For The Defense™

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The magazine for defense, insurance and corporate counsel

April 2023

Employment and Labor Law

Including . . .

The Duty of Loyalty: A Powerful Tool for Employers

Also in This Issue . . .

Forced Retirement Based on Age: Is It Legal?

The National Labor Relations Board is Watching You Employers: Section 7 Rights and Workplace Electronic Surveillance

And More!

DRI Means Business.

DRI Second Vice President **R. Jeffrey Lowe** is a partner in Kightlinger & Gray, LLP, in New Albany, Indiana, and Louisville, Kentucky.

DRI recently completed a membership drive titled "DRI Means Business" highlighting the opportunities DRI membership provides to grow you and your firm's business. A recent survey of DRI members showed that approximately 50% of DRI members had received or referred business to another DRI member in the last two years, and approximately 50% of those referrals generated more than $50,000 in business to the receiving firm. The slogan's main message was obvious, but I believe it also had a secondary meaning. The idiom that a person "means business" has meanings "to be focused about achieving a goal" or to do something in a "very earnest way." DRI ***membership*** shows DRI "means business" about being the most important asset in a defense lawyer's toolkit and provides more than just referrals.

My personal involvement in DRI has made me—first and foremost—a better lawyer. Second, DRI membership has made me a better leader. Finally, DRI membership has made me a better person. However, DRI membership is different for every person, and it provides unique opportunities for each member. DRI membership enables members to seek out opportunities in different areas and allows them to grow their expertise in whatever area she or he chooses. And DRI means business about providing the specific tools and opportunities that each of its members wants and needs.

DRI means business about being the gold standard in legal education for lawyers representing business that will in turn make its members better lawyers. DRI has long been known for its first-class education provided at ***in-person seminars***. However, a DRI member does not have to attend seminars and get involved in a substantive law committee to make themselves a better lawyer. DRI membership provides access to one of the preeminent legal research databases in the country. ***LegalPoint*** is a member-only service that provides exclusive access to every DRI-produced publication, whether it be a seminar presentation, For The Defense article, newsletter article, ***Defense Library Series*** offering, or any other ***DRI publication***. All a DRI member has to do to gain access to the best scholarly legal defense writing from the premier lawyers representing business is log in to the website and search LegalPoint. You'll instantly gain access to insights from leading civil defense lawyers in the country on the topics every defense lawyer needs. LegalPoint may or may not provide the pinpoint cite to the relevant case in your circuit, but it will at least provide you a great starting point to answer the questions your client is asking. Additionally, DRI membership provides discounted access to the best online database of presentations regarding topics relevant to your practice area.

Finally, DRI's ***Expert Witness Database*** provides access to information regarding expert witnesses we all face daily in litigation that provides crucial information necessary for cross-examination. Personally, I have used DRI's Expert Witness Database to find information on experts I was cross-examining on multiple occasions, which led to the successful exclusion of said experts. My clients' defense has been directly benefited by my DRI membership.

DRI also means business about providing opportunities to its members to become better leaders. At DRI, you can serve on one of our 29 ***substantive law committees*** or affinity groups. Whether you want to write for DRI's multiple publications, help market a seminar, or help a committee with social media, you can leverage multiple opportunities to get involved. As DRI leaders will tell you, the more you do with your role in the steering committee, the more opportunities you will get to take on additional and greater roles. And when you take on greater roles and responsibilities, you have to lead others. The lessons I learned in how to lead people in the substantive law committee roles I had have directly contributed to the manner in which I lead in my law firm.

Additionally, through the ***Center for Law and Public Policy***, DRI has created the voice for the civil defense bar in the national discussion of substantive law, constitutional issues, and the integrity of the civil justice system. The Center has become the thought leader for issues relevant to business, and lawyers representing business, through the materials prepared by The Center. With access to these ***resources***, DRI members can become thought leaders in their jurisdiction or practice area.

DRI also means business about providing opportunities for its members to become better people. ***The DRI Foundation's*** ***DRI for Life*** group contains invaluable wellness resources to help members navigate the stresses that plague civil defense lawyers. As the DRI Foundation's philanthropic arm, ***DRI Cares*** provides opportunities for members to give back to the communities in which they practice. And membership gives you the opportunity to meet not only some of the best lawyers in the country but some

Continued on page 4

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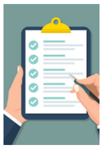
ON THE RECORD

EMPLOYMENT AND LABOR LAW



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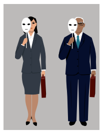

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Continued from page 2

opportunities membership provides, you will meet lifelong friends and colleagues. Those will be the people you reach out to when you are having a difficult issue with a case. Those will also be the people you reach out to share great case results. They will become friends on whom you will rely for practice-related issues, as well as non-practice-related issues.

In conclusion, DRI means business because it can result in business referrals for you and your firm. But DRI *also* means business about providing benefits to its members that they cannot get anywhere else. Those benefits will make you a better lawyer, leader, and person. If you agree, I ask that you think about what fellow lawyer representing business you know who is not a DRI member and then pick up the phone and call them to tell them about ***all DRI has to offer***. And when you tell them membership in DRI means business, please also tell them DRI means business about providing all the tools they will need to assist them in becoming a successful lawyer, leader, and person.

From the Chair

Gordon Hill is a shareholder at Hill Ward Henderson. Gordon's practice primarily involves employment litigation and counseling, noncompete litigation, trade secret litigation, business litigation, commercial litigation, and drafting of executive employment agreements, noncompete agreements, and employee handbooks and policies. In his employment practice, Gordon advises, represents, and defends corporate clients in a broad spectrum of employment-related issues. He has successfully defended clients in a wide variety of employment-related litigation and provides proactive counseling and solutions to help clients manage their employees and avoid litigation.

I have the honor of serving as the Chair of the ***Employment and Labor Law Committee***. It is incredible to follow in the footsteps of so many great leaders who came before me. They are far too many to list in this short article, so I will simply focus on my predecessor Dessi Day. Dessi is one of the most positive, inspiring, and energetic people I have ever known. She led our Committee as Vice Chair and later as Chair through the trials and tribulations of the global pandemic, the shift to virtual programming (twice), Zoom networking functions (and Zoom fatigue), school and business shutdowns, and the slow return to live events. Dessi never shrank from the many challenges she encountered; instead, she eagerly tackled each one with laughter and a smile on her face. I had the privilege of having a front row seat as she worked so hard to keep us connected, engaged, and inspired (often involving text messages sent in the middle of the night with great new ideas for our group). Thank you Dessi for everything you did for us and will continue to do. You set an impossible example to follow, but our Vice Chair Helen Holden and I will do our best.

In that regard, we have so many exciting things we have already accomplished this year, and there is much more to come. In January, ***we hosted a webinar*** featuring the constitutional scholar Erwin Chemerinsky. Professor Chemerinsky discussed the most important cases from the latest Supreme Court term, highlighted what's to come, and shared his thoughts on the FTC's proposed rule to ban most non-compete agreements. In February, we had our second ***Labor Law Boot Camp*** led by Reggie Belcher and his team of labor law experts. This virtual seminar provided valuable insights on basic labor law topics for the non-labor lawyer with an emphasis on how labor laws affect non-unionized workforces. Both are available for viewing on-demand through the ***DRI Learning Center***, so it's not too late to watch, learn, and get some CLE credits.

From May 3 to 5, we will be having our annual ***Employment and Labor Law Seminar*** in New Orleans. As usual, our program offers an incredible lineup of speakers and CLE topics, unparalleled networking opportunities, and of course outstanding food and fun. A huge thank you to Diane Krebs, David Renner, and the rest of the planning team who worked so hard to put everything together for us. Notably, this is happening during New Orleans's Jazz Fest – one of the country's largest music festivals. This year's lineup features a wide variety of famous (and not so famous) artists, including Santana, Leon Bridges, Kane Brown, Ludacris, Dead & Company, The Lumineers, H.E.R., John Hiatt, Mumford & Sons, Melissa Etheridge, Tom Jones, and Trombone Shorty. Please join us for the seminar and stay the weekend for extra networking, food, music, and fun. As you may imagine, *Jazz Fest* is quite popular, so I encourage everyone to register and book your flights and hotel reservations now before rooms sell out.

As you can see, we have already accomplished a lot this year. But there is a lot more to do, which means there are still many ways in which you can engage more in our committee. As with anything in life, the more involved you are in DRI, the more you will get out of it, and I promise that investing just a little time will pay many dividends. Over the years, DRI has provided me with business, good friendships, practical education that has benefitted my clients and practice, and a referral network of outstanding lawyers all over the country. And it is easy to get involved. Many start by attending the seminar and participating in our ***community discussions*** (a/k/a the Listserve), but you can also simply raise your hand by reaching out to me. There are so many different opportunities including ***membership***, ***writing an article***, editing articles, ***webinar planning***, speaking opportunities, networking zooms, and more. As a recent example, our new ***Young Lawyers*** Division liaisons Laura Bassett, Rachel Laurel, and Justin Reudaflores raised their hands and will now be assisting with publications and various aspects of our seminar including marketing, the Young Lawyers social event, and the ambassador program as we welcome new attendees to our seminar. Please reach out, and I look forward to seeing so many of you ***in New Orleans in May***!

Gordon Hill

The National Labor Relations Board Is Watching You Employers

Section 7 Rights And Workplace Electronic Surveillance

By Dessi Day and Jean E. Faure

Many employers who do not have unionized workers may not be aware that they too are subject to the requirements of the Act.

On October 31, 2022, the Office of General Counsel for the National Labor Relations Board ("NLRB") issued a memorandum on "*Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights*" (hereinafter "the Memorandum"). Memorandum GS 23-02, Office of the General Counsel, Jennifer A. Abruzzo, General Counsel: "Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights." (October 31, 2022.) This Memorandum is available on the NLRB website at www.nlrb.gov.The focus of the Memorandum is on technological advances which employers increasingly use to monitor and manage employees within the workplace and beyond. The General Counsel notes that these advances in monitoring capabilities raise multiple issues for employers under the National Labor Relations Act ("the Act") and discusses these issues at length in the 9-page Memorandum. One area of specific concern for the General Counsel appears to be the "omnipresent surveillance and other algorithmic-management tools" used by employers, which may impair or discourage employees' abilities to engage in protected activities and keep any such activities confidential from the employer.

Many employers who do not have unionized workers may not be aware that they too are subject to the requirements of the Act. The Act applies to most private employers, granting employees the right to unionize, collectively bargain, and, **even in non-union settings**, the right to engage in concerted activity for employees' "mutual aid and protection" – **commonly known as Section 7 rights**. Employees' rights under the NLRA include permission to discuss the terms and conditions of employment, and employees now more often than not use technology to do so.

In the last decade, NLRB has focused on enforcement efforts in the area of technological advances involving social media activities. Following the Obama administration, the NLRB in Boeing Co., 365 NLRB No. 154 (Dec. 15, 2017) created what was considered an employer-friendly standard in analyzing employee's use of social media. Following Boeing, the NLRB was willing to consider an employer's interest in protecting its reputation to justify limitations on employee social media expression. For example, in Bemis Company, 370 NLRB No. 7 (Aug. 7, 2020), the NLRB found lawful an employer's social media policy requiring employees to be "respectful and professional when using social media tools." The employer's social media rule prohibited employees from disclosing proprietary employer information and required employees to respect the rights of coworkers. In Motor City Pawn Brokers Inc., 369 NLRB No. 132 (July 24, 2020) the NLRB found lawful an employer's rule that prohibited employees from communicating to any customer or third party any disparaging claim, "the effect of or intention of which is to cause embarrassment,

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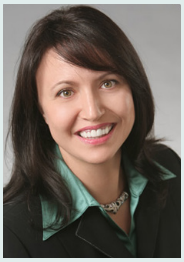

disparagement, damage or injury to the reputation, business, or standing" of the company.

But employers soon learned that the ability to limit employee social media activity or employee statements about the company was not unfettered. In Union Tank Car Company, 369 NLRB No. 120 (July 17, 2020), the NLRB found that the employer unlawfully maintained a non-disparagement rule that prohibited statements that "are intended to injure the reputation of the Company or its management personnel with customers or employees." The NLRB clearly found problematic the rule's prohibition against statements to other employees.

The NLRB has taken an aggressive approach to social media policies. This has proven problematic for some employers because the NLRB has taken the position that efforts to severely restrict the ability to share employment information interferes with Section 7 rights. Rules which impact discussions between employees almost universally are considered unlawful. Employers thus generally cannot limit employees' comments on:

- Website articles or blogs. *Valley Hosp. Med. Ctr.*, 351 N.L.R.B. 1250, 1252 (2007).
- Social media posts. *Desert Cab, Inc. (ODS Chauffeured Transportation)*, 367 N.L.R.B. No. 87 (Feb. 8, 2019) (finding Facebook private posts critical of employer protected); *North West Rural Elec. Coop.*, 366 N.L.R.B. No. 132 (July 19, 2018); *Gen. Motors LLC* 369 NLRB No. 127 (July 21, 2020) [discussing standard applied to social media postings, holding that the *Wright Line* burden-shifting framework applied and that after causal connection is established between discipline and Section 7 activity (e.g. abusive social media positing), employer must prove it would have taken the same action in the absence of the Section 7 activity to avoid liability); *FDRLST Media, LLC v. National Labor Relations Board*, 35 F.4th 108 (3d Cir. 2022) (post on microblog (Twitter) by supervisory employee of media company, using his personal account, that "first one of you tries to unionize I swear I'll send you back to the salt mine" was not a threat of reprisal for protected union activity under the NLRA).
- Emails. *Mexican Radio Corp.*, 366 N.L.R.B. No. 65 (Apr. 20, 2018); *Dalton Schools, Inc.*, 364 N.L.R.B. No. 18 (June 1, 2016).
- Text messages. *Laurus Technical Inst.*, 360 N.L.R.B. 1155 (2014) (employee sent coworker concerted protected text messages regarding employer favoritism in assigning leads and inherently concerted discussion of job security); also see *Salon/Spa at Boro, Inc.*, 356 N.L.R.B.

444 (2010)); *Cordua Restaurants, Incorporated v. National Labor Relations Board*, 985 F.3d 415 (5th Cir. 2021) (employer discovered through unauthorized access to personal text messages that employee solicited coworkers to join in his lawsuit and fired him; full reinstatement upheld as employee's protected activity was found to be a motivating factor in the decision to fire him); *Hitterman v. List Industries, Inc.*, 2022 WL 2663400, at *21 (N.D. Ind., July 11, 2022) (pro-Union private text thread that contained some message of sexual nature was found to have "some chance" of establishing that it constitutes protected activity).

The NLRB's scrutiny naturally has expanded beyond social media. According to the Memorandum of the General Counsel, the area of electronic surveillance is now emerging as another increasingly problematic area for employers in terms of Section 7 rights. The Memorandum provides examples of potential but otherwise legitimate practices that may interfere with concerted activities, including the following:

- Recording employee conversations at work, especially prevalent in warehouse settings,
- Using keyloggers and software that takes screenshots, webcam photos, or audio recordings throughout the day for employees using computers—whether in call centers, offices, or at home,
- Tracking movement using wearable devices, security cameras, and radio-frequency identification badges, and
- GPS tracking devices and cameras keeping tabs on drivers on the road.

The Memorandum also identifies afterhours monitoring as a potential red flag when "employers continue to track employees' whereabouts and communications using employer-issued phones or wearable devices, or apps installed on workers' own devices." Social media monitoring also continues to present a concern this time in the context of pre-employment screening efforts, including "scrutinizing applicants' social media accounts" during the employment application process.

The Memorandum is not yet law. But it demonstrates how the NLRB is likely to handle the right case in front of it. The recommended framework by the General Counsel for protecting employees from employer's potential abuse of technology is to hold that an employer has presumptively violated the Act "where the employer's surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act." To rebut this presumption, the employer would have to establish that the practices at issue are **narrowly tailored to address a legitimate business need** that cannot otherwise be met through means less damaging to employees' rights. In this proposed balancing test of the respective interests of the employer and the employees, the General Counsel recommends that "[i]f the employer's business need outweighs employees' Section 7 rights, unless the employer demonstrates that special circumstances require covert use of the technologies," the Board should require the employer **to disclose to employees the technologies it uses to monitor and manage them**, its reasons for doing so, and how it is using the information it obtains. According to the General Counsel, this approach will provide employees with information they can use to "intelligently exercise their Section 7 rights and take appropriate measures to protect the confidentiality of their protected activity if they so choose." The General Counsel also recommends that the Board explore other safeguards and assurances to protect employees' right by discussing proposals to require employers to limit who may access information obtained through electronic surveillance and algorithmic management, and to permit employees to respond before imposing discipline based on such information.

This Memorandum follows the NLRB's expansion of when an activity is "concerted" for Section 7 purposes. In March 2021, the Board issued Memorandum 21-03 stating that when a single employee speaks about certain social justice issues, the speech is "inherently concerted" (and protected) regardless of whether any of the traditional bases for concertedness are satisfied. So long as the speech is about a matter of "common concern in the workplace," Section 7 protections apply. In January 2022, in a brief filed in a pending Section 7 case, General Counsel urged the adoption of the new standard and if adopted, a mass of previously unprotected speech will fall within Section 7's ambit.

The combination of these two Memoranda and the NLRB General Counsel's intent to make sweeping changes in employee rights should give all employers cause for concern.

The Memorandum also identifies afterhours monitoring as a potential red flag when "employers continue to track employees' whereabouts and communications

Key Takeaways for Employers

Given the proposed framework and guidance from the Office of General Counsel, employers should expect closer scrutiny of their electronic surveillance and automated management practices by the NLRB. To ensure compliance with the Act, it is important for employers to consider the following: (1) analyze electronic monitoring and automated management practices to determine if they inhibit employees' rights to engage in concerted activities; (2) if Section 7 rights may be impacted by surveillance rules, ensure that employers have well documented legitimate business reasons for implementing the monitoring practices; (3) assuming such reasons exist, take steps to limit the scope of electronic surveillance to work hours and work areas only and analyze overall surveillance practices to ensure that they are narrowly tailored to business needs; (4) with regard to pre-employment screening, avoid social media monitoring; (5) beware of reliance on electronic and automated tools in discipline and discharge; and (6) as a general rule, promote transparency by disclosing any surveillance and productivity monitoring practices to employees, and limit those who have access to the data that is gathered through these practices.

Forced Retirement Based On Age

Is it Legal?

By Amy L. Miletich and Jennifer A. Scott

The percentage of Americans aged 65 or older working or actively looking for work has nearly doubled since 1985.

Mandatory retirement practices were widespread in the United States in the 1960s and 1970s and they are still common in other countries. For example, mandatory retirement is permissible in Egypt at age 60, in Singapore at age 62, in the Philippines at age 65, in the Netherlands at age 66, in Sweden and Finland at age 68, in Peru and Argentina at age 70, and in Norway at age 72. Gender Data Portal: ***Mandatory Retirement Age***, The World Bank. In certain countries, the mandatory retirement age is gender dependent with females facing mandatory retirement at age 50 in China, 60 in Poland, and 65 in Brazil. *Id.*

Originally passed in 1967, the Age Discrimination in Employment Act (ADEA), protected all workers between the ages of 40 and 65 from discrimination in hiring, firing, and promotion on the basis of age. Amendments signed into law in 1978 expanded the ADEA coverage to workers up to the age of 70. In 1986, the upper age limit was removed entirely. Today, with few exceptions, mandatory retirement in the United States is illegal.

The Aging American Workforce

Americans are increasingly working later in life due to a variety of reasons, including longer lifespans, the increased cost of living, and the dearth of once common traditional pension plans.

In the last 20 years, the employment of workers aged 65 and older has grown by 117%. *See* United State Bureau of Labor and Statistics, ***Productive Aging and Work***, US Centers for Disease Control and Prevention.

The percentage of Americans aged 65 or older working or actively looking for work has nearly doubled since 1985, reaching 18% in 2020. ***2020 Profile of Older Americans***, The Administration for Community Living (May 2021).

Many analysts are predicting a "Great Unretirement," in which older individuals return to work because of changing economic conditions. The labor force of people aged 75 or older is expected to continue to grow to nearly double between 2020 and 2030. ***Number of people 75 and older in the labor force is expected to grow 96.5 percent by 2030***, U.S. Bureau of Labor and Statistics (November 4, 2021).

Federal Law Protects Employees Aged 40 and Over

The ADEA makes it unlawful for an employer to fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's age. 29 U.S.C. § 623(a)(1). It is not enough to prove that age was a motivating factor in such a decision, as is permissible under other federal anti-discrimination statutes. For age discrimination claims, a plaintiff must prove that age was a "but for" cause of the employer's adverse employment decision. *See Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009).

According to the U.S. Supreme Court, as set forth in *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020), a but-for test requires that a decision maker "change

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one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." Under this standard, the protected characteristic (e.g., age) need not be the one and only cause of the adverse action and "a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision. So long as the plaintiff's [protected status] was one but-for cause of that decision, that is enough to trigger the law." *Id*.

Importantly, the ADEA's protection only applies to workers 40 years old and older and is also limited to employers with 20 or more employees. See 29 U.S.C. §§ 630(b) and 631(a). Some state laws, however, provide broader protections and many state and local anti-discrimination laws expand protection to employees of smaller employers.

Can an Employer Force an Employee to Retire at a Certain Age?

With a few exceptions, the answer is no. A mandatory retirement age is tantamount to an involuntary termination and is therefore a form of discrimination based on age. The exceptions to the ADEA's prohibition of establishing mandatory retirement at a pre-determined age essentially fall into two categories: (1) "executives and high-level policymakers," and (2) age as a "bona fide occupational qualification."

Executives and High-Level Policymakers

The executive and high-level policymaker exemption requires that the employee be at least 65 years old and employed in "a bona fide executive or a high policymaking position" for the two-year period prior to the mandatory retirement. Moreover, the employee must be entitled to an immediate, nonforfeitable retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan of the employer of at least $44,000 annually. 29 U.S.C. § 631(c); 29 C.F.R. § 1625.12. When relying upon this exemption, which is narrowly construed by the courts, the employer has the burden of proving that every element has been met. 29 C.F.R. § 1625.12(b).

As an alternative to mandatory retirement, employers are permitted to modify such an individual's position or status, including a transfer to a position of lesser status or a part-time position. 29 C.F.R. § 1625.12(c). Once an employee accepts a new status or position, however, the employee may not be treated any less favorably, on account of age, than similarly situated younger employees. *Id*.

The ADEA adopts the definition of "bona fide executive" from the Fair Labor Standards Act of 1938 (the "FLSA"). 29 C.F.R. § 1625.12(d)(1); *see also* 29 C.F.R. § 541.100. For mandatory retirement purposes, however, the employee must also meet additional criteria specified in the examples outlined in the Conference Committee Report on the Age Discrimination in Employment Act Amendments of 1978 (the "Conference Committee Report"). 29 C.F.R. § 1625.12(d)(2).

The examples outlined in the Conference Committee Report explain that the head of a significant local or regional operation of an organization, such as a major production facility, would typically be considered a bona fide executive. H.R. Conf. Rep. No. 95-950, 1978 WL 8765, at *531 (1978). Employees who possess comparable or greater levels of responsibility and authority at higher levels in the corporate organizational structure would also qualify. This could include heads of major departments or divisions, such as finance, marketing, legal, production, or manufacturing. *Id.* Conversely, the head of a minor branch or warehouse would typically not qualify for the executive exemption.

The regulations implementing the ADEA expressly provide that the executive exemption applies "only to a very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business." 29 C.F.R. § 1625.12(d)(2). The exemption does not apply to middle-management regardless of retirement income entitlement. Id. As outlined by the FLSA, to qualify as a bona fide executive, an employee's primary duty must be management of the organization or a department or subdivision of the organization, and the employee must regularly direct the work of two or more employees. 29 C.F.R. § 541.100. Additionally, the employee must have the authority to hire or fire other employees, or at a minimum, the employee's suggestions as to personnel decisions must be given particular weight. *Id.*

The question of who may qualify as a bona fide executive was the primary issue addressed in *Passer v. Am. Chem. Soc.*, 935 F.2d 322 (D.C. Cir. 1991), where the court found that the director of the American Chemical Society's education division was a bona fide executive because he was the head of one of twelve divisions that performed the Society's core functions. The employee was in charge of the division's 25 to 30 employees and its four-million-dollar budget. *Id.* The court noted that only three supervisors stood between him and the board of directors. *Id.*

Top-level employees who are not bona fide executives may nonetheless qualify for the exemption as a "high policymaker" if the employee plays a significant role in the development and implementation of corporate policy. 29 C.F.R. § 1625.12(e). This could include employees whose duties are primarily intellectual, as opposed to executive or managerial. *Id.* For example, a chief economist or a chief research scientist could meet the definition of a high policymaking employee if the employee has a significant impact on decisions related to economic or scientific policies by virtue of the employee's expertise and direct access to decisionmakers. H.R. Conf. Rep. No. 95-950, 1978 WL 8765, at *531 (1978).

This was the situation in *Morrissey v. Bos. Five Cents Sav. Bank*, 54 F.3d 27 (1st Cir. 1995), in which the First Circuit held that an executive vice president for corporate affairs of a bank was a high policymaker. In making the determination, the court relied on the employee having direct access to the top decisionmakers, being responsible for evaluating significant legislative and regulatory trends and issues, working with legislators on these issues, and recommending policies on acquisitions and mergers, capitalization, and other areas of importance to the bank. *Id.*

Age as a Bona Fide Occupational Qualification

An exception to mandatory retirement prohibition may apply "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). This defense is most often applied where an employee is no longer able to successfully or safely perform the duties of the position. The burden of proving this affirmative defense is onerous. 29 C.F.R. § 1625.6(a). It is very limited in scope and will be narrowly construed by the court. *Id.*

An employer asserting a bona fide occupational qualification ("BFOQ") defense "has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age." 29 C.F.R. § 1625.6(b).

According to the United States Supreme Court, the underlying rationale behind the BFOQ defense is that classifications based on age "may sometimes serve as a necessary proxy for neutral employment qualifications essential to the employer's business." *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 411 (1985). "If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact." 29 C.F.R. § 1625.6(b).

Mandatory retirement issues become more complex when an older worker is not technically considered to be an employee, such as an equity partner in a professional services firm.

Characteristics associated with age do not provide a sufficient rationale to support a BFOQ defense. For example, if an individual moves more slowly due to age, it generally does not mean that the employee is not qualified for the position. Similarly, customer preferences, such as for female flight attendants or male mechanics, do not present a basis for a BFOQ defense.

The BFOQ defense has, however, been successfully used to impose a mandatory retirement age for corporate airline pilots based on safety concerns. *Rasberg v. Nationwide Life Ins. Co.*, 671 F. Supp. 494 (S.D. Ohio 1987). In *Rasberg*, the holding was based, in part, on a finding that it was "impossible or highly impractical to test for all of the various potential defects in pilot performance on an individualized basis." *Id.* at 497.

In contrast, the Eleventh Circuit in *Tullis v. Lear Sch., Inc.*, 874 F.2d 1489 (11th Cir. 1989), reversed a safety based BFOQ finding, holding that tests were available to determine whether individual school bus drivers were capable of performing their jobs safely.

It should be noted that for firefighters and law enforcement officers employed by a state, a political subdivision of a state, or an interstate agency, the ADEA contains a special exemption for bona fide hiring or retirement plans that are not used as subterfuge to evade the purposes of the law. 29 U.S.C. § 623(j).

Can Owners and Partners be Forced to Retire Based on Age?

Mandatory retirement issues become more complex when an older worker is not technically considered to be an employee, such as an equity partner in a professional services firm. The ADEA only protects employees, not employers. See Simpson v. Ernst & Young, 100 F.3d 436, 443 (6th Cir.1996); 29 U.S.C. §§ 623(a)(2), (a)(3), 630(f).

In *Clackamas Gastroenterology Assocs., P. C. v. Wells*, 538 U.S. 440 (2003), the United States Supreme Court created a six-part test for determining whether a shareholder of a medical practice was an employee or an owner. The Court determined that the common-law element of "control" was the principal guidepost that should have been followed in the case. The Court also endorsed the EEOC standard regarding whether a shareholder-director is an employee. *Id*. at 449-50.

According to the EEOC, each of the following six factors is relevant to the inquiry as to whether a shareholder-director is an employee: 1) whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; 2) whether and, if so, to what extent the organization supervises the individual's work; 3) whether the individual reports to someone higher in the organization; 4) whether and, if so, to what extent the individual is able to influence the organization; 5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and 6) whether the individual shares in the profits, losses, and liabilities of the organization. EEOC Compliance Manual §605:0009 (2000).

Certain federal courts have extended the protection of the ADEA to partners, particularly where the partnership is large and the partner has minimal authority and autonomy. *See e.g., E.E.O.C. v. Sidley Austin LLP*, 437 F.3d 695 (7th Cir. 2006). In *Sidley*, the EEOC sued on behalf of 32 former partners who were demoted to counsel status. The firm claimed that the demotions were based on performance, but the EEOC alleged that older partners were forced to accept a lesser economic share and an earlier retirement in violation of the ADEA. *Id*. Much of the litigation, including presuit litigation concerning the enforcement of subpoenas during the EEOC's investigation, centered on whether the former partners were employees subject to antidiscrimination laws or whether they were exempt as employers. *See E.E.O.C. v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002). The EEOC argued that the former partners were employees because, among other things, they did not discuss or vote on management issues and all major decisions were made by an unelected executive committee. *Id*. Ultimately, the lawsuit was resolved with the firm paying $27.5 million.

Age Discrimination Claims

A 2018 survey conducted by the American Association of Retired Persons found that 61% of workers over the age of 45 reported witnessing or experiencing age discrimination. Rebecca Perron, ***The Value of Experience: Age Discrimination Against Older Workers Persists***, American Association of Retired Persons. The percentage is even higher for female (64%) and Black (77%) workers. *Id*.

A study by the Urban Institute and ProPublica similarly found that 56% of workers over the age of 50 have likely been pushed out of longtime jobs before the individual would have otherwise chosen to retire. ***If You're Over 50, Chances Are the Decision to Leave a Job Won't Be Yours***, ProPublica (Dec. 28, 2018).

Fifty years ago, shortly after the passage of federal legislation banning age discrimination in employment in the United States, it was typical for the EEOC to receive a few thousand charges alleging age discrimination per year. In 2021, the EEOC received approximately thirteen thousand charges alleging age discrimination, which accounted for over 20% of all charges of discrimination filed with the EEOC that year. Given the increase in older workers, a concomitant increase in age discrimination claims is anticipated as well.

Potential Employer Responses to ADEA Claims

It is not unlawful under the ADEA for an employer to take adverse action against an older employee if it is "based on reasonable factors other than age." 29 C.F.R. § 1625.7(a). However, as the regulation later explains, an employment practice that adversely affects older individuals is discriminatory unless the "*practice is justified by a reasonable factor other than age.*" 29 C.F.R. § 1625.7(c) (emphasis added.) Caution is still warranted, however, as even if an employment practice is justified by a reasonable factor other than age, the ADEA prohibits this defense from being used when age is a limiting criterion, such as with a mandatory retirement policy. 29 C.F.R. § 1625.7(b).

To establish this "based on reasonable factors other than age" defense, "an employer must show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer." 29 C.F.R. § 1625.7(e)(1). The relevant considerations include, but are not limited to, the extent to which factor, other than age, is related to the employer's stated business purpose; the employer defined the factor accurately and applied it fairly and accurately; the employer limited a supervisor's discretion to assess an employee subjectively; the employer assessed the adverse impact of the employment practice on older workers, and took steps to reduce the harm, in light of the burden of undertaking such steps. 29 C.F.R. § 1625.7(e)(2).

Whether an employer's "cost cutting" measures constituted a reasonable factor other than age has been the subject of frequent litigation. *See e.g., Aldridge v. City of Memphis*, 404 F. App'x 29 (6th Cir. 2010) (upholding an employer's practice of demoting employees of a certain seniority status for cost-saving operational considerations.) If an employer determines, based on an objective measurement, that a higher paid employee is not as productive as employees who are paid less, the higher paid employee can likely be terminated or demoted to reduce costs. In the absence of measurements of productivity, however, employers should be cautious to not use cost cutting as a proxy for age discrimination by replacing older, higher paid workers with younger, lower paid workers.

Employers should also keep in mind that they are always entitled to terminate an employee under the ADEA for "good cause." 29 U.S.C. § 623(f)(3). This may apply if an employment decision was made in the exercise of good faith business judgment for a legitimate, nondiscriminatory reason, such as the poor performance of an employee.

An Alternative to Mandatory Retirement

Some employers decide to offer their most senior employees an early retirement package to encourage, but not require, that older employees retire. Early retirement packages must be carefully planned, preferably with the advice of legal counsel. Employers that are considering developing an early retirement incentive program should review the guidance published by the EEOC concerning employee benefits. ***See Section 3 Employee Benefits***, U.S. Equal Employment Opportunity Commission.

Among other considerations, employers should be careful that their incentive programs do not cross the line into forced retirement by punishing individuals who decline offers of early retirement, or that the employer runs afoul of the Older Workers Benefit Protection Act, the Worker Adjustment and Retraining Notification Act, or the Employee Retirement Income Security Act of 1974.

If successfully implemented, however, a voluntary early retirement incentive program can reduce claims of age discrimination, reduce the potential need for layoffs, increase employee morale, encourage healthy employee turnover, and ultimately save the organization money.

The Duty of Loyalty

A Powerful Tool For Employers

By Scott F. Gibson

The American economy is based on fair competition. But the same competition that boosts our standard of living can be cruel and messy, creating economic winners and losers in its path.

It's late Friday afternoon, and your office is winding down for the weekend. You're cleaning out the last few emails in your inbox and are looking forward to a quick weekend getaway with your spouse when your assistant buzzes you on the intercom.

"Hey, Boss. Savannah Vasquez is on the line. She says it's urgent."

Savannah is the President of your largest client, a construction company handling multiple high-end commercial projects throughout your state.

"Put her through." You realize that your getaway will be delayed and give thanks for an understanding spouse.

"Hi, Savannah. What's up?"

"I'm so angry I could spit nails," she says. "Our top sales rep, Ralph Fernsby, resigned abruptly last week. We just found out that he spent the last two months bidding jobs for our main competitor."

Savannah explains that following Ralph's departure, the company's head of IT conducted a routine review of his company-issued laptop and uncovered dozens of bids submitted on behalf of the competitor in the past two months. Government records reflect that permits were issued for at least three jobs – valued at more than $20 million. Adding insult to injury, Ralph bid the jobs using the company's bid template. Email records show that Ralph's father helped him scrape off the company's logo from the template and convert it into a template for the competitor.

*"Those jobs were for our customers," Savannah says. "We spent a small fortune developing contacts and relationships with the customers and he bid the job for our competitor **while he was drawing a paycheck from us!**"*

"Did Ralph sign the company's non-solicitation agreement?" you ask.

"We thought he had signed the agreement," Savannah continues, "but we can't find a signed copy. Does it really matter? From what I understand, the Biden Administration is trying to invalidate all restrictive covenants."

You explain that in response to President Biden's Executive Order in the summer of 2021, the Federal Trade Commission proposed regulations that would ban most restrictive covenants, particularly covenants not to compete.

"But those regulations are not yet effective," you explain. "And even if they are enacted as drafted, most experts agree that the FTC lacks the authority to issue the regulations. We're likely looking at years of legal uncertainty as test cases make their way through the courts."

"I can't believe that the law would allow an employee to steal business from his employer for his personal benefit," Savannah says. "This is not a case of an employer oppressing the 'little guy.' I don't mind competition; it helps make us a better company. But I can't fathom why it is fair for an employee to steal business from us while he is on our payroll."

"I've got good news for you," you explain. "He can't. Ralph had a duty of loyalty that prevented him from competing with you."

"You've got my attention," Savannah says. "Tell me more about this duty of loyalty."

The Common Law Duty of Loyalty

The American economy is based on fair competition.

> The freedom to engage in business and to compete for the patronage of prospective customers is a fundamental premise of the free enterprise system. Competition in the marketing of good

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and services creates incentives to offer quality products at reasonable prices and fosters the general welfare by promoting the efficient allocation of economic resources the freedom to compete necessarily contemplates the probability of harm to the commercial relations of other participants in the market.

RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. 1 (Am. Law Inst. 1995).

Free enterprise rewards innovation and provides incentives for entrepreneurs to build a better mousetrap. Fair competition – the foundation of our high standard of living – is the American way.

But the same competition that boosts our standard of living can be cruel and messy, creating economic winners and losers in its path. Nonetheless, "competition is not a tort," *Frandsen v. Jensen-Sundquist Agency, Inc.*, 802 F.2d 941, 947 (7th Cir. 1986), even though it may be "painful, fierce, frequently ruthless, sometimes Darwinian in its pitilessness." *Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862, 865 (7th Cir. 1999).

"Ralph had a duty of loyalty to the company based on his relationship as an employee of the company," you say. "He has to put the company's interests first and can't compete with the company because he is your agent."

You explain that an employee is an agent of his employer. As such, he is subject to the duties and obligations arising in a principal / agent relationship. The underlying principles of that duty of loyalty are outlined in the Restatements of the law, which outline the fundamental principles supporting fair competition.

The duty arises out of the employee's fiduciary relationship with her employer and requires that the employee render fair and honest service to the employer as long as the relationship continues. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 *comment b* (During the duration of an employment relationship, an employee is subject to a duty of loyalty applicable to all conduct within the scope of the employment").

The duty of loyalty has a strong historical precedent based on both common sense and the common law. As the Arizona Supreme Court held 100 years ago, "it is too plain to need discussion that an agent is under the duty to act with entire good faith and loyalty for the furtherance of the interests of his principal in all matters concerning or affecting the subject of his agency, and if he fails to do so he is responsible to his principal for any loss resulting therefrom." *Thomas v. Newcomb*, 221 P. 226, 228 (Ariz. 1923).

The Wisconsin Supreme Court reiterated these same principles:

> It is well settled that an agent is a fiduciary with respect to all matters within the scope of his agency. The very relation implies that the principal has reposed some trust or confidence in the agent. Therefore, the agent or employee is bound to the exercise of the utmost good faith and loyalty toward his principal or employer. He is duty bound not to act adversely to the interest of his employer by serving or acquiring any private interest of his own in antagonism or opposition thereto. His duty is to act solely for the benefit of the principal in all matters connected with his agency. This is a rule of common sense and honesty as well as of law.

Bank of California v. Hoffman, 38 N.W.2d 506, 509 (Wis. 1949) quoting 2 Am. Jur. Agency § 252.

An employee owes her employer "a duty of good faith, loyalty and fair dealing." *Science Accessories Corp. v. Summagraphics Corp.*, 425 A.2d 957, 962 (Del. 1980); *see also Krause v. Gelman*, 580 N.Y.S.2d 750 (N.Y. App. Div. 1992) (an employee must exercise the "utmost good faith and loyalty" in performing her duties during the terms of her employment). An employee's duty of loyalty places multiple restrictions on his conduct. "Unless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency" during the term of the agency. RESTATEMENT (SECOND) OF AGENCY § 393 (emphasis added).

The duty of loyalty requires the employee to "act solely for the benefit of the principal in all matters connected with his agency." RESTATEMENT (SECOND) OF AGENCY § 387. An employee may not put himself "in a position antagonistic to his principal concerning the subject matter of his agency." *Science Accessories Corp.*, 425 A.2d at 962.

The duty further prohibits the employee from acquiring a "private interest antagonistic to that of his employer." *Edwards v. Hauff*, 682 P.22d 1, 3 (Ariz. Ct. App. 1984). Indeed, "it is the agent's duty to further his principal's interests even at the expense of his own in matters connected with the agency." RESTATEMENT (SECOND) OF AGENCY § 393 comment b.

The duty of loyalty is broad and expansive.

> While acting as an agent or employee of another, one owes the duty of fidelity and loyalty; accordingly, a fiduciary cannot act inconsistently with his agency or trust; i.e., solicit his employer's customers for himself, entice coworkers away from his employer, or appropriate his employer's personal property.

ABC Trans Nat'l Transp. v. Aeronautic Forwarders, Inc., 379 N.E.2d 1228, 1237 (Ill. App. Ct. 1978) (citation omitted).

"Ralph owed the company his good faith, loyalty, and fair dealing. He breached that duty when he began competing against the company for customers while he still was your employee."

Savannah sighs.

"And he used our proprietary software to prepare the bids for our customers. I'll bet you dollars to donuts that he used the company's cell phone and computer systems to help divert our customers to the competitor," Savannah says. "We know that he used the company email system to contact the clients – that's how we found out what he had done."

Savannah is still upset at Ralph's antics, but she's starting to understand how the law works in her favor. You continue your outline of the breadth of Ralph's legal problems.

"During his employment, an employee "has a duty (1) not to use property of the [employer] for [the employee's] own purposes. .., and (2) not to use or communicate confidential information of the principal for the agent's own purposes of those of a third party." RESTATEMENT (THIRD) OF AGENCY § 8.05.

The duty of loyalty requires the employee to "act solely for the benefit of the principal in all matters connected with his agency."

"The agent's duty is not only to act solely for the benefit of the principal in matters entrusted to him. .., but also to take no unfair advantage of his position in the use of information or things acquired by him because of his position as agent or because of the opportunities which his position affords." *Id.*, comment b; *see also* RESTATEMENT (SECOND) OF AGENCY § 388, comment c. ("An agent who acquires confidential information in the course of his employment or in violation of his duties has a duty not to use it to the disadvantage of the principal").

"The duty of loyalty fosters fair competition by requiring employees to act fairly and honestly on behalf of their employer,"

you continue. "An employee may not use the company's customer relationships, equipment, or confidential information on behalf of anyone other than his employer. As your employee, he owed you faithful, honorable, and diligent service. The law holds him accountable for his failure to behave honorably."

Post-Termination of Employment

You pause for a moment, allowing Savannah to absorb the significance of everything you have said. You've worked with her long enough to know that she has something on her mind and is formulating how to best ask her question.

"If the duty of loyalty is based on Ralph's status as an employee, do we have any rights against him once he resigns his position?" Savannah asks.

"Remember when I told you the 'money answer' to every legal question?" you reply. "It depends. He doesn't have an ongoing duty of loyalty once he resigns, but the law still places certain restrictions on what he can do."

"What can we prevent him from doing?" Savannah asks.

"For one thing, he cannot exploit the confidential information that he received as a result of his employment with the company. Let me explain."

Once the employment relationship ends, the employee no longer has a duty of loyalty to the former employer. In the absence of a valid restrictive covenant, the employee has no duty not to compete with the former employer. RESTATEMENT (SECOND) OF AGENCY § 396 (a). Still, the duty of loyalty requires him to maintain the secrecy of his employer's trade secrets, both during and after his employment. Specifically, a former employee has a duty

- not to "use or to disclose to third persons" any "trade secrets, written lists of names, or other similar confidential matters given to him only for the principal's use or acquired by the agent in violation of duty." The employee may, however, "use general information concerning the method of business of the principal and the names of customers retained in his memory, if not acquired in violation of his duty as an agent;"
- "to account for profits made by the sale or use of trade secrets and other confidential information, whether or not in competition with the principal;" and
- "not to take advantage of a still subsisting confidential relation created during the prior agency relation."

Id., § 396 (b)-(d).

"In other words, Ralph has to maintain the confidentiality of your truly confidential information. You can't prevent him from using the general skills and knowledge –"

"Woah! What do you mean by 'general skills and knowledge'?"

"Glad you asked, Savannah. 'General skills and knowledge' are those things that a competent person in the field knows how to do. Those 'skills and knowledge' vary depending on the job involved. For example, a brain surgeon has very different 'skills and knowledge' than a truck driver does. But each of them has a set of skills that makes her competent in her field."

"Let's apply that principle to your industry. A competent salesperson in your industry understands both sales techniques and the methods of bidding a commercial construction project. Those are the 'general skills and knowledge' that Ralph – and any other competent sales rep – knows."

"You cannot prevent Ralph from using those 'general skills and knowledge' because they belong to him as a competent construction sales representative," you continue. "But you can prevent him from using confidential information that the company spent time, effort, and money to develop."

"Like our customer list," Savannah says. "We've spent thousands of man hours over the past 20 plus years developing the information contained in our CRM database. And we've developed proprietary software that helps us analyze and bid a project more efficiently than our competition. That software has been a big part of our success that past few years."

"Exactly! Your customer list and your proprietary software are generally unknown in the industry. The law forbids Ralph from exploiting them for his personal benefit," you explain.

Preparing to Compete

"Tell me, Counselor, how does the duty of loyalty impact an employee who is looking for a new job?"

"It wouldn't be fair if the duty of loyalty prevented an employee from looking for a new job or setting up a competing business. We're Americans. We believe in free enterprise and in fair competition. Ralph could not legally compete against the company while he was your employee. But he could ***prepare*** *to compete."*

"What does that mean?" she asks.

Once an employee leaves her job, she is free to properly compete against the employer unless she has signed a valid restrictive covenant. RESTATEMENT (SECOND) OF AGENCY § 393 *comment e.* Moreover, before she resigns her position, she is allowed to "make arrangements to compete" as long as she does not use confidential information that is "peculiar to [her] employer's business and acquired therein." *Id.*

> Thus, before the end of his employment, he can properly purchase a rival business and upon termination of employment immediately compete. He is not, however, entitled to solicit customers for such rival business before the end of his employment nor can he properly do other similar acts in direct competition with the employer's business.
>
> *Id.*

Savannah contemplates the magnitude of your statement.

"So," she says, "Ralph legally could have written a business plan, incorporated a competing business, leased office space, purchased software, printed business cards, and leased equipment while he still was employed at the company – as long as he didn't solicit customers or start business operations."

"Exactly!" you exclaim.

Savannah pauses briefly before continuing. "And because we don't have an enforceable non-compete agreement with him, Ralph could have gotten away with what he did if he had waited until after he left to start competing with the company."

"That's the irony of the situation," you say. "Ralph's greed got the best of him. He figured that he could 'double dip,' so he start competing while he continued to draw a paycheck from the company."

Damages

You've been speaking with Savannah for the better part of an hour. You may still be able to avoid the weekend traffic head-

ing out of town. But she has a few remaining questions.

"Let me see if I understand what we've been talking about," Savannah says.

"Ralph had a duty of loyalty that prevented him from competing against us while he worked for us. That duty of loyalty prevents him from using our confidential information even though he no longer works for us. But he competed against us, nonetheless. What happens next?

"Here comes the good part," you say. "Ralph committed a tort, which means that he did something that harmed another person. The law makes him liable for all of the harm – all of the damages – that his actions caused."

If an employee "receives anything as a result of his violation of a duty of loyalty to the principal, he is subject to a liability to deliver it, its value, or its proceeds, to the principal." RESTATEMENT (SECOND) OF AGENCY § 403. The employee is liable for all damages his conduct caused, including lost money or other property, the lost profits or proceeds that the employer would have received if the employee had performed his duties, and any other money or property that is unjust for him to keep. RESTATEMENT (SECOND) OF TORTS § 874 comment b and § 924;

The court also may award punitive damages in appropriate cases involving breach of the duty of loyalty. *See, e.g., National Legal Research Group, Inc. v. Lathan*, 42 F.3d 1386 (4th Cir. 1994) (affirming an award of punitive damages).

"What about Ralph's new employer?" Savannah asks. "Can we recover from him?"

"Remember the 'money answer,'" you say. "It depends on what the employer knew. But I'd be surprised if the employer had no idea that Ralph was sending your jobs over to his company."

A person who knowingly assists a fiduciary in committing a breach of fiduciary duty may also be guilty of tortious conduct and subject to liability for the harm thereby caused. RESTATEMENT (SECOND) OF TORTS § 874 comment b.

A Faithless Servant

"Everything you've explained makes sense," Savannah says. "But I'm still having problems understanding why Ralph can work for a competitor and steal our customers while he is drawing a paycheck from us."

"I've got more good news," you say. "What would you think if I told you that Ralph not only is obligated to pay the profits the company lost as a result of his actions, but also may be required to repay the wages that you paid him while he was working for the competition?"

"I'll be a fan for life if you can recover what we paid the cheating scoundrel."

You smile. "Let's talk about it."

The Restatement requires a disloyal employee to disgorge any benefit he receives as a result of his disloyal conduct. RESTATEMENT (SECOND) OF AGENCY § 403. Among other things, "[a]n agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a willful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned." RESTATEMENT (SECOND) OF AGENCY § 469.

"The law of restitution and unjust enrichment also creates a basis for an agent's liability to a principal when the agent breaches a fiduciary duty, even though the principal cannot establish that the agent's breach caused loss to the principal. If through the breach the agent has realized a material benefit, the agent has a duty to account to the principal for the benefit, its value, or its proceeds." RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006)

When an agent betrays his principal, such misconduct and breach of duty results in the agent losing his right to compensation for services to which he would otherwise be entitled. *See, e.g., ABS Trans National Transport, Inc. v. Aeronautic Forwarders, Inc.*, 413 N.E.2d 1299, 1315 (Ill. App. Ct. 1980) ("one who breaches fiduciary duties has no entitlement to compensation during a willful or deliberate course of conduct adverse to the principal's interests"); *American Timber & Trading Co. v. Niedermeyer*, 558 P.2d 1211, 1223 (Or. 1976) (employee who breached duty of loyalty must return compensation received, whether in form of salary or bonuses, during period of disloyalty); *Chelsea Industries, Inc. v. Gaffney*, 449 N.E.2d 320, 326-27 (Mass. 1983) (employee who breaches duty of loyalty "can be required to forfeit the right to retain or receive his compensation for conduct in violation of his fiduciary duties").

The principal may recover all compensation paid to an employee during a period of disloyalty as damages. *Jet Courier Service, Inc. v. Mulei*, 771 P.2d 486 (Colo. 1989) An award of disgorgement, where the employee must turn over profits received as a result of breaching his duty of loyalty, is a remedy for the breach of the duty of loyalty. *Eckard Brandes, Inc. v. Riley*, 338 F.3d 1082, 1086–87 (9th Cir. 2003).

The principal may recover all compensation paid to an employee during a period of disloyalty as damages.

Conclusion

"I always feel better after I talk to you, Counselor," Savannah says. "You don't just tell me the law, you explain how the law impacts my situation."

"We've got a lot of work to do," you explain, "but we can work though this problem. I'll spend some time this weekend outlining a plan of attack. Let's talk the first thing Monday morning and we can make some decisions about how you want to proceed."

"Thanks, Counselor. I'll rest better knowing that you have things under control."

You hang up the phone and look at your watch. You can still make it out of town for your weekend getaway.

The DOL's Rotating Menu Of Tips, *Or* Trying To Stay On Top Of The Latest Rules For Operating A Tip Pool

By Chelsea E. Thompson

The DOL's changing regulations have caused ripples on who is a tipped employee and what is a valid tip pool.

Even experienced wage and hour practitioners have struggled to keep updated on how the U.S. Department of Labor (DOL) is enforcing its rules on which employees can receive tips and when they may permissibly pool their tips. The DOL revised its practices and issued new regulations toward the end of the Trump Administration (though many courts chose not to defer to the revised guidance) and then abruptly changed position. It withdrew rules before their effective dates and promulgated new rules with the switch to the Biden Administration. Here is where we currently stand.

Briefly, the Fair Labor Standards Act (FLSA) generally requires employers to pay their employees a set minimum wage. This federal minimum wage is $7.25 hour. In 1966, Congress created an exception to this well-known rule that permits employers to pay less than the federal minimum wage to an employee who regularly makes more than thirty dollars a month in tips. At present, this federal "cash minimum wage" is $2.13 per hour, and employers can rely on the tips the employee receives to make up the difference in what is commonly called a tip credit, though the employer must make up the difference for any employee who does not receive enough tips to reach the minimum wage. The only limitations are: 1) that the employer must provide a notice informing the employee of the tip credit; and 2) the employee must keep all tips the employee receives, except for tips that are part of a valid tip pool. 29 U.S.C. § 203(m)(2)(A)(ii). The DOL's changing regulations have caused ripples on who is a tipped employee and what is a valid tip pool.

Determining Who Is a "Tipped Employee" and the 80/20 Rule

The DOL has long sought to clarify the meaning of a "tipped employee." One major focus has been with employees who work dual jobs for a single employer, one tipped and one not. In this case, the employee is considered a tipped employee only while working in the tipped job, such as a restaurant server, bartender, busser, food runner, casino dealer, exotic dancer, or customer service representative. But the employer cannot take tip credit for the employee's time working in a job that does not regularly receive tips, such as is the case with cooks, janitors, dishwashers, maintenance personnel, or owners. 29 C.F.R. § 531.56(e). Accordingly, employers may only claim a tip credit while the employee is working in a tipped occupation, such as a server. All other work must be paid at least at the $7.25 minimum wage.

In seeking to clarify the scope of a dual job, the DOL took the position for decades that employers could take a tip credit not just for time spent in direct service to customers, but also for time spent working on related duties incidental to the regular duties of the tipped employees. Since the 1980's, the DOL's position has been that incidental work cannot take a substantial amount of the employee's time, which the DOL defined as in excess of 20 percent of the workweek. If the employee performed excessive directly supporting work, then the employer cannot take a tip credit for that time and must pay the full minimum wage. This interpretation is commonly referred to as the "80/20 Rule." While never formally adopted by regulation, it was the DOL's interpretation of the law by way of its

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Field Operations Handbook. Courts largely deferred to this interpretation.

In 2018, the DOL formally rescinded this 80/20 Rule. In its place, the DOL announced that it would no longer prohibit an employer from taking a tip credit for the time a tipped employee performed related, non-tipped duties, as long as those duties were performed contemporaneously with, or for a reasonable time immediately before or after, the employee performed true tip-producing work. The DOL asserted that the 80/20 Rule was too difficult for employers to administer as a practical matter and led to confusion. Consequently, the Department promulgated a Final Rule which would have adopted this looser standard with an effective date of March 1, 2021. Notably, the few courts asked to consider applying this new policy chose not to give it deference.

Almost immediately after the change in administration in January 2021, the DOL extended the effective date of this looser rule and then later withdrew it. Late last year, the DOL published a new Final Rule, which not only reinstated the 80/20 Rule, but incorporated it into the Department's regulatory scheme for the first time. Under 29 C.F.R. § 531.56(f), tipped work now falls into two buckets:

1. Tip-producing work, and
2. Directly supporting work, which is work "performed by a tipped employee in preparation of or to otherwise assist tip-producing customer service work."

29 C.F.R. § 531.56(f).

Tip-producing work is to be broadly construed to encompass any work performed by a tipped employee that provides a service to customers. The regulation then gives some examples of what is tip-producing and what is directly supporting. "A server's tip-producing work includes providing table service, such as taking orders, making recommendations, and serving food and drink [and a] bartender's tip-producing work includes making and serving drinks, talking to customers at the bar and, if the bar includes food service, serving food to customers" In contrast, a server's directly supporting work "includes dining room prep work, such as refilling salt and pepper shakers and ketchup bottles, rolling silverware, folding napkins, sweeping or vacuuming under tables in the dining area, and setting and bussing tables [and a] bartender's directly supporting work includes work such as slicing and pitting fruit for drinks, wiping down the bar or tables in the bar area, cleaning bar glasses, arranging bottles in the bar, fetching liquor and supplies, vacuuming under tables in the bar area, cleaning ice coolers and bar mats, making drink mixes, and filling up dispensers with drink mixes."

This arcane distinction matters greatly because, while all time spent performing tip-producing work can be paid at the tipped minimum, only a limited amount of directly supporting work can be. As with the old policy, "[a]n employer can take a tip credit for the time a tipped employee spends performing work that is not tip-producing, but directly supports tip-producing work, provided that the employee does not perform that work for a substantial amount of time." 29 C.F.R. § 531.56(f)(4). The rule also expands the definition of substantial to include not just the traditional standard of "more than 20% of a workweek," but also to include any continuous period of time that exceeds 30 minutes. As a result, an employer cannot take a tip credit for any time where a tipped employee is performing only directly supporting duties that exceeds 30 minutes. The impact of this new rule is that employers are required to carefully track the time spent by their tipped employees to determine what time the employee is doing "tip producing work" and the amount of time they are performing directly supporting work. Regardless, if a tipped employee is doing work that is neither tip-producing nor directly supporting tip-producing work, then they must be paid at least minimum wage for all hours worked while performing the work. For example, according to the DOL, "cleaning the dining room or bathroom is not part of the tipped occupation" of bartenders or servers.

What Is Tip Pooling and When Is It Legal

Under the FLSA, while tipped employees are to receive and keep all tips they receive, there is a carve out that allows for "the pooling of tips among employees who customarily and regularly receive tips." A "Tip Pool" is an arrangement whereby employees contribute a portion (or all) of their tips to a general pool to be shared by others—for instance servers sharing tips with those who bus tables. This is different from a tip sharing arrangement which is a voluntary process among employees to share received tips. The DOL does not technically regulate tip sharing arrangements but considers truly voluntary tip sharing agreements to be rare; if there is any employer involvement, the DOL will treat arrangement to be a tip pool and subject to the tip pool regulations.

In general, tip pools are valid so long as the tip pool does not include: (1) employees who do not perform customer service functions; or (2) managers. If the tip pool includes either group of impermissible employees, the tip pool is invalid and the employer is not permitted to take a tip credit, which means the employer failed to pay minimum wage. "Front of house" employees such as servers, hosts, and bartenders generally receive tips and may be included in a tip pool, while "back of the house" employees such as cooks, dishwashers, and janitors may not be included in a tip pool.

In 2018, Congress amended the FLSA to prohibit employers from keeping tips received by their employees, regardless of whether the employers take a tip credit under section 3(m). This had been the longstanding policy of the DOL, but a circuit split had developed whether the DOL interpretation comported with the law. Subsequently, while it was trying to rescind the 80/20 Rule, the DOL also revised its rules on tip pools to mesh with the congressional change. Under these revised rules, the DOL affirmed that an employer and managers cannot keep employees' tips under any circumstances, including through tip pools. The only exception is that managers can keep tips: (a) provided directly to them, (b) for services they personally performed, (c) as long as those services are exclusively provided by managers. These revisions also established than an employer who pays the full minimum wage and takes no tip credit may allow employees who are not tipped employees (the "back of house" employees) to participate in the tip pool. The Final Rule also established that any employer who collects tips as part of a mandatory tip pool generally must fully redistribute the tips within the same pay period.

Additionally, as business models continue to evolve and change, this creates unique challenges in determining who is a manager. For example, in a recent federal case from Virginia, *Hoffman v. Bear Chase Brewing Co., LLC.*, No. 1:21CV1443, 2023 WL 384293 (E.D. Va. Jan. 18, 2023), the employer (a brewery) had customers order food and beverages at point-of-sale terminals and permitted customers to move around within indoor and outdoor serving stations without assigned seating. Multiple servers would be involved in preparing food and beverages and serving the customers. This non-standard model forced the court to consider anew who was a tipped employee (who could be in the pool) and who was a cook or manager (who could not be in pool). In evaluating, the federal court found the blend of duties created enough doubt that the court permitted the case to go to trial, so a jury could determine whether these employees were "managers" under the law based on their job duties—not their job titles. Thus, employers who choose to use a nontraditional business model where employees fulfill a wide range of duties may wish to avoid the use of tip pools.

State Law Considerations

Though this article focuses on federal FLSA and the recent DOL changes, that is not the only law to worry about. Most states have their own state-mandated minimum wage laws that must be followed, and some of those are similarly in flux. States and localities are free to establish a higher minimum wage for their jurisdiction than the federal $7.25. If anyone is looking to move, New York ($12.00 state, $15.00 NYC), Washington DC ($13.25), Washington ($12.00), and Massachusetts ($12.00) currently having the highest state minimum wages. On the other hand, seven states (Alabama, Louisiana, Mississippi, South Carolina and Tennessee, Georgia and Wyoming) default to the federal minimum wage of $7.25 because they either lack state legislation on the subject, or have legislated for a rate lower than the FLSA. States are also free to legislate their own cash minimum wage—the federal being $2.13—and have considerable range. At the top are New York City ($10.00), Hawaii ($9.35), New York state ($8.65), and Connecticut ($8.23). Employers should be aware of the minimums set by their state or locality, in addition to the FLSA.

Importantly, a handful of states have eliminated the tip credit entirely for all employers (Alaska, California, Minnesota, Oregon, Washington). Other states (Montana, Nevada) have eliminated the tip credit for certain employers, like those making over certain amounts in annual gross sales or failing to offer qualifying health insurance. In these states, traditionally tipped employees must receive the full state minimum wage from their employers. Other states are joining or considering similar legislation. In November 2022, for example, Washington DC approved a plan that increases the cash minimum wage until 2027, when it will equal the state minimum wage, thereby phasing out the tip credit.

As always, states take drastically different approaches to the same issue. This means employers must ensure their tipping and compensation practices comply with FLSA and any state equivalent laws. If an employer's business crosses state lines, it should be aware of any legal differences applicable at different locations.

What Happens If a Tip Pool Is Invalid or Federal Minimum Wage Is Not Paid

There are usually two ways an employer's tip pool comes under scrutiny: either an investigation by the DOL's Wage and Hour Department (which usually result from a confidential complaint), or a private lawsuit by a current or former employee. Given that employees are often paid under the same compensation structure, FLSA violations are often brought as a collective action on behalf of numerous employees.

If a violation is found through either a DOL investigation or lawsuit, the employer may be forced to repay the tipped employees for any unpaid wages or improperly withheld tips that were contributed to the invalid tip pool, reaching back 2 years (or 3 years if DOL finds misconduct to be willful). This amount is doubled by liquidated damages if the DOL or court finds the employer's violation was willful. In a private lawsuit, attorneys fees are automatically awarded to a winning plaintiff, meaning it can greatly increase an employer's financial exposure. There are no attorney fees in a DOL investigation, but there are civil money penalties equal to $1,100 per violation imposed as the DOL deems appropriate—this is a much lower, easier-to-meet standard courtesy of the same, new 2021 regulations.

Given these potential penalties, and the recent carousel of federal regulations, it is critical for employers using the tip credit to review their policies and procedures for compliance, or consider alternative payment structures.

Options for Employers

If an employer wishes to keep using the tip credit and/or a tipping pool, it needs to do an internal audit to confirm that its practices comply with the current regulations, including that:

- only tipped employees who perform customer service functions are included;
- the tip pool does not include managers;
- employees are properly considered managers under the FLSA based on the actual duties of the employee, and not job title;
- written job descriptions are accurate;
- ensure that it has notified all participants of the tip pool with proper documentation;
- no tipped employee is engaging in directly supporting work for more than 30 minutes or more than 20% of their overall duties;
- the employer is properly documenting employees' tips, tip pool contributions, and tip pool payments;
- management is properly trained on how to consistently implement the tip pool process; and
- dual jobs are re-examined for potential reassignment of duties to create single job (*i.e.*, all tipped work or not).

To minimize the risk and administrative burden of the 80/20 Rule and tip pooling rules, which can confound even experienced wage and hour practitioners and are difficult to administrate, employers have several other options when employing traditionally tipped employees.

First, employers may simply pay all their employees at least minimum wage and not take a tip credit. Doing so guarantees compliance with the FLSA, avoids the 80/20 Rule, and eliminates the associated headache of tracking tipped employees' non-tipped work. It also allows the employer to expand tip pools to include "back of house" employees (but still not itself or managers), which is often viewed as more egalitarian, and avoids significant potential consequences with an improperly managed tip pool. If done correctly, paying traditionally tipped workers a higher wage can also be a major recruiting tool as staffing remains difficult for certain industries, offset employee turnover, balance the financial power a customer has over a tipped employee, avoid tipping bias based on age, sex, race or other impermissible traits, and garner positive publicity for the business.

Most states have their own state-mandated minimum wage laws that must be followed, and some of those are similarly in flux.

Second, employers also have the option of incrementally increasing menu prices to offset paying standard minimum wage to traditionally tipped employees. A thorough market evaluation may aid in determining if this is possible for an individual business.

Third, the employer may also add a mandatory service charge, or a required additional charge that is normally stated directly on a bill. These service charges are considered part of the employer's gross receipts, and the employer can share, or not share, these service charges among its employees as it deems fit.

Employers considering these options should keep several things in mind. First, employers should first examine tipped employee's actual compensation under the tip pool policy to make sure the switch from tip credit to minimum wage will not consistently or drastically reduce tipped employee's take home pay. Though the switch can allow an employer to offer better benefits, some employees may initially balk at the reduced cash earnings.

Second, adding sample calculations for possible tips on a receipt is, according to Internal Revenue Service, not the same as adding a service charge because the customer still ultimately determines the amount of the tip (or leaves the amount blank).

And third, imposing a mandatory service fee can create initial customer unrest—customers suffer from odd psychology, as studies show they react differently to leaving a tip on a cheaper menu item than paying a single menu price which anticipates gratuity, even if the former costs them more at the bank. Therefore, getting the formatting and language of the no-tipping policy and receipt can be critical.

No matter the option an employer goes with, the important thing is that an employer remain informed about the FLSA and its state law counterparts and routinely re-assess its compensation practices to ensure compliance.

Effective Voir Dire Methods For Revealing Juror Bias

By Jeff Goodman and Courtney Clapper Ringhofer

Empaneling a fair and impartial jury is of paramount importance to ensure just verdicts.

As trial lawyers, we understand the importance that empaneling an impartial jury has on a fair trial. The problem that afflicts many of us, however, is that the questions typically posed to jurors during voir dire do not effectively reveal bias or prejudice. This issue becomes even more challenging when we consider the complexities at play in every case. At a minimum, all cases involve a party who files and prosecutes the case and a party who defends it. What one attorney perceives as bias is commonly an advantage to their opponent. Further, lawsuits often involve multiple parties, which magnifies the complexities that trial lawyers must take into account when questioning prospective jurors.

All trial lawyers should take a day off from work to watch jury selection in a case in which you are not involved. As an onlooker, you will be surprised by how many inane, unproductive questions are asked of jurors, such as: "Mrs. Johnson, I see that you wrote on your questionnaire that you work for Walmart as an inventory specialist. What does an inventory specialist do, exactly? Do you enjoy your job? How do you get along with your co-workers?"

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These anodyne "get acquainted" and "wanna be liked by you" questions are better suited to cocktail party banter or checkout line chitchat than to the courtroom. While it's certainly good to establish a cordial rapport with jurors, there is simply not enough time during voir dire to engage in a social conversation with each prospective juror. Doing so comes at the expense of asking the kind of probing, substantive questions that will actually uncover the most important truths about prospective jurors—namely, their biases and prejudices that may affect the outcome of the case.

Your Success in Voir Dire Hinges on Your Focus and Your Questions

Trial attorneys know that the purpose of voir dire is to unearth potential jurors' biases and prejudices that may render them unfit to serve in a particular case. Not all attorneys are aware, however, that their approach to questioning jurors can impact their ability to expose the latent and sometimes deeply hidden biases of a juror that may render the juror unfit to serve.

Too often, trial attorneys fall prey to the temptation of treating voir dire as a time to get acquainted with or charm the jury panel.

Too often, trial attorneys fall prey to the temptation of treating voir dire as a time to get acquainted with or charm the jury panel, in the hopes that jurors will form a favorable opinion of them, potentially gaining them an advantage for trial. Nearly as often, they utilize the time to introduce case themes, or secure commitments from jurors as to how they will approach the case. These common tactics impede trial attorneys from achieving their primary goal during voir dire of asking the specific types of questions that will expose biases within the very people who will decide their case. Voir dire is no time for a chat with jurors.

Attorneys will vastly increase their chances of empaneling a fair and impartial jury by crafting questions ahead of time that are specifically designed to uncover bias, and then keeping their focus during voir dire trained squarely on eliciting the information they are hoping to reveal.

The Limitations of Minimal Voir Dire

The effectiveness of various styles of voir dire questions was examined in the landmark social science study, *The Impact of Minimal versus Extended Voir Dire and Judicial Rehabilitation on Mock Jurors' Decisions in Civil Cases*, 45 Law & Hum. Behav. 336 (2021) by Jessica M. Salerno et al) [hereinafter "Extended Voir Dire"]. During the study, 2,000 mock jurors read one of three case files based on actual civil cases, and were then tasked with rendering liability judgments and damage awards. *Id*. at 341.

Each study participant was also asked to answer three sets of voir dire questions: 1) demographic questions such as their "gender, age, race and ethnicity, education, yearly income, marital status, and parental status;" 2) "minimal voir dire" questions consisting of eleven generic yes/no questions about prior contacts with the legal system, along with juror self-assessments of whether they were biased; and 3) "extended voir dire" questions consisting of 27 questions with multiple-choice answer options regarding preexisting attitudes as to the burden of proof, trust in the various parties, the likelihood of fraudulent claims, ascribing bad motives to the litigants, attitudes towards lawsuits, and political orientation. *Id*. at 341.

The Extended Voir Dire study revealed three main conclusions regarding the impact of the three sets of questions, two of which relate to minimal voir dire, and one to extended voir dire (see Section IV below). *Id*. First, the study found that jurors are unable to identify and self-report their biases through minimal voir dire questions, and such questions fail to identify many jurors who are biased enough to be challengeable for cause. *Id*. at 350. Second, neither demographic data nor minimal voir dire questions are effective in enabling an attorney to discover biased jurors or to predict trial outcomes. *Id*.

Before we go further, let's examine the nature of the minimal voir dire questions that were presented to the mock jurors in this study. These questions:

> … were taken from an example set of voir dire questions for civil trials posted online by federal judge Susan Oki Mollway (Mollway, n.d.). These minimal voir dire measures were reviewed by a trial attorney and jury consultant and considered to be representative of common questions that attorneys or judges might ask when their time is highly limited (Bermant, 1982) and typical of the types of questions some judges list in their local courtroom rules. These questions included a set of yes/no questions that asked about prior experiences with the legal system and asked them to self-identify potential sources of bias or prejudice that might make them unable to be impartial … These questions are similar to those used in previous experiments that featured standard, minimal voir dire questions (e.g., Sommers, 2006) and are reflective of those commonly used in U.S. courts…

Id.

In other words, they were exactly the type of minimal voir dire questions that trial attorneys present to prospective jurors in courtrooms every day. Based on your experience as a trial lawyer, what examples come to mind? Perhaps questions such as: "Are you aware of any reason you may be prejudiced for or against the plaintiffs or defendants?" "Are you aware of any reason that you would be prevented from sitting in this case with complete fairness and impartiality?" "Do you agree that a defendant is presumed innocent until proven guilty?"

These minimal (or limited) voir dire style of questions are often close-ended, and usually can be answered with a simple yes or no. The questions typically do not trigger meaningful contemplation or self-reflection within the juror and require only scant consideration or effort. As a result, they are limited from the outset in how much information they can yield.

It is perhaps not surprising, then, that the Extended Voir Dire study found that these types of questions are not helpful in revealing biases, which is the ultimate goal of voir dire. Relying on minimal voir dire style questions as a method to reveal juror bias not only requires trial attorneys to operate under the assumption that potential jurors are *capable* of spontaneously self-identifying any bias they might have, but they must also trust that the potential jurors are *willing* to be forthcoming and admit those biases.

As noted briefly in the excerpt above, another shortcoming of minimal voir dire is the imposition of strict time limits by trial courts. *Id*. The Extended Voir Dire study underscored the harmful effects of these court-imposed restraints, stating:

> The consequence of such time limitations in voir dire is that attorneys are left to rely on stereotypes about jurors' demographic characteristics and previous experience with the legal system, and quick catchall questions that rely on jurors to identify predispositions or attitudes that might bias them. They must trust that prospective jurors can identify their own biases, when asked something as general as, "Do you know of any reason you may be prejudiced for or against the plaintiffs or defendants?" (Hans & Jehle, 2003; Hans & Vidmar, 2007). In contrast, when extensive questioning is allowed, attorneys are better able to probe for specific biases relevant to the case and identify jurors whose views are likely to compromise their impartiality.

Id. at 337.

Time restrictions prevent attorneys from being able to ask jurors in-depth, thought-provoking questions. Instead, they are forced to ask surface-level, catchall questions, which tend to bring about uninformative and often useless answers. Such circumstances frustrate trial attorneys' efforts to detect and explore biases among jurors, which in turn compromises the very purpose of voir dire.

As the Extended Voir Dire study ultimately revealed, minimal voir dire is ineffective in revealing jurors who are biased enough to be challengeable for cause. *Id*. at 350. Therefore, when trial attorneys chose to engage in minimal voir dire style questioning, or when they are forced by a court to practice minimal voir dire due to significant time restraints, their ability to draw out and expose harmful biases among the prospective jurors is significantly hindered.

Extended Voir Dire

The third conclusion the Extended Voir Dire study reached was that extended voir dire questions not only provide information about which jurors are challengeable for cause, but they may also serve as a basis for predicting trial outcomes. *Id*. at 350-352. Extended voir dire style questions enable attorneys to inquire about jurors' specific attitudes on various litigation matters, as well as matters specific to the parties and the case. These questions tend to be more effective because they allow attorneys to take the lead in uncovering specific sources of potential bias, rather than relying on jurors to self-identify and report their biases, and because they intentionally prompt more in-depth and informative responses than questions with a simple yes/no answer ever can.

The problem of identifying juror bias has always bedeviled trial lawyers, and always will. The Extended Voir Dire study, however, demonstrated that jurors are willing and able to discern and expose their biases, but they need to be asked about them directly. The researchers found a dramatic divergence between the percentage of mock jurors who self-identified their biases in response to the minimal voir dire questions, and the percentage that revealed biases via the extended voir dire questions: "In contrast to the very small percentage of mock jurors able to self-identify and be willing to admit bias in response to the minimal voir dire questions (less than 2%), 42% acknowledged relatively extreme views in response to at least one of the extended voir dire items." *Id*. at 348

Extended voir dire allows trial attorneys sufficient time to meaningfully investigate the beliefs and potential biases of prospective jurors. Extended voir dire is not effective merely because it is longer in duration, but rather its success is contingent on the quality of the questions asked and the trial attorney's ability to delve deep into the prospective juror's attitudes and beliefs on specific topics. Trial attorneys must understand that additional time for questioning will not increase the chances of exposing bias in jurors if it is spent bouncing from topic to topic, asking only surface-level, lightweight questions. In order to derive benefit from extended voir dire, you must inquire about a specific topic, and through the use of methodical and specific questioning, dig deeper into the juror's attitudes and biases.

Effective Questions

So, how does all of this translate into actual trial practice? How can trial attorneys optimize the way they conduct themselves during voir dire so they can reveal more juror bias and better serve their client?

Consider, for example, the insurance bad faith case example tested in the Extended Voir Dire study. The study summarized the facts provided to the mock jurors as follows:

> Plaintiff is Ms. Bari. She is suing Allstate Insurance, the Defendant. In this case, the plaintiff is represented by an attorney at a firm that advertises on TV and is a firm that handles personal injury lawsuits. The defendant is represented by a firm that is a large defense firm. It specializes in defending a variety of corporations, including insurance companies … In this case, Ms. Bari and her husband purchased underinsured motorist coverage from Allstate. Ms. Bari alleges that even though she paid premiums to Allstate for many years, Allstate did not pay the amount that was owed. In legal terms, she asserts Allstate acted in "bad faith." Ms. Bari asserts that Allstate tried to underpay the claim, and unnecessarily and improperly delayed paying the claim. Allstate disagrees and denies it did anything wrong. Allstate asserts that its duty is to pay only valid claims, and to avoid paying too much or too little on any claim. It asserts that it must investigate claims and decide the proper amount to pay because if it overpays, it will cause all the premiums of other customers to go up. Allstate

> asserts that in order to know how much to pay, the insured (Mr. and Ms. Bari in this case) must cooperate with Allstate and help Allstate understand the claim.

Salerno et al, *LHB Voir Dire OSF Materials vh*, OSFHOME 2 (June 13, 2021), https://osf.io/tdv9b.

Imagine you are defending the insurance company in this case. In the manner of minimal voir dire, you ask a juror, "Do you know of any reason you may be prejudiced for or against plaintiffs or defendants because of the nature of the case, or otherwise?" Nine times out of ten, jurors' answer will be, "No."

Now, what have you actually learned about that juror's potential biases? That they have no biases that could potentially impact your case? No, of course not. At best, you have learned that the juror has no bias that they are capable of identifying and self-reporting. Or, you've learned that they are unwilling to disclose bias. Given the option of either answering "no" or being forced to publicly admit that they are a biased person, most people will opt for the former.

Now consider an extended voir dire version of the question: "When an insurance company denies a valid claim, do you think it is more likely that they simply made an honest mistake, or it is more likely that they are denying a claim they know to be valid in order to keep from having to pay any money?"

This probing question prompts deeper self-reflection, requires more meaningful information than a simple yes/no answer, and, most critically, forces the juror to consider whether they actually may have an underlying bias against insurance companies, such as whether they believe insurance companies are inherently deceitful or exploitative.

Let's look at another example comparing minimal and extended voir dire questioning. Suppose you decide that it would be helpful to gain some insight into a juror's bias for or against plaintiffs in general. The minimal voir dire style of questioning would be to simply pose the question to the potential juror: "Do you have any preconceived notions, prejudices, or feelings about people who bring lawsuits or make claims against other people in court?" This close-ended question prompts only a yes or no response, and relies on the juror to identify and self-report their biases.

A better approach would be to try the extended voir dire method of asking jurors to rank their feelings or opinions on a scale. For instance, you could ask a question as simple as, "Would you say you strongly disagree, disagree, neither agree nor disagree, agree, or strongly agree that most people who sue others in court have legitimate grievances?" This question forces a juror to really consider how they feel about the issue, admit whether they are biased in favor or against plaintiffs, and rank how strong that bias is.

Next, assume that your case has the potential for noneconomic damages to be awarded to the plaintiff. During voir dire, you decide to inquire into possible juror biases regarding damages. After explaining to the potential jurors the difference between economic and noneconomic damages, you could ask, "Do you have any preconceived notions or feelings regarding awarding noneconomic damages?" This question will likely result in a yes or no answer and provide you with little insight into the jurors' potential biases.

Instead, consider the extended voir dire version of the question presented to the mock jurors in the Extended Voir Dire study:

> Some people believe that awarding noneconomic damages is important, because they will help compensate for things that go beyond bills and lost wages. Others believe that noneconomic damages are not a good idea because they aren't tied to any measurable costs and won't change the pain and suffering, loss of enjoyment of life, etc. Which is closest to your view?
>
> [1.] I am comfortable awarding economic damages for out-of-pocket expenses AND I am comfortable awarding noneconomic damages for pain and suffering, loss of enjoyment of life, and other injuries that are not tied to a specific out-of-pocket cost.
>
> [2.] I am comfortable awarding economic damages for out-of-pocket expenses BUT I DO NOT think there should be an award for noneconomic damages because they are not tied to specific out-of-pocket costs.

Salerno et al, *LHB Voir Dire OSF Materials vh*, OSFHOME 64 (June 13, 2021), https://osf.io/tdv9b.

This nuanced question invites jurors to reflect upon and consider their opinions on noneconomic damages, which could result in the exposure of biases that the potential jurors might not even realize they have. As a result, you are provided with real insight into how they might view the issue during trial, and whether or not they might be problematic to your case.

One of the biggest challenges voir dire poses is persuading potential jurors to speak candidly about their opinions and biases—a challenge further compounded by jurors who are operating with implicit biases. The extended voir dire method offers trial lawyers their best chance of unearthing all kinds of biases among potential jurors. Recognition of these biases is very important for lodging challenges for cause, or for when you are tasked with exercising peremptory strikes.

Conclusion

Empaneling a fair and impartial jury is of paramount importance to ensure just verdicts. Therefore, it is critical for every trial lawyer to understand the types of questions they should ask to elicit the most knowledge about the opinions and biases of the jurors they will depend on to decide the outcome of their cases. Don't fool yourself into thinking that you can expose jurors' preconceived opinions and biases merely by asking superficial or close-ended questions. Nor can you rely on jurors to self-identify and report their biases.

You—and your clients—are better served if you focus your time and energy on asking in-depth, probing questions that expose unfavorable opinions, discerning their potential impact on your case, and addressing them as necessary. Developing the skills to ask the right questions to expose juror bias could mean all the difference between a verdict for or against your client in your next case.

Chemical & Toxic Torts:

A Practice Update on Personal Jurisdiction

By Luis Leitzelar

Over the past decade, the U.S. Supreme Court and lower courts have addressed the scope of general and specific jurisdiction, with significant implications for product liability and toxic tort cases.

Personal jurisdiction is a constitutional safeguard meant to protect defendants from being sued in forums in which they do not have sufficient minimum contacts. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Defendants can move to dismiss a case if the forum state lacks personal jurisdiction, which may be either general or specific.

Over the past decade, the U.S. Supreme Court and lower courts have addressed the scope of general and specific jurisdiction, with significant implications for product liability and toxic tort cases.

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General Jurisdiction

General jurisdiction (all-purpose jurisdiction) exists when a defendant has such substantial contacts with a forum that it is essentially "at home" in the forum and can be subject to any claim there, irrespective of whether the lawsuit relates to the forum. *See Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915, 924-25 (2011) (holding that North Carolina state court lacked general jurisdiction over foreign subsidiaries of U.S. tire manufacturer and rejecting North Carolina's stream of commerce analysis to establish general jurisdiction).

Instructed by *Goodyear*, the Supreme Court in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), found that a corporation is typically only "at home" in its "place of incorporation and principal place of business." In a footnote, the Court stated that it could not foreclose the possibility that in an "exceptional" case, "a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that state." *Id.* at 139 n.19. The Court held that general jurisdiction was lacking in California despite Daimler's sale of $4.6 billion in the state, noting that "[a] corporation that operates in many places can scarcely be deemed at home in all of them." *Id.* at 139 n.20.

Three years later, in *BNSF Ry. Co. v. Tyrrell*, 581 U.S. 402 (2017), the Supreme Court further narrowed general jurisdiction, rejecting the argument that BNSF could be considered "at home" in Montana because the company had over 2,000 miles of railroad track and more than 2,100 employees in the state. *Id.* at 414. According to the Court, these contacts were not substantial enough for general jurisdiction because they represented only a small portion (less than 6%) of BNSF's total personnel and track mileage in the United States. *Id.* at 406.

The Supreme Court's rulings in *Daimler* and BNSF are of particular significance to defendants in product liability and toxic tort litigation, where hundreds or thousands of plaintiffs can sue the same defendant manufacturer over the same product or tort. Narrowing the venues in which defendants are considered "at home" can critically curtail plaintiffs' efforts to "forum shop" for perceived and actual favorable courts.

In an attempt to erode *Daimler* and *BNSF*, plaintiffs have turned to "consent" arguments to broaden general jurisdiction. For instance, plaintiffs will argue that defendants "consent" to jurisdiction in any state where they register to do business. Generally, courts have held that registration to do business in a state, standing alone, is not a basis for general jurisdiction. *See, e.g., Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492, 499 (2d Cir. 2020) (noting that there were "constitutional concerns… including that such a regime could justify the exercise of general jurisdiction over a corporation in a state in which the corporation had done no business at all… and that every corporation would be subject to general jurisdiction in every state in which it registered, and Daimler's ruling would be robbed of meaning by a back-door thief"); *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1318-22 (11th Cir. 2018) (registration to do business in Florida was not express or implicit consent to subject corporate defendant in a product liability suit to jurisdiction in the state).

Mallory v. Norfolk Southern

In reaction to the Supreme Court's narrowing of general jurisdiction, courts and state legislatures have sought to expand the consent argument. *See, e.g., Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 652-53 (E.D. Pa. 2016) (holding that "Pennsylvania law imposes a basis for personal jurisdiction over a business if the business qualifies as a foreign corporation in the state" and that "[t]he ruling in Daimler does not eliminate consent to general personal jurisdiction over a corporation registered to do business in Pennsylvania"). In 2021, the Pennsylvania Supreme Court held that the Pennsylvania statute violated the U.S. Supreme Court's general jurisdictional rulings in *Goodyear & Daimler. See Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 571 (Pa. 2021) (deeming the state statute "legislatively coerced consent," which violated the defendants' due process and personal jurisdiction rights). The *Mallory* plaintiff, diagnosed with colon cancer, alleged occupational exposures to toxic chemicals while working for Norfolk Southern, a Virginia corporation. Even though he did not allege that any exposures occurred in Pennsylvania, Mallory argued that by registering to do business in Pennsylvania, Norfolk Southern should be subject to general personal jurisdiction in Pennsylvania state court.

Last year, the U.S. Supreme Court granted the *Mallory* plaintiff's writ application to review the Pennsylvania Supreme Court's decision. *See Mallory v. Norfolk S. Ry. Co.*, 142 S. Ct. 2646 (Apr. 25, 2022). The Supreme Court heard oral argument on the *Mallory* case on November 8, 2022. The Court may rule on the issue of whether a company can be sued in a state solely based on the fact that it has registered to do business there. There is precedent to support the assertion of personal jurisdiction. More than a century ago, while still operating under the "territorial approach to personal jurisdiction" espoused in *Pennoyer v. Neff,* 95 U.S. 714 (1878), the Supreme Court held in *Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co.*, 243 U.S. 93 (1917), that such a case could proceed under a consent by registration theory.

In its seminal case of *International Shoe* requiring "minimum contacts," the Court did not overrule *Pennsylvania Fire*, nor did it address the continued viability of the consent by registration theory. The Supreme Court in *Mallory* could ultimately decide that a corporation can be considered to be "at home" at a place other than its principal place of business or incorporation as an "exceptional case" for purposes of *Daimler*. As a textbook example of an "exceptional case," the Court in *Goodyear* and *Daimler* cited *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 448 (1952), where it held that where war had forced the foreign corporation's owner to relocate its business temporarily from the Philippines to Ohio, Ohio then became the center of the corporation's activities, which was sufficient to confer Ohio courts with general jurisdiction over the foreign corporation.

As every state in the country has a corporate registration statute, if the court were to uphold Pennsylvania's consent-by-registration theory, it could sound the death knell for the general and specific personal jurisdiction as we know it and open the door for rampant venue and forum shopping. *See, e.g., Chavez v. Bridgestone Ams. Tire Ops., LLC*, 503 P.3d 332, 339

(N.M. 2021) ("consent by registration theory of personal jurisdiction... is a relic of the now-discarded *Pennoyer*... era of personal jurisdiction jurisprudence"); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 132 (Del. 2016) (finding consent by registration unconstitutional and noting that "two recent U.S. Supreme Court decisions, *Goodyear and Daimler*, made a major shift in our nation's personal jurisdiction jurisprudence—a shift that undermines the key foundation upon which prior federal cases like [*Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 170, 175 (1939)] and *Pennsylvania Fire* relied").

Given the Supreme Court's contraction of specific jurisdiction, we should expect product liability plaintiffs to continue to rely on the "stream of commerce" theory.

Specific Jurisdiction

Specific jurisdiction (case- linked or conduct- linked jurisdiction) can be invoked even when a defendant has few contacts with the forum, as long as the claim arises directly out of those contacts. To exercise personal jurisdiction, a court must find (1) the defendant purposely availed itself of the privileges of conducting activities within the forum; (2) the plaintiff's claim "arises out of or relates to" the defendant's conduct in the forum state; and (3) the exercise of jurisdiction must be reasonable under the circumstances. *See Walden v. Fiore*, 571 U.S. 277, 284-85 (2014).

Bristol Myers Squibb

In 2017, the Supreme Court decided *Bristol-Myers Squibb Co. v. Superior Court of California*, 582 U.S. 255 (2017), wherein it significantly limited specific jurisdiction in product cases. BristolMyers, a pharmaceutical company, was sued in a product liability lawsuit in California state court by both resident and non-resident plaintiffs. The non-resident plaintiffs comprised eighty percent (80%), or nearly 600 of the 678 plaintiffs, who did not claim to have suffered harm in California. The Court held that specific jurisdiction could be exercised over the claims of the resident plaintiffs who lived, purchased, or were prescribed Plavix in California. However, the non-resident plaintiffs, whose claims had no relation to California, could not piggyback their claims onto those of the California residents to establish specific jurisdiction. Justice Sotomayor dissented from the majority opinions in *BristolMyers* and *BNSF*, specifically noting that the Court was imposing substantial curbs on general jurisdiction by holding that a corporation that engages in a nationwide course of conduct cannot be held accountable in a state court unless all the people were injured in the forum state. *Id.* at 269.

BristolMyers has been applied by courts across the country to prevent forum shopping by out-of-state plaintiffs asserting product liability claims. *See, e.g., LG Chem, Ltd. v. Super. Ct. of San Diego Cnty.* (2022) 80 Cal. App. 5th 348, 370, *rev. denied* (Oct. 12, 2022) ("Since Lawhon's product liability claims have no demonstrated connection to LG Chem's sales of 18650 batteries in California, specific jurisdiction is lacking."); *Miller v. LG Chem, Ltd.*, 281 N.C. App. 531, 540 (2022) (granting motion to dismiss because "'stream of commerce' theory of jurisdiction over Defendants violates due process, is contrary to established precedents, and is invalid"); *Wallace v. Yamaha Motors Corp., U.S.A.*, 2022 WL 61430, at *4 (4th Cir. Jan. 6, 2022) ("Wallace offers no facts to connect her specific claims to Yamaha's actions in South Carolina."); *Davis v. Cranfield Aerospace Sols. Ltd.*, 2022 WL 36488, at *8 (D. Idaho Jan. 4, 2022) ("This … is a tort case involving all out -of-state plaintiffs, an out-of-state accident, and an out-of-state defendant. No party alleges any harm suffered in Idaho[.]"); *Sloan v. Gen. Motors LLC,* 2020 WL 1955643, at *4 (N.D. Cal. Apr. 23, 2020) ("[T]he Court followed "the growing weight of authority" that has applied *Bristol-Myers* to federal courts sitting in diversity and concluded that the exercise of pendent personal jurisdiction as to Plaintiff Szep's claims would be improper."); *Gebel v. Ethicon, Inc.*, 2020 WL 888729, at *3 (E.D. Mo. Feb. 24, 2020) (granting motion to dismiss because non-Missouri plaintiffs did not allege facts connecting the product to their contacts with Missouri); *In re Zostavax (Zoster Vaccine Live) Prods. Liab. Litig.*, 358 F. Supp. 3d 418, 423-424 (E.D. Pa. Jan. 7, 2019) (defendant's in-state activities not involving the alleged injury-causing product were not jurisdictional contacts).

In class action cases, however, courts are split on the application of *BristolMyers* to putative class members' claims. Certain courts have found *BristolMyers* requires dismissal of non-resident putative class members' claims that have no connection to the forum state. *See, e.g., Carpenter v. PetSmart, Inc.*, 441 F. Supp. 3d 1028, 1037 (S.D. Cal. 2020) ("[s]ome courts, including this one, have found that *Bristol-Myers* applies to the claims of non-resident named plaintiffs in a case involving state-specific classes concerning the same product"); *Chavira v. OS Rest. Servs., LLC*, 2019 WL 4769101, at *6 (D. Mass. Sept. 30, 2019) (granting motion to strike non-resident class action allegations, noting that *BristolMyers* applies to all cases, including class actions). Certain courts have refused to extend *BristolMyers* to the class action context, declining to dismiss the claims of non-resident putative class members. *See, e.g., Partida v. Tristar Prod., Inc.*, 2021 WL 4352374, at *5 (C.D. Cal. Aug. 5, 2021) (noting that the Supreme Court in *Bristol-Myers* did not address whether its holding extended to the class action context and "… the weight of authority examining this issue[, which] has concluded that Bristol-Myers does not apply to class actions."); *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 297-98 (D.C. Cir. 2020) (holding it is premature to raise issue of personal jurisdiction as to unnamed putative class members claims before a class is certified); *In re Takata Airbag Prod. Liab. Litig.*, 396 F. Supp. 3d 1101, 1134-37 (S.D. Fla. 2019) (denying motion to dismiss claims of non-resident putative class members in MDL where jurisdiction was based on federal question); *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 443 (7th Cir. 2020) (*BristolMyers* does "not apply to the case of a nationwide class action filed in federal court under a federal statute"), *cert. denied*, 2021 WL 78484 (U.S. Jan. 11, 2021).

Indeed, courts have noted the fundamental differences between mass joinders and class actions in determining the impact of *Bristol Myers. See, e.g., Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 247 n.4 (5th Cir. 2020) (discussing split of authority over application of *Bristol Myers* to class actions brought in federal court); *Rosenberg v. LoanDepot.com LLC*, 435 F. Supp. 3d 308, 326 (D. Mass. 2020) ("A mass tort action is fundamentally distinguishable from a class action. This court joins the large majority of district courts which have held the Bristol Myers case inapplicable to class actions such as the instant [mass tort action]."); *Cabrera v. Bayer Healthcare, LLC*, 2019 WL 1146828, at *7-8 (C.D. Cal. Mar. 6, 2019) (discussing split of authority and holding that "decisions concluding that *Bristol-Myers* does not apply in the class action context are more persuasive").

Given the Supreme Court's contraction of specific jurisdiction, we should expect product liability plaintiffs to continue to rely on the "stream of commerce" theory. Under the Fifth Circuit's stream of commerce approach, the minimum contacts requirement is satisfied if the court "finds that the defendant delivered the product into the stream of commerce with the expectation that it would be purchased by or used by consumers in the forum state." *Ainsworth v. Moffett Eng'g, Ltd.*, 716 F.3d 174, 177 (5th Cir. 2013). Courts have generally held that a defendant's placement of products into the stream of commerce, alone, does not establish jurisdiction, even if that product ultimately causes an alleged injury in the forum. *See, e.g., M.S. v. W. Power Sports, Inc.*, 2021 WL 83393, at *3 (W.D. Pa. Jan. 11, 2021) (applying the "stream of commerce"-plus theory); In *re: DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*, 888 F.3d 753, 778-79 (5th Cir. 2018) (noting that this "issue divides the circuits" and taking "Justice Brennan's more expansive view" in *Bristol-Myers* that "awareness that a product will be sold in the forum state suffices to support jurisdiction").

Ford Motor v. Montana

The Supreme Court recently decided the case of *Ford Motor Co. v. Montana Eighth Judicial Dist. Court,* 141 S. Ct. 1017 (2021), where it rejected the defendant's "causation-only" argument, i.e., that the defendant's forum conduct must give rise to the plaintiff's claims to support specific jurisdiction. There, Ford sold allegedly defective cars outside the forum States (Montana and Minnesota), with consumers later selling them to those States' residents. After establishing that Ford did have minimum contacts with either of the forum states, which Ford did not contest, the Supreme Court focused on the second requirement for personal jurisdiction, that the conduct must "arise out of or relate to" the minimum contacts with the forum. Pointing to the "or relate to" portion of the Supreme Court test, the Court rejected Ford's contention that the minimum contacts must have a direct causal relationship to the damages sought by the plaintiffs. An automaker regularly marketing a vehicle in a state, the Court said, has "clear notice" that it will be subject to jurisdiction in the state's courts when the product malfunctions there, regardless of where it was first sold.

The Court in *Ford* did not mention the "stream of commerce" argument advanced by the plaintiffs. But that has not stopped product liability plaintiffs from citing *Ford* while arguing that a manufacturer placing its products in the stream of commerce supports the exercise of specific jurisdiction. *See, e.g., Thurman v. Am. Honda Motor Co., Inc.*, 2022 WL 4292331 (W.D. Mo. Sept. 16, 2022) ("A manufacturer's "'strategic choice of distributors that could reach much of the country [is] evidence of [its] efforts to place its products in the stream of commerce'"); *cf. Lorenzen v. Toshiba Am. Info. Sys., Inc.*, 569 F. Supp. 3d 109 (D.R.I. 2021) (stating *Ford* "expanded the constitutional reach of personal jurisdiction" in cases where a company serves a market for a state and product causes injury to a resident of that state).

Imputing Personal Jurisdiction

In *Stein v. E.I. du Pont de Nemours & Co.*, 879 S.E.2d 537 (N.C. Nov. 4, 2022), the North Carolina Supreme Court recently expanded the concept of personal jurisdiction in the area of toxic torts and product liability. Prefacing the opinion with the observation that "personal jurisdiction is a shield—not a sword" and that "it is not a tool to be weaponized against claimants by enabling defendants to evade accountability for potentially tortious conduct," the *Stein* court allowed a predecessor's personal jurisdiction to be imputed to its corporate successors to establish personal jurisdiction even where the successor itself had no direct contact with the forum state.

Here, E.I. DuPont de Nemours and Company (Old DuPont) underwent a significant corporate reorganization and transferred millions of dollars in assets to out-of-state companies, creating substantial losses for itself. In 2020, the State of North Carolina brought an action against Old DuPont and its corporate successors, including Chemours, New DuPont, and Corteva, alleging that Old DuPont knowingly operated a plant in Fayetteville, North Carolina that released per- and polyfluoroalkyl substances (PFAS) into the environment for over 40 years.

New DuPont and Corteva moved to dismiss the State's action, arguing personal jurisdiction could not be exercised over them because they were Delaware holding companies who did not conduct business in North Carolina. The trial court held that jurisdiction was established by imputing Old DuPont's liabilities to Corteva and New DuPont, and New DuPont appealed.

The parties agreed that Corteva and New DuPont were not subject to general jurisdiction in North Carolina state court. The question then was whether they were subject to specific jurisdiction. The court ruled that North Carolina law permitted a predecessor company's liabilities to be imputed to its corporate successors, making jurisdiction over out-of-state successors proper under the Due Process Clause. Specifically, the *Stein* court reasoned that because Corteva and New DuPont expressly assumed Old DuPont's PFAS-related liabilities via an April 2019 separation agreement and a June 2019 letter agreement, Corteva and New DuPont's conduct and connection with the forum state were such that they should have reasonably anticipated being sued in North Carolina state court.

The court declined to recognize mergers as the sole circumstance in which successor jurisdiction was appropriate. If that were the case, companies could avoid liability for tortious conduct simply by forming a new, out-of-state company instead of effectuating a merger. A company cannot expressly assume liabilities from its predecessor, fail to limit those liabilities geographically, and then disclaim liability based on the notion that it did not expect to be brought to court in a particular forum. Moreover, when companies undergo complicated transactions like that between Old DuPont, Corteva, and New DuPont, they conduct extensive due diligence, and the new parties either were aware of, or should have been aware of, the liabilities they might have acquired.

The North Carolina Supreme Court cited federal court case law holding that the Supreme Court's pronouncement that the due process requirements of *International Shoe* "must be met as to each defendant over whom a state court exercises jurisdiction" does not preclude us from imputing the jurisdictional contacts of a predecessor corporation to its successor corporation or individual alter ego. *See Patin v. Thoroughbred Power Boats Inc.*, 294 F.3d 640, 653 (5th Cir. 2002); *City of Richmond v. Madison Mgmt. Grp., Inc.*, 918 F.2d 438, 454 (4th Cir. 1990) ("'The great weight of persuasive authority permits imputation of a predecessor's actions upon its successor whenever forum law would hold the successor liable for its predecessor's actions.'" (quoting *Simmers v. Am. Cyanamid Corp.*, 576 A.2d 376, 385 (Pa. 1990))).

Courts are increasingly imputing personal jurisdiction over out-of-state parent and affiliated companies using successor liability and alter ego principles. *See, e.g., Ewalt v. Gatehouse Media Ohio Holdings II, Inc.*, 2021 WL 825978, at *6 (S.D. Ohio Mar. 4, 2021) ("An out-of-state parent exerting a large degree of control over its in-state subsidiary's corporate activities risks being hauled into the forum state.") (citing *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1069 n. 17 (9th Cir. 2000)) ("Although jurisdiction over a subsidiary does not automatically provide jurisdiction over a parent... where the parent totally controls the actions of the subsidiary so that the subsidiary is the mere alter ego of the parent, jurisdiction is appropriate over the parent as well."); *Verizon Trademark Servs., LLC v. Prods., Inc.*, 810 F. Supp. 2d 1321, 1329 (M.D. Fla. 2011) (noting that while personal jurisdiction over a Florida parent corporation will generally not equate to personal jurisdiction over a subsidiary, "[a]n exception arises when the subsidiary is merely the alter ego or mere instrumentality of the Florida parent corporation, over which the Court does have personal jurisdiction" but that "[t]he corporate veil will not be penetrated... unless it is shown that the corporation was organized or employed to mislead creditors or to work a fraud upon them."); *FTC - Forward Threat Control, LLC v. Dominion Harbor Enter., LLC*, 2020 WL 5545156, at *7 (N.D. Cal. Sept. 16, 2020) ("The standard for personal jurisdiction under an alter ego theory is lower than the standard for liability under an alter ego theory.").

Conclusion

Consent, stream of commerce, and imputation arguments threaten to broaden personal jurisdiction and enable forum shopping by plaintiffs seeking to make defendants answerable in states and forums beyond where they are at home or transact business. Defendants should keep a close eye on court decisions that could significantly impact the forums available in products and toxic tort cases.