200198, at *1 (D. Kan. Sept. 22, 2023).
253. *Id.*
254. *Id.*
255. *Id.* at *2.
256. *Id.* at *9–10.
257. *Id.* at *10.
258. Gulf Island Shipyards, LLC v. Mediterranean Shipping Co. (USA), Inc., No. 1:22-cv-1018, 2023 U.S. Dist. LEXIS 97887 (S.D.N.Y. June 6, 2023).
259. As way of background, Gulf Island Shipyards contracted with Wartsila Defense to purchase a propeller shaft. Wartsila Defense subcontracted with Martin Bencher to arrange for the shipping of the cargo from Italy to Louisiana and Martin Bencher issued a Combined

for reconsideration, arguing that there was no genuine dispute that the MSC Waybill that was filed with its reply brief was the operative version of the Waybill and that version clearly limited recovery to $500 per package.[260] MSC argued that the complete Waybill was not available until the filing of its reply brief, but the court responded that MSC's story did not "add up."[261] Specifically, the Waybill differed in various ways, MSC did not attempt to explain the differences, and the court was left unable to opine what shipping documents "were provided to what parties and when."[262] The court noted that it might turn out that MSC was correct about which Waybill governed, but she could not decide that based on the current evidence. MSC was scolded, stating, "[w]hile MSC complains that the issue could be resolved more efficiently at the summary judgment stage, MSC squandered that opportunity by electing to file a premature motion, which was based entirely on a document that MSC now claims (without any support) to be defunct."[263] Further, "MSC should not have filed its motion, and wasted the resources of its adversary and this Court until it had done its diligence and obtained the as-issued MSC Waybill. The Court will not give MSC another (unjustified) bite at the apple."[264]

Transport Bill of Lading for the shipment. Martin Bencher then contracted with Mediterranean Shipping Co. (MSC) to transport the propeller shaft. MSC issued a Sea Waybill for the shipment. The shaft was damaged when it was dropped during its discharge from the vessel in Louisiana, and Gulf Island initiated this suit against MSC in federal court in Louisiana based on the Carriage of Goods by Sea Act (COGSA), alternatively the Harter Act, and, alternatively, negligence/bailment. MSC moved to transfer the case to New York based on the forum-selection clause, and the case was transferred. As the complaint alleged that the damage occurred while the shaft was being discharged from the vessel, the court held that COGSA, not the Harter Act, applied. MSC moved for partial summary judgment that its liability was limited by COGSA's package limitation to $1,500, as the Sea Waybill identified three packages. Gulf Island invoked the "fair opportunity" doctrine that it did not have the opportunity to declare a higher value, citing the Waybill attached to MSC's motion for summary judgment. In its reply, MSC attached a version of the Waybill, which presented the opportunity to declare a higher value, and the court noted that it appeared to be fatal to Gulf Island's argument. In light of the different versions of the Waybill that were submitted, however, the court found a fact dispute that would have to be resolved and that precluded summary judgment.

260. *Id.* at *2.
261. *Id.* at *3.
262. *Id.* at *4.
263. *Id.*
264. *Id.* at *5.

RECENT DEVELOPMENTS IN ANIMAL TORT AND INSURANCE LAW

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I. INTRODUCTION

This survey includes a review of cases involving animal tort and insurance law. Four dog bite cases are included in the review. Landlord liability was considered in one case, with the court refusing to adopt the *Restatement* approach, which would impose on landlords liability for off-premises injuries. Two cases explored the scope of liability under state dog bite statutes. In one, the court held that a state law enforcement agency had not waived sovereign immunity to a suit under the statute. The second held that the state's dog bite statute did not apply to an animal shelter. The final dog bite case involved a lawsuit over an attack by a fake service dog against the doctor who provided the letter establishing the need for the dog. The court held that the plaintiffs' claims were not health care liability claims requiring submission of expert reports to the defendant, thereby allowing the case to proceed.

Two emotional distress cases were also reviewed with neither court allowing the claim. In the first, the court held that emotional distress damages were not available for the death of a pet, even when the plaintiff has suffered minor physical injuries. In the second, the court refused to allow a negligent infliction of emotional distress claim even though the pet was the plaintiff's emotional support animal. In addition, in that same case, the court held that the corporate negligence doctrine did not apply to animal hospitals. A veterinarian's liability for wrongfully securing the plaintiff's permission for a painful procedure used to euthanize a cat was considered in another case, with the court holding that the plaintiff had stated valid claims for fraud, misrepresentation, conversion, trespass to chattels, and intentional infliction of emotional distress.

Damages were also at issue in this survey period, with two courts reviewing issues of first impression. In one, the court held that reasonable veterinary costs are recoverable even if they exceed the reduction in the dog's fair market value. In the second, the court held that a state provision that allows recovery of exemplary damages for wrongful injuries to animals did not itself create a cause of action, but allowed recovery of those damages based on other claims.

This survey also includes several cases relating to ownership of animals. One court rejected an animal shelter's claim that expiration of the shelter's hold period cut off an owner's title to the impounded animal where the dog had been impounded solely because the dog was with the owner when she was arrested and jailed for a traffic offense. In two divorce cases, the courts applied New York's newish "best interests" standard, and, in two replevin cases, the courts applied New York's older "best for all concerned" standard to resolve contested claims of ownership.

The scope of California's Hayden Act was considered in another case, with the court holding that the law imposes a mandatory obligation on an

animal shelter to release animals scheduled for euthanasia to an adoption partner, but also finding that the animal shelter could place conditions on becoming an adoption partner with the shelter. And, in a case involving a private zoo, a court held that violations of state wildlife and animal cruelty laws and the Endangered Species Act could not support a claim for public nuisance.

Several horse cases span the topics of equine activity liability acts (EALAs), liability waivers, and common law negligence. In two cases involving limiting liability for injuries to participants in horse activities, a riding stable was protected from a riding student's claims arising out of risks inherent in equine activities, while a tree services company could not hide behind its state's EALA to avoid liability for injury to a person driving her carriage horse past its worksite. Three liability waiver cases demonstrate the enhanced protections that well-written waivers can provide beyond the protections of an EALA and that the degree to which enhanced protections are available vary from state to state. A fourth liability waiver case demonstrates the importance of a well-written waiver in states in which there is no EALA, because in that case the court (albeit a divided one) held that the liability waiver, though detailed, did not actually release the riding stable from liability for negligence. Two more horse cases address common law negligence, one affirming summary judgment against a plaintiff, and the other concluding that any claim of mishandling of a horse required the plaintiff to establish such negligence through expert testimony.

Four insurance cases are also surveyed. The first held that a horse-drawn buggy is not a motor vehicle that triggers the underinsured motorist coverage. The other three involve the question of animal exclusions under homeowners and CGL policies and whether there is a duty to defend and indemnify, all of them together demonstrating that every policy and animal exclusion provision has its own quirks, as do the facts of each case, such that it is a case-specific analysis each time.

II. ANIMAL TORT LAW

A. *Dog Bites*

1. Landlord Liability

In *Aviles v. Barnhill*,[1] a Connecticut appellate court considered whether a landlord could be held liable for an off-premises injury caused by a tenant's dog. In the case, the plaintiffs' and the tenant's premises had adjoining backyards. The tenant owned a dog that ran to the plaintiffs' premises and attacked the plaintiffs, causing serious injury.[2] The plaintiffs sued both the

1. 289 A.3d 224 (Conn. App. Ct. 2023).
2. *Id.* at 228.

tenant and the landlord, with the claims against the landlord sounding in negligence.[3] The landlord moved for summary judgment, claiming that the landlord owed no duty to the plaintiffs for premises liability because the attack occurred off-premises and the landlord was unaware of the dog or a dangerous condition.[4] The plaintiffs opposed the motion, asserting that § 379A of the *Restatement (Second) of Torts* should apply,[5] which would allow the court to imply knowledge "'from all of the circumstances existing at the time of the lease,'"[6] including whether the defendant became aware of the activities when the lease was renewed.[7] The trial court initially denied the landlord's motion for summary judgment, but vacated it upon reconsideration, stating that § 379A had not yet been adopted by Connecticut appellate courts nor did precedent support its application.[8] Finding no common law liability for off-premises injuries, the motion for summary judgment was granted.[9]

Plaintiffs appealed, arguing that the Connecticut Supreme Court recognized landlord liability for off-premises injuries in *Giacolone v. Housing Authority*[10] and that, even though § 379A was not currently adopted by Connecticut courts, it should be "because it 'strikes a reasonable balance between concerns over the expansion of landlord liability and the need to hold accountable those landlords who have knowledge of dangerous conditions on their property and who fail to act.'"[11] The court of appeals disagreed, reviewing Connecticut case law and finding no extension of a landlord's duty to land not under the landlord's control.[12] As for *Giacolone*,

3. The plaintiffs alleged the landlord knew or should have known about the dangerous condition posed by the dog and failed to secure the premises to prevent the dog's escape, order the tenant to remove the dog from the premises, inspect the premises, and warn the plaintiff about the dog. *Id.*

4. *Id.*

5. Section 379A provides:

> A lessor of land is subject to liability for physical harm to persons outside of the land caused by activities of the lessee or others on the land after the lessor transfers possession if, but only if, (a) the lessor at the time of the lease consented to such activity or knew that it would be carried on, and (b) the lessor knew or had reason to know that it would unavoidably involve such an unreasonable risk, or that special precautions necessary to safety would not be taken.

2 Restatement (Second) of Torts § 379A (1965).

6. *Aviles*, 289 A.3d at 228–29 (quoting 2 Restatement (Second) of Torts § 379A, comment (b) (1965)).

7. *Id.* at 229 (quoting 4 Restatement (Second) of Torts § 837, comment (g) (1979) ("If at the time the lessor renews the lease [it] knows that activities are being carried on . . . [the lessor] is liable for the continuance of the interference after the renewal.").

8. *Id.*

9. *Id.*

10. 51 A.3d 352 (Conn. 2012).

11. *Aviles*, 289 A.3d at 230 (quoting plaintiffs' brief).

12. *Id.* at 231 (discussing Stokes v. Lyddy, 815 A.2d 263 (Conn. App. 2003), and Charles v. Mitchell, 118 A.3d 149 (Conn. App. 2015)); *see also id.* at 234–35 (discussing Raczkowski v. McFarlane, 225 A.3d 305 (Conn. App. 2020)).

although the plaintiffs interpreted the case to mean "'a property owner's duty under premises liability . . . does not evaporate if that harm crosses the property's boundary line[,]'"[13] the court rejected that reading, finding that the plaintiffs not only misunderstood the location of the dog attack as being off premises in *Giacolone*,[14] but also misinterpreted the holding. According to the court, *Giacolone* is clear that "it is the property lines, and the potential harms within them, that defines a landlord's duty."[15] The court of appeals also refused to adopt § 379A because it was inconsistent with Connecticut case law, which consistently followed traditional premises liability principles, and it was constrained from departing from or modifying supreme court precedent.[16]

2. Dog Bite Statutes

a. *State Agencies*

In *Berrier v. Minnesota State Patrol*,[17] a Minnesota appellate court determined that the state's dog bite statute did not apply to state agencies because of sovereign immunity.[18] In the case, the plaintiff was employed at a car dealership. While a state patrol car was being serviced at the dealership, a state police dog, without provocation, attacked the plaintiff, causing her serious injury.[19] The plaintiff sued, claiming strict liability under Minnesota Statutes § 347.22 and negligence.[20] The defendant, Minnesota State Patrol, moved to dismiss the § 347.22 claim, asserting sovereign immunity for strict liability claims. The trial court denied the motion, finding that § 347.22 itself waived the state's sovereign immunity.[21]

On appeal, the court of appeals reversed, finding no waiver of sovereign immunity under the statute. The court began its analysis by indicating that sovereign immunity did not apply to common law tort claims, but still existed for statutory claims unless expressly waived in the statute.[22] It explained that a statute waives immunity if the state is either explicitly named in the statute or the statutory language is "'so plain, clear, and

13. *Id.* at 231 (quoting plaintiffs' brief).

14. The plaintiffs had asserted the attack in *Giacolone* occurred off premises at the plaintiff's home, but the court extensively reviewed the facts of the case to show that the attack actually occurred "at or near" the dog owner's home (i.e., the landlord's premises). *See id.* at 232–33.

15. *Id.* at 233.

16. *Id.* at 234–36.

17. 992 N.W.2d 421 (Minn. Ct. App. 2023), *rev. granted* (Aug. 22, 2023).

18. *Id.* at 422.

19. *Id.* at 422–23.

20. *Id.* at 423.

21. *Id.* The appellant also moved to dismiss based on the respondent's failure to cite § 347.22 in the complaint, but the court held the claim was adequately pleaded. *Id.*

22. *Id.* at 423–24 (citing Nichols v. State, 858 N.W.2d 773, 775 (Minn. 2015); Nieting v. Blondell, 235 N.W.2d 597, 603 (Minn. 1975)).

unmistakable as to leave no doubt as to the intention of the legislature.'"[23] If the statute is ambiguous, immunity applies.[24]

The court then turned to the language of the dog bite statute, which states in pertinent part:

> If a dog, without provocation, attacks or injures any person who is acting peaceably in any place where the person may lawfully be, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained. The term "owner" includes any person harboring or keeping a dog but the owner shall be primarily liable.[25]

The trial court had interpreted "owner" to mean "'all who own dogs,'"[26] which it deemed encompassed the state because the Minnesota Supreme Court had already determined that the term "owner" could include municipalities as "bodies politic" in *Hyatt v. Anoka Police Department*.[27] The court of appeals disagreed, stating that, under *Nichols v. State*,[28] "merely using a broad term that *could* include the state is not a 'plain, clear, and unmistakable' sign that the legislature intended to subject the state to liability."[29] It was also unpersuaded by the lower court's reliance on *Hyatt*, stating that *Hyatt* addressed municipal, not state, liability and did not consider immunity.[30] Further, prior case law had already determined that the term "bodies politic" did not include the state, and the court in *Hyatt* did not contradict that.[31] Finding no clear expression of a waiver of sovereign immunity, the court dismissed the strict liability claim but allowed the negligence claim to proceed.[32]

b. *Animal Shelters*

In *Riad v. Brandywine Valley SPCA, Inc.*,[33] a Delaware lower court held, in an unpublished opinion, that the state's strict liability dog bite statute does not apply to animal welfare organizations. In the case, the defendant animal shelter took in an abandoned dog that exhibited fearful and aggressive behavior. Shelter staff worked with the dog until the dog no longer

23. *Id.* at 424 (quoting Minn. Stat. Ann. § 645.27).
24. *Id.* (citing FAA v. Cooper, 566 U.S. 284, 290 (2012); Nichols v. State, 842 N.W.2d 20, 25 (Minn. App. 2014), *aff'd*, 858 N.W.2d 773 (Minn. 2015)).
25. Minn. Stat. Ann. § 347.22.
26. *Berrier*, 992 N.W.2d at 424.
27. 691 N.W.2d 824 (Minn. 2005); *see also Berrier*, 992 N.W.2d at 424 (discussing *Hyatt*).
28. 858 N.W.2d 773 (Minn. 2015).
29. *Berrier*, 992 N.W.2d at 425 (quoting *Nichols*, 858 N.W.2d at 777). The court of appeals also rejected arguments asserted by the appellant and *amicus curiae* that attempted to distinguish *Nichols* based on the specificity of the language in the dog bite statute. *See id.* at 425–26.
30. *Id.* at 426.
31. *Id.* at 427.
32. *Id.* at 427–28.
33. 2023 WL 4140774 (Del. Super. Ct. June 22, 2023) (unpublished), *reargument denied*, 2023 WL 4671956 (Del. Super. Ct. July 20, 2023).

barked or growled, could be leashed without issue, and interacted calmly with staff.[34] The shelter adopted out the dog to a woman, but a few days later, the woman returned with the dog because the dog had been chasing her cats. While the dog was in the lobby, the plaintiff saw the dog and expressed an interest in adopting him. A shelter employee took the dog and the plaintiff to a play area where the plaintiff interacted with the dog without incident.[35] The three returned to the lobby, the plaintiff briefly left, and upon return, reached down to pet the dog. The dog bit the plaintiff. The woman who initially adopted out the dog signed a Return Contract and the shelter retook custody of the dog.[36]

The plaintiff sued the shelter, then moved for partial summary judgment based on the state's dog bite statute, which provides that "[t]he owner of a dog is liable in damages for any injury, death, or loss to person or property that is caused by such dog . . . ."[37] The court denied the motion, finding that the dog bite statute does not apply to animal welfare organizations like the shelter.[38] In making this determination, the court focused on the intent of the statute, which it described as "to rein in irresponsible dog owners who were keeping vicious dogs as pets by eliminating the 'one free bite rule.'"[39] The court compared the case to *Tilghman v. Delaware State University*,[40] which held that the dog bite statute does not apply to working police dogs that are not pets.[41] Although recognizing the differences between this case and *Tilghman*, the court said the analysis was the same, boiling it down to three questions: "(1) is Defendant an irresponsible dog owner; (2) is Defendant keeping vicious dogs; and (3) are the aforementioned vicious dogs being kept as pets?"[42] The court answered the first two questions in the negative, explaining that the shelter provides for the health and adoption of animals, follows written protocols regarding behavioral evaluations and, if necessary, euthanizes aggressive dogs.[43] As to the last question, the court again found the answer to be no as the shelter's purpose is to provide welfare before adoption as pets, not to keep the animals as pets.[44] Further, the court deemed applying the dog bite statute to animal welfare organizations like the defendant would be against public policy because it would make the

34. *Id.* at *1.
35. *Id.*
36. *Id.* at *2.
37. 16 Del. Code Ann. tit. 16, § 3053F (2023).
38. *Riad*, 2023 WL 4140774, at *3.
39. *Id.* (quoting Tilghman v. Del. State Univ., 2012 WL 3860825, at *10 (Del. Super. Aug. 15, 2012)).
40. *Tilghman*, 2012 WL 3860825.
41. *Id.* at *10.
42. *Riad*, 2023 WL 4140774, at *3.
43. *Id.*
44. *Id.*

shelter's work "essentially impossible."[45] Finding the statute inapplicable to the defendant, the court denied the plaintiff's motion for summary judgment and granted the defendant's cross-motion for summary judgment.[46]

c. *Fake Service Dogs*

In *Liebman v. Waldroup*,[47] a Texas court of appeals considered whether a doctor's provision of a letter to a patient to obtain "fraudulent 'service dog' credentials" was a health care liability claim requiring the plaintiffs to file an expert report under the Texas Medical Liability Act (TMLA).[48] In the case, the plaintiffs—a couple and their three-year-old daughter—were entering a restaurant when the defendant's dog, wearing a service dog vest, attacked the child unprovoked, causing her severe injuries.[49] The plaintiffs sued the dog owner and the doctor that provided the dog owner with the letter establishing the need for a service dog. The claims against the doctor—negligence and aiding and abetting—were based on allegations that the doctor, a gynecologist, provided several letters to the dog owner at her request "'solely . . . for the purpose of avoiding eviction from her apartment'" and stating that she required four service animals based on her "'generalized anxiety disorder.'"[50] They claimed that the doctor "'took no steps to ascertain whether [the dog] was actually a service animal, trained to assist her with a disability'" and that the doctor "'was indifferent to the

45. *Id.* The court stated: "Regardless of the screening dogs are put through to test their temperaments, there is always a chance that a seemingly appropriate for adoption dog could become vicious and ultimately bite someone." *Id.*

46. The plaintiff also asserted a negligence claim, but the court granted the defendant's motion for summary judgment because the plaintiff had failed to identify an expert to testify as to the standard of care when ordered to do so. *Id.* at *5. The court concluded its opinion with a discussion of a discovery dispute involving the plaintiff's failure to produce tax documentation, despite being ordered to do so. Although the court did not dismiss the action on that ground or issue sanctions, the court warned the plaintiff that it could do so, indicating its clear frustration with the plaintiff's behavior. *Id.* at *8 ("The Court is far beyond issuing sanctions in this matter. Again, the blatant disregard of the Court's order and conflicting representations push this Court to dismissal. The Court does not need to employ dismissal via Rule 37(b)(2)(C), but warns about the potential use of that Rule and its consequences.").

47. 2023 WL 2603206 (Tex. App. Mar. 23, 2023) (unpublished).

48. Tex. Civ. Prac. & Rem. Code § 74.001 *et seq.*

49. 2023 WL 2603206, at *1.

50. *Id.* Two of the letters simply stated that "'[the defendant] has General Anxiety Disorder and having her service animals helps her with this disorder. [The defendant] is currently taking medication for the disorder as well.'" *Id.* A third letter stated that the defendant "'had a depression/anxiety disorder that requires she have her four service animals which are all certified to be with her to help the disorder.'" The fourth letter provided more information:

> "Due to [the defendant's] anxiety disorder she needs all her service animals. Kingston walks into every entrance before her, everywhere we go. Daisy licks her entire face, Molly brings her toys and sits in her lap, Maddie sits on her chest, Milly puts her paw on her face and Major si[ts] at her side and Lulu sits at her head. It appears as she needs these service animals to control her anxiety and perform her daily duties." *Id.* at *1–2.

actual grave risk posed to the community by assisting [the defendant dog owner] in her illegal and tortious conduct.'"[51]

The defendant doctor moved to dismiss, asserting that the TMLA required the plaintiffs to serve him with an expert report within 120 days of his filed answer because their claims were health care liability claims.[52] The plaintiffs contested the claims' characterization as relating to health care, stating that they had no issue with the doctor's diagnosis of general anxiety or the need for a service animal, but were claiming that the doctor "'had no basis and no qualifications to justify his opinions that [the defendant's] animals were "service animals" and specifically that . . . the animal that attacked and seriously injured [the child], was a service animal, while also offering his unqualified and non-medical opinion regarding [the dog's] behaviors.'"[53] The trial court denied dismissal, and the doctor appealed.

The appellate court began its analysis discussing the TMLA and set out the elements for a health care liability claim under the statute:

> (1) the defendant must be a physician or health care provider; (2) the claim or claims at issue must concern treatment, lack of treatment, or a departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care; and (3) the defendant's conduct must proximately cause the claimant's injury.[54]

The doctor argued that the second requirement regarding treatment was met, comparing the facts to two cases. The first, *Buchanan v. O'Donnell*,[55] held that a doctor's prescription of medication that contributed to the plaintiff's injury was a health care liability claim requiring an expert report. The second, *Monson v. Allen Family First Clinic*,[56] involved a letter written by a doctor and sent to the plaintiff's employer regarding the plaintiff's ability to work. The plaintiff was fired, and she thereafter sued the doctor for negligence for failing to train staff and prevent disclosure of the plaintiff's confidential information.[57] Although the plaintiff in *Monson* argued that her claim was not a health care liability claim, the court held that it was because the letter related to the plaintiff taking time off of work, which was part of her medical treatment.[58] The court in *Liebman* distinguished both cases from the facts, stating that the facts in the other two cases related

51. *Id.* at *1.
52. *Id.*; *see also* Tex. Civ. Prac. & Rem. Code § 74.351 (requiring expert reports).
53. *Liebman*, 2023 WL 2603206, at *1.
54. *Id.* at *3 (citing Texas West Oaks Hosp., LP v. Williams, 371 S.W.3d 171, 179–80 (Tex. 2012)).
55. 340 S.W.3d 805 (Tex. App. 2011).
56. 390 S.W.3d 598 (Tex. App. 2012).
57. *See id.* at 599.
58. *Id.* at 602–03.

directly to the plaintiff's medical treatment—the drug prescription in *Buchanan*[59] and the letter limiting working conditions in *Monson*.[60] Instead, the court agreed with the plaintiffs, stating that their claims related solely to the doctor's statements regarding the dog's behavior and the dog's certification as a service animal.[61] Further, the claims did not allege a departure from the standard of care because, as argued by the plaintiffs, "there is no accepted standard related to when a medical doctor for humans can offer his opinion about the qualifications and behaviors of animals."[62] The court concluded that the plaintiffs' claims were not "'inseparable' from the rendition of health care."[63] Instead, the court explained that

> the gravamen of the [plaintiffs'] negligence and aiding and abetting claims against [the doctor] is that he had no basis or qualifications to make the statements about [the dog] for the purpose of helping [the plaintiff] avoid eviction and which assisted her in obtaining a service vest for the dog and deceiving the public that [the dog] was a service dog.[64]

Concluding that the plaintiffs' claims were not health care liability claims, the court affirmed denial of the defendant's motion to dismiss.[65]

B. *Emotional Distress*

The Wyoming Supreme Court considered the issue of emotional distress in *Cardenas v. Swanson*.[66] In the case, the defendant, a trapper, had set snares on state land near the plaintiffs' home. The plaintiffs, a family of four, owned three dogs that frequently ran free on both the state land and nearby private land, returning each evening. One evening, one of the dogs did not return, and the plaintiffs searched unsuccessfully for the dog. The following day, the two children continued the search, taking their other two dogs to assist. While searching, the two dogs became tangled in the

59. *See Liebman*, 2023 WL 2603206, at *5.
60. *See id.* at *6.
61. *Id.*
62. *Id.* (citing Village Green Alzheimer's Care Home, LLC v. Graves, 650 S.W.3d 608, 627 (Tex. App. 2021), *petition denied* (Tex. 2022)).
63. *Id.*
64. *Id.*
65. *Id.* at *9. The doctor asserted two other arguments that were unsuccessful. He argued first that the plaintiffs' claims were health care liability claims because they suggested a departure from the accepted standards under the Americans with Disabilities Act and the federal and state Fair Housing Acts. The court held that the doctor waived this argument because he had not made it at the trial court level. *See id.* at *7. The doctor's second argument was that the plaintiffs' claims were "safety standards-based claims" constituting health care liability claims under four of the seven factors listed in *Ross v. St. Luke's Episcopal Hospital*, 462 S.W.3d 496 (Tex. 2015). The court dismissed this argument as well, finding that for each of the claimed factors asserted, either the claims were unsupported by the facts in the record or the doctor had waived them by failing to bring them up at trial. *See Liebman*, 2023 WL 2603206, at *7–9.
66. 531 P.3d 917 (Wyo. 2023).

defendant's snares and died.[67] The children tried to release the dogs, with one being physically injured in the process, but were unsuccessful. When the parents arrived, they found the children distraught, with one "'rolled up in a ball, crying'" and the other "'crying, apologizing over and over' for being unable to save the dogs."[68] Soon thereafter, a neighbor called, indicating they found the previously missing dog dead in a snare. The plaintiffs sued, alleging various claims and seeking emotional distress damages for the children's injuries caused by witnessing the death of their dogs. The trial court dismissed all claims, except the negligence claim,[69] and the plaintiffs appealed.

The Wyoming Supreme Court considered three issues on appeal: (1) whether emotional injuries are recoverable for property loss; (2) whether the plaintiffs' minor personal injuries could support a claim for emotional distress damages; and (3) whether the court should adopt a rule allowing recovery of emotional distress damages for property loss if the defendant's actions were illegal or unauthorized by law. The court rejected each proposition. As to the first issue, the court explained that prior case law had only recognized recovery for emotional injury without a physical injury for intentional torts such as false imprisonment and malicious prosecution,[70] certain constitutional violations,[71] and breach of the covenant of good faith and fair dealing.[72] And, although infliction of emotional distress was a recognized claim, such claims were also limited because negligent infliction requires a familial relationship and the witnessing of serious bodily injury and intentional infliction requires outrageous conduct and severe emotional distress.[73]

The court also considered two cases asserted to support damages for emotional distress without physical injury. The first was *Daily v. Bone*,[74] which allowed recovery in circumstances where the driver of a car hit and killed a snowmobile driver and witnessed the impact and death, resulting in post-traumatic stress disorder, depression, and agoraphobia, but no physical injury.[75] The court emphasized that *Daily* only allowed such a claim in the context of an automobile collision and did not otherwise create a

67. *Id.* at 918.
68. *Id.* at 919.
69. The plaintiffs had also sued for willful and wanton misconduct, statutory violations, intentional and negligent infliction of emotional distress, and various civil violations. *Id.*
70. *Id.* at 920 (citing Waters v. Brand, 497 P.2d 875, 877–78 (Wyo. 1972); Cates v. Eddy, 669 P.2d 912, 921 (Wyo. 1983)).
71. *Id.* (citing Town of Upton v. Whisler, 824 P.2d 545, 549 (Wyo. 1992)).
72. *Id.* (citing State Farm Mutual Auto. Ins. Co. v. Shrader, 882 P.2d 813, 833 (Wyo. 1994)).
73. *Id.* (citing Gates v. Richardson, 719 P.2d 193, 195 (Wyo. 1986) (negligent infliction); Leithead v. Am. Colloidal Co., 721 P.2d 1059, 1066 (Wyo. 1986) (intentional infliction)).
74. 906 P.2d 1039 (Wyo. 1995).
75. *Id.* at 1042.

negligence cause of action based on mental injury only.[76] The second case, *Larsen v. Banner Health Systems*,[77] involved a hospital that switched two newborns at birth, separating mother and daughter for forty-three years. The court allowed recovery by the mother and daughter, despite only suffering "great emotional pain, humiliation, anxiety, grief, and expenses for psychological counseling," concluding that "'in the limited circumstances where a contractual relationship exists for services that carry with them deeply emotional responses in the event of breach, there arises a duty to exercise ordinary care to avoid causing emotional harm.'"[78]

The plaintiffs argued that *Larsen* applied in the instant case because the *Larsen* court made clear that "'the availability of [emotional distress] damages must be limited to plaintiffs who can prove that emotional injury occurred under circumstances tending to guarantee its authenticity.'"[79] Here, the plaintiffs asserted, the circumstances surrounding the dogs' deaths "authenticate" the emotional injuries of the children. The court rejected this argument, stating that "authenticity is not the determinative factor giving rise to a cause of action for emotional harm"[80] and suggesting that the required factor is breach of a contract that creates a deeply emotional response, which the court found lacking here.[81] The court compared the case instead to *Blagrove v. JB Mechanical, Inc.*,[82] which involved flood damages to a home and destruction of personal property caused by a plumbing contractor. Although the homeowners sought emotional damages without physical injury, the court held that "'emotional distress damages in connection with property damages are not compensable.'"[83] Applying that rule here, the court held that the plaintiffs could not recover for their injuries.

Turning to the second issue, which asked whether the children's minor injuries could sustain their claim for emotional distress damages from witnessing the dogs' deaths, the court held that they could not, based on the traditional impact rule. Under that rule, recovery is allowed for mental injuries only if they are "'linked to an actual or threatened physical impact [to the plaintiff] caused by the defendant.'"[84] Because the damages in this

76. *Cardenas*, 531 P.3d at 920 (citing Blagrove v. JB Mech., Inc., 934 P.2d 1273, 1276 (Wyo. 1997)).
77. 81 P.3d 196 (Wyo. 2003).
78. *Cardenas*, 531 P.3d at 920–21 (quoting *Larsen*, 81 P.3d at 206).
79. *Id.* at 921 (quoting *Larsen*, 81 P.3d at 202).
80. *Id.* (citing *Larsen*, 81 P.3d at 206–07).
81. *Id.*
82. 934 P.2d 1273 (Wyo. 1997).
83. *Cardenas*, 531 P.3d at 921 (quoting *Blagrove*, 934 P.2d at 1277).
84. *Id.* (quoting Gates v. Richardson, 719 P.2d 193, 195 (Wyo. 1986)).

case arose from the loss of the dogs (property damage) and not the children's physical injuries, no emotional distress damages were recoverable.[85]

The final issue before the court was whether it should adopt a rule that would allow recovery of emotional distress damages for property loss if the "acts or omissions of the defendant were illegal or unauthorized by law."[86] The plaintiffs argued that pets should fall into a "property-plus category" because of the emotional attachment owners have to their pets.[87] The court declined to make such a rule, refusing to "draw a distinction between animate and inanimate personal property" and leaving the issue to the legislature.[88]

In *Flynn v. Woodinville Animal Hospital, P.S.*,[89] a Washington appellate court considered whether a negligent infliction of emotional distress claim could stand for the death of an emotional support dog. In the case, the plaintiffs owned a dog that provided emotional support for one of the plaintiffs. They took the dog to Woodinville Animal Hospital for treatment. On instruction of Woodinville, the plaintiffs took the dog to BluePearl Specialty Emergency Pet Hospital for surgery. The dog died shortly thereafter, resulting in insomnia, lack of focus, and depression in the one of the plaintiffs.[90] The plaintiffs sued both Woodinville and BluePearl, alleging negligent infliction of emotional distress.[91] Although Washington courts had already rejected negligent infliction claims based on loss of a pet,[92] the plaintiffs argued that their case was different because the dog involved was an emotional support animal, their dog died and was not merely injured, and the defendants were experts hired to provide a service to the plaintiffs.[93] The plaintiffs also argued that, because emotional support animals were subject to reasonable accommodations by housing providers under the Fair Housing Act,[94] their emotional support dog was a "canine of a

85. *Id.* at 922.

86. *Id.*

87. *Id.* (citing Debra D. Burke, *A Clarion Call for Emotional Damages in Loss of Companion Pet Cases*, 15 Tenn. J.L. & Pol'y 250, 251–52 (2021)).

88. *Id.*

89. 25 Wash. App. 2d 1054, 2023 WL 2366663 (Wash. Ct. App. Mar. 6, 2023) (unpublished), *review denied*, 532 P.3d 153 (Wash. 2023).

90. *Id.* at *1.

91. The plaintiffs also asserted causes of action for corporate negligence, discussed below in section II.C, and breach of contract. The plaintiffs asserted causes of action against the veterinarians involved in the dog's care for negligent infliction of emotional distress and veterinary malpractice. *Id.*

92. The court stated: "[I]t is well established that a pet owner has no right to emotional distress damages or damages for loss of [the] human-animal bond based on the negligent death or injury to a pet." *Id.* at *5 (quoting Sherman v. Kissinger, 195 P.3d 539, 548 (Wash. Ct. App. 2008)).

93. *Id.*

94. In support, the plaintiffs cited a 2020 Fair Housing and Equal Opportunity flyer that explained to housing providers their obligations regarding people with service and support animals. *Id.*

different legal pedigree."[95] The court rejected the arguments, finding no difference in this case and stating that rights established in another legal context do not establish a right for negligent infliction of emotional distress.[96] The court concluded that status as an emotional support animal does not elevate the animal above others in the emotional distress context: "[T]he gravamen is not the degree of the emotional connection between the owner and its animal, but the fact that animals, whether they are pets or emotional support animals, are still considered property—even when there is a profound emotional connection."[97]

C. *Corporate Negligence*

Also considered in *Flynn*, discussed immediately above, was the question whether the corporate negligence doctrine could apply to an animal hospital.[98] The court held that it could not. The court explained that corporate negligence establishes four nondelegable duties owed by hospitals to their patients:[99] "(1) to use reasonable care in the maintenance of buildings and grounds for the protection of the hospital's invitees; (2) to furnish the patient supplies and equipment free of defects; (3) to select its employees with reasonable care; and (4) to supervise all persons who practice medicine within its walls."[100] These duties create in a hospital "an independent responsibility to patients to supervise the medical treatment provided by members of its medical staff."[101] The trial court dismissed the claim, finding that the corporate negligence doctrine only applied to full-service hospitals that treat humans.

On appeal, the plaintiffs argued that, because veterinary hospitals and human hospitals have similar construction and maintenance codes and because veterinarians are held to the same expectations as doctors, corporate negligence should apply to veterinary hospitals just as it does to human hospitals.[102] The court of appeals disagreed, stating that, despite similar expectations society may have for veterinarians and doctors, the fact remains that animals are considered personal property and therefore are treated differently under Washington law.[103] To demonstrate this difference, the court set out the Washington Supreme Court's decision in

95. *Id.*
96. *Id.*
97. *Id.* at *6.
98. The plaintiffs asserted claims against both animal hospitals providing care to the plaintiffs' dog. *Id.* at *1.
99. *Id.* at *2.
100. *Id.* (citing Douglas v. Freeman, 814 P.2d 1160, 1164 (Wash. 1991)).
101. *Id.* (citing Pedroza v. Bryant, 677 P.2d 166, 168 (Wash. 1984)).
102. *Id.* at *3.
103. *Id.* (citing State v. Abdi-Issa, 504 P.3d 223, 228 (Wash. 2022)).

Sherman v. Kissinger,[104] which held that the statutory medical malpractice provision did not apply to veterinarians or veterinary clinics.[105] Further, the case that adopted corporate negligence as a cause of action in Washington, *Pedroza v. Bryant*,[106] dealt only with human hospitals, and the doctrine has never applied to anything but human hospitals.[107] Although the plaintiff offered case law indicating that veterinary malpractice and medical malpractice claims are treated similarly, the court distinguished the cases,[108] stating that "while physicians and veterinarians are comparable in some respects, this does not change the fact that Washington treats animals as property under the law."[109] The court concluded that whether corporate negligence should be expanded to animal hospitals is a question that must be answered by the legislature.[110]

D. *Veterinarian Liability*

In *Berry v. Frazier*,[111] a California appellate court considered the scope of potential veterinarian liability when a veterinarian wrongfully secured a plaintiff's consent to a procedure. In the case, the plaintiff cat owner had sought the services of the defendant veterinarian to have her cat humanely euthanized at her home in the backyard. The defendant initially tried to inject a sedative into the cat to allow the plaintiff to say goodbye before a second injection would end the cat's life; however, the defendant was unable to place a catheter to do so.[112] The cat's co-owner suggested that the defendant administer an overdose of the cat's medication, but the defendant said that it would "take too long" and suggested instead an intracardiac injection where fluid would be injected straight into the cat's heart.[113] After some calming reassurances,[114] the defendant sent the plaintiff and

104. 195 P.3d 539 (Wash. 2008).
105. *Id.* at 545.
106. 677 P.2d 166 (Wash. 1984).
107. *Flynn*, 25 Wash. App. 2d, 2023 WL 2366663, at *3.
108. The plaintiffs cited *Baechler v. Beaunaux*, 272 P.3d 277 (Wash. Ct. App. 2012), and *Clark v. United Emergency Animal Clinic, Inc.*, 390 F.3d 1124 (9th Cir. 2004), both of which contained language comparing veterinarians to physicians. The court, however, distinguished *Baechler* as relating merely to the requirement for experts to testify as to the standard of care and *Clark* as relating solely to overtime under the Fair Labor Standards Act. *See Flynn*, 25 Wash. App. 2d, 2023 WL 2366663, at *3–4.
109. *Id.* at *4.
110. *Id.*
111. 90 Cal. App. 5th 1258 (Apr. 28, 2023), *review denied* (Aug. 9, 2023).
112. *Id.* at 1264.
113. *Id.*
114. The defendant assured the plaintiff that the needle was "'very small,'" the procedure would be "'very quick,'" and the cat would "'never know what's happening'" and "'won't feel a thing.'" *Id.* at 1264–65.

co-owner inside the house and then completed the procedure with his assistant.[115]

The plaintiff later learned that the procedure used by the defendant was "'extremely painful,'" considered "'inhumane'" if administered when an animal is conscious,[116] and was illegal under California law "'unless the animal is heavily sedated or anesthetized in a humane manner, or comatose, or unless, in light of all the relevant circumstances, the procedure is justifiable.'"[117] The plaintiff asserted that the procedure was unjustifiable in her case[118] and that she would have chosen the overdose option if she had known about the "true nature" of intracardiac injection.[119] The plaintiff sued, claiming causes of action for fraud, deceit, intentional misrepresentation, breach of fiduciary duty, conversion and trespass to chattels, and intentional infliction of emotional distress.[120] The trial court sustained the defendant's demurrer, and the plaintiff's complaint was dismissed. The plaintiff appealed.

The appellate court went through each cause of action in turn, disagreeing with the trial court's findings. The court first turned to the claims of fraud and misrepresentation. The defendant alleged that the plaintiff neither stated facts entitling her to relief nor asserted legally cognizable damages as she only claimed deprivation of the right to "'give the cat a good death'" and was not the "subject or beneficiary of the veterinary care."[121] In support, the defendant cited *McMahon v. Craig*,[122] which determined that "a veterinarian's malpractice does not directly harm the owner in a manner creating liability for emotional distress" because the veterinarian's care is directed at the pet, not the owner.[123] The court disagreed, first noting that the plaintiff had sufficiently alleged statements of the defendant that would have affected any animal owner's decision to consent to the procedure.[124] The court also found *McMahon* inapposite because it did not consider "a claim of fraud based not on a veterinarian's malpractice but rather

115. *Id.*
116. *Id.* at 1265.
117. *Id.* (quoting Cal. Penal Code § 597u(a)(2)).
118. The plaintiff alleged that the cat was not in "acute, active distress," so immediate euthanization was not required. The defendant also admitted that administering an overdose of the cat's medication would have resulted in a painless death. *Id.* The euthanasia report did not indicate whether the cat was sedated prior to the intracardiac injection. *Id.* at 1266.
119. *Id.*
120. *Id.* The plaintiff also asserted a claim for violation of California Civil Code § 3340, which is discussed in section II.E.2 below.
121. *Id.* at 1270.
122. 126 Cal. App. 4th 1502 (2009).
123. *Id.* at 1510.
124. *Berry*, 90 Cal. App. 5th at 1269–70.

on intentional misrepresentations made to induce a pet owner to consent to an unnecessary, unjustified, and painful procedure."[125]

The court next turned to the claim for conversion and trespass to chattels.[126] The defendant claimed that his alleged conduct could only support a claim for malpractice and not trespass to chattels. The appellate court disagreed, relying on the decision in *Levy v. Only Cremations for Pets, Inc.*,[127] which had allowed a cause of action for trespass to chattels and emotional distress damages based on a crematorium's mishandling of animal remains. In *Levy*, the court based its opinion on the agreement between the pet owner and the crematorium to provide a "'dignified treatment of pet remains,' thereby giving 'emotional solace to grieving pet owners.'"[128] The court found that this case was comparable to *Levy* because the plaintiff and the defendant "had a relationship predicated on the veterinarian's agreement to provide for a humane euthanasia of a dying animal (i.e., 'dignified treatment' of a dying pet), thereby giving 'emotional solace' to a grieving pet owner who has made the difficult decision to euthanize the pet."[129] Although the defendant tried to argue that the plaintiff failed to state a claim for conversion or trespass to chattels because she had sought euthanasia, which was accomplished, and he did not intentionally harm the cat, the court disagreed, stating that the plaintiff alleged a legally protected right to decide when and how her cat would be euthanized and her consent to the defendant's procedure was fraudulently induced.[130]

As for the intentional infliction of emotional distress claim, the court again rejected the trial court's dismissal, which had been based on the plaintiff's failure to plead extreme and outrageous conduct and her outright consent to a procedure that had been successful and not done in the plaintiff's presence.[131] However, the appellate court found that the plaintiff had pleaded facts supporting an intentional infliction claim. It stated that the defendant's conduct was directed at the plaintiff because he knew she wanted a humane death for her cat, but nonetheless "for his own motives and [being] aware of the suffering caused by the intracardiac injection" wrongfully secured her consent for the "unnecessary and unjustifiable procedure" with intentionally misleading statements.[132] Finding no support for

125. *Id.* at 1270.

126. Although the court referenced both claims, the court's opinion focused on trespass to chattels. *See id.* at 1270–73.

127. 57 Cal. App. 5th 203 (2020).

128. *Berry*, 90 Cal. App. 5th at 1272 (quoting *Levy*, 57 Cal. App. 5th at 219).

129. *Id.*

130. *Id.* at 1272–73.

131. *Id.* at 1274.

132. *Id.* The defendant argued that *McMahon* supported dismissal of the plaintiff's claim because the court there had dismissed an intentional infliction of emotional distress claim

the trial court's dismissal of the plaintiff's complaint, the court remanded the case, instructing the trial court to allow the plaintiff to amend her complaint.[133]

E. *Damages*

1. Veterinary Expenses

In *Blue Pearl Veterinary Partners, LLC v. Anderson*,[134] a Virginia appellate court considered an issue of first impression, addressing whether damages for negligent injury to a dog can include veterinary costs that exceed the reduction in the dog's fair market value. The court concluded that they can. The case involved a dog whose legs were crushed during a CT scan. The plaintiff dog owner sought $6,782 for "'necessary treatment and evaluations'" and between $108,855 and $119,055 per year thereafter for the dog's lifetime "'for adequate and necessary rehabilitative care.'"[135] The defendant veterinary group sought to exclude evidence of veterinary expenses exceeding $350, the dog's purchase price, because "'necessary and reasonable expenses incurred'" from injury to personal property cannot include repair costs exceeding the property's diminished value.[136] The plaintiff countered, arguing that the rule does not apply to dogs because they are living beings and owners must provide continuing veterinary care, partly to avoid criminal liability; therefore, veterinary costs are reasonable and necessary expenses.[137] The trial court acknowledged the general rule asserted by the defendant, but determined that certain veterinary expenses

based on negligent veterinary care. However, the court distinguished *McMahon*, stating that in this case, the claim was based on the defendant's conduct towards the plaintiff, not the cat. As the court explained, the defendant "intentionally lied to or misled [the plaintiff] about the nature of an inhumane and painful euthanasia, thereby obtaining consent under false pretenses and resulting in [the plaintiff] suffering severe emotional distress once she learned that she had allowed her cat to suffer an unnecessary and extremely painful death." *Id.*

133. *Id.* at 1280.

134. 888 S.E.2d 783 (Va. Ct. App. 2023).

135. *Id.* at 784. Asserted rehabilitative care included "electronic stimulation, shockwave therapy, ultrasound therapy, laser therapy, underwater treadmill, platelet rich plasma therapy, and stem cell therapy." *Id.* at 784–85.

136. The defendant cited Virginia Code § 3.2-6585, which states in part:

> All dogs and cats shall be deemed personal property and may be the subject of larceny and malicious or unlawful trespass. Owners, as defined in § 3.2-6500, may maintain any action for the killing of any such animals, or injury thereto, or unlawful detention or use thereof as in the case of other personal property. The owner of any dog or cat that is injured or killed contrary to the provisions of this chapter by any person shall be entitled to recover the value thereof or the damage done thereto in an appropriate action at law from such person.

VA. CODE ANN. § 3.2-6585.

137. *Blue Pearl Veterinary Partners*, 888 S.E.2d at 785.

exceeding the dog's value could be deemed "reasonable and necessary" by the fact finder.[138]

On review, the court of appeals also acknowledged the general rule regarding damages for repair costs, but noted that "'the sundry rules for measuring damages are subordinate to the ultimate aim of making good the injury done or loss suffered'"[139] and that the rule is "'a standard, not a shackle.'"[140] It found support in prior Virginia case law for the proposition that a different measure of damages must apply when the damaged property has no market value,[141] such as for damages for a family portrait or an architect's plans.[142] Having no case law of its own on the issue of pets, the court looked to Massachusetts case law and found a rule it deemed consistent with Virginia law:

> "[I]f an animal is injured in such a way that proper care and attention reasonably may be expected to effect a cure," the "expense properly incurred for this purpose is a part of the damage to the owner, for which he is entitled to compensation" even if that expense exceeds the diminution in the animal's market value.[143]

Although approving of the rule,[144] the court cautioned that the expenditures must be reasonable, with reasonableness determined by the jury after consideration of factors such as "the type of animal; its age, purchase price, and any special traits or skills; the likelihood of the medical procedure's success; and whether the medical procedures are typical and customary to treat the injuries at issue."[145] The court emphasized, however, that damages for emotional distress or mental anguish arising from the animal's injuries are not allowed.[146]

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138. *Id.*

139. *Id.* at 786 (quoting Younger v. Appalachian Power Co., 202 S.E.2d 866, 867 (Va. 1974)).

140. *Id.* (quoting Charles T. McCormick, Handbook on the Law of Damages § 45 (1935)).

141. *Id.* (citing *Younger*, 202 S.E.2d at 867; Norfolk & Western Ry. Co. v. Richmond Cedar Works, 170 S.E. 5, 10–11 (Va. 1933)).

142. *Id.* (citing *Norfolk*, 170 S.E. at 10; Green v. Boston & Lowell R.R. Co., 128 Mass. 221 (1880); Mather v. Am. Express Co., 138 Mass. 55 (1884)). The court also turned to the *Restatement* for a similar viewpoint: "[W]hen a 'chattel has peculiar value to the owner . . . , it may be reasonable to make repairs at an expense greater than the cost of another chattel.'" *Id.* (quoting Restatement (Second) of Torts § 928 cmt. a (1979) (emphasis omitted)).

143. *Id.* (quoting Atwood v. Bos. Forwarding & Transfer Co., 71 N.E. 72, 72 (Mass. 1904)).

144. "'[I]f money is prudently expended in the hope of mitigating the injury, . . . there is no good reason why this expense, as well as the value of the animal, should not be included as a part of the damages,' even if the animal ultimately 'is lost.'" *Id.* at 787 (quoting *Atwood*, 71 N.E. at 72).

145. *Id.* (citing Irwin v. Degtiarov, 8 N.E.3d 296, 300 (Mass. App. Ct. 2014)).

146. *Id.* (citing Kondaurov v. Kerdasha, 629 S.E.2d 181, 186 (Va. 2006)).

2. Exemplary Damages

In *Berry v. Frazier*,[147] discussed above in section II.D, the California Court of Appeal also considered whether a statute allowing exemplary damages created a cause of action for such damages, an issue of first impression for the court despite the provision being 150 years old.[148] The plaintiff had asserted a violation of California Civil Code § 3340, which states: "For wrongful injuries to animals being subjects of property, committed willfully or with gross negligence, in disregard of humanity, exemplary damages may be given."[149] The trial court had dismissed the plaintiff's § 3340 claim because the provision did not create a separate cause of action. With this, the appellate court agreed.[150] The court explained that a statutory cause of action arises only if the statutory language or legislative history shows a legislative intent to create the cause of action.[151] Here, the court explained, neither the statute nor its legislative history sheds light on the legislature's intent or even defines "wrongful injuries."[152] Further, in its application, courts have permitted exemplary damages in cases involving intentional conduct, but have never based the damages on § 3340 itself.[153] However, the court noted that, although the plaintiff could not assert § 3340 as a basis for exemplary damages, she could use § 3340 in conjunction with other actions in her pleading that would meet the statutory requirements of being "willful" and "in disregard for humanity."[154]

The court also rejected other bases for the trial court's dismissal of the claim for exemplary damages. First, it disagreed that exemplary damages were barred because the plaintiff consented to the euthanasia procedure, pointing again to the defendant's misleading statements to get that consent.[155] Second, the court disputed the defendant's unsupported assertion that § 3340 does not apply to veterinarians or to veterinary malpractice cases. It stated that the statute was broadly worded and had the legislature intended to create an exception for veterinarians, it knew how to do so.[156] Finally, the court rejected the proposition that exemplary damages under § 3340 requires compliance with the procedural requirements

147. 90 Cal. App. 5th 1258 (2023).
148. *See id.* at 1275.
149. Cal. Civ. Code § 3340.
150. *Berry*, 90 Cal. App. 5th at 1275.
151. *Id.* (citing Vikco Ins. Serv., Inc. v. Ohio Indemnity Co. 70 Cal. App. 4th 55, 62–63 (1999)).
152. *Id.*
153. *Id.* at 1276.
154. *Id.* ("Exemplary damages 'are merely incident to a cause of action and can never constitute a basis thereof . . . .'" (quoting Hilliard v. A.H. Robins Co., 148 Cal. App. 3d 374, 391 (1983))).
155. *Id.* at 1277.
156. *Id.* at 1277–78.

of § 3294, which deals with exemplary damages for oppression, fraud, or malice.[157] After examining § 3294, the court concluded that the language of the provision dealt exclusively with wrongful conduct against people, whereas § 3340 applies only to conduct against animals.[158] Further, § 3340 has not been amended since enacted in 1872 and was extended to "the killing and slaughter of cattle" in the state Food and Agricultural Code, proving the provision's continued validity.[159] Noting that none of the cases that have applied § 3340 has required compliance with § 3294 requirements, the court refused to place those requirements on § 3340 now. Instead, the court stated, that is a decision for the legislature.[160]

F. *Ownership*

1. Impoundment

In *Perczak v. Greenhill Humane Society*,[161] an Oregon court of appeals reversed a district court's summary judgment that cut off ownership rights of a dog owner. In the case, while traveling through Eugene on a road trip with her dog, the plaintiff was arrested and jailed for reckless driving and eluding police.[162] Because no one was identified who could care for the dog, Eugene animal control took custody and completed an impound report, identifying the reason for taking the dog as plaintiff's arrest while the dog was in the car.[163] The defendant Humane Society took custody of the dog pursuant to a contract with the city through a "safekeep," a custody taken pursuant to an emergency, such as incarceration.[164] Following protocol, the dog was subject to a five business-day hold period because the owner was known, and an impound notice was sent to the jail and to the plaintiff's last known address. The notice informed the plaintiff of the hold period and redemption fees and stated that the defendant could adopt out or euthanize the dog after the hold period if the plaintiff had not contacted the defendant "'to preserve [her] ownership rights.'"[165] Because the plaintiff[166] failed to contact the defendant before the hold period expired, the defendant adopted out the dog the following day to an unidentified individual.[167]

157. Cal. Civ. Code § 3294(a).
158. *Berry*, 90 Cal. App. 5th at 1278.
159. *Id.* at 1278–79 (quoting Cal. Food & Agric. Code § 21855).
160. *Id.* at 1279.
161. 324 Or. App. 842 (2023) (unpublished).
162. *Id.* at 844.
163. *Id.* at 844–45.
164. *Id.*
165. *Id.* at 845.
166. The opinion misidentified the person who failed to contact the defendant Humane Society as "the defendant," but the court likely meant to state "the plaintiff." *See id.*
167. *Id.* at 845–46.

The plaintiff sued, naming not only the defendant in the lawsuit but also ten unidentified John Does who represented the dog's adopter but who were never served with the complaint because the defendant refused to disclose the adopter's identity.[168] The defendant moved for summary judgment, arguing that the plaintiff abandoned the dog under § 4.350 of the Eugene City Code, thereby entitling the city to impound the animal and subjecting the plaintiff to forfeiture. The plaintiff argued that § 4.350 did not apply because she was neither charged with or convicted of violation of the provision. The trial court entered summary judgment for the defendant.[169]

The plaintiff appealed, reasserting her argument that § 4.350 was inapplicable because her dog was taken as a safekeep, not as an abandoned dog.[170] The defendant responded with a new argument, this time asserting that the plaintiff's failure to respond to the notice of impound constituted abandonment of the dog, which allowed a peace officer to enter the premises to impound an animal under § 4.370(6).[171] The court of appeals rejected the argument, siding with the plaintiff. First, the court explained, the defendant's argument failed to comport with the facts of the case. Section 4.370(6) states in part: "If there is probable cause to believe that any animal is being subjected to treatment in violation of 4.335 to 4.350, a peace officer, after obtaining a search warrant . . . , may enter the premises where the animal is being held, provide food and water and impound such animal."[172] Here, the dog was not seized based on a search warrant and probable cause of a violation, but was taken into custody as a safekeep, so the ordinance was inapposite.[173] Second, the defendant's new § 4.370(6) argument was not the basis for the issued summary judgment and, therefore, could not support its affirmation.[174] Finding no legal basis for the defendant's claim that the plaintiff "relinquished" her dog by failing to respond to the impound notice, the court reversed and remanded the case to the trial court.[175]

168. The plaintiff also sued the University of Oregon, because the plaintiff's arresting officer was a member of the university police department, but the school was dismissed from the suit. *See id.*

169. *Id.* at 846.

170. *Id.* at 847.

171. *Id.* at 847–48.

172. Eugene, Or., Code § 4.370(6).

173. *Perczak*, 324 Or. App. at 848–49.

174. *Id.* at 848 (citing Eklof v. Steward, 385 P.3d 1074, 1085 (Or. 2016)).

175. The court indicated that the trial court should resolve the issue regarding the identity of the adopter because it is unclear how the court could order the dog's return to the plaintiff if the adopter was not joined in the suit. *Id.* at 849.

2. Custody and Replevin

In *L.B. v. C.C.B.*,[176] a New York lower court examined the origin of the "best interests" standard in determining the custody of pets at divorce. The case involved claims of both divorcing spouses for ownership of their two dogs.[177] Before designating the custodial spouse, the court explored the development of the "best interests" standard by New York courts. It indicated that courts had long grappled with the issue of custody because, as chattel, the property rights of the spouses took precedence over their emotional ties to the pet.[178] The view began to change in 1999 with the decision in *Raymond v Lachmann*,[179] which applied a "best for all concerned" standard in the distribution of a family cat. Considerations in distribution included the cat's age, life expectancy, and physical and emotional well-being.[180] In 2013, the same standard was applied in *Travis v. Murray*,[181] but not before an examination of whether a "best interests of the canine" standard should be applied instead.[182] The court in *Travis* set out a list of questions that should be considered in the distribution, which this court interpreted as including consideration of the "best interest of the pet."[183] The court also noted that the "best for all concerned" standard had been applied outside the matrimonial context in *Finn v. Anderson*,[184] a case that noted that "best interests of a pet" might be a valid consideration in distribution.[185]

Despite prior case law carefully avoiding a pure "best interests" standard, the court nonetheless applied "best interests" in this case based on a new statutory edict from the New York legislature that became effective in 2021. Under § 236(B)(5)(d)(15) of the New York Domestic Relations Law, "in awarding the possession of a companion animal, [a] court shall consider the best interest of such animal."[186] Although the statute does not enumerate factors to consider in determining "best interests," the court set out its duty:

In determining the best interests of a companion animal under DRL section 236 [B][5][d][15], the reviewing court should consider the totality of

176. 175 N.Y.S.3d 705 (Sup. Ct. 2022).
177. *See id.* at 709.
178. *Id.* (citing Travis v. Murray, 977 N.Y.S.2d 621, 624 (Sup . Ct. 2013)).
179. 264 A.D.2d 340 (N.Y. App. Div. 1999).
180. *L.B.*, 175 N.Y.S.3d at 709.
181. 977 N.Y.S.2d 621 (Sup. Ct. 2013).
182. *L.B.*, 175 N.Y.S.3d at 709.
183. *Id.* at 709–10. In support of its interpretation, the court cited child custody cases that used the "best interests of the child" standard. *See id.* at 710 (citing Eschbach v. Eschbach, 436 N.E.2d 1260 (N.Y. 1982); Yu Chao Tan v. Hong Shan Kuang, 136 A.D.3d 933 (N.Y. App. Div. 2016)).
184. 101 N.Y.S.3d 825 (City Ct. 2019).
185. *See id.* at 828.
186. N.Y. Dom. Rel. Law § 236(B)(5)(d)(15).

circumstances by weighing relevant factors applicable to the care of a companion animal. Salient factors for a court to consider include: the involvement, or absence, of each party in the companion animal's day-to-day life; the availability and willingness of each party to care for the companion animal; each party's involvement in health and veterinary care decisions; the quality of each party's respective home environment; the care and affection shown towards the companion animal; and each party's fitness and caretaking abilities. No single factor is dispositive.[187]

The court also noted that, in its analysis of "best interests," the court must "evaluate the testimony, character, and sincerity of all the parties involved."[188] Applying that standard to the facts before it, the court awarded sole care and custody of the two dogs to the wife.[189]

The same factors indicated in *L.B. v. C.B.B.* were used by another New York court in *Conte v. Conte*[190] when establishing ownership and a visitation schedule for a divorcing couple's dog. In *Conte*, the husband had left the marital home pursuant to an order of protection issued to the wife. At the time, the wife retained possession of the dog and allowed the husband visitation, but the husband took possession of the dog two months later with the assistance of a state trooper.[191] The husband initially refused the wife visitation, but pursuant to court order, allowed the wife to take the dog for five hours on Tuesdays and Thursdays. The husband refused her overnight visits. The couple returned to court after the husband twice failed to allow visitation per their schedule.[192] In applying the "best interests" standard, the court considered a number of factors, including the wife's willingness to allow the husband visitation, an ultimately false claim by the husband that the dog was his service dog, and the husband's angry, but presumed aberrational, response "when he ripped the service vest off of [the dog] and threw the leash to the wife's attorney."[193] The court named the wife the dog's owner and primary caretaker, but allowed a requested visitation schedule that gave the husband four continuous days with the dog each week.[194]

Despite use of "best interests" in the divorce context, two replevin cases continued to use the "best for all concerned" standard. In *Cromwell v.*

187. *L.B.*, 175 N.Y.S.3d at 710–11.
188. *Id.* at 711.
189. *Id.* at 712.
190. 187 N.Y.S.3d 580, 2023 WL 3239943 (Sup. Ct. 2023) (unpublished).
191. *Id.* at *1. The couple had two dogs, but one of them died unexpectedly during the divorce. *Id.*
192. *See id.* at *2.
193. *See id.* at *4–5.
194. *Id.* at *5. The court noted the obvious love that each party had for the dog and hoped that both parties would always look out for the dog's best interests. In particular, the court requested that the husband reconsider his habit of taking the dog to crowded bars and restaurants, which had been a concern for the wife. *Id.*

Lashley,[195] for example, the court used that standard because it "'[strikes] the best balance between a strict property analysis and the more extensive interests analysis involved in child custody cases.'"[196] It also stated that consideration of "best for all concerned" includes "'intangible factors such as why each party would benefit from having the dog in . . . her life and why the dog has a better chance of prospering, loving and being loved in the care of one party or another.'"[197] Similarly, in *Pron v. Tymshan*,[198] the court added other considerations, including "[r]elevant facts . . . that reflect each party's ability to meet the animal's physical and emotional needs, including financial circumstances, access to outdoor activities, opportunities for exercise and socialization, access to veterinary care and necessary supplies, and the time required to meet these needs on a daily basis."[199] Applying the standards, the courts resolved the ownership disputes, with the court in *Cromwell* placing ownership in the dog trainer who received the dog from the original owner almost three years before[200] and the court in *Pron* returning possession of a cat to the original owner after having been in the possession of a sitter for over two years.[201]

G. *Animal Shelters*

In *Santa Paula Animal Rescue Center, Inc. v. County of Los Angeles*,[202] the court reviewed two issues under California's Hayden Act, a statute that was enacted to increase live release of animals from shelters.[203] The Hayden Act allows shelters to enter into cooperative agreements with non-profit "animal rescue or adoption organizations" and requires the shelters to release shelter animals to these organizations if requested before euthanization.[204] The release requirement does not apply if the animal is "irremediably

195. 196 N.Y.S.3d 617 (Civ. Ct. 2023).

196. *Id.* at 622 (quoting Mundo v. Weatherson, 2022 WL 589500 (N.Y. Civ. Ct. 2022)).

197. *Id.* (quoting Mitchell v. Snider, 2016 WL 3191291 (N.Y. Civ. Ct. 2016)).

198. 192 N.Y.S.3d 917, 2023 WL 4940439 (Civ. Ct. 2023) (unpublished).

199. *Id.* at *3.

200. *Cromwell*, 196 N.Y.S.3d at 622 (considering facts such as condition of dog upon receipt by trainer compared to current condition, possible abuse and lack of affection by original owner, and bond between dog and trainer). The court stated: "Removing Princess from defendant's home at this point, as if the dog was a borrowed but unreturned blender, would completely disregard the bond that has naturally formed between Princess and defendant and would undoubtedly cause the dog as well as defendant much anxiety." *Id.*

201. 192 N.Y.S.3d at *4 ("[P]laintiff has established her initial purchase of Murchik, over five years of exclusive care, and her consistent desire to support him and intent to eventually retrieve him. Plaintiff has further demonstrated that she is now able to financially provide for Murchik's physical needs and that she has the knowledge and familiarity with him to keep him safe and to provide for his emotional needs. As such, the Court finds that returning Murchik to plaintiff is in the best interest for all concerned.").

202. 95 Cal. App. 5th 630 (2023), *review denied* (Dec. 13, 2023).

203. For more information about the Hayden Law, see Taimie Bryant, *Hayden Law*, Maddie's Fund, https://www.maddiesfund.org/hayden-law.htm (last visited Feb. 19, 2024).

204. Cal. Food & Agric. Code § 31108(b)(1) (dogs); *id.* § 31752(c)(1) (cats).

suffering from a serious illness or severe injury."[205] At issue in the case was Los Angeles County's policies of (1) only releasing animals from county shelters to organizations that were pre-approved by the county; and (2) not releasing animals that the shelter determined had behavioral problems.[206]

In the case, two non-profit, no-kill animal organizations sought release of dogs from county shelters. The first organization, Lucky Pup Dog Rescue, was twice denied release of an animal because it was not pre-approved as an adoption partner. The second organization, Santa Paula Animal Rescue Center, Inc., was a pre-approved partner, but was denied release of two dogs because the county had determined that the dogs had behavioral problems.[207] The organizations petitioned for a writ of mandate to compel the county to comply with the Hayden Act. They argued that the county could not place qualifications other than non-profit status on potential adoption partners and could not deny release of an animal scheduled for euthanasia unless the animal was irremediably suffering from a serious illness or injury.[208] The county filed a demurrer, asserting that nothing in the Hayden Act precluded the county from imposing additional standards on its pre-approved adoption partners and, under the law, animals with behavioral problems are deemed unadoptable.[209] In support, the county offered Food & Agricultural Code § 17005(a), Civil Code § 1834.4(a), and Penal Code § 599d(a), saying that the three provisions, when read together, "define adoptable animals, in part, as animals that 'have manifested no sign of a behavioral or temperamental defect that could pose a health or safety risk or otherwise make the animal unsuitable for placement as a pet.'"[210] It would be "absurd," explained the county, to transfer animals deemed unadoptable.[211] The rescues argued that the Hayden Act had only three exceptions to release of shelter animals and behavioral problems was not one of them.[212] The trial court sustained the county's demurrer and dismissed the rescues' action with prejudice.[213]

The court of appeals reversed the dismissal, holding that the county had no discretion to withhold animals that it determined had behavioral problems or were unadoptable or untreatable, although the county could place

205. *Id.* § 17006.
206. *Santa Paula Animal Rescue Center*, 95 Cal. App. 5th at 636.
207. *Id.* The court noted that "[t]he County's failure to comply with the Hayden Act has resulted in unnecessarily high rates of euthanasia." *Id.*
208. *Id.* at 637.
209. *Id.*
210. *Id.* The sections cited by the county have identical language spelling out the policy that adoptable and treatable animals should not be euthanized. Cal. Food & Agric. Code § 17005(a); Cal. Civ. Code § 1834.4; Cal. Penal Code § 599d.
211. *Santa Paula Animal Rescue Center*, 95 Cal. App. 5th at 636.
212. *Id.*
213. *Id.*

additional requirements on its adoption partners.[214] The court addressed the release issue first, examining the statutory provisions relating to release and euthanasia. It found that § 31108(b)(1) imposed a mandatory duty of release because the provision states "*shall* . . . be released."[215] The court also agreed with the appellants that the Hayden Act only provided for three exceptions to the release, each of which provides for euthanasia instead: animals suffering from serious illness or severe injury under § 17006; newborn animals without a mother under § 17006; and owner-relinquished animals under § 31108.5 that have a "'history of vicious or dangerous behavior documented by the agency charged with enforcing state and local laws.'"[216] The court found support for its interpretation in the Hayden Act's legislative history, which showed that an early version of the statute did contain language that would have allowed the county to exclude from release those animals it considered unadoptable or untreatable, but the language was "excised in a later draft, never to resurface."[217] The court also rejected the county's argument that § 17005, which sets out a policy that no adoptable or treatable animals be euthanized, limits animals subject to mandatory release as only those that are adoptable or treatable.[218] The court stated:

> Imposing upon the County a mandatory duty to release dogs to adoption or rescue organizations is not incompatible with the general policy against euthanizing adoptable and treatable animals. Rather, we read the Hayden Act as providing the County access to additional resources, through cooperation with animal adoption and rescue organizations that focus on animals

214. *Id.* at 635.

215. *Id.* at 641 (emphasis added).

216. *Id.* (quoting Cal. Food & Agric. Code § 31108.5(c)).

217. *Id.* at 642 (citing Assembly Amendment to Senate Bill No. 2754, sec. 1, 1999-2000 Reg. Sess. (Cal. May 16, 2000) (including "adoptable and treatable" limitation); Assembly Amendment to Senate Bill No. 2754, 1999-2000 Reg. Sess., sec. 1 (Cal. May 26 2000) (excluding "adoptable and treatable" limitation)).

218. Section 17005 states:

> (a) It is the policy of the state that no adoptable animal should be euthanized if it can be adopted into a suitable home. Adoptable animals include only those animals eight weeks of age or older that, at or subsequent to the time the animal is impounded or otherwise taken into possession, have manifested no sign of a behavioral or temperamental defect that could pose a health or safety risk or otherwise make the animal unsuitable for placement as a pet, and have manifested no sign of disease, injury, or congenital or hereditary condition that adversely affects the health of the animal or that is likely to adversely affect the animal's health in the future.
>
> (b) It is the policy of the state that no treatable animal should be euthanized. A treatable animal shall include any animal that is not adoptable but that could become adoptable with reasonable efforts. This subdivision, by itself, shall not be the basis of liability for damages regarding euthanasia.

Cal. Food & Agric. Code § 17005.

> traditionally kept as pets, to determine whether dogs may be adoptable or treatable, and to prevent overuse of euthanasia, even in circumstances where the animal might not be adoptable or treatable. Rescue and adoption organizations may be better equipped to determine whether a dog is in fact adoptable or treatable, to treat those dogs that can be treated, or to rescue and care for dogs that cannot be safely adopted as pets. That the Legislature has permitted the County to form cooperative agreements with animal rescue and adoption organizations demonstrates its intent for these entities to work together to prevent the greatest number of animals possible from suffering euthanasia.[219]

The court concluded that, based on the plain language and legislative history of the Hayden Law, the county had no discretion to withhold from mandatory release animals that were deemed by the county to have behavioral problems or were otherwise deemed unadoptable and untreatable.[220]

Moving to the second issue, the court reviewed whether the county could place additional requirements on potential adoption partners other than non-profit status as set out in § 31108. The court first looked at the language of § 31108, which states that animals shall be released "to a nonprofit, as defined in Section 501(c)(3) of the Internal Revenue Code, animal rescue or adoption organization."[221] Based on this language, the court described the appellant animal organizations claim as "posit[ing] that the Hayden Act essentially deferred to the Internal Revenue Service which organizations should qualify as adoption or rescue organizations."[222] The court disagreed, noting that the placement of the language referencing the Internal Revenue Code relates to the word "nonprofit," not the phrase "animal rescue or adoption organization," and the appellants did not provide support for any other reading of the language.[223] The court stated that, because the Hayden Act is silent as to what constitutes a qualifying organization, the county had discretion to make that determination.[224] The court also found support in § 31108 itself, which states that the county "may" enter cooperative agreements, which suggests the county has discretion.[225] The court ultimately held that the county could place additional conditions on prospective adoption partners, stating that giving discretion to the county makes sense because it "facilitates the safe and appropriate placement of dogs."[226]

219. 95 Cal. App. 5th at 642–43.
220. *Id.* at 643.
221. Cal. Food & Agric. Code § 31108(b)(1).
222. 95 Cal. App. 5th at 644.
223. *Id.*
224. *Id.* at 644–45.
225. *Id.* at 645.
226. *Id.*

H. *Public Nuisance*

In *Animal Legal Defense Fund v. Olympic Game Farm, Inc.*,[227] the Washington Supreme Court received a certified question asking whether violations of state wildlife and animal cruelty laws and the Endangered Species Act could establish a claim for public nuisance in the absence of a legislative designation as a public nuisance, interference with use and enjoyment of property, or injury to public health and safety.[228] The court held that they could not. The court's analysis began with the statutory definition of nuisance, which is:

> unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.[229]

Public nuisance "is a type of nuisance that 'affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal,'"[230] and can only be pursued by a private party where there is special injury.[231] In addition, some specific actions constituting public nuisances are statutorily identified.[232]

In analyzing the case law, the court found that an actionable nuisance required some injury or unreasonable interference with the use and enjoyment of private property, including loss to a neighborhood's property values or the residents' peace of mind,[233] or some interference with public property, such as blocked waterways.[234] Although a statutory violation can constitute nuisance per se, to be a public nuisance it must be shown that the violation occurred and that the action is a nuisance in all circumstances as declared by statute or case law.[235] As for the certified question, though,

227. 533 P.3d 1170 (Wash. 2023) (en banc).

228. *Id.* at 1172. The case leading up to the question involved a complaint filed by the Animal Legal Defense Fund against Olympic Game Farm, a private zoo, for alleged violations of the federal Endangered Species Act and public nuisance based on violation of the state Endangered Species Act and animal protection laws. The certified question arose upon reconsideration of the trial court's dismissal of the public nuisance claim. *Id.* at 1171–72.

229. *Id.* (quoting Wash. Rev. Code § 7.48.120).

230. *Id.* (quoting Wash. Rev. Code § 7.48.130).

231. *Id.* (citing Wash. Rev. Code § 7.48.210).

232. *Id.* (citing Wash. Rev. Code § 7.48.140).

233. *Id.* at 1172–73 (citing Tieg v. Watts, 954 P.2d 877 (Wash. 1998) (plurality opinion); Champa & Wash. Compressed Gas Co., 262 P. 228 (Wash. 1927)).

234. *Id.* at 1173 (citing Chelan Basin Conservancy v. GBI Holding Co., 413 P.3d 549 (Wash. 2018); Morris v. Graham, 47 P. 752 (Wash. 1897)).

235. *Id.* (citing Moore v. Steve's Outboard Serv., 339 P.3d 169 (Wash. 2014); Kitsap County v. Kev, Inc., 720 P.2d 818 (Wash. 1986); Motor Car Dealers' Ass'n of Seattle v. Fred S. Haines Co., 222 P. 611 (Wash. 1924)).

none of the asserted statutory violations of animal cruelty or animal protection laws declared the actions to be nuisance per se, nor did any case law that interpreted them.[236] Further, the certified question itself indicates that there is neither interference with the use and enjoyment of property nor a threat to public safety. Therefore, the court concluded that the answer to the question is no, unless the court changed the definition of public nuisance to include violations of animal protection laws.[237]

The Animal Legal Defense Fund (ALDF) argued that the court's reading of case law was too restrictive and that Washington law included cases expansively defining public nuisance to include activities unrelated to infringement of property, public health, or safety.[238] The court disagreed, distinguishing each case offered. ALDF then argued that the activity in the case—operation of the defendant's private zoo—was a nuisance because it infringed on the public property of wildlife.[239] The court again disagreed, stating that there is no proof that the animals in the zoo came from the wild or was there any law suggesting that the public could use wildlife as they see fit, had any individual property rights to it, or even had a right to access the zoo's private property.[240] The court ultimately rejected ALDF's view, stating: "Where the statutory framework and case law do not support a claim, none exists. We decline to expand the scope of nuisance any further."[241]

Chief Justice González concurred to emphasize his view of the changing nature of nuisance. He stated:

> [T]he world has changed much since the days when King Henry II, Kukulkan, and the Great Khan were young. Now, the private use of land has profound potential to harm our ecosystem and the various species we share it with. It may well be time to heed Justice Douglas's call to consider whether those places and things threatened with environmental catastrophe should have standing in court to sue for their own injuries. . . .[242]
>
> The common law evolves. People who would not have had the ability to come to court in the 12th century through much of the 20th century are now recognized as entitled to petition for redress of grievances, to demand equal justice under law, and to be heard. As the law recognizes new injuries it may also be called on to recognize new remedies.[243]

236. *Id.*

237. *Id.* at 1173–74.

238. *Id.* at 1174 (citing Thornton v. Dow, 111 P. 899 (Wash. 1910), *abrogated by* Davis v. Baugh Indus. Contractors, Inc., 150 P.3d 545 (Wash. 2007); State *ex rel.* Dow v. Nichols, 145 P. 986 (Wash. 1915); Kitsap County v. Kev, Inc., 720 P.2d 818 (Wash. 1986)).

239. *Id.* at 1175.

240. *Id.* ALDF also offered case law from other jurisdictions where private zoos have been considered public nuisances, but the court distinguished those cases as well. *Id.*

241. *Id.*

242. *Id.* at 1176 (citing Sierra Club v. Morton, 405 U.S. 727, 741–42 (1972) (Douglas, J., dissenting) (citing Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450 (1972))).

243. *Id.*

I. *Equine-Related Injury*

1. Claims Limited by Equine Activity Liability Acts

In the Eleventh Circuit case *Fahey v. Kolcun Tree Care, LLC*,[244] a tree services company could not use the Georgia EALA to shield itself from liability when an injured horse carriage driver sued the company for negligence after her carriage horse spooked and injured her. Consistent with EALAs across the country, Georgia's EALA protects a specified subset of people from liability for injuries caused by the inherent risk of animal activities.[245] At issue here was the statute's catch-all phrase "any other person" in the list of who is protected: "an equine activity sponsor, an equine professional, a livestock activity sponsor, a livestock professional, an owner of a livestock facility, a llama activity sponsor, a llama professional, *or any other person*, which shall include a corporation or partnership."[246] Here, no other facts were in dispute, such that if the tree services company was in fact within the group of protected persons, it would have escaped liability: the carriage driver was a participant engaged in an equine activity, and her injuries resulted from the inherent risks of animal activities.[247]

Although the plain and ordinary meaning of the words "any other person" could encompass a tree services company, the court explained that the words must be read in the context of the entire statute.[248] In so doing, the court concluded that the phrase does not apply to a tree services company.[249] The canon of interpretation *ejusdem generis* provides that when words of specificity ("equine activity sponsor, equine professional . . .") are followed by words of general import ("any other person") that are more comprehensive, the general words are to be viewed as relating only to the same kind of matters that were more specifically stated (an affiliation with equine and other animal activities).[250] Moreover, if the catchall phrase were so broad as to include all persons of any characteristic, the words of specificity would be rendered unnecessary and mere surplusage, an interpretation that courts seek to avoid.[251] Finally, the statute's codified statement of intent of limiting liability to those involved in equine activities, livestock activities, and llama activities indicated that only those involved in such activities are granted protection under the law.[252] Therefore, a tree services company is not immune from suit for negligence just because the injured

244. 2023 WL 4448012 (11th Cir. July 11, 2023) (unpublished).
245. *Id.* at *1.
246. *Id.* (quoting Ga. Code Ann. § 4-12-3(a) (emphasis added)).
247. *Id.* at *2.
248. *Id.*
249. *Id.* at *2–3.
250. *Id.* at *2.
251. *Id.* at *3.
252. *Id.*

party happened to be engaged in an equine activity at the time of the incident and injury.

In *Molnar v. Tenacity Farm, Inc.*,[253] an injured riding student's negligence claims against the riding school and its instructor were barred by Michigan's EALA, and her claim under the EALA for "willful and wanton disregard for the safety of the participant" also failed on the facts of the case. The plaintiff successfully and safely completed her first lesson on a horse assigned to her because it was especially gentle. Before her second lesson, the plaintiff was charged with retrieving the horse from a larger pasture to a smaller pasture.[254] However, because neither she nor the instructor closed the gate between the pastures, another horse that was being led by the instructor broke free from the instructor and rushed through the gate after the plaintiff and her horse, kicking the plaintiff and breaking her leg.[255]

In a circumstance where there is both a state EALA in effect and a signed liability waiver, a horse facility and instructor generally enjoy immunity from liability. To get around this immunity, in addition to alleging negligence, a plaintiff often will allege willful and wanton misconduct because those claims generally are not waivable in a liability waiver and not barred by statute. That is what this *Molnar* plaintiff did here.[256] The Michigan Court of Appeals quickly dispensed with the negligence claim, affirming the trial court's summary disposition because all parties fit squarely within the statutory framework, implicitly concluding that the circumstances involved injury caused by an inherent risk of an equine activity and noting that it does not matter that the horse that caused the injury was not the horse with which the plaintiff was engaged in activities.[257] As for the claim for willful and wanton conduct, the Michigan Court of Appeals again agreed with the trial court that there was no genuine issue of material fact in the absence of any such conduct.[258] The evidence indicated that plaintiff had done well and safely in her first lesson, and, at the start of this second lesson, she had no difficulty retrieving the horse into the smaller pasture. While the problems of the gate not being closed and the instructor's loss of control of the second horse might be considered negligence on the instructor's part, they certainly were not willful, in the sense of an intent to harm, or wanton, in the sense of being so reckless as to infer an intent to harm.[259] Therefore, in the end, the plaintiff's claims were summarily dismissed, without recovery.

253. --- N.W.2d ----, 2023 WL 1482338 (Mich. Ct. App. Feb. 2, 2023).
254. *Id.* at *1, *4.
255. *Id.* at *2.
256. *Id.*
257. *Id.* at *3.
258. *Id.*
259. *Id.*

2. Claims Limited by Liability Waivers

The Michigan Court of Appeals case *Britten v. Circle H Stables, Inc.*[260] emphasizes the importance of the protections that liability waivers add beyond those given in state EALAs, and it highlights the variations in state law when it comes to cases involving horse-related injuries, EALAs, and liability waivers. In *Britten*, the Michigan Court of Appeals concluded that the state's EALA permitted a liability waiver to prospectively waive a plaintiff's claims for willful and wanton conduct, thereby abrogating the common law rule that a person cannot contract away exposure to liability for his willful and wanton misconduct.[261]

Like most EALAs across the nation, Michigan's EALA grants immunity to certain equine professionals from liability for injury or death to a participant that resulted from an inherent risk of an equine activity, subject to exclusions.[262] Under the Michigan EALA, one of the exclusions from immunity is if the equine professional acts or fails to act in a manner that constitutes willful and wanton disregard for the participant's safety.[263] The Michigan EALA goes on to permit an agreement "'in writing to a waiver of liability beyond the provisions of [the EALA],'"[264] which is an express statement approving of liability waivers that may not be so common among other states' statutes. In reviewing the statute's legislative purpose together with recent legislative history, the Michigan Court of Appeals concluded that the statement expressly allowing liability waivers to waive liability "beyond the provisions" of the EALA demonstrated the legislature's intent to permit waivers of liability under each of the scenarios that would otherwise be exempt from the statute's grant of immunity.[265] As a result, nothing in the statute carved out the willful and wanton conduct exemption from the same treatment.[266] Therefore, the Michigan statute permits waivers of claims for willful and wanton conduct,[267] something not readily available elsewhere. This case re-emphasizes that the same case may have different results under different state EALAs, and that, while an EALA grants limited immunity, a well-drafted liability waiver can extend much greater protections to equine professionals.

In the Texas case of *Green v. Lajitas Capital Partners, LLC*,[268] a resort's liability release barred the injured plaintiff's claim of negligence causing her

260. --- N.W.2d ----, 2023 WL 5986564 (Mich. Ct. App. Sept. 14, 2023).
261. *Id.* at *5.
262. *Id.* at *2.
263. *Id.*
264. *Id.* at *3 (quoting Mich. Comp. Laws § 691.1664(2)).
265. *Id.* at *3–4.
266. *Id.*
267. *Id.* at *4.
268. 2023 WL 3153644 (Tex. App. Apr. 28, 2023) (unpublished).

injury during a trail ride in which she fell from her horse. The two sides' wildly different descriptions of events is a common theme in such cases: on the one hand, the trail guide testified that when the resort's water sprinklers activated and spooked the horses, most of the horses turned suddenly and sped up for a few steps, causing the plaintiff to fall from her horse; on the other hand, the plaintiff described her horse as having "bucked wildly" and "violently" throwing her to the ground.[269]

In her lawsuit, the plaintiff alleged that the sprinklers were a "dangerous latent condition of the land" that the resort negligently failed to guard against and failed to properly warn against, a claim that if proven would not be barred by the Texas EALA but would be barred by an enforceable liability waiver.[270] Having signed a liability waiver, the plaintiff argued for its inapplicability on the grounds that the waiver applied only to incidents arising from "elements of nature" and that it was not sufficiently specific to be enforceable.[271]

As to the waiver's specificity and "conspicuousness," the Texas Court of Appeals began by quoting large sections of the thoroughly detailed agreement, demonstrating that the terms of the agreement contained headings and contrasting type with bold and underlined words to emphasize key points which, in this instance, plaintiff had also initialed.[272] It thus rejected her argument regarding conspicuousness. The court further concluded that the liability waiver was sufficiently specific with respect to releasing plaintiff's negligence claim.[273] While a release must specify the type of claims being released, it need only "mention" a claim to an extent that the parties' intent is clear, even if the actual name of the claim (such as "negligence") is not used.[274] This liability waiver contained the word "negligence," and more, in the language releasing liability.[275] Finally, the court rejected plaintiff's attempt to argue that the man-made cause of her accident, water sprinklers, was not contemplated in the liability waiver.[276] Dissecting the language of the waiver, the court concluded that it was clear that the release language alternately released liability arising either from "'elements of nature'" *or* "other incidents caused by unfamiliar sights, sounds, or sudden movements."[277] The liability waiver even expressly provided an example of a condition subject to the waiver: "'man-made changes in landscape.'"[278]

269. *Id.* at *1.
270. *Id.* at *1, *2.
271. *Id.* at *2.
272. *Id.* at *3–5, *7.
273. *Id.* at *8.
274. *Id.*
275. *Id.*
276. *Id.* at *9.
277. *Id.*
278. *Id.* at *4.

As such, plaintiff could not escape the enforceability of her liability waiver, and her claim failed.

In the California case of *Browne v. Foxfield Riding School*,[279] a horse-riding school's liability waiver did not protect it or its instructor against the plaintiff riding student's negligence claims because the waiver did not include a release of claims for negligent conduct. California does not have an EALA, and so liability waivers are of particular import. The twelve-year-old riding student, through her mother, sued the school and the instructor for ordinary and gross negligence following a horse-riding accident while the student was attending the school's summer sleepaway camp.[280] Evidence was disputed as to how much of a beginner or not the student was, but on the third day of riding lessons, she joined a group for jumps in the cross-county field.[281] On her second jump, the horse that she was riding bucked, and she was thrown, resulting in a spinal injury requiring surgery.[282]

Plaintiff alleged, with expert testimony at trial, that her riding instructor had increased the risk to plaintiff beyond the risks inherent in horseback riding.[283] In California, the primary "assumption of risk" doctrine limits the duty owed to others in recreational activities to the duty not to act in a manner that increases the risk of injury over the risk already inherent in the activity.[284] Here, the student's mother signed a thorough and detailed liability release that spelled out the dangers of riding a horse, that doing so always carries risk of injury, that horses are unpredictable, that they assumed these risks and waived any claims against the school and its instructors, agreeing to pay all medical bills associated with any resulting injury.[285] Following plaintiff's case-in-chief at trial, the trial court granted nonsuit on the negligence claim, finding that the liability waiver released plaintiff's negligence claim.[286] The gross negligence claim went to the jury, which returned a verdict in favor of the riding school.[287]

On appeal, a divided division of the California Court of Appeal reversed the nonsuit of the negligence claim, explaining that the liability waiver was indeed thorough but it only released liability for risks inherent to horseback riding. In the majority's view, the waiver was focused on inherent risks and did not clearly or expressly apply to negligent conduct or waive all

279. 2023 WL 5194953 (Cal. Ct. App. Aug. 14, 2023) (unpublished), *review denied* (Nov. 21, 2023).
280. *Id.* at *1.
281. *Id.*
282. *Id.* at *1–2.
283. *Id.* at *2.
284. *Id.* at *3.
285. *Id.* at *1.
286. *Id.* at *2.
287. *Id.*

liability.[288] The waiver did not mention or indicate that the stated release and assumption of risk also applied to negligent conduct of the school or conduct that increased the risks inherent in horseback riding.[289] The dissenting judge criticized the majority opinion, arguing that it was clear to the child's mother of the risk of injury, and that the riding school had a reasonable expectation that it would not be the subject of a negligence claim, in keeping with the purpose of the law of contracts to "protect the reasonable expectation of the parties."[290] The dissent posited the question of how could a reasonable person read the agreement and not expect that every activity that the student participated in was covered by the release.[291] If that were the case, according to the dissent, the mother's signature on the form was of little effect.[292]

In the Kentucky Court of Appeals case of *Rieff v. Jesse James Riding Stables, Inc.*,[293] a riding stable's release was a valid pre-injury release because it clearly waived liability for all conduct short of gross negligence by indicating that *all* claims are released except for claims for gross negligence.[294] The absence of an express reference to negligence did not defeat the enforceability of the release. Rather, it was an express release from all claims but gross negligence; it was virtually impossible to interpret the release to do anything other than protect against all claims but gross negligence; and the hazards at issue were specifically mentioned in the release and therefore clearly contemplated.[295]

The injured plaintiff also took issue with the fact that a part of the waiver's language could be construed as signing a release of liability for her children, who were also on the ride, and not for herself in her individual capacity.[296] But the court declined to read that sentence fragment out of context.[297] On review, the court concluded that the sentence was not ambiguous and was not capable of being interpreted as signed on behalf of

288. *Id.* at *4–5.
289. *Id.* at *4.
290. *Id.* at *8 (Yegan, J., dissenting).
291. *Id.*
292. *See id.*
293. 656 S.W.3d 225 (Ky. Ct. App. 2022).
294. *Id.* at 227 (noting that the relevant language read: "I/WE understand and agree that except in the event of THIS STABLE'S gross negligence, I/WE accept full responsibility for bodily injury, property damage, death . . . ; and that I/WE hereby . . . release [the releasees] from all claims, demands, actions and causes of action for same injuries, damages and death . . . "); *see id.* at 230.
295. *Id.* at 230.
296. *Id.* at 231.
297. *Id.* (noting that the sentence read: "By this agreement, made and entered into this day, by and between Sylvia Rieff [who had written her own name on the blank line] who will sign below for and on behalf of all under-age family members, and those for whom I am guardian, hereinafter referred to as 'I/WE,' and [JJ Stables] hereinafter referred to as 'THIS STABLE.'").

her children only and not herself as well.[298] The sentence itself states she is a party to the agreement, and later in the document she lists her name as one of the individuals for whom the waiver was signed, among other indications in the document that demonstrated that she in her individual capacity is included in the group of participants to whom the waiver applied.[299] Plaintiff's own deposition testimony confirmed that she knew that if she did not sign, she would not get to ride; in other words, this waiver was for her too, not just her children.[300] The liability waiver withstood review on appeal, but it provides a good reminder when drafting liability waivers to ensure clarity about identifying the parties and the capacity in which they are signing, particularly when a liability waiver is intended to apply to more than one person at a time.

3. Negligence

In *Garcia v. Mountain Creek Riding Stable Inc.*,[301] the Third Circuit affirmed the grant of summary judgment against an injured rider claiming negligence on the part of a trail ride operator. The plaintiff, who did not speak English, participated in a trail ride with her family.[302] While the trail operator gave verbal riding instructions and her son was translating for her as a general matter, her son did not translate those instructions because she was distracted and busy putting on boots, though her husband gave some instruction based on personal experience.[303] The operator also had participants sign a liability waiver written in English, which her husband signed for her.[304] On the ride, the plaintiff's horse went off trail, began running, and eventually reared up causing her to fall and sustain injuries.[305] On review of summary judgment, the Third Circuit explained that because there was no evidence that the horse had a dangerous propensity, and because plaintiff was not alleging intentional misconduct, the operator could be liable only if it was negligent in "failing to prevent the harm."[306] To the court, the evidence did not demonstrate a failure to prevent the harm because the plaintiff had a translator available to receive instructions; she received some instruction on horse handling; she demonstrated some understanding of how to control a horse; and, finally, there was no evidence the operator did anything to cause the horse to run.[307]

298. *Id.* at 231–32.
299. *Id.*
300. *Id.* at 232.
301. 2023 WL 4418230 (3d Cir. July 10, 2023) (unpublished).
302. *Id.* at *1.
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.* at *2.
307. *Id.*

In *Jacob v. Wainwright*,[308] the New Jersey court of appeals held that, for the plaintiff to prevail on her claim of negligence against the person handling the horse that injured her, she must present expert testimony to establish the applicable standard of care regarding horse handling. In this case, the plaintiff was injured while attending a horse show.[309] She was near the defendant who was holding a horse and "shanking" (pulling up and down) the horse's lead to get its attention.[310] The horse appeared to be fidgety, and it was standing on pavers with steel shoes on its front hooves.[311] Hearing a commotion, plaintiff turned, only to find the horse falling on top of her and injuring her leg.[312] At trial, following the plaintiff's case in chief, the trial court dismissed plaintiff's complaint for lack of an expert on horse handling because the average juror would not know from common knowledge whether the defendant had mishandled the horse, noting that the average person would not know whether it was negligent to have a steel shod horse standing on pavers, or whether shanking was appropriate.[313] The New Jersey court of appeals agreed, analogizing to many other contexts where experts are required to establish negligence of professionals in specialized professions or occupations.[314] It explained that knowledge of horsemanship has become too far removed from the days when horses were commonly used such that the average juror today would not possess such knowledge.[315] The court of appeals also affirmed the trial court's ruling declining to apply the doctrine of *res ipsa loquitor* to the facts.[316] Just because the horse fell on plaintiff does not mean someone was negligent, because there are numerous reasons other than negligent conduct that could explain the fall.[317]

III. ANIMAL INSURANCE LAW

A. *Uninsured Motorist Coverage*

In *Harper v. State Farm Mutual Automobile Insurance Co.*,[318] a Delaware trial court held, as a matter of first impression under Delaware law, that a horse-drawn buggy is not an "uninsured motor vehicle" for the purpose of obtaining uninsured motor vehicle coverage after an insured's vehicle col-

308. 2022 WL 16639343 (N.J. Super. Ct. App. Div. Nov. 2, 2022) (unpublished).
309. *Id.* at *1.
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.* at *2.
314. *Id.* at *3–4.
315. *Id.* at *4.
316. *Id.*
317. *Id.*
318. 2022 WL 17494200 (Del. Super. Ct. Dec. 8, 2022) (unpublished).

lided with the buggy. As the court explained, the plain meaning of motor vehicle simply does not include a vehicle pulled by a horse as opposed to being powered by a motor, nor do Delaware's UM/UIM laws require a different result.[319]

B. *Dog Bites and Duty to Defend*

In the New Jersey court of appeals case of *Ruch v. Morales*,[320] the appellate court held that a landlord's insurer had a duty to defend and indemnify the landlord in a dog bite case against the landlord and one of its renters, on the basis that the animal exclusion in the policy was inapplicable. Individuals bitten by a renter's three dogs that had escaped the rental premises sued the alleged dog owner, and also sued the property owner and managers for negligence in failing to maintain safe fencing, failing to enforce the property's "no dog policy," and failing to require removal of dogs with a known history of biting another.[321] The property owner's insurance carrier denied coverage under its policy on the basis that the policy contained an animal exclusion clause excluding coverage for claims relating to a "Designated Animal" either owned by the insured or for which the insured was responsible.[322]

The trial court agreed with the insurer, finding no duty to defend or indemnify on the basis that the property owner was "responsible" under the alleged facts.[323] However, the court of appeals did not agree. As the court of appeals explained, the insurer had a duty to defend because the claims asserted arose out of the property owner's ownership of the premises, namely allegations of failure to maintain the fence and failure to enforce its lease against the dog owner.[324] Such claims are "potentially covered claims" and therefore triggered the duty to defend.[325] Furthermore, the court of appeals held that the designated animal exclusion did not apply because the term "responsible" was ambiguous, subject to more than one possible interpretation, and therefore the interpretation that supports coverage must apply.[326] Specifically, the property owner interpreted the exclusion to apply only to animals for which the owner was "responsible" in the sense that it was obligated to care for it, which it was not.[327] Consequently, the insurer was required to provide a defense.

319. *Id.* at *2–4.
320. 2023 WL 5811673 (N.J. Super. Ct. App. Div. Sept. 8, 2023) (unpublished).
321. *Id.* at *1, *3–4.
322. *Id.* at *3.
323. *Id.* at *5.
324. *Id.* at *6.
325. *Id.* at *7.
326. *Id.*
327. *Id.*

In *Missy J, LLC v. Westchester Surplus Lines Insurance Co.*,[328] yet another landlord was sued for injuries from a dog on its premises. The landlord sought coverage under its commercial general liability (CGL) policy but was denied on the basis that the animal exclusion provision applied.[329] This time the insurer prevailed. In this instance, the animal exclusion provision excluded coverage for injury that resulted from an animal simply existing or being present on the insured's premises, not just for injury from an animal that the landlord owned or used in its operations.[330]

The California Court of Appeal case of *Dua v. Stillwater Insurance Co.*[331] involved the question of whether a homeowner's insurer was obligated to defend her in a dog bite case, the answer being "yes." In the underlying case, the third-party plaintiffs sued the homeowner for injuries to themselves and their dogs after two pit bulls owned by the homeowner's boyfriend bit them while on a public street.[332] The plaintiffs alleged that the dogs lived at the homeowner's home and that she knew that her boyfriend's dogs were dangerous, and the attack was therefore reasonably foreseeable and she had a duty to prevent it.[333] The homeowner's insurance company denied that it had a duty to defend because the policy had an animal liability exclusion precluding any duty to indemnify, and the underlying complaint alleged that the two pit bulls lived in the homeowner's home, triggering the animal liability exclusion.[334] The homeowner settled the underlying lawsuit and sued the insurer for bad-faith breach of contract and breach of the duty of good faith and fair dealing.[335] She argued that the insurer had a duty to defend because the true facts, contrary to the underlying complaint, were that her boyfriend was not living with her at the time of the attack, the attack did not occur on her property, and the dogs were not under her care, custody, or control at the time of the attack.[336] Such facts would trigger a covered claim.[337] She therefore argued that the plaintiffs could have amended their complaint to allege a covered claim, thus resulting in a duty to defend.[338]

In agreement with the homeowner, the court explained that just because there is no duty to indemnify does not mean there is no duty to defend.[339]

328. 2022 WL 17811440 (D.N.H. Dec. 19, 2022) (unpublished).
329. *Id.* at *1.
330. *Id.* at *1–3.
331. 91 Cal. App. 5th 127 (2023), *review denied* (July 12, 2023).
332. *Id.* at 130, 133.
333. *Id.* at 133.
334. *Id.* at 130, 134.
335. *Id.* at 134.
336. *Id.*
337. *Id.* at 137.
338. *Id.* at 135.
339. *Id.* at 138.

An insurer's duty to defend is broader than the duty to indemnify, applying to claims that potentially seek damages that are within policy coverage, even if groundless, false, or fraudulent.[340] Because facts outside the complaint and known to the insurer, if they had been pled, would have triggered coverage, the insurer had a duty to defend.[341] It does not matter that ultimately the homeowner may face no legal liability under the true fact that she was not the dogs' owner; in other words, the plaintiff's claims were frivolous.[342] That fact does not negate the duty to defend.[343] As a result, the Court of Appeal reversed the grant of summary judgment in favor of the insurer on these bad-faith claims.[344]

340. *Id.* at 136.
341. *Id.* at 137.
342. *Id.* at 138.
343. *Id.*
344. *Id.* at 139–40.

RECENT DEVELOPMENTS IN CANNABIS LAW

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I. INTRODUCTION

With a quasi-legal status, the multi-billion dollar cannabis industry faces complex, novel, and constantly changing legal issues. This Article discusses new and noteworthy developments in the cannabis industry, including federal regulations, business issues, and state laws. This Article also includes references to federal and state cases, insurance coverage, advertising requirements, and the overlapping hemp industry. Although cannabis remains an illegal Schedule I drug under the federal Controlled Substances Act, this Article addresses recent developments toward rescheduling. From 2012 to 2024, twenty-four states, including the District of Columbia, have

legalized cannabis recreationally, while forty states and the District of Columbia have legalized cannabis for medical purposes.[1]

II. STATE LEGALIZATION STATUS

Although cannabis remains illegal under federal law, numerous states have passed legislation to decriminalize cannabis and permit its use for medicinal and/or recreational purposes. As of April 24, 2023, thirty-eight states, three territories, and the District of Columbia have enacted medicinal cannabis use laws.[2] As of November 8, 2023, twenty-four states, two territories, and the District of Columbia have recreational cannabis use laws.[3] The most recent cannabis legislation has cropped up in Delaware, Kentucky, Maryland, Minnesota, Missouri, and the U.S. Virgin Islands. The following paragraphs in this section will briefly explore these new laws in these states and territory.

Delaware first "legalized" cannabis for only medicinal use in 2011 through the Delaware Medical Marijuana Act.[4] In April 2023, Delaware passed additional legislation to permit the recreational use of cannabis. Adults aged twenty-one and over may now possess, use, display, purchase, and share cannabis (without reciprocal remuneration) with other adults without a resulting penalty, such as a civil fine.[5] The law places parameters on the quantity of cannabis that may be possessed, which cannot exceed one ounce of marijuana in the form of leaf marijuana, twelve grams or less of concentrated marijuana, or cannabis products containing 750 milligrams or less of delta-9-THC.[6] The Delaware Marijuana Control Act, which also passed in 2023, creates regulations for the state's cannabis industry, including licenses for cannabis-based businesses.[7]

In March 2023, Kentucky passed cannabis legislation that creates a state medicinal cannabis program.[8] Under Kentucky's medicinal cannabis

1. *Marijuana Legality by State*, DISA Glob. Sol. Inc. (May 1, 2024), https://disa.com/marijuana-legality-by-state; *Medical Marijuana States 2023*, World Population Rev., https://worldpopulationreview.com/state-rankings/medical-marijuana-states (last visited Mar. 15, 2014).

2. *State Medical Cannabis Laws*, Nat'l Conf. of State Legislatures (June 22, 2023), https://www.ncsl.org/health/state-medical-cannabis-laws#:~:text=Non%2DMedical%2FAdult%2DUse,medical%20adult%20(recreational)%20use.

3. *Id.*

4. Delaware Medical Marijuana Act, S. 17, 146th Gen. Assemb., Reg. Sess. (Del. 2011).

5. H.B. 1, 152d Gen. Assemb. (Del. 2023).

6. *Id.*

7. Delaware Marijuana Control Act, H.B. 2, 152d Gen. Assemb., Reg. Sess. (Del. 2023).

8. S.B. 47 2023 Leg., Reg. Sess. (Ky. 2023), https://apps.legislature.ky.gov/recorddocuments/bill/23RS/sb47/bill.pdf.

program, a registered qualified patient will generally be able to possess a thirty-day supply of medical cannabis to treat certain qualifying conditions, such as cancer, epilepsy, or PTSD.[9] The law does not permit the recreational use of smoking or personal cultivation of cannabis. Moreover, the law will not take effect until January 1, 2025.[10] Until then, cannabis use for any reason in the state of Kentucky remains illegal.

However, individuals who have lawfully purchased it in other jurisdictions and have been diagnosed with a qualifying medical condition may be eligible for a pardon for the criminal offense of possessing cannabis pursuant to Governor Andy Beshear's Executive Order, which took effect on January 1, 2023.[11] This Order notes that the Team Kentucky Medical Cannabis Advisory Committee received more than 3,500 public comments and 98.6% of them were in favor of legalizing medical cannabis, including military veterans with PTSD.[12] The committee also reported that Kentuckians cross state lines to purchase this medical cannabis where it is legal to do so and then fear arrest when returning home to Kentucky.[13] As a result, the governor granted a full, complete, and conditional pardon in circumstances where the medical cannabis is lawfully purchased and certain medical documentation is produced.[14]

Maryland legalized medicinal cannabis in 2014;[15] however, in 2022, Maryland voters successfully amended the state constitution to permit the use and possession of cannabis for adult recreational use.[16] Effective July 1, 2023, state law permits those aged twenty-one and older to possess a "personal use amount" of cannabis, which by Maryland regulation is defined as "(a) [c]annabis that does not exceed 1.5 ounces; (b) [c]oncentrated cannabis that does not exceed 12 grams; (c) [c]annabis products containing no more than 750 milligrams of delta-9-tetrahydrocannabinol; or (d) [t]wo or fewer cannabis plants."[17]

Minnesota enacted its Therapeutic Research Act in 2014 to permit the medicinal use of cannabis,[18] and, similar to Maryland, Minnesota, as of

9. *Id.*
10. *Id.*
11. Office of Governor Andy Beshear, Executive Action Relating to Medicinal Cannabis, Exec. Order 2022-798 (Nov. 15, 2022).
12. *Id.*
13. *Id.*
14. *Id.*
15. H.B. 881, 2014 Leg., Reg. Sess. (Md. 2014), https://mgaleg.maryland.gov/2014rs/chapters_noln/ch_240_hb0881e.pdf.
16. H.B. 1, 2022 Leg., Reg. Sess. (Md. 2022), https://mgaleg.maryland.gov/2022RS/bills/hb/hb0001E.pdf; *see Maryland: the 20th State to Legalize Cannabis*, Marijuana Pol'y Project, https://www.mpp.org/states/maryland (last visited Sept. 24, 2023).
17. Md. Code Regs. 14.17.01.01 (2023).
18. Therapeutic Research Act, S.F. 2470, 88th Leg., Reg. Sess. (Minn. 2014), https://www.revisor.mn.gov/bills/text.php?number=SF2470&version=3&session_year=2014&session_number=0.

August 1, 2023, also permits adult recreational cannabis use.[19] In addition to medicinal use of cannabis for patients with qualifying medical conditions, adults aged twenty-one and older may now possess or transport two ounces or less of adult-use cannabis flower in a public place; two pounds or less of adult-use cannabis flower in the individual's private residence; eight grams or less of cannabis concentrate; or edible cannabis products or lower-potency hemp edibles infused with a combined total of 800 milligrams or less of THC.[20] Home cultivation of up to eight cannabis plants (with up to four mature plants) is also permitted under the enabling legislation.[21] The law also regulates lower-potency hemp edibles and hemp-derived consumer products and creates multiple licenses for the cultivation, manufacture, and retail of cannabis.[22]

Following Missouri voters' passage of the Medical Marijuana and Veterans Health Services Act in 2018 (Amendment 2)—which legalized medical cannabis as of November 2022—Missouri voters approved Amendment 3, a public ballot initiative to amend the Missouri Constitution and legalize adult-use cannabis.[23] Cannabis consumers in Missouri are allowed to legally possess up to three ounces of cannabis as of December 8, 2022.[24]

On January 18, 2023, the U.S. Virgin Islands enacted the Virgin Islands Cannabis Use Act, which authorizes the use of adult recreational cannabis.[25] This enabling legislation permits those twenty-one years of age and older to possess up to two ounces of cannabis, fourteen grams of cannabis concentrate, and one ounce of cannabis products for recreational, sacramental, and other uses.[26] Qualifying patients utilizing cannabis for medicinal purposes may possess four ounces of cannabis, one ounce of cannabis concentrate, and two ounces of cannabis products.[27] Governor Albert Bryan Jr. also issued a proclamation that allows persons convicted of simple possession of cannabis to apply for a pardon through the Virgin Islands Department of Justice.[28]

19. H.F. 100, 93rd Leg., Reg. Sess. (Minn. 2023), https://wdoc.house.leg.state.mn.us/leg/LS93/HF0100.12.pdf.

20. *Id.*

21. *Id.*

22. *Id.*

23. Mo. Const. art. 14, § 1; Michael Rosenblum & Barry Weisz, *Cannabis State-by-State Regulations*, Thompson Coburn LLP 11 (2023), https://www.thompsoncoburn.com/docs/default-source/acartha/cannabis-state-by-state_2023.pdf.

24. *Adult Use FAQs*, Mo. Dep't Health & Senior Servs., https://health.mo.gov/safety/cannabis/faqs-adultuse.php# (last visited Mar. 15, 2024).

25. Virgin Islands Cannabis Use Act, Act 8680, 34th Leg., Reg. Sess. (V.I. 2023), https://ocr.vi.gov/wp-content/uploads/2023/01/8680.pdf.

26. *Id.*

27. *Id.*

28. *Governor Bryan Signs Adult Use Cannabis Legislation Into Law*, Gov't of the U.S. Virgin Is., https://www.vi.gov/governor-bryan-signs-adult-use-cannabis-legislation-into-law (last visited Mar. 15, 2024).

III. NEW AND PROPOSED FEDERAL LAWS AND REGULATIONS

A. *SAFER Banking Act*

Although many states have authorized the manufacture and sale of cannabis, cannabis remains a federally classified Schedule I Controlled Substance, rendering the manufacture and sale of cannabis an "illicit" business under federal law.[29] The federal legal status of cannabis creates tension between state and federal cannabis laws, including banking laws. Consequently, cannabis-based businesses operating lawfully under applicable state laws are often forced to operate as cash businesses.[30] Operating with large quantities of cash on hand presents additional risk for cannabis businesses. For example, they are particularly susceptible to burglaries. Furthermore, cannabis businesses operating in cash frustrates states' efforts to tax cannabis sales.[31] Currently, financial institutions handling proceeds from an unlawful activity, such as the sale of cannabis, are subject to anti-money laundering laws and, if prosecuted, may face fines and imprisonment.

The Secure and Fair Enforcement Regulation Banking Act (SAFER Banking Act), introduced in September 2023, aims to reduce barriers to access financial services in the cannabis industry.[32] The bill does not aim to change the legal status of cannabis, but it will alleviate some risk to financial institutions desiring to provide financial services to cannabis-based businesses. If passed, the SAFER Banking Act exempts transactions involving state-sanctioned cannabis businesses from anti-money laundering laws, and proceeds from cannabis-related transactions in jurisdictions where cannabis is legal under state law will not be considered proceeds from an unlawful activity. The bill also states that a financial institution, insurer, or federal agency may not be held liable (or subject to asset forfeiture) under federal law for providing a loan, mortgage, or other financial service to a state-sanctioned cannabis business.[33]

The SAFER Banking Act would also prohibit a federal banking regulator from penalizing a depository institution for providing banking services to a cannabis-business lawfully operating in accordance with state law.[34] Thus,

29. *See Drug Scheduling*, U.S. Drug Enf't Admin., https://www.dea.gov/drug-information/drug-scheduling (last visited Mar. 15, 2024).

30. *See* Heather Morton, *Banking and Cannabis: Yearning to be Buds?*, Nat'l Conf. State Legislatures (Mar. 7, 2022), https://www.ncsl.org/state-legislatures-news/details/banking-and-cannabis-yearning-to-be-buds.

31. *See* Letter from Attorneys General in Support of SAFER Banking Act to Congressional Leaders (Sept. 26, 2023), https://www.doj.state.or.us/wp-content/uploads/2023/09/SAFER-Banking-Act-2023-State-AGs-Comment-Letter.pdf.

32. Secure and Fair Enforcement Regulation Banking Act ("SAFER" Banking Act), S. 2860, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/senate-bill/2860.

33. *Id.*

34. *See*, *e.g.*, Heidi Urness & Aaron Kouhoupt, *SAFER ACT: Marijuana May Soon Become a Bigger Deal*, Am. Bar Ass'n: Bus. L. Today (Feb, 15, 2024), https://www.americanbar.org

federal banking regulators will not be able to terminate or limit the deposit or share insurance of a depository institution solely due to that institution providing financial services to a state-sanctioned cannabis business.[35] Further, the bill prohibits federal banking regulators from requesting or requiring depository institutions to terminate deposit accounts of cannabis businesses or service providers without valid cause.[36] Valid cause includes reason to believe the depository institution is engaging in an unsafe or unsound practice; merely funding businesses in the cannabis industry is insufficient.[37]

The proposed legislation holds great promise for the cannabis industry as it aims to improve access to capital and conduct safer and more transparent cannabis transactions. This, in turn, could potentially pave the way for greater expansion of the market. The SAFER Banking Act was initially referred to the United States Senate Committee on Banking, Housing, and Urban Affairs, and, after a favorable Committee report, it was placed on the Senate Legislative calendar and is awaiting a vote.[38]

B. *Department of Health and Sciences Recommendation to Reschedule Cannabis*

In October 2022, President Biden urged the Secretary of Health and Human Services and the United States Attorney General to initiate an expedited review of cannabis's classification as a Schedule I Controlled Substance.[39] On August 29, 2023, the Department of Health and Human Services (HHS) recommended to the Drug Enforcement Administration (DEA) that cannabis be rescheduled from Schedule I to Schedule III under the Controlled Substances Act (CSA).[40]

While reclassifying cannabis from a Schedule 1 to a Schedule III substance may not have the same effect as descheduling the drug altogether (i.e., nationally legalizing cannabis), the repercussions of this shift are nonetheless significant. As a Schedule I drug, cannabis is considered a substance with a "high potential for abuse" and is considered to have no

/groups/business_law/resources/business-law-today/2024-february/safer-banking-act/#:~:text=The%20SAFER%20Banking%20Act%2C%20passed,despite%20federal%20restrictions%20on%20cannabis.

35. *Id.*

36. *Id.*

37. *Id.*

38. *All Information (Except Text) for S.2860 - Secure and Fair Enforcement Regulation Banking Act*, Congress.Gov, https://www.congress.gov/bill/118th-congress/senate-bill/2860/all-info (last visited Mar. 1, 2024).

39. White House: Briefing Room, Statement from President Biden on Marijuana Reform (Oct. 6, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform.

40. Lisa N. Sacco & Hassan Z. Sheikh, Cong. Rsch. Serv, IN12240, Department of Health and Human Services Recommendation to Reschedule Marijuana: Implications for Federal Policy (2023), https://crsreports.congress.gov/product/pdf/IN/IN12240.

accepted medical use, despite multiple states enacting legislation to the contrary.[41] If cannabis is reclassified to Schedule III, it will be considered a substance with less potential for psychological dependence and abuse, as well as acceptable for medical use.[42] Rescheduling would result in fewer restrictions on cannabis testing, which could enable further research on cannabis's medicinal value.

Moreover, rescheduling cannabis changes the way cannabis products are taxed. Currently, Internal Revenue Code 280E prohibits businesses trafficking Schedule I or II Controlled Substances from deducting the costs of selling product (such as payroll, rent, and advertising). Thus, rescheduling cannabis to Schedule III means cannabis businesses would be subject to a lower tax burden.

Finally, rescheduling cannabis results in an expansion of federal benefits currently unavailable to cannabis users (due to its Schedule I classification). For example, as a Schedule III drug, cannabis users would not be automatically precluded from federal employment, military service, or public housing based solely on their cannabis use.

C. *Federal Clemency Act Signed by President Biden*

On October 6, 2022, President Biden issued a proclamation pursuant to the grant of authority in Article II, Section 2, of the Constitution of the United States, wherein he granted a "full, complete, and unconditional pardon" to U.S. citizens and lawful permanent residents for the simple possession of cannabis.[43] The scope of the pardon is very limited and includes only simple possession of cannabis subject to a charge or conviction in a federal court's jurisdiction or in D.C.[44] The pardon does not extend to state offenses.[45] The United States Department of Justice released an application for eligible individuals to apply for pardons pursuant to President Biden's proclamation.[46] The need for the proclamation is illustrative of inequities that are caused by the current legal status of cannabis as a federally illegal and dangerous substance, while many states decriminalize and authorize the use of cannabis for therapeutic and recreational purposes.

41. 21 U.S.C. § 812.
42. *Id.*
43. White House Press Release, A Proclamation on Granting Pardon for the Offense of Simple Possession of Marijuana (Oct. 6, 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/06/granting-pardon-for-the-offense-of-simple-possession-of-marijuana.
44. *Id.*
45. *Id.*
46. Press Release, U.S. Dep't of Just. Off. of Pub. Affs., Justice Department Announces Application Form for Marijuana Pardon Certificates (Mar. 3, 2023),https://www.justice.gov/opa/pr/justice-department-announces-application-form-marijuana-pardon-certificates.

D. *The Medical Marijuana and Cannabidiol Research Expansion Act Signed*

President Biden signed into law the Medical Marijuana and Cannabidiol Research Expansion Act on December 2, 2022.[47] Research on cannabis has been extremely limited due to its classification as a Schedule I Controlled Substance. The National Center for the Development of Natural Products at the University of Mississippi has been the exclusive supplier of cannabis for research purposes in the United States, producing cannabis solely for the National Institute on Drug Abuse.[48] The Act expands cultivation of cannabis for research purposes by permitting registered entities (including institutions of higher education, practitioners, and manufacturers) to manufacture, distribute, dispense, or possess cannabis or cannabidiol (CBD) for the purposes of medical research. The Act also directs the Department of Health and Human Resources to evaluate the health benefits and risks of cannabis and directs the Drug Enforcement Agency to approve applications of manufacturers of FDA-approved drugs derived from cannabis.[49] The Act also authorizes physicians to discuss the potential harms and benefits of cannabis and its derivatives (including CBD) with patients. It also requires HHS, in coordination with the National Institutes of Health and relevant federal agencies, to report on the therapeutic potential of cannabis for various conditions such as epilepsy, the impact on adolescent brains, and the ability to operate a motor vehicle.[50] The Act simplifies a previously complicated research process in favor of a more streamlined research approach, which will almost certainly encourage more cannabis research.

IV. PARAPHERNALIA AND HEMP

A. *Importation of Cannabis Paraphernalia Allowed in the United States*

The case of *Eteros Technologies USA, Inc. v. United States* marked a significant legal milestone as it was the first of its kind.[51] This ruling sets an important precedent for international trade in cannabis paraphernalia by recognizing that states' authorization of persons to manufacture, distribute, or possess cannabis paraphernalia triggers the "authorization exemption."[52] In turn,

47. Medical Marijuana and Cannabidiol Research Expansion Act, H.R. 8454, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/house-bill/8454/text.

48. DEA Headquarters Division – Public Information Office, *DEA Continues to Prioritize Efforts to Expand Access to Marijuana for Research in the United States*, U.S. Drug Enf't Admin. (May 14, 2021), https://www.dea.gov/stories/2021/2021-05/2021-05-14/dea-continues-prioritize-efforts-expand-access-marijuana-research.

49. Medical Marijuana and Cannabidiol Research Expansion Act, H.R. 8454, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/house-bill/8454/text.

50. *Id.*

51. Eteros Techs. USA, Inc. v. United States, 592 F. Supp. 3d 1313 (Ct. Int'l Trade 2022).

52. *See id.*

this allows the importation of such products into the United States.[53] The decision essentially directs United States Customs and Border Protection (CBP) to permit the import of cannabis paraphernalia into states where these items are legalized for manufacturing, distribution, and possession.[54] Given the booming $38.8 billion cannabis market in 2023 and the substantial capital expenditures by multi-state operators—accounting for up to thirty percent of revenue—this ruling could significantly impact billions of dollars of cannabis equipment imports annually.[55]

In *Eteros*, the United States Court of International Trade addressed whether a Washington State company, Eteros Technologies USA (Eteros), could import drug paraphernalia, specifically cannabis-trimming equipment.[56] The CSA prohibits importing or exporting such paraphernalia but includes an exemption for those authorized by local, state, or federal law to possess, manufacture, or distribute these items.[57] This law means that CBP is instructed to seize any paraphernalia that it finds. However, the CSA also states that "[t]his section shall not apply to any person authorized by local, *state*, or federal law to manufacture, possess, or distribute such items."[58] The court found that "Eteros is 'authorized' under 21 U.S.C. § 863(f)(1) and thereby exempted in Washington State from subsection 863(a)'s prohibition on importing drug paraphernalia."[59] As a result, CBP was not justified in seizing or forfeiting Eteros's trimmer.

The *Eteros* decision included an analysis of the United States Supreme Court case *Murphy v. NCAA*, where the Supreme Court determined that New Jersey's sports-betting law "authorized" sports gambling, despite contradictory federal law.[60] As a result, the court in *Eteros* determined that Washington law did authorize the importation of the trimmer and instructed the Port of Blain, Washington to release the trimmer.[61] In essence, this case suggests that importers of cannabis-related paraphernalia are exempt from CBP's otherwise existing authority to seize drug paraphernalia as long as the final destination is to a state that has a legal can-

53. Melissa Schiller, *Eteros Wins Court Case in Favor of Excluding "Marijuana-Related Drug Paraphernalia" Pursuant to the Authorization Exemption of the Controlled Substances Act*, Cannabis Bus. Times (Oct. 5, 2022), https://www.cannabisbusinesstimes.com/news/eteros-wins-court-case-authorization-exemption-controlled-substances-act.

54. *Id.*

55. *Id.*

56. Daniel Shortt, *Cannabis Paraphernalia: Custom and Border Protection Loses Case*, McGlinchey: Green Leaf Brief (Oct. 3, 2022), https://www.greenleafbrief.com/2022/10/cannabis-paraphernalia-custom-and-border-protection-loses-case.

57. Controlled Substances Act of 1970, 21 U.S.C. § 863.

58. *Id.* § 863(f)(1) (emphasis added).

59. Eteros Techs. USA, Inc. v. United States, 592 F. Supp. 3d 1313, 1320 (U.S. Ct. Int'l Trade 2022).

60. Murphy v. NCAA, 584 U.S. 453, 480 (2018).

61. Shortt, *supra* note 56.

nabis market. However, at this point, *Eteros* does not necessarily establish a firm precedent, as the United States government is likely to appeal the ruling to the United States Court of Appeals for the Federal Circuit.[62]

B. *Cannabis in Your Luggage Could Be Criminal*

Instances of individuals traveling by plane with cannabis have drawn significant media attention this year. For example, American basketball star Brittney Griner possessed vape cartridges containing hashish oil in her luggage at the airport, which resulted in a criminal case and detainment in Russia.[63] Griner received a sentence of nine years in prison, and she served nearly ten months before she was released in a prisoner swap.[64] Similarly, supermodel Gigi Hadid was arrested for alleged cannabis possession in the Cayman Islands after CBP discovered alleged cannabis and paraphernalia in her luggage.[65] Although she was released, others like Raquel Rivera, the defendant in the *United States v. Rivera* case, faced severe consequences.[66]

CBP officers at the Saint Thomas airport found cannabis in Rivera's suitcases during a search.[67] The exact THC concentration was not determined, a crucial factor since the 2018 Agricultural Improvement Act (the 2018 Farm Bill) amended the CSA to exclude hemp from the definition of marijuana, meaning hemp with a THC concentration of 0.3% or less is no longer a controlled substance.[68]

Ms. Rivera contested the government's case, asserting a lack of evidence proving the THC content exceeded 0.3%, rendering the substance illegal under the CSA.[69] Ms. Rivera's case introduced no evidence at trial that the cannabis was 0.3% or less THC, the permissible range outlined in the CSA.[70] Despite her conviction at the trial level, Ms. Rivera appealed, arguing that the government failed to demonstrate the THC content surpassed the legal limit.[71] However, the Third Circuit upheld the conviction, noting

62. *Id.*

63. Michael Crowley & Jonathan Abrams, *Brittney Griner, Star W.N.B.A. Center, Is Detained in Russia*, N.Y. Times: Sports (Mar. 5, 2022), https://www.nytimes.com/2022/03/05/sports/basketball/russia-brittney-griner.html.

64. Tania Ganguli et al., *What We Know About Brittney Griner's Release from Russia*, N.Y. Times (Dec. 17, 2022), https://www.nytimes.com/article/brittney-griner-russia.html.

65. Caitlin O'Kane, *Gigi Hadid Arrested in Cayman Islands for Possession of Marijuana*, CBS News (July 28, 2023 9:04 PM), https://www.cbsnews.com/news/gigi-hadid-arrested-in-cayman-islands-for-possession-of-marijuana.

66. Douglas W. Charnas et al., *Hemp in Your Suitcase Can Get You Convicted of Trafficking in Marijuana*, McGlinchey: Green Leaf Brief (July 21, 2023), https://www.greenleafbrief.com/2023/07/hemp-in-your-suitcase-can-get-you-convicted-of-trafficking-in-marijuana.

67. *Id.*

68. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (codified in scattered sections of 7 U.S.C. & 16 U.S.C.).

69. United States v. Rivera, 74 F.4th 134, 137 (3d Cir. 2023).

70. *Id.*

71. *Id.* at 136.

that, under the law, the burden falls on the defendant to introduce evidence showing the cannabis was 0.3% or less THC (akin to an affirmative defense of self-defense in some states).[72] The appeals court examined the 2018 Farm Bill's amendments to the CSA and congressional intent when enacting it, focusing on 21 U.S.C. § 885(a)(1), which provides that the government does not need to "negative any exemption or exception set forth" in the subchapter of the CSA that defines marijuana.[73] Through this same section, Congress placed "the burden of going forward with evidence" of this nature on "the person claiming [its] benefit."[74] This case establishes that, in trafficking cases involving cannabis, the burden of proving exemption from the marijuana classification lies with the defense rather than the prosecution.

C. *Cannabis Sativa: Is THCA Legal?*

It is evident that Congress intended to regulate the distinction between legal hemp and cannabis markets in the United States. Congressional, DEA,[75] and federal court[76] interpretations of relevant federal laws emphasize that the sole statutory measure for differentiating controlled cannabis from legal hemp is its delta-9 THC concentration level.[77]

The 2018 Farm Bill defines hemp as "the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 [THC] concentration of not more than 0.3% on a dry

72. *Id.* at 141.

73. *Id.* at 140; 21 U.S.C. § 885(a)(1).

74. *Rivera*, 74 F.4th at 138.

75. Heidi Urness, *Is THCA Legal? The State Line Is the Bottom Line*, McGlinchey: Green Leaf Brief n. 3 (Oct. 16, 2023), https://www.greenleafbrief.com/2023/10/is-thca-legal-the-state-line-is-the-bottom-line ("On June 24, 2021, Sean Mitchell, Chief of Intergovernmental Affairs for the DEA stated, 'I'll be very, very deliberate and clear. At this time, I repeat again, at this time, per the Farm Bill, the only thing that is a controlled substance is delta-9 THC greater than 0.3% on a dry-weight basis.' 'Town Hall with USDA and DEA' conducted by the Florida Department of Agriculture and Consumer Services (FLDACS) on June 24, 2021.").

76. Daniel Shortt, *Federal Court Rules Hemp-Derived Delta-8 THC is Lawful*, McGlinchey: Green Leaf Brief (May 25, 2022), https://www.greenleafbrief.com/2022/05/federal-court-rules-hemp-derived-delta-8-thc-is-lawful ("On May 19, 2022, the United States Court of Appeals for the Ninth Circuit ruled in a landmark case regarding the legality of delta-8 tetrahydrocannabinol (delta-8 THC). The court held, in *AK Futures LLC v. Boyd Street Distro, LLC*, that the plain and unambiguous text of the 2018 Agricultural Improvement Act (2018 Farm Bill) compelled the court to the conclusion that e-cigarette and vaping products containing delta-8 THC are lawful.").

77. 7 U.S.C. § 1639o(1); Shortt, *supra* note 76 (noting that federal courts interpreting relevant federal laws have determined that "[i]mportantly, the only statutory metric for distinguishing controlled marijuana from legal hemp is the delta-9 THC concentration level. In addition, the definition extends beyond just the plant to all derivatives, extracts, [and] cannabinoids.").

weight basis."[78] Tetrahydrocannabinolic acid (THCA) is a hemp-derived cannabinoid, which falls under a federal law "loophole," excluded from the Controlled Substances Act's definition of "marijuana" under the 2018 Farm Bill, as it contains 0.3% or less THC.[79] This quasi-legal status means selling THCA could be costly, if not criminal.[80] Consequently, harvested cannabis containing less than 0.3% THC is classified as hemp, not a federally controlled substance, irrespective of THCA presence. However, THCA is the precursor to THC, found in the flowers and leaves of the cannabis plant and converted into psychoactive THC when exposed to heat via a process called "decarboxylation."[81] THCA also decarboxylates to form THC during storage and fermentation.[82] It is crucial for cultivated hemp to maintain a total THC concentration (THCA + THC) of 0.3% or lower to meet regulatory standards before harvest."[83] Regardless of the black letter of the law, THCA is accessible online and in physical stores. This is true regardless of whether the state defines hemp by its delta-9 THC or total THC content, or if the state expressly prohibits inhalable hemp products. In such cases, the relevant issue is one of enforcement.[84]

V. LABOR AND EMPLOYMENT LAW

A. *Applicant/Employee Protections for Off-Duty Use and Prior Convictions*

As more states legalize medical and recreational cannabis use, there is a trend to include explicit employee protections against discrimination related to off-duty or pre-employment cannabis use. These protections may preclude employers from (1) discriminating based on an employee's

78. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (codified in scattered sections of 7 U.S.C. & 16 U.S.C.).

79. *Id.*

80. *Id.*

81. *See* Guillermo Moreno-Sanz, *Can You Pass the Acid Test? Critical Review and Novel Therapeutic Perspectives of Delta-9 Tetrahydrocannabinolic Acid A*, 1 Cannabis and Cannabinoid Rsch. 124 (2016), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5549534.

82. *Id.* at 124.

83. Heidi Urness, *Is THCA Legal? The State Line Is the Bottom Line*, McGlinchey: Green Leaf Brief No. 3 (Oct. 16, 2023), https://www.greenleafbrief.com/2023/10/is-thca-legal-the-state-line-is-the-bottom-line ("THCA *was* contemplated by Congress and expressly incorporated into the 2018 Farm Bill through hemp testing requirements. This distinguishes THCA from other alternative cannabinoids such as delta-8, delta-10, or CBD because those cannabinoids are not considered in testing. In June 2023, the DEA acknowledged THCA when expanding the USDA-required post-decarboxylation testing requirement, writing, 'Congress has directed that, when determining whether a substance constitutes hemp, delta-9 THC concentration is to be tested "using post-decarboxylation or other similarly reliable methods." 7 USC § 1639p(a)(2)(A)(ii); 7 USC § 1639q(a)(2)(B).' Both of these cited code sections apply to the 'production' – that is, the growing – of hemp, not hemp that has already been harvested or products containing hemp derivatives.").

84. *Id.*

use of cannabis off the job and away from the workplace; and (2) drug testing of job applicants or current employees for non-psychoactive cannabis metabolites, which are substances that can stay in the body for weeks after cannabis use but do not indicate whether an employee's brain function is impaired at the time of testing. For example, California provided these employee protections with the recently passed Assembly Bill 2188,[85] an amendment to the California Fair Employment and Housing Act, which will go into effect January 1, 2024. The District of Columbia also provides similar employment protections in the D.C. Marijuana Employment Protections Amendment Act of 2022 (MEPAA),[86] which went into effect October 22, 2023, and requires employers to provide annual notice to all employees of their rights under the MEPAA.

Some states also implement so-called "Ban-the-Box" laws, which prohibit employers from requiring job applicants to disclose information regarding cannabis arrests, criminal charges, or convictions.[87] Proponents of "Ban-the-Box" legislation argue that self-disclosure or background checks revealing cannabis possession charges and convictions discriminate by disproportionately affecting certain protected classes and communities of color. California extended "Ban-the-Box" legislation to include conditional offers of employment.[88] Many state statutes expanding employee protections for off-duty cannabis use also include exceptions for so-called "safety sensitive" positions, which are discussed further below.

B. *"Safety Sensitive" Exceptions*

When adopting laws prohibiting discrimination of off-duty cannabis use, states often include "safety sensitive" exceptions for jobs with inherent health and safety risks to the employee or others.[89] Often "safety sensitive"

85. Assemb. B. 2188, 2022-2023 Leg., Reg. Sess. (Cal. 2022); Cal. Gov. Code § 12954 (2023).

86. D.C. Code § 32-951.01 et seq. (2024).

87. As of 2024, several states and cities in the United States have implemented "Ban the Box" laws. While the specifics vary, some jurisdictions include California, Colorado, Connecticut, Hawaii, and Maryland. *See, e.g.*, Nat'l Empl. L. Project, https://www.nelp.org/campaign/ensuring-fair-chance-to-work (last visited Mar. 15, 2024).

88. See discussion *infra* note 89.

89. Definitions of "safety sensitive" in state law include the following: Okla. Stat. tit. 63, § 427.8(K)(1) (2019) ("any job that includes tasks or duties that the employer reasonably believes could affect the safety and health of the employee performing the task"); N.M. Stat. Ann. § 26-2B-3(Q) (2021) ("a position in which performance by a person under the influence of drugs or alcohol would constitute an immediate or direct threat of injury or death to that person or another"); 35 Pa. Stat. Ann. § 10231.510 (2022) (medical marijuana patients prohibited from performing employment duties in small, confined spaces or at great heights and can be prohibited by employer "from performing any duty which could result in a public health or safety risk while under the influence of medical marijuana"); Iowa Code § 730.5(1)(j) (2023) ("a job wherein an accident could cause loss of human life, serious bodily injury, or significant property or environmental damage, including a job with duties that include immediate

jobs may involve potentially dangerous tasks, such as administering medical care, handling firearms, operating heavy machinery, or working with hazardous materials. In states with a "safety sensitive" exception, employers may implement zero tolerance drug policies for "safety sensitive" positions that prohibit employees' use of cannabis at any time, including all off-duty medical or recreational use.

As with many state-specific cannabis laws, not all "safety sensitive" carveouts are identical. Some statutes define specific job duties or positions as inherently dangerous and "safety sensitive," while other statutes allow employers discretion to designate positions as "safety sensitive," regardless of the specific tasks of the position. The Western District of Arkansas examined this distinction in *Prinsen v. Domtar A.W., LLC*.[90] In *Prinsen*, the district court examined the Arkansas Medical Marijuana Amendment of 2016 (AMMA), which expressly included in the definition of "safety sensitive" any position "so designated by an employer."[91] The employer in *Prinsen*, a pulp and paper mill, adopted a drug-free workplace policy that listed all mill jobs as "safety sensitive" regardless of specific tasks.[92] Two qualified cannabis patient employees who failed drug tests and lost their jobs challenged their discharge on the basis that their jobs were not truly "safety sensitive" as contemplated under AMMA.[93] The court in *Prinsen* rejected the employees' argument, ruling that AMMA explicitly permits an employer to designate any position as "safety-sensitive," even through a blanket categorization for all positions at a given location. Not all states or municipalities adopted "safety-sensitive" exceptions for off-duty cannabis use discrimination statutes, and, of those that do, not all clearly define the term "safety sensitive."[94] For states, like Arkansas, where statutes provide employers with discretion to designate positions as "safety sensitive," courts may be unlikely to second guess an employer's determination as to "safety sensitive" positions.

C. *Contradictory Federal Workplace Laws Create (Reefer) Madness*

In June 2022, the Occupational Safety and Health Administration (OSHA) cited ParmaCann Inc. for potential workplace hazards at a greenhouse

supervision of a person in a job that meets the requirement of this paragraph"); D.C. Code § 32-951.01 (2024) (safety sensitive jobs designated by employer in which it is "reasonably foreseeable" that employee performing the job under the influence of drugs or alcohol "would likely cause actual, immediate, and serious bodily injury or loss of life to self or others").

90. Prinsen v. Domtar A.W., LLC, No. 4:22-CV-4076, 2023 WL 1425333 (W.D. Ark. Jan. 31, 2023).

91. *Id.* at *3; *see also* Ark. Const. amend. XCVIII, § 2(25)(B) (2016).

92. *Prinsen*, 2023 WL 1425333, at *1.

93. *Id.*

94. *Id.* at *5–6.

facility.[95] It also issued a hazard letter to Trulieve, Inc. after a Trulieve employee, responsible for grinding and handling cannabis, died due to asthma-related complications following exposure to "occupational quantities of whole and ground cannabis."[96] OSHA's regulatory actions followed the federal courts' and agencies' awkward trend that ignores the illegality of cannabis in some federal law applications while pointing to its illegality in others to deprive cannabis users and business from accessing other federal law protections and benefits of federal law, such as federal workplace accommodations for disabilities[97] and bankruptcy protections and processes.[98]

Despite cannabis remaining classified as an illegal substance under federal law, cannabis and cannabis-ancillary businesses cannot hide behind federal illegality to shield against federal employment statutes and regulatory actions aimed at protecting employees. Particularly, cannabis businesses may still be required to adhere to discrimination statutes (Title VII of the Civil Rights Act of 1964), provide wage and hour protections (Fair Labor Standards Act), and ensure workplace safety regulations are followed (OSHA). In contrast, federal courts routinely point to the illegality of cannabis under the CSA to rule that Titles I and II of the Americans with Disabilities Act (ADA) provide no employee protection against discrimination for medical cannabis use, even when it is state-authorized, physician-supervised, and used to treat a recognized disability under the ADA. Further muddying the waters, federal courts may require cannabis businesses to comply with Title III of the ADA, which prohibits discrimination in public accommodations on the basis of disabilities.[99]

95. *Employers Subject to Workplace Safety Laws Despite Marijuana's Illegal Status*, McGlinchey (Mar. 17, 2023), https://www.mcglinchey.com/insights/employers-subject-to-workplace-safety-laws-despite-marijuanas-illegal-status.

96. Letter from Mary E. Hoye, Area Dir., U.S. Dep't of Lab. OSHA, to Mitchell Osterhout, EH&S Coordinator, Trulieve Holyoke Holdings LLC (June 30, 2022), https://aboutblaw.com/5sw.

97. *See e.g.*, Zarazua v. Ricketts, No. 8:17CV318, 2017 WL 6503395 (D. Neb. Oct. 2, 2017) (no cognizable claim under the ADA for denial of access to medical marijuana).

98. *See In re* Great Lakes Cultivation, LLC, No. 21-12775, 2022 WL 3569586 (E.D. Mich. Aug. 18, 2022) (federal bankruptcy protections and processes are not available for assets that are used for, or generated by, a business prohibited under the CSA).

99. *See* Smith v. 116 S Mkt. LLC, 831 F. App'x 355 (9th Cir. 2020) (unpublished) (affirming ruling that defendant violated Title III of the ADA by failing to provide ADA-compliant parking spaces and routes to its property, which was leased to a marijuana dispensary).

VI. ADVERTISING, BRANDING, TRADEMARKS, AND LICENSING

A. *Social Media Advertising: Twitter (X) Allows Cannabis Advertising*

In the first quarter of 2023, the social media site X (formerly Twitter) became the first social media website to permit U.S. cannabis businesses to advertise their goods and services on its platform. Prior to this policy change, X only allowed the advertising of CBD products. Now, X permits the advertising of products containing more than 0.3% THC, CBD, and other cannabis-related goods and services.[100] This authorization presents a potentially lucrative opportunity for cannabis business owners, who can now access a larger target audience online. Cannabis businesses influencers can now monetize their content while promoting their products.

B. *Ban on Cannabis, CBD, and Hemp SMS Communications*

In the Federal Communications Committee's (FCC) effort to combat illegal, unwanted, spam, and scam text messages, many cannabis, hemp, and CBD businesses have been prohibited from sending SMS/MMS text messages to their customers. In 2022, the FCC estimated that consumers lost over $20 billion from illegal text messages (text messaging scams).[101] The influx of these text messaging scams—and the great financial loss to consumers caused by these scams—triggered a requirement for text message providers to register all ten-digit-long code phone numbers (10DLC) with the Campaign Registry.[102]

Likely because of this FCC rule, Twilio, a consumer engagement platform used by over 300,000 businesses across the globe,[103] implemented a new policy banning cannabis, hemp, and CBD businesses from using its platform to send text messages. Twilio's Help Center now explicitly states:

> Cannabis, CBD, Kratom, or drug paraphernalia product businesses are prohibited from utilizing SMS/MMS messaging on Twilio in the US and Canada, regardless of content. These restrictions apply regardless of the federal or state legality. All use cases for these are disallowed from sending SMS whether

100. *See* Alexa Alianiello & Rohan Routroy, *Enabling More Brands to Connect with the Cannabis Conversation*, Twitter: Business, https://business.twitter.com/en/blog/twitter-cannabis-ads-policy-changes.html (last visited Mar. 15, 2024).

101. *See* Targeting and Eliminating Unlawful Text Messages, 88 Fed. Reg. 21,697 (Apr. 11, 2023), https://www.federalregister.gov/documents/2023/04/11/2023-07405/targeting-and-eliminating-unlawful-text-messages.

102. The Campaign Registry is the platform that registers all 10DLC to verify whether the numbers are sending out illegal or unwanted text messages.

103. *See What Is Twilio? An Introduction to the Leading Customer Engagement Platform*, Twilio: Resource Center, https://www.twilio.com/en-us/resource-center/what-is-twilio-an-introduction-to-the-leading-customer-engagement-platform (last visited Mar. 15, 2024).

> it contains cannabis content or not, even for [two factor authentication] purposes it is not permissible for such entities.[104]

Text messaging as a marketing channel enables businesses to target and communicate with customers effectively and efficiently, which can lead to an increase in revenue via marketing and sales promotions. The FCC's policy change directly impacts revenue potential for cannabis and hemp businesses.

The FCC makes it clear that they will prohibit all types of illegal text messages.[105] The Cellular Telecommunications Industry Association (CTIA), an organization that advocates for legislative and regulatory policies for the wireless industry, is a leader in creating best practices for the cell phone wireless industry. According to its most recent publication on industry best practices, consumer messaging platforms like Twilio are advised to use reasonable efforts to prevent and combat unwanted or unlawful messaging traffic, including spam and unlawful spoofing.[106] Furthermore, CTIA recommends that message senders, such as Twilio, proactively utilize tools to monitor and prevent unwanted messages and content—which may include cannabis-related content.[107]

Hemp, grown in accordance with the 2018 Farm Bill, is no longer considered a Schedule I Controlled Substance. Despite its federally legal status, Twilio made it clear that even hemp businesses are prohibited from using their platform for business communications. Twilio's blanket restriction on hemp, cannabis, and CBD businesses imposes more stringent limitations than the existing state and federal legal frameworks. Recently, the National Cannabis Industry Association (NCIA) issued a letter calling the text messaging ban a "[c]rackdown [i]mpacting the [c]annabis [i]ndustry."[108] Furthermore, Twilio's restriction has fundamentally disrupted the way numerous cannabis, CBD, and hemp businesses conduct business.

The NCIA is urging fellow impacted stakeholders to contact their organization if they are interested in "fight[ing] this attack on the legal cannabis

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104. *Forbidden Categories in the US and Canada (Short Code, Toll-Free, and Long Code)*, Twilio: Help Center (Aug. 21, 2023), https://support.twilio.com/hc/en-us/articles/360045004974-Forbidden-Message-Categories-in-the-US-and-Canada-Short-Code-Toll-Free-and-Long-Code-.

105. *See* Targeting and Eliminating Unlawful Text Messages, 88 Fed. Reg. 21,697 (Apr. 11, 2023), https://www.federalregister.gov/documents/2023/04/11/2023-07405/targeting-and-eliminating-unlawful-text-messages.

106. *See Twilio Messaging Policy*, Twilio (Feb. 27, 2024), https://www.twilio.com/en-us/legal/messaging-policy.

107. *See generally Messaging Principles and Best Practices*, Cellular Telecomm. Indus. Ass'n (May 2023), https://api.ctia.org/wp-content/uploads/2023/05/230523-CTIA-Messaging-Principles-and-Best-Practices-FINAL.pdf.

108. Rachel Kurtz-McAlaine, *Text Messaging (SMS) Crackdown Impacting the Cannabis Industry*, Nat'l Cannabis Indus. Ass'n (May 11, 2021), https://thecannabisindustry.org/text-messaging-sms-crackdown-impacting-the-cannabis-industry.

industry."[109] As of the date of this writing, there are no pending lawsuits or legislation against Twilio or other text messaging service providers for banning cannabis, CBD, and hemp business communications.

C. *Cannabis and CBD Trademarks*

Although there are some exceptions, it is legal for cannabis and/or CBD brands to obtain certain trademark protections, despite cannabis's illegal status under federal law. The United States Patent & Trademark Office (USPTO) is clear that the use of a mark in commerce must be lawful under federal law to be the basis for federal registration.[110] Thus, the USPTO refuses to register marks for goods and/or services that show any violation of federal law, regardless of the legality of the activities under state law.[111] As a result, cannabis flower, isolate, distillate, tincture, and other cannabis products do not qualify for federal trademark protection. However, cannabis brands can meet the qualifications for federal trademark protection by creating ancillary products and services for their businesses (such as clothing, publications, podcasts, events, machinery, etc.). Because these products and services do not contain cannabis, they are eligible for federal trademark protection.

In states where cannabis and CBD are legalized, businesses can obtain state trademark protection for their plant products. State trademarks are typically considered to provide limited protection compared to federal trademarks, as they only safeguard the mark (i.e., brand name) within the geographical boundaries of that specific state. Despite this limitation, state trademark protection proves effective for cannabis businesses, given the nature of the state legalization framework.

VII. FINANCE: BANKRUPTCY, INSURANCE COVERAGE, AND TAX UPDATES

A. *Conflicting Outcomes for Bankruptcy Cases Pave the Way for Possible Bankruptcy Relief*

The United States Bankruptcy Court for the District of Massachusetts denied confirmation of a cannabis company employee's Chapter 13 plan and dismissed his bankruptcy case.[112] In *In re Blumsack*, employee Scott H. Blumsack is a general manager licensed in Massachusetts to work for

109. *Id.*

110. Exam Guide 1-19: Examination of Marks for Cannabis and Cannabis-Related Goods and Services After Enactment of the 2018 Farm Bill, U.S. Pat. & Trademark Off. (May 2, 2019), https://www.uspto.gov/sites/default/files/documents/Exam%20Guide%201-19.pdf.

111. *Id.*

112. *In re* Blumsack, 647 B.R. 584 (Bankr. D. Mass. 2023).

Society Cannabis Co., a Massachusetts-licensed retailer, wholesaler, and producer of cannabis products.[113] In his role, Blumsack oversees sixteen full-time employees and directly serves cannabis products to customers, earns a $75,000 annual salary, and does not have equity ownership in Society Cannabis Co.[114] Despite operating legally in Massachusetts and his mere employee status, the court found that Blumsack violated federal statutes criminalizing controlled substances and held that he objectively lacked good faith by reasoning it would be an abuse of process to confirm Blumsack's Chapter 13 plan.[115] Interestingly, the court still found bad faith, despite Blumsack's proposal to fund his bankruptcy plan using his wife's retirement funds, because he intend to continue working in the cannabis industry, which was in further violation of federal law.[116] As a result, the court held that Blumsack could not satisfy the good faith requirement under §§ 1325(a)(3) and (a)(7) of the Bankruptcy Code and also found "cause" for dismissal under § 1307(c)(5) of the Bankruptcy Code.[117]

In contrast, the court in a more recent Chapter 11 bankruptcy case in California—*In re The Hacienda Company, LLC*—took a different stance. Despite finding a cannabis industry debtor's post-petition violation of federal drug laws, the court rejected a motion to dismiss the bankruptcy filing.[118] The *Hacienda* court's refusal to dismiss and instead confirm the debtor's Chapter 11 plan represents a departure from a majority of bankruptcy court decisions, which have typically dismissed bankruptcy cases based on perceived violations of federal drug laws alone.[119]

In this case, the debtor was in the business of wholesale manufacturing, packaging, and distribution of cannabis products to dispensaries in California under the brand name Lowell Herb Co.[120] The debtor ceased its operations and transferred its assets to Lowell Farms, Inc. (Lowell Farms), a Canadian entity, whose sole business was cannabis growth and sales. In return, the debtor received approximately 9.4% of Lowell Farms' shares,

113. *Id.*

114. Kyle Arendsen, *Bankruptcy Court Dismisses Cannabis Company Employee's Chapter 13 Case*, Squire Patton Boggs: Restructuring Glob. View News (Feb. 17, 2023), https://www.restructuring-globalview.com/2023/02/bankruptcy-court-dismisses-cannabis-company-employees-chapter-13-case.

115. *Id.*

116. *Id.*

117. *Id.*

118. Schuyler G. Carroll et al., *Bankruptcy Court Refuses to Dismiss Marijuana Industry Debtor Chapter 11 Case*, Reuters: Westlaw Today (Oct. 11, 2023, 11:27 AM), https://www.reuters.com/legal/litigation/bankruptcy-court-refuses-dismiss-marijuana-industry-debtor-chapter-11-case-2023-10-11.

119. *See, e.g.*, *In re* Way to Grow, Inc., 610 B.R. 338 (D. Colo. 2019); Burton v. Maney (*In re* Burton), 610 B.R. 633 (B.A.P. 9th Cir. 2020).

120. Carroll, *supra* note 118.

valued at approximately $35 million at the time of sale.[121] The court's refusal to dismiss was based on several grounds: it found no ongoing violation of federal law, noted that mere ownership of stock intending to pay creditors did not constitute a connection with cannabis and highlighted that a violation of the CSA alone might not warrant dismissal.[122] Nevertheless, the court—in a footnote—kept the door open to revisiting its decision, observing: "Perhaps, if all the facts and circumstances were known to this Bankruptcy Court, and if this Bankruptcy Court were to engage in independent research beyond the authorities cited by the parties, Debtor's proposed liquidation actually would be a violation of the CSA or some other criminal statute."[123] This case signifies a potential avenue for bankruptcy relief in the cannabis industry.

B. *Insurance Coverage Availability When a Person Is Under the Influence of Cannabis*

A recent decision from the Court of Appeals of Ohio, *Grange Insurance Co. v. Cleveland*, addressed the novel issue of whether insurance companies should be permitted to exclude coverage for individuals driving under the influence of cannabis when the state prohibits insurance companies from denying coverage for accidents caused by alcohol.[124] While this ruling may have stirred more uncertainties than resolutions, it serves as a cautionary tale for all drivers and businesses that employ drivers, irrespective of personal cannabis use.[125]

In effect, the decision implies that in Ohio—and in the fifteen other states (plus D.C.) that also prohibit Alcohol Exclusion Laws—insurance companies must cover claims from accidents caused by drunk drivers, but the same laws do not require them to cover claims resulting from "drugged" drivers—i.e., drivers under the influence of cannabis.[126] Notably, medical cannabis use was not at issue in this case; however, the Ohio Court of Appeals cited three reasons justifying the differential treatment between cannabis and alcohol use: (1) cannabis remains illegal under federal law; (2) Ohio had only legalized the use of cannabis for medicinal purposes (at the time of the case); and (3) the absence of legal precedence extending policies beyond the state's stance on alcohol exclusions to include cannabis.[127]

121. *Id.*
122. *Id.*
123. *In re* Hacienda Co., 647 B.R. 748 (Bankr. C.D. Cal. 2023).
124. Grange Ins. Co. v. Cleveland, 203 N.E.3d 6, 9 (Ohio Ct. App 2022).
125. Lauren Ybarra et al., *Ohio Appellate Decision Tackles Excluded Coverage for Marijuana Use*, McGlinchey: Green Leaf Brief (Apr. 18, 2023), https://www.greenleafbrief.com/2023/04/ohio-appellate-decision-tackles-excluded-coverage-for-marijuana-use.
126. *Id.*
127. *Id.*

C. *Tax Win in Oregon Reminds Cannabis Businesses to Properly Classify Expenses*

IRC 280E, a tax code impacting the cannabis industry, prohibits cannabis businesses from deducting most operational expenses due to the federal classification of marijuana as a Schedule I Controlled Substance. Recent cases, like *Lessey v. Department of Revenue*, highlight how misallocation of expenses affects taxes in this industry.[128] In that case, the court differentiated between costs that qualify as Cost of Goods Sold (COGS) and those considered general business deductions, or even personal expenses.[129] The Lesseys made the common mistake of lumping all of the expenses they sought to exclude from their farm's gross receipts in their 2016 taxable year into the COGS category, totaling $57,654.[130] The court examined the various claimed expenses and determined which ones should be classified as COGS (e.g., air condition units were capital improvements to the farm building rather than product costs and thereby not included as COGS), and which ones should be classified as general administrative business deductions (e.g., an office rental), or, in some cases, personal expenses (e.g., internet service).[131] Neglecting these tax intricacies often hampers cannabis businesses, affecting profitability and compliance with both federal and state laws.

128. Lessey v. Dep't of Revenue, No. TC-MD 210265G, 2022 WL 17336203 (Or. T.C. Nov. 29, 2022).

129. Douglas W. Charnas & Heidi Urness, *Tax Win in Oregon Reminds Cannabis Businesses to Properly Classify Expenses*, McGlinchey: Green Leaf Brief (Dec. 2, 2022), https://www.greenleafbrief.com/2022/12/tax-win-in-oregon-reminds-cannabis-businesses-to-properly-classify-expenses.

130. *Id.*

131. *Id.*

RECENT DEVELOPMENTS IN CYBERSECURITY AND DATA PRIVACY

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I. U.S. AND EU STATUTORY DEVELOPMENTS

A. *United States and International Statutory Developments, by Lauren D. Godfrey, Suzie Allen & Catherine Geisler*

State legislatures in the data breach notification and consumer privacy space have been very active during the survey period with amending existing data breach notification statutes, as well as more states enacting their own consumer privacy statutes. Outside of the United States, countries continue to enact laws to protect its residents' data. This section of the survey will focus on states that enacted new data breach and privacy legislation during the survey period, and developments outside the United States.

1. United States State Developments

a. *California Privacy Rights Act*

On February 3, 2023, the Board of the California Privacy Protection Agency held a meeting focusing on the regulations that will interpret the California Consumer Privacy Act (CCPA), as amended by the California Privacy Rights Act (CPRA).[1] The regulations were set to go into effect on July 1, 2023, but were delayed by a ruling of the Superior Court of California, County of Sacramento.[2] Additionally, Governor Gavin Newsom signed AB 947 and AB 1194 into law. AB 947 amends the definition of "sensitive personal information" to add a consumer's citizenship or immigration status.[3] AB 1194 provides that a business must comply with the privacy rights of consumers under the CCPA if the consumer's personal information contains information related to reproductive health.[4] It also amends the text of the law to provide that a consumer that accesses, procures, or searches for reproductive health services does not constitute a natural person at risk or danger of death or serious physical injury.[5]

b. *Colorado Privacy Act*

On July 7, 2021, Governor Polis signed Senate Bill 21-190: Protect Personal Data Privacy, otherwise known as the Colorado Privacy Act (CPA).[6]

1. Cal. Consumer Privacy Act of 2018 (amended), Cal. Civ. Code § 1798.100 *et seq*. (2020), https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?division=3.&part=4.&lawCode=CIV&title=1.81.5.

2. *See* Cal. Chamber of Commerce v. Cal. Privacy Prot. Agency, No. 34-2023-80004106-CU-WM-GDS (Cal. Super. Ct. June 30, 2023), *available at* https://www.mwe.com/pdf/cal-chamber-of-commerce-v-cal-privacy-prot-agency.

3. Cal. Consumer Privacy Act of 2018, A.B. 947, 2023–2024 Reg. Sess. (Cal. 2023) (enacted) (sensitive personal information).

4. Cal. Privacy Rights Act of 2020, A.B. 1194, 2023–2024 Reg. Sess. (Cal. 2023) (enacted) (contraception services).

5. *Id.*

6. Act Concerning Additional Protection of Data Relating to Personal Privacy, S.B. 21-90, 2021 Reg. Sess. (Colo. 2021) (enacted), https://leg.colorado.gov/bills/sb21-190.

The CPA is part of the State of Colorado's Consumer Protection Act, and it went into effect on July 1, 2023. Additionally, the Colorado Secretary of State filed its final rules on March 15, 2023. The CPA provides consumers the right to access, correct, and delete personal data, along with the right to opt out of the sale, collection, and use of their personal data.[7] It imposes affirmative obligations upon companies to safeguard consumer personal data, provide clear, understandable, and transparent information to consumers about how their personal data are used, and strengthens compliance and accountability.[8] Finally, the CPA empowers the Colorado Attorney General and district attorneys to access and evaluate a company's data protection assessments, impose penalties where violations occur, and prevent future violations.[9]

c. *Connecticut*

On May 10, 2022, Governor Ted Lamont signed Senate Bill 6: An Act Concerning Personal Data Privacy and Online Monitoring (also known as The Connecticut Data Privacy Act) (CTDPA) into law.[10] The CTDPA went into effect on July 1, 2023.[11] The CTDPA gives Connecticut residents rights over their personal data and creates responsibilities and privacy protection standards for data controllers that process consumer's personal data.[12] It applies to people who conduct business in Connecticut or produce products or services targeted to Connecticut residents and who control or process the personal data of at least 100,000 Connecticut consumers or 25,000 or more consumers and derived more than twenty-five percent of gross revenue from the sale of personal data.[13] It also applies to service providers called "processors" that maintain or provide services involving personal data on behalf of covered business.[14]

d. *Delaware*

On September 11, 2023, Delaware became the thirteenth state to enact a consumer privacy law. The Delaware Personal Data Privacy Act (DPDPA)—to go into effect on January 1, 2025—provides residents the rights to access, opt out, correct, and request a deletion of their personal data by an entity or person.[15] The DPDPA applies to entities that control

7. *Id.*
8. *Id.*
9. *Id.*
10. An Act Concerning Personal Data Privacy and Online Monitoring, S.B. 6, Gen. Assemb. (Conn. 2022) (enacted), https://www.cga.ct.gov/2022/ACT/PA/PDF/2022PA-00015-R00SB-00006-PA.PDF.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. Delaware Personal Data Privacy Act, H.B. 154, 152d Gen. Assemb. §12D-104(a)(1)–(6) (Del. 2023), https://legis.delaware.gov/BillDetail?LegislationId=140388.

or process personal data of 35,000 or more Delaware residents in a given year or organizations that control or process personal data of 10,000 or more Delaware residents and derive more than twenty percent of their gross revenue from the sale of personal data.[16] The DPDPA also applies to nonprofits that are dedicated exclusively to preventing an addressing insurance crimes. Enforcement will exclusively be left to the Department of Justice (DOJ), and the DPDPA does not provide for a private right of action.[17] Entities will receive a sixty-day notice to rectify violations. Failure to do so can result in an enforcement action by the DOJ.[18]

e. *Pennsylvania*

In November 2022, the Pennsylvania legislature amended Pennsylvania's Breach of Personal Information Notification Act (Pennsylvania Act).[19] The amendments to the Pennsylvania Act went into effect on May 3, 2023.[20] In amending the Pennsylvania Act, the state legislature took steps similar to other states' data breach notification statutes and expanded the definition of "personal information."[21] Among other things, the amendments expanded the reach of the Act to cover "State Agency Contractors," as well as hold state agencies (including public schools) and their contractors to stricter notification requirements, specific timelines, and requirements for notification by state agencies, state agency contractors, public schools, counties, and municipalities when a determination of breach has been made.[22] The amendments will allow entities to investigate and make a "determination" that a breach has occurred before their notification obligation takes effect;[23] they will be able to provide certain notifications by email;[24] and they may be exempt if they are in compliance with other specified regulatory obligations.[25]

f. *Florida*

On June 7, 2023, Governor Ron DeSantis signed into law the Florida Technology Transparency Bill (FTTB),[26] which will take effect on July 1,

16. *Id.* § 12D-103(a)(1)–(2).
17. *Id.* § 12D-111(a)–(d).
18. *Id* § 12D-111(b).
19. Breach of Personal Information Notification Act, Act of Dec. 22, 2005, P.L. 474, No. 94 (Penn. 2022), https://www.legis.state.pa.us/WU01/LI/LI/US/HTM/2005/0/0094..HTM.
20. Act of Nov. 3, 2022, Breach of Personal Information Notification Act, Act. Of Nov. 3, 2022, P.L. 2139, No. 151 (Penn. 2022), https://www.legis.state.pa.us/WU01/LI/LI/US/HTM/2022/0/0151..HTM?40.
21. 73 Pa. Cons. Stat. § 2302.
22. *See id.* § 2303(a.1), (a.2).
23. *Id.* § 2309.
24. *Id.* § 2303(a.3).
25. *Id.* §§ 2305.3, 2307(b)(2).
26. Technology Transparency, S.B. 262, 2023 Leg., Reg. Sess. (Fla. 2023) (enacted) (Fla. Stat. § 501.701 *et seq.* (2023)).

2024. The bill is split into three sections, (a) the Florida Digital Bill of Rights (FDBR); (b) the protection of minors in online spaces; and (c) the prohibition of government entities from using their positions to make certain requests to social medial platforms. FTTB applies to a person who conducts business in Florida or produces products or services targeted to Florida residents and that processes or engages in the sale of personal data.[27] FDBR provides consumers the rights to access, to correct, to delete, to portability, to opt out of profiling/targeted advertising purposes, to opt out of the sale of their personal information, to opt out of the collection or processing of personal data, and to opt out of the collection of personal data collected through voice recognition or facial recognition features.[28] FTTB prohibits online platforms that provide services predominantly accessed by minors from processing the minor's personal data if it has actual knowledge that such processing may result in substantial harm or privacy risk to minors.[29] FTTB further prohibits government entities from requesting social media platforms to remove content or accounts from the platform.[30] The bill also prohibits government entities from initiating or maintaining relationships with social media platforms for the purposes of content moderation.[31] FTTB does not create a private right of action.[32] The bill grants the Florida Department of Legal Affairs exclusive enforcement authority and may seek civil penalties of up to $50,000 per violation.[33]

g. *Iowa*

On March 28, 2023, Iowa Governor Kim Reynolds signed into law the Iowa Consumer Data Protection Act (Iowa CDPA),[34] which will take effect on January 1, 2025. Iowa CDPA applies to a person who conducts business in Iowa or produces products or services targeted to Iowa residents and that during a calendar year (a) controls or processes personal data of at least 100,000 consumers; or (b) controls or processes personal data of at least 25,000 consumers and derives over fifty percent of gross revenue from the sale of personal data.[35] Iowa CDPA grants consumers the rights to access, to delete, to portability, and to opt out of the sale of personal data.[36] The act also imposes certain obligations on controllers, such as providing a privacy notice that includes the categories of personal data processed by

27. *Id.* § 6 (Fla. Stat. § 501.705(2) (2023)).
28. *Id.* § 8 (Fla. Stat. § 501.705(2) (2023)).
29. *Id.* § 2 (Fla. Stat. § 501.1735(2) (2023)).
30. *Id.* § 1 (Fla. Stat. § 112.23(2) (2023)).
31. *Id.*
32. *Id.* § 2 (Fla. Stat. § 112.23(4)(f) (2023)).
33. *Id.* § 2 (Fla. Stat. § 501.1735(4)); *id.* § 23 (Fla. Stat. § 501.72(1) (2023)).
34. Iowa Consumer Data Protection Act, Iowa S.F. 262 (2023) (enacted) (Iowa Code § 715D.1 *et seq*. (2023)).
35. *Id.* § 2 (Iowa Code § 715D.2.1 (2023)).
36. *Id.* § 3 (Iowa Code § 715D.3.1 (2023)).

the controller and shared with third parties, the purpose for processing that data, and a description on how consumers may exercise their rights.[37] The act does not create a private right of action.[38] The act grants the Iowa Attorney General exclusive enforcement authority and may seek civil penalties of up to $7,500 per violation.[39]

h. *Indiana*

On May 1, 2023, Governor Eric Holcomb signed the Indiana Consumer Data Protection Act (Indiana CDPA),[40] which takes effect on January 1, 2026. Indiana CDPA applies to a person who conducts business in Indiana or produces products or services that are targeted to Indiana residents and that during a calendar year (a) controls or processes personal data of at least 100,000 Indiana consumers; or (b) controls or processes personal data of at least 25,000 Indiana consumers and derives over fifty percent of gross revenue from the sale of personal data.[41] Indiana CDPA grants consumers the rights to access, to correct, to portability, to delete, and to opt out of targeted advertising and sale of personal data.[42] The act also imposes certain obligations on controllers, such as providing a privacy notice that includes the categories of personal data processed by the controller and shared with third parties, the purpose for processing that data, and a description on how consumers may exercise their rights.[43] Indiana CDPA does not grant a private right of action.[44] The act grants the Indiana Attorney General exclusive enforcement authority and may seek civil penalties of up to $7,500 per violation.[45]

i. *Montana*

(1) Montana Consumer Data Privacy Act (MCDPA)

On May 19, 2023, Governor Greg Gianforte signed into law the Montana Consumer Data Privacy Act (MCDPA),[46] which will take effect on October 1, 2024. MCDPA applies to controllers that conduct business in Montana or produce products or services targeted to Montana residents and that (a) control or possess personal data of 50,000 or more consumers; or (b) personal data of 25,000 or more consumers, while deriving more than

37. *Id.* § 4 (Iowa Code § 715D.4.5 (2023)).
38. *Id.* § 8 (Iowa Code § 715D.8.4 (2023)).
39. *Id.* § 8 (Iowa Code § 715D.8.1 (2023)).
40. Consumer Data Protection, S.B. 5, 123d Gen. Assemb., Reg. Sess. (Ind. 2023) (enacted) (Ind. Code § 24-15 *et seq.* (2023)).
41. *Id.* ch. 1 (Ind. Code § 24-15.1.1(a)).
42. *Id.* ch. 3 (Ind. Code § 24-15.3.1(b)).
43. *Id.* ch. 4 (Ind. Code § 24-15.4.3(b)).
44. *Id.* ch. 10 (Ind. Code § 24-15.10.4).
45. *Id.* ch. 10 (Ind. Code § 24-15.10.1–2(a)).
46. Montana Consumer Data Privacy Act, S.B. 384, 68th Leg., Reg. Sess. (Mont. 2023).

twenty-five percent gross revenue from selling personal data.[47] MCDPA grants consumers the rights to access, to correct, to delete, to portability, and to opt out of targeted advertising, selling of personal data, or profiling in furtherance of decisions that produce legal or similarly significant effects on a consumer.[48] The act also imposes certain obligations on controllers, such as providing a privacy notice that includes the categories of personal data processed by the controller and shared with third parties, the purpose for processing that data, a description on how consumers may exercise their rights, and an active email address or other contact that consumers may use to contact the controller.[49] MCDPA does not grant a private right of action.[50] The act grants the Montana Attorney General exclusive enforcement authority.[51]

(2) Montana Genetic Information Privacy Act (MGIPA)

On June 7, 2023, Governor Greg Gianforte signed into law the Montana Genetic Information Privacy Act (MGIPA),[52] which went into effect on October 1, 2023. MGIPA requires entities to provide clear and complete information regarding its policies and procedures with respect to the collection, use, and disclosure of genetic data.[53] MGIPA requires entities to include a prominent and publicly available privacy notice that includes information regarding the entity's data collection, consent, use, access, disclosure, transfer, security, and retention and deletion practice for genetic data.[54] The entity must also obtain express consent from the consumer to collect, use, or disclose the consumer's genetic data.[55] Express consent is also required for the transfer or disclosure of genetic data to third parties for research purposes.[56] Finally, entities must obtain express consent for marketing to a consumer based on their genetic data, marketing by a third party to a consumer based on the consumer's purchase history of a genetic product or service, or sale of the consumer's genetic data.[57] The act grants the Montana Attorney General the exclusive authority to enforce MGIPA and may seek civil penalties of up to $2,500 per violation.[58]

47. *Id.* § 3.
48. *Id.* § 59.
49. *Id.* § 7(5).
50. *Id.* § 12(3).
51. *Id.* § 12(1).
52. Genetic Information Privacy Act, S.B. 351, 68th Legis., Reg. Sess. (Mont. 2023) (enacted).
53. *Id.* § 4(1)(a).
54. *Id.* § 4(1)(b).
55. *Id.* § 4(2).
56. *Id.* § 4(3)(b).
57. *Id.* § 4(3)(c).
58. *Id.* § 6.

j. *Nevada*

In May 2023, Nevada signed the Consumer Health Data Privacy Act (CHDPA) into law, providing additional protections for consumer health data collected and maintained by regulated entities.[59] The CHDPA will protect both residents and non-residents of Nevada whose consumer health data is being collected in Nevada.[60] The CHDPA provides consumers with several rights, including the right to access their data, to know with whom the regulated entity has shared or sold their data, to request deletion of their data, and to request the regulated entity cease processing their data.[61] Notably, the CHDPA will prohibit the use of geofencing—a type of location-based marketing and advertising—in and around healthcare facilities.[62] The CHDPA does not provide for a private right of action; however, a violation may constitute a deceptive trade practice for which the Attorney General may seek injunctive relief and/or civil penalties pursuant to Nevada Revised Statutes chapter 598.[63] The law will go into effect on March 31, 2024, with no delayed effective date for small businesses.[64]

k. *Oregon*

On July 18, 2023, Governor Tina Kotek signed into law the Oregon Consumer Privacy Act (OCPA), which will take effect on July 1, 2024.[65] OCPA applies to controllers that conduct business in Oregon or produce products or services targeted to Oregon residents and that during a calendar year (a) control or possess personal data of 100,000 or more consumers; or (b) personal data of 25,000 or more consumers, while deriving more than twenty-five percent gross revenue from selling personal data.[66] OCPA provides consumers the rights to access, to correct, to delete, to opt out of profiling/targeted advertising purposes, and to opt out of the sale of their personal information.[67] OCPA also imposes certain obligations on data controllers, such as providing a privacy policy that includes the categories of personal data processed by the controller and shared with third parties, the purpose for processing that data, and a description on how consumers may exercise their rights.[68] The act does not create a private

59. Consumer Health Data Privacy Act, S.B. 370, 83d Leg., Reg., Sess. (Nev. 2023) (enacted), https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/Bill/10323/Text.

60. *Id.* § 7.

61. *Id.* § 24(1)–(2).

62. *Id.* § 31(1)(a)–(1)(c).

63. *Id.* § 34(1)–(2).

64. *Id.* § 36.

65. Oregon Consumer Privacy Act, S.B. 619, 82d Leg. Assemb., Reg. Sess. (Or. 2023) (enacted) (Or. Rev. Stat. § 180.095 *et seq*. (2023)).

66. *Id.* § 2.(1) (Or. Rev. Stat. § 180.095-2.(1) (2023)).

67. *Id.* § 3.(1) (Or. Rev. Stat. § 180.095-3.(1) (2023)).

68. *Id.* § 5 (2023) (Or. Rev. Stat. § 180.095-5.(4) (2023)).

right of action.[69] The act grants the Oregon Attorney General exclusive authority to enforce OCPA and may seek civil penalties of up to $7,500 per violation.[70]

l. *Tennessee*

On May 11, 2023, Governor Bill Lee signed into law the Tennessee Information Protection Act (TIPA),[71] which will take effect on July 1, 2025. TIPA applies to any person that conducts business in Tennessee or produces products or services targeted to Tennessee residents and that (a) exceeds $25 million in revenue and (b) controls or processes 25,000 consumers and derives more than fifty percent of gross revenue from the sale of personal information or controls or processes personal information of at least 175,000 consumers during a calendar year.[72] TIPA provides consumers the rights to access, to correct, to delete, to opt out of profiling/targeted advertising purposes, and to opt out of the sale of their personal information.[73] A unique feature of TIPA is that it will allow data controllers an affirmative defense if the data controller creates, maintains, and complies with its privacy policy that reasonably conforms to the National Institute of Standards and Technology privacy framework or other documented policies, standards, and procedures designed to safeguard consumer privacy.[74] The act does not provide a private right of action.[75] The Tennessee Attorney General has exclusive authority to enforce TIPA, and a court may impose civil penalties of up to $7,500 per violation.[76]

m. *Texas*

(1) Breach Reporting

Texas amended its breach notification law to shorten the amount of time that entities have to notify the Texas Attorney General of a data breach. Effective September 1, 2023, Texas requires entities that experience a data breach affecting 250 or more Texas residents to notify the Texas Attorney General as soon as practicable, but not later than thirty days from the determination of a breach.[77] Previously, businesses had up to sixty days to notify the Texas Attorney General.

69. *See id.* § 9 (Or. Rev. Stat. § 180.095-9 (2023)).
70. *Id.* § 9(4)(a) (Or. Rev. Stat. § 180.095-9(4)(a) (2023)).
71. Tennessee Information Protection Act, H.B. 1181, 112th Gen. Assemb., Reg. Sess. (Tenn. 2023) (enacted).
72. *Id.* § 2 (Tenn. Code Ann. § 47-18-3202 (2023)).
73. *Id.* § 2 (Tenn. Code Ann. § 47-18-3203(a) (2023)).
74. *Id.*
75. *Id.* § 2 (Tenn. Code Ann. § 47-18-3212(e) (2023)).
76. *Id.* § 2 (Tenn. Code Ann. § 47-18-3212 (a), (d) (2023)).
77. Tex. Bus. & Com. Code § 521.053(j) (2023).

(2) Texas Data Security & Privacy Act (TDSPA)

On June 18, 2023, Governor Greg Abbott signed into law the Texas Data Security & Privacy Act (TDSPA),[78] which will take effect on July 1, 2024. TDSPA applies to persons that conduct business in Texas or produce products or services for Texas residents, that process or engage in the sale of personal data, and that are not a "small business."[79] TDSPA is the first to adopt an exemption for small businesses as that term is defined by the U.S. Small Business Administration (SBA) and based on the SBA's industry size standards. TDSPA provides consumers the rights to access, to correct, to delete, to opt out of profiling/targeted advertising purposes, to opt out of sales, and to opt out of certain automated decision making.[80] TDSPA also imposes certain obligations on data controllers, such as providing a privacy policy that includes the categories of personal data processed by the controller and shared with third parties, the purpose for processing that data, and a description on how consumers may exercise their rights.[81] The act does not provide a private right of action.[82] The Texas Attorney General has exclusive authority to enforce the TDSPA and may seek civil penalties of up to $7,500 per violation.[83]

(3) Securing Children Online through Parental Empowerment (SCOPE) Act

On July 13, 2023, Governor Greg Abbott signed into law the Securing Children Online through Parental Empowerment (SCOPE) Act,[84] which will take effect on September 1, 2024. SCOPE applies to digital service providers that collect or process personal information of minors (under the age of eighteen) and either target minors or know or should know that the digital service appeals to minors.[85] Under SCOPE, digital service providers must obtain parental consent before allowing users under the age of eighteen to create an account on a provider's platform.[86] Digital service providers must develop and implement strategies to prevent minors from being exposed to harmful materials such as self-harm, suicide, eating disorders, and other similar behaviors.[87] SCOPE also requires digital service provid-

78. H.B. 4, 88th Leg., Reg. Sess. (Tex. 2023) (enacted) (Tex. Bus. & Com. Code § 541 *et seq*. (2023)).
79. *Id.* § 1 (Tex. Bus. & Com. Code § 541.003 (2023)).
80. *Id.* (Tex. Bus. & Com. Code § 541.051(b) (2023)).
81. *Id.* (Tex. Bus. & Com. Code § 541.102 (2023)).
82. *Id.* (Tex. Bus. & Com. Code § 541.155 (2023)).
83. *Id.* (Tex. Bus. & Com. Code § 541.154–155 (2023)).
84. Securing Children Online through Parental Empowerment Act, H.B. No. 18, 88th Leg., Reg. Sess. (Tex. 2023) (enacted) (Tex. Bus. & Com. Code § 509 *et seq*.).
85. *Id.* § 2 (Tex. Bus. & Com. Code § 509.002 (2023)).
86. *Id.* § 2 (Tex. Bus. & Com. Code § 509.052 (2023)).
87. *Id.* § 2 (Tex. Bus. & Com. Code § 509.051 (2023)).

ers to provide parents or guardians tools to allow them to supervise the minor's use of the digital service.[88] A minor's parent or guardian has a private right of action against a digital service provider for a violation under SCOPE and can seek injunctive relief, actual damages, punitive damages, reasonable attorney's fees, court costs, and any other relief that the court deems appropriate.[89] SCOPE also grants the Texas Attorney General authority to enforce the act.[90]

n. *Utah*

On March 24, 2022, Governor Spencer Cox signed into law the Utah Consumer Privacy Act (UCPA),[91] which went into effect on December 31, 2023. Utah will be the fourth state in the United States to enact a comprehensive consumer privacy law following California, Virginia, and Colorado. UCPA applies to any controller or processor that conducts business in Utah or produces products or services targeted to Utah residents, and that controls or process the personal data of at least (a) 100,000 consumers during a calendar year or (b) 25,000 consumers and derives over fifty percent of gross revenue from the sale of personal data.[92] UCPA provides consumers rights of access, deletion, data portability, and the right to opt-out of targeted advertising or sales of personal data.[93] Unlike its California, Virginia, and Colorado counterparts, UCPA does not include the right to correct. UCPA also requires controllers to provide a privacy policy that includes the categories of personal data processed by the controller and shared with third parties, the purpose for processing that data, and a description on how consumers may exercise their rights.[94] UCPA also requires controllers to provide clear and transparent information to consumers about how they can opt out of sales of their personal data or processing for targeted advertising and not discriminate against them for exercising their rights.[95] Moreover, controllers must establish, implement, and maintain reasonable administrative, technical, and physical data-security practices.[96] UCPA does not provide a private right of action.[97] The Utah Attorney General has exclusive authority to enforce UCPA and can seek civil penalties of up to $7,500 per violation.[98]

88. *Id.* § 2 (Tex. Bus. & Com. Code § § 509.053 (2023)).
89. *Id.* § 2 (Tex. Bus. & Com. Code § 509.152 (2023)).
90. *Id.* § 2 (Tex. Bus. & Com. Code § 509.151 (2023)).
91. Consumer Privacy Act, S.B. 227, 2022 Gen. Sess. (Utah 2022) (enacted) (Utah Code Ann. § 13-61-101 *et seq.* (2022)).
92. *Id.* § 3 (Utah Code § 13-61-102 (2022)).
93. *Id.* § 5 (Utah Code § 13-61-102 (2022)).
94. *Id.* § 9 (Utah Code § 13-61-102 (2022)).
95. *Id.*
96. *Id.*
97. *Id.* § 12 (Utah Code § 13-61-102 (2022)).
98. *Id.* § 14 (Utah Code § 13-61-102 (2022)).

o. *Virginia*

On March 2, 2021, Governor Ralph Northam signed into law the Virginia Consumer Data Protection Act (VCDPA),[99] which went into effect on January 1, 2023. VCDPA applies to any person that conducts business in Virginia, or produces products or services targeted to Virginia residents, in which that business controls or processes (a) personal data of at least 100,000 consumers during a calendar year; or (b) personal data of at least 25,000 consumers and derives over fifty percent of gross revenue from the sale of personal data.[100] The act grants consumers the rights to access, to correct, to delete, to portability, and to opt out of targeted advertising, selling of personal data, or profiling in furtherance of decisions that produce legal or similarly significant effects on a consumer.[101] The act also imposes certain obligations on controllers, such as providing a privacy notice that includes the categories of personal data processed by the controller and shared with third parties, the purpose for processing that data, and a description on how consumers may exercise their rights.[102] VCDPA does not grant a private right of action.[103] The act grants the Virginia Attorney General exclusive enforcement authority and may seek civil penalties of up to $7,500 per violation.[104]

2. Developments Outside the United States

a. *Swiss Data Protection Act*

The new Swiss Federal Act on Data Protection (nFADP) took effect on September 1, 2023. The goal of the law is to more closely align with the European Union's General Data Protection Regulation (GDPR) to protect the fundamental rights of persons when their data is processed. Notably, the nFADP applies only to natural persons—excluding legal "persons" such as corporations.[105] Another important objective of the nFADP is to continue allowing information to flow freely between EU and Swiss companies.[106] In part, the nFADP imposes new obligations on businesses processing data subject to the law. For example, implementing the principles of data protection by default,[107] keeping a register of processing activity,[108]

99. Va. Code Ann. § 59.1-576 *et seq*. (2023).
100. *Id.* § 59.1-576(A).
101. *Id.* § 59.1-577(A).
102. *Id.* § 59.1-578(C).
103. *Id.* § 59.1-584 (E).
104. *Id.* § 59.1-584 (A), (C).
105. Regulation 2020/7397, of the Federal Assembly of the Swiss Confederation, based on Articles 95, 122 and 173 paragraph 2 of the Federal Constitution, and having regard to the Federal Council Dispatch dated 23 March 1988 [hereinafter nFADP], Art. 2(1).
106. *Id.* Art.16 (1).
107. *Id.* Art. 7(1), (2).
108. *Id.* Art. 12, 15(1).

and providing prompt notice to the Federal Data Protection and Information Commissioner in the event of a security breach.[109] Further, the nFADP provides individuals additional rights to information regarding the processing of their personal data[110] including access to their data[111] and ensuring its accuracy.[112]

b. *India*

India's President Droupadi Murmu signed The Digital Personal Data Protection Act (DPDPA) into law on August 12, 2023.[113] The Act provides for processing of digital personal data "in a manner that recognises both the right of individuals to protect their personal data and the need to process such personal data for lawful purposes" and other related matters.[114] The DPDPA sets out the obligations of Data Fiduciaries,[115] which includes the appointment of a Data Protection Officer in India.[116] Data Fiduciaries are persons who alone or in conjunction with other persons determine the purposes and means of processing of personal data.[117] The DPDPA sets out the rights and duties of a Data Principal,[118] the individual to whom personal data relates, including parents of children and guardians of individuals with disabilities.[119] The DPDPA also includes special provisions that address the processing of personal data outside of India.[120] The DPDPA established a Data Protection Board of India.[121] The DPDPA requires that Data Fiduciaries notify the Board and each affected Data Principal when an "intimation" of a personal data breach has occurred in a "form and manner as may be prescribed."[122] In part, the Board may direct any urgent remedial or mitigation measures in the event of a personal data breach, inquire into the breach, and impose penalties.[123] The DPDPA authorizes penalties to be assessed against a person who breaches the provisions of the DPDPA.[124]

109. *Id.* Art. 24 (1).
110. *Id.* Art. 19 *et seq*.
111. *Id.* Art. 25(2).
112. *Id.* Art. 6 (5).
113. The Gazette of India Extraordinary, CG-DL-E-12082023-248045, New Delhi, Aug. 11, 2023/Sravana 20, 1945 (SAKA).
114. *Id.*
115. *Id.*, ch. II.
116. *Id.*, ch. II., (10)(2).
117. *Id.*, ch. I, (2)(i).
118. *Id.*, ch. III.
119. *Id.*, ch. I., (2)(j).
120. *Id.*, ch IV.
121. *Id.*, ch. V.
122. *Id.*, ch. II, (8)(6).
123. *Id.*, ch. VI, (27)(1)(a).
124. *Id.*, ch. VIII.

c. *Saudi Arabia*

On September 7, 2023, the Saudi Data and Artificial Intelligence Authority (SDAIA) released the Kingdom of Saudi Arabia Personal Data Protection Law (PDPL).[125] Additionally, Implementing Regulations and Regulations pertaining to Personal Data Transfer outside the Kingdom were enacted.[126] These Regulations clarify and add further requirements separate from the PDPL.[127] The PDPL will be enforced starting on September 14, 2024.[128] The law applies to processing of personal data related to individuals, which takes place in the Kingdom including by parties outside of the Kingdom.[129] This also includes deceased individuals if it would lead to them or a member of their family being specifically identified.[130] Article 4 of the DPDPA sets forth data subject rights including the right to be informed, to access, to obtain their Personal Data from the controller, and to request destruction of their personal data held by the Controller.[131] The PDPL requires that the purpose of the collection of personal data must be directly related to the Controller's purposes and limited to the minimum amount necessary to achieve the purpose of the data collection.[132] Personal data must be destroyed if it is no longer necessary for the purpose for which it was collected.[133] Controllers must have a privacy policy in place and available to data subjects prior to collecting personal data.[134]

The PDPL also contains restrictions on the disclosure of personal data.[135] The PDPL requires the Controller to notify the Competent Authority upon "knowing of any breach, damage, or illegal access to personal data," as well as the data subject.[136] Notification to the Competent Authority be made within seventy-two hours of becoming aware of an incident, if the incident potentially causes harm to the personal data, or to the data subject, or conflicts with their rights or interests.[137] If notification cannot be made within seventy-two hours, then it must be made as soon as possible

125. Personal Data Protection Law (PDPL), Royal Decree No. (M/19) 9/02/1443, https://sdaia.gov.sa/en/SDAIA/about/Documents/Personal%20Data%20English%20V2-23April2023-%20Reviewed-.pdf.
126. The Implementing Regulation of the PDPL.
127. *Id.*
128. PDPL, Art. 43.
129. *Id.*, Art. 2(1).
130. *Id.*
131. *Id.*, Art. 4 (1)–(5).
132. *Id.*, Art. 11(1)–(3).
133. *Id.*, Art. 11(4).
134. *Id.*, Art. 12.
135. *Id.*, Arts. 15–16.
136. *Id.*, Art. 20(1)–(2).
137. The Implementing Regulation of the PDPL, Art. 24.

along with justifications for the delay.[138] Prior consent of the data subject is required before sending advertising or awareness-raising materials, as well as an opt out mechanism.[139] Cross-border data transfer of personal data is permitted to achieve certain purposes set out by the PDPL.[140] The PDPL contains penalties including fines (up to three million riyals) and imprisonment for disclosing or publishing sensitive data with the intent to harm the data subject or achieve a personal benefit.[141] It also imposes fines on persons "with a special natural or legal capacity" who violate this law or this regulation.[142]

d. *UK-US Data Bridge*

The UK-US Data Bridge was announced in September 2023 in order to establish a means through which UK businesses and organizations can transfer personal data to those that are certified compliant in the United States. According to the UK's Department for Science, Innovation, and Technology, the Data Bridge will drive trans-Atlantic research and innovation through ensuring robust and reliable data flows.[143] As of October 12, 2023, UK businesses are able to transfer data to a U.S.-based service provider or company in a more efficient and cost-effective manner.[144] The EU-US Data Privacy Framework (DPF) is an opt-in certification system for U.S. businesses and organizations that provides a set of enforceable requirements that must be complied with in order to join the DPF.[145] Organizations in the United States that have been certified through the DPF can now opt in to receive data from the United Kingdom through the UK-US Data Bridge.[146]

e. *European-US Data Privacy Framework Adequacy Decisions 2023, by Joy Momin*

(1) Background on GDPR's Data Exportation Regulations

The General Data Protection Regulation (GDPR) is the central law governing data protection in the European Union. The central objective of the GDPR's data transfer provisions is to ensure that the level of protection of

138. *Id.*, Art. 24(2).
139. *Id.*, Art. 25(1)–(2).
140. *Id.*, Art. 29(1)–(4).
141. *Id.*, Art. 35(1).
142. *Id.*, Art. 36(1).
143. Press release: Department for Science, Innovation, & Technology, "UK and US reach commitment in principle over 'data bridge.'" (June 8, 2023).
144. "UK Extension to the EU-US Data Privacy Framework" (UK Extension) under Article 45 of the UK General Data Protection Regulation (GDPR)
145. Department for Science, Innovation, & Technology, "Notice UK-US data bridge: factsheet for UK organisations." (Sept. 21, 2023).
146. *Id.*

natural persons guaranteed by the GDPR is not undermined. Pursuant to Article 45(3) of the GDPR, the European Commission has the authority to determine whether a third country ensures an adequate level of protection for personal data.[147] An adequacy decision establishes that the level of protection for personal data in the third country is "essentially equivalent" to the level of protection in the European Union (EU).[148] The test of whether a foreign system delivers the required level of protection is whether—through the substance of privacy rights and their effective implementation, supervision, and enforcement—the system as a whole delivers the level of protection that is available under the GDPR.[149] Once an adequacy decision is in place, personal data can flow freely from the EU and European Economic Area (EEA) countries to the third country without the need for any additional safeguards.[150] The United Kingdom has its own version of the GDPR, similar to that of the EU.[151]

(2) History of the EU-US Data Privacy Framework

Two previous iterations of the EU-US Data Privacy Framework are worth mentioning: the Safe Harbor framework and the Privacy Shield framework. In 2000, the United States and the European Union signed the Safe Harbor Agreement in compliance with the 1995 European Data Directive.[152] The Safe Harbor Agreement was a self-certification framework that allowed U.S. companies to transfer personal data from the EU to the United States by affirming their adherence to certain privacy principles. In 2015, the CJEU invalidated the Safe Harbor Agreement in the case of *Schrems v. Data Protection Commissioner*, finding that the Safe Harbor

147. *See* Case C-311/18, Data Prot. Comm'r v. Facebook Ireland Ltd., ECLI:EU:C:2020:559 (Dec. 19, 2019), https://curia.europa.eu/juris/document/document.jsf;jsessionid=0D2FE09B7D7A588F8B97358BEE3D6897?text=&docid=221826&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=14058780.

148. Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 Pursuant to Directive 95/46/EC of the European Parliament and of the Council on the Adequacy of the Protection Provided by the EU-U.S. Privacy Shield, 2016 O.J. (L 207) 1.8 [hereinafter Decision 2016/1250].

149. See Communication from the Commission to the European Parliament and the Council, Exchanging and Protecting Personal Data in a Globalised World, COM (2017) 7 final, sec. 3.1, at 6–7 (Jan. 10, 2017), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0007.

150. Case C-362/14, Maximilian Schrems v. Data Prot. Comm'r, ECLI:EU:C:2015:650, ¶ 73.

151. Data Protection Act 2018, c. 12 (UK).

152. Letter from Chairwoman Edith Ramirez to Věra Jourová, Commissioner for Justice, Consumers and Gender Equality of the European Commission, Describing Federal Trade Commission Enforcement of the New EU-U.S. Privacy Shield Framework (Feb. 29, 2016), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/letter-chairwoman-edith-ramirez-vera-jourova-commissioner-justice-consumers-gender-equality-european.

Agreement did not adequately protect the personal data of EU citizens from access by U.S. intelligence agencies.[153]

In 2016, the United States and the European Union signed the Privacy Shield Agreement, which was designed to address the concerns raised by the CJEU in the *Schrems* case. The Privacy Shield Agreement included new safeguards, such as an ombudsperson mechanism to investigate complaints from EU citizens about the collection and use of their personal data by U.S. companies. However, in 2020, the CJEU invalidated the Privacy Shield Agreement in the case of *Schrems II v. Data Protection Commissioner*. The CJEU found that the Privacy Shield Agreement still did not adequately protect the personal data of EU citizens from access by U.S. intelligence agencies.[154]

(3) EU-U.S. Data Privacy Framework Adequacy Decision

Following an initial February 2023 Opinion[155] on the insufficiency of a proposed framework and after several rounds of negotiations, the European Parliament adopted a resolution opposing the adoption of an EU adequacy decision for the United States based on the EU-US Data Privacy Framework (DPF) on May 11, 2023. The resolution was passed after the European Parliament analyzed Executive Order 14086 on Enhancing Safeguards for United States Signals Intelligence Activities (EO 14086), which was issued in the United States to implement the DPF.[156]

The European Parliament concluded that EO 14086 fails to provide sufficient safeguards for the transfer of personal data from the EU to the United States, highlighting that:

(1) U.S. signals intelligence practices are still considered too broad, allowing for the bulk collection of personal data, including the content of communications. EO 14086 includes safeguards for bulk data collection, but does not require independent prior authorization, which is necessary to limit U.S. intelligence activities. The European Parliament has expressed concern that U.S. authorities could use this loophole to access data they would otherwise be prohibited from accessing, as noted by the European Data Protection Board in its opinion on the DPF.

153. Case C-362/14, *supra* note 150.

154. Decision 2016/1250, *supra* note 148.

155. Opinion 5/2023 on the European Commission Draft Implementing Decision on the Adequate Protection of Personal Data Under the EU-US Data Privacy Framework (Feb. 28 2023), https://www.edpb.europa.eu/our-work-tools/our-documents/opinion-art-70/opinion-52023-european-commission-draft-implementing_en.

156. European Parliament Resolution of 11 May 2023 on the adequacy of the Protection Afforded by the EU-U.S. Data Privacy Framework (2023/2501(RSP)), https://www.europarl.europa.eu/doceo/document/TA-9-2023-0204_EN.html.

(2) The European Parliament believes that European citizens do not have access to effective legal remedies under EO 14086. Although EO 14086 creates a redress mechanism for European citizens, the decision of the competent authority is not intended to be made public, which means that data subjects who file complaints lack the ability to both appeal a decision and claim damages.

The EU Parliament furthered its stance, stating:

(1) The United States still lacks a federal data protection law, and Executive Order 14086 can be amended or revoked by the U.S. President at any time, undermining any long-term guarantee of the protection of EU citizens' data.
(2) The European Commission is required to assess the adequacy of a third country based on both its laws and regulations, and how they are implemented in practice. The EU Parliament is concerned that the United States has not demonstrated that it has the necessary safeguards in place to protect EU citizens' data.
(3) The DFP principles issued by the U.S. Department of Commerce were not considered to have been sufficiently amended subsequent to the criticisms of the EU-US Privacy Shield, continuing to fail in providing an essentially equivalent level of data protection to that provided under the GDPR.

On July 10, 2023, the European Commission adopted its adequacy decision for the DPF, finding that the proffered revisions were sufficient to meet the "essentially equivalent" standard.[157] U.S. companies and organizations (as well as their European subsidiaries and other entities) may now transfer personal data to participating companies in the United States without having to either take extra steps to protect the data (such as signing standard contractual clauses) or risk breaking the GDPR. The relevant companies must first join the DPF by self-certifying that they follow a set of privacy rules issued by the U.S. Department of Commerce.

Under the DFP, companies that want to be certified must follow seven principles:

(1) Notice: Companies must tell people what data they collect and how they use it.
(2) Choice: People must have the right to choose whether or not to let companies collect and use their data.

157. European Commission Press Release, European Commission Adopts Adequacy Decision for EU-U.S. Data Privacy Framework (July 10, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3721.

(3) Accountability for onward transfer: Companies must be accountable for how they share personal data with other companies.
(4) Security: Companies must protect personal data from unauthorized access, use, or disclosure.
(5) Data integrity and purpose limitation: Companies must collect and use personal data in a way that is accurate and consistent with the purpose for which it was collected.
(6) Access: People must have the right to access their personal data and have it corrected or deleted.
(7) Recourse, enforcement, and liability: People must have the right to file complaints about how companies handle their personal data, and companies must be held accountable for violating the DPF principles.

In addition to these seven principles, DPF-certified companies must follow sixteen "Supplemental Principles" and provide additional details about how companies must comply with the seven core principles.

(4) Swiss-US Data Privacy Framework

As Switzerland is not a member of the EU or the EEA, but rather of only the Schengen Area, the Swiss-US Data Privacy Framework was subsequently adopted, following the EU-US. Under the Swiss-US DPF, the Swiss Federal Data Protection and Information Commissioner (FDPIC) has the same authority as the European Union Data Protection Authorities (DPAs). However, the definition of "sensitive data" under the Choice Principle is modified slightly under the Swiss-US DPF to include ideological views or activities, information on social security measures, or administrative or criminal proceedings and sanctions that are not pending.[158]

(5) October 2023 UK-US Data Bridge Regulations

The United Kingdom government published the data protection regulations (the "UK-US Data Bridge Regulations"), which adopt an adequacy decision for the United States (the "UK-US Data Bridge") and came into force on October 12, 2023.[159]

The UK-US Data Bridge recognizes that the United States offers an adequate level of data protection where the transfer is to a U.S. organization that (1) is listed on the DPF, and (2) participates in the UK Extension to the DPF.[160] The Information Commissioner's Office (ICO) and EU pri-

158. Privacy Shield Framework, SWISS-U.S. PRIVACY SHIELD FAQS, https://www.privacyshield.gov/ps/swiss-us-privacy-shield-faqs (last visited Oct. 19, 2023).
159. Data Protection (Adequacy) (United States of America) Regulations 2023, SI 2023/1028 (UK), https://www.legislation.gov.uk/uksi/2023/1028/regulation/1/made.
160. *Id.* § 3.

vacy activists have commented on the UK-US Data Bridge and the DPF.[161] Prevalent concerns include:

(1) The UK-US Data Bridge differs from the United Kingdom's GDPR in (a) the right to be forgotten; (b) the right to withdraw consent; and (c) the right to obtain human review of automated decisions—potentially resulting in UK residents lacking equivalent control over personal data.
(2) "Sensitive information" under the UK-US Data Bridge does not specify the UK GDPR's categories of personal data, and rather provides for a broad concept providing that any data may be designated as sensitive by the transferring entity, meaning that UK-based entities must clearly label sensitive data as such when transferring information to a U.S.-based UK Extension certified entity to remain in compliance with the GDPR.
(3) The United States does not have regulations in place for employment following a completed conviction record, whereas, in the United Kingdom, a "spent" conviction is a conviction that is no longer considered relevant for the purposes of employment or other background checks, risking that spent conviction data may be used for a variety of purposes, such as employment, housing, and immigration decisions in the United States.

f. *THE OECD and the EU Issue Declaration on Government Access to Personal Data Held by Private Sector Entities, by Elisabeth Axberger*[162]

(1) Introduction

In today's digital economy, different data governance models have emerged. In contrast to the noninterventionist era that facilitated globalization, the increase in conflicting data protection regulations is fragmenting the international community. It is clear, however, that a frictionless flow of data is the source of great economic and societal potential. Yet, debates over international agreements—such as the EU-U.S. Data Privacy Framework—have repeatedly given rise to uncertainties for the future of cross-border

161. Information Commissioner's Office, The UK Government's Assessment of Adequacy for the UK Extension to the EU-US Data Privacy Framework for the General Processing of Personal Data (Sept. 21, 2023), https://ico.org.uk/about-the-ico/what-we-do/information-commissioners-opinions-on-adequacy/the-uk-government-s-assessment-of-adequacy-for-the-uk-extension-to-the-eu-us-data-privacy-framework.

162. Elisabeth Axberger is an LLM graduate and Data Privacy Research Fellow at the University of Texas at Austin Strauss Center for International Security and Law.

data flows, and governments continue to enact legislation that limits transfers to address issues of privacy and national security.[163]

Private sector entities process significant amounts of personal data. This information is valuable for governments for a variety of purposes, perhaps most notably, to enable national security and law enforcement efforts. The issue of government access to privately held data was at the core of the Court of Justice of the European Union's (CJE") review of the EU-U.S. adequacy agreement, and the recent reciprocity requirements in Executive Order 14086 has put EU member states' frameworks under similar scrutiny.[164] Moreover, a considerable number of law enforcement cases involve electronic evidence located in other countries, which has spurred an increase in national legislation to ensure cross-border access.[165] There is a fear that these developments could lead to mistrust in transnational data flows, which could prompt governments to invoke data localization requirements that could be detrimental to the global economy.

To advance the debate about international cooperation on these matters, the Organization for Economic Co-operation and Development (OECD) has worked to establish common privacy standards. In December 2022, the organization adopted the Declaration on Government Access to Personal Data Held by Private Sector Entities (Declaration).[166] The Declaration articulates commonalities between member countries to help restore trust in data flows between democratic nation states. It aims to create "a shared understanding among like-minded democracies of protections for privacy and other human rights and freedoms in place for law enforcement and national security."[167] The OECD stated the importance of emphasizing similarities to increase trust between nation states that, although their frameworks are not identical, share the same views on democracy and the rule of law.[168] While it is not binding, the Declaration marks the first time democracies have come together and publicly issued a common

163. World Economic Forum, Data Free Flow with Trust: Overcoming Barriers to Cross-Border Data Flows 3 (Jan. 2023), https://www3.weforum.org/docs/WEF_Data_Free_Flow_with_Trust_2022.pdf.

164. Exec. Order No. 14086, 87 Fed. Reg. 62283; U.S. DOJ, Nat'l Sec. Div., Memorandum in Support of Designation of the European Union and Iceland, Liechtenstein and Norway as Qualifying States Under Executive Order 14086, https://www.justice.gov/d9/2023-07/Supporting%20Memorandum%20for%20the%20Attorney%20General%27s%20designation%20of%20EU-EEA.pdf.

165. For example, the Cloud Act and the coming EU e-Evidence Regulation. Theodore Christakis, Kenneth Propp, Peter Swire, *Towards OECD Principles for Government Access to Data*, Lawfare (Dec. 20, 2021), https://www.lawfaremedia.org/article/towards-oecd-principles-government-access-data.

166. OECD, Declaration on Government Access to Personal Data Held by Private Sector Entities (Dec. 13, 2022), https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0487 [hereinafter OECD Declaration].

167. *Id.*

168. *Id.*

approach on government access to personal data for national security and law enforcement purposes.[169]

(2) The Declaration

The Declaration is brief. It consists of opening recitals and seven privacy principles. The central theme is the member countries' commitment to "maintaining a global, open, accessible, interconnected, interoperable, reliable and secure internet."[170] While it is recognized that nation states across the globe have a commitment to their citizens to ensure national security, the means to this end must always be consistent with democratic values and the rule of law. Any approach that undermines such values will significantly impede data flows and could have detrimental effects on the global economy.[171]

The Declaration applies to governments when accessing personal data that is in the possession of, or controlled by, private sector entities. The scope was contested during the negotiations. There was an ongoing debate as to whether the principles should govern both indirect and direct access to data. The current text suggests that direct access is excluded, which, from a U.S. perspective, means that the Declaration applies to data collection under the Cloud Act, however, not to direct access pursuant to Executive Order 12333.[172]

To enhance a trust-based common understanding of privacy protections, the Declaration sets out seven principles for government access: (1) legal basis; (2) legitimate aims; (3) approvals; (4) data handling; (5) transparency; (6) oversight; and (7) redress. As these principles are derived from existing frameworks, the OECD is not imposing new concepts on members. While these principles may not seem novel, the agreed-upon language paves the way for more interoperable frameworks internationally.

For example, the first principle states that government access to information held by private sector entities is regulated under the national legal frameworks. Though it requires a legal basis, it does not mandate regulation through statutory law. Rather, the term can be construed more broadly to include executive measures such as intelligence collection pursuant to Executive Order 12333.[173] This option gives more room for governments to maintain existing frameworks, as long as they meet the substantive standards.

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169. Kenneth Propp, *Gentlemen's Rules for Reading Each Other's Mail: The New OECD Principles on Government Access to Personal Data Held by Private Sector Entities*, Lawfare (Jan. 10, 2023), https://www.lawfaremedia.org/article/gentlemens-rules-reading-each-others-mail-new-oecd-principles-government-access-personal-data-held.

170. OECD Declaration, *supra* note 166.

171. *Id.*

172. Propp, *supra* note 169.

173. *Id.*

Principle II states that government "access supports the pursuit of specified and legitimate aims" and clarifies that legal standards such as necessity, proportionality, and reasonableness apply.[174] Historically, the United States has used reasonableness while the EU has preferred necessity and proportionality. This has been a point of contention for the CJEU. However, the Declaration strives to bridge this gap by stressing that these terms are functionally the same.[175]

The transparency principle emphasizes the importance of having a general legal framework that is accessible to the public such that individuals can evaluate the privacy impacts. It also considers the specific nature of surveillance by stating that all member countries have mechanisms in their national frameworks that balance the interest of "the public to be informed with the need to prevent the disclosure of information that would harm national security or law enforcement activities."[176]

According to Principle VII, member countries also provide effective oversight and redress. The Declaration widens the perspective on redress by acknowledging that both judicial and non-judicial measures can identify and remedy violations effectively. To increase flexibility regarding oversight, the OECD used the terms "effective" and "impartial," rather than "independent," which is used in EU-jurisprudence.[177]

In essence, the Declaration highlights that substance must prevail over form and, by articulating the commonalities, it simultaneously delineates how OECD member countries are distinguished from nation states that allow unconstrained, arbitrary, and disproportionate access. This delineation is designed to increase trust between nation states that, although their frameworks are not identical, share the same values.

(3) Implications for Cross-Border Data Flows

Though some argue that the divergence between the largest economies will never allow compatible surveillance frameworks to enable multilateral agreements and frictionless flow of data, recent efforts such as the OECD Declaration and the new EU-U.S. Data Privacy Framework suggest otherwise.[178] As Cameron Kerry wrote for *Lawfare*, highlighting and

174. OECD Declaration, *supra* note 166.

175. *The OECD Breaks New Ground with Historic Declaration on Government Access to Private Sector Data*, Allen and Overy LLP (Jan. 2023), https://www.allenovery.com/en-gb/global/blogs/data-hub/the-oecd-breaks-new-ground-with-historic-declaration-on-government-access-to-private-sector-data; Propp, *supra* note 169.

176. OECD Declaration, *supra* note 166.

177. *Id.*; Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, 2016 O.J. (L 119) art. 45 [hereinafter GDPR].

178. U.S. DOJ, Nat'l Sec. Div., Memorandum in Support of Designation of the European Union and Iceland, Liechtenstein and Norway as Qualifying States Under Executive Order

comparing surveillance frameworks of different democracies should not be interpreted as "a matter of 'everybody does it,' finger pointing, or a lowest common denominator . . . [but provides] some understanding of what is necessary in a democratic society."[179] Though the Declaration is not binding, it is still an important step in leveraging greater trust in cross-border data flows, and it represents a constructive way to work towards interoperable standards.

For transatlantic data transfers, the Declaration signifies a step in the right direction. While the European Commission has issued a new U.S. adequacy decision, the new agreement has yet to be evaluated by the CJEU, and the court could (at least in theory) consider the Declaration as proof of the United States' commitment to privacy standards.[180] Beyond the EU-U.S. controversy, the new Declaration will likely be a positive contribution to other countries' adequacy determinations and, it is hoped, provide more foreseeability for adequacy agreements as well as convergence in future legislation.

II. DEVELOPMENTS IN ARTIFICIAL INTELLIGENCE

A. *Statutory Developments in Artificial Intelligence, by Pahoua Thao*

Prior to 2022, artificial intelligence (AI) was not considered mainstream technology. However, in the past year, the publicity surrounding generative AI websites has caused legislators and courts to focus their attention on AI. In general, all laws governing data privacy can bear upon AI use; however, the recent rise in the potential use of AI has prompted numerous privacy laws or proposals that specifically address AI and consumer rights.

The term "artificial intelligence" is a catchall term used to describe computers and technology that have the capability to imitate human intelligence. AI comprises four main elements: machine processing, machine learning, machine perception, and machine control—where "machine" refers to the AI system conducting data analysis, which can be a code or a network of connected hardware, and "processing," "learning," "perception," and "control" are functions that the machine performs.

14086 (July 10, 2023), https://www.justice.gov/d9/2023-07/Supporting%20Memorandum%20for%20the%20Attorney%20General%27s%20designation%20of%20EU-EEA.pdf.

179. Cameron Kerry, *Will the New EU-U.S. Data Privacy Framework Pass CJEU Scrutiny?*, Lawfare (Aug. 10, 2023), https://www.lawfaremedia.org/article/will-the-new-eu-u.s.-data-privacy-framework-pass-cjeu-scrutiny.

180. GDPR art. 45(2)(c); *see also The OECD Breaks New Ground with Historic Declaration on Government Access to Private Sector Data*, Allen and Overy LLP (Jan. 2023), https://www.allenovery.com/en-gb/global/blogs/data-hub/the-oecd-breaks-new-ground-with-historic-declaration-on-government-access-to-private-sector-data (EU-leaders indicating that the Declaration has been favorably received, but also stressed that the "essentially equivalent" standard will ultimately be measured against EU law).

At the time of this survey, no comprehensive privacy law exists in the United States that bears upon the use of data in AI. At the federal level, a few bills of note have been proposed that specifically address AI:

- The Artificial Intelligence Accountability Act[181] requires the National Telecommunications and Information Administration (NTIA) to study and report on accountability measures for artificial intelligence systems. The NTIA must study, solicit stakeholder feedback about, and report to Congress concerning mechanisms (*e.g.*, audits, certifications, and assessments) to provide assurances that an AI system is trustworthy.
- In June 2023, a bill was introduced to amend 47 U.S.C. § 230.[182] This bill proposes to add a provision to waive immunity under section 230 of the Communications Act of 1934 for claims and charges related to generative AI.
- The Preventing Deep Fake Scams Act[183] proposes to establish the Task Force on Artificial Intelligence in the Financial Services Sector. The Task Force is to report to Congress on issues related to AI in the financial services sector.

With the rise in the use of AI in commercial operations, the potential that AI could be used for discriminatory purposes has become a concern for federal agencies. In response to the potential discriminatory effects of AI, four federal agencies issued a joint statement on AI. On April 25, 2023, the Consumer Financial Protection Bureau, the Department of Justice's Civil Rights Division, the Equal Employment Opportunity Commission, and the Federal Trade Commission issued a Joint Statement on Enforcement Efforts against Discrimination and Bias in Automated Systems.[184] The agencies jointly pledged to uphold the principles of fairness, equality, and justice as automated systems become increasingly common and may impact civil rights, fair competition, consumer protection, and equal opportunity.[185]

181. The Artificial Intelligence Accountability Act, H.R. 3369, 118th Cong. (1st Sess. 2023).

182. A bill to waive immunity under section 230 of the Communications Act of 1934 for claims and charges related to generative artificial intelligence, S. 1933, 118th Cong. (1st Sess. 2023).

183. The Preventing Deep Fake Scams Act, H.R. 5808, 118th Cong. (1st Sess. 2023).

184. Fed. Trade Comm'n Press Release, FTC Chair Khan and Officials from DOJ, CFPB and EEOC Release Joint Statement on AI (Apr. 25, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-chair-khan-officials-doj-cfpb-eeoc-release-joint-statement-ai.

185. Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems, FTC ET AL. (Apr. 25, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf.

Five consumer privacy laws went or will go into effect by December 31, 2023. On January 1, 2023, the California Privacy Rights Act (CPRA)[186] and the Virginia Consumer Data Protection Act (VCDPA)[187] went into effect. On July, 1, 2023, the Colorado Privacy Act (CPA)[188] and the Connecticut Data Privacy Act (CTDPA)[189] went into effect. At the end of the year, the Utah Consumer Privacy Act (UCPA)[190] went into effect on December 31, 2023. Numerous states have followed suit and have proposed or enacted privacy bills which would also regulate AI. Many of the proposed privacy bills use the same or similar language that can be found in the privacy laws that went into effect this year.

In 2024, four new privacy laws will go into effect. Those new privacy laws and other notable proposed bills for AI are highlighted below.

- **Delaware:** The Delaware Personal Data Privacy Act[191] provides individuals with the right to opt out of profiling in furtherance of solely automated decisions that produce legal or similarly significant effects concerning the consumer. This Act is effective on January 1, 2025.
- **District of Columbia:** The proposed Stop Discrimination by Algorithms Act of 2023 (SDAA)[192] would prohibit both for-profit and nonprofit organizations from using algorithms that make decisions based on protected personal traits such as race, color, religion, national origin, sex, gender identity or expression, sexual orientation, familial status, source of income, or disability.
- **Illinois:** H.B. 3563 amended the Department of Innovation and Technology Act[193] to allow the Department of Innovation and Technology to establish the Generative AI and Natural Language Processing Task Force to investigate and report on generative artificial intelligence software and natural language processing software. This statute was effective on August 4, 2023.

186. Cal. Civ. Code §§ 1798.99.28–1798.99.40 (West 2023).
187. Va. Code Ann. §§ 59.1-575 to -585 (West 2023).
188. Colo. Rev. Stat. §§ 6-1-1301 to -1313 (West 2023).
189. Conn. Gen. Stat. Ann. §§ 42-515 to 42-530 (West 2023).
190. Consumer Privacy Act, 2022 Utah Laws 462 (codified at Utah Code Ann. §§ 13-61-101 to -404 (West 2023)).
191. The Delaware Personal Data Privacy Act, H.B. 154, 152d Gen. Assemb., Reg. Sess. (Del. 2023) (codified at Del. Code Ann. tit. 6, §§ 12D-101 to 12D-111 (West 2023)) [effective Jan. 1, 2025].
192. The Stop Discrimination by Algorithms Act of 2023, B25-0114, (D.C. 2023), https://lims.dccouncil.gov/downloads/LIMS/52282/Introduction/B25-0114-Introduction.pdf.
193. The Department of Innovation and Technology Act, H.B. 3563, 103d Gen. Assemb., Reg. Sess. (Ill. 2023) (codified at 20 Ill. Comp. Stat. Ann. 1370/1-80 (West 2023)).

- **Indiana:** Indiana created a consumer privacy law[194] regulating the collection and processing of personal information. The article sets out rules for profiling and automated decision-making and allows individuals to opt out of profiling. The Act is effective January 1, 2026.
- **Maine:** The proposed Data Privacy and Protection Act[195] is a comprehensive bill aimed at protecting consumer data. Section 9615 specifically governs the use of algorithms. The Act provides that covered entities that use algorithms to collect, process, or transfer data in a manner that poses a consequential risk of harm must complete an assessment of the algorithm and provide the assessment to the Attorney General's office. The bill includes a private right of action and allows for the recovery of punitive damages.
- **Massachusetts:**
  - The proposed Massachusetts Data Privacy Protection Act (MDPPA)[196] would require companies to conduct an impact assessment if they use a "covered algorithm" such as machine learning, natural language processing, artificial intelligence techniques, or other computational processing techniques, in a way that poses a consequential risk of harm to individuals.
  - An Act Regulating the Use of Artificial Intelligence in Providing Mental Health Services[197] proposes to regulate the use of AI in providing mental health services. The bill provides that the use of AI by any licensed mental health professional in the provision of mental health services must satisfy certain conditions.
  - The proposed Massachusetts Information Privacy and Security Act (MIPSA)[198] creates various rights for individuals regarding the processing of their personal information. Large data holders are required to perform risk assessments where the processing is based in whole or in part on an algorithmic computational process.
  - An Act Preventing a Dystopian Work Environment[199] proposes to require employers to provide employees and independent

194. S.B. 5, 123d Gen. Assemb., 1st Reg. Sess. (Ind. 2023) (codified at Ind. Code Ann. §§ 24-15-1-1 to 24-15-11-2 (West 2023)) [effective Jan. 1, 2026].

195. The Data Privacy and Protection Act, H.P. 1270, 131st Leg., 1st Spec. Sess. (Me. 2023).

196. The Massachusetts Data Privacy Protection Act, S.25, 193d Gen. Ct., Reg. Sess. (Mass. 2023).

197. An Act Regulating the Use of Artificial Intelligence in Providing Mental Health Services, H.B.1974, 193d Gen. Ct., Reg. Sess. (Mass. 2023).

198. The Massachusetts Information Privacy and Security Act, S.227, 193d Gen. Ct., Reg. Sess. (Mass. 2023).

199. An Act Preventing a Dystopian Work Environment, H.1873, 193d Gen. Ct., Reg. Sess. (Mass. 2023).

contractors with a particularized notice prior to the use of an Automated Decision System (ADS) and the right to request information, including whether their data is being used as an input for the ADS, and what ADS output is generated based on that data. The bill also prohibits the use of ADSs in certain circumstances and requires the performance of algorithmic impact assessments.

  - An Act drafted with the help of ChatGPT to Regulate Generative Artificial Intelligence Models Like ChatGPT[200] proposes to regulate generative AI models like ChatGPT. This Act would require any company operating a large-scale generative AI model to adhere to certain operating standards such as reasonable security measures to protect the data of individuals used to train the model, informed consent from individuals before collecting, using, or disclosing their data, and performance of regular risk assessments. The bill further requires any company operating a large-scale generative AI model to register with the Attorney General and provide certain enumerated information regarding the model.

- **Montana:** The Consumer Data Privacy Act[201] creates an omnibus consumer privacy law that regulates data uses, the collection and processing of personal information and profiling and automated decision-making. The Act regulates profiling by automated processes performed on personal data related to an identified or identifiable individual's economic situation, health, personal preferences, interests, reliability, behavior, location, or movements. The Act is effective on October 1, 2024.
- **New Hampshire:** An Act Relative to the Expectation of Privacy[202] was proposed. The bill sets out rules for profiling and automated decision-making. The bill enables individuals to opt out of solely automated decisions that produce legal or similarly significant effects concerning the consumer. Profiling is defined as "any form of automated processing of personal data to evaluate, analyze, or predict personal aspects concerning an identified or identifiable natural person's economic situation, health, personal preferences, interests, reliability, behavior, location, or movements."[203]

200. An Act Drafted with the Help of ChatGPT to Regulate Generative Artificial Intelligence Models Like ChatGPT, S.31, 193rd Gen. Ct., Reg. Sess. (Mass. 2023).

201. An Act Establishing the Consumer Data Privacy Act, S.B. 384, 68th Leg., Reg. Sess. (Mont. 2023) (codified at Mont. Code Ann. §§ 30-14-2801 to 30-14-2817 (West 2023)) [effective Oct. 1, 2024].

202. An Act Relative to the Expectation of Privacy, S.B. 225, 2023 Sess. (N.H. 2023).

203. *Id.*

- **New Jersey:** A bill was proposed to regulate the use of automated tools in hiring decisions to minimize discrimination in employment.[204] This bill would require that candidates be notified that an automated employment decision tool was used in connection with the application for employment within thirty days of the use of the tool.
- **New York:** The proposed New York Privacy Act[205] would be the state's first comprehensive privacy law. The law would require companies to disclose their use of automated decision-making that could have a "materially detrimental effect" on consumers, such as a denial of financial services, housing, public accommodation, health care services, insurance, or access to basic necessities; or could produce legal or similarly significant effects.
- **Oregon:** The Oregon Consumer Privacy Act[206] creates an omnibus consumer privacy law and sets out rules for profiling and automated decision-making. The Act enables individuals to opt out of processing for the purpose "profiling the consumer to support the decisions that produce legal effects or effects of similar significant significance."[207] Profiling is defined as "an automated processing of personal data for the purpose of evaluating, analyzing or predicting an identified or identifiable consumer's economic circumstances, health, personal preferences, interests, reliability, behavior, location or movements." This Act is effective on January 1, 2024.
- **Pennsylvania:** The proposed amendment to the Administrative Code of April 9, 1929,[208] would direct the Department of State to establish a registry of business operating AI systems in the State. The proposed Consumer Data Protection Act[209] would establish an omnibus consumer privacy law that allows consumers the right to opt out of the processing of their personal data for certain purposes. Profiling is defined as a "form of automated processing performed on personal data to evaluate, analyze or predict personal aspects related to an identified or identifiable natural person's economic situation, health, personal preferences, interests, reliability, behavior, location

204. An Act Concerning the Use of Automated Tools to Assist with Hiring Decisions and Supplementing Title 34 of the Revised Statutes, A. 49093, 220th Leg., Sess., 2022–2023 (N.J. 2022).

205. New York Privacy Act, S.B. 365, Reg. Sess., 2023–2024 (N.Y. 2023).

206. S.B. 619, 82d Legis. Assemb., Reg. Sess. (Or. 2023) (amending Or. Rev. Stat. Ann. § 180.095 (West 2023)) [effective Jan. 1, 2024].

207. *Id.*

208. Administrative Code of 1929, H.B. 49, Gen. Assemb., Reg. Sess., 2023–2024 (Pa. 2023).

209. Consumer Data Protection Act, H.B. 708, Gen. Assemb., Reg. Sess., 2023–2024 (Pa. 2023).

or movements."[210] The bill also mandates the performance of data protection assessments in connection with "profiling" where the profiling presents a reasonably foreseeable risk for certain impacts on consumers.

- **Rhode Island:** The proposed Rhode Island Data Transparency and Privacy Protection Act[211] would establish an omnibus consumer privacy law that provides consumers the right to opt out of the processing of their personal data for purposes of profiling in furtherance of solely automated decisions. Profiling is defined as "any form of automated processing performed on personal data to evaluate, analyze or predict personal aspects related to an identified or identifiable individual's economic situation, health, personal preferences, interests, reliability, behavior, location or movements."[212] The bill also mandates the performance of data protection assessments in connection with "profiling" where the profiling presents a reasonably foreseeable risk for certain impacts on consumers.
- **South Carolina:** Proposed S.B. 404[213] would prohibit any operator of a website, an online service, or an online or mobile application to utilize an automated decision system for content placement for a user under the age of eighteen. The bill includes a private right of action.
- **Tennessee:** The Tennessee Information Protection Act[214] establishes an omnibus consumer privacy law that mandates the performance of data protection assessments in connection with "profiling" where the profiling presents a reasonably foreseeable risk of certain types of impacts on consumers. This Act is effective on July 1, 2025.
- **Texas:** The Texas Data Privacy and Security Act[215] creates requirements enabling individuals to opt out of "profiling" that produces a legal or similarly significant effect concerning the individual. "Profiling" means any form of solely automated processing performed on personal data related to an identified or identifiable individual's economic situation, health, personal preferences, interests, reliability, behavior, location, or movements. This Act is effective on July 1, 2024.

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210. *Id.*

211. Rhode Island Data Transparency and Privacy Protection Act, H.B. 6236, Gen. Assemb., Jan. Sess., 2023 (R.I. 2023).

212. *Id.*

213. S.B. 404, Gen. Assemb., 125th Sess., 2023-2024 (S.C. 2023).

214. Tennessee Information Protection Act, H.B. 1181, Gen. Assemb., Reg. Sess. (Tenn. 2023) (codified at Tenn. Code Ann. §§ 47-18-3301 to 47-18-3315 (West 2023)) [effective July 1, 2025].

215. Texas Data Privacy and Security Act, H.B. 4, 88th Leg. Sess., (Tex. 2023) (codified at Tex. Bus & Com Code Ann. §§ 541.001–541.005 (West 2023)) [effective July 1, 2024].

- **Vermont:** Proposed Bill H. 114[216] would restrict the use of electronic monitoring of employees and the use of automated decision systems (ADSs) for employment-related decisions. ADSs must meet a number of requirements including corroboration of system outputs by human oversight of the employee and creation of a written impact assessment prior to using the ADS.

The easy access to generative AI has caused courts across the United States to address the use of AI in the courtroom. In 2023, fourteen courts issued standing orders addressing the use of generative AI. Below is a summary of notable developments for courts.

In May 2023, Judge Brantley Starr from the Northern District of Texas issued a standing order on the use of AI requiring that all attorneys and pro se litigants appearing in court file on the docket a certificate attesting that either no portion of any filing will be drafted by generative AI or that any language drafted by generative AI will be checked for accuracy, using print reporters or traditional legal databases by a human being.[217] Judge Starr specifically noted that generative AI in its current state, although being incredibly powerful, is prone to hallucinations and bias.

Senior Judge Michael J. Baylson from the Eastern District of Pennsylvania issued a standing order[218] on June 6, 2023. The standing order requires disclosure of the use of AI in the preparation of the filing, and the party must certify that every citation to the law or record in the filing has been verified as accurate.

On June 8, 2023, Magistrate Judge Gabriel A. Fuentes from the Northern District of Illinois issued a standing order[219] for civil cases. The standing order requires that any party using any generative AI tool to conduct legal research or to draft documents for filing with the court must disclose in the filing that AI was used. The party must specifically identify the AI tool that was used and the way in which it was used. The court reminded parties of the applicability of Federal Rule of Civil Procedure 11.

216. H. 114, 2023–2024 Sess. (Vt. 2023).

217. Judge Brantley Starr, *Mandatory Certification Regarding Generative Artificial Intelligence*, N.D. Tex. (Dec. 1, 2023), https://www.txnd.uscourts.gov/judge/judge-brantley-starr.

218. Judge Michael M. Baylson, *Standing Order re: Artificial Intelligence ("AI") in Cases Assigned to Judge Baylson*, E.D. Pa. (June 6, 2023), https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/Standing%20Order%20Re%20Artificial%20Intelligence%206.6.pdf.

219. Magistrate Judge Gabrial A. Fuentes, *Standing Order for Civil Cases Before Magistrate Judge Fuentes*, N.D. Ill. (Dec. 1, 2023), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Fuentes/Standing%20Order%20For%20Civil%20Cases%20Before%20Judge%20Fuentes%20rev%27d%205-31-23%20(002).pdf.

Magistrate Judge Jeffrey Cole from the Northern District of Illinois also issued a standing order[220] on the use of AI. Judge Cole's standing order requires the disclosure of what AI tool was used to conduct legal research and/or used in the preparation of any document. The court reminded parties that Federal Rule of Civil Procedure Rule 11 would apply and that certification on a filing will be deemed as a representation by the filer that they have read and analyzed all cited authorities to ensure that such authorities exist.

On July 14, 2023, District Judge Michael J. Newman issued a standing order[221] on the use of AI. The court's order prohibits the use of AI in the preparation of any filing submitted to the court. The order warns that a party in violation of the order may face sanctions or contempt. The order specifically excludes legal search engines and Internet search engines from the AI ban. The order also imposes a duty on all parties to immediately inform the court if they discover the use of AI in any document filed in their case.

As outlined by the courts in the Northern District of Illinois, the improper use of generative AI has severe consequences for attorneys in the form of sanctions.[222] While not every improper use of generative AI will result in sanctions, federal courts are aware of generative AI's shortcomings.[223] Courts have made it clear that attorneys are ultimately responsible for court filings regardless of the tools employed.

AI is a powerful tool when used properly, but, as Judge Starr's standing order notes, generative AI in its current state may be full of hallucinations. The failure to understand how to use AI properly—whether in court or for consumer data collection—may cause more harm than good. Users of AI should understand the laws and rules that they must abide by before using AI tools.

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220. Magistrate Judge Jeffrey Cole, *The Use of "Artificial Intelligence" in the Preparation of Documents Filed Before this Court*, N.D. Ill. (Dec. 1, 2023), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Cole/Artificial%20Intelligence%20standing%20order.pdf.

221. Judge Michael J. Newman, *Standing Order Governing Civil Cases*, S.D. Ohio (Dec. 1, 2023), https://www.ohsd.uscourts.gov/sites/ohsd/files/MJN%20Standing%20Civil%20Order%207.14.23%20Final.pdf.

222. *See* Mata v. Avianca, Inc., 2023 WL 4114965, *1 (S.D.N.Y. 2023) (the court sanctioning attorneys for their use fake quotes and citations created by ChatGPT and for refusing to admit to the use of AI until the court issued an order to show cause).

223. *See* Frier v. Hingiss, 2023 WL 6046840, at *3 n.1 (E.D. Wis. 2023) (reminding counsel that to the extent AI was used, counsel is responsible for any briefing filed regardless of the tools employed).

III. DEVELOPMENTS IN CASE LAW

A. *Case Law Developments Related to Advertising Technology, by Tara D. Kennedy*

1. Case Law Narrowing "Subscriber" Status Under the Video Privacy Protection Act

The last year has seen an exponential increase in the number of lawsuits alleging violations of the Video Protection Privacy Act[224] (VPPA). The VPPA was enacted in 1988, after a newspaper published a profile of then-Supreme Court nominee Judge Robert H. Bork, "which contained the titles of 146 films he and his family had rented from a local video store."[225] Despite the fact that brick and mortar video rental stores are now nearly extinct, between October 1, 2022, and September 30, 2023, more than 150 cases were filed raising VPAA claims. Many of these new cases focus on websites that offer video content of any kind (for example, WebMD, sports websites, and even General Mills) and their use of pixel technology to transmit information about videos watched on the website to third parties such as Facebook.

Given the pervasiveness of pixel tracking technology—it would be difficult if not impossible to browse the Internet without encountering websites that utilize pixels—the potential for filing this type of VPPA claim appears nearly limitless. Motions to dismiss such suits have resulted in a mixed bag of decisions, but over the last year some defenses have emerged where courts are beginning to limit the expanding scope of the VPPA. One such area is in the definition of a "subscriber" under the statute. Specifically, several courts have held that the VPPA does not extend to any website visitor, and not even to any person that signs up for an electronic newsletter; instead, to qualify as a "subscriber," a plaintiff must at least allege some relationship between their subscription and access to video content.

2. What Does the VPPA Cover?

The VPPA prohibits "video tape service providers" from "knowingly" disclosing personally identifiable information about a "consumer" of that provider, subject to a few narrow exceptions.[226] The VPPA defines "video tape service provider" in relevant part, as "any person, engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials[.]"[227] Notably, courts have construed "similar audio visual materials" broadly,

224. 18 U.S.C. § 2710.
225. Ellis v. Cartoon Network, Inc., 803 F.3d 1251, 1252–53 (11th Cir. 2015).
226. 18 U.S.C. § 2710(b)(1).
227. *Id.* § 2710(a)(4).

"finding that streaming video delivered electronically falls within that definition" with an exception for live broadcasts.[228] A "consumer" is a "renter, purchaser, or *subscriber* of goods or services from a video tape service provider."[229]

The statute creates a private right of action for any consumer whose PII is disclosed in violation of the Act with statutory damages of $2,500, and the potential for punitive damages and reasonable attorney's fees and costs.[230] The private right of action, statutory damages, and widespread use of prerecorded videos on the Internet have made the VPPA an attractive tool for the plaintiff's class action bar, especially given the ubiquitous use of pixel technology on websites containing video content.

3. Cases Dismissing VPPA Claims Where Plaintiff Did Not Adequately Allege "Subscriber" Status

As noted above, one defense increasingly successful at the motion to dismiss stage is the argument that the plaintiff is not a "consumer" under the VPPA because they do not qualify as a "subscriber of goods or services."[231] Courts had previously established that the VPPA does not provide coverage for every visitor to a website that happens to include free video content. Rather, to qualify as a consumer where they have not rented or purchased video content, a plaintiff must be a "subscriber," which requires some relationship such as account registration, subscription to a newsletter or content, or access to restricted content.[232] Over the past year, courts have narrowed this further, finding that just any "subscription" is not enough. Specifically, plaintiffs bringing VPPA claims based on enrollment in electronic newsletters must allege some relationship between their subscription and access to video content. Links to video content on the public website will not suffice; the subscription must contain special or tailored video content for subscribers.

For example, in *Carter v. Scripps Networks, LLC*,[233] the court dismissed a VPPA claim where plaintiffs alleged they were "subscribers" under the

228. *See Stark v. Patreon, Inc.*, 635 F. Supp. 3d 841, 851 (N.D. Cal. 2022) (collecting cases regarding "broad" interpretation covering streaming).

229. 18 U.S.C. § 2710(a)(1) (emphasis added).

230. *Id.* § 2710 (c)(1), (c)(2).

231. *Id.* § 2710(a)(1).

232. *See* Ellis v. Cartoon Network, Inc., 803 F.3d 1251, 1256 (11th Cir. 2015) (holding that "merely downloading [the provider's] app for free and watching videos at no cost does not make [plaintiff] a subscriber"); Austin-Spearman v. AMC Network Ent. LLC, 98 F. Supp. 3d 662, 669 (S.D.N.Y. 2015) (finding no subscriber relationship where plaintiff merely visited website to watch videos and "did not pay [the provider] for the content on its free website, nor did [plaintiff] 'sign up,' register for an account, establish a user ID or profile, download an app or program, or take any action to associate herself with [the provider]").

233. Carter v. Scripps Networks, LLC, 2023 WL 3061858 (S.D.N.Y. Apr. 24, 2023).

VPPA because they subscribed to HGTV's electronic newsletter and independently watched videos on the HGTV website.[234] The court disagreed, finding that, under the VPPA, "the scope of a 'consumer' is cabined by the definition of 'videotape service provider,' with its focus on the rental, sale, or delivery of audiovisual materials, not a broader category of consumers."[235] As a result, the court found that the plaintiffs' "subscription" to defendant's newsletter was not enough to qualify them as subscribers under the VPPA because their "status as a newsletter subscriber was not a condition to accessing videos on defendant's website," nor did it "enhance or in any way affect the viewing experience."[236] Simply put, the plaintiffs "were subscribers to *newsletters*, not subscribers to *audio visual materials*."[237] That the newsletter contained links directing subscribers back to the website, where they were free to watch—or not watch—videos without any type of obligation, did not create subscriber status, because plaintiffs were no different from any visitor to the website.[238]

Similarly, in *Jefferson v. Healthline Media, Inc.*,[239] the Northern District of California held that "while the VPPA broadly protects paid and unpaid subscribers, not everything that might be labeled a 'subscription' automatically triggers the statute's protections."[240] There, the plaintiff subscribed to the defendant's e-mail list using her name and e-mail address.[241] But the court held that a "subscriber [under the VPPA] is not just someone who provides [their] name and address to a website for some undisclosed purpose or benefit," and dismissed plaintiff's VPPA claim.[242]

In another recent decision, *Gardener v. MeTV*,[243] the Northern District of Illinois reached a similar conclusion. The plaintiffs in *Gardener* alleged they were "subscribers" under the VPPA because they provided their names and e-mail addresses to MeTV when they opened an account. The court held that opening an account with MeTV did not qualify plaintiffs as subscribers under the VPPA, because viewing videos on the website was "separate and apart from" their accounts.[244] The plaintiffs did not receive special access to video content and were "free to watch or not watch [MeTV's] videos without any type of obligation, no different than any of the other

234. *Id.* at *1.
235. *Id.* at *11.
236. *Id.* at *12–13.
237. *Id.* at *12 (emphasis added).
238. *Id.*
239. Jefferson v. Healthline Media, Inc., 2023 WL 3668522 (N.D. Cal. May 24, 2023).
240. *Id.* at *3.
241. *Id.*
242. *Id.*
243. Gardener v. MeTC, NLP, 2023 WL 4365901 (N.D. Ill. July 6, 2023).
244. *Id.* at *4.

[] monthly visitors to the site."[245] Ultimately, the court held the plaintiffs were "subscribers to a *website*, not subscribers to audio visual materials" and therefore dismissed their VPPA claims.[246]

Plaintiffs are testing these decisions, however, in an appeal in *Salazar v. National Basketball Association*.[247] In *Salazar*, the district court agreed with the *Carter* court and held that the plaintiff was not a subscriber under the VPPA because the plaintiff did "not allege that his newsletter subscription allowed him access to the videos on the NBA.com site that any member of the public would not otherwise have, Plaintiff has alleged that he was a "subscriber[ ] to newsletters, not [a] subscriber[ ] to audio visual materials."[248] On appeal, the plaintiff has asked the court to decide whether a subscription to any good or service, not only audio visual materials, is sufficient to qualify as a subscriber under the VPPA, and whether a newsletter containing links to otherwise generally available videos is enough to create a subscriber relationship. The appeal is in the briefing phase, but will provide guidance on the strength of the subscriber defense moving forward.

B. *Case Law Developments in Session Replay Litigation, by Alexandra N. Cabeza*

Session replay software allows a website operator to monitor and record a website visitor's interactions with the website, namely mouse movements, clicks, keystrokes, search terms, and pages viewed. This software allows a website operator to "replay" the visitor's experience on their website, focusing on how users interact with the website. Companies use this software to understand and enhance a visitor's online experience.

This technology has created a wave of litigation challenging the use of session replay code. Courts in numerous jurisdictions have been inundated with lawsuits related to session replay software involving state and federal wiretap laws and claimed violations of privacy rights. The core of plaintiffs' claims is that by using the software provided by third-party vendors, website operators permit and participate in the interception, use, and/or disclosure of plaintiffs' communications with the website without their consent.

Most cases are in their earliest stages, where defendants are seeking dismissal on several grounds, including a lack of standing, the party exemption rule, and a failure to state a claim under relevant wiretap acts. Arguments

245. *Id.* (citing *Carter*, 2023 WL 3061858, *6).

246. *Id.* (quotation marks omitted and emphasis supplied).

247. Salazar v. Nat'l Basketball Ass'n, 2023 WL 5016968 (S.D.N.Y. Aug. 7, 2023), appeal pending in No. 23-1147 (2d Cir.).

248. *Id.* at *9. The court further noted the complaint "does not allege that the newsletters contained videos" or that "a user must log in to watch the video [content on NBA.com]," or that "the video content he accessed was exclusive to a subscribership." *Id.*

raising a lack of jurisdiction—both personal[249] and subject matter—have been the most successful. Some courts have even considered the issue *sua sponte*.[250] Specifically, courts are finding that plaintiffs are unable to allege a concrete harm necessary to establish an injury in fact, and therefore lack Article III standing to bring these lawsuits.[251] Essential to a claim is plaintiffs' burden of demonstrating the following: (1) an injury in fact, (2) that is fairly traceable to the challenged conduct, and (3) that is likely to be redressed by judicial decision.[252] The harm alleged across these lawsuits is the violation of wiretapping statutes themselves, which bears a close relationship to traditional harms for invasion of privacy torts. But this argument runs contrary to established Supreme Court precedent "as it would mean *any* alleged violation of a wiretap statute necessarily constitutes an injury in fact even without allegations of actual harm."[253]

The lack of standing argument fares noticeably better in session replay cases than other trending data privacy litigation—like pixel healthcare and VPPA lawsuits—because the nature of the data allegedly intercepted, used and/or disclosed does not implicate a protectable privacy interest. Like the court in *Adams* noted, "[T]he plaintiff's alleged harm was not closely related to the harm upon which the tort of intrusion of seclusion is based—or any invasion of privacy tort for that matter—because plaintiff had not alleged the [website operator] had intercepted private communications or personal information."[254] Courts across numerous districts are concluding that the use of session replay code, without more, is insufficient to establish a concrete injury and are dismissing cases at the motion to dismiss stage.[255]

249. Numerous district courts across the country have found a lack of specific jurisdiction over session-replay code claims. *See*, *e.g.*, Rosenthal v. Bloomingdale's, Inc., No. CV 22-11944-NMG, 2023 WL 5179506 (D. Mass. Aug. 11, 2023); Hasson v. Fullstory, Inc., No. 2:22-cv-1246, 2023 WL 4745961 (W.D. Pa/ July 25, 2023); Alves v. Goodyear Tire & Rubber Co., No. CV 22-11820-WGY, 2023 WL 4706585 (D. Mass. July 24, 2023); Licea v. Caraway Home Inc., No. EDCV 22-1791-JGB, 2023 WL 1999496 (C.D. Cal. Feb. 9, 2023); Sacco v. Mouseflow, Inc., No. 2:20-cv-233-TLN-KJN, 2022 WL 4663361 (E.D. Cal. Sept. 30, 2023); Massie v. Gen. Motors Co., No. 1:20-cv-1560-JLT, 2021 WL 2142728 (E.D. Cal. May 26, 2021); Mikulsky v. Noom, Inc., No. 3:23-cv-285-H-MSB, 2023 WL 4567096 (S.D. Cal. July 17, 2023); Schnur v. Papa John's Int'l, No. 2:22-cv-1620-NL, 2023 WL 5529775 (W.D. Pa. Aug. 28, 2023); Mikulsky v. Bloomingdale's, LLC, No. 23-cv-425-L- WVG, 2023 WL 6538380 (S.D. Cal. Oct. 6, 2023).

250. *See* Jones v. Bloomingdales.com LLC, No. 4:22-cv-01095 (E.D. Mo. Sept. 18, 2023).

251. Adams v. PSP Grp., LLC, No. 4:22-CV-1210 RLW (E.D. Mo. Sept. 13, 2023).

252. Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540 (2016) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)).

253. *Adams*, No. 4:22-CV-1210 RLW (E.D. Mo. Sept. 13, 2023) (emphasis added).

254. *Id.*

255. A number of district courts across the country have addressed Article III standing in cases involving session replay code. These courts have all held that where personal or sensitive information has not been shared on the website in question, the plaintiff has not alleged a concrete harm to support standing. *See* Straubmuller v. Jetblue Airways Corp., No. CV DKC 23-384, 2023 WL 5671615, at *4 (D. Md. Sept. 1, 2023) (finding plaintiff lacked Article III

C. *A Year in Review: Meta Pixel, by Lindsey Knapton*

Over the last year, there has been a surge in litigation related to Meta's pixel technology. These lawsuits target businesses that allegedly share protected information with Meta. In particular, cases involving hospitals exploded after the Markup shed light on the common use of the Meta Pixel on hospital websites, followed by the Office of Civil Rights and the U.S. Department of Health and Human Services (HHS) publication of a bulletin on the use of online tracking technologies.[256] But hospitals are not the only target of pixel litigation. Plaintiffs' attorneys across the country have filed suits against entities that collect protected information, which includes other health-related, firearm, tax, and driver's license information.

The Meta Pixel, as it is known, is a snippet of JavaScript code that is placed on a website. This code enables businesses to learn how visitors interact with their websites and to better direct their products and services to potential customers. The pixel works by sharing information about a visitor's actions on a third-party website with Meta. In addition, the pixel also directs the visitor's browser to share information stored in their Facebook cookies with Meta. As a result, both businesses and website visitors can control how much information Meta receives. As case law emerges, these basic notions about how the pixel works have formed the foundation for many court orders.

1. *In re Meta Pixel*, Case No. 22-cv-03580-WHO (United States District Court for the Northern District of California)

Over the last year, numerous cases against Meta were consolidated in the Northern District of California for Meta's role in hospitals' use of the pixel. These cases are now before Judge William H. Orrick. The claims against the original named plaintiffs' healthcare providers—MedStar Health System, Rush University System for Health, and UK Healthcare—have

standing because allegations in the complaint that Session Replay Code on the defendant's website captioned the plaintiff's keystrokes and clicks were insufficient to allege a concrete harm that bears a close relationship to the substantive right of privacy); Cook v. GameStop, Inc., No. 2:22-CV-1292, 2023 WL 5529772, at *2 (W.D. Pa. Aug. 28, 2023) (same); Mikulsky v. Noom, Inc., No. 3:23-CV-00285-H-MSB, 2023 WL 4567096, at *5 (S.D. Cal. July 17, 2023) (same); Lightoller v. Jetblue Airways Corp., No. 23-CV-00361-H-KSC, 2023 WL 3963823, at *4 (S.D. Cal. June 12, 2023) (same); Massie v. Gen. Motors, No. 21-cv-787-RGA, 2022 WL 534468, at *5 (D. Del. Feb. 17, 2022) ("'Eavesdropping' on communications that do not involve personal information, personally identifiable information, or information over which a party has a reasonable expectation of privacy does not amount to a concrete injury.").

256. Todd Feathers et al., *Facebook Is Receiving Sensitive Medical Information from Hospital Websites*, Markup (June 16, 2022), https://themarkup.org/pixel-hunt/2022/06/16/facebook-is-receiving-sensitive-medical-information-from-hospital-websites; *Use of Online Tracking Technologies by HIPAA Covered Entities and Business Associates*, HHS (Dec. 1, 2022), https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-online-tracking/index.html.

proceeded separately. In the meantime, hundreds of other cases have been filed against other hospitals, some also naming Meta as a defendant.

Through the course of this litigation, the *In re Meta Pixel* court has issued two significant orders this year that will continue to shape pixel litigation moving forward. In December, the court denied Plaintiffs' Motion for Preliminary Injunction and, then in September, the court denied in part and granted in part Meta's motion to dismiss.[257]

When it denied the preliminary injunction, the court was clear that it did so because of Meta's mitigation efforts, not because plaintiffs had failed to state a plausible claim. In particular, the court pointed to Meta's filtering mechanisms, which it "designed and implemented" as the "'most effective and feasible methods' to address the receipt of sensitive information."[258] The court noted that discovery would also be necessary to clarify both the scope of the problems and the potential solutions.[259] For these reasons, the court denied the preliminary injunction.

Again, in its motion to dismiss, Meta leaned into its mitigation efforts to defend the collection of any protected information. Consistent with its preliminary analysis of the claims, the court refused to dismiss the case against Meta in its entirety. Although the court initially indicated that it was inclined to dismiss some claims without leave to amend, plaintiffs convinced the court that they could amend their complaint to state a claim. The court ultimately dismissed with leave to amend the following claims: the common-law privacy, violation of California's Comprehensive Computer Data Access and Fraud Act (CDAFA), negligence per se, trespass, larceny, violation of California's Unfair Competition Law (UCL), and violation of California's Consumer Legal Remedies Act (CLRA). But the court refused to dismiss claims for violations of the federal wiretap law, Electronic Communications Privacy Act of 1986 (ECPA); violation of the state wiretap law, the California Invasion of Privacy Act; breach of contract; and unjust enrichment.[260] In large part, the court found many of Meta's arguments were evidence-bound and thus not ripe for resolution at the motion to dismiss stage. As this case proceeds towards class certification and summary judgment, it will likely continue to influence the broader ecosystem of pixel litigation.

257. *In re* Meta Pixel Healthcare Litig., 647 F. Supp. 3d 778 (N.D. Cal. 2022) (order denying preliminary injunction); Doe v. Meta Platforms, Inc., No. 22-CV-03580-WHO, 2023 WL 5837443 (N.D. Cal. Sept. 7, 2023) (order on motion to dismiss)

258. *In re* Meta Pixel Healthcare Litig., 647 F. Supp. 3d at 805.

259. *Id.* at 790.

260. *Meta Platforms, Inc.*, 2023 WL 5837443, at *17.

2. *Kurowski v. Rush System for Health*, No. 22 C 5380 (United States District Court for the Northern District of Illinois)

The *Rush Health* case has also become influential in *Meta Pixel* litigation. This early adtech case is before Judge Matthew F. Kennelly in the Northern District of Illinois. In it, plaintiffs allege that Rush deployed adtech, including the Meta Pixel and Google Analytics, on its public-facing website and within its patient portal. Even so, in two separate orders, the court largely granted the hospital's motions to dismiss claims related to its use of the Meta Pixel.[261]

This case has paved the way for how other courts have addressed violations of the federal Wiretap Act. The Wiretap Act has a "party exception," which essentially permits a party to the communication to "intercept" the communication. Here, there was no question that the hospital was a party to plaintiff's communications on the hospital's website. The only issue was whether the criminal or tortious rule barred the application of the Wiretap Act's party exception. In its second order, the *Rush Health* court took great efforts to close the door on such an argument. Not only did the court find that the plaintiffs failed to allege "any particular health or treatment information" was disclosed to Meta, but the court explained that the Department of Health and Human Services' guidance on website tracking technologies is not entitled to deference.[262] In addition, the court noted that the plaintiffs had failed to identify any independent criminal or tortious purpose from the alleged interception.[263]

Similarly, the analysis of the intrusion upon seclusion claim in *Rush Health* is widely cited in *Meta Pixel* litigation. Specifically, the court rejected the plaintiffs' argument that Rush "bugs" its own web properties by placing third-party cookies on them that are disguised as belonging to Rush. But even with plaintiff's new theory, the *Rush Health* court found that the hospital could not have intruded on plaintiffs' communications as it was the intended recipient.[264] Courts continue to cite the *Rush Health* orders in recent decisions and will likely continue to do so.

3. *Cousin v. Sharp Healthcare*, Case No. 22-cv-2040-MMA (DDL) (United States District Court for the Southern District of California)

One such order that cites *Rush Health* is the July order in *Cousin v. Sharp Healthcare* before Judge Michael Anello in the Southern District of

261. Kurowski v. Rush Sys. for Health, No. 22 C 5380, 2023 WL 4707184 (N.D. Ill. July 24, 2023); Kurowski v. Rush Sys. for Health, No. 22 C 5380, 2023 WL 2349606 (N.D. Ill. Mar. 3, 2023).

262. *Kurowski*, 2023 WL 4707184, at *6–8.

263. *Id.* at *9.

264. *Id.* at *17–18.

California. In this order, the court dismissed five claims against Sharp Healthcare for its use of the Meta Pixel: (1) breach of fiduciary duty; (2) violation of common law invasion of privacy—intrusion upon seclusion; (3) invasion of privacy under the California Constitution; (4) violation of the California Confidentiality of Medical Information Act; and (5) violation of the California Invasion of Privacy Act. Unlike other pixel cases, Sharp Healthcare did not use the pixel in its user authenticated patient portal. But even before reaching the merits of Sharp's claims, the court dismissed Plaintiffs' allegations as factually deficient because the plaintiffs never explained how they used Sharp's website.[265]

Although the court found that most claims should be dismissed, it did not accept all of Sharp Healthcare's arguments. First, it found that the disclosure of health information from the hospital's appointment scheduling page may constitute a "highly offensive" intrusion sufficient to withstand dismissal.[266] Second, the court decided that the question of whether Meta or the hospital intruded is best left for summary judgment.[267] Last, the court found whether the communication was intercepted in transit and whether the hospital had either aided, agreed, employed, or conspired with Meta sufficient to survive a motion to dismiss. Even so, before the court will consider these claims again, plaintiffs must add specificity to the complaint.

4. *Hartley v. University of Chicago Medical Center* (United States District Court for the Northern District of Illinois)

In yet an even more recent *Meta Pixel* order, the court again cited the *Rush Health* case. In the case before Judge Harry D. Leinenweber against the University of Chicago Medical Center (UCMC), the court dismissed claims for violation of the federal Wiretap Act, breach of implied duty of confidentiality, and intrusion upon seclusion. Like in *Rush Health*, the *UCMC* court agreed that the hospital is a necessary party to any communication between a patient and the hospital. And again, like *Rush Health*, the court found plaintiffs' "similar generalizations as to what UCMC was communicating with Facebook" insufficient to plausibly violate HIPAA, and thus preclude the application of the party exception.[268] The court also found that, absent specificity, plaintiff failed to allege a breach of any duty of confidentiality. And like in *Rush Health*, the court found no intrusion

265. Cousin v. Sharp Healthcare, Case No.: 22-cv-2040-MMA (DDL), 2023 WL 4484441, at *5–7 (S.D. Cal. July 12, 2023).

266. *Id.* at *12.

267. *Id.*

268. Hartley v. Univ. of Chi. Med. Ctr., No. 22 C 5891, 2023 WL 7386060, at *4 (N.D. Ill. Nov. 8, 2023).

upon seclusion claim where plaintiff initiated the publication of her information to Meta.

5. Developing Legal Trends

Because most cases involving the Meta Pixel were filed only within the last year, few courts have reached the merits of plaintiffs' common-law and statutory claims. These claims frequently include violations of state and federal wiretap laws, intrusion upon seclusion, negligence, unjust enrichment, breach of fiduciary duty, and breach of contract. To the extent that courts have addressed those claims in motions to dismiss, several trends are beginning to emerge, suggesting how courts may address pixel-related claims moving forward.

First, claims related to the Meta Pixel must include specific allegations about how a plaintiff used a website. This is because a URL or button click alone is not protected information. Without such details, it is unclear that protected information has been disclosed. As the *Sharp Healthcare* court found, plaintiffs must provide "meaningful factual support as to what activities each Plaintiff engaged in on [the hospital's] website and what information each Plaintiff provided. *Sharp Healthcare*, 2023 WL 4484441, at *3. In another case, the court found plaintiff's allegations sufficient where she alleged that she entered data relating to her heart issues and high blood pressure in MyChart and then later received advertisements on Facebook for high blood pressure medication.[269] Following this order, courts have found such allegations to be the bare minimum required by plaintiffs in Meta Pixel cases. This would include details about the plaintiff's use of the hospital's website and the nature of the information disclosed. Courts generally dismiss similar claims in the absence of these core details.[270]

Second, website owners do not intrude by using the pixel on their own websites. Instead of an intrusion, courts largely agree that a hospital's use of the pixel amounts to a disclosure or publication as the hospital was the intended recipient of the information.[271]

Third, courts—and even some plaintiffs' counsel—largely now agree that hospitals are a party to a website visitor's communications on the hospital's website.[272] Some plaintiffs are now choosing to litigate whether a

269. Doe v. Regents of Univ. of Cal., Case No. 23-cv-00598-WHO, 2023 WL 3316766, at *4 (N.D. Cal. May 8, 2023).

270. *See, e.g.*, *Hartley*, 2023 WL 7386060; Murphy v. Thos. Jefferson Health, Civ. Action No. 22-4674, 2023 WL 7017734 (E.D. Pa. Oct. 10, 2023).

271. *Kurowski*, 2023 WL 4707184, at *8 ("The harm caused by Rush, if any, continues to be its alleged disclosure of the Kurowski's private health information."); *Hartley*, 2023 WL 7386060, at *3 ("Since Plaintiff is complaining about what she thinks UCMC told Facebook, her complaints are with the publication, and not any intrusion, which she probably initiated.").

272. *Hartley*, 2023 WL 7386060 (finding the hospital a necessary party to the communication); *Kurowski*, 2023 WL 4707184, at *2 (observing the parties do not dispute that the hospital was the intended recipient of the allegedly intercepted communications).

hospital's use of the Meta Pixel is a criminal or tortious act. To date, courts have rejected such arguments.[273] However, at least one court has left open the door open to reconsider with more specific allegations.[274]

Last, class certification is likely to present challenges for plaintiffs' counsel if they proceed past the motion to dismiss phase. In this last year, we have seen at least one court deny class certification for claims related to the Meta Pixel because plaintiffs failed to show that common issues of law and fact predominate over individual issues and that class certification is a superior method for adjudicating the claims.[275] Specifically, the court found that the "highly offensive" standard for an intrusion upon seclusion claim is a high standard that will require consideration of the exact type of information the hospital shared with Meta.[276] But unlike the *MedStar* case, the pixel case against Virginia Mason Medical Center has slowly lurched forward after an unsuccessful appeal of the trial court's adoption of plaintiffs' proposed order granting class certification in late 2021.[277]

The next year will undoubtedly be filled with new Meta Pixel decisions and new legal arguments as plaintiffs continue to file novel cases and claims and courts are steadily issuing orders.

IV. NOTABLE ENFORCEMENT ACTIONS

A. *Privacy Breaches, Settlements, and Regulator Activity: A Year (and Then Some) in Review, by Josh Hansen*

The last year (and then some) has brought significant changes to the status quo when it comes to regulator privacy/security enforcement. Regulators have shown an increased willingness to revive "dead" laws, hold executives accountable, embrace expansive readings of their authority, impose more prescriptive requirements, target data brokers, and protect children. Join me on this journey as we walk through some of the more notable decisions in those areas.

1. The FTC Revives Dormant Rule to Address Disclosures of Medical Data.

In early 2023, the FTC reached separate settlements with two companies—GoodRX and BetterHelp—for alleged violations of the Health

273. *Kurowski*, 2023 WL 4707184, at *2–4 (rejecting plaintiff's allegations that by violating HIPAA, the hospital acted with a criminal or tortious purpose); *see also Murphy*, 2023 WL 7017734.

274. *Kurowski*, 2023 WL 4707184, at *2–4.

275. Doe v. MedStar Health, Inc., Case No. 24-C-20-000591, 2023 WL 4931348, at *10 (Md. Cir. Ct. Mar. 10, 2023).

276. *Id.* at *17.

277. *See* Doe v. Virginia Mason Med. Ctr., Case No. 19-2-26674-1 SEA (King Cnty. Super. Ct.).

Breach Notification Rule.[278] That rule requires companies not governed by HIPAA to notify the FTC and any impacted individuals when there is "breach"—unauthorized processing—of a person's identifiable health information.[279] Although the FTC issued the rule in 2009, it had never brought an enforcement action—until 2023.

The FTC revived the rule in their lawsuit against GoodRX and a month later in a complaint against BetterHelp.[280] Both cases were premised on the companies disclosing health records to advertisers via third-party trackers (such as the Meta Pixel) and other third parties, despite stating they did not do so in their privacy policies. The FTC asserted those disclosures violated the Health Breach Notification Rule. Specifically, the FTC alleged the disclosures, which occurred without the user's authorization, constituted a security breach requiring notice—which the companies did not provide. And the FTC added an FTC Act Section 5 claim on the grounds that the misrepresentation about disclosures constituted an unfair/deceptive practice. Both GoodRX and BetterHelp settled with the FTC; they agreed to, among other conditions, refrain from sharing health information with advertisers (except in limited situations) and obtain consent before disclosing information to other parties.[281]

These cases, along with a similar complaint that the FTC filed in May 2023, reflect a renewed focus on health information beyond the confines of HIPAA.[282] The FTC has breathed new life into its authority in the space, and its recent proposed rulemaking on the Health Breach Notification Rule suggests this will be an area of continued focus.[283] Some practical takeaways:

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278. Stipulated Order for Permanent Injunction, Civil Penalty, and Other Relief, United States v. GoodRx Holdings, Inc., No. 3:23-cv-460 (N.D. Cal. Feb. 17, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/goodrxfinalstipulatedorder.pdf; Decision and Order, BetterHelp, Inc., FTC Docket No. C-4796 (July 14, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023169betterhelpfinalorder.pdf.

279. *Complying with FTC's Health Breach Notification Rule*, Fed. Trade Comm'n (Jan. 2022), https://web.archive.org/web/20230921095737/https://www.ftc.gov/business-guidance/resources/complying-ftcs-health-breach-notification-rule-0; *see also* 16 C.F.R. § 318 (2023).

280. *FTC Enforcement Action to Bar GoodRx from Sharing Consumers' Sensitive Health Info for Advertising*, Fed. Trade Comm'n (Feb. 1, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-enforcement-action-bar-goodrx-sharing-consumers-sensitive-health-info-advertising#:~:text=The%20Federal%20Trade,and%20other%20companies; United States v. GoodRx Holdings, Inc., Case No. 3:23-cv-00460-DMR (N.D. Cal.); *In re* Betterhelp, Inc., FTC Complaint.

281. *See* Stipulated Order, *supra* note 278 (GoodRX); Decision and Order, *supra* note 278 (BetterHelp).

282. *See* Complaint, United States v. Easy Healthcare Corp., Case No. 1:23-cv-03107 (N.D. Ill.), https://www.ftc.gov/system/files/ftc_gov/pdf/2023.06.22_easy_healthcare_signed_order_2023.pdf.

283. *FTC Proposes Amendments to Strengthen and Modernize the Health Breach Notification Rule*, Fed. Trade Comm'n (May 18, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-proposes-amendments-strengthen-modernize-health-breach-notification-rule.

- **Key Takeaway #1.** There are restrictions on the use of health information even for companies not regulated by HIPAA.
- **Key Takeaway #2.** A privacy policy must accurately reflect disclosures of personal information.

2. Privacy and Security Liability Comes for Leadership.

The FTC, SEC, and DOJ have sought (and secured) civil or criminal penalties against senior executives—CEOs, Chief Information Security Officers (CISOs), etc. We will walk through a few of these cases.

- **Uber's Security Officer.** A jury convicted Uber's former security officer, Joseph Sullivan, of two federal crimes (obstruction and concealment of a felony) for his role in covering up a data breach at Uber. Upon learning of the breach, he tried to keep the breach hidden. He tried to conceal it from the FTC—who was investigating Uber's security practices due to an earlier breach—by signing off on documents that he knew were misleading. He also paid the threat actors a bug bounty that was ten times the maximum allowed under the program and had them sign nondisclosure agreements attesting that no data was exfiltrated, even though he knew this was false. [Another Uber executive would later state this payment was akin to extortion].[284]
- **Drizly's CEO.** Drizly's CEO, James Rellas, entered into a settlement agreement with the FTC that imposes conditions on him that persist even after he leaves the company. The FTC alleged Drizly and Mr. Rellas learned of various security failures—missing or deficient MFA, policies, access controls, and threat monitoring. And, despite making public proclamations about maintaining robust security, the company and Mr. Rellas failed to address those shortcomings or even hire a senior executive responsibility for security. After the FTC filed a complaint against Drizly and the CEO, they both settled. Mr. Rellas agreed to implement an information security program at any company he works at as an executive within the next ten years that collects personal data on more than 25,000 people, while Drizly agreed to various remedial measures (*e.g.*, destroying data, limiting collection, and obtaining independent assessments).[285]
- **Solar Winds' CEO.** The SEC charged Solar Winds' CISO with fraud in connection with misleading investors about the company's

284. *See* Press Release, U.S. Atty's Office, N.D. Cal., Former Chief Security Officer of Uber Convicted of Federal Charges for Covering up Data Breach Involving Millions of Uber User Record (Oct. 5, 2022)), https://www.justice.gov/usao-ndca/pr/former-chief-security-officer-uber-convicted-federal-charges-covering-data-breach.

285. Decision and Order, *In re* Drizly, LLC, FTC (Jan. 10, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/2023185-drizly-llc-matter.

> security posture. [You may recall Solar Winds for its supply-chain hack: a threat actor compromised SolarWinds' security tool, and the company unknowingly pushed out that compromised code (and the resulting vulnerability) to its customers who used the tool.] The company claimed in public filings that it had a robust security posture and adhered to NIST frameworks. But the SEC alleges those were lies. Allegedly, the CISO acknowledged during an internal presentation that the "current state of security leaves us in a very vulnerable state for our critical assets," while the company lacked policies for most of the NIST they claimed to follow, and executives were told of widespread noncompliance with key policies. The SEC summed up the case by stating: "We allege that, for years, SolarWinds and [the CISO] ignored repeated red flags about SolarWinds' cyber risks, which were well known throughout the company and led one of [the CISO's] subordinates to conclude: 'We're so far from being a security minded company.'"[286]

These cases are a warning sign to executives: take privacy and security seriously because the stakes are now personal. But these cases are not signals that executives are at risk due to regular/routine shortcomings. Instead, consider the following takeaways:

- **Key Takeaway # 1.** Executives are likely not at risk for routine activities; regulators brought charges where there egregious, intentional, and irregular behavior.
- **Key Takeaway # 2.** The FTC will impose sanctions on executives that stay with them and affect how their future job opportunities.
- **Key Takeaway # 3.** Ransom payments remain legal, but companies cannot extract knowingly false statements or use them to conceal a breach.

3. OCR Takes Expansive Reading of HIPAA and Online Trackers.

The United States Department of Health and Human Services Office for Civil Rights (OCR)—the regulator who enforces HIPAA—issued subregulatory guidance stating OCR's position that the use of online trackers can constitute a HIPAA violation.[287] Specifically, OCR states that using these tracking tools—such as pixels, cookies, and session-replay tools—can cause

286. Press Release, U.S. SEC, SEC Charges SolarWinds and Chief Information Security Officer with Fraud, Internal Control Failures (Oct. 30, 2023) https://www.sec.gov/news/press-release/2023-227.

287. *Use of Online Tracking Technologies by HIPAA Covered Entities and Business Associates*, U.S. Dep't of Health & Hum. Servs. (Dec. 1, 2022), https://www.hhs.gov/about/news/2022/12/01/hhs-office-for-civil-rights-issues-bulletin-on-requirements-under-hipaa-for-online-tracking-technologies.html.

an unauthorized disclosure of protected health information (PHI). A few months after issuing the guidance, OCR signaled this is an area of focus by sending a joint letter—cosigned by the FTC—to approximately 130 hospitals and telehealth providers in which the regulators highlighted OCR's guidance and the FTC's enforcement of the Breach Notification Rule (discussed above).[288]

To understand OCR's guidance, one needs a basic grasp of the technology underlying these tracking tools. These tools are third-party code that a company embeds into its website to track user activity and direct the user's browser to send that information to a third party.[289] The shared information includes details such as the user's IP address as well as details on the user's activity: webpages visited, actions taken (such as links clicked), and, in limited situations, text entered.

In its guidance on those tools, OCR starts by stating that regulated entities using online trackers are disclosing information (even though it is the user's browser that shares the data with the third party) and that a user's IP address "generally is PHI" (even without identifying details such as name or email address). The premise is that tracked information is PHI because it concerns a user's care or payment for care and "connects the individual to the regulated entity."[290] But then, OCR reveals the analysis is more nuanced: one must consider whether the tracking occurred on an authenticated page (which requires a user login before accessing) or unauthenticated page (which does not require a login).

- **Authenticated Pages.** OCR states that tracking tools on authenticated pages generally have access to PHI, and so a regulated entity must ensure that their use of the tools complies with the HIPAA Privacy Rule. [Basically, turn them off or execute a business associate agreement.]
- **Unauthenticated Pages.** Unlike authenticated pages, OCR explains that tracking tools on unauthenticated pages generally do not have access to PHI. But OCR states that the tools receive PHI if they collect an IP address when a user visits a website to search for available appointments, and they may access PHI if they monitor information on pages addressing specific symptoms.

288. *HHS Office for Civil Rights and the Federal Trade Commission Warn Hospital Systems and Telehealth Providers About Privacy and Security Risks from Online Tracking Technologies*, U.S. Dep't of Health & Hum. Servs. (July 20, 2023), https://www.hhs.gov/about/news/2023/07/20/hhs-office-civil-rights-federal-trade-commission-warn-hospital-systems-telehealth-providers-privacy-security-risks-online-tracking-technologies.html.

289. Again, worth repeating: the website is not actually sharing the information with the third party—the user shares their information with the third party.

290. *Office for Civil Rights*, *supra* note 288.

In short, OCR takes the position that the use of tracking tools can involve a disclosure of PHI, even when the only potentially identifying characteristic is an IP address.

Suffice to say, the guidance is causing a ripple effect through the industry and has drawn some fierce criticism. One district court recently held that the guidance—which the court ruled was not entitled to deference—was not persuasive because its interpretation of what constitutes PHI "goes well beyond the meaning of what the statute can bear."[291] And trade groups have also gotten in on the action. In a letter to OCR, the American Hospital Association (AHA) urged OCR to suspend its "rule" (more on that terminology later) because it erred by treating an IP address as PHI.[292] The AHA argued that an IP address should not be treated as PHI for a few reasons, including that the user may be searching for general medical information or seeking nonmedical details (such as hours). The AHA reiterated their concerns in a letter to Congress and added that the guidance would have negative policy implications, such as limiting the use of analytic tools that help hospitals tailor guidance.[293] When none of those gained sufficient traction, the AHA sued OCR alleging that the guidance reflects improper rulemaking.[294] That lawsuit is pending.

4. Data Brokers Find Themselves in the FTC Crosshairs.

The FTC filed a lawsuit against Kochava alleging the company engaged in unfair practices by selling precise location data.[295] [Kochava tried to stop this lawsuit by preemptively suing the FTC. But that did not pan out: the court dismissed that complaint without leave to amend.][296] The crux of the FTC's complaint was that Kochava substantially harmed consumers because, by selling data that could identify them and reveal their movements to/from sensitive locations, the company put consumers at substantial risk of harm from third parties.[297] The FTC pressed two theories why

291. Kurowski v. Rush Sys. for Health, 683 F. Supp. 3d 836, 844 (N.D. Ill. 2023).

292. Melinda Reid Hatton, AHA Letter to OCR on HIPAA Privacy Rule, Online Tracking Guidance, Am. Hosp. Ass'n (May 22, 2023), https://www.aha.org/lettercomment/2023-05-22-aha-letter-ocr-hipaa-privacy-rule-online-tracking-guidance.

293. Stacey Hughes, *AHA Responds to Senate RFI on Health Data Privacy*, Am. Hosp. Ass'n (Sept. 28, 2023), https://www.aha.org/lettercomment/2023-09-28-aha-responds-senate-rfi-health-data-privacy.

294. Complaint, Am. Hosp. Ass'n v. Rainier, No. 4:23-cv-01110-P (N.D. Tex. Nov. 2, 2023), https://www.aha.org/legal-documents/2023-11-02-case-complaint-aha-tha-thr-united-health-care-system-v-rainer.

295. Press Release, Fed. Trade Comm'n, FTC Sues Kochava for Selling Data that Tracks People at Reproductive Health Clinics, Places of Worship, and Other Sensitive Locations (Aug. 29, 2023), https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-sues-kochava-selling-data-tracks-people-reproductive-health-clinics-places-worship-other.

296. Kochava Inc. v. FTC, No. 2:22-cv-00349-BLW, 2023 WL 3250496 (D. Idaho May 3, 2023).

297. Complaint, FTC v. Kochava Inc., Case No. 2:22-cv-00377-DCN (D. Idaho Aug. 29, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/1.%20Complaint.pdf.

consumers suffered a substantial injury (an element of an unfair practice claim). First, the FTC alleged Kochava's sale of location data constituted a direct harm because the disclosure of sensitive data is an invasion of privacy. Second, the FTC alleged Kochava's practices created an increased risk of secondary harms because a company using the data could draw inferences (*e.g.*, someone has a specific medical condition) and use that information to inflict harm. Kochava moved to dismiss on a variety of grounds.

In granting Kochava's motion to dismiss, the court explained that it did not buy the FTC's position on either theory of how Kochava substantially harmed consumers.[298] The court rejected the direct-harm contention because the FTC had not shown a sufficiently severe invasion of privacy. The court highlighted that (1) the potential harm comes from inferences—which are often unreliable; (2) the data is available through other means; and (3) the FTC did not allege how many users were impacted. Next, the court rejected the secondary harm theory because the FTC failed to alleged that Kochava's practices were likely to create an increased risk of injury—the FTC merely claimed the sales *could* lead to such harm.

The FTC filed an amended complaint. Kochava responded by urging the court to not make the new complaint public because it is "rife with false statements" as well as "false and inflammatory allegations clearly aimed at misleading this court and the public."[299] But the court ruled against Kochava, and the complaint is now publicly available.[300]

5. New York Enforces and Bolsters Its Cybersecurity Requirements.

The New York Department of Financial Services (NYDFS)—the state's regulator for the insurance, financial, and banking industry—has been active on the enforcement and rulemaking front when it comes to the department's rigorous cybersecurity requirements. Those requirements, which are called "New York's Cybersecurity Requirements for Financial Services Companies," apply to anyone operating under or required to operate under authorization from the state's laws on banking, insurance, or financial services.[301]

In May 2023, NYDFS reached a settlement with OneMain Financial Group for violations of NYDFS's cybersecurity rules.[302] NYDFS alleged

298. FTC v. Kochava Inc., 671 F. Supp. 3d 1161, 1174–75 (D. Idaho 2023).

299. Wendy Davis, *Mobile Data Broker Kochava Wants FTC's 'Scandalous' Complaint Kept Under Wraps*, Media Post (June 14, 2023), https://www.mediapost.com/publications/article/386332/mobile-data-broker-kochava-wants-ftcs-scandalous.html.

300. *See id.*

301. N.Y. Comp. Code R. & Regs. tit. 23 § 500.1(e).

302. Consent Decree with OneMain Financial Group, N.Y. Dep't Fin. Servs. (May 24, 2023), https://www.dfs.ny.gov/system/files/documents/2023/05/ea20230524_co_onemain.pdf; *see also Superintendent Adrienne A. Harris Announces $4.25 Million Cybersecurity Settlement with*

OneMain left itself (and its customers) at a significant risk of a cybersecurity incident because it failed to effectively manage third-party service provider risk, manage access privileges, and maintain a formal application security development methodology. In particular, NYDFS flagged a variety of issues, such as OneMain:

- Neglecting to follow its policies on vendor due diligence;
- Allowing administrators to keep default passwords;
- Using shared administrator accounts;
- Failing to address shortcomings identified by internal audit team;
- Storing passwords in a folder called "PASSWORDS" (which was accessible and editable by people across the company);
- Disregarding its obligation to properly train employees or track their training.

Based on those issues, NYDFS and OneMain entered into a consent decree. OneMain has agreed to pay $4.25 million and take various remedial measures within 180 days (including updating policies, implementing training procedures, and adopting a plan to review access privileges).

In early November, NYDFS issued amendments to the cybersecurity rules.[303] [Spoiler: They only got more prescriptive.] The changes add a variety of obligations covering topics such as accountability, incident reporting, and compliance certification. Some of the most notable changes:

- **Compliance Certifications** [500.17(b)]. Submit certifications from the CISO and highest executive attesting to material compliance or submit a written acknowledgment discussing the lack of such compliance.
- **Incident Reporting** [500.17(c)]. Notify NYDFS of cyber-extortion payments within twenty-four hours and explain within thirty days why the payment was necessary.
- **Asset Inventories** [500.13(a)]. Create and maintain a complete, accurate asset inventory.
- **Policy Review** [500.12(a–b)]. Obtain approval for policies each year from senior officer or senior governing body (board of directors or equivalent).
- **Training** [500.14(a)]. Conduct annual (or more frequent) cybersecurity training that includes social engineering for all personnel.

OneMain Financial Group LLC, N.Y. Dep't Fin. Servs. (May 25, 2023), https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202305251.

303. *Second Amendment to 23 NYCRR 500*, N.Y. Dep't Fin. Servs. (Oct. 16, 2023), https://www.dfs.ny.gov/system/files/documents/2023/10/rf_fs_2amend23NYCRR500_text_20231101.pdf.

The amendments impose even more onerous obligations on large companies ($20 million in gross revenue + other criteria)—which NYDFS calls "Class A Companies." Those companies must, for example deploy an Endpoint Detection and Response solution, implement a solution for centralized logging and security alerts, and conduct independent audits at a frequency determined by their risk assessment.

6. Children's Privacy Becomes a Focal Point for the FTC.

In 2023, the Federal Trade Commission (FTC) reached settlements with three companies over alleged violations of the Children's Online Privacy Protection Act (COPPA). A few critical points about COPPA before turning to each of the cases. The law, which protects minors under thirteen, generally empowers parents to control how their child's data is used (and when it is deleted), requires and prevents a company from keeping data after it is no longer necessary for its intended purpose. The three FTC settlements all honed in on various aspect of those rules.

- **Amazon.** Amazon agreed to pay a $25 million fine and implement remediation measures following allegations that it improperly retained voice recordings of minors who used Alexa. The FTC alleged that Amazon targeted children and collected recordings of their voice without deleting the data when it was no longer necessary. In some cases, Amazon even kept transcripts after the parent requested the company delete the data.[304]
- **Microsoft.** Microsoft agreed to pay $20 million and adopt various remediation measures to resolve a lawsuit alleging it failed to properly process minors' data or empower parents in connection with the company's online gaming service. Specifically, the FTC faulted Microsoft for (1) collecting information on known minors without first telling the parents about the company's privacy practices; (2) providing parents with incomplete disclosures about what it collected about their child; and (3) retaining information indefinitely on minors whose parents did not consent.[305]
- **Epic Games.** Epic Games, a video game developer, entered a settlement for alleged COPPA violations in connection with its popular game—Fortnite. The company agreed to pay $275 million and adopt a variety of remediation measures (including, a first-of-its-kind term:

304. *Amazon Agrees to Injunctive Relief and $25 Million Civil Penalty for Alleged Violations of Children's Privacy Law Relating to Alexa*, U.S. Dep't of Justice (July 19, 2023), https://www.justice.gov/opa/pr/amazon-agrees-injunctive-relief-and-25-million-civil-penalty-alleged-violations-childrens.

305. *Microsoft Agrees to Pay $20 Million Civil Penalty for Alleged Violations of Children's Privacy Laws*, U.S. Dep't of Justice (June 12, 2023), https://www.justice.gov/opa/pr/microsoft-agrees-pay-20-million-civil-penalty-alleged-violations-children-s-privacy-laws.

a requirement to adopt strong privacy defaults for minors). The settlement came after the FTC filed a lawsuit alleging various COPPA violations, including that Epic Games ignored evidence of children playing the game, failed to obtain parental consent to collect data from minors, and imposed unreasonable barriers for parents requesting deletion of their child's data (and sometimes the company never responded).[306]

V. NOTABLE SETTLEMENTS

A. *Advocate Aurora Health Pixel Litigation Settlement, by Robert A. Stines*

In October 2022, a group of plaintiffs initiated a class action against Advocate Aurora Health, Inc. for the alleged failure to properly secure and safeguard personally identifiable information and personal health information, including names, email addresses, phone numbers, computer IP addresses, emergency contact information, appointment information, medical provider information, and medical histories. The initial class complaint was filed in the United States District Court of the Eastern District of Wisconsin.[307] According to the complaint, Advocate configured and implemented a tracking pixel to collect and transmit information from its website to third parties, including information communicated in sensitive and presumptively confidential patient portals and mobile apps like its MyChart portal and LiveWell app.

Before the lawsuit was filed, on October 30, 2022, Advocate posted a Breach Notification on its website in which it disclosed that it used Internet tracking technologies, such as Google and Meta. Advocate learned that pixels or similar technologies installed on their MyChart and LiveWell patient portals, as well as on some of their scheduling widgets, transmitted certain patient information to third-party vendors. In the Breach Notification, Advocate disclosed that the information transmitted to third parties included IP addresses; dates, times, and/or locations of scheduled appointments; proximity to an Advocate Aurora Health location; provider information; appointment or procedure type; and communications between patients and others through MyChart. Advocate made it clear that no social security number, financial account, credit card, or debit card information was involved in the incident.

306. *Epic Games Inc., Developer of Fortnite Video Game, Agrees to $275 Million Penalty and Injunction for Alleged Violations of Children's Privacy Law*, U.S. Dep't of Justice (Dec. 19, 2022), https://www.justice.gov/opa/pr/epic-games-inc-developer-fortnite-video-game-agrees-275-million-penalty-and-injunction.

307. *In re* Advocate Aurora Health Pixel Litig., Case No. 22-CV-1253-JPS, 2023 WL 2787985 (E.D. Wis. Apr. 5, 2023).

After Advocate made the breach disclosure, individuals filed class action lawsuits in various jurisdictions. The plaintiffs alleged that they never consented, agreed, authorized, or otherwise permitted Advocate to disclose their private information to third parties. The plaintiffs also alleged that Advocate never provided written notice about the disclosure of patient protected health information to third parties. The complaints alleged various claims for (1) Invasion of Privacy, (2) Breach of Contract (3) Breach of Fiduciary Duty, and (4) Violations of Confidentiality of Patient Health Care Records (Wis. Stat. § 146.81 *et seq*.). The various class actions were consolidated.[308]

On June 5, 2023, the parties notified the court that they had reached a settlement. On August 11, 2023, Plaintiffs filed an unopposed motion for preliminary approval of their class action settlement with Advocate, which would conclude the litigation. The parties agreed to the certification, for settlement purposes, of a class of approximately 2,500,000 individuals who

> resid[e] in the United States whose Personal Information or health information was or may have been disclosed to a third party without authorization or consent through any Tracking Pixel on Defendant's websites, LiveWell App, or MyChart patient portal between October 24, 2017 and October 22, 2022. Excluded from the Class are Defendant and its affiliates, parents, subsidiaries, officers, and directors, as well as the judges presiding over this matter and the clerks of said judges. This exclusion does not apply to those employees of Defendant and its Related Parties who received Defendant's October 22, 2022 notification regarding its usage of Tracking Pixels.

The parties' settlement agreement provides that Advocate will establish a non-reversionary common settlement fund of $12,225,000.00, out of which payments to class members, service payments to named plaintiffs, settlement administration costs, and attorneys' fees and costs will be paid. Specifically, payments will be capped at $50.00 per class member; named Plaintiffs will receive service awards of $3,500.00 each; and class counsel will be permitted to seek an award of attorney's fees in an amount up to thirty-five percent of the common fund, or $4,278,750.00, plus up to $30,000.00 in costs.[309]

The court granted Plaintiffs' motion for preliminary approval of the class settlement. The court agreed that there were no barriers to conditional certification of the proposed class and preliminary approval of the class settlement. The court found that the class appears to satisfy the numerosity, commonality, typicality, adequacy, and predominance and superiority

308. *Id.*

309. *See* Advocate Aurora Pixel Litig., Case No. 2:22-cv-1253 (E.D. Wis.), https://www.advocateaurorasettlement.com.

requirements of Federal Rule of Civil Procedure 23(a) and (b)(3). The proposed settlement appeared fair, reasonable, and adequate, and it was within the range of approval. The court noted that the agreement was negotiated with the assistance of a mediator (Hon. David E. Jones) and did not appear to be a "product of collusion."[310] Finally, the settlement agreement provided for direct notice to class members in a manner that is practicable under the circumstances.

There will be a final approval hearing in 2024 where the court will consider whether (a) the settlement is fair, reasonable, and adequate; (b) the Settlement Class should be finally certified; (c) the preliminary appointment of Class Counsel should be made final; (d) the preliminary appointment of the Class Representatives should be made final; (e) Class Counsel's motion for attorneys' fees and Litigation Expenses should be granted; (f) the Service Awards sought for Class Representatives should be granted; and (g) a final judgment should be entered.

310. Order, Advocate Aurora Pixel Litig., Case No. 2:22-cv-1253 (E.D. Wis. Aug. 21, 2023), https://www.advocateaurorasettlement.com/home/7675/DocumentHandler?docPath=/Documents/_0036_ORDER_signed_by_Judge_J_P_Stadtmueller_on.pdf.

RECENT DEVELOPMENTS IN FIDELITY AND SURETY LAW

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I. SURETY LAW

A. *Performance Bonds*

1. Arbitration

In *Arch Insurance Co. v. Clark Construction, Inc.*,[1] a prime contractor initiated an arbitration proceeding against the subcontractor and subcontractor's performance bond surety filed suit seeking declaratory judgment.[2] The prime contractor moved to stay the federal action.[3] The surety argued that resolution of the federal action would not impact the arbitration proceeding, which was based on whether the prime contractor complied with conditions precedent under the bond and not the substantive dispute, and that waiting would hinder judicial efficiency.[4] The court granted the motion to stay, explaining that allowing litigation to proceed simultaneously with arbitration could create a risk of inconsistent and duplicative litigation.[5]

2. Jurisdiction, Venue, and Forum

In *Key Construction, Inc. v. Western Surety Co.*,[6] a subcontractor default on a project in Washington resulted in a project-wide shut down.[7] The prime contractor brought suit in Kansas state court under the subcontract's forum-selection clause, which provided that to the extent the contractor did not elect arbitration, the "Eighteenth Judicial District, District Court Sedgwick County, Kansas is the court of exclusive jurisdiction and venue" to resolve disputes between the prime contractor and subcontractor.[8] The surety removed to federal court and sought transfer to Washington.[9] The prime contractor moved to remand back to Kansas state court.[10] The court denied both motions.[11] As to the motion to transfer, the court explained that the balance of factors did not strongly favor transfer as required under precedent.[12] The court noted that the prime contractor's choice of forum and court congestion weighed against transfer, whereas conflict of laws

1. No. 5:22-cv-00100-KS-BWR, 2023 WL 2762025 (S.D. Miss. Apr. 3, 2023).
2. *Id.*
3. *Id.* at *2.
4. *Id.*
5. *Id.* at *2–3.
6. No. 6:22-cv-01247-DDC-ADM, 2023 WL 2187291 (D. Kan. Feb. 23, 2023).
7. *Id.* at *1.
8. *Id.* at *1–2.
9. *Id.* at *1, *4.
10. *Id.* at *1.
11. *Id.* at *4, *8.
12. *Id.* at *6–8 (citing Emp'rs. Mut. Cas. Co. v. Bartile Roofs, Inc., 618 F.3d 1153, 1167 n.13 (10th Cir. 2010)).

and allowing a local court to decide localized issues favored transfer.[13] In denying the motion to remand, the court explained that the subcontract only applied to disputes with the subcontractor, and that the performance bond did not specify that the surety assumed all obligations undertaken in the subcontract.[14]

In *Jackson Contractor Group, Inc. v. Travelers Casualty & Surety Co. of America*,[15] a subcontractor ceased working on an Idaho project.[16] The prime contractor sued the subcontractor's performance bond surety in federal court in Washington.[17] The surety moved to dismiss under the performance bond's forum-selection clause, which designated Idaho.[18] The surety also moved to transfer to federal court in Idaho on forum non conveniens grounds.[19] The prime contractor argued that the forum-selection clause was void *ab initio* under a Washington statute that provides that insurance contracts may not "depri[ve] the courts of this state of the jurisdiction of action against the insurer" and that venue transfer was inappropriate as private and public interest factors weighed in favor of staying in Washington.[20]

The court denied the surety's motion, explaining that the forum-selection clause was void *ab initio* because the performance bond was subject to Washington law as it was signed in Washington, work was partially performed in Washington, and the prime contractor and subcontractor were located in Washington.[21] The court further explained that transfer was inappropriate because relevant witnesses were located in Washington.[22]

3. Conditions Precedent

In *Sterling & Wilson Solar Solutions, Inc. v. Fidelity & Deposit Co. of Maryland*,[23] a prime contractor default-terminated a subcontract and sent the subcontractor's performance bond sureties written notice in which it advised the sureties that the subcontractor had "defaulted" on the subcontract.[24] The notice further advised the sureties that the notice was being provided pursuant to section 3 of the AIA A312-2010 performance bond.[25] The sureties lost the notice and did not respond, and the prime contractor obtained

13. *Id.* at *8.
14. *Id.* at *2–4.
15. No. 2:22-cv-00178-TOR, 2022 WL 16541163 (E.D. Wash. Oct. 28, 2022).
16. *Id.* at *1.
17. *Id.*
18. *Id.* at *2.
19. *Id.* at *1, *3.
20. *Id.* at *2–3.
21. *Id.* at *2 (citing Wash. Rev. Code § 48.18.200).
22. *Id.* at *3.
23. No. 1:22-cv-03076-SAB, 2023 WL 1864872 (E.D. Wash. Feb. 9, 2023).
24. *Id.* at *1.
25. *Id.*

a completion contractor and filed suit against the sureties.[26] The sureties moved for summary judgment, arguing that the notice failed to satisfy the express conditions precedent of section 3, which required pre-termination notice and a post-termination agreement to pay the balance of the subcontract price.[27] In denying the sureties' motion, the court held that violation of a notice requirement exonerates a surety only to the extent of resulting prejudice even when notice is an express condition precedent to liability.[28]

4. Surety Liability

In *Hanover Insurance Co. v. Binnacle Development, LLC*,[29] the surety completed three projects in a municipal utility district for a defaulted prime contractor.[30] The prime contracts were with three separate private developers and the district was not a party.[31] The surety sued the developers to recover the contract balances.[32] The developers sought an offset based on the contracts' liquidated damages provisions.[33] A governing statute allowed for economic disincentives for delayed projects only for "district contract[s]."[34] The court found that the contracts could not be district contracts absent the district's inclusion as a party.[35] Therefore, the court held that the liquidated damages clauses were unenforceable penalties under Texas law.[36]

In *Apex Development Co. v. Rhode Island Department of Transportation*,[37] after substantial completion of an interstate highway project a property owner sued the DOT, claiming trespass and damage to property during construction.[38] The DOT sought to enforce the contract's indemnification claim against the prime contractor's sureties.[39] The sureties argued that the bond only applied to direct construction costs and that their obligations were conditioned on the prime contractor's default and notice to the sureties.[40] The supreme court affirmed summary judgment in favor of the sureties, finding the performance bond was null and void without a declaration

26. *Id.* at *1–2.
27. *Id.* at *2 (citing AIA A312-2010 performance bond form).
28. *Id.* (quoting Colo. Structures, Inc. v. Ins. Co. of the W., 167 P.3d 1125, 1130 (Wash. 2007)).
29. 57 F.4th 510 (5th Cir. 2023) (applying Texas law).
30. *Id.* at 513.
31. *Id.*
32. *Id.*
33. *Id.* at 513–14.
34. *Id.* at 515 (citing Tex. Water Code Ann. § 49.271).
35. *Id.* at 517.
36. *Id.* at 517–18.
37. 291 A.3d 995 (R.I. 2023).
38. *Id.* at 997.
39. *Id.*
40. *Id.* at 998.

of default and notice.[41] The court further held that it would be unreasonable to extend liability to the sureties where the failure to provide notice prevented them from intervening to minimize their liability for damages.[42]

In *E&I Global Energy Services, Inc. v. United States*,[43] after prime contractor's termination on a federal project the performance bond sureties retained a completion contractor under a contract in which the sureties were responsible for paying pre-default debts owed to subcontractors and suppliers.[44] The completion contractor had difficulty retaining subcontractors and suppliers and paid some of prime contractor's outstanding debts to retain their performance.[45] The completion contract was terminated for default for untimely performance.[46] The completion contractor sued the government seeking damages and a conversion of the termination to a termination for convenience. On appeal, the Federal Circuit concluded that the factual allegations were sufficient to support the completion contractor's theory of excusable delay.[47] The court explained that the sureties' failure to pay subcontractors and suppliers could constitute an adequate excuse for delay if it substantially impaired the completion contractor's performance.[48] The court further explained that the sureties' alleged failures and the government's failure to enforce the sureties' payment obligations could also constitute an adequate excuse for delay under federal law.[49]

In *U.S. Specialty Insurance Co. v. Trawick Contractors, Inc.*,[50] following a subcontractor default, its surety filed a declaratory judgment action against the prime contractor who counterclaimed for completion costs.[51] After discovery, the surety issued payment to the prime contractor that excluded legal and consulting expenses.[52] The surety then moved for summary judgment, arguing that it was not obligated for such costs because the performance bond did not reference legal or consulting fees and did not otherwise incorporate the subcontract by reference.[53] The court denied the surety's motion, explaining that the subcontract and bond must be "read together" because the bond described the subcontract and the work required thereunder, and the subcontract required the bond at issue.[54] The court then

41. *Id.* at 1000–01
42. *Id.* at 1000.
43. No. 2022-1472, 2022 WL 17998224 (Fed. Cir. Dec. 30, 2022).
44. *Id.* at *1.
45. *Id.*
46. *Id.*
47. *Id.* at *4.
48. *Id.* (citing Int'l Elecs. Corp. v. U.S., 646 F.2d 496, 509–10 (Cl. Ct. 1981)).
49. *Id.* (citing 48 C.F.R. 52.249-10(b)(1)).
50. No. 2:21-cv-00378-MHH, 2023 WL 1478476 (N.D. Ala. Feb. 2, 2023).
51. *Id.* at *1–2.
52. *Id.*
53. *Id.* at *2.
54. *Id.* at *3–5 (citing Bill White Roofing & Specialty Co., Inc. v. Cedric's, Inc., 387 So. 2d 189, 191 n.3 (Ala. 1980)).

found that the subcontract and bond, as read together, required the surety to reimburse the prime contractor for legal and consulting expenses up to the penal sum of the bond.[55]

5. Limitations

In *L&C Expedition, LLC v. Swenson, Hagen & Co.*,[56] a performance bond obligee filed suit outside of the bond's limitation period.[57] The obligee argued that the limitations period was invalid under a North Dakota state law that prohibited parties from modifying the statute of limitations by contract.[58] The court disagreed and found that another state statute provides that a surety cannot be held beyond the express terms of the bond.[59] The court further found that a bond provision limiting the amount of time to bring a claim was an acceptable "express provision" under the statute.[60] Accordingly, the limitations period was valid and the obligee's claims were barred.[61]

6. Bad Faith

In *Posterity Scholar House v. FCCI Insurance Co.*,[62] the court held the duty of good faith in performing obligations under an insurance policy did not apply in the context of contract bonds. The obligee argued that sureties owe a duty of good faith because Indiana state law classifies bonds as a type of insurance.[63] The court disagreed, first noting the difference between bilateral insurance contracts and the tripartite relationship inherent to suretyship.[64] Second, the court determined that whether sureties are governed by the same rules as insurance companies was irrelevant because an insurer's duty of good faith arises from the special relationship between insurer and insured.[65] Finally, the court found that the surety-obligee relationship was distinguishable from the "special relationship" between insurers and their insureds, because sureties, unlike insurers, bear no responsibility to defend an obligee from third party claims, and an obligee has remedies against the principal as well as the surety.[66]

55. *Id.* at *4.
56. 985 N.W.2d 692 (N.D. 2023).
57. *Id.* at 693.
58. *Id.* (citing N.D. Cent. Code § 9-08-05).
59. *Id.* at 694–95 (citing N.D. Cent. Code § 22-03-03).
60. *Id.* at 694.
61. *Id.* at 694–95.
62. 205 N.E.3d 1018 (Ind. Ct. App. 2023)
63. *Id.* at 1022 (citing Erie Ins. Co. v. Hickman, 622 N.E.2d 515 (Ind. 1993)).
64. *Id.* at 1023.
65. *Id.* at 1023–24.
66. *Id.* at 1024.

In *GEC, LLC v. Argonaut Insurance Co.*,[67] an obligee sued the surety for violation of the implied covenant of good faith and fair dealing for denying a performance bond claim.[68] The surety moved to dismiss, arguing that no bad faith claim was available to the obligee for breach of the surety's obligations under the bond due to the differences between suretyship and insurance.[69] The court rejected the surety's argument on the grounds that Virgin Islands' law qualifies a bad faith claim as a claim in contract, rather than a claim in tort.[70] Because the bond was governed by Virgin Islands' law, the implied duty of good faith and fair dealing applied.[71]

B. *Payment Bonds*

1. Arbitration

In *United States ex rel. EWS Texas, Inc. v. Robins & Morton Group*,[72] a subcontractor sued a surety and the prime contractor for payments due on a government project. The prime contractor sought to stay the case and compel arbitration pursuant to the subcontract.[73] The subcontractor argued that Miller Act claims could not be arbitrated and the claims were outside scope of the arbitration clause.[74] The court compelled arbitration and stayed the action, finding that other courts have overwhelmingly concluded that the Miller Act does not prohibit the enforcement of arbitration agreements.[75] The court also held that the claims were within the scope of the type of claims to which the arbitration clause applied.[76]

In *Herman Goldner Co. v. Noresco, LLC*,[77] a subcontractor completed performance on a state construction project and sued the prime contractor and its payment bond sureties to recover the remaining balance.[78] The sureties moved to compel arbitration under the subcontract's arbitration provision, which was not limited to specific parties.[79] The subcontractor argued that the payment bond's forum selection clause required litigation and that the sureties lacked standing.[80] The court granted the sureties' motion, finding that the forum selection clause was compatible with arbitration because

67. No. 1:18-cv-58-CAK, 2023 WL 2610860 (D.V.I. Mar. 23, 2023).
68. *Id.* at *2.
69. *Id.* at *7.
70. *Id.* at *8–9.
71. *Id.*
72. No. 1:23-cv-00288-RAH-KFP, 2023 WL 6350362 (M.D. Ala. Sep. 28, 2023).
73. *Id.* at *4.
74. *Id.*
75. *Id.* at *4.
76. *Id.* at *7–8.
77. No. 2:22-cv-05047-JDW, 2023 WL 2761290 (E.D. Pa. Apr. 3, 2023).
78. *Id.* at *1.
79. *Id.* at *1, *3.
80. *Id.* at *2.

it only specified where arbitration-related litigation (e.g., "validity, scope, and enforceability of an arbitration clause") must occur.[81]

In *Total Environmental Concepts, Inc. v. Federal Insurance Co.*,[82] a payment dispute arose between a prime contractor and subcontractor on a federal construction project.[83] The subcontractor filed a Miller Act claim against the prime contractor's payment bond surety.[84] The surety moved to dismiss or stay under the subcontract's arbitration provision.[85] The subcontractor argued that there was no arbitration agreement between the subcontractor and surety, and that the payment bond did not incorporate, reference, or otherwise refer to the arbitration agreement.[86] The court denied the surety's motion, explaining that the subcontractor did not agree to arbitrate disputes with the surety.[87]

2. Defenses

In *HC&D, LLC. v. DCK Pacific Construction, LLC*,[88] the court was asked to determine whether a pay-if-paid clause in a purchase order subcontract conflicted with a provision added by the concrete supplier requiring payment no later than thirty days following the last day of the month in which the concrete was purchased. There was no dispute that the concrete supplier subcontractor's terms would prevail in the event of a conflict.[89] The court held that the provisions were in conflict, and the contractor and its surety were liable.[90]

In *U.S. ex. rel. RME Ltd. v. Intact Insurance Group USA, LLC*,[91] the surety's motion to alter judgment was granted, reducing the judgment based on partial recovery by the claimant of garnished funds from the principal's bank accounts and payment by the surety.[92] The court noted that the claimant was not precluded from filing a future Miller Act claim if garnished funds were returned due to the principal's bankruptcy proceeding.[93] Further, the court determined that the fee shifting provision between the subcontractor and prime contractor was enforceable against the surety under the Miller Act, and the claimant was entitled to recover reasonable attorney fees in

81. *Id.* at *2–3 (quoting Sharpe v. AmeriPlan Corp., 769 F.3d 909, 916 (5th Cir. 2014)).
82. No. 2:20-cv-3992, 2023 U.S. Dist. LEXIS 59690 (S.D. Ohio Apr. 4, 2023).
83. *Id.* at *2–3.
84. *Id.* at *3.
85. *Id.* at *3–6.
86. *Id.* at *5.
87. *Id.* at *6–7 (citing Richmond Health Facilities v. Nichols, 811 F.3d 192, 195 (6th Cir. 2016)).
88. 529 P.3d 691 (Haw. Ct. App. 2023).
89. *Id.* at 694.
90. *Id.* at 697.
91. No. 21-cv-03285-CMA-SKC, 2023 WL 2837340 (D. Colo. Apr. 7, 2023).
92. *Id.* at *2.
93. *Id.*

part on the basis that the surety acted vexatiously and in bad faith when it continued to improperly defend the claim after the final arbitration award was entered.[94]

3. Interpleader

In *United States ex rel. Terry Bedford Concrete Construction, Inc. v. Argonaut Insurance Co.*,[95] the surety after paying some Miller Act claims in full received additional claims which exceeded the penal sum on the bond.[96] The surety sought to interplead the remaining penal sum funds but did not seek a discharge of liability.[97] The remaining claimants objected and argued that the surety should have ensured a pro rata distribution of the entire penal sum before settling the initial claims.[98] The court permitted the surety to deposit the remaining penal sum funds because the surety was not seeking a discharge of liability or a dismissal.[99]

4. Jurisdiction, Venue, and Indispensable Parties

In *Chowns Group, LLC v. Liberty Mutual Insurance Co.*,[100] the court determined that venue based on the fabrication of materials was improper under the Miller Act, and transferred the case to the district court where the public project's jobsite was located, the appropriate venue under the Miller Act.[101]

In *TJ Sutton Enterprises v. Citadel Recovery Services, LLC*,[102] venue was transferred from the U.S. Virgin Islands to Louisiana based on: (i) the contract forum selection clause;[103] (ii) the deposit of monies at issue and pending related litigation in Louisiana;[104] (iii) both parties' ability to absorb the costs of litigating in either forum;[105] and (iv) the ease and expense of trial in Louisiana.[106] These factors outweighed plaintiff's original choice of forum and the local interest in deciding local controversies.[107]

In *MJM Electric, Inc. v. National Union Fire Insurance Co. of Pittsburgh*,[108] a subcontractor sued its prime contractor's surety, but not the prime

94. *Id.* at *3–4.
95. No. 1:23-cv-00130-CDB, 2023 WL 5004216 (E.D. Cal. Jun. 22, 2023).
96. *Id.* at *4.
97. *Id.* at *5–6.
98. *Id.*
99. *Id.* at *8.
100. 634 F. Supp. 3d 211 (E.D. Pa. 2022).
101. *Id.* at 216.
102. No. 3:22-cv-0022, 2022 WL 17145268 (D.V.I. Nov. 22, 2022).
103. *Id.* at *4.
104. *Id.*
105. *Id.*
106. *Id.* at *5–6.
107. *Id.* at *6.
108. No. 8:22-cv-2008-KKM-JSS, 2023 WL 2649059 (M.D. Fla. Mar. 27, 2023).

contractor itself. The surety filed a motion to join the prime contractor as a compulsory party.[109] The court denied the motion because the prime contractor was not a required party and the surety did not argue that the case should be dismissed.[110] The surety then filed a motion to join the prime contractor under the permissive joinder rule.[111] The court denied the motion, finding that the prime contractor was not a required party because no right to relief was asserted against the prime contractor.[112]

5. Liability

In *United States ex rel. American Civil Construction, LLC v. Hirani Engineering & Land Surveying, PC*,[113] the court held that a subcontractor could pursue a Miller Act claim for *quantum meruit* even where there exists an express subcontract and remanded to the district court to avoid any impermissible double recovery by determining whether any part of the Miller Act award against the surety was for work performed beyond that specified in the subcontract.[114] The court also determined, as a matter of first impression, that because the construction work at issue had to be supervised and inspected for conformance with the subcontract and other requirements, such as government quality control standards, the superintendent's on-site supervisory work constituted compensable "labor" within the meaning of the Miller Act.[115]

In *Hayes Pipe Supply, Inc. v. Aegis Security Insurance Co. (In re Pinnacle Constructors, Inc.)*,[116] the court awarded partial summary judgment to the surety, determining that because the payment bonds were common law bonds, the contractual terms regarding sufficiency of notice must be applied without substitution of statutory terms.[117] The payment bonds were common law bonds because they extended past the statutory minimums, including by: (i) extending coverage to equipment and defining "labor, materials and equipment" to include utilities;[118] (ii) extending the notice period for claimants who were employed by or had a direct contract with the contractor by not setting a deadline to give notice of their claim;[119] and (iii) extending the six-month statutory period for filing suit to a one-year

109. *Id.* at *2–3.
110. *Id.* at *3.
111. *Id.*
112. *Id.* at *3–4.
113. 58 F.4th 1250 (D.C. Cir. 2023).
114. *Id.* at 1252–53 (citing on United States *ex rel.* Heller Elec. Co. v. William F. Klingensmith, Inc., 670 F.2d 1227 (D.C. Cir. 1982)).
115. *Id.* at 1254.
116. 647 B.R. 352 (Bankr. M.D. Tenn. Nov. 17, 2022).
117. *Id.* at 365.
118. *Id.* at 359.
119. *Id.* at 359–60.

contractual limitations period for filing suit.[120] The court further determined that a clause included to assure compliance with minimum state standards was a "savings clause" that did not eliminate contractual provisions that expanded on those minimum statutory requirements or convert the payment bond into a statutory bond.[121]

In *McLean Contracting Co. v. Great American Insurance Co.*,[122] the surety's motion for summary judgment was denied based on the court's determination that claimant's standby costs were incurred by furnishing materials, labor, or equipment for use in the performance of the contract, and thus fell within the scope of the payment bond terms.[123]

In *Greenup Industries, LLC v. Five S Group, LLC*,[124] the court permitted the subcontractor and the subcontractor's surety's counterclaim for breach of contract to proceed against contractor and the contractor's surety for the contractor's failure to provide sufficient transport trucks to maintain necessary production levels and related standby time. The court found an ambiguity in the subcontract as to whether the terms regarding trucks and standby time in the bid proposal were additional to or conflicting with those of the subcontract.[125] The court further determined that same ambiguity, combined with the Fifth Circuit's holdings that parties can sue under the Miller Act for daily expenses incurred due to contractor delays, including standby time, also permitted the counterclaim to proceed against the contractor and the contractor's surety.[126] The subcontractor's separate counterclaim under the state prompt payment statute, however, was dismissed against the contractor's surety, because the prompt payment statute does not allow suppliers to recover against sureties under a Miller Act theory.[127]

In *Nature-Tech, LLC v. Hartford Fire Insurance Co.*,[128] judgment was entered in favor of the surety and the subcontractor against a sub-subcontractor. The court determined the sub-subcontractor had failed to prove entitlement to additional payment under the payment bond for items fabricated pursuant to purchase orders issued by the subcontractor prior to termination, but fabricated after the subcontractor's termination, where the prime contractor directly arranged for claimant to fabricate items outside of the performance of the terminated contract and after the termination.[129] The court also denied the sub-subcontractor's claim for immediate payment of

120. *Id.* at 360.
121. *Id.* at 361–65.
122. No. 2:20-cv-439-JVB-JEM, 2023 WL 3618847 (N.D. Ind. May 24, 2023).
123. *Id.* at *6.
124. No. CV 22-2203, 2023 WL 2540287 (E.D. La. Mar. 16, 2023).
125. *Id.* at *4.
126. *Id.* (citing U.S. v. Millers Mut. Fire Ins. Co., 942 F.2d 946, 951(5th Cir. 1991)).
127. *Id.* at *5 (citing La. Stat. § 38:2191).
128. No. DKC 19-2053, 2022 WL 17094584 (D. Md. Nov. 21, 2022).
129. *Id.* at *3–4.

retainage and permitted the subcontractor to continue to withhold retainage until the separate litigation of claims by and between the prime contractor and subcontractor were resolved.[130]

6. Limitations

In *Diamond Services Corp. v. Travelers Casualty & Surety Co. of America*,[131] the district court dismissed a Miller Act payment bond claim as time barred under the statute of limitations, and the Fifth Circuit affirmed.[132] The issue on appeal was whether the claimant could assert equitable estoppel, where it contended that it relied upon the surety's request for information letter advising of its investigation.[133] The court held that equitable estoppel did not apply, as the claimant failed to show that it was misled to its detriment because it failed to plead that the surety's letter requesting additional information was a representation that the claimant reasonably relied on in deciding not to bring suit within the statutory limitations period.[134]

7. Notice

In *United States ex rel. Krane Development, Inc. v. Gilbane Federal Co.*,[135] the district court granted the surety and its principal's motion for judgment on the pleadings where the claimant failed to comply with the Miller Act's notice of nonpayment requirements.[136] The claimant argued that it was not required to provide written notice because a lower-tier bond, where the principal served as a dual obligee and the claimant served as a principal, created contractual privity between the parties.[137] The court found this relationship insufficient to create contractual privy under the Miller Act's notice requirement.[138] The court also disagreed with the claimant's argument that its notice of nonpayment was timely.[139] The claimant sent two notices of nonpayment before the claimant completed its work on the project, which the court held as being premature and untimely pursuant to the Miller Act.[140]

In *Five Rivers Carpenters District Council v. Covenant Construction Services, LLC*,[141] the claimant served as a multi-employer fringe benefit funds

130. *Id.* at *5–6.
131. No. 22-40240, 2022 WL 4990416 (5th Cir. 2022).
132. *Id.* at *1.
133. *Id.*
134. *Id.*
135. No. CV 121-035, 2023 WL 2616925 (S.D. Ga. Mar. 23, 2023).
136. *Id.* at *1, *3–4.
137. *Id.* at *3–4.
138. *Id.*
139. *Id.*
140. *Id.*
141. No. 3-22-cv-00036-RGE-HCA, 2023 WL 6370779 (S.D. Iowa Aug. 24, 2023).

organization.[142] A lower-tier subcontractor signed a collective bargaining agreement that required it to make contributions to the claimant based on the number of hours of work performed by union employees.[143] The subcontractor failed to pay these contributions for work performed by twenty-one employees.[144] The surety argued notice to the surety's principal's attorney, rather than sending notice directly to the principal, was insufficient.[145] The court disagreed and found that the notice to the principal's attorney satisfied the Miller Act.[146] The surety also argued that the claimant's notice was untimely as to eighteen of the twenty-one employees.[147] This dispute centered around whether the claimant must provide notice within 90 days of each employee's last day or whether notice is measured from the last date on which any employee performed work.[148] The court found the latter, and accordingly held the claimant was entitled to recover.[149]

8. Proof and Sufficiency of Evidence

In *United States ex rel. Colorado Custom Rock Corp. v. G&C Fab-Con, LLC*,[150] the court granted in part a payment bond claimant's motion for sanctions for spoliation of evidence against a prime contractor and its surety.[151] The court found that the prime contractor owed a duty to preserve two buildings at issue where it became foreseeable that the parties would be unable to resolve their dispute without litigation.[152] The potential litigation was foreseeable prior to the destruction of the buildings.[153] The prime contractor, however, demolished the buildings before giving the claimant an opportunity to inspect.[154] The court held that the prime contractor spoliated relevant evidence and sanctioned the defendants with an adverse inference at trial.[155]

In *Penn Hydro, Inc. v. B.V.R. Construction Co.*,[156] a claimant sought additional compensation for demolishing concrete, which was of greater

142. *Id.* at *1.
143. *Id.*
144. *Id.*
145. *Id.* at *2–3.
146. *Id.*
147. *Id.*
148. *Id.* at *3.
149. *Id.* at *6.
150. No. 20-2968 (GC) (RLS), 2023 WL 3212516 (D.N.J. May 2, 2023).
151. *Id.* at *1.
152. *Id.* at *5–6.
153. *Id.*
154. *Id.*
155. *Id.* at *5–6, *8.
156. 194 N.Y.S.3d 1253 (App. Div. 2023).

strength than originally anticipated in the claimant's proposal.[157] The court agreed with the surety that the proposal, which was attached to the executed subcontract, provided only one estimate of pricing, and, therefore, the price established in the subcontract was a set price, not contingent on the concrete strength.[158] The court held that where a contract establishes a set price, and a party assumes responsibility for inspecting the construction project to determine what conditions could affect the work, that party is charged with the knowledge such an inspection would reveal.[159] Accordingly, the surety met its burden of establishing that claimant was not entitled to any additional compensation.[160]

C. *Other Bonds*

1. License & Permit Bond

In *Immigrant Rights Defense Council, LLC v. Hudson Insurance Co.*,[161] the bond claimant was a self-described "watchdog association" that brings actions for injunctive relief against immigration consultants.[162] Claimant prevailed in its suit against two bonded consultants and filed suit against the bonds to recover its attorney fees and costs.[163] The court explained that a surety issuing a statutory bond is liable only to the extent indicated in the code section under which the surety executes the bond, and, under the plain language of the bond statutes, a non-aggrieved person who suffers no damages is not entitled to recovery from the subject statutory immigration consultant bond.[164] The relevant statute was designed to protect the class of people most vulnerable to fraud and deceit by unscrupulous consultants, and the court found that the claimant did not fall within the class of persons the statute was designed to protect.[165] Accordingly, the court held that claimant did not suffer damages under the applicable statutes and affirmed the ruling that claimant was not entitled to attorneys' fees and costs.[166]

2. Mortgage Broker, or Lender Bond

In *Legg v. Liberty Mutual Insurance Co.*,[167] the court denied the surety's motion to dismiss based on lack of subject matter jurisdiction.[168] The

157. *Id.* at 657–58.
158. *Id.* at 658.
159. *Id.*
160. *Id.*
161. 300 Cal. Rptr. 3d 259 (Ct. App. 2022).
162. *Id.* at 260–61
163. *Id.* at 260.
164. *Id.* at 264.
165. *Id.* at 264–65
166. *Id.* 270.
167. No. 2:23-cv-00188, 2023 WL 3261590 (S.D. W. Va. May 3, 2023).
168. *Id.* at *1.

plaintiff sued the principal in an underlying action, alleging the origination of a loan above the fair market value.[169] Plaintiff had issues serving the principal, but eventually obtained service through a statute governing withdrawn corporations.[170] The court in the underlying action entered a judgment against the principal.[171] The surety argued that the judgment was void due to improper service, and therefore, the surety's obligations under the bond had not yet been triggered.[172] The court found that the bond was a "judgment bond," and that a surety is limited to contesting judgment bonds obtained via fraud or collusion.[173] Accordingly, the court held that the surety's argument that the court lacks subject matter jurisdiction due to improper service fails.[174]

3. Reclamation Bond

In *In re Fieldwood Energy III LLC*,[175] the sureties' principal, an oil and gas exploration and production company, filed for Chapter 11 bankruptcy relief.[176] The subrogation rights of the sureties were a point of contention during the process of approving the Chapter 11 plan.[177] The confirmation order allocated the sureties subrogation rights to post-merger entities.[178] Certain sureties sought, but did not obtain, a stay of the confirmation order.[179] The district court, acting as the appellate court for the bankruptcy court's decision, held that the appeal was statutorily moot because the statute protects an authorized sale from later modification on appeal where the purchaser acted in good faith and the sale was not stayed pending appeal.[180] The court found the provisions challenged by the sureties were integral to the sale of debtors' assets.[181] The court rejected the sureties' argument that the statute did not apply because the credit bid purchaser was not a good-faith purchase under that provision.[182] Lastly, the court found that the sureties failed to meet the elements for equitable mootness to apply.[183]

169. *Id.*
170. *Id.* (citing W. Va. Code § 31D-15-1520).
171. *Id.*
172. *Id.* at *2.
173. *Id.* at *3.
174. *Id.*
175. No. 4:21-cv-2201, 2023 WL 2402871 (S.D. Tex. Mar. 7, 2023) (pending appeal).
176. *Id.* at *1.
177. *Id.*
178. *Id.* at *1–2.
179. *Id.*
180. *Id.* at *2–3.
181. *Id.* at *3.
182. *Id.* at *4.
183. *Id.* at *4–5.

4. Release of Lien Bond

In *Akins Construction, Inc. v. North American Specialty Insurance Co.*,[184] a subcontractor filed construction liens after the owner and prime contractor refused to pay for its work. The surety filed a release of lien bond to remove the liens.[185] The subcontractor filed a motion to enforce arbitration relying on a mandatory arbitration provision in its contract.[186] The surety opposed arbitration claiming that as a non-signatory to the contract it could not be forced to arbitrate.[187] The court held that the surety must arbitratebecause it stands in the shoes of its principal.[188]

5. Subdivision Bond

Fidelity & Deposit Co. of Maryland v. TRG Venture Two, LLC (In re Kimball Hill, Inc.)[189] involved subdivision bonds the surety executed in the early 2000s.[190] In the principal's subsequent bankruptcy, the surety participated in the confirmation proceedings and voted in favor of the plan, which specifically prohibited the surety from seeking payment on claims that they agreed to extinguish.[191] The surety later attempted to seek indemnity from the entity that purchased the development rights.[192] Due to this violation, the bankruptcy court imposed civil contempt sanctions on the surety totaling $9.5 million.[193] In a prior proceeding, the district court vacated and remanded.[194] The bankruptcy court then reinstated its original contempt findings and reimposed its sanctions award.[195] The surety appealed again, and the district court affirmed the sanctions award.[196] Ultimately, the Seventh Circuit also affirmed the sanctions, finding they were calculated based on actual damages incurred as a result of the indemnity claims.[197]

184. No. 22-11331, 2023 WL 3865509 (E.D. Mich. June 7, 2023).
185. *Id.* at *1–2.
186. *Id.* at *2.
187. *Id.* at *7.
188. *Id.* at *8.
189. 61 F.4th 529 (7th Cir. 2023).
190. *Id.* at 531.
191. *Id.* at 532.
192. *Id.* at 532–33.
193. *In re* Kimball Hill, Inc., 595 B.R. 84 (Bankr. N.D. Ill. 2019).
194. Fid. & Deposit Co. of Md. v. TRG Venture II, LLC, No. 19 C 389, 2019 WL 5208853 (N.D. Ill. Oct. 16, 2019).
195. *In re* Kimball Hill, 620 B.R. 894 (Bankr. N.D. Ill. Sept. 30, 2020).
196. Fid. & Deposit Co. of Md. v. TRG Venture II, LLC, No. 20 C 6105, 2022 WL 952737 (N.D. Ill. Mar. 30, 2022).
197. *In re* Kimball Hill, Inc., 61 F.4th 529, 535 (7th Cir. 2023).

D. *Rights of Surety*

1. Indemnity

In *Frankenmuth Mutual Insurance Co. v. National Bridge Builders, LLC*,[198] the indemnitors filed a motion for summary judgment asserting that the indemnity agreement was invalid and unenforceable because it was not signed by both managers of the company.[199] An employee had executed the indemnity agreement by electronically signing it on behalf of one of the named managers.[200] Neither manager executed, reviewed, or received the indemnity agreement prior its execution, an apparent violation of the principal's operating agreement, in addition to the fact that the employee did not have actual authority.[201] The surety issued 35 payment and performance bonds to the principal over three years, and there were other instances where the same employee executed documents binding the company.[202] The court found that the principal received the benefit of the indemnity agreement and thus ratified its execution, even if it was technically defective.[203] The principal intended to be bound, and the indemnity agreement was enforceable.[204]

In *Travelers Casualty & Surety Co. of America v. Bunting Graphics, Inc.*,[205] the indemnitors sought to compel production of certain communications and documents the surety asserted to be privileged in connection with the payment and settlement of claims.[206] The court recognized that "[t]he surety contract language and prevailing case law entitles [the surety] to a certain degree of deference to pay and settle claims."[207] While the indemnitors may have defenses to the surety's payment and settlement of claims, they do not have carte blanche into the surety's decision without some initial showing regarding whether the [disputed] claim should have been paid or paid for a lower value.[208] The court held the indemnitors failed to meet their initial burden of showing that the claims either should have not been paid or paid for a lower value.[209]

In *North American Specialty Insurance Co. v. Arch Concept Construction, Inc.*,[210] the court granted in part and denied in part the surety's motion for

198. No. 1:22-cv-00024, 2023 WL 5340919 (W.D.N.C. Aug. 18, 2023).
199. *Id.* at *28–29.
200. *Id.* at *6.
201. *Id.* at *30.
202. *Id.* at *10.
203. *Id.* at *33.
204. *Id.*
205. No. 2:21-cv-01041-MJH, 2023 WL 2163221 (W.D. Pa. Feb. 22, 2023).
206. *Id.* at *1.
207. *Id.*
208. *Id.*
209. *Id.*
210. No. 21-287, 2022 WL 18024210 (D.N.J. Dec. 30, 2022).

summary judgment seeking to recover under the indemnity agreement.[211] The court found that the surety was entitled to summary judgment as to liability, but it had not sufficiently established the specific amount of damages.[212] Due to inconsistencies in payments made to claimants, the surety had to clarify the discrepancy before judgment could be entered.[213] The court further stated that it could not reduce to judgment an unspecified loss adjustment expense amount, and thus, the surety had to clarify the sum it seeks, supported by appropriate itemization, before judgment could be entered.[214] The court held that the *prima facie* clause in the indemnity agreement was enforceable and shifted the burden to defendants to show that a rational factfinder could determine that liability has not attached.[215]

In *Westchester Fire Insurance Co. v. Edge Electric, LLC*,[216] the court granted the surety's motion for partial reconsideration of a prior order denying the surety's request for attorneys' fees and costs incurred in defending a bond claim.[217] The court noted that the state supreme court has long refused to enforce contractual provisions providing for the award of attorneys' fees for the prevailing party, instead holding to the American Rule that each party pay its own costs.[218] The surety asserted that state law recognized a small exception to the American Rule, which permitted a surety to recover attorneys' fees and costs incurred in defending a dispute underlying the indemnity agreement, rather than in an indemnity enforcement action.[219] The court predicted that the state supreme court would adopt the exception relied on by the surety and allowed the surety to recover its reasonable attorneys' fees and costs incurred in defending an underlying bond claim.[220]

2. Banks

In *United States Fire Insurance Co. v. FineMark National Bank & Trust*,[221] the surety sued a bank for taking contract funds from the principal's bank account.[222] The court denied the bank's motion to dismiss because the funds may have been a special deposit, and the bank may have owed a duty

211. *Id.* at *3.
212. *Id.* at *5.
213. *Id.*
214. *Id.*
215. *Id.* at *6.
216. No. 8:22cv170, 2022 WL 16748685 (D. Neb. Nov. 7, 2022).
217. *Id.* at *2.
218. *Id.* at *1 (quoting Hand Cut Steaks Acquisitions, Inc. v. Lone Star Steakhouse & Saloon of Neb., Inc., 905 N.W.2d 644, 667 (Neb. 2018)).
219. *Id.* (citing McGreevy v. Bremers, 288 N.W.2d 490, 492 (Neb. 1980); Am. Sur. Co. of N.Y. v. Vinsonhaler, 137 N.W. 848, 850 (Neb. 1912)).
220. *Id.* at *2.
221. No. 2:22-cv-130-SPC-KCD, 2023 WL 145013 (M.D. Fla. Jan. 10, 2023).
222. *Id.* at *1.

to the surety.[223] The court held that the bank owed a duty to the principal and the principal assigned its rights, title, and interest in the funds to the surety.[224] The court also held that the funds deposited into the principal's account could qualify as a special deposit.[225]

In *Arch Insurance Co. v. FVCbank*,[226] the principal obtained a revolving line of credit from the bank, wherein the bank was granted the right to access the principal's general funds to repay credit used.[227] The surety's indemnity agreement required that contract funds be held in a separate trust account.[228] The principal attempted to open a trust account, but when the bank declined the principal deposited all funds into its general accounts.[229] After the principal's default on the credit line, the bank used the deposited funds to resolve the outstanding balance and froze the accounts.[230] The surety and the principal sued the bank for conversion and unjust enrichment.[231] The trial court granted the bank's motion to strike the surety's claims, holding that there was no legal claim for unjust enrichment or conversion because the bank had a priority.[232] The judgment was affirmed because the law of equitable subrogation did not permit the surety to have greater rights than that of the principal.[233]

3. Collateral Deposit

In *Liberty Mutual Insurance Co. v. Biltmore General Contractors, Inc.*,[234] the court granted the surety's summary judgment motion seeking specific performance to pay the surety's costs and expenses and deposit collateral pursuant to the indemnity agreement. The court rejected the indemnitors' argument that the surety retaining lawyers and accountants to investigate the various claims involving the underlying bonds was excessive and wholly unnecessary because the indemnitors had already retained their own lawyers.[235] The indemnity agreement, however, expressly provides for the surety to be indemnified without any limitation to cases in which an indemnitor had not itself retained counsel.[236] The court found that the

223. *Id.* at *2–3.
224. *Id.*
225. *Id.* at *3.
226. 881 S.E.2d 785 (Va. 2022).
227. *Id.* at 787.
228. *Id.*
229. *Id.* at 790.
230. *Id.*
231. *Id.*
232. *Id.* at 794–95.
233. *Id.*
234. No. 21-cv-5130 (RPK) (RER), 2023 WL 5350813 (E.D.N.Y. Aug. 21, 2023).
235. *Id.* at *11–12.
236. *Id.* at *12.

declaration of the surety's senior claims counsel was satisfactory proof of payment for the claims.[237]

In *Atlantic Specialty Insurance Co. v. Landmark Unlimited, Inc.*,[238] the court affirmed an order granting a preliminary injunction requiring the indemnitors to deposit collateral.[239] The indemnitors asserted that the signatures on an indemnity agreement were forged.[240] Because the signatures were notarized, the court found that, without more, the indemnitors could not overcome the presumption of due execution, especially considering that certain of the indemnitors had issued and signed checks for the bonds as representatives of the principal.[241] The court also found that proof of the indemnitors' substantial assets negated concerns regarding financial hardship or inability to provide collateral.[242]

In *Frankenmuth Mutual Insurance Co. v. Firefly Builders, Inc.*,[243] the court entered a preliminary injunction requiring its indemnitors to post collateral in the amount of the surety's anticipated loss plus attorneys' fees.[244] Although the surety's claim had a monetary aspect, the surety demonstrated irreparable harm in losing its security interest and priority level, essentially becoming an unsecured creditor.[245] Absent the opportunity for the surety to secure the debt, the surety lacked an adequate remedy at law and would suffer irreparable harm.[246]

4. Contract Funds

In *Capital Indemnity Corp. v. United States*,[247] following the surety's completion of its principal's scope of work and payment of subcontractors, the surety sued the government seeking damages under the theories of equitable subrogation, equitable adjustment, and under the Contract Disputes Act. The court granted the government's motion for summary judgment because (i) the government's notice to the surety of potential payment bond claims was insufficient to trigger the notice requirement that the surety was required to send the government;[248] and (ii) the government's receipt of the surety's request for joint checks did not put the government

237. *Id.* at *13.
238. 186 N.Y.S.3d 14 (App. Div. 2023).
239. *Id.* at 15.
240. *Id.*
241. *Id.* (citing Genger v. Arie Genger 1995 Life Ins. Trust, 922 N.Y.S.2d 347 (App. Div. 2011); John Deere Ins. Co. v. GBE/Alasia Corp., 869 N.Y.S.2d 198 (App. Div. 2008)).
242. *Id.* at 15.
243. No. 5:22-cv-05079-RAL, 2022 WL 10378001 (D.S.D. Oct. 18, 2022).
244. *Id.* at *1.
245. *Id.* at *3.
246. *Id.*
247. 162 Fed. Cl. 388 (2022).
248. *Id.* at 399–400.

on notice of the default because the surety did not direct the government to withhold payments until more than a month after making the ninth progress payment.[249]

5. Discovery

In *United States ex rel. M. Frank Higgins & Co. v. Dobco Inc.*,[250] the court held that although a common interest privilege may apply to communications between the principal and surety, it does not automatically apply to every communication exchanged between them.[251] The court noted that the party invoking the work-product protection bears the burden of establishing its essential elements.[252] The court also held that the principal and surety cannot conceal prior communications with professionals engaged in the ordinary course of business by transforming them into non-testifying experts.[253] The court must examine the particular facts to determine whether the experts were retained or specially employed in anticipation of litigation.[254]

6. Insurance

In *Great American Insurance Co. v. Lexington Insurance Co.*,[255] the indemnity agreement gave the surety a security interest in the principal's assets.[256] An insurer issued various liability policies on behalf of the principal.[257] The principal prevailed on a wrongful termination action and was awarded damages including attorney's fees and costs.[258] The surety demanded the award from the principal via its security interest rights.[259] The insurer demanded the award based on its subrogation rights as an insurer.[260] The surety sued the insurer, alleging claims of tortious interference with a contractual relationship, declaratory judgment, trespass to chattels, and seeking attorneys' fees under the state's general recovery rule.[261] The insurer filed a motion to dismiss all four counts.[262] The court held that because the surety does not satisfy the definition of a person in possession, the surety cannot state

249. *Id.* at 414.
250. No. 22-cv-9599 (CS) (VR), 2023 WL 5302371 (S.D.N.Y. Aug. 17, 2023).
251. *Id* at *4.
252. *Id.*
253. *Id.* at *10.
254. *Id.*
255. No. 2:22-cv-00345-TLS-JEM, 2023 WL 3119659 (N.D. Ind. Apr. 27, 2023).
256. *Id.* at *2.
257. *Id.*
258. *Id.* at *4–5.
259. *Id.*
260. *Id.*
261. *Id.* at *7–8.
262. *Id.*

a claim for trespass to chattels and granted the motion as to that claim.[263] The court allowed the surety to pursue the other claims.[264]

II. FIDELITY LAW

A. *War or Hostile Acts Exclusion*

In *Merck & Co. v. Ace American Insurance Co.*,[265] the insured's computer systems were infected by malware known as "NotPetya," which impacted tens of thousands of systems in the insured's network.[266] The insured and its captive insurer had purchased $1.75 billion in "all risks" property insurance which provided coverage for loss or damage from destruction or corruption of computer data and software.[267] The insured filed a claim against the policy, which was denied.[268] The insurers stated that it had been determined that the NotPetya attack was likely orchestrated by actors working for the Russian Federation as part of ongoing hostilities with Ukraine[269] and that the insured's loss was, therefore, excluded under the hostile/warlike action exclusions contained in the policies.[270] The insured argued that the attack was not an official state action, but a form of ransomware, and even if instigated to harm Ukraine, the exclusion still would not apply.[271] The court held that the plain language of the hostile/warlike exclusion did not support the insurers' position.[272] The court found that "the NotPetya attack is not sufficiently linked to a military action or objective as it was a non-military cyberattack against an accounting software provider."[273]

B. *Employee Theft*

In *National Union Fire Insurance Co. of Pittsburgh v. Cargill, Inc.*,[274] the insured, an international marketer, processor, and distributor of agricultural products, claimed that it incurred losses of approximately $32 million as a result of an employee misrepresenting the price of corn and sorghum.[275] The claimed loss consisted of approximately $29 million in freight costs paid by the insured to ship the grain, plus approximately

263. *Id.*
264. *Id.* at *20–21.
265. 293 A.3d 535 (N.J. Super. Ct. App. Div. 2023).
266. *Id.* at 540
267. *Id.* at 426.
268. *Id.* at 425.
269. *Id.* at 429.
270. *Id.*
271. *Id.* at 441.
272. *Id.* at 439.
273. *Id.* at 445.
274. 61 F.4th 615 (8th Cir. 2023) (applying Minnesota law).
275. *Id.* at 618.

$3 million that the employee had allegedly diverted to personal bank accounts.[276] The commercial crime policy provided coverage for employee "theft," defined as "the unlawful taking of property to the deprivation of the insured."[277] Additionally, the policy required that the insured's loss must have resulted "directly from" employee theft to be covered.[278] In addition, the policy contained an investigative settlement clause that allowed the insured and insurer to jointly appoint an investigator to "investigate the facts and [definitively] determine the quantum of loss" being claimed.[279]

On appeal the key issue was whether the employee's control over the grain sales was a "taking" under the "theft" definition. As the policy did not define a "taking," both parties adopted the dictionary definition of the term: "[t]he act of seizing an article, with or without removing it, but with an implicit transfer of possession or control."[280] The court, applying Minnesota law, found that the employee had taken implicit control over the grain because she "exercised her authority to direct the transfer and sale of the grain" and "lied to [the insured] and manipulated its financial records to induce the company to ship its grain to Albany."[281] The court reasoned that there was an "implicit transfer" of control to the employee, as she "controlled the pricing and recordkeeping elements of the sale" of the grain, and if not for her misrepresentations, the insured would have sent only a minimal amount of grain.[282] Thus, the court held that this exercise of control amounted to an "unlawful taking" under the employee theft provision, and affirmed judgment on the pleadings for the insured.[283]

In *Ryan LLC v. National Union Fire Ins. Co. of Pittsburgh, PA*,[284] the insured provided various tax services to entities and was compensated using a percentage of the savings.[285] In turn, the insured compensated its employees via commissions based on their role in the reductions for the clients.[286] Taking advantage of this structure, an employee submitted fraudulent tax submissions resulting in millions of dollars of phantom savings for the clients and increased commissions for the insured and employees, including the fraudulent employee.[287] The court concluded that the "extra" commissions paid to the fraudulent employee was a direct loss from the employ-

276. *Id.*
277. *Id.* at 620.
278. *Id.*
279. *Id.*
280. *Id.* at 620–21.
281. *Id.* at 621.
282. *Id.* (citing Black's Law Dictionary (11th ed. 2019)).
283. *Id.* at 623.
284. No. 05-22-00286-CV, 2023 WL 2472889 (Tex. App. Mar. 13, 2023).
285. *Id.* at *1.
286. *Id.*
287. *Id.*

ee's "Theft," which was defined using the phrase "unlawful taking."[288] The court disregarded an earlier decision that required seizure or direct control over the transferred item.[289] Instead, the court agreed with out-of-state cases to find that "an 'unlawful taking' includes taking by deception."[290] The case was remanded for consideration of additional issues and remains pending in the trial court.[291]

C. *Computer Fraud and Authorized Representative*

In *Westlake Chemical Corp. v. Berkley Regional Insurance Co.*,[292] the insured, a manufacturer of chloride products, purchased plastic shipping bags from a supplier who was authorized to place orders for shipping supplies and manage insured's inventory.[293] The supplier submitted fraudulent invoices via email that led to payments of more than $16 million for fictitious bags that were never delivered.[294] The insured discovered the fraud and tendered coverage under its commercial crime policy.[295] The trial court had agreed with the insurer that the supplier was an authorized representative, so that the authorized representative exclusion applied.[296] The appellate court affirmed, finding that the term "authorized representative" did not require an agency relationship, but that "the phrase "authorized representative" can be commonly understood to mean someone who has permission to speak or act for another, or someone who is empowered to act on another's behalf.[297] The court stated further that to the extent the insured "attempts to augment the definition of 'authorized representative' to encompass a legal or technical definition of agent, such an interpretation is inconsistent with the commonly understood meaning of the term and is thus unreasonable."[298]

D. *Forgery and Alteration and Computer Fraud Coverages*

In *Cachet Financial Services v. Berkley Insurance Co.*,[299] the insured entered into written agreements with clients that allowed the clients to upload ACH batch files into the insured's computer system.[300] The clients uploaded various forms of fraudulent ACH batch files causing losses of approximately

288. *Id.* at *5.
289. *Id.* at *4.
290. *Id.* at *5.
291. *Id.* at *6.
292. No. 01-21-00225-CV, 2023 WL 3634322 (Tex. App. May 25, 2023).
293. *Id.* at *1, *13.
294. *Id.* at *2.
295. *Id.*
296. *Id.* at *3.
297. *Id.* at *6.
298. *Id.*
299. 2:22-cv-01157-SPG-JEM, 2023 WL 2558413 (C.D. Cal. Jan. 20, 2023)
300. *Id.* at *1–2.

$40 million.[301] The insured sought coverage under its crime insurance policy under the forgery or alteration or computer and funds transfer fraud insuring agreements.[302] Granting the insurer's motion to dismiss, the court found that the complaint did not adequately allege a claim because a fraudulent entry was not made into the insured's computer system since the clients were authorized to upload the ACH batch files.[303] Similarly, the court found that the complaint did not adequately allege a claim under the forgery or alteration insuring agreement as the insured could not show an "alteration" under the plain and ordinary meaning of that term.[304]

In *Veneman v. Travelers Casualty Insurance Co. of America*,[305] the insureds, an accounting provider and an electronic payroll company, entered a contract with an individual to provide payroll services through a company.[306] The insureds hired a clearinghouse bank to make the transfers.[307] The payroll services provider furnished bank account information and directed the insureds to transfer money to accounts purportedly belonging to the provider's employees.[308] However, the other accounts belonged to the contracting individual, an imposter, or persons working with him.[309] Once the transfers had taken place, the imposter withdrew large sums of money.[310] The imposter also contacted his bank to report the outgoing transfers as fraudulent.[311] Under clearinghouse rules for banks, this report of fraud triggered a "claw back" of various transactions such that the clearinghouse bank bore the risk of loss, which it then shifted to the insureds by contract.[312]

The insurer denied coverage, and the insureds filed a complaint alleging coverage under both the forgery or alteration and computer fraud provisions of the policy.[313] The court held that the subject funds were not "covered property" in that the electronic funds were not located on the insureds' building premises, nor were they "money" or "securities" in that the funds in the imposter's account were intangible and incapable of being physically possessed.[314] Second, the forgery or alteration coverage was not triggered as the emails sent by the imposter directing the insureds to ini-

301. *Id.*
302. *Id.* at *2–3.
303. *Id.* at *4–8.
304. *Id.* at *8–10.
305. No. 2022-CA-0021-MR, 2023 WL 3261555 (Ky. Ct. App. May 5, 2023).
306. *Id.* at *2.
307. *Id.* at *1.
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.* at *2.
314. *Id.* at *6.

tiate the transfers of electronic funds did not constitute "checks, drafts, promissory notes, or similar written promises, orders, or directions to pay," nor did the scheme involve a check being "drawn by or drawn upon" the Insured.[315] Third, in finding no direct connection between the imposter's use of a computer to send emails and the subsequent transfer of the funds, the court held that the computer fraud coverage was not triggered as the scheme did not involve a hacker gaining access to the insureds' computer system to fraudulently cause a transfer of funds.[316] Rather, the imposter used a computer to send emails to the insureds directing them to process payroll, and then insureds sent the information to the third party clearinghouse, who actually transferred the funds from the imposter's bank account to the imposter's fictitious employees.[317]

In *Discovery Land Co. v. Berkley Insurance Co.*,[318] the court found no coverage and no improper claims handling for a purported loss submitted under a crime policy involving schemes perpetrated by an attorney at a UK law firm hired by insureds to assist in their acquisition of a Scottish castle. As to the first scheme, which concerned misappropriation of purchase funds, the court found no coverage for: (i) employee theft as the attorney was not an "employee" due to a lack of direct compensation and control, or (ii) outside premises coverage as the attorney was not a "partner" of the insured entities merely because of his indirect role in the castle acquisition process.[319] As to the second scheme, which concerned a fraudulent loan for the attorney's benefit using the castle as security, there was no forgery coverage because the forged loan application was not an enumerated document in the insuring agreement.[320] Moreover, the loss did not directly result from the loan application itself.[321] Finally, the court rejected claims of improper claim handling that were largely premised on the insurer's use of an outside "attorney investigator."[322]

E. *Ransomware*

In *Yoshida Foods International, LLC v. Federal Insurance Co.*,[323] the insured sought coverage for losses sustained from a ransomware attack where the president of the insured paid the ransom from his personal funds and was subsequently reimbursement by the insured.[324] The insurer denied based

315. *Id.* at *7.
316. *Id.* at *8.
317. *Id.*
318. No. CV-20-01541-PHX-ROS, 2023 WL 2503634 (D. Ariz. Mar. 14, 2023).
319. *Id.* at *7–10.
320. *Id.* at *11–13.
321. *Id.* at *12.
322. *Id.* at *14–15.
323. No. 3:21-cv-01455-HZ, 2022 WL 17480070, at *1 (D. Or. Dec. 6, 2022).
324. *Id.* at *2.

on the absence of a "direct loss" because the insured did not directly make the ransom payment.[325] Further, the insurer argued that insured did not sustain a loss until it reimbursed the company's president more than one year after the ransomware attack.[326] The court noted that under Oregon interpretation of "direct loss," only a proximate causal relationship is necessary between the act covered under the policy and the resulting loss.[327]

The court reasoned that regardless of when the insured reimbursed its president, the loss was still a direct and foreseeable consequence of the computer fraud perpetrated by the hacker.[328] The passage of time did not break the causal chain because there was always an understanding that the ransom payment was a liability to the insured.[329] Reasoning that the hacker's entry into the insured's computer system was central to the scheme to extort money from the insured, the volitional ransom payment did not negate the fact that the insured suffered a direct loss.[330] The court also rejected the insurer's arguments that the Fraudulent Instructions Exclusion applied to preclude coverage for the reimbursement payment or, alternatively, the president's payment of cryptocurrency for the ransom.[331]

In *EMOI Services, LLC v. Owners Insurance Co.*,[332] the insured, a computer software company, sought coverage for damage caused by a ransomware attack that encrypted files and data.[333] The insurer denied coverage for the ransom and costs associated with investigating and remediating the attack and upgrading its security systems under a "Data Compromise" endorsement and an "Electronic Equipment" endorsement, which, among other things, excluded ransom payments from coverage.[334] The Ohio Supreme Court found that (i) a policy that requires "direct physical loss of or damage to" property does not cover losses from a ransomware attack; (ii) software is an intangible item that cannot experience direct physical loss or direct physical damage; and (iii) a court cannot read a ransomware coverage into an all risk property policy by reading key ransomware exclusions out.[335] Thus, the court held that because the ransomware attack caused no "direct physical loss of or damage to" the software, a requirement for

325. *Id.* at *5.
326. *Id.*
327. *Id.*
328. *Id.* at *6.
329. *Id.*
330. *Id.* at *7–8.
331. *Id.* at *8–9.
332. 208 N.E.3d 818 (Ohio 2022).
333. *Id.* at 819.
334. *Id.* at 820.
335. *Id.* at 822.

coverage under the policy, the insurer was not responsible for covering the resulting loss.[336]

F. *Fidelity Bond*

In *Blue Star Sports Holdings, Inc. v. Federal Insurance Co.*,[337] the insured sports media business brought an action against its commercial crime insurer, seeking to recover losses from employee embezzlement of more than $6 million of company funds through illegal wire transfers. The insurer moved for partial dismissal citing the insured's alleged failure to state a claim.[338] The district court held that the insured stated a claim that it was entitled to recover for common law and statutory bad faith from the insurer, but the policy's employee theft provision constituted a "fidelity bond" and, thus, the insured's claims against the insurer were exempted from Texas Prompt Payment of Claims Act.[339]

G. *Ownership of Funds*

In *Montachem International Inc. v. Federal Insurance Co.*,[340] a hacker with access to the insured's computer system caused a customer service agent for the insured to change the banking information on a customer invoice resulting in the customer sending more than $200,000 to the hacker's bank account.[341] The insurer argued that the insured could not claim coverage under the policy unless it could establish that it either "owned" the stolen funds, "held" the stolen funds, or "was legally liable for" the stolen funds pursuant to the policy's "Ownership Provision."[342] The court denied the insurer's motion to dismiss, finding that the language in the insured's policy was broad in that it used the language "held . . . in any capacity," which is broader than policies which merely use the terms "own" or "hold."[343]

H. *Money Versus Electronic Money*

In *Kem Krest LLC v. Hanover Insurance Co.*,[344] the insured transferred more than $3.2 million by electronic means to an escrow agent for the purchase of sterile medical gloves that the supplier never delivered.[345] The insured sought coverage under the policy's Transit Coverage.[346] The insurer argued

336. *Id.*
337. 658 F. Supp. 3d 351 (E.D. Tex. 2023).
338. *Id.* at 356.
339. *Id.* at 352.
340. No. 20-20100 (ZNQ) (DEA), 2023 WL 2401510 (D.N.J. Mar. 8, 2023).
341. *Id.* at *1.
342. *Id.*
343. *Id.*
344. No. 3:21-cv-572 RLM-MGG, 2023 WL 1795879 (N.D. Ind. Feb. 6, 2023).
345. *Id.* at *1.
346. *Id.*

that the Transit Coverage provision only provided coverage for the loss of physical property and not of money that is transferred by electronic means.[347] In granting the insurer's motion for summary judgment, the court found that the policy's definition of "money" only suggests that it covers physical money and did not incorporate "electronic money" within the Transit Coverage provision.[348]

347. *Id.* at *2.
348. *Id.*

RECENT DEVELOPMENTS IN HEALTH INSURANCE, LIFE INSURANCE, AND DISABILITY INSURANCE LAW

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The issues decided or addressed in this year's collection of accident, disability, ERISA, health, and life insurance decisions will be familiar to practitioners and to regular readers of this article. As always, cases involving accidental death coverage give rise to provocative questions. Is medical malpractice

an "accident?" Is a heroin overdose an intentionally self-inflicted injury? When an unprescribed supplement combines with prescription medication to cause or contribute to an insured's death, is the supplement a "drug" for purposes of a policy's drug exclusion? Several disability insurance decisions this survey period took a close look at the circumstances under which pain and other physical conditions affect claimants' cognitive abilities and arguably prevent them from performing the duties of their occupations. Another disability insurance decision considered whether an insured's full-time work during a period of claimed disability automatically defeated her claim for benefits. This year's ERISA discussion reviews two circuit-level decisions that examined the type of relief available under ERISA Section 502(a)(3), as well as another circuit-level decision that examined whether a third-party administrator's claims repricing services made it a plan fiduciary. This year's health insurance section discusses a district court decision that vacated and enjoined the enforcement of several Affordable Care Act coverage mandates, and it examines regulations proposed by the Departments of Labor, Health and Human Services, and Treasury concerning non-qualitative treatment limitations under the Mental Health Parity and Addiction Equity Act. Finally, this year's article discusses several significant life insurance decisions that were issued this survey period. The Texas Supreme Court settled longstanding disputes over an insurer's ability to rescind a life insurance policy due to material misrepresentations made in applications for insurance, an Illinois Appellate Court concluded the state's revocation-on-divorce statute did not have a retroactive effect, and the supreme courts of Arizona and Georgia clarified the application of their states' statutes concerning stranger-originated-life-insurance policies.

I. ACCIDENTAL DEATH

When it comes to accidental death jurisprudence, Rust Cohle and Frederich Nietzsche may have been right that "time is a flat circle."[1] The focus once again of the most significant accidental death and dismemberment decisions this survey period was whether an incident was an "accident." And where a death was deemed accidental, courts were called upon to determine whether the form of accident was excluded from coverage, often in the context of sickness/infirmity and medical-treatment exclusions. Before we dive into this year's medical mayhem, however, we have an update on a drug overdose decision discussed in last year's article.

1. True Detective: The Long Bright Dark (Home Box Office television broadcast Jan. 12, 2014).

A. *Drug Overdoses: "First you take a drink, then the drink takes a drink, and then the drink takes you."*[2]

In last year's edition of this article, our readers met Johnny Yates, a reported heroin user, whose parents found him dead, lying face-down in his bedroom on top of a hypodermic needle with a bottle cap containing a dried light brown substance on a nearby nightstand.[3] Yates's wife subsequently filed a claim for accidental death benefits, which the insurer denied because Yates's death resulted from the purposeful use of heroin, which the insurer argued fell under the exclusion for "losses caused by an 'intentionally self-inflicted injury.'"[4] In *Yates v. Symetra Life Insurance Co.*, the United States District Court for the Eastern District of Missouri entered judgment for the plaintiff, holding that Symetra's inability to point to evidence showing Mr. Yates "intended his death to occur or that he should have known death was highly likely to occur as a result of injecting heroin" meant Symetra could not satisfy its burden to establish that the intentionally self-inflicted injury exclusion applied.[5]

Affirming the district court, the United States Court of Appeals for the Eighth Circuit observed that the exclusion made a distinction between "loss" (death) and "injury" (overdose): "Symetra will not pay for any loss caused wholly or partly, directly or indirectly, by . . . intentionally self-inflicted injury, whi[le] sane."[6] To the court, the distinction meant the dispositive issue was whether the insured *intentionally* overdosed; i.e., whether the loss (Mr. Yates's death) was caused by Mr. Yates's "intentionally self-inflicted injury."[7]

The court found support for its reasoning in decisions where the insured's death was attributable to drunk driving.[8] Those cases, according to the court, showed that an insured's accidental death "does not fall under the 'intentionally self-inflicted injury' exclusion simply because [the death] was caused by inherently risky conduct." Rather, the issue of whether an "intentionally self-inflicted injury" exclusion applies to an insured's accidental death turns on whether or not the injury itself was intended.[9] The Eighth Circuit agreed that there was no evidence that Mr.

2. *F. Scott Fitzgerald*, NPR, https://www.npr.org/templates/story/story.php?storyId=6625552 (last visited Dec. 12, 2023).
3. Yates v. Symetra Life Ins. Co., 578 F. Supp. 3d 1024, 1035 (E.D. Mo. 2022), *aff'd*, 60 F.4th 1109 (8th Cir. 2023).
4. Yates v. Symetra Life Ins. Co., 60 F.4th 1109, 1112 (8th Cir. 2023).
5. Yates v. Symetra Life Ins. Co., 578 F. Supp. 3d at 1045, *aff'd*, 60 F.4th 1109 (8th Cir. 2023).
6. *Yates*, 60 F.4th at 1117.
7. *Id*.
8. *Id*.
9. *Id*. at 1118.

Yates intentionally overdosed and held that Symetra's denial of the plaintiff's claim for accidental death benefits was erroneous.[10]

B. *Sickness/Infirmity and Treatment Exclusions: "There's no need for fiction in medicine . . . for the facts will always beat anything you can fancy."*[11]

This survey period saw numerous decisions in which coverage turned on the applicability of sickness/infirmity and medical treatment exclusions. In *Johnson v. Farmers New World Life Insurance Co.*,[12] the United States District Court for the District of Colorado analyzed whether sickness/treatment exclusions in four policies issued by three insurers barred coverage for the insured's death.[13] The insured had two identical accidental death policies issued by Farmers, another issued by Minnesota Life, and a fourth issued by Washington National.[14]

The insured died a day after being found unresponsive in her front yard.[15] Prior to her death, the insured's physician had prescribed hydrocodone to treat her severe gout.[16] The insured also purchased a legal, unprescribed supplement called Mitragynine, which is commonly known as Kratom.[17] After performing an autopsy, the coroner concluded the insured's death was caused by the combined use of hydrocodone and Mitragynine.[18] All three insurers denied the resulting claims, invoking the accidental bodily injury exclusions in their policies.[19]

Each of the Farmers policies stated, "This is an accidental death only policy; . . . we will pay the Accidental Death Benefit amount shown in the Schedule provided that: Death occurs as the direct result of an accidental bodily injury, independent of all other causes."[20] The policies' exclusions stated, "We will not pay a benefit for a death which is caused by, results from, or is contributed to by: . . . sickness or its medical or surgical treatment . . . [or] taking of any drug, medication . . . unless as prescribed by a physician."[21]

The accidental death policy issued by Minnesota Life stated that coverage "was limited to a loss that 'results directly—and independently—from

10. *Id.*
11. Arthur Conan Doyle, *A Medical Document*, *in* Round the Red Lamp 200, 215 (1894).
12. Johnson v. Farmers New World Life Ins. Co., No. 121CV02573DDDKAS, 2023 WL 6793399 (D. Colo. Sept. 13, 2023).
13. *Id.* at *1.
14. *Id.*
15. *Id.* at *2.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at *2, *4.
20. *Id.* at *1.
21. *Id.*

all other causes, from an accidental bodily injury which was unintended, unexpected and unforeseen.'"[22] The policy also contained additional exclusions for losses "caused directly or indirectly by, result[ing] from, or [where] there is contribution from, any of the following: (1) bodily infirmity, illness or disease; . . . (5) the use of. . . drugs, medications . . . unless taken upon the advice of a licensed physician in the verifiable prescribed manner and dosage."[23]

The insured's Washington National policy specifically excluded coverage for losses that occurred while "'being under the influence of any illegal drugs, or being under the influence of any narcotic, unless such narcotic is taken under the direction of and as prescribed by a Physician.'"[24] The policy also excluded coverage for loss attributable to "'any disease, bodily or mental illness or degenerative process.'"[25] The Washington National policy defined an Accident as "'a sudden, unexpected and unforeseen event,' and Accidental Injury as 'all bodily injuries solely caused by and resulting from an Accident.'"[26] Importantly, the policy explicitly stated that an injury resulting directly or indirectly from any illness, any disease, or any type of medical treatment would not qualify as an Accidental Injury.[27]

Farmers moved to dismiss, arguing that the plaintiff's actions for breach of contract and bad faith failed to state claims for relief because the policies' "sickness" and "drugs" exclusions plainly applied.[28] Washington National joined Farmers' motion to dismiss.[29] The court agreed with Farmers' reasoning that the exclusions applied because Kratom is an unprescribed drug and the insured's ingestion of it caused the insured's death.[30] The court also held that the insured's death fell under the Farmers policies' "sickness or its medical treatment" exclusion because the hydrocodone the insured used to treat her gout contributed to her death.[31] In light of the foregoing, the court granted the motion to dismiss, finding that Farmers (and Washington National) properly denied the insured's claim under each of their exclusions.[32]

Minnesota Life argued that the insured's death was an excluded loss because Kratom, which was not prescribed by a physician, caused the

22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at *3.
29. *Id.* at *2.
30. *Id.* at *4.
31. *Id.*
32. *Id.*

insured's death.[33] The court observed that the beneficiaries did not clearly rebut Minnesota Life's assertion that Kratom should be considered a drug or medication for purposes of the exclusion.[34] As a result, the court concluded Minnesota Life properly denied coverage based on the exclusion for losses caused by unprescribed drugs or medications.[35]

Is medical malpractice an accident? The insured in *Hawkins v. Cuna Mutual Group*,[36] died while undergoing treatment at a hospital.[37] The insurer denied coverage on the grounds that the insured's death was not caused by an accident but, even if the death was an accident, the death was not covered because it fell within the policy's medical-treatment exclusion.[38] The United States District Court for the Western District of Oklahoma agreed.[39]

The insured was unresponsive when she was admitted to a hospital emergency department and resuscitated.[40] Thereafter, she was intubated and put on a ventilator for treatment in the hospital's intensive care unit.[41] Days later, a feeding tube was inserted into her nostril but was quickly removed after causing her nostril to bleed.[42] This ultimately resulted in the insured becoming unresponsive and receiving advanced cardiovascular life support for forty-three minutes before the family terminated life support.[43] Respiratory failure was listed as the immediate cause of death with gastroenteritis accompanied by vomiting as underlying causes, and septic shock, acute renal failure, atherosclerotic coronary artery disease and epistaxis as other significant contributors to death.[44] The death certificate listed the insured's death as "natural," not "accidental."[45]

The insured's policy defined "accidental death" as "[d]eath resulting from an *injury*, and occurring within 1 year of the date of the accident causing the *injury*." The term "injury" was defined as "[b]odily damage or harm caused directly by an *accident* and independently of all other causes"[46]

33. *Id.*
34. *Id.*
35. *Id.*
36. Hawkins v. Cuna Mut. Grp., No. CIV-22-536-SLP, 2023 WL 185102 (W.D. Okla. Jan. 13, 2023), *motion for relief from judgment denied*, No. CIV-22-536-SLP, 2023 WL 3903812 (W.D. Okla. June 8, 2023), *aff'd sub nom*. David Hawkins, as personal representative of the Est. of Peggy Robinson, Plaintiff–Appellant, v. CUNA Mut. Grp., d/b/a CMFG Life Ins. Co., Defendant–Appellee., No. 23-6084, 2023 WL 8185530 (10th Cir. Nov. 27, 2023).
37. *Id.* at *2.
38. *Id.* at *4.
39. *Id.* at *6.
40. *Id.* at *2.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at *1.

and defined an "accident" as "[a]n occurrence which is unexpected or unforeseen, either as to its cause or as to its result."[47] Finally, the policy excluded coverage for any loss or covered injury due to any complication resulting from medical treatment or surgery.[48]

The insurer maintained the insured's death did not result from an "accident" as defined by the policy because it was foreseeable that complications might arise from medical treatment provided to the insured.[49] The beneficiaries countered that the insured's death was the result of "medical malpractice" and, therefore, was not foreseeable.[50] The court explicitly noted a lack of evidence establishing a causal connection between the insured's death and the allegedly negligent intubation.[51] Additionally, the court noted the insurer's persuasive citations to decisions in which coverage was denied under a medical treatment exclusion and upheld, even when medical malpractice was alleged.[52] The decisions generally found that medical treatment exclusions would be meaningless if they did not extend to deaths caused by medical malpractice because "[d]eath is never caused by medical treatment absent some misdiagnosis or mistake."[53] The court upheld the insurer's denial of benefits, reasoning that even if the insured's death resulted from a covered "injury," the medical treatment exclusion applied, so the denial of coverage was proper.[54]

Similarly, in *Wicks v. Metropolitan Life Insurance Co.*,[55] the United States District Court for the Northern District of Texas examined whether an insurer properly denied coverage of accidental death benefits due to an "illness/treatment" exclusion.[56] The insured underwent gastric sleeve surgery to improve his health and was prescribed various medications to assist with recovery, including hydromorphone for pain.[57] At one point following the surgery, the insured received a prescription of an additional milligram of hydromorphone (Dilaudid).[58] About thirty minutes later, the insured was found unresponsive.[59] The hospital attempted lifesaving procedures, but the insured died two days later.[60]

47. *Id.*
48. *Id.*
49. *Id.* at *4.
50. *Id.*
51. *Id.* at *5.
52. *Id.* at *6.
53. *Id.* at *7.
54. *Id.* at *8.
55. Wicks v. Metro. Life Ins. Co., No. 4:21-CV-1275-O, 2023 WL 5216493 (N.D. Tex. Aug. 14, 2023).
56. *Id.* at *4.
57. *Id.* at *1.
58. *Id.* at *2.
59. *Id.*
60. *Id.*

The insured's accidental death and dismemberment coverage contained a provision stating, "Direct and Sole Cause means that the Covered Loss occurs within 12 months of the date of the accidental injury and was a direct result of the accidental injury, independent of other causes."[61] There also was an "illness/treatment" exclusion which stated, "benefits will not be paid for any loss caused or contributed to by physical or mental illness or infirmity, or the diagnosis or treatment of such illness or infirmity."[62] The insurer denied the insured's claim for accidental death benefits on the grounds that the insured's death did not result "directly and solely from an accidental injury," but, even if the insured's death resulted from an accidental injury, it would still be excluded under the illness/treatment exclusion.[63]

The court found that the insured died from a "standard complication (negative reaction to pain medications) of standard medical treatment (gastric sleeve surgery)."[64] The court also found that treatment of the insured was proper because the "uncontroverted records shows that [the insured] received an appropriate dose of Dilaudid."[65] This finding is critical because an insured's death resulting from proper medical treatment provides no reason to disassociate their death from the complications of an underlying illness as death would be a foreseeable result of medical treatment for said illness.[66] Importantly, the beneficiaries provided no evidence or expert testimony establishing negligent care,[67] while the insurer's expert explicitly stated the dosages were appropriate and that he could not conclude with a reasonable degree of medical certainty that a drug overdose caused the insured's death.[68] Because the record established the dosages were appropriate and treatment was proper, the court concluded the insured's death was caused by a pre-existing infirmity (obesity) and affirmed the insurer's denial of benefits.[69]

In similar fashion, in *Couch v. Mutual of Omaha Insurance Co.*,[70] the United States District Court for the Middle District of Tennessee considered whether a sickness/infirmity exclusion barred recovery of accidental death benefits when an insured died shortly after being found in her home "prone and unresponsive" near her bed with bruising on her face and head.[71] The

61. *Id.*
62. *Id.*
63. *Id.* at *3.
64. *Id.* at *8.
65. *Id.*
66. *Id.* at *7.
67. *Id.* at *8.
68. *Id.*
69. *Id.* at *9.
70. Couch v. Mut. of Omaha Ins. Co., No. 3:22-CV-00473, 2023 WL 7131039 (M.D. Tenn. Oct. 30, 2023).
71. *Id.* at *8.

insured's daughter, who visited regularly, described the insured as "fine and in good spirits" a couple of days prior.[72] The daughter did not witness the fall but believed the insured had been lying there for some time.[73] The insured was taken to the hospital where she did not improve and received only "comfort measures" until she died several days later.[74] The insurer denied coverage reasoning that there was no evidence an injury caused or contributed to the insured's death.[75] The insured's discharge summary revealed a complicated medical history replete with chronic health issues and a CT scan that was "negative for intracranial process," indicating that the insured's death was likely due to sickness rather than injury.[76] Furthermore, the insured's death certificate identified the events directly responsible for the insured's death as comfort measures, acute respiratory failure, septic shock, and chronic obstructive lung disease.[77] These findings further justified the insurer's denial of benefits "on the basis that there was 'no evidence that injury caused or contributed to the decedent's death.'"[78]

The policy provided benefits if the insured died as the result of and within 365 days of an injury.[79] "Injury" was defined as "bodily harm which is the result of an accident or trauma that occurs while your policy is in force and results in loss independently of sickness and all other causes."[80] The policy also "expressly excluded coverage for any 'death resulting directly or indirectly from disease or bodily infirmity.'"[81]

The court found that the plain language of the policy required the plaintiff to prove the insured's death resulted from "injury," independent of all causes, and it found that causation had to be established via expert testimony.[82] According to the insurer, the insured did not experience an accident or trauma, and there was no accident or trauma that independently contributed to the insured's death.[83] The insurer offered the testimony of two experts who opined there was no medical proof in the record establishing the insured suffered a serious head injury or that her death could be linked to such an injury.[84] The plaintiff failed to provide any evidence, let alone expert testimony, to establish that the insured's death was the

72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at *2.
76. *Id.* at *8.
77. *Id.* at *2.
78. *Id.*
79. *Id.* at *7.
80. *Id.*
81. *Id.*
82. *Id.* at *12, *13.
83. *Id.* at *14.
84. *Id.*

direct and independent result of an accident or trauma.[85] As a result, the court concluded the plaintiff failed to establish the insured's death was a covered injury under the plan. The insurer's denial of benefits, therefore, was proper.[86]

Although it determined that the insured's death was not covered by the policy, the court also went on to analyze whether the policy's "disease or bodily infirmity" exclusion applied.[87] Because the insurer's experts unequivocally agreed illness caused the insured's death and because the plaintiff failed to effectively refute those opinions, the court concluded the insurer satisfied its burden to prove the exclusion applied.[88]

The accidental death and dismemberment issues that the courts addressed this survey period are not new to practitioners in this area or to readers of this article, but they shed important light on the circumstances and policy language likely to govern the outcome when an insured's death can be attributed in some way to medical treatment and the use of prescription and non-prescription medications.

II. DISABILITY

A. *Cognitive Abilities Loom Large in Disability Determinations: "Cognition Reigns but Does Not Rule."*[89]

The three cognitive disability decisions spotlighted below examined claims predicated on pain or other conditions affecting a claimant's cognitive abilities. "It's impossible to think when you're in pain" is a common refrain from claimants seeking disability insurance benefits, and, in the cases where pain was cited as the source of a claimant's inability to perform cognitive tasks, the claimant was successful.

In *Snapper v. Unum Life Insurance Co. of America*,[90] the United States District Court for the Northern District of Illinois criticized the insurer for failing to take into account the effect the plaintiff's reported pain had on his ability to perform the cognitive tasks of an attorney.[91] Joseph Snapper was a litigation associate at Mayer Brown LLP and had a long history of back and lower-leg problems arising from a herniated disc sustained in 2008 and microdiscectomy in 2012.[92] In 2016, Snapper was involved

85. *Id.* at *15.
86. *Id.*
87. *Id.*
88. *Id.* at *15–16.
89. *Paul* Valéry Quotes, Goodreads, https://www.goodreads.com/author/quotes/141425.Paul_Val_ry?page=2 (last visited Jan. 25, 2024).
90. Snapper v. Unum Life Ins. Co. of Am., 662 F. Supp. 3d 804 (N.D. Ill. 2023).
91. *Id.* at 835–36.
92. *Id.* at 813–14.

in an automobile accident that aggravated the symptoms in his back and lower left leg.[93] Snapper took a three-month medical leave of absence in April 2018 and attended several weeks of physical therapy,[94] during which time he also received epidural injections.[95] Snapper returned to work when the three-months leave expired and received additional epidural injections over the next five months.[96]

Snapper began a second leave of absence in February 2019.[97] His pain management specialist wrote in support of his application for leave, advising that Snapper was unable to work for an indefinite period of time and would be reevaluated after receiving a spinal cord stimulator in March 2019.[98] The spinal cord stimulator worsened Snapper's pain,[99] and he eventually underwent L5-S1 decompression surgery four months later.[100] Snapper applied for long-term disability benefits within weeks of his decompression surgery.[101] Three months later, Snapper, underwent a L5-S1 discectomy and anterior lumbar interbody fusion.[102] These procedures did not resolve his complaints of lower extremity pain, and Snapper continued receiving treatment and therapies for pain management in January and August 2020.[103]

Unum initially granted Snapper's long term disability (LTD) claim and began paying benefits in the amount of $17,000 per month, but it eventually terminated benefits on the grounds that Snapper was not prevented from performing the duties of his sedentary occupation.[104] A Unum vocational specialist concluded Snapper's occupation in the national economy matched the demands of a "Litigation Attorney" and involved sedentary work.[105] According to Snapper's physician, Snapper was limited to working fewer than six hours per day, with breaks every twenty minutes, which was not consistent with the demands of a sedentary occupation.[106] Unum's Designated Medical Officer disagreed, observing that Snapper's pain and symptoms had improved and that Snapper reported swimming for exercise, travelling, and an ability to lift heavy weights.[107] In light of his findings,

93. *Id.* at 814.
94. *Id.* at 815.
95. *Id.*
96. *Id.*
97. *Id.* at 816.
98. *Id.* at 816–17.
99. *Id.* at 817.
100. *Id.* at 819.
101. *Id.* at 825.
102. *Id.* at 819.
103. *Id.* at 820.
104. *Id.* at 825–28.
105. *Id.* at 827.
106. *Id.* at 826.
107. *Id.* at 826–27.

Unum's Designated Medical Officer concluded the restrictions on Snapper's performance of sedentary work were not supported.[108] That opinion was confirmed by an internal report of a consulting physician who specialized in physical medicine and rehabilitation, as well as pain management.[109] On July 17, 2020, Unum advised Snapper that it was terminating his long-term disability benefits.[110]

Snapper appealed and provided Unum with the findings of a three-hour functional capacity evaluation (FCE) that found Snapper was unable to work as an attorney due to an inability to sit at a computer and type for extended hours or handle oral presentations while standing, among other tasks.[111] Snapper also provided Unum with the opinion of his own vocational consultant who opined that the restrictions and limitations on Snapper's activities meant that he was unable to engage in the occupation of a litigation attorney on a full-time basis.[112] Unum upheld the termination of Snapper's benefits after its reviewing physicians noted that Snapper's ability to shift positions from standing to sitting during the day and observed that the FCE included findings "suggestive of submaximal and inconsistent effort."[113]

The district court reviewed Snapper's claim de novo and focused on Unum's reliance on a job description that was different from the description Snapper obtained from Mayer Brown.[114] Unum looked to the definition of "Litigation Attorney" in the *Enhanced Dictionary of Occupational Titles*, which defined the occupation as "Sedentary" and focused on the occupation's limited physical requirements.[115] Mayer Brown's job description focused on the cognitive aspects of the occupation, including the ability to "Perform and/or understand technical legal research issues and analysis"; "Review and analyze complex and sophisticated facts, issues, risks, and documents"; and "Draft clear, cogent and well-structured written materials, including but not limited to, emails, correspondence, legal memoranda, and transaction documents"; and other functions that the district court characterized as "cognitive tasks."[116] The court noted Snapper's statements in claim forms and interviews with physicians and therapists in which he emphasized that he was unable to "read, write or concentrate because of constant pain."[117] The district court further noted Snapper's reports that the side effects of

108. *Id.* at 827.
109. *Id.*
110. *Id.* at 828.
111. *Id.* at 828–29.
112. *Id.* at 828.
113. *Id.* at 830–31.
114. *Id.* at 832–33.
115. *Id.* at 833.
116. *Id.*
117. *Id.* at 834.

his pain medications, gabapentin, and Cymbalta, negatively affected his cognition, and it cited declarations from Snapper's friends and colleagues who, based on their observations, stated Snapper's cognition was negatively affected by pain.[118]

The court concluded Unum's decision was flawed because Unum "devote[d] virtually no attention" to whether Snapper was able to perform the cognitive tasks his occupation required, focusing instead on Snapper's failure to adduce evidence demonstrating a cognitive impairment.[119] The failure to address Snapper's ability (or inability) to perform the cognitive aspects of his occupation was fatal to Unum's defense of its decision to terminate benefits. The court found that Snapper sustained his burden to prove that his pain and the medications used to treat that pain prevented him from adequately performing the material and substantial cognitive duties of his occupation,[120] and it ordered that Snapper's benefits be reinstated and that he be paid past-due benefits starting from the date of the termination.[121]

The requirement that insurers (and courts) address whether a claimant's pain and other symptoms impair a claimant's cognitive abilities and prevent him from performing the duties of his occupation was central to the decision to reverse and remand for further proceedings in *Scanlon v. Life Insurance Co. of North America*.[122] Scott Scanlon was a Windows Systems Administrator for the McKesson Corporation and "a U.S. Army veteran with a history of chronic pain and sleep disorders."[123] He went on temporary leave due to complaints of chronic pain and sleep disorders, and he requested certain accommodations to return to work.[124] McKesson agreed to grant some but not all of those accommodations and Scanlon sought long-term disability benefits instead of returning to work.[125]

The Life Insurance Company of North America (LINA) denied his claim for long-term disability benefits.[126] LINA and Scanlon agreed that Scanlon's job as performed in the national economy was that of systems analyst and that the job required the performance of both physical and cognitive tasks.[127] A functional capacity evaluation (FCE) established that Scanlon could perform a variety of physical tasks (e.g., kneel, squat, climb stairs, fine-motor tasks), but it also found he was not capable of sitting at

118. *Id.* at 835.
119. *Id.* at 834.
120. *Id.* at 835–36.
121. *Id.* at 836.
122. Scanlon v. Life Ins. Co. of N. Am., 81 F.4th 672 (7th Cir. 2023).
123. *Id.* at 675.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 677.

a computer for eight hours a day.[128] More specifically, the FCE found that Scanlon could sit fifteen minutes at a time for up to two hours and fifty minutes a day, and that he could stand forty-five minutes at a time for up to four hours and twenty-two minutes a day.[129] In terms of Scanlon's cognitive abilities, a clinical psychologist opined that Scanlon's "sleep and pain disorders impacted his cognition and verbal fluency in conversation."[130]

The district court reviewed Scanlon's claim de novo.[131] It acknowledged the psychologist's opinion of Scanlon's condition and noted that he suffered from "myriad chronic orthopedic and sleep disorders that cause him pain and impact his daily life."[132] Nevertheless, the district court upheld LINA's denial on the grounds that Scanlon had not shown that his condition prevented him from performing the material duties of his job.[133]

The Seventh Circuit concluded the district court failed to consider Scanlon's "inability to perform the cognitive requirements of his job during regular work hours" as well as his "inability to sit at his desk for eight hours a day as required by his occupation."[134] LINA argued that the district court appropriately declined to consider the effect Scanlon's chronic conditions had on his ability to perform the cognitive aspects of his occupation because McKesson made accommodations that relieved Scanlon of responsibility for those aspects of his job.[135] The Seventh Circuit rejected that approach, focusing on the policy requirement that Scanlon's occupation be evaluated as it is performed in the national economy, i.e., without McKesson's accommodations.[136] The district court's failure to address that issue was clear error according to the Seventh Circuit, which reversed and remanded the district court's decision with instructions to address Scanlon's ability to perform the cognitive aspects of his job in light of the limitations reflected in the record.[137]

While complaints of cognitive impairments carry weight, they do not always rule whether benefits are owed. The holding in *Arenson v. First Unum Life Insurance Co.*[138] is one such example. Gregg Arenson, a former futures and options broker, argued that he was entitled to disability benefits because Unum erroneously discounted the effect a stroke reportedly had

128. *Id.* at 678.
129. *Id.* at 677.
130. *Id.* at 680.
131. *Id.* at 675.
132. *Id.* at 676.
133. *Id.*
134. *Id.* at 675.
135. *Id.* at 680.
136. *Id.*
137. *Id.*
138. Arenson v. First Unum Life Ins. Co., 650 F. Supp. 3d 643 (N.D. Ill. 2023).

on his cognitive abilities.[139] Applying a deferential standard of review, the district court concluded the denial of benefits was reasonable and granted summary judgment for the defendant insurer.[140]

Arenson's stroke occurred on October 11, 2018, and Arenson complained to his neurologist of difficulty with vocabulary and word-finding.[141] Arenson's neurologist, however, noted no cognitive abnormalities on examinations the next day or ten days later.[142] Moreover, his neurologist opined that the symptoms Arenson complained about were "unlikely to be from [mild cognitive impairment] since [the results of his short test of mental status are] normal."[143] At approximately the same time, Arenson was diagnosed with coronary artery disease and atrial fibrillation.[144] His primary care physician instructed him to remain off-work due to the high stress of his occupation.[145] Arenson applied for and received short-term disability benefits and, in December 2018, Unum opened an inquiry into whether he qualified for long-term disability benefits.[146]

After consulting with Arenson's employer and its own vocational analyst, Unum asked Arenson's neurologist whether he believed Arenson was capable of performing the duties of his "broker-plus" occupation.[147] The neurologist opined that Arenson could perform those duties and could return to work in February 2019.[148] Two Unum in-house physicians reviewed Arenson's medical records and agreed that Arenson could perform the duties of his occupation.[149] As support, they cited a lack of "focal neurological, cognitive, or functional deficits" in Arenson's medical records.[150] Relying on those opinions, Unum denied Arenson's claim.[151]

On appeal, Arenson submitted the results of tests conducted by a neuropsychologist, who concluded that Arenson displayed "a few isolated cognitive impairments/inefficiencies."[152] Relying on the neuropsychologist's opinion, Arenson's vocational expert opined that Arenson would be unable to perform his specific occupational responsibilities, "which required managerial skills and quick thinking, [and] encompassed more than those of a

139. *Id.* at 646.
140. *Id.* at 651.
141. *Id.* at 646.
142. *Id.* at 646–47.
143. *Id.* at 647 (bracketed terms in original).
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 648.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 649.

broker or securities trader."[153] Unum's in-house physicians, a neurologist and a psychiatrist, reviewed Arenson's submissions.[154] The neurologist concluded, and the psychiatrist agreed, that any cognitive deficiencies identified by Arenson's neuropsychologist were not caused by the stroke because they did not correlate to the left pre-central gyrus or right cerebellum, which were the parts of Arenson's brain affected by his stroke.[155] As for the nature of Arenson's job duties, Unum's vocational expert agreed with Arenson's experts that his duties included managerial tasks that went beyond the duties of a typical broker.[156]

Responding to the opinions of Unum's neurologist and psychiatrist, Arenson's neuropsychologist asserted that they lacked the qualifications necessary to evaluate neuropsychological test results.[157] Unum's neuropsychologist then reviewed the test results (but not the underlying data) and concluded that they did not show that Arenson suffered from any cognitive impairments.[158] Unum upheld its decision to deny benefits on February 28, 2020, and Arenson brought suit in May 2020.[159]

Unum was entitled to deferential review of its determination that Arenson was not eligible for LTD benefits.[160] Arenson argued that Unum's reliance on the opinions of a neuropsychologist who did not review the data generated by neuropsychological testing, as well as Unum's reliance on the opinions of a neurologist and psychiatrist who proffered opinions based on the results of that testing, amounted to an unreasonable claims procedure.[161]

The court rejected that argument and observed that Arenson's primary care physician was the only medical professional who expressed concern about Arenson's return to work, and his concern arose from Arenson's high blood pressure and the stress associated with Arenson's occupation, rather than from any diagnosis of a cognitive impairment.[162] Because none of Arenson's treating physicians diagnosed Arenson as having any cognitive impairments, the court found that the Unum physicians who reviewed Arenson's medical records reasonably concluded he was not prevented by any cognitive impairment from performing the material duties of his occupation.[163] The court also found it was reasonable for Unum to rely

153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 650.
160. *Id.*
161. *Id.* at 652.
162. *Id.* at 651.
163. *Id.*

on the statement by Arenson's neurologist that Arenson was able to return to work in February 2019.[164] Because the opinions Unum relied on were reasonable, the court was bound to defer to Unum's choice to credit its own physicians over those supporting Arenson's claim under the deferential standard of review.[165]

B. *Claimant's Work History Not Determinative: "We Ought Not to Look Back, Unless It Is to Derive Useful Lessons from Past Errors, and for the Purpose of Profiting by Dearly Bought Experience."*[166]

Decisions this survey period remind that a claimant's history of working prior to asserting a disability claim is often but not always a critical part of any benefits decision. In *Mucciacciaro v. Hartford Life and Accident Insurance Co.*,[167] the insurer denied benefits based on the plaintiff's history of working during the time period that she claimed to be disabled.[168] The court overturned the insurer's denial and directed it, on remand, to look beyond the plaintiff's work history and to the medical record.[169]

Sandra Mucciacciaro was a dental hygienist who began experiencing back pain in 2017.[170] She brought her condition to her employer's attention in 2019, along with a doctor's note asking that she be permitted to work no more than thirty hours per week.[171] Her employer denied the request, and she worked another six months before resigning.[172] Her last day of work was June 17, 2020.[173]

Mucciacciaro's application for long-term disability benefits identified June 18, 2020, as the first date on which she was unable to work.[174] The insurer denied Mucciacciaro's claim because she was no longer employed as of that date and, thus, was not eligible for benefits under her LTD plan.[175] In her administrative appeal, Mucciacciaro explained that she misunderstood the application and erroneously listed June 18, 2020, as the date her disability began when, in fact, it had begun in 2019.[176] The insurer upheld its denial, determining Mucciacciaro could not have been disabled prior to

164. *Id.* at 650–51.
165. *Id.* at 651.
166. *George Washington to John Armstrong, March 26, 1781*, Library of Congress, https://loc.gov/resource/mgw3h.002/?sp=200&st=text (last visited Jan. 25, 2024).
167. Mucciacciaro v. Hartford Life & Accident Ins. Co., No. CV 22-01503, 2023 WL 4014278 (D.N.J. June 15, 2023).
168. *Id.* at *2.
169. *Id.* at *5.
170. *Id.* at *1.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at *2.

June 18, 2020, because she had been "performing the Essential Duties of [her] Occupation" in 2019 and through her last day of work.[177]

Because the insurer had discretion to determine Mucciacciaro's eligibility for benefits, the question for the court was whether the insurer's denial of benefits was arbitrary and capricious.[178] Mucciacciaro argued that her prior complaints and request for accommodation served as evidence of her earlier disability; the insurer countered that the strict language of the policy meant Mucciacciaro was not disabled because she was performing all essential functions of her job up to the date of her resignation.[179]

With no Third Circuit precedent addressing whether a claimant's full-time work during a period of claimed disability automatically defeated a finding of disability, the district court surveyed decisions from the Seventh, Eighth, and Eleventh Circuits.[180] Those jurisdictions agreed that a participant's full-time work was not determinative of a claimant's disability,[181] and they agreed that a claimant could work while disabled.[182] In those instances, a claimant's work history was just one fact to consider, along with the claimant's medical history, when making a benefit determination.[183] Rather than deciding whether the denial of benefits was arbitrary and capricious, the court remanded the claim to the insurer with instructions to analyze Mucciacciaro's medical records and determine whether her claimed disability pre-dated her resignation.[184]

C. *Improving Medical Conditions' Effect on Ongoing Claims Determinations: "I've Got to Admit It's Getting Better."*[185]

Does a claimant's history of receiving disability benefits have an effect on a court's review of a decision to terminate benefits due to a claimant's reportedly improved medical condition? Two decisions this survey period suggest that the answer is "yes" and that the effect is significant, though perhaps not significant enough to overcome the deferential review of such terminations.

177. *Id.*
178. *Id.* at *3.
179. *Id.* at *4.
180. *Id.*
181. *Id.* (citing Levinson v. Reliance Standard Life Ins. Co., 245 F.3d 1321, 1325 (11th Cir. 2001); Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan, 195 F.3d 975, 982 (7th Cir. 1999); Wuollet v. Short-Term Disability Plan of RSKCo, 360 F. Supp. 2d 994, 1008 (D. Minn. 2005); *and* Marecek v. BellSouth Telecomm., Inc., 49 F.3d 702, 705 (11th Cir. 1995)).
182. *Id.*
183. *Id.*
184. *Id.* at *5.
185. The Beatles, *Getting Better*, *on* Sgt. Pepper's Lonely Hearts Club Band (Parlophone 1967).

In *Geiger v. Zurich American Insurance Co.*,[186] Kevin Geiger, a writer and editor for CBS News New York became disabled as a result of pulmonary hypertension and pulmonic regurgitation, culminating in open-heart surgery in July 2018.[187] After receiving short term disability benefits through September 2018, Geiger applied and was approved for long-term disability benefits.[188]

Several months later, Geiger moved to North Carolina and began treating with Dr. Brett Izzo in April 2019.[189] Dr. Izzo recorded as part of Geiger's initial visit that Geiger was doing quite well: he had lost approximately sixty pounds after his surgery and was exercising daily.[190] Normal findings on an echocardiogram further supported the view that Geiger's condition had improved.[191] Nevertheless, in a statement to Zurich, Dr. Izzo supported Geiger's continued receipt of long-term disability benefits.[192] He explained that Geiger's extensive cardiac history and need to take high doses of a diarrhetic prevented him from returning to work.[193] Zurich terminated benefits in July 2019, citing Geiger's normal echocardiogram findings and his lack of cardiovascular symptoms.[194]

Geiger appealed, and Zurich requested a peer review by an internal medicine physician who specialized in cardiovascular disease.[195] The reviewing doctor concluded Geiger was capable of full-time seated work with certain restrictions and limitations.[196] The Physical Requirements and Job Demand Analysis completed for Geiger's job at CBS confirmed his occupation was sedentary.[197] Because the restrictions and limitations that the reviewer identified would not prevent Geiger from performing his job at CBS, Zurich upheld the denial of benefits.[198] Geiger sued, and the district court entered judgment in favor of Zurich on cross-motions for summary judgment.[199]

The Fourth Circuit affirmed, citing the importance of the deferential standard of review afforded to Zurich.[200] The Fourth Circuit concluded

186. Geiger v. Zurich Am. Ins. Co., 72 F.4th 32 (4th Cir. 2023).
187. *Id.* at 35.
188. *Id.*
189. *Id.* at 36.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 36–37.
197. *Id.* at 37.
198. *Id.*
199. *Id.*, *aff'g*, Geiger v. Zurich Am. Ins. Co., No. 6:20-CV-00656-JD, 2022 WL 20234512, at *1 (D.S.C. May 3, 2022).
200. *Id.*

that it was reasonable for Zurich to disagree with Dr. Izzo and Geiger based on Dr. Izzo's report that Geiger was free of heart-related symptoms after moving to North Carolina.[201] In affirming the judgment for Zurich, the court emphasized that the standard of review was central to its holding by quoting from another of its 2023 decisions: "like offensive linemen on a football team, standards of review lack glamour but are often decisively important."[202]

The insurer in *Iravani v. Unum Life Insurance Co. of America*,[203] did not have the benefit of deferential review and, to borrow from the Fourth Circuit's football analogy, was sacked in the district court under a de novo standard of review.[204] Sharareh Iravani was a cosmetic beauty specialist at Saks Fifth Avenue between 2006 and 2010 when she became disabled from that occupation due to neck pain and migraine headaches.[205] Iravani received long-term disability benefits for nearly a decade before they were terminated on January 7, 2021.[206] Pointing to the totality of medical evidence in the file, including the infrequency and lack of intensity in the treatment Iravani received, Unum concluded she was capable of "full-time sedentary or light physical demands" and, therefore, also was capable of "perform[ing] the duties of alternative gainful occupations" for which she was qualified based on her education and experience.[207]

Iravani was diagnosed with cervicalgia, bilateral upper extremity C6 radiculopathy; cervical spondylosis at C5-C6 and C6-C7; and cervical spinal stenosis at C5-C6; and C6-C7 in 2010.[208] In 2011, she was treating her migraines with a combination of prescription medication, injections, and physical and chiropractic therapy.[209] She was diagnosed the same year with cervical disc syndrome, lumbar degenerative disc disease, radicular neuralgia, cervical sprain, thoracic sprain/strain, lumbar sprain/strain, and segmental dysfunction along her spine.[210] By March 2012, her physician opined that she had reached maximal medical improvement with regard to her cervical and lumbar conditions, and Unum's in-house registered nurse concurred.[211] Thereafter, Iravani continued care with a number of

201. *Id.* at 38.
202. *Id.* at 39 (quoting United States Sec. & Exch. Comm'n v. Clark, 60 F.4th 807, 812 n.6 (4th Cir. 2023) (punctuation omitted)).
203. Iravani v. Unum Life Ins. Co. of Am., No. 21-CV-09895-HSG, 2023 WL 6048785 (N.D. Cal. Sept. 15, 2023).
204. *Id.* at *1.
205. *Id.* at *2.
206. *Id.*
207. *Id.*
208. *Id.* at *3.
209. *Id.* at *4.
210. *Id.*
211. *Id.* at *4–5.

physicians taking primarily over-the-counter medications for pain.[212] Four years later, in July 2016, Unum confirmed there had been no change in Iravani's reported pain complaints or level of impairment.[213]

A 2017 annual review by one of Unum's employees concluded that Iravani's symptoms and functional capacity had not improved.[214] However, a June 2017 form completed for California disability insurance by Iravani's pain specialist physician arguably suggested that Iravani would be able to return to work by January 2018.[215] The form required the physician to identify a date certain for Iravani's return to work and notably did not allow him to list "indefinite."[216] He selected January 5, 2018, as a potential return-to-work date[217] but, on the same form, also advised that Iravani received "acupuncture, cortisone injections, and physical therapy . . . [and] was incapable of performing her normal work."[218]

In October 2019, Iravani advised Unum she had stopped seeing her physicians because she had lost her health insurance and was taking Tylenol and Excedrin to treat her pain.[219] She resumed some care in August 2020 when she returned to her pain specialist, and he concluded Iravani's condition was "either the same or worse than before."[220]

Dr. Stewart Russell conducted a review of Iravani's files for Unum at the end of 2020.[221] He opined that no functional restrictions were warranted for Iravani based on her medical records.[222] His opinion was informed largely by Iravani's recent history of taking only Tylenol and Excedrin for pain, which he considered to be inconsistent with reports of severe spinal pain complaints and migraine pain respectively.[223] Unum's medical director reviewed and agreed with Dr. Russell's opinion, as did another physician who reviewed Iravani's medical records at Unum's request.[224] Notably, an Unum claims analysist concluded that Dr. Russell did not give sufficient weight to the findings of an administrative law judge who awarded Iravani social security disability benefits,[225] and she advised that she could not support Dr. Russell's opinions.[226] Unum forwarded Dr. Russell's opinions to

212. *Id.* at *6.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at *7.
220. *Id.* at *8.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*

Iravani's pain specialist for review and comment, and he also advised that he disagreed with Dr. Russell's opinion.[227]

The district court rejected Unum's argument that Iravani's medical condition had improved.[228] It found that the reviewing physicians' "conclusions and Unum's argument fail[ed] to situate Plaintiff's treatment in the broader context of her medical care."[229] It pointed out that several of her conditions were degenerative and would not be expected to improve over time.[230] Moreover, the reviewing physicians' opinions did not say that Iravani's condition had improved, but, rather, opined that "there was a dearth of evidence to substantiate [Iravani's] claims of disabling pain."[231] Even that reasoning, however, ignored important context, according to the court; that is, Iravani's physicians had universally agreed that a conservative approach to her treatment was appropriate.[232]

The court acknowledged that it was Iravani's burden to establish her entitlement to benefits, but it also observed that Ninth Circuit precedent held that a prior award of benefits weighed against the propriety of a decision to terminate benefits.[233] In light of the weight given to a prior award of benefits, the court concluded that the evidence established Iravani continued to experience severe pain that made it impossible for her to work in any gainful occupation to which she was suited by her background, education, and experience, and it entered judgment in her favor and against Unum.[234]

III. ERISA

A. *Courts Open the Door to Equitable Relief . . . but Only Against Fiduciaries*

1. Plans' alleged unfairness works in participants' favor for Section 502(a)(3) claims: "The world isn't fair, Calvin." "I know, but why isn't it ever unfair in my favor?"[235]

Several Circuit Courts this reporting period wrestled with equitable claims in ERISA cases. In *Rose v. PSA Airlines, Inc.*,[236] the Fourth Circuit found that a sufficiently alleged unjust enrichment theory could support a Section

227. *Id.*
228. *Id.* at *10.
229. *Id.* at *11.
230. *Id.* at *10.
231. *Id.* at *11.
232. *Id.* at *13–14.
233. *Id.* at *15 (citing Muniz v. Amec Const. Mgmt., Inc., 623 F.3d 1290, 1295 (9th Cir. 2010)).
234. *Id.* at *17.
235. Bill Watterson, The Essential Calvin and Hobbes: A Calvin and Hobbes Treasury (Andrews McMeel Publishing 1988), *available at* https://www.gocomics.com/calvinandhobbes/1986/04/14 (last visited Jan. 25, 2024).
236. Rose v. PSA Airlines, Inc., 80 F.4th 488 (4th Cir. 2023).

502(a)(3) claim for monetary relief.[237] The plaintiff sought relief for her deceased son's estate under Section 502(a)(1)(B) following the defendants' allegedly wrongful denial of benefits for a heart transplant, or in the alternative, under Section 502(a)(3) for an alleged breach of fiduciary duty.[238] The plaintiff "sought declaratory and injunctive relief, monetary damages, and 'appropriate equitable relief' including 'surcharge, disgorgement, constructive trust, restitution, [and] equitable estoppel.'"[239]

In *Rose*, the plaintiff's son, a plan participant, was waiting for a heart transplant due to a rare heart condition.[240] He died less than two months after receiving his diagnosis at twenty-seven years old.[241] Within a few weeks of his diagnosis, his physicians submitted the required information for requesting approval for the heart transplant surgery.[242] The physicians twice asked for approval, and the defendants denied both requests, asserting that the requested treatment was not covered because it was experimental.[243] When the plaintiff's son asked for a re-evaluation, the defendants denied the request, asserting that he did not satisfy certain criteria that were not actually part of the plan.[244] His physicians appealed, advising that the plaintiff's son would not survive without the surgery.[245] The defendants again denied the request, citing the same criteria.[246] The physicians then sought an "'expedited' external claim review," but the defendants did not complete it within the required seventy-two hours.[247] The plaintiff's son died approximately one week after the physicians submitted the external claim review, which was five days after the defendants should have rendered a decision.[248] More than a month after the death of the plaintiff's son, the reviewers overturned the previous claim denials.[249]

The Fourth Circuit first noted that that Section 502(a)(1)(B) generally allows for a plan participant to pay for their medical treatment and later request reimbursement or to sue for an injunction to require the plan's medical provider to give the plan participant the medical treatment.[250] Neither happened in *Rose*. The Fourth Circuit also noted that "[Section] 502(a)(1)(B) does not authorize a plaintiff to seek the monetary cost of

237. *Id.* at 505.
238. *Id.* at 492–93.
239. *Id.* at 494.
240. *Id.* at 492.
241. *Id.* at 493.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.* at 493–94.
248. *Id.* at 494.
249. *Id.*
250. *Id.* at 495 (citing Aetna Health, Inc. v. Davila, 542 U.S. 200, 211 (2004)).

a benefit that was never provided."[251] The plaintiff's Section 502(a)(1)(B) claim sought the monetary cost of the heart transplant that her son never received.[252] Accordingly, the Fourth Circuit affirmed the dismissal of the Section 502(a)(1)(B) claim.[253]

But the Fourth Circuit reversed the dismissal of the plaintiff's Section 502(a)(3) claim in which the plaintiff alleged the defendants were "unjustly enriched by keeping the money they should have paid [the plaintiff's son's] doctors."[254] The Fourth Circuit conducted an extensive review of Supreme Court case law regarding equitable relief, noting that a plaintiff who seeks "personal liability" against a defendant for an amount of money seeks legal, not equitable, relief under Section 502(a)(3).[255] It also noted that "subject to certain limits—monetary relief based on a defendant's unjust enrichment can be 'equitable.'"[256] As part of its review, the Fourth Circuit noted that the United States Supreme Court, in *CIGNA Corp. v. Amara*,[257] "suggested that it might allow certain plaintiffs to pursue 'make-whole,' loss-based, monetary relief under [Section] 502(a)(3)" because "such relief was analogous to 'surcharge,' an 'exclusively equitable' remedy under the law of trusts."[258] But the Fourth Circuit also noted that "the Supreme Court has since acknowledged . . . this part of *Amara* was *dicta*" and that the Court's interpretation of equitable relief prior to *Amara* remained "'*unchanged*.'"[259]

The district court did not consider whether the plaintiff's unjust enrichment allegations "plausibly alleged facts that would support relief that was 'typically' available in equity."[260] Because there remained a question of whether the plaintiff plausibly alleged the defendants "were unjustly enriched by interfering with [her son's] rights . . . and . . . that the fruits of that unjust enrichment remain in the [defendants'] possession or can be traced to other assets," the Fourth Circuit remanded the action to the district court to make those determinations.[261]

The Sixth Circuit, in *Patterson v. United HealthCare Insurance Co.*,[262] remanded an appeal to the district court to determine whether the plaintiff's breach of fiduciary duty claim could be used to recoup a payment

251. *Id.*
252. *Id.*
253. *Id.* at 505.
254. *Id.* at 496.
255. *Id.* at 504.
256. *Id.* at 496.
257. CIGNA Corp. v. Amara, 563 U.S. 421 (2011).
258. *Rose*, 80 F.4th at 502–03.
259. *Id.* at 503 (quoting Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan, 577 U.S. 136, 148 n.3 (2016) (emphasis added)).
260. *Id.* at 504.
261. *Id.* at 505.
262. Patterson v. United HealthCare Ins. Co., 76 F.4th 487 (6th Cir. 2023).

that he made to the plan administrator for his plan.[263] The plaintiff was in an auto accident and sustained injuries that the plan paid to treat.[264] After recovering from the other driver, the plan administrator informed the plaintiff that his plan required him to use that recovery to reimburse the plan for the expenses that it paid.[265] The plaintiff and the plan settled, with the plaintiff agreeing to pay $25,000 to the plan.[266] The plaintiff later received the plan document, which he claimed did not require him to pay the money that he recovered from the other driver to the plan.[267]

The plaintiff sued the insurer and related companies under ERISA.[268] The district court dismissed some of the claims for lack of standing and the others for failure to state a claim upon which relief could be granted.[269] On appeal, the Sixth Circuit first held that the plaintiff had standing to sue to recover the $25,000 settlement payment.[270] He had standing to seek that relief because the money he allegedly lost was a "concrete injury" that the defendants' behavior allegedly caused.[271] The plaintiff, however, did not have standing under Section 502(a)(2) to seek injunctive relief for any "plausible future injury" or for "settlements wrongfully taken from other plan beneficiaries and wasted or mismanaged plan assets," or "harm to the plan itself," including "inadequate funding" of the plan.[272] The only cognizable claims the plaintiff could assert against the plan and its agent arose under Section 502(a)(3) for "breach of fiduciary duty and engagement in prohibited transactions," and, in that action, the plaintiff's relief was limited to recouping the $25,000 settlement payment.[273] The Sixth Circuit reversed the district court's dismissal of the "breach of fiduciary duty and prohibited transaction claims," remanded the case to the district court to address those claims, and affirmed the remainder of the district court's decision.[274] The Sixth Circuit also directed that the remand address, *inter alia*, whether one of the defendants "was acting as a fiduciary at the relevant time."[275]

263. *Id.* at 500.
264. *Id.* at 491.
265. *Id.* at 491–92.
266. *Id.* at 492.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.* at 493.
271. *Id.*
272. *Id.* at 493–94.
273. *Id.* at 500.
274. *Id.*
275. *Id.* at 497.

2. Third-party administrator lacked the control necessary to make it a functional fiduciary: "You seem to be mistaken about how much control you exercise over this arrangement."[276]

In *Massachusetts Laborers' Health & Welfare Fund v. Blue Cross Blue Shield of Massachusetts*,[277] the First Circuit addressed whether the defendant was an ERISA fiduciary for purposes of the plaintiff's breach of fiduciary duty claim.[278] The court, as a matter of first impression, concluded that a person is a fiduciary even if they exercise "nondiscretionary control or authority over plan assets."[279] In doing so, it joined the Second, Third, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits.[280] The First Circuit noted, however, that under ERISA, only "persons who 'exercise[ ] . . . authority or control' with respect to the 'management or disposition' of plan assets" reach fiduciary status.[281] It noted that merely exercising "'physical control or the performance of mechanical administrative tasks generally is insufficient to confer fiduciary status.'"[282] Instead, as the First Circuit noted, fiduciary status requires some "'meaningful control.'"[283] The First Circuit concluded that the plaintiff's allegations did not satisfy these criteria.[284]

The defendant, Blue Cross Blue Shield of Massachusetts (BCBSMA) contracted with a self-funded multi-employer group health plan to serve as a third-party administrator from 2006 to 2022.[285] The plaintiff Fund administered the plan.[286] The Fund gave participants access to rates that BCBSMA negotiated at a discount with "a network of medical providers."[287] BCBSMA's responsibilities included "repricing participants' claims according to its provider arrangements and transmitting approved claim payments to providers . . . ."[288] The Fund alleged that BCBSMA priced claims inaccurately, resulting in millions of dollars of overpayments to providers, and it alleged that BCBSMA engaged in self-dealing by collecting "wrongful and excessive recovery fees" arising from its inaccurate repricing efforts.[289] The

276. The X-Files: Soft Light (20th Century Fox television broadcast May 5, 1995).
277. Massachusetts Laborers' Health & Welfare Fund v. Blue Cross Blue Shield of Massachusetts, 66 F.4th 307 (1st Cir. 2023).
278. *Id.* at 310.
279. *Id.* at 325.
280. *Id.*
281. *Id.* (quoting 29 U.S.C. § 1002(21)(A)(i)).
282. *Id.* (quoting Beddall v. State St. Bank & Tr. Co., 137 F.3d 12, 18 (1st Cir. 1998)).
283. *Id.* (quoting Beddall, 137 F.3d at 18).
284. *Id.* at 326.
285. *Id.* at 310.
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.* at 314–15.

Fund alleged, for example, that BCBSMA would cause a pricing error and then catch the error, remedy it in regard to the payment to a provider, but collect a fee from the Fund based on the erroneous repricing.[290] The Fund asserted claims for breach of fiduciary duty under 29 U.S.C. § 1109(a), "self-dealing with Plan assets in violation of 29 U.S.C. § 1106(b)(2)," and "injunctive relief under 29 U.S.C. § 1132(a)(3)."[291]

The district court rejected the Fund's argument that BCBSMA was an ERISA fiduciary and granted BCBSMA's Rule 12(b)(6) motion to dismiss.[292] It found that BCBSMA was not a named fiduciary in the summary plan description, and it concluded BCBSMA was not a "functional fiduciary" because its application of negotiated rates did not give it "discretionary management over the management of the Plan."[293] Furthermore, because the working capital the Fund provided to BCBSMA to administer claims was not a plan asset, BCBSMA did not have discretionary authority over plan assets.[294] And even if the working capital was a plan asset, BCBSMA "had not exercised sufficient 'authority or control' over the working capital amount to render BCBSMA a fiduciary."[295]

On appeal, the First Circuit noted that, under ERISA, a person can be a fiduciary if named as such in a plan instrument or under a plan procedure, or can be a "'functional fiduciary'" by "'performing at least one of several enumerated functions with respect to a plan.'"[296] Because it is possible for a person to be a fiduciary for only some purposes, the First Circuit analyzed whether BCBSMA was a fiduciary with respect to (1) "pricing claims and allegedly overpaying providers," and (2) "when pursuing recoveries of overpaid amounts and retaining associated fees before reimbursing the Fund."[297]

The First Circuit affirmed the dismissal of the Fund's actions for failure to state claims upon which relief could be granted after reviewing the administrative-services-only contract, the summary plan description, and the complaint.[298] It found that BCBSMA lacked discretion when acting as alleged in the complaint.[299] The court observed that, while BCBSMA's actions may have been a breach of contract, they were not the actions of an ERISA fiduciary.[300] For instance, the complaint alleged BCBSMA's pricing

290. *Id.* at 315.
291. *Id.* at 314.
292. *Id.* at 315.
293. *Id.* at 315–16.
294. *Id.*
295. *Id.* at 316.
296. *Id.*; 29 U.S.C. § 1002(21)(A).
297. *Massachusetts Laborers'*, 66 F.4th at 317.
298. *Id.* at 320–23.
299. *Id.*
300. *Id.* at 320.

claim outcomes were inaccurate, but it did not allege "that [BCBSMA] had the discretion to reach different conclusions."[301] Similarly, the remedies that the Fund sought did not plausibly suggest that it stated claims for breach of fiduciary duty.[302] The overpayments and retention fees the Fund alleged that it was entitled to recover did not depend on the grant of any discretion to BCBSMA.[303] Rather, the relief that the Fund sought arose from "actions alleged to violate BCBSMA's contractual obligations, . . . as to which BCBSMA had no discretion."[304] To the extent the complaint alleged BCBSMA exercised discretion in connection with judgments it made about insufficient claim settlements, as opposed to "reprocessing claims" for "full recoveries," the Fund did not allege BCBSMA's exercise of discretion involved the management of the plan.[305] Therefore, "[t]he Fund . . . failed to plausibly allege that BCBSMA exercised discretionary authority or control over management of the Plan when taking the actions" on which the Fund's claims were based.[306] Finally, the First Circuit found that the Fund did not plausibly allege that "BCBSMA exercised 'any authority or control respecting management or disposition'" of Fund assets.[307] The Fund provided BCBSMA access to working capital for the administration of the Fund's claims, but that "working capital amount" was not a plan asset, according to the First Circuit.[308] Even if it was, the Fund did not plausibly allege "BCBSMA exercised 'any authority or control respecting management or disposition' of the working capital amount."[309] The First Circuit emphasized that its holding was limited, and that it did "not hold, for example, that a [third-party administrator] lacks fiduciary status whenever the plan sponsor is responsible for claims adjudication."[310] Thus, the Circuit Courts' detailed analyses in these cases indicate that the issue of equitable relief in the context of Section 502(a)(3) claim is likely to continue to invite vigorous debate.

B. *Procedural Irregularities That Aren't Bad Enough to Be Fatal to a Benefit Denial: "I'm Not Bad; I'm Just Drawn That Way."*[311]

Two courts this reporting period were called upon to decide how the arbitrary and capricious standard of review should be applied in long-term

301. *Id.* at 321.
302. *Id.* at 321–22.
303. *Id.* at 322.
304. *Id.* at 321.
305. *Id.* at 315, 323.
306. *Id.* at 323.
307. *Id.* at 324.
308. *Id.* at 315.
309. *Id.* at 324 (quoting 29 U.S.C. § 1002(21)(A)(i)).
310. *Id.* at 327.
311. Who Framed Roger Rabbit (Touchstone Pictures & Amblin Entertainment 1988).

disability disputes in which procedural irregularities occurred during the administrative review of a claim. One decision reinforces the notion that not all procedural irregularities are created equal and, so, do not always warrant a loss of deference. The other decision illustrates that even a standard of review that is weakened by procedural irregularities is not fatal to a plan's case.

In *McIntyre v. Reliance Standard Life Insurance Co.*,[312] the Eighth Circuit vacated the district court's granting of summary judgment to the plaintiff ERISA plan participant.[313] The plaintiff was a nurse who stopped working due to symptoms of a "genetic, degenerative neurological disease that damages peripheral nerves."[314] The plan administrator paid the plaintiff long-term disability benefits for over two years and terminated the benefits after conducting a review regarding the any-occupation period.[315]

On appeal of summary judgment for the plaintiff, the Eighth Circuit considered, in part, how much weight to give the plan administrator's delay in deciding the plaintiff's administrative appeal and the plan participator's "evaluator/payor conflict of interest."[316] The Eighth Circuit gave the delay of the decision little weight, noting that "the delay was 'caused by both [the plaintiff and the plan administrator],' but there is no evidence (and [the plaintiff] does not claim) that [the plan administrator's] role in the delay stems from an attempt to find a sympathetic doctor, pressure [the plaintiff] to drop her appeal, or otherwise rig the appeals process against her."[317] The Eighth Circuit gave some weight, however, to the plan administrator's conflict of interest because, although the plaintiff did not establish the plan administrator had a history of biased claims administration, the plan administrator did "not argue that it maintained structural separations to minimize its conflict of interest."[318] The Eighth Circuit reversed summary judgment for the plaintiff and reversed the fee award to the plaintiff, remanding the case for entry of judgment in favor of the plan administrator.[319]

In *MacNaughton v. Paul Revere Insurance Co.*,[320] the plaintiff, an ERISA plan participant and radiologist, who had problems with her vision in one eye, sought reinstatement of her own-occupation long-term disability

312. McIntyre v. Reliance Standard Life Ins. Co., 73 F.4th 993 (8th Cir. 2023).
313. *Id*. at 1004.
314. *Id*. at 996.
315. *Id*.
316. *Id*. at 1002.
317. *Id*.
318. *Id*. at 1004.
319. *Id*.
320. MacNaughton v. Paul Revere Ins. Co., 663 F. Supp. 3d 136 (D. Mass. 2023), *appeal dismissed sub nom*. Macnaughton v. Paul Revere Life Ins. Co., No. 23-1366, 2023 WL 7181649 (1st Cir. Aug. 10, 2023).

benefits under Section 502(a)(1)(B).[321] The District Court for the District of Massachusetts noted that "the Plan vests [the plan administrator] with discretion and therefore [the court] reviews the denial decision under an 'arbitrary and capricious' standard. That requires the decision to be supported by 'substantial evidence' and to be 'reasoned.'"[322] The district court considered several examples of "procedural unreasonableness" in the plan administrator's review, deciding that they called for "a less deferential review" of the plan administrator's benefit termination decision.[323] Specifically, the court noted that the plan administrator decided to "reevaluate" the plaintiff's claim after she made an "offhand statement to an examiner that 'there are no R[estrictions] & L[imitation]s, really.'"[324] Further, the opinion of the plan's peer reviewer was problematic in the court's view.[325] The peer reviewer opined on the plaintiff's ability to perform the duties of her occupation as a diagnostic radiologist, but did so without having been provided a description of the physical requirements of the occupation.[326] The court also noted "inconsistencies" in the plan administrator's "decision-making process," such as its reliance on a peer reviewer's cherry-picking of medical information in the notes of plaintiff's treating physicians.[327] Accordingly, it decided to use a "less deferential" arbitrary and capricious standard of review.[328]

Even applying a less deferential review, the district court granted the plan administrator's motion for summary judgment.[329] The court noted that, in comparing the plaintiff's treating physician's report with the peer reviewing physician's reports, the plan administrator has to accept that the plaintiff has "some subjective difficulties in her left eye," but "does not need to accept that [the plaintiff] is disabled absent objective tests proving otherwise."[330] The court further noted, "As discussed above, [the plaintiff's treating physician] never adequately explains how his diagnosis affects the controlled conditions radiologists work in."[331]

These cases serve as a reminder that the weight given to procedural irregularities is case-specific and that they do not necessarily sound the death-knell for insurers' and plan administrators' positions.

321. *Id.* at 138–39.
322. *Id.* at 142.
323. *Id.*
324. *Id.* at 139.
325. *Id.* at 142.
326. *Id.* at 143.
327. *Id.*
328. *Id.* at 142–43.
329. *Id.* at 146.
330. *Id.* at 145.
331. *Id.* at 146.

C. *The Parity Act and Looking at Different Medical Necessity Guidelines: "When You Change the Way You Look at Things, the Things You Look at Change."*[332]

The United States District Court for the Western District of Washington looked beyond the third-party guidelines that a plan used to determine whether residential treatment for mental health concerns was medically necessary. Under the Mental Health Parity and Addiction Equity Act (Parity Act), if a group health plan or health insurance coverage provides (i) medical and surgical benefits and (ii) mental health or substance use disorder benefits, the issuer of the plan or the insurance coverage "must not impose more restrictions on the latter than it imposes on the former."[333] The Parity Act is incorporated into ERISA, and Plan participants who bring claims for Parity Act violations under Section 502(a)(3), also commonly assert claims for medical benefits under Section 502(a)(1)(B).[334]

The plaintiff in *N.C. v. Premera Blue Cross*,[335] filed suit on behalf of her minor son, A.C., who received 14 months' worth of residential treatment for mental health concerns.[336] The plan administrator for A.C.'s plan approved benefits for nine days of his stay, advising that the remainder of the stay was not medically necessary under the terms of the plan.[337] Plaintiff sued seeking benefits for all fourteen months of A.C.'s treatment under ERISA Section 502(a)(1)(B), arguing that it was medically necessary and therefore covered by the plan.[338] She also asserted a Parity Act claim and sought equitable relief under ERISA Section 502(a)(3), arguing that the criteria used to deny A.C. benefits violated the Parity Act by imposing more restrictive limitations on mental health benefits than on comparable medical benefits.[339]

The plan administrator used guidelines from an organization named InterQual to determine whether residential treatments for mental health

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332. *Max Planck*, Today in Science History, https://todayinsci.com/P/Planck_Max/PlanckMax-Quotations.htm (last visited Jan. 25, 2024) (frequently attributed to Max Planck, but also attributed to Wayne Dyer, author of the best-selling self-help book *Your Erroneous Zones* (1976), and may be apocryphal).

333. S.L. by & through J.L. v. Cross, No. C18-1308RSL, 2023 WL 3738991, at *11 (W.D. Wash. May 31, 2023), *appeal docketed*, No. 23-353381 (9th Cir. June 2, 2023) (quoting Danny P. v. Cath. Health Initiatives, 891 F.3d 1155, 1157 (9th Cir. 2018)); 29 U.S.C. § 1185a(a)(3)(A).

334. K.K. v. Premera Blue Cross, No. C21-1611-JCC, 2023 WL 3948236, at *4 (W.D. Wash. June 12, 2023), *appeal docketed*, No. 23-35480 (9th Cir. July 17, 2023) (citing 29 U.S.C. § 1132(a)(3)).

335. N.C. v. Premera Blue Cross, No. 2:21-CV-01257-JHC, 2023 WL 2741874, at *1 (W.D. Wash. Mar. 31, 2023).

336. *Id*.

337. *Id*. at *2, *6.

338. *Id*. at *1.

339. *Id*.; *see also* Plaintiff's Motion for Summary Judgment at 21–27, N.C. v. Premera Blue Cross, No. 2:21-CV-01257-JHC (W.D. Wash. July 7, 2022), ECF No. 53.

conditions were medically necessary.[340] The guidelines established several steps for determining whether a residential treatment was medically necessary.[341] The first step looked at whether, for each week of a stay at a residential treatment facility, a patient exhibited one or more symptoms appearing on a list prepared by InterQual.[342] The guidelines next provided that a patient must exhibit one of the behavioral symptoms appearing on a second list that InterQual prepared.[343] And, finally, InterQual's guidelines suggested that, for each week of a residential treatment stay, several varieties of interventions must have occurred for residential treatment to qualify as medically necessary.[344]

The plan administrator denied the plaintiff's claim for benefits beyond the first nine days of A.C.'s stay because it concluded that, under the InterQual guidelines, the residential treatment that A.C. received was not medically necessary.[345] In her administrative appeals, the plaintiff argued, *inter alia*, that the InterQual guidelines violated generally accepted standards for determining medical necessity and that the effect of the plan administrator's reliance on the InterQual guidelines was to violate the Parity Act because the plan imposed more stringent coverage requirements on mental health benefits than on benefits for medical care.[346] The plan administrator denied the plaintiff's appeals on the grounds that, *inter alia*, A.C. could have been treated in a less restrictive setting and, so, residential treatment beyond the first nine days of his stay did not satisfy the plan's requirement that treatment be consistent with "generally accepted standards of medical practice"; that it be medically necessary.[347]

The court reviewed the plan's denial of benefits de novo. Because the InterQual guidelines were not incorporated into the plan documents, the court concluded that it was not beholden to them to determine whether A.C.'s treatment was medically necessary.[348] Citing the Ninth Circuit's "reasonable expectations" doctrine (providing that "courts will protect the reasonable expectations of insureds") and the doctrine of *contra proferentem*, the court concluded that it needed to consult other guidelines and principles to determine the meaning of the plan's phrase "generally accepted standards of medical practice."[349] The court consulted the American Academy of Child and Adolescent Psychiatry's (AACAP) "Principles

340. *N.C.*, 2023 WL 2741874, at *2.
341. *Id.* at *3.
342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.* at *6.
346. *Id.*
347. *Id.* at *7–9.
348. *Id.* at *9.
349. *Id.* at *9–10.

of Care for Treatment of Children and Adolescents with Mental Illness in Residential Treatment Centers" (Principles of Care) and "Practice Parameter for the Assessment and Treatment of Children and Adolescents with Reactive Attachment Disorder and Disinhibited Social Engagement Disorder" (RAD Practice Parameter).[350]

Relying on the various guidelines and the evidence in the record, including the medical opinions and recommendations of A.C.'s treating physicians, to which the court assigned greater weight than to the plan's independent peer review physicians, the court found that the treatment that A.C. received during the remainder of his stay was "in accordance with the generally accepted standards of medical practice" and, therefore, was covered by the plan.[351] The court awarded the plan benefits to the plaintiff under Section 502(a)(1)(B)[352] but dismissed her Parity Act claim, which she brought under Section 502(a)(3) of ERISA, on the grounds that it "would be inappropriate" to award the equitable relief available under that Section when it also awarded her plan benefits.[353]

IV. HEALTH INSURANCE

A. *Are Some Affordable Care Act Mandates Built on Unfirm Foundations?: "And I Discovered That My Castles Stand Upon Pillars of Salt and Pillars of Sand."*[354]

The Affordable Care Act (ACA) imposes several coverage mandates on private health insurers.[355] Many of those mandates are based on recommendations and guidelines issued by various federal agencies. The past several versions of this article have tracked litigation challenging those mandates, and this survey period saw the United States District Court for the Northern District of Texas vacate all recommendations and guidelines issued by one federal agency since March 23, 2010. The court further enjoined the Secretaries of the United States Departments of Labor, Health and Human Services, and Treasury from implementing or enforcing all coverage mandates based on those recommendations and guidelines.

Last year's article reported on *Braidwood Management Inc. v. Becerra*,[356] a lawsuit that challenged the authority of three federal agencies to issue

350. *Id*. at *10.
351. *Id*. at *12–13.
352. *Id*. at *14–15.
353. *Id*. at *15 (citing Varity Corp. v. Howe, 516 U.S. 489, 515 (1996)).
354. Coldplay, *Viva La Vida*, *on* Viva La Vida or Death and All His Friends (Parlophone 2008).
355. *See* Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624, 632–33 (N.D. Tex. 2022), *appeal docketed*, No. 23-10326 (5th Cir. Apr. 3, 2023).
356. *See* Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624 (N.D. Tex. 2022), *appeal docketed*, No. 23-10326 (5th Cir. Apr. 3, 2023).

some of the recommendations and guidelines that became ACA coverage mandates for most private health insurance contracts.[357] The *Braidwood* plaintiffs challenged the following: (1) the recommendation by the U.S. Preventive Services Task Force (PSTF) to cover pre-exposure prophylaxis (PrEP) drugs in order to prevent HIV infection;[358] (2) the recommendation by the Advisory Committee on Immunization Practices (ACIP) to cover the HPV vaccine in order to prevent new HPV infections and HPV-associated diseases, including some cancers;[359] (3) guidelines issued by the Health Resources and Services Administration (HRSA) calling for coverage of counseling for alcohol abuse, screening, and behavioral health counseling for sexually transmitted infections, screening and behavior interventions for obesity, and counseling for tobacco use;[360] and (4) other HRSA guidelines that required nonexempt employers to cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[361] The last set of HRSA guidelines became known as the Contraceptive Mandate.[362]

The plaintiffs objected to the mandated coverage on a mixture of religious and economic grounds. All of them wanted the option to purchase or to obtain health insurance that excluded or limited coverage for the agencies' recommended drugs and procedures, something that they argued they could not do because "health insurance companies stopped selling insurance plans excluding the objectionable coverage in response to" the mandates.[363]

The plaintiffs argued the mandates were invalid because the agencies that issued them were constituted in violation of two Article II clauses of the United States Constitution—the Appointments Clause and the Vesting Clause—and also violated the Nondelegation Doctrine and the Religious Freedom Restoration Act (RFRA).[364] We reported last survey period that, for reasons that go beyond the scope of this article, the *Braidwood* court agreed the PrEP mandate (prompted by the PSTF's recommendations) violated Braidwood's rights under the RFRA.[365] The court also concluded

357. *Id*. at 632. In previous Articles, we reported on developments in the *Braidwood* case under the name *Kelley v. Azar*, No. 4:20-CV-00283-O, 2021 WL 4025804 (N.D. Tex. Feb. 25, 2021). The defendants in the two cases were (and remain) the United States Departments of Health and Human Services, Labor, and the Treasury.

358. *Id*. (discussing the U.S. Preventive Services Task Force).

359. *Id*. at 632–33 (discussing the Advisory Committee on Immunization Practices).

360. *Id*. at 633 (discussing the Health Resources and Services Administration).

361. *Id*.

362. *Id*.

363. Braidwood Mgmt. Inc. v. Becerra, No. 4:20-CV-00283-O, 2023 WL 2703229, at *4, *8 (N.D. Tex. Mar. 30, 2023), *appeal docketed*, No. 23-10326 (5th Cir. Apr. 3, 2023).

364. Braidwood Mgmt., 627 F. Supp. 3d at 634–35.

365. *Id*. at 652–53.

that (1) the process by which PSTF members were appointed violated the Appointments Clause, but stated it would entertain additional briefing before selecting a remedy for that violation; (2) the Secretary of the Department of Health and Human Services (HHS) effectively ratified the actions of ACIP and HRSA, meaning that their recommendations and guidelines did not violate the Appointments Clause; (3) Congress's assignment of authority to the PSTF did not violate the Vesting Clause; and (4) none of the three agencies' actions violated the nondelegation doctrine.[366]

This survey period, the *Braidwood* court addressed three issues that remained unresolved following its prior decision. Two of those issues—the determination that the religious- and non-religious-objector plaintiffs had standing to assert the claims described, and the determination that the PrEP mandate violated the RFRA as to the religious-objector plaintiffs—are beyond the scope of this article.[367] The third issue, however, addressed the appropriate remedy following the court's holding that the appointment of PSTF members since the ACA's enactment on March 23, 2010, violated the Appointments Clause.[368] The court held that the plaintiffs were entitled to vacatur of all HHS actions implementing the PSTF's recommendations and guidelines after March 23, 2010, and it further enjoined the Secretaries of HHS, Labor, and Treasury "and their officers, agents, servants, and employees" from implementing or enforcing the coverage mandates adopted based on recommendations from the PSTF.[369]

The government appealed the district court's decision[370] and sought a partial stay of the order pending resolution of the appeal.[371] The government argued the vacatur and nationwide injunction were not legally justified.[372] Both were overly broad, they argued, because the district court's order otherwise granted the plaintiffs complete relief,[373] whereas the vacatur and injunction affected coverage beyond the PrEP mandate about which the plaintiffs complained, reaching services such as screenings for breast and lung cancer and certain colonoscopies.[374] In a Joint Stipulation and Proposed Order, the plaintiffs acknowledged that the district court's order would not shield them (or their insurers) from statutory penalties and enforcement actions that the government might impose or pursue

366. *Id*. at 639–41, 645–48, 652.
367. Braidwood Mgmt., 2023 WL 2703229, at *4–9.
368. *Id*. at *9–14.
369. *Id*. at *14.
370. Defendants' Notice of Appeal, Braidwood Mgmt. Inc. v. Becerra, No. 23-10326 (5th Cir. Mar. 31, 2023), ECF No. 1.
371. Motion for Partial Stay of Final Judgment Pending Appeal, Braidwood Mgmt., Inc. v. Becerra, No. 23-10326 (5th Cir. Apr. 27, 2023), ECF No. 30.
372. *Id*. at 2–3.
373. *Id*.
374. *Id*.

if the judgment were reversed or vacated.[375] In light of that ruling, the plaintiffs stipulated to a stay of the district court's vacatur and injunction, subject to the government's agreement that it would not seek penalties or pursue enforcement actions against the plaintiffs or their insurers for conduct taken by them consistent with the district court's order prior to the Fifth Circuit's issuance of the mandate in the appeal.[376] Following the parties' stipulation, the Fifth Circuit issued a stay pending the issuance of the mandate.[377]

We have every reason to believe there will be further developments to report in the *Braidwood* dispute during the next survey period, and we look forward to reporting on those updates.

B. *Scrutinizing How Plans Select Medical Necessity Guidelines and How They Affect Rights Under the Parity Act. "It's About Who Controls the Information: What We See and Hear, How We Work, What We Think . . . . It's All About the Information!"*[378]

The principal focus of the Mental Health Parity and Addiction Equity Act (Parity Act)[379] is to ensure that persons covered by group health plans or health insurance coverages that provide benefits for (i) mental health/substance use disorder treatments (Mental/SUD) and (ii) medical and surgical treatments do not face greater barriers and restrictions on access to Mental/SUD benefits than they face when accessing benefits for a medical or surgical procedure.[380] The United States District Courts for the Western District of Washington and the District of Utah considered the adoption by two plans of guidelines used to determine whether Mental/SUD treatments were "medically necessary." One court considered the extent to which a plan was obligated to analyze such guidelines before adopting them to ensure that they did not violate the Parity Act, and the other court considered whether the adopted guidelines improperly limited Mental/SUD benefits in violation of the Parity Act. And, in a development that is likely to inform future court decisions examining those issues, the United States Departments of Labor, HHS, and Treasury proposed new Parity Act regulations during this survey period.

375. Joint Stipulation and Proposed Order ¶ 3, Braidwood Mgmt. Inc. v. Becerra, No. 23-10326 (5th Cir. June 12, 2023), ECF No. 147-1.

376. *Id.* ¶ ¶ 4–6.

377. Unpublished Order, Braidwood Mgmt. Inc. v. Becerra, No. 23-10326 (5th Cir. June 13, 2023), ECF No. 153-2.

378. Sneakers (Universal Pictures 1992).

379. 29 U.S.C. § 1185a.

380. Requirements Related to Mental Health Parity and Addiction Equity Act, 88 Fed. Reg. 51,552–01, 51,556, (proposed Aug. 3, 2023) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, & 45 C.F.R. pts. 146, 147), 2023 WL 4931008.

The Parity Act targets two types of "treatment limitations" that may be imposed on Mental/SUD benefits.[381] The first type of limitation is known as a quantitative treatment limitation (QTL), which is a limitation that is expressed numerically.[382] For example, a plan's limit on the number of outpatient visits a plan covers in a year is a QTL.[383] The second type of treatment limitation is a nonquantitative treatment limitation (NQTL), which is any limitation on the scope or duration of benefits for Mental/SUD treatment.[384]

In *S.L. by & through J.L. v. Cross*,[385] the plaintiffs sought benefits for a minor, S.L., in connection with his stay at a residential treatment facility.[386] The plan denied benefits after determining the stay was not medically necessary.[387] Faced with the deferential review of the plan's decision, the plaintiffs argued the court's review should be "tempered by a degree of skepticism" due to what the plaintiffs characterized as several conflicts of interest.[388]

One purported conflict concerned the adoption by the plan's claims administrator, Premera Blue Cross, of InterQual 2015 Residential & Community-Based Treatment Criteria to determine whether S.L.'s treatment was medically necessary under the plan.[389] The plaintiffs argued that the claims administrator was required analyze the guidelines as NQTLs before adopting them, in order to ensure the plan did not impose greater treatment limitations on Mental/SUD benefits than it imposed on medical or surgical benefits.[390] The plan adopted InterQual's guidelines without conducting such an analysis.[391] That "failure," the plaintiffs argued, reflected a conflict of interest that required the court to conduct a less deferential review of the plan's benefit determination.[392] The court was far from convinced that the alleged Parity Act violation, if it occurred, would amount to a conflict of interest, but, in the end, it did not reach the issue because it found that the plaintiffs failed to establish the existence of a violation.[393]

381. S.L. by & through J.L. v. Cross, No. C18-1308RSL, 2023 WL 3738991, at *11 (W.D. Wash. May 31, 2023), *appeal docketed*, No. 23-353381 (9th Cir. June 2, 2023) (quoting Danny P. v. Cath. Health Initiatives, 891 F.3d 1155, 1157 (9th Cir. 2018)); 29 U.S.C. § 1185a(a)(3)(A).
382. *S.L.*, 2023 WL 3738991, at *11.
383. *Id.*
384. *Id.*
385. *Id.* at *1.
386. *Id.* at *1–2.
387. *Id.* at *1.
388. *Id.* at *5.
389. *Id.* at *2.
390. *Id.* at *10.
391. *Id.* at *12 (citing 29 C.F.R. § 2590.712(d)(3)).
392. *Id.* at *10.
393. *Id.* at *12.

The court agreed with the defendants that the written-analysis requirement was not in effect in 2016, when S.L.'s claims arose and were denied.[394] The requirement did not go into effect, the court explained, until February 2021 following the passage of the 2021 Consolidated Appropriations Act.[395] The plaintiffs argued that a federal regulation in effect in 2016 required the plan to conduct an NQTL analysis. The regulation required plans to provide participants and beneficiaries access to "documents with information on medical necessity criteria for both medical/surgical benefits and mental health and substance-use disorder benefits," which documents included those reflecting "the processes, strategies, evidentiary standards, and other factors used to apply a nonquantitative treatment limitation" to Mental/SUD benefits.[396] The court found the plaintiffs' Parity Act argument unavailing and, as a result, rejected the plaintiffs' argument that a conflict of interest required the court to temper its deferential review of the plans' benefit decision with "a degree of skepticism."[397] Ultimately, the court found some procedural irregularities unrelated to the NQTL issue but determined that the denial of benefits was reasonable and not an abuse of discretion.[398]

In *K.D. v. Anthem Blue Cross & Blue Shield*,[399] the plaintiffs argued that the criteria that the defendants used to determine the medical necessity or medical appropriateness of Mental/SUD treatments violated the Parity Act.[400] One of the plaintiffs, A.D., had a long history of social anxiety, severe depression, and suicidal ideation by the time she was in her late teens and early twenties.[401] She dropped out of college after only forty-five days due to criminal behavior, drug and alcohol use, and an inability to follow through with her psychiatric care independently.[402] At the recommendation of her therapist, A.D. was admitted to a residential treatment facility.[403] The facility's nine to twelve month program started with full-time residential treatment and, over time, shifted to a "transitional living" setting, as a patient's progress warranted.[404] The plan approved sixteen days' worth of benefits and steadfastly denied A.D.'s requests and appeals for additional

394. *Id.*
395. *Id.* at *11–12.
396. *Id.* at *12.
397. *Id.*
398. *Id.* at *19.
399. K.D. v. Anthem Blue Cross & Blue Shield, No. 2:21-CV-343-DAK-CMR, 2023 WL 6147729 (D. Utah Sept. 20, 2023).
400. *Id.* at *10.
401. *Id.* at *2.
402. *Id.*
403. *Id.*
404. *Id.*

benefits, explaining that her continued stay was not "medically necessary" and, therefore, was not covered under the plan."[405]

The plan relied on certain Milliman Care Guidelines[406] to determine whether the treatment that A.D. received was medically necessary.[407] The plaintiffs argued that the discharge criteria set forth in those guidelines imposed more stringent treatment limitations on access to Mental/SUD benefits than the guidelines the plan used to assess the "medical necessity" of medical and surgical benefits.[408]

The discharge criteria for Mental/SUD benefits "allowed for discharge from residential health treatment at any time after treatment began whereas the internal criteria for discharge from analogous medical/surgical treatment considers discharge only in the last of three 'stages' of treatment following a developed treatment plan."[409] That means, the court explained, that the residential mental health treatment that participants received under the plan could be terminated as not medically necessary "as soon as Defendants believe [participants] have progressed to the point that they no longer need [treatment], regardless of how far along they are in their treatment plans or services."[410]

That conclusion contrasts with the guidelines for determining medical necessity in skilled nursing facilities, which the court described as the medical/surgical analog to residential mental health facilities.[411] The medical necessity guidelines for skilled nursing facilities contained no criteria that would warrant discharge as early in a course of treatment as the Mental/SUD criteria allowed.[412] Rather, "discharge is contemplated only for the third 'stage' of care, which occurs as patients progress through a treatment plan and show progression, a therapeutic response to interventions, and an ability to transition out of treatment."[413]

The court concluded that the plan's discharge criteria applied more stringent limitations on Mental/SUD benefits than on analogous medical and surgical benefits.[414] It did not attempt to determine whether the differences in treatment limitations were due to the criteria established by the guidelines, or whether the differences were attributable to plan's application of

405. *Id.* at *3.
406. *Id.* at *4. Specifically, the plan relied on Milliman's Residential Behavioral Health Level of Care, Adult guidelines. *Id.*
407. *Id.*
408. *Id.* at *11.
409. *Id.* at *10.
410. *Id.* at *11.
411. *Id.* at *10.
412. *Id.* at *11.
413. *Id.*
414. *Id.* at *12.

those criteria.[415] Either way, the plan was "determining medical necessity . . . in a materially different way that significantly limits benefits for mental health treatment" and that violated the Parity Act.[416] In light of those findings, the court granted summary judgment for the plaintiffs and remanded the plaintiffs' claims to the plan administrator.[417]

C. *The Departments of Labor, Health and Human Services, and Treasury Propose New Parity Act Regulations for Plans Adopting Medical Necessity Guidelines: "If We Don't Get Some Cool Rules Ourselves—Pronto—We'll Just Be Bogus, Too!"*[418]

New regulations proposed by the Employee Benefits Security Administration of the United States Department of Labor, the Centers for Medicare & Medicaid Services within the United States Department of Health and Human Services, and the Internal Revenue Service under the United States Department of the Treasury "would amend the existing NQTL standard to prevent plans and issuers from using NQTLs" in ways that place greater limits on access to Mental/SUD benefits than on medical/surgical benefits.[419] The rules also would implement, among other things, recent statutory mandates that require plans and issuers to "document their NQTL comparative analyses . . . [in order] to demonstrate whether the processes, strategies, evidentiary standards, and other factors used to apply an NQTL to [Mental/SUD] benefits are comparable to, and applied no more stringently than, those used to apply the limitation with respect to medical/surgical benefits in the same benefit classification."[420]

The comparative analyses required under the proposed regulations would have to include five elements. First, the analyses would have to include the specific terms used by a plan or insurance coverage to describe and/or apply an NQTL and would have to provide "a description of all [Mental/SUD] benefits and medical/surgical benefits to which each . . . term applies in each benefit classification."[421] Next, the analyses would need to include all "factors" that the plan or issuer used to determine how the NQTLs would apply to Mental/SUD and medical/surgical benefits.[422]

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415. *Id.*
416. *Id.*
417. *Id.*
418. Fast Times at Ridgemont High (Universal Pictures 1982).
419. Requirements Related to Mental Health Parity and Addiction Equity Act, 88 Fed. Reg. 51,552–01 (proposed Aug. 3, 2023) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, & 45 C.F.R. pts. 146, 147), 2023 WL 4931008.
420. *Id.* at 51,563; *see also id.* at 51,558 ("The 2013 final regulations established an exhaustive list of six classifications of benefits . . . inpatient, in-network; inpatient, out-of-network; outpatient, in-network; outpatient, out-of-network; emergency care; and prescription drugs.").
421. *Id.* at 51,561.
422. *Id.*

The Departments explained that their use of the term "factors" refers to "all information, including processes and strategies . . . that a [group or issuer] considered or relied upon to design [the] NQTL or [that it] used to determine how the NQTL applie[d] to benefits under the plan or coverage."[423]

As a fourth consideration, the analyses also must include the evidentiary standards that the plan or issuer used to develop the "factors" behind the NQTLs, and include the comparative analyses that demonstrate that the NQTLs are not applied more stringently to Mental/SUD benefits than the NQTLs that apply to medical/surgical benefits for the same classification.[424] Finally, the comparative analyses must include the specific findings and conclusions that the plan or issuer reached, including the results of any analyses that indicate the plan or coverage is not in compliance with Parity Act requirements.[425] If a plan or issuer is unable to show that an NQTL is no more restrictive as to Mental/SUD benefits than medical/surgical benefits "the NQTL would violate [Parity Act] and may not be imposed on mental health or substance use disorder benefits in the classification."[426]

The proposed rules, however, make an exception for NQTLs that reflect either "[i] independent professional medical or clinical standards or [ii] guard against indicators of fraud, waste, and abuse (while minimizing the negative impact on access to appropriate benefits)."[427] "NQTLs that impartially apply generally recognized independent professional medical or clinical standards . . . to medical/surgical benefits and mental health or substance use disorder benefits" may be imposed notwithstanding the fact that they violate the no-more-restrictive requirement, the prohibition on the use of discriminatory factors and evidentiary standards, or the data-evaluation requirements.[428] The exception for NQTLs imposed to prevent fraud, waste, and abuse is more narrow. Those NQTLs may be imposed even if they violate the no-more-restrictive requirement, but they still must comply with requirements concerning the design and application of NQTLs and the relevant data evaluation requirements for NQTLs.[429] The Departments proposed the exceptions because they "are of the view that such [NQTLs] are premised on standards that generally provide an independent and less suspect basis for determining access to mental health and substance use disorder treatment."[430]

423. *Id.* at 51,567.
424. *Id.* at 51,561.
425. *Id.*
426. *Id.* at 51,568.
427. *Id.* at 51,557.
428. *Id.* at 51,578.
429. *Id.* at 51,573.
430. *Id.* at 51,557.

The proposed regulations aim to realize the Parity Act's promise that "participants, beneficiaries, and enrollees . . . experience financial requirements and treatment limitations for mental health and substance use disorder benefits that are in parity with those applied to their medical/surgical benefits."[431] If new rules are approved in a form substantially similar to those in the Departments' proposal, the challenge will be to implement and enforce them when so many of the proposed standards and requirements are subjective. We will follow developments concerning the proposed rules and anticipate additional reporting on them in the next survey period.

V. LIFE INSURANCE

A. *Revocation on Divorce: "Seems to Be Fair. Split Right Down the Middle. The House to Barbara; The Mortgage Payments to Me. The Furnishings, Color TV and Piano to Barbara. The Monthly Payments to Me. The Insurance Benefits to Barbara. The Premiums to Me."*[432]

This survey period saw a continued exploration of the timing and impact of various state revocation-on-divorce statutes, including those in Illinois and Florida.

In *Shaw v. U.S. Financial Life Insurance Co.*,[433] the Illinois Appellate Court affirmed a circuit court's decision that Illinois's revocation-on-divorce statute does not apply to divorces that preceded the statute's January 1, 2019, effective date.[434] The insured in *Shaw* named his then-wife the primary beneficiary of his life insurance policy and named his children as the policy's contingent beneficiaries.[435] The insured and his ex-wife divorced in 2016, and the insured's insurance policy was not mentioned in their divorce decree or in an April 2017 modification to the divorce judgment.[436]

Following Illinois's 2018 amendment to its Marriage and Dissolution of Marriage Act, an insured's designation of a former spouse as the beneficiary of a life insurance policy entered into before the divorce is revoked, unless the insured takes steps to redesignate the former spouse as the policy's beneficiary (via the divorce judgment or directly with the insurer), or unless the former spouse is to receive the proceeds in trust for a dependent.[437] The insured in *Shaw* died in February 2020 without having redesignated his ex-wife as the beneficiary of his life insurance policy.[438]

431. *Id.* at 51,557.
432. Divorce American Style (Columbia Pictures 1967).
433. Shaw v. U.S. Fin. Life Ins. Co., 2022 IL App (1st) 211533.
434. *Id.* ¶ 49.
435. *Id.* ¶ 1.
436. *Id.* ¶ 5.
437. *Id.* ¶ 6; 750 Ill. Comp. Stat. 5/503(b-5).
438. Shaw, 2022 IL App (1st) 211533, ¶ 7.

When assessing whether a statute has retroactive effect, Illinois courts recognize that procedural statutory amendments may be applied retroactively while substantive ones cannot.[439] The circuit court in *Shaw* determined on summary judgment that Illinois's revocation-on-divorce statute could not apply retroactively to the divorce because the statute was substantive, not procedural.[440] The circuit court also held that the applicable statute was the one in effect on the date of the divorce, not on the date of the insured's death.[441] Because the insured and his wife divorced before the statute went into effect, it did not apply, and the beneficiary designation was not revoked by operation of law.[442]

The appellate court, after a detailed examination of the revocation statute's legislative history and of case law involving similar statutes in other states, agreed with the circuit court's decision.[443] It focused on whether the statute's application was triggered by the insured's divorce or death.[444] The court acknowledged that "the nature of life insurance policies suggests that the insured's death is the operative event"[445] that triggers application of the statute, but found that the language of the statute and its location in the Dissolution of Marriage Act suggested the legislature intended the revocation provision to take effect at the time of a divorce, "not at some later time"—such as the insured's death or the conclusion of a probate proceeding.[446] The court considered it significant that the Illinois legislature

439. Allegis Realty Invs. v. Novak, 860 N.E.2d 246, 253 (Ill. 2006); Shaw v. U.S. Fin. Life Ins. Co., No. 20-CH-04851, slip op. at 4–6 (Cir. Ct., Cook Cnty., Ill. Aug. 10, 2021).

440. Shaw, 2022 IL App (1st) 211533, ¶ 13.

441. *Id.*

442. *Id.*

443. *Id.* ¶¶ 29–51.

444. *Id.* ¶¶ 42–47.

445. *Id.* ¶ 39.

446. *Id.* ¶ 49. Additionally, the Illinois Marriage and Dissolution of Marriage Act provides, in pertinent part that:

> (a) This Act applies to all proceedings commenced on or after its effective date.
>
> (b) This Act applies to all pending actions and proceedings commenced prior to its effective date with respect to issues on which a judgment has not been entered. Evidence adduced after the effective date of this Act shall be in compliance with this Act.
>
> (c) This Act applies to all proceedings commenced after its effective date for the modification of a judgment or order entered prior to the effective date of this Act.

750 Ill. Comp. Stat. 5/801. Illinois courts have held amendments adding new provisions to the Act apply to divorce proceedings occurring after the amendment's effective date. *See, e.g.*, In re Marriage of Azrikan, 2021 IL App (2d) 200392-U, ¶ 11 (although settlement agreement entered before Section 513 was amended, court held amendment applied to party's petition filed after amendment's effective date); Augusewicz v. Drazkiewicz, 2022 IL App (1st) 200064-U, ¶¶ 17–18 (citing 750 Ill. Comp. Stat. 5/801(a); In re Marriage of Salvatore, 2019 IL App (2d) 180425, ¶¶ 19–20)) ("The Act applies to proceedings commenced on or after its effective date, and therefore the version that was in effect at that time should have been the one utilized

apparently elected not to use language from the Uniform Probate Code's revocation-on-divorce provision, which would have given the statute retroactive effect.[447] Although both the circuit court and the appellate court mention *Sveen v. Melin*, neither discussed whether the Illinois revocation statute violated the Contract Clauses of the Illinois or federal constitutions.[448] Several courts applying Illinois law have already begun to follow the ruling in *Shaw*.[449]

In *Dargan v. Federated Life Insurance Co.*,[450] the United States District Court for the Southern District of Florida analyzed Florida's revocation on divorce statute and found that it does not apply to an insurance policy no longer owned by an insured at the time of divorce.[451] The insured and owner of the life insurance policy at issue in *Dargan* identified his wife at the time as the policy's primary beneficiary.[452] Before they divorced, the insured allegedly gifted the policy to his wife, making her the policy's owner and beneficiary.[453] When the ex-wife filed suit against the insurer for its failure to pay her the policy's death benefits, the insurer moved to dismiss, arguing that the couple's divorce, combined with Florida's revocation-on-divorce statute, voided the designation of the ex-wife as the policy's beneficiary.[454] The Southern District of Florida disagreed with the insurer, concluding that Florida's revocation statute applied only to interests the insured held at the time of the divorce and the time of his death.[455] Because

by the circuit court."). Thus, the Act by its own language also prohibits the revocation-on-divorce provision from being applied to divorces occurring before January 1, 2019.

447. Shaw, 2022 IL App (1st) 211533, ¶ 49.

448. *Id.* ¶ 45; Shaw, No. 20-CH-04851, slip op. at 8; *see, e.g.*, Sveen v. Melin, 138 S. Ct. 1815, 1822, 1826 (2018) (Minnesota revocation-on-divorce statute that went into effect in 2002 could apply retroactively to 1998 policy without violating federal Contract Clause); Protective Life Insurance Co. v. LeClaire, No. 7:17-CV-00628-AMQ, 2018 WL 3222796, *1, *4–5 (D.S.C. July 2, 2018) (South Carolina revocation-on-divorce statute amendment in 2014 making it applicable to life insurance could apply retroactively to 2001 policy without violating South Carolina or federal Contract Clauses).

449. State Farm Ins. Co. v. Haas, No. 22-CV-02704-NJR, 2022 WL 17986565, *4 (S.D. Ill. Dec. 29, 2022) (following *Shaw* and finding that because divorce occurred before effective date of revocation on divorce statute, statute does not apply and former spouse was entitled to life insurance proceeds); Murphy v. Transamerica Life Ins. Co., No. 3:22-CV-02782-MAB, 2023 WL 4591837, *3 (S.D. Ill. July 18, 2023) (finding no convincing reason why the Illinois Supreme Court would decide the issue differently than the Illinois Appellate Court did in *Shaw*).

450. Dargan v. Federated Life Ins. Co., No. 22-14284-CV, 2022 WL 9510979 (S.D. Fla. Sept. 30, 2022), *report and recommendation adopted*, No. 22-14284-CIV, 2022 WL 9426660 (S.D. Fla. Oct. 14, 2022), and *report and recommendation adopted*, No. 22-14284-CIV, 2022 WL 17583733 (S.D. Fla. Oct. 25, 2022).

451. *Id.* at *2–3.

452. *Id.* at *1.

453. *Id.*

454. *Id.* at *2.

455. *Id.* at *3.

the district court accepted as true the ex-wife's allegations that the insured gifted the policy to her before their divorce, it declined to dismiss the ex-wife's complaint.[456]

B. *Material Misrepresentations: "Why Do People Have to Tell Lies?" "Usually It's Because They Want Something. They Are Afraid the Truth Won't Get It for Them."*[457]

During this survey period Texas solidified its minority position as a state that requires insurers seeking to rescind a life insurance policy due to a material misrepresentation in an application for insurance to plead and prove the insured's intent to deceive. Several other states continued to apply their respective versions of material misrepresentation statutes, none of which requires proof of an intent to deceive.

In *American National Insurance Co. v. Arce*,[458] the Supreme Court of Texas confirmed that Texas's common law scienter requirement comports with Section 705.051 of the Texas Insurance Code,[459] which is the State's statute permitting rescission of life insurance policies during the contestable period due to material misrepresentations made on an application for insurance.[460] The insured in *Arce* applied for a $25,000 life insurance policy and answered "no" to most of the application's medical questions.[461] The insured died during the policy's contestable period, and the insurer refused to pay the policy's proceeds to the beneficiary after discovering that the insured incorrectly answered at least one of the application's questions related to certain medical diagnoses and treatment.[462] The beneficiary sued, the trial court ruled in favor of the insurer on summary judgment, the appeals court reversed most of the trial court's rulings and remanded the lawsuit for further proceedings, and the insurer petitioned the Texas Supreme Court for review.[463] The petition requested review of whether an insurer must prove an insured's intent to deceive to rescind a life insurance policy under Section 705.51.[464] The petition also asked the Texas Supreme Court determine whether Section 705.005 of the Texas Insurance Code, which requires insurers to provide notice of the insurer's intent to rescind

456. *Id.*
457. Charade (Universal Pictures 1963).
458. Am. Nat'l Ins. Co. v. Arce, 672 S.W.3d 347, 349 (Tex. 2023), *reh'g denied* (Sept. 1, 2023).
459. Tex. Ins. Code Ann. § 705.051.
460. Arce, 672 S.W.3d at 349.
461. *Id.* at 349–50.
462. *Id.* at 350.
463. *Id.* at 350–52.
464. *Id.* at 352.

within ninety days after discovering a misrepresentation in an insurance application,[465] applied to the policy at issue in the case.[466]

The first question boiled down to whether Texas common law informed the construction of Section 705.51.[467] Texas common law provided insurers a defense to actions seeking policy benefits when an insured made a material misrepresentation that the insurer relied on to issue the insurance policy, but the defense was available only if the insured made the misrepresentation with the intent to deceive.[468] The Texas Insurance Code established other misrepresentation defenses, including one under Section 705.51, which applied specifically to life insurance policies.[469]

The insurer in *Arce* argued that the misrepresentation defense in Section 705.051 did not require it to prove the insured's intent to deceive.[470] The beneficiary argued Section 705.051 must be construed to include the common law's intent-to-deceive requirement.[471] After examining the text of Section 705.051, the court concluded that Section 705.051 should not be read as foreclosing the common-law requirement that an insurer must prove an insured's intent to deceive in addition to the Section's statutorily mandated conditions.[472] The Texas Supreme Court acknowledged that, although Texas was in the minority of jurisdictions when it came to requiring proof of intent to establish a material misrepresentation defense, the State has knowingly and intentionally required that element for more than a century and the Court would not assume the legislature intended to change its position on the issue without a more definitive expression of such intent.[473]

As for the second question, the Texas Supreme Court concluded the requirement in Section 705.005—that an insurer provide notice of its intent to rescind within ninety days of discovering the falsity of the misrepresentation—did not apply to the policy in *Arce*.[474] According to the Court, Section 705.005 was inapplicable to life insurance policies that included language confirming the policy was subject to a two-year contestability period.[475] Because the life insurance policy in *Arce* included that language, Section 705.005's ninety-day notice requirement did not apply.[476]

465. *Id.* at 355; Tex. Ins. Code Ann. § 705.005.
466. Arce, 672 S.W.3d at 352.
467. *Id.* at 356–58.
468. *Id.* at 353–54.
469. *Id.* at 355; Tex. Ins. Code Ann. § 705.051.
470. Arce, 672 S.W.3d at 355.
471. *Id.* at 351.
472. *Id.* at 356–58.
473. *Id.* at 358–59.
474. *Id.* at 360.
475. *Id.* (citing Tex. Ins. Code Ann. §§ 705.005, 705.051).
476. *Id.*

Decisions in several other jurisdictions this survey period affirmed the majority position that "innocent" misrepresentations may be material and can support an insurer's right to rescind. In *American General Life Insurance Co. v. Kleshnina*,[477] the United States District Court for the Northern District of Georgia held that Georgia law required only that it determine whether an insured's misrepresentation on his application for coverage was material, not whether it was fraudulent.[478] The insured had been advised to schedule a colonoscopy in the five years prior to completing his application and went so far as to schedule and then reschedule the procedure without completing it before submitting his application.[479] The insured died during the contestable period, and the insurer subsequently discovered that the insured's history of having been advised to have, but not completing, a colonoscopy within five years of his application.[480] The insurer's underwriting guidelines mandated that it decline coverage for any applicant for whom medical testing had been recommended but not completed.[481]

The Georgia material misrepresentation statute bars insurers from rescinding a policy unless an insured's misrepresentation was fraudulent or material.[482] The court in *Kleshnina* found that the insured's failure to report the planned colonoscopy was a misrepresentation.[483] Because the insurer rescinded on the basis of the representation's materiality (and not that it was fraudulent), it did not matter whether the insured was aware that his statement was false.[484] The only factor that the court considered was whether the insured's misrepresentation was objectively false, which it was.[485] The court further concluded, based on the testimony of the insurer's underwriter, that the insured's misrepresentation about the diagnostic testing recommended to him was material because, had the insurer known of the recommendation, it would have waited for the testing to be completed

477. Am. Gen. Life Ins. Co. v. Kleshnina, 640 F. Supp. 3d 1378 (N.D. Ga. 2022).

478. *Id.* at 1388 (citing Nappier v. Allstate Ins. Co., 961 F.2d 168, 170 (11th Cir. 1992); White v. Am. Family Life Assur. Co., 643 S.E.2d 298, 300 (Ga. Ct. App. 2007) ("Because only subsection (1) refers to fraud, the Supreme Court of Georgia has specifically eschewed any need for the insurer to show that the plaintiff was aware of the falsity of the representation or statement in order to void a policy under subsections (2) or (3).")).

479. *Id.* at 1382.

480. *Id.* at 1383.

481. *Id.* In fact, the insured underwent a colonoscopy two days after the policy's issuance, after which his doctor diagnosed him with Stage 4 rectal cancer. *Id.*

482. *Id.* at 1384, 1388 ("Although the term 'material' only appears in § 33-24-7(b)(2), courts incorporate an identical standard into claims brought under subsection (b)(3)."); Ga. Code Ann. § 33-24-7.

483. Kleshnina, 640 F. Supp. 3d at 1385.

484. *Id.* at 1385.

485. *Id.* at 1385–86.

before deciding whether to issue the policy.[486] The court granted summary judgment in the insurer's favor.[487]

Similarly, in *Wharran v. United of Omaha Life Insurance Co.*,[488] the United States District Court for the Middle District of Florida held that the insurer was entitled to rescind the life insurance policy at issue because the insured incorrectly answered an application question about his driving history.[489] Florida's material misrepresentation statute allows an insurer to rescind a policy due to an insured's fraudulent or material misrepresentation.[490] Because the insured's response to the question about his driving history was unquestionably false, and because deposition testimony from an underwriter confirmed the insurer would not have issued the policy had it known the truth of the insured's driving history, the court granted the insurer's summary judgment motion.[491]

The analysis and holding in *Frohn v. Globe Life & Accident Insurance Co.*[492] illustrates the operation of Ohio's material misrepresentation statute. If an insurer proves that a response to an application question is objectively false, it creates a rebuttable presumption under Ohio law that the applicant intended to deceive the insurer.[493] In *Frohn*, the insurer proved at summary judgment that responses on the insured's application to questions related to depression, abnormal liver function, and stiff-man syndrome were false.[494] The application was completed by the insured's wife, who also was the plaintiff. She was unable to demonstrate that the false responses on the application were due to honest mistakes or that she did not believe her husband had the conditions at issue.[495] She claimed not to know the insured had liver issues and argued that she did not consider depression to be a "mental disorder," and further claimed that she did not know stiff-man syndrome was a neurological disorder.[496] The court found her assertions unsupported by the evidence and determined that the plaintiff had not rebutted the presumption that her application answers were willfully false.[497] The insurer's underwriting testimony demonstrated that the false answers were material because had the insurer known the truth, it would

486. *Id.* at 1390–91.
487. *Id.* at 1393.
488. Wharran v. United of Omaha Life Ins. Co., 645 F. Supp. 3d 1299 (M.D. Fla. 2022).
489. *Id.* at 1302, 1304–05.
490. *Id.* at 1303–04.
491. *Id.* at 1304–05.
492. Frohn v. Globe Life & Accident Ins. Co., No. 1:19-CV-713, 2023 WL 3730925 (S.D. Ohio Mar. 31, 2023).
493. *Id.* at *8–9.
494. *Id.* at *10.
495. *Id.* at *11.
496. *Id.* at *11–12.
497. *Id.* at *12.

have declined to issue the policy or issued a different policy.[498] The court granted summary judgment in the insurer's favor.

C. *STOLI Questions: "Whoever You Are, I Have Always Depended on the Kindness of Strangers."*[499]

Two federal courts sent their stranger-originated life insurance (STOLI) questions to the state supreme courts in their respective jurisdictions this survey period. The Georgia Supreme Court clarified that even if an insured intends to sell their life insurance policy to a third party with no insurable interest, the policy is not an illegal wagering contract in Georgia if the third party had no involvement in the policy's procurement. And the Arizona Supreme Court weighed in on the interaction between STOLI and the contestable period.

In *Crum v. Jackson National Life Insurance Co.*,[500] the Georgia Supreme Court answered a certified question from the United States Court of Appeals for the Eleventh Circuit concerning STOLI. Jackson National issued a life insurance policy in 1999, and the insured sold it to a buyer as a viatical settlement eight months later.[501] After the insured died, the buyer tried to collect the policy's proceeds, but Jackson National refused to pay.[502] The United States District Court for the Northern District of Georgia agreed with the insurer that the policy was an illegal wagering contract because the insured intended to sell the policy when he bought it.[503] The Eleventh Circuit, however, did not believe Georgia case law definitively answered the questions raised by the buyer's appeal.[504] Therefore, it asked the Georgia Supreme Court to determine whether a life insurance policy purchased by an insured on his own life but with the intent to sell it to a third party with no insurable interest was an illegal wagering contract if the third party had nothing to do with the policy's procurement.[505]

The Georgia Supreme Court closely examined Georgia's common law and statutory history related to STOLI policies, and it concluded that a policy taken out in the manner described above would not be void as an illegal wagering contract.[506] The court acknowledged that older Georgia case law that might have viewed the issue differently, but it explained that view did not survive Georgia's 1960 revision to its Insurance Code.[507] The

498. *Id.* at *12–13.
499. A Streetcar Named Desire (Warner Bros. 1951).
500. Crum v. Jackson Nat'l Life Ins. Co., 880 S.E.2d 205 (Ga. 2022).
501. *Id.* at 206.
502. *Id.*
503. *Id.*
504. *Id.* at 207.
505. *Id.* at 207, 209.
506. *Id.* at 214.
507. *Id.* at 211–12.

court flagged the insurable interest statute in particular as support for its construction of Georgia law.[508] That statute expressly allowed an insured who purchased a policy on their own life to name someone without an insurable interest in their life as the beneficiary of their policy.[509]

In *Columbus Life Insurance Co. v. Wilmington Trust, N.A.*,[510] the Arizona Supreme Court answered a certified STOLI question from the United States District Court for the District of Arizona.[511] The insurer issued a second-to-die policy to the insureds in 2003, which policy contained a two-year incontestability provision, consistent with Arizona law.[512] After the contestability period expired, an investor purchased the policy, and Wilmington Trust was made the policy's owner.[513] After both insureds died, Wilmington Trust submitted a claim for the policy's benefits, which the insurer refused to pay.[514] The insurer argued the policy was part of a STOLI scheme that violated Arizona law, making it void *ab initio* and making the contestability provision a nullity.[515] Wilmington Trust argued that Arizona's statutorily required incontestability provision precluded the insurer's challenge to the policy's validity.[516]

The Arizona Supreme Court examined the history of Arizona public policy concerning STOLI. That history revealed that Arizona prohibited, under both common law and the insurance code, the issuance of life insurance policies to third parties lacking an insurable interest in the insured.[517] The Arizona Supreme Court acknowledged that contracts which contravened public policy were typically void *ab initio* but, the Court observed, public policy concerning STOLI had to be viewed in the context of Arizona's comprehensive statutory scheme regarding such insurance.[518] Arizona

508. *Id.* at 209, 213.

509. Ga. Code Ann. § 33-24-3(b) (1995); Crum, 880 S.E.2d at 213. Thereafter, the Eleventh Circuit reversed the Northern District of Georgia's ruling in the insurer's favor and remanded the case to the Northern District of Georgia for further proceedings regarding the insurer's other arguments that the buyer's claim was barred. Jackson Nat'l Life Ins. Co. v. Crum, 54 F.4th 1312, 1314 (11th Cir. 2022). The Northern District of Georgia found that the insurer's other defenses failed and ordered the insurer to pay. Jackson Nat'l Life Ins. Co. v. Crum, No. 1:17-CV-03857-WMR, 2023 WL 6442932, at *11 (N.D. Ga. July 20, 2023); Jackson Nat'l Life Ins. Co. v. Crum, No. 1:17-CV-03857-WMR, 2023 WL 6442931, at *11 (N.D. Ga. Sept. 19, 2023). The insurer appealed these decisions to the Eleventh Circuit on September 21, 2023. Jackson Nat'l Life Ins. Co. v. Crum, 2023 WL 6442932 (N.D. Ga. July 20, 2023) & 2023 WL 6442931 (N.D. Ga. Sept. 19, 2023), *appeal docketed*, No. 23-13192 (11th Cir. Sep. 21, 2023).

510. Columbus Life Ins. Co. v. Wilmington Tr., N.A., 532 P.3d 757 (Ariz. 2023).

511. *Id.* at 758.

512. *Id.* at 758–59.

513. *Id.*

514. *Id.* at 759.

515. *Id.*

516. *Id.*

517. *Id.*

518. *Id.* at 758–60.

law provided exclusive remedies related to STOLI: (1) those who procured STOLI policies could be subject to misdemeanor penalties; and (2) an insured's estate could recover insurance policy proceeds from the STOLI beneficiary.[519] The court also found it compelling that Arizona's statutorily required incontestability provision only had one exception—that the policy's validity could be challenged after two years only for non-payment of premiums—with no express exception related to STOLI.[520]

The court also took note of the way Arizona's statutory scheme structured the STOLI remedies. First, the scheme requires insurance proceeds to be paid to STOLI beneficiaries and only later permits recovery by the insured's estate upon proof that the policy is not valid. The court understood that scheme to mean the statutes assume that STOLI policies are valid. In addition, the language used in the statutes—i.e., repeated use of the word "contract" and no use of the word "void"—signaled that the Arizona legislature did not intend that STOLI policies be treated as void *ab initio* after the two-year contestability period. In light of its construction of Arizona's comprehensive statutory scheme to regulate STOLI policies, the Arizona Supreme Court concluded that insurers may not challenge a life insurance policy's validity based on lack of insurable interest after expiration of the two-year contestability period.[521]

VI. CONCLUSION

Many of the decisions on which this year's article reported are certain to see additional developments over the course of the next survey period. We fully expect to see further developments in the *Braidwood* case and in connection with the proposed Parity Act regulations. And we will be interested to see how the state supreme court and appellate court decisions on issues concerning rescission, revocation-on-divorce, and STOLI are applied going forward. Undoubtedly, accidental death insurance cases in the coming year will present additional provocative questions, and we will see other significant decisions in the ERISA and disability insurance realms. We look forward to bringing those issues to you in next year's article.

519. *Id.* at 760–61.

520. *Id.* at 761.

521. *Id.* at 762. Thereafter, the case returned to the District of Arizona, and the parties have engaged in motion practice and discovery. Columbus Life Ins. Co. v. Wilmington Tr. N.A., No. CV-21-00734-PHX-DJH, 2022 WL 3285451 (D. Ariz. Aug. 11, 2022), ECF Nos. 109-123.

RECENT DEVELOPMENTS IN INSURANCE REGULATION

Anthony Macauley

Anthony (Tony) Macauley was a beloved attorney at Floyd Skeren Manukian and Langevin in Westlake Village, California. He passed away unexpectedly in May 2024. As noted by his firm, "[W]ith deep sadness and heavy hearts, the firm of Floyd Skeren Manukian and Langevin announced the death of our colleague and friend, Anthony (Tony) Macauley. Floyd Skeren will miss him more than words can express. He was a kind and gentle soul. He loved his family deeply and always aimed to please. Tony was a valued member and contributed to the firm in many ways. Besides being a dedicated FSML family member, he was always good-humored and considerate towards his colleagues. His sense of humor and laughter were infectious and he was the consummate gentleman. The void he left is immeasurable."

The Treasury Department's Federal Insurance Office (FIO) issued its first Annual Report in 2013.[1] The annual reports, along with other documents and material, are published on Treasury's website.[2] The Annual Reports are published in September each year and review FIO's activities, its interactions with federal agencies and state and international insurance regulators, and developments in the insurance industry, in the previous calendar year and often the first half of that current calendar year. The September 2024 FIO will report on 2023 activities and presumably on the first half of 2024.[3]

The Annual Report begins with a table of contents, a glossary, and a table of figures. The Report is seventy-one pages. Pages one through nine summarize FIO's activities in 2022 and the first half of 2023, with a more detailed descriptions of FIO's Cyber Insurance Initiative and its oversight of the Terrorism Risk Insurance Program (TRIP). This is followed by a sixty-one-page Insurance Industry Financial Overview and Outlook.

I. INTRODUCTION

A. *Summary and Findings*

The period examined is calendar year 2022 and various activities in 2023. The financial condition reported is as of December 31, 2022.[4] Financial pressures weighing on the industry in 2022 included market volatility, inflationary pressure, monetary tightening, and natural catastrophes for the Property Casualty Sector.[5] In 2022, premiums increased but at a slower

1. This Report is submitted pursuant to Section 502(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), which requires the annual submission by FIO of a report to the President, the Committee on Financial Services of the House of Representatives, and the Committee on Banking, Housing, and Urban Affairs of the Senate "on the insurance industry and any other information as deemed relevant by the [FIO] Director or requested by such Committees." Federal Insurance Office Act of 2010 (FIO Act), 31 U.S.C. § 313(n)(2).

2. U.S. Dep't of the Treasury, Federal Insurance Office, https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/federal-insurance-office (last visited May 9, 2024). The home page has five drop down tabs. One of these is "POLICY ISSUES." A side panel tab is "Financing Markets, Financial Institutions, and Fiscal Service." A subtab is "Federal Insurance Office." Attached to FIO's subtab are eight more subordinated tabs, which include "Reports & Notices, Covered Agreements, Terrorism Risk Insurance Program, and Federal Advisory Committee on Insurance (FACI)."

3. The TIPS Annual Survey, including this article, will be published in September 2024. If you read this article at that time, the 2024 FIO Annual Report would provide additional context to evaluate 2022 along with a detailed description of its 2023 and early 2024 activities.

4. This article will be published in September 2024. There is a twelve-month lag between Treasury's publication of its annual report and our publication about that report. Since Treasury's report lags the financial condition reported by nine months. Our article lags the financial condition reported by twenty-one months. It will be useful to put where we are in September 2024 in context, but it will not provide anything close to a current picture.

5. Fed. Ins. Office, U.S. Dep't of the Treasury, Annual Report on the Insurance Industry 1 (Sept. 2023) [hereinafter FIO 2023 Annual Report].

pace than in 2021 for most types of insurance. In 2022, however, surplus decreased for the first time since 2008 which brought the worldwide financial crisis.

B. *FIO Overview and Activities*

1. FIO Overview

The states and territories regulate most insurance in the United States and its possessions.[6] However, after the 2008 financial crisis Congress enacted the Dodd-Frank Act, which significantly changed how the federal government regulates financial institutions, including the establishment of the Federal Insurance Office (FIO), a new unit within Treasury Department.[7]

It is charged with identifying vulnerabilities in the regulation of insurers that could cause a systemic crisis, any non-bank financial company which should be regulated by the Federal Reserve, state insurance measures preempted by U.S. agreements with foreign entities, and insurers for whom the Federal Deposit Insurance Corp. (FDIC) should become a receiver.

FIO has a significant role on international insurance issues and represents the United States at the International Association of Insurance Supervisors (IAIS) and advises the Treasury Secretary on international prudential regulatory issues and negotiating "covered agreements."[8] FIO sits on the IAIS Executive Committee, along with several state insurance regulators.

2. FIO Activities

In line with the administrations' priorities, FIO spent significant time on three issues: climate change, cyber insurance, and the IAIS Insurance Capital Standards.

a. *Climate Change*

FIO first announced its intent to collect climate-related data from homeowners insurers in 2022 and issued a request for comment on its proposed survey in October 2022. Industry and the NAIC objected to FIO's proposed data collection effort,[9] and FIO requested the necessary Office of

6. Congress can regulate insurance as it does any other financial services product. *See* United States v. SE Underwriters, 322 U.S. 533 (1944)). Its general reluctance to do so (outside of health insurance) is a matter of public policy, rather than constitutional limitations.

7. FIO Act, 31 U.S.C. § 313(a). Title V also designates the Secretary of the Treasury as an advisor to the President on "major domestic and international prudential policy issues in connection with all lines of insurance except health insurance." *Id.* § 321(a)(9).

8. 31 U.S.C. § 313(c)(1)(E).

9. There was also strong support for FIO's proposal by environmental and consumer groups. *See* Letter from Nat'l Ass'n of Ins. Comm'rs to Graham Steele, Ass't Sec. for Fin. Insts., U.S. Dep't of Treasury (Nov. 22, 2023), https://content.naic.org/sites/default/files/government-affairs-letter-fio-climate-related-financial-risk-data-comments-221122.pdf.

Management and Budget (OMB) approval in November 2023, which was obtained in early 2024. Critics renewed their opposition, and, on March 8, 2024, FIO and the NAIC agreed to collaborate on data collection with information to be collected and initially analyzed by the NAIC.[10]

Independent of its own data collection efforts, FIO released a report on June 27, 2023, titled, "Insurance Supervision and Regulation of Climate Related Risks." The report assessed issues and gaps in supervision and regulation and provided twenty policy recommendations, many related to the need for the states and the NAIC to obtain additional information and perform additional data analysis.[11]

FIO also assisted the Financial Stability Oversight Council (FSOC) with its Climate-Related Financial Risk Committee, which issued its report on July 28, 2023, which discusses actions underway to support capacity building and disclosure, address data gaps, and assess climate-related financial risks.[12] FIO serves on the steering committee for the EU-US Insurance Dialogue Project, which during 2022–2023 centered on climate change risk and resilience, and is on the IAIS's executive committee, which has also done extensive work in this area.

b. *Cyber Insurance*

As cyber terror intensifies, FIO's activities and duties have increased. President Biden has directed FIO to work with the Cybersecurity & Infrastructure Security Agency (CISA) to coordinate national cybersecurity and cyber-insurance programs and responses related to insurance markets, including evaluating whether a federal insurance backstop was warranted by the risks and potential financial exposure from catastrophic cyberattacks on "critical infrastructure."[13]

10. Press Release, U.S. Dep't of the Treasury, U.S. Department of the Treasury and State Insurance Regulators Launch Coordinated Effort on Homeowners Insurance Data Collection to Asses the Effects of Climate Risk on U.S. Insurance Markets (Mar. 8, 2024), https://home.treasury.gov/news/press-releases/jy2162.

11. FIO, U.S. Dep't of the Treasury, Insurance Supervision and Regulation of Climate-Related Risks (2023), https://home.treasury.gov/system/files/311/FIO-June-2023-Insurance-Supervision-and-Regulation-of-Climate-Related-Risks.pdf.

12. Fin. Stability Oversight Council (FSOC), Climate-Related Financial Risk: 2023 Staff Progress Report (July 28, 2023), https://home.treasury.gov/system/files/261/FSOC-2023-Staff-Report-on-Climate.pdf.

13. "In accord with a recommendation made by the Government Accountability Office, FIO and CISA continue to work together 'to produce a joint assessment for Congress on the extent to which the risks to the nation's critical infrastructure from catastrophic cyberattacks, and the potential financial exposures resulting from these risks, warrant a federal insurance response.'" FIO 2023 Annual Report, *supra* note 5, at 8 (citing Government Accountability Office, Cyber Insurance: Action Needed to Assess Potential Federal Response to Catastrophic Attacks (June 2022), https://www.gao.gov/assets/gao-22-104256.pdf.

In September 2022, FIO issued and then extended a Request for Comments on a Potential Federal Insurance Response to Catastrophic Cyber Incidents.[14] FIO has received numerous comments from insurers, reinsurers, insurance producers, academics, think tanks, and cyber insurance and cybersecurity companies. These comments, along with information from its TRIP data calls, and other sources including international bodies, inform its recommendations and activities.[15] FIO reported that these comments support a federal insurance response.[16]

On March 1, 2023, President Biden released his National Cybersecurity Strategy. Strategic Objective 3.6 required an assessment of the need and possible structure of a federal cyber insurance program. [17] Its Implementation Plan released in July 2023 identified FIO as the lead agency to implement Objective 3.6.[18] FIO was to complete its initial assessment by the first quarter of 2024.

c. *The IAIS Insurance Capital Standard*

Solvency regulation in the United States is based on the "Aggregation Method" and differs from the approach taken by the IAIS's Insurance Capital Standard (ICS), which follows the European Union's Solvency II system. The IAIS has spent much of the last decade developing and now implementing its ICS prudential standards, which many countries are expected to adopt. The IAIS is now evaluating whether the U.S. Aggregation method is sufficiently comparable to the ICS and produces comparable regulatory results; it should release its findings in December 2024.[19]

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14. For more information on the cyber insurance market, see FIO, U.S. Dep't of the Treasury, Study of Small Insurer Competitiveness in the Terrorism Risk Insurance Marketplace (June 2023), https://home.treasury.gov/system/files/311/2023%20TRIP%20Small%20Insurer%20Report%20FINAL.pdf [hereinafter Small Insurer Study].

15. All Requests for Information issued by FIO are listed and hyperlinked from the same FIO page as all FIO's reports going back to 2012. U.S. Dep't of the Treasury, Notice: Potential Federal Insurance Response to Catastrophic Cyber Incidents, 87 Fed. Reg. 67,755 (Nov. 9, 2022), https://www.federalregister.gov/documents/2022/11/09/2022-24476/potential-federal-insurance-response-to-catastrophic-cyber-incidents.

16. 87 Fed. Reg. 59,162–63 (Sept. 29, 2022), https://www.govinfo.gov/content/pkg/FR-2022-09-29/pdf/2022-21133.pdf.

17. White House, National Cybersecurity Strategy 22 (Mar. 2023), https://www.whitehouse.gov/wp-content/uploads/2023/03/National-Cybersecurity-Strategy-2023.pdf.

18. White House, National Cybersecurity Strategy Implementation Plan 34 (July 2023), https://www.whitehouse.gov/wp-content/uploads/2023/07/National-Cybersecurity-Strategy-Implementation-Plan-WH.gov_.pdf.

19. Insurance is increasingly global, and insurance supervisors in each jurisdiction must have confidence that the regulators in other countries are effectively overseeing the solvency of their domiciled insurers doing business in the host country's jurisdiction, so that these insurers will have the financial capacity to pay policyholder claims in that jurisdiction. This requires, if not a common regulatory framework, at least a common regulatory language and understanding of different solvency systems and whether they are comparable to their own solvency regulatory scheme.

A finding of "equivalency" is essential for U.S. domiciled and internationally active life and property casualty insurers, as it would enable them to compete in other jurisdictions on a level regulatory playing field. Accordingly, it may be the most important international regulatory issue related to insurance for FIO, the Federal Reserve Board and the NAIC. FIO's report summarizes this work *infra*.[20]

d. *Other Activity*

FIO is responsible for administering TRIP and requires all participating insurers to submit information, subject to certain reporting exemptions.[21,22] Sharing knowledge about terrorism risks is encouraged,[23] and FIO issued a report on small insurer competitiveness in the terrorism risk insurance marketplace.[24] FIO reconvened the Advisory Committee on Risk-Sharing Mechanisms (ACRSM) on July 26, 2023.[25] There was discussion of the small insurer study and FIO's request for comment on a potential federal insurance response to catastrophic cyber incidents.[26]

FIO also assists other federal agencies. FIO helped Federal Emergency Management Agency's (FEMA) transfer of $502.5 million of risk from the National Flood Insurance Program to the private reinsurance market in January 2023 with $275 million of capital markets placement of coverage over three years.[27]

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20. The FRB and FIO's work with the IAIS and EU on comparable solvency systems are described in more detail in FIO's annual "Engagement in Global Insurance Regulatory or Supervisory Forums, and its "Covered Agreements" reports. U.S. Dep't of the Treasury, Reports & Notices, https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/federal-insurance-office/reports-notices. The IAIS should announce its decision on equivalency in late 2024 or first quarter of 2025.

21. Comments in Aid of Analyses of the Terrorism Risk Insurance Program, 88 Fed. Reg. 18,374 (Mar. 28, 2023).

22. See 2023 Terrorism Risk Insurance Data Call, 88 Fed. Reg. 18,632 (Mar. 29, 2023).

23. See Sharing Knowledge About Terrorism Risk, IFTRIP (2020), https://iftrip.org.

24. Small Insurer Study, *supra* note 14.

25. The ACRSM provides advice and recommendations to the FIO with respect to (1) the creation and development of non-governmental, private market risk-sharing mechanisms for protection against losses arising from acts of terrorism; and (2) FIO's administration of the TRIP. U.S. Dep't of the Treasury, Advisory Committee on Risk Sharing Mechanisms (ACRSM), https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/federal-insurance-office/terrorism-risk-insurance-program/advisory-committee-on-risk-sharing-mechanisms-acrsm.

26. *See* FIO, Summary of Comments on Request for Comment: Federal Insurance Response to Catastrophic Cyber Incidents (FACI presentation, Washington, DC, Mar. 29, 2023), https://home.treasury.gov/system/files/311/2023-03-27%20Presentation%20Summary%20of%20Cat%20Cyber%20RFI%20Responses.pdf. Note that FIO was not endorsing these views, but merely summarizing them to highlight the initial feedback received.

27. *See* FEMA, National Flood Insurance Program's Reinsurance Program (Sept. 11, 2023), https://www.fema.gov/flood-insurance/work-with-nfip/reinsurance; News Release, FEMA, FEMA Announces Reinsurance Program to Manage Future Flood Risk in 2023 (Jan. 10, 2023), https://www.fema.gov/press-release/20230110/fema-announces-reinsurance-pro

II. INDUSTRY FINANCIAL OVERVIEW AND OUTLOOK

The sixty-page Section II, Industry Overview, is divided into subsections A, B, and C. A covers the domestic market; B covers the capital markets; and C covers the international market. A is broken down further into (1) financial performance and condition; (2) Life and Health Sector; (3) Property and Casualty Sector; (4) market performance; and (5) domestic outlook. Subsection A2, relating to life and health, also contains the next two "boxes" in the report: Box 2: The Pension Risk Transfer Market; and Box 3: Trends in Offshore Reinsurance for the U.S. Life/Retirement Sector. Section 3 property and casualty contains the next box: Box 4: Cyber Insurance Market. Section 5 domestic outlook contains the FIO report's fifth and final box: Box 5: Technology, Data Use, and Privacy.

Inflationary pressures that emerged in 2021 escalated in 2022, as the consumer price index reached a forty-year high: 9.1% in June 2022. The Federal Reserve increased the federal funds rate 4.25% by year end 2022. The insurance industry surplus contracted for the first time since 2008 because of unrealized capital losses and other factors. Rising rates decreased the value of fixed income securities.

A. *Life and Health*

Life and Health revenue was up 9% to $1.03 trillion. Capital losses increased by 30% to $10.8 billion. Obviously, the ratio of revenue to capital losses is about 100 to 1. That large ratio makes it hard to imagine the category of Life and Health ending up upside down. Also, interest rate increases contributed to Life and Health's capital losses. By year end 2023, rates were trending down. However, at least one recent study suggests that higher long-term rates are good for Life and Health, particularly annuities. The Federal Reserve chair predicted in December 2023 that the trend of lower rates was likely to continue. That was heralded as good news for everybody, including both Property and Casualty. and Life and Health. However, a thirty percent increase in capital losses was a very big increase. If similar increases follow, this author would foresee that eventually Life and Health would be upside down. There is nothing stated along these lines in the FIO 2023 Annual Report, but, despite its goal to be a watchdog of the insurance industry, FIO behaves less like a watchdog and more like a cheerleader.

According to FIO, the 2023 outlook looks decent. However, the sector took on more risk in 2022 than ever before. This risk included more

gram-manage-future-flood-risk-2023; FEMA, Public Notice for Capital Market Reinsurance Placement – March 2023, https://www.fema.gov/sites/default/files/documents/fema_taa-procurement-notice_2023.pdf.

issuance of paper for its own financing, more loans to banks, higher levels of reinsurance, more reliance on reserves, more use of alternative investments,[28] and more annuity products.[29] The net leverage ratio was almost 12% in 2022 up from 11.2%.[30] Shifts in investment strategies to bolster returns has resulted in a less liquid portfolio.[31] If unexpected shocks to the life and health sector arise, it may be less mobile as it tries to deal with those shocks.

B. *Property and Casualty*

The Property and Casualty sector is greatly affected by the increasing number of severe weather events, including decreased surplus. FIO states, "The industry will need to adapt to heightened catastrophic expenses." This 2023 Annual Report, however, was silent as to suggestions for those adaptations.

For 2022, the total Property and Casualty sector direct premiums written reached a record level at $876 billion, marking a 10% increase over 2021 levels and the second consecutive year of strong growth following two years of much more moderate increases. However, reinsurance increased by 22% which brought net Property and Casualty premiums down to $776 billion.

The loss ratio was about 60% for years 2018, 2019, and 2020.[32] In 2021, it jumped to 62.37% and in 2022 to 66.44%. Expenses, salaries, benefits, admin, and policy holder dividends all dropped so the combined ratio did not go up as much as it might have. Nevertheless, it was about 99% for four years in a row 2018 to 2021. Then it jumped to 102.73%. This increase was attributed to inflation and loss severity.[33]

28. Alternative investments refer to those investments reported on Schedule BA of the statutory financial statements, capturing investments that include joint ventures, hedge funds, and private equity.

29. Kris Elaine Figuracion & Tyler Hammel, *US Annuity Considerations Reach Another Record High in 2022*, S&P Global (Apr. 6, 2023), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/us-annuity-considerations-reach-another-record-high-in-2022-75075583.

30. Net leverage ratio is an indicator of the sector's exposure to pricing and estimation errors, determined by calculating total liabilities and net premiums, annuities, and considerations as a multiple of capital and surplus.

31. Michele Wong & Jean-Baptiste Carelus, *U.S. Insurance Industry's Exposure to Schedule BA Assets Exceeds $500 Billion in 2021*, NAIC (2022), https://content.naic.org/sites/default/files/capital-markets-special-reports-Sch-BA-YE2021.pdf. Michele Wong, *Growth in U.S. Insurance Industry's Cash and Invested Assets Declines to 1.3% at Year-End 2022*, NAIC (2022), https://content.naic.org/sites/default/files/capital-markets-special-reports-asset-mix-ye2022.pdf.

32. FIO 2023 Annual Report, *supra* note 5, at 44 (Fig. 28 Operating Ratios).

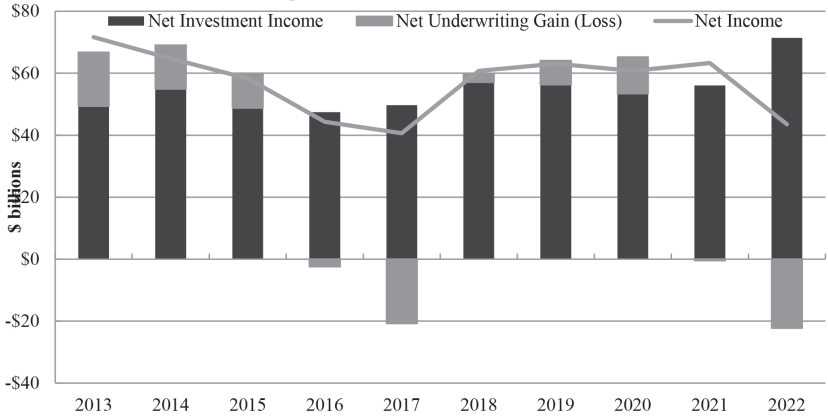
33. *See, e.g.*, Gordon, APCIA Analysis of Financial Operating Results and Trends Impacting 2023, at 45; Christopher Grimes, *North American Property/Casualty Insurers' 2022 Results*, Fitch Ratings (Mar. 27, 2023).

Net investment income for the Property and Casualty sector swelled by 27% to $71 billion in 2021, while cash and invested assets balances decreased by a slight one percent to $2.2 trillion. As a result, the net yield on invested assets jumped to 3.22% in 2022 from 2.65% in 2021. Rising short-term interest rates and an inverted yield curve favored the generally shorter-duration P&C asset portfolio (compared to the Life and Health investment portfolio).[34]

The increase in net investment income was essentially offset, however, by a 90% decline in realized capital gains. Realized capital gains on investments were almost $2 billion in 2022, compared to nearly $18 billion in 2021. All fixed income and preferred stock categories recorded net realized capital losses in 2022 versus gains in 2021, but net gains on unaffiliated common stocks were sufficiently strong to leave the overall position in a slight net gain for the year.[35]

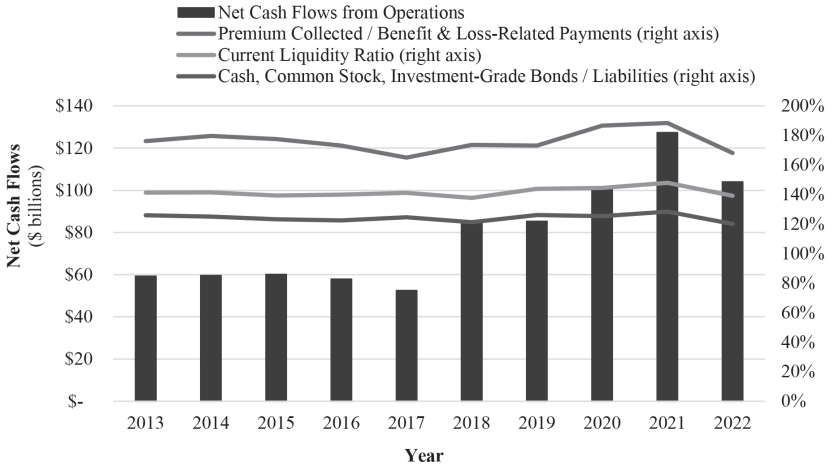
The Property and Casualty sector's net income decreased by 31% in 2022 to $43.5 billion from the $63.3 billion reported in 2021, as shown in Figure 32. Despite solid growth in net premiums earned (up 8%) in 2022, the sector experienced a significant underwriting loss of $22.3 billion as compared to a small loss of $491 million in 2021. The increase in net investment income and the deterioration in capital losses led to a decrease in pre-tax operating income of 31% to $49.6 billion in 2022 from $72.3 billion in 2021. A similar reduction in federal income taxes led to a decrease in net income of 31%.[36]

Figure 32: P&C Sector Net Income



34. FIO 2023 Annual Report, *supra* note 5, at 46.
35. *Id.*
36. *Id.* at 47.

Figure 39: A View of P&C Sector Liquidity



While the Property and Casualty sector maintained positive cash flows from operations of $104 billion in 2022, they declined by over 18% from $127.3 billion in 2021. As shown in Figure 39, premiums collected, net of reinsurance, exceeded benefit and loss-related payments by only 68% at year-end 2022, sharply down from 88% and 87% for the years ending 2021 and 2020, respectively.[37]

C. *Cyber Insurance*

The direct written premium grew 51% to $7.2 billion in 2022 up from $4.8 billion in 2021. $7.2 billion is still only 1% of the Property and Casualty total. Will growth slow? FIO suggests a decrease in the rate of increase of premium rates fueled premium growth. Rates are said to have risen by 62% in 2022, which was less than 2021.[38]

D. *International Marketplace*

At year-end 2022, the United States remained the world's largest single-country insurance market, with a 44% market share of global direct

37. The liquidity analysis here is based on cash inflows and outflows—premiums that were collected as well as benefit and loss-related payments made during the year. This liquidity analysis contrasts with the income statement analysis, which refers to premiums earned and written and captures dividends and incurred loss and loss adjustment expenses, among other items.

38. See Alexei Alexis, *Cyber Insurance Premium Hikes Slowed in 2022, Fitch Says*, Cybersecurity Dive Apr. 18, 2023), https://www.cybersecuritydive.com/news/cyber-premiums-spike-slower-pace-2022-fitch/647942.

premiums written.[39] This market share increased by approximately 3.3% compared to 2021 and is the highest level since 2019. When viewed as a single market, the European Union's combined share of global direct premiums written (17%, or $1.1 trillion) is the next largest, although its market share dropped by 2.1% from 2021. China remained the second-largest single-country insurance market, with 10% of global direct premiums written for 2022. Collectively, the twenty largest of the world's (single country) insurance markets accounted for 91% of global direct premiums written. Globally, direct premiums written increased by less than 1% (in nominal terms, unadjusted for inflation) in 2022, as a 4% decline in global life insurance premiums was slightly more than offset by a 4% rise in global non-life premiums.[40] For the same period, global GDP expanded by an estimated 3.5% (in nominal terms).[41]

III. CONCLUSION

FIO's conclusion to the annual report is a cursory single paragraph. In the coming year, FIO will continue to monitor macroeconomic and other developments affecting the U.S. insurance industry and consumers. The effects to insurers from increased catastrophe exposure, as well as the accelerated shift to digital technology and the heightened need for cybersecurity, are among the considerations that FIO will continue to analyze.

The report does not address the fundamental question: Is there too much risk in the insurance industry? FIO says Property and Casualty as well as Life and Health continued to maintain their financial health in 2022. While multiple risks may affect this financial health, FIO's message still echoes the general view that the industry is okay.

Does FIO have the stature, the regulatory authority, the will, the mission, the resources, and the expertise to fully measure and articulate insurance industry risks? Not currently, and unfortunately, FIO is the one

39. Fernando Casanova Aizpun et al., *sigma 3/2023: World Insurance: Stirred, and Not Shaken* (July 10, 2023), https://www.swissre.com/institute/research/sigma-research/sigma-2023-03.html. Swiss Re sigma examines insurance and macroeconomic data from 147 countries sourced through Swiss Re Institute. Swiss Re sigma separates the insurance industry into "life" and "non-life" sectors according to standard European Union and OECD conventions; under these conventions, the "non-life" sector includes health insurance. Beginning with 2019, data retrospectively include A&H business written by health insurers in the United States to align with practice in other regions. In 2019, premiums from this line of business were $912 billion. Because of this change in methodology, market shares from prior years are not comparable. Figures shown for 2020–2022 have been adjusted for this change. All figures shown use amounts converted to U.S. dollars.

40. *See id.* at 14.

41. IMF, World Economic Outlook Update: Near-Term Resilience, Persistent Challenges 1 (July 2023), https://www.imf.org/en/Publications/WEO/Issues/2023/07/10/world-economic-outlook-update-july-2023.

representative of the American people responsible for evaluating the property casualty and life insurance sectors nationwide.

There are risky forces at play. How risky is climate? What will be done? What will happen? Can cyber really be insured? Should cyber be insured? What does market performance show? What can be expected? What is FIO's outlook? Is FIO reliable? For one-stop shopping about Federal involvement in insurance, FIO is it. For now, all those interested in any Federal points of view regarding insurance (outside of health) remain well advised to pay attention to FIO throughout the year and its annual report.

While we pay attention to FIO, couldn't it flex its muscles a bit more to accomplish its mission to lessen risks in the industry and to head off a financial crisis? To accomplish these goals, Congress will need to provide FIO with at least some regulatory authority, which much of the industry and the NAIC would oppose. Might FIO recommend to the Federal Reserve that more regulation of certain carriers by the Federal Reserve is necessary? Since the Dodd-Frank Act, the Federal Reserve has had the responsibility to monitor and regulate insurers who could present systemic risks, and FIO's recommendations to the Federal Reserve need not usurp or challenge the current state-based paradigm. Who should FIO suggest be so examined by the Federal Reserve? Should it be limited to the five or so of the largest insurers in terms of direct written premium in the main insurance categories who are not already regulated by the Federal Reserve? FIO is currently a nonvoting member of FSOC. Might FIO ask the Treasury Secretary and FSOC to allow FIO to be a voting member, and, if so, would this give FIO's recommendations more weight?

Can FIO's increased advisory role in this area not be inferred to have been recommended by FIO's original mandate and to be a very important part of the mandate?