For The Defense™

dri™

The magazine for defense, insurance and corporate counsel

May 2023

Insurance Law and Aviation Law

Including . . .

Appeal Bonds 101: For Insurers and Insureds

Also in This Issue . . .

The Great Aircraft Robbery: How Russia's Invasion of Ukraine Inadvertently Created a Flurry of Aviation Insurance Litigation

Birth Injury Litigation's New Targets: Pediatricians, Neonatologists, and Neonatal Hypothermia

And More!

A New Era in Partnerships

For over 60 years DRI has been the leader in providing resources and thought leadership to the civil defense community.

Today, we look to further advance the profession by creating Partnerships with organizations that are ready to work in concert to shape the future.

DRI welcomes LawyerGuard as our inaugural Premier Corporate Partner—we look forward to collaborating on a number of exciting new initiatives in support of the interests of business and individuals in civil litigation.

LawyerGuard®
An Insurance Program for Lawyers

Learn more about DRI and our Premier Corporate Partners at dri.org/partners.

dri PREMIER CORPORATE PARTNER

For The Defense
Vol. 65, No. 5 May 2023

For The Defense, May 2023, Vol. 65 Issue 5 (ISSN 0015-6884).

Published ten times per year by DRI, 222 South Riverside Plaza ~ Suite 1870, Chicago, Illinois 60606. Telephone: (312) 795-1101. Fax: (312) 795-0747.

Correspondence and manuscripts should be sent to the Director of Communications, *For The Defense.*

INSURANCE LAW

AVIATION LAW

SEXUAL TORTS

MEDICAL LIABILITY AND HEALTH CARE LAW

PRODUCT LIABILITY

LITIGATION SKILLS

DRI Services

222 S. Riverside Plaza, Ste 1870
Chicago, Illinois 60606
Phone (312) 795-1101
Fax (312) 795-0747
Internet www.dri.org
E-mail dri@dri.org
Hours 8:30-4:30 CST, M-F

DRI Staff Contacts
(direct-dial numbers in
area code 312).

· DRI Committees
E-MAIL: committees@dri.org
Denise Eichhorn, 698-6222

· Annual Meeting
E-MAIL: annualmeeting@dri.org

· Marketing
E-MAIL: marketing@dri.org
Trish Cleary, 698-6272

· Sponsorships
E-MAIL: jstults@dri.org
John Stults, 698-6216

· Expert Witness Database
E-MAIL: ewd@dri.org
John Hovis, 698-6218

· *For The Defense*
E-MAIL: FTD@dri.org

· *In-House Defense Quarterly*
E-MAIL: IDQ@dri.org

· *The Voice*
E-MAIL: TheVoice@dri.org

· And The Defense Wins
E-MAIL: DefenseWins@dri.org

· Seminars
E-MAIL: seminars@dri.org

· Webconferences/CLE
E-MAIL: webinars@dri.org

· Customer Service
E-MAIL: custservice@dri.org
Shnese Ingram, 698-6255

DRI 2023 ANNUAL MEETING

SAVE YOUR SPOT

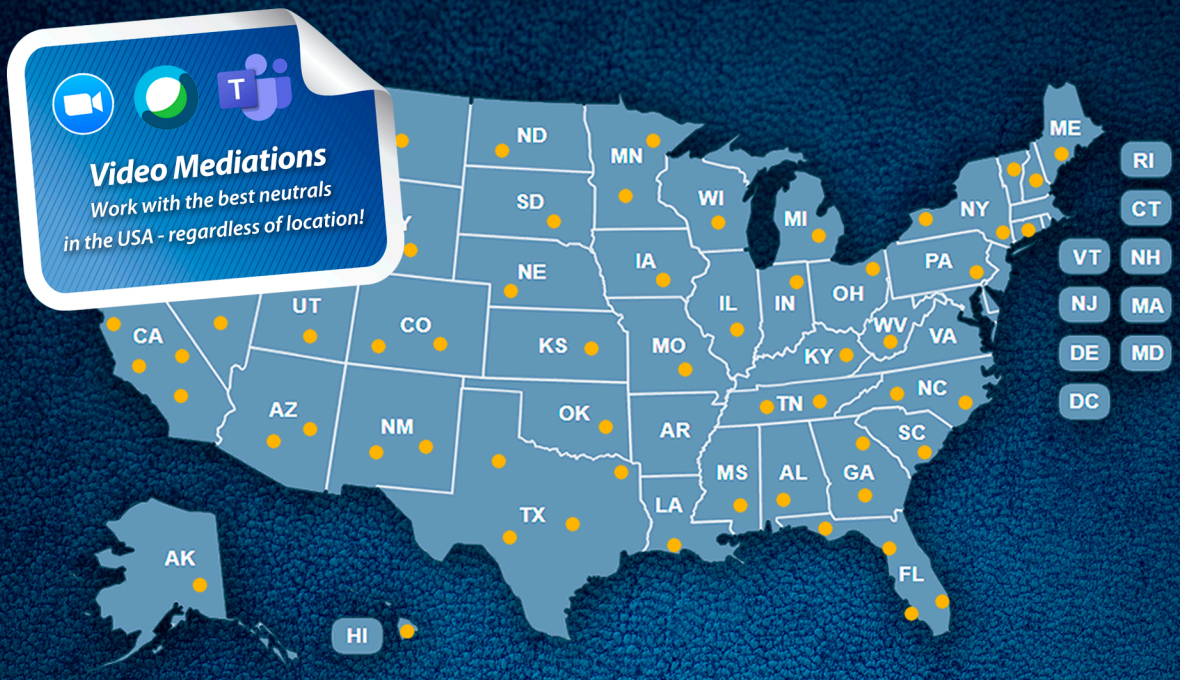
OCTOBER 25 to 27, 2023

Free Database

THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

America's Most Experienced Civil-Trial Mediators & Arbitrators

Finding the right neutral for your case has never been easier...



Check detailed bios and live Available Dates Calendars for over 1000 of the nation's top litigator-rated neutrals

www.NADN.org

Over 575,000 mediations and arbitrations scheduled online since 2015, by more than 20,000 firms across the US.

NADN is proud to partner with the national defense and plaintiff bar associations.
Visit our DRI Neutral Database at DRI.org/neutrals

dri™

AMERICAN ASSOCIATION FOR JUSTICE®
The Association for Trial Lawyers

Appeal Bonds 101

For Insurers and Insureds

By Dan Huckabay

Staying enforcement of a judgment using appeal bonds is a topic most practitioners only have vague familiarity with, but the implications are often significant. This article provides a primer on the basics that will arm attorneys with the knowledge and tools they need to serve their clients that are faced with a judgment.

Many civil defense attorneys only have a vague idea of what appeal bonds are, and they're not something you hope to deal with often. After all, no one wants to lose a case, and even in those rare circumstances when there is a judgment rendered that a client wants to appeal, the insurers may handle procuring the appeal bond themselves. Despite the infrequency with which civil defense attorneys need to deal with appeal bonds, knowing the basics is extremely important, because what's at stake is usually very significant. Much like an emergency kit for a natural disaster, you need to have this information in hand before the event strikes in order for it to have value. This article will provide that emergency kit while addressing the key unique elements relating to insurers and insureds applying for such a bond.

What Are Appeal Bonds?

In almost all state and federal courts the filing of an appeal of a monetary judgment does not in and of itself stay enforcement of the judgment. Many jurisdictions, but not all, have some form of automatic stay after a judgment is entered, but the timeframe is relatively short. For example, Federal Rule 62 stays enforcement for "30 days after entry, unless the court orders otherwise." In order for appellants to stay enforcement during the course of the appeal, almost all state and federal courts require the appellant to post security with the court for the protection of the judgment creditor. This stops the collection efforts by the judgment creditor, thereby benefiting the appellant, and it protects the judgment creditor by providing them a source of payment for the judgment if it is upheld on appeal.

Appeal bonds, also called supersedeas bonds, are the most common form of security used, and they are provided by surety companies (also referred to as bond companies). Surety or bond companies are insurers, some of which are monoline specialty carriers, meaning they only provide the one product. Other providers are divisions of large multiline insurance companies that provide a variety of insurance products. Like many insurance products, surety bonds are primarily written through insurance agents.

When issuing an appeal bond, the surety company is issuing a guarantee on behalf of the appellant to the judgment creditor, stating that if the judgment is affirmed and the appellant doesn't satisfy the judgment, the surety will pay up to the bond amount.

The Amount of the Appeal Bond

Each state and federal district court has their own rules for setting the bond amount. Some states, like California, Michigan, and New Mexico, use a fixed number that the judgment is multiplied against. The multiplier used in California is 1.5 times the judgment amount (CCP 917.1), Michigan is 1.25 times (Mich. Ct. R. 7.108), and New Mexico is 2 times (New Mexico Statues Chapter 39, Article, 3, Section 39-33-22).

Other jurisdictions like Illinois (Rule 305 - Stay of Judgments Pending Appeal) require the bond amount to be for the judgment plus costs and post-judgment interest that is estimated to accrue during the course of the appeal. It is important to confirm the appropriate interest rate to be used as specified by the rules; in some instances where there is ambiguity as to the interest rate or length of time that the interest should be applied, it can be best to file a motion to the court to approve the bond amount.

In terms of the judgment amount, it is also necessary to review the local rules to determine whether the entire judgment

Dan Huckabay is president of Court Surety Bond Agency and an active member of DRI. He has underwritten appeal bonds in almost every state and federal district court for clients ranging from individuals to Fortune 500 companies. In addition, he has delivered numerous presentations across the country on appeal bonds and authored dozens of published articles. He has also served as an expert witness in several cases where appeal bonds represented a central issue.

needs to be bonded. Some jurisdictions, such as Texas (Rule 24.2 Amount of Bond, Deposit, or Security), only require bonding for compensatory damages and exclude punitive damages.

Many states have caps on the appeal bond amounts that appellants are required to file, regardless of the judgment amount. Kansas (Supersedeas Bonds; SB 199) and Georgia (Georgia Code Title 5. Appeal and Error § 5-6-46 b), for example, require a maximum bond amount of $25 million.

Difference between Appeal Bonds and Insurance

There are three main differences that distinguish surety bonds from most insurance products:

1) The appellant applying for the surety bond derives no direct benefit. Instead, the bond provides a benefit to a third party, the judgment creditor.
2) Unlike insurance, where losses are expected and actuarially priced in, appeal bonds are underwritten and priced to theoretically not have losses. Therefore, they are underwritten conservatively since the premiums are generally not sufficient to make up for losses.
3) Sureties require the appellant to indemnify and reimburse the surety against losses under the bonds, a feature that does not exist in typical insurance policies.

How Appeal Bonds Are Underwritten

Since appeal bonds are underwritten to theoretically not have losses, sureties must evaluate whether the appellant will have the financial resources to satisfy the judgment at some unknown point in the future when the appeal is concluded. Given that appeals can take many years and the bonds cannot be canceled, the surety must be very confident in the appellant's financial capabilities. If the surety believes the appellant will have the means to satisfy the judgment if upheld on appeal, they will provide the bond based on the indemnity of the appellant without any collateral being required.

When evaluating a business in need of an appeal bond, surety companies will generally consider the overall economic environment, how long the business has been in operation, the specific market(s) the company provides its product or services to, and the financial strength of the company, including that of any parent

companies or affiliates that are able and willing to indemnify the surety company.

For sureties to determine whether the financial strength of a company is adequate to provide the necessary confidence that the business will be able to satisfy the judgment, sureties study the company's financial statements for the past several years. They look for the consistency and level of profitability in past financials, as well as whether those profits are likely to remain in the future during the course of the appeal. From a balance sheet perspective, sureties will look at the company's liquidity, including cash balances and available lines of credit. Sureties generally want a company's cash and cash equivalents along with availability under lines of credit to be well in excess of the bond amount required. Further, sureties want the lines of credit to have expiration dates of at least a year, or preferably two years in the future, to raise the surety's confidence of the line's availability. Sureties will also look at long-term debt to evaluate whether the company's cash flow is adequate to cover the ongoing debt obligations.

Surety companies will also review corporate debt ratings from third-party rating agencies, such as Standard & Poor's, Moody's, and Fitch. They will typically only provide bonds on an uncollateralized basis to companies rated as investment-grade by the rating agencies. Companies that are noninvestment grade are considered to be a much higher risk of default on their loan obligations, which directly impacts the value of the indemnity provided to a surety company.

Let's look at an example: If a company needed an appeal bond for $1 million and it had $1 million in cash, a surety company would require collateral, because there is a great amount of uncertainty whether that $1 million in cash would be available in 2 years to pay the judgment when the appeal was concluded. If on the other hand, the same company had $20 million in cash and all other things about the company's performance were positive, the surety would have much greater certainty that the company would be able to satisfy the judgment on their own. While there are no ratios set in stone and there are many variables considered, this generally gives a sense of the surety company's considerations.

When Collateral is Required by Sureties

When an appellant doesn't meet the surety's qualifications, the surety company will require collateral to secure the appeal bond. While there are times when a surety company will accept collateral for a percentage of the appeal bond amount, generally they require collateral in the full amount of the bond. Similar to jumping out of the plane to go skydiving, the skydiver wants to be 100% confident their parachute is packed correctly, because the consequences are so severe. As a result, if someone were told beforehand that there was only an 80% chance their parachute was packed correctly, they would probably choose not to jump. Surety companies approach appeal bonds needing the same level of certainty.

On rare occasions, surety companies will approve less than 100% collateral when the appellant is very qualified but is lacking slightly in one or two small areas. In these circumstances, the surety company has a very high degree of confidence that the appellant will be able to satisfy the judgment, but there is something causing a twinge of uncertainty. For example, perhaps a company is very strong and has a good track record, but the economic environment is impacting their particular marketplace, and it is hard to see how that will play out over the next couple of years during the appeal. Generally, if a surety agrees to accept partial collateral, they will charge a higher premium rate for the appeal bond to compensate for the additional risk they believe they are taking on.

Types of Collateral That Sureties Accept

Surety companies will accept four different types of collateral to secure appeal bonds.

Cash

While cash is one of the most well-known forms of collateral that can be used to secure appeal bonds, it is also one of the least understood in terms of its benefits. Part of the confusion arises because some courts will actually accept cash directly in lieu of an appeal bond, which makes people wonder why they would purchase an appeal bond and pay a premium rather than just pay cash into the court directly.

The first main advantage is that some sureties will pay interest on the cash deposits, whereas the courts often pay little to no interest. There are even some courts that charge for the cash deposit. The amount of interest paid by sureties changes depending on the interest rate environment in the overall economy. These interest rates often equal or exceed the premium rate for the bond, leaving the client in a neutral or a net positive position.

When an appellant doesn't meet the surety's qualifications, the surety company will require collateral to secure the appeal bond.

For larger cash deposits, some sureties offer options that allow appellants to invest in short-term U.S. Treasuries. Again, the interest rate for U.S. Treasuries fluctuates, but as of the writing of this article, the 12-month U.S. Treasury rate is in excess of 4%.

Bank Letters of Credit

Letters of credit are provided by banks and are essentially a promise to pay on demand to the surety up to a certain dollar amount (usually equal to the bond amount). Letters of credit are viewed similar to cash by surety companies due to their liquid nature. The surety company must approve the bank, because essentially, the risk the surety undertakes in these scenarios is the bank failing and the surety not being able to draw under the letter of credit. The sureties also have their own letter of credit format that needs to be provided to the bank.

For appellants with established banking relationships, these often prove to be a good option, and a letter of credit can be obtained within a week or two. For those appellants that do not have established banking relationships, the process with their bank is akin to applying for a loan and can take several weeks. In some instances, a bank might require the letter of credit to be secured by cash, and in those cases, it can often be better for the appellant to obtain a bond by directly providing the cash to the surety to avoid paying the letter of credit fee.

Insurance companies often require appeal bonds, and there are several nuances in the process that are unique to insurers.

Real Estate

Many are unaware that real estate is even an option to secure an appeal bond. Presently, there are only two surety companies in the marketplace that will accept real estate as collateral for appeal bonds. The sureties will primarily consider residential real estate (single and multi-family) and commercial properties (office, industrial and retail). In some limited instances, they will accept the raw land in very well-developed and high-demand areas.

Generally, the sureties will require an appraisal of the property (there can be exceptions) and title insurance, which the appellant is responsible for paying. The sureties discount the value of the property to account for potential market fluctuations, similar to how banks don't loan up to the full value of a property.

Marketable Securities

As with real estate, marketable securities are one of the lesser-known options available. Marketable securities are defined as money market funds, stock and bond investments, mutual funds, and exchange-traded funds (ETF's) held in a brokerage account. To be considered by a surety, the assets must contain high-quality stocks and bonds and be held in a non-retirement account. The first step in the process is to provide the surety company with the most recent account statement, so they can review the holdings. The value of the account typically needs to be more than the bond amount. The exact amount that the marketable securities need to exceed the bond amount by depends on the type of investments; for example, the value of a stock account will have to be much higher than a low-risk investment like short-term U.S. Treasuries.

After the surety determines that the assets are acceptable to secure the bond, they will need to enter into an account control or pledge agreement with the brokerage firm. Many brokerage firms have their own format, but the surety also has a standard form that can be used. This can take several weeks to get in place if there are aspects of the agreements that the surety and brokerage firm need to negotiate. If they cannot agree on a mutually acceptable format, the client is generally able to transfer their account to another brokerage firm that has an agreement acceptable to the surety.

When the client uses a brokerage firm owned by a bank, we often advise that they look into having the bank affiliate issue a letter of credit secured by their brokerage account. This can sometimes be the quicker and less costly option for the client.

Appeal Bond Costs

The premiums for appeal bonds are charged annually during the course of the appeal. The first year's premium is fully earned once the bond is issued, and any renewal premiums are prorated if the bond is exonerated midterm.

The premiums are based on three factors:

1) The financial strength of the appellant;
2) The size of the bond;
3) The type of collateral provided, if required.

The average premium rate is around 1% of the bond amount. The rates for financially strong appellants needing large bonds can go as low as 0.35%, and the highest rate is usually when real estate is used due to the illiquid nature, which costs 4%.

Appeal Bonds for Insurers

Insurance companies often require appeal bonds, and there are several nuances in the process that are unique to insurers. The first question that always needs to be addressed is whether the insurer has the obligation to post the appeal bond, or whether that lies with the insured. If the insurer does determine that they need to provide the appeal bond, then they must decide the amount they are obligated to bond. In most instances insurers will bond only up to their policy limits, because providing a bond in excess creates an additional liability if the judgment is affirmed. However, there are times when insurers will bond judgments in excess of their policy limits-- Susan Knell Bumbalo's article for DRI's For the Defense in October 2017 titled *Examining Insurers' Obligations to the Insureds Post-Verdict* does an excellent job of reviewing this topic in great detail.

Can Insurers Provide Their Own Appeal Bonds?

Yes, some insurers can provide their own appeal bonds, but contrary to popular belief, most insurers do not have the ability. As of 2023 there are 3,708 property-casualty insurers in the United States, according to IBISWorld. However, there are only 259 companies licensed to transact surety and approved by the Department of Treasury to provide bonds to the United States federal government or courts.

The Treasury Department assigns each approved surety an underwriting limitation, and when a surety issues a bond in excess of the assigned underwriting limitation, "the excess must be protected by coinsurance, reinsurance, or other methods in accordance with 31 CFR Section 223.10, Section 223.11."

Of the 259 surety companies that are approved by the Department of the Treasury, some still decide to go to an outside source. There are probably a variety

of reasons for this, but one is that in large companies it can sometimes be easier to go to an outside source than to coordinate between intercompany departments.

Appeal Bonds with Multiple Insurers

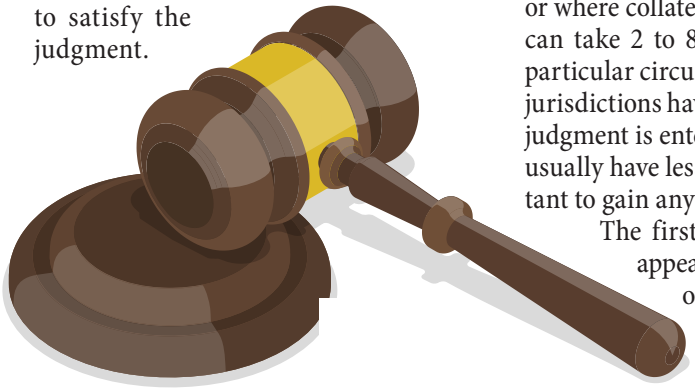
In some cases, there may be multiple insurance policies and insurers involved. In these situations, there are times where there will be a lead insurer appointed to coordinate getting one bond. Generally, each insurer will indemnify the surety for their respective portion of the bond (typically up to their policy limit). However, we have seen cases where a lead insurer makes the guarantee to the surety and coordinates their own agreements with the other insurers in the background. Insurers also sometimes choose to post separate bonds, each for their respective portion.

Setting up an Appeal Bond Facility

Some insurers choose to set up ongoing facilities with surety companies whereby they have signed a general indemnity agreement covering any bonds issued, which allows them to avoid signing an individual indemnity agreement for each bond. This can speed up the process for issuing the bonds, and it may be possible to obtain lower premium rates for the insurer based on the continuing relationship.

What Happens When an Insurer Doesn't Financially Qualify?

Not all insurers are created equal; some are very financially strong while others are not. Even when an insurer is reasonably strong, they may require an appeal bond for a large amount that equals a substantial portion of their surplus. Surety companies evaluate insurers just as they would any other business to determine whether they believe there is certainty that the insurer will be able to satisfy the judgment.



When an insurer is borderline on meeting the surety's qualifications, the surety company may want to ascertain whether there is any reinsurance involved in the case; if there is, getting confirmation of that coverage or possibly the indemnity of the reinsurer can sometimes be an option. Barring those options, there are times when a surety may determine that collateral is required.

Appeal Bonds for Insureds

The first step an insured should take is to determine whether the insurer is providing the bond for any portion of the judgment amount. Once the bond amount is known that the insured must obtain, the surety will evaluate the insured's qualifications.

If the insured is financially qualified, the appeal bond can be written on an uncollateralized basis. This most often occurs with publicly-traded companies, large private entities, and municipalities. When it comes to private entities, they will generally need to provide the surety with an audited financial statement from an outside CPA firm, but there can be exceptions with smaller bonds.

Small businesses and individuals will typically be required to provide collateral to the surety in one of the forms described earlier in this article. There are cases where very high net worth individuals can qualify for an appeal bond without collateral, but there are very few surety companies in the market that will consider it.

When to Start the Process

The general rule of thumb is that it is never too early to start the process for an appeal bond. For a very financially strong insurer or publicly-traded company, the process may only take a few days. For more complex situations involving multiple insurers or where collateral is required, the process can take 2 to 8 weeks depending on the particular circumstances. Given that some jurisdictions have no automatic stay after a judgment is entered, and those that do are usually have less than 30 days, it is important to gain any extra time possible.

The first step is to speak with an appeal bond broker to get a sense of the timing based on the circumstances and preferences of the client. Starting these discussions can happen as early as before the trial even begins, but often occurs before a verdict is rendered or the judgment is entered.

Post-appeal Status of the Bond

Appeals conclude in a variety of ways, and since the bond is tied to the underlying liability of the judgment, it means there is no one answer for how to close out a bond. When the appellate court issues their opinion, it's important to reach out to the surety. If the judgment was affirmed, in whole or part, advise the surety on how the appellant intends to satisfy the judgment or whether they would like the surety to satisfy it using the collateral they may be holding.

If the case is being appealed to a higher court or there are any disagreements over the amount due to the other party, which usually relates to the costs or interest calculation, it's important to communicate that to the surety. We also advise having the surety review any draft settlement agreements before they are finalized to ensure the proper language is included to exonerate the bond and release the surety from all liability.

Conclusion

Law professor Joseph Blocher of the Duke University School of Law was recently quoted in the May 2023 edition of the *ABA Journal* as saying, "The best lawyer isn't always the person who has memorized the most rules." The same is true for the subject of appeal bonds. Appeal bonds can be complex and incredibly nuanced, and attorneys don't need to memorize all the details outlined in this article. However, having at least a vague familiarity with the process for getting a bond in place and a reference to turn to for the details can enable attorneys to be alert to potential issues and allow them to guide their clients through the unchartered waters in an effort to help their clients protect their assets.

Should I Stay or Should I Go?

Recent Developments and Special Situations Impacting Removal in Insurance Cases

By Stephen P. Pate and Karl A. Schulz

This article will focus on recent developments in law governing removals as well as removals that involve special situations.

Discussion of removal is one of the most important early strategy questions in insurance litigation. 28 U.S.C. §1446(b)(1) provides:

> The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which the proceeding is based, or within 30 days after the service of the summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

Removal in insurance cases is typically going to be based on diversity jurisdiction and a careful evaluation will have to be made of whether diversity exists. This article will focus on recent developments in law governing removals as well as removals that involve special situations, such as the London market, limited liability companies, and improperly joined defendants. This article will also examine a unique procedure under Texas law to defeat improper joinder of adjusters.

Is Federal Court Really Better?

It's often assumed that the decision to remove should be automatic. Not so. Attorneys may wish to consider the following factors:

i. Who are the federal judges to whom the case will be removed?
ii. What is the federal judge's level of expertise regarding insurance? What is the state court judge's level of expertise regarding insurance by comparison?
iii. Are the federal judges hostile towards insurance cases?
iv. What is the federal judge's track record with regard to finding improper joinder of adjusters, since this is a typical issue upon removal?
v. Do you really have diversity? Do you have a forum defendant problem, is any defendant a citizen of the state in which the case was filed?
vi. If you are uncertain regarding whether diversity is complete, what is the federal judge's track record regarding allowing jurisdictional discovery?
vii. Would you be removing a case into an MDL, such as the Hurricane Laura and Hurricane Delta fast track protocol in the Western District of Louisiana? Would you be okay with the required procedures and one of the court-required neutrals?
viii. What are the differences, if any, between state jury pools and federal jury pools in your jurisdiction?
ix. Are you okay with what are likely to be stricter and more onerous disclosure and docket control deadlines, which can escalate costs early in litigation?
x. Are you considering an offer of judgment? Do the differences between the state and federal offer of judgment rules make a difference? In Texas, Texas Rule of Civil Procedure 167 is probably

Stephen P. Pate of Cozen O'Connor focuses his litigation practice on property insurance matters, Directors and Officers insurance matters, business interruption issues, CGL insurance matters, builders risk matters, commercial general liability insurance disputes, fraud, and various other extracontractual litigation matters. Over a 30-year career in coverage work, he has tried more than 45 first-party extracontractual cases to verdict. **Karl A. Schulz** of Cozen O'Connor is an experienced litigator who serves clients in the insurance industry. In particular, Karl has experience in first-party property claims and is widely published on the subject. Karl is a member of the State Bar of Texas Insurance Law Section.

not as strong or favorable to defendants as Federal Rule of Civil Procedure 68(d).

xi. Federal courts limit the availability of interlocutory appeals as compared to state courts.

Improper Joinder of Adjusters and Other Professionals

Policyholder plaintiffs often join local adjusters to destroy diversity and keep matters in state court, which is perceived to be more pro-plaintiff than federal court. *See SYP-Empire LC v. Travelers Cas. Ins. Co. of Am.*, 2015 U.S. Dist. LEXIS 61789, *3 (N.D. Tex. 2015) ("The joinder of a local claims adjuster in a state court action against a non-citizen insurance company in an attempt to avoid federal court jurisdiction apparently has become a popular tactic."). This practice is called "improper joinder" or "fraudulent joinder."

Adjusters are usually considered the agent of the insurer. An important threshold is whether a state's unfair claims practices statute even allows adjusters to be sued. Courts will also analyze whether the adjuster acted in the course and scope of his or her employment.

Texas, for example, recently enacted Section 542A of the Texas Insurance Code to address rampant improper joinder of adjusters. As discussed below, under the new law, an insurer can accept liability for the alleged wrongdoing of the adjuster, removing him or her from the diversity analysis, and enabling removal based on diversity. Texas' approach has no apparent analog around the country.

Policyholder attorneys have also tried suing engineers and insurance agents to destroy diversity. This creates threshold problems for claimants, since many states have onerous and strict pre-suit notice requirements to protect professionals. Unless the pre-suit notice requirements are properly completed, such as a certificate of merit for a claim against an engineer, the professionals are improperly joined. Also, courts have held that engineers are not "engaged in the business of insurance" such that they would be subject to the applicable unfair claim practices statute. *See, e.g., Michels v. Safeco Ins. Co.*, 544 Fed. Appx. 535, 540 (5th Cir. 2013) ("Although adjusters can be liable under Texas law, Texas courts have held that engineers who investigate and consult with insurance companies in the adjustment of a claim are not 'persons' engaged in the business of insurance. An independent engineering firm hired by an insurer to investigate a claim is not 'engaged in the business of insurance' under the Insurance Code.").

Removals Involving Special Situations

The London Market

What is Lloyd's of London? The Fifth Circuit Court of Appeals provided a useful discussion in *Corfield v. Dallas Glen Hills, LP*, 355 F.3d 853, 857 (5th Cir. 2003):

a. Lloyds of London is not an insurance company but rather a self-regulating entity which operates and controls an insurance market.

b. The members or investors who collectively make up Lloyd's are called "Names" and they are the individuals and corporations who finance the

insurance market and ultimately insure risks.

c. In order to increase the efficiency of underwriting risks, a group of Names will, for a given operating year, form a "Syndicate" which will in turn subscribe to policies on behalf of all Names in the Syndicate. A typical Lloyd's policy has multiple Syndicates which collectively are responsible for 100 percent of the coverage provided by a policy.

d. In practice, since many Names through their respective Syndicates are liable on a Lloyd's policy, the active underwriter from *one* of the underwriting Syndicates is designated as the representative of *all* the Names on the policy. This single underwriter, called the "lead" underwriter on the policy, is usually the only Name disclosed on the policy with all other Names remaining anonymous. The lead underwriter is typically the first to subscribe to the policy and typically assumes the greatest amount of risk.

e. A claimant can sue a Name individually, but if the claimant does not sue a Name, those Names on the Policy who are not parties to the case and are not before the court are relevant to determining whether the parties are completely diverse.

So how does one determine diversity in a London case? *Corfield* has already given us a preview: Look at the Names who are parties and determine if they are diverse. The court in *Green Coast Enters., LLC v. Certain Underwriters at Lloyd's*, 2022 U.S. Dist. LEXIS 109199, *6 (E.D. La. June 21, 2022) explained:

> Thus, a policyholder insures at Lloyd's but not *with* Lloyd's. Overall, "while an insured receives a Lloyd's 'policy' of insurance, what he has in fact received are numerous contractual commitments from each Name which has agreed to subscribe to the risk." With respect to the requirement of complete diversity for subject matter jurisdiction based on diversity, "[t]he majority of courts that have addressed this issue have found that each Name must be diverse.

A good example of how complicated this analysis can be is found in *Dailey v. Certain Underwriters at Lloyds London*, 2022 U.S. Dist. LEXIS 127522, *11 (S.D. Tex. July 19, 2022). The court recited the case's typical fact pattern:

> Policyholders bringing first-party insurance claims on Lloyd's of London policies, who often do not have the "highly confidential" information regarding the identities of most of the underwriting Names, typically list as the defendant "Certain Underwriters at Lloyd's, London Subscribing to" the number of the policy at issue. Suing "Certain Underwriters at Lloyd's, London Subscribing to" the number of the policy at issue is considered "synonymous with suing every Name subscribing to the policy since the Names are the underwriters[,]" which allows the policyholder to get all of the underwriters with potential liability on his or her policy into court without knowing all of their identities. That is what plaintiff did here.

The Court allowed limited discovery related to the identities of the Names that subscribed to plaintiff's policy. We will discuss this procedure more later. The resultant evidentiary record showed that the claimant's policy was underwritten by Lloyd's Syndicate 1206. Lloyd's Syndicate 1206's underwriting business was being fully reinsured to close by Lloyd's Syndicate 2008. Lloyd's Syndicate 2008's sole Name was SGL, which was a subsidiary of Enstar Group. SGL was domiciled in the United Kingdom, and Enstar Group is domiciled in Bermuda. Plaintiff was a citizen of Texas. Accordingly, the Court decided that the action was between a citizen of a state and citizens of foreign countries, and plaintiff did not share citizenship with any defendant.

Significantly, the $75,000.00 amount in controversy requirement applies to each Name. *Team One v. Certain Underwriters,* 281 Fed. App'x 323, 323 (5th Cir. 2008). A claimant cannot aggregate claims against individual names to satisfy the jurisdictional amount. *Rips, LLC v. Underwriters at Lloyd's London*, 2015 U.S. Dist. LEXIS 66594, *6 (E.D. La. 2015). The Eleventh Circuit Court of Appeals expressly follows the Fifth Circuit Court of Appeals in these matters. *See Underwriters at Lloyd's v. Osting-Schwinn*, 613 F.3d 1079, 1089 (11th Cir. 2010); *Certain Underwriters at Lloyd's v. Zoller Eng'g*, 2021 U.S. Dist. LEXIS 6418, *3 (M.D. Fla. 2021). Courts answering to the Third Circuit Court of Appeals also rely on the analysis by the Fifth Circuit Court of Appeals but have also elaborated with their own analysis. *See Atlantic Casualty Company v. Federal Insurance Company,* 2010 U.S. Dist. LEXIS 129058, *2 (D. N.J. 2010).

What do you do when you're not certain about a limited liability company's citizenship? One option is to ask the court to conduct limited discovery.

Limited Liability Companies

"Like limited partnerships and other unincorporated associations or entities, the citizenship of an LLC is determined by the citizenship of all of its members." *Guijarro v. Enterprise Holdings,* 39 F.4th 309, 314 (5th Cir. 2022). Where do you get information about citizenship of members? Many states, but not all, have an online search engine that requires signing up for an account and creating a password, but the system is easy to navigate, and you can print records that you can attach to removal pleadings.

The Ninth Circuit Court of Appeals observed that limited liability companies have characteristics of both partnerships and corporations but ultimately decided that a limited liability company is a citizen of every state where its members are citizens. *Johnson v. Columbia Props. Anchorage*, 437 F.3d 894, 899 (9th Cir. 2006). The Eleventh Circuit Court of Appeals made the same observation and holding in *Rolling Greens MHP, LLP v.*

Comcast SCH Holdings, LLC, 374 F.3d 1020, 1021 (11th Cir. 2004).

What do you do when you're not certain about a limited liability company's citizenship? One option is to ask the court to conduct limited discovery. In *Dougherty Funding, LLC v. Gateway Ethanol, LLC,* 2008 U.S. Dist. LEXIS 44749 (D. Kan. 2008), the motion for limited jurisdictional discovery emphasized the very limited nature of the discovery sought. The movant's briefing and the court's opinion demonstrate that it is best to specify how many interrogatories you are going to ask and what you are going to ask. The movant also emphasized good cause for quickly resolving the jurisdictional dispute and the lack of prejudice to the plaintiff. The plaintiff did not respond to the motion, which helped make the movant's lack of prejudice argument.

Some courts are hostile to limited jurisdictional discovery, though, even when it seems like there is good cause. *See NL Industries v. OneBeacon Ins. Co.*, 435 F. Supp. 2d 558, 566 (N.D. Tex. 2006) (stating that the removing party should anticipate a motion to remand, and should be prepared to show that the parties are completely diverse without the need for jurisdictional discovery; "Jurisdictional discovery places an undue and unnecessary burden on the parties when the proponent of such discovery only supports the request by conjecture, speculation, or suggestion."); *MCP Trucking, LLC v. Speedy Heavy Hauling, Inc.*, 2014 WL 5002116, *6 (D. Col. Oct. 6, 2014) (denying jurisdictional recovery and remanding action to state court even as it was acknowledged that further discovery in that forum could demonstrate that diversity exists, leading to a subsequent removal).

Inactive and Dissolved Entities

The Fifth Circuit Court of Appeals has held that inactive corporations remain citizens of the state of their incorporation. *Williams v. Homeland Ins. Co.*, 657 F.3d 287, 291 (5th Cir. 2011). The interesting pre-*Williams* case of *Ewert v. Poly Implant Protheses*, 2008 U.S. Dist. LEXIS 87047 (S.D. Tex. 2008) undertook an entirely different analysis but arrived at the same result:

> The capacity of P.I.P./USA to be sued is determined by the law of the state where it is incorporated--Florida. FED. R. CIV. P. 17(b)(2); *see also Texas Clinical Labs, Inc. v. Leavitt*, 535 F.3d 397, 402 (5th Cir. 2008). Under Florida law, "[a] dissolved corporation continues its corporate existence," FLA. STAT. ANN. § 607.1405(1) (West 1993), and its dissolution does not "[p]revent commencement of a proceeding by or against the corporation in its corporate name." FLA. STAT. ANN. § 607.1405(2)(3); *see also DeLeo v. Swirsky*, No. 00 CC 6917, 2001 U.S. Dist. LEXIS 8465, 2001 WL 687458, at *9 (N.D. Ill. June 19, 2001) (applying Florida law). Therefore, contrary to Plaintiffs' allegations, P.I.P./USA still exists for the purposes of litigation and it remains a citizen of Florida. *See Harris v. Black Clawson Co.,* 961 F.2d 547, 550 (5th Cir. 1992) (stating that an inactive or dissolved corporation is a citizen of the state of its incorporation).

The Fifth Circuit did not cite *Ewert* in *Williams*, nor has *Ewert's* analysis been criticized by other courts.

No rule has been announced by the Ninth Circuit Court of Appeals that we could locate. At least one lower court has followed the so-called "functional approach." *Ibrahim v. FiatChrysler*, 2020 U.S. Dist. LEXIS 244167, *6 (C.D. Cal. 2020) ("When a *substantial period of time has lapsed* since a corporation was active, its citizenship reverts to include only its state of incorporation." Three years is a substantial period of time for this test.). In the Second Circuit Court of Appeals, the citizenship of a corporation that has ceased business activity is determined by examining its state of incorporation and last place of transacted business. *Wm. Passalacqua Builders, Inc. v. Resnick Developers., Inc.*, 933 F.2d 131, 141 (2nd Cir. 1991). The Third Circuit Court of Appeals, on the other hand, has determined that an inactive corporation has no principal place of business. Accordingly, it has held that an inactive corporation was only a citizen of the state of its incorporation. *Midlantic Nat'l Bank v. Hansen*, 48 F.3d 693, 698 (3rd Cir. 1995).

Stipulations as to Amount in Controversy

Some policyholder attorneys try to defeat removal by stipulating that the claimant does not seek and will not accept relief in excess of $74,999.99. These stipulations sometimes come in the form of an affidavit from the attorney or claimant or are sometimes simply contained in the pleading that initiates the litigation.

Policyholder attorneys have been sharpening their game to make the stipulations more and more effective as courts analyze the stipulations. Stipulations should be scrutinized to see if in fact the amount in controversy remains below $75,000.00. *Abascal v. United Prop. & Cas. Ins. Co.*, 2019 U.S. Dist. LEXIS 119653, *4 (S.D. Tex. 2019) (read the whole petition; trebling under consumer protection statute may raise the amount in controversy over $75,000); *Varela v. Wal-Mart Stores East, Inc.*, 86 F. Supp.2d 1109, 1110 (D. N.M. 2000) (defendant trying to use plaintiff's refusal to stipulate against her; unsuccessful because court found plaintiff is the master of her lawsuit and court will not draw negative inferences from a refusal to stipulate to a cap on damages).

Texas Insurance Code Section 542A

In *Advanced Indicator & Manufacturing v. Acadia Insurance Company*, 50 F.4th 469 (5th Cir. 2022), the Fifth Circuit Court of Appeals resolved a thorny split in Texas federal district courts regarding Texas Insurance Code Section 542A by returning to a bedrock principle governing removal. Now, as long as the insurer has elected to accept the adjuster's liability any time before removal – even after suit is filed – there is no possibility of recovery against the adjuster and removal will be proper.

The Texas Legislature enacted Texas Insurance Code Section 542A to combat abuses and gamesmanship by policyholder attorneys arising out of weather claims. HB 1774, House Research Organization (May 4, 2017); *Gateway Plaza Condo v. Travelers Indem. Co.*, 2019 U.S. Dist. LEXIS 211244, *6 (N.D. Tex. 2019) (strictly applying Section 542A's pre-suit notice requirements and

expressing concern about the involvement of public adjusters in plaintiff's claim).

The statute includes a number of provisions to accomplish this public policy goal, including additional information required in a pre-suit notice letter and a statutory right for the insurer to conduct a re-inspection. Tex. Ins. Code §542A.003; Tex. Ins. Code §542A.004. Another provision enables insurers to elect to accept legal responsibility for the acts and omissions of "agents," such as adjusters. Tex. Ins. Code §542A.006. Such an election precludes any cause of action against the adjuster, removing him or her from the diversity analysis. *Id*.

Even after the enactment of Section 542A, policyholder attorneys tried to skirt the statute by arguing that the timing of an election mattered to its effectiveness, and many cases were remanded on the basis that a post-suit election was ineffective. *See, e.g., Collier v. Metro. Lloyds Ins. Co.,* 2022 U.S. Dist. LEXIS 52434, *8 (E.D. Tex. Mar. 11, 2022). Other courts, though, held that "both pre-suit and post-suit elections of acceptance of liability are sufficient to establish improper joinder." *See, e.g., Southbound, Inc. v. Firemen's Ins. Co. of Washington, D.C.,* 2021 U.S. Dist. LEXIS 45424, *6 (W.D. Tex. 2021) adopted by 2022 U.S. Dist. LEXIS 52292.

Advanced Indicator arose out of a Hurricane Harvey claim. The insured (a Texas resident) sued its insurer and its adjuster (also a Texas resident) for breach of contract, bad faith, and violations of the Texas Insurance Code. The insurer elected to accept the adjuster's liability under Section 542A.006 and, after accepting liability in writing, removed the case the next day. The adjuster subsequently moved to dismiss the claims against him, arguing that the insured could no longer state a claim against him. The insured filed a motion to remand. The district court denied the remand and ordered that the adjuster was "struck as improvidently joined." The district court subsequently granted the insurer's motion for summary judgment based on the insured's failure to segregate its damages under the doctrine of concurrent causation.

On appeal, the insured argued that the removal violated the voluntary-involuntary rules, which states that a case is only removable by a voluntary act of plaintiff. The insured also argued that the adjuster was properly joined because the insurer elected to accept his liability only after the suit was filed.

The Fifth Circuit opined:

> [The insured] argues that removal of this case based on [the insurer's] post-suit, pre-removal §542A.006 election violates the voluntary-involuntary rule. This judicially created rule dictates that "an action nonremovable when commenced may become removable thereafter only by the voluntary act of the plaintiff." [The insured] contends that because the §542A.006 election was an action of a *defendant*, rather than the plaintiff, it cannot make the case removable. This question has deeply divided district courts. Some courts have held that the voluntary-involuntary rule bars removal when an insurer makes a §542A.006 election after the filing of suit. Others have held that the voluntary-involuntary rule is inapplicable if the agent is improperly joined at the time of removal.
>
> Today we adopt the latter approach, which is a natural extension of our precedent. Indeed, "courts have long recognized an exception to the voluntary-involuntary rule where a claim against a nondiverse or in-state defendant is dismissed on account of fraudulent joinder." Moreover, our en banc court stressed that "to determine whether a plaintiff has improperly joined a non-diverse defendant, the district court must examine the plaintiff's possibility of recovery against that defendant *at the time of removal*." In this case, [the nondiverse adjuster] was improperly joined after [the insurer's] election because §542A.006's mandate that an agent be dismissed with prejudice dictates that [the insured] had no possibility of recovery against him. Taking our holdings in *Crockett* and *Flagg* together, the answer to this case becomes clear: because [the nondiverse adjuster] was improperly joined at the time of removal, [the insurer's] removal was proper.

Id. at 475. Internal citations omitted; emphasis in original.

The Fifth Circuit added that *Hoyt v. Lane Construction Corp.*, 927 F.3d 287 (5th Cir. 2019) confirms its decision. The Fifth Circuit reasoned that improper joinder is an exception to the voluntary-involuntary rule and opined: "If the court court's post-filing, pre-removal ruling dismissing an in-state defendant [by summary judgment as in *Hoyt*] can make a case removable, so too can a §542A.006 election, which eviscerates any claim against an agent."

The Fifth Circuit also disposed of another similar argument by the insured. Texas Insurance Code Sections 542A.006(b) and 542A.006(c) contain slightly different wording regarding dismissal of actions against adjusters. Some insureds have been able to evade removal based on the wording. In any event, both parts of the statute require dismissal of the adjuster. The Fifth Circuit held that the differences between the statutory provisions are not material, so long as the insurer elects to accept liability for the adjuster before removal.

Advanced Indicator will likely touch many pending motions to remand for weather-related claims. Going forward, insurers will have up to the thirty-day post service removal deadline to evaluate potential adjuster liability, and how to address it, prior to deciding whether to remove a Texas state-filed suit to federal court.

Rule of Unanimity

28 U.S.C. §1446(b)(2)(A) provides that, "[w]hen a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action." Generally speaking, the removing defendants bear the burden of establishing compliance with the rule of unanimity, either by showing all properly joined and served defendants' consent to removal or by establishing that a named defendant's consent to removal is not required.

In the Fifth Circuit, *Breitling v. LNV Corp.*, 86 F. Supp.3d 564, 570 (N.D. Tex. 2014) and *Bohannon v. W. Indep. Sch. Dist.*,

2021 U.S. Dist. LEXIS 147363, *12 n. 1 (W.D. Tex. 2021) adopted by 2021 U.S. Dist. LEXIS 145400 (W.D. Tex. 2021) discuss application of the Rule of Unanimity and an important exception to the Rule of Unanimity that is not limited to insurance defendants. If a defendant is not properly joined and served, that defendant's consent to removal is not required. Other exceptions to the Rule of Unanimity include nominal parties and unnecessary parties. *See id.* The Ninth Circuit Court of Appeals follows the same Rule of Unanimity. *Vasquez v. N. County Transit Dist.,* 292 F.3d 1049, 1060 (9th Cir. 2002).

The case of *Cachet Residential Builders, Inc. v. Gemini Ins. Co.*, 547 F. Supp. 2d 1028, 1029 (D. Ariz. 2007) provides an interesting example of the application of the Rule of Unanimity within the context of an Arizona statute governing service of process. The plaintiff sent the summons and complaint to the defendant via FedEx rather than by U.S. postal mail as required by the statute. The Court deemed that the defendant may have had notice, but not service required by the statute, and the Rule of Unanimity did not apply. Thus, the exception to the Rule of Unanimity is available not just when the plaintiff wholly fails to join and serve the defendant at all, but when the plaintiff fails to properly join and serve the defendant under applicable law.

The Rule of Unanimity and exceptions thereto are widely analyzed and accepted around the country. *See, e.g., Sherman v. A.J. Pegno Constr. Corp.*, 528 F. Supp. 2d 320, 330 (S.D.N.Y. 2007) ("There are exceptions to this rule for defendants who have not been served, unknown defendants, and fraudulently joined defendants."); *Environmental, Inc. v. Hess Oil Co., Inc.*, 718 F.Supp.2d 719, 722 (N.D. W. Va. 2010) (nominal party need not join in removal and such a party's presence in the lawsuit will have no bearing on the court's diversity jurisdiction).

Reviewability of Remand

Generally, remand is not reviewable on appeal. 28 U.S.C. 1447(d); *Gonzalez-Garcia v. Williamson Dickie Mfg. Co.*, 99 F.3d 490, 491 (1st Cir. 1996) (where the district court order of remand rests on lack of subject matter jurisdiction, that order is not reviewable by appeal or mandamus, even if erroneous). There are appeals of remands allowed in federal question cases, as required by statute, but those situations almost never apply in insurance disputes.

Conclusion

Removal can be a potent defensive tool for insurers. Texas has expanded the availability of removal in insurance cases. It will be interesting to see if other states follow suit. In addition, the other special situations discussed in this article are likely to continue to generate litigation as policyholder attorneys adjust their tactics. Courts and legislatures may intervene if, as in Texas, it is perceived that policyholder tactics are getting out of hand.

Legal Primer

Understanding and Competing In Canada's Defense Sector

By Marin Leci and Emily Paslawski

American defense firms seeking to compete in Canada will find a complex system of patchwork legislation, specialized programs, and policies that must be read together to minimize risk and ensure compliance.

Defense spending in Canada is expected to increase by $8 billion over the next five years, in addition to planned increases associated with the country's defense policy, *Strong, Secure, Engaged*. Funding is not predicted to exceed 1.5% of Canada's Gross Domestic Product ("**GDP**"), even with these increases, even though Canada is a party to the NATO Defence Investment Pledge which requires its members to commit 2% of their GDP to defense spending. Given the size of the defense industry in the United States, several American firms are exploring entry or expansion into the growing Canadian defense sector market. However, American defense firms seeking to compete in Canada will find a complex system of patchwork legislation, specialized programs, and policies that must be read together to minimize risk and ensure compliance. Further, if litigation arises involving a military product that was the subject of a defense procurement contract, Canada does not recognize a government contractor defense in situations where it might have been asserted in the United States.

Canadian Defense Policy and Agencies

As in the United States, national security and defense are federally regulated. The Prime Minster of Canada is not the Commander-in-Chief of the Canadian Armed Forces ("**CAF**"), despite being the head of government. Rather, the Canadian defense portfolio is run by the Governor General and Commander-in-Chief of Canada (currently, Mary Simon), and the Minister of National Defense (currently, the Honourable Anita Anand, MP). While the United States Armed Forces consists of six service branches, the CAF is a unified force comprised of the Royal Canadian Navy, Canadian Army, and Royal Canadian Air Force, which share a budget.

Canada's Defence Procurement Strategy was developed in 2014 following industry engagement and consultation with independent advisors, including David Emerson and Tom Jenkins. The purpose of the Defence Procurement Strategy is to improve procurement initiatives and projects throughout several federal departments. Canada's Defence Procurement Strategy is shaped by the Defence Investment Plan and *Strong, Secure, Engaged:* Canada's defense policy ("**Strong, Secure, Engaged**"). The previous Defence Investment Plan was released in 2018 and was updated in 2019. Subsequent updates have been delayed in light of the Canadian government's response to the COVID-19 pandemic.

Strong, Secure, Engaged arose from the Department of National Defence's ("**DND**") commitment "to the significant and strategic long-term investments that will ensure the Canadian Armed Forces continues to function as an agile and combat-ready force, capable of making tangible contributions and delivering on its commitments at home and around the world." Emphasized in *Strong, Secure, Engaged* is the importance of well-supported, diverse, resilient people and families, long-term investments to

Marin Leci is a senior associate at BLG's Calgary office. He specializes in advising national and international firms navigating Canada's complex procurement and defense landscapes. He has been involved in Canada's largest aviation and naval procurement initiatives. Marin advises clients on all aspects of defense and procurement mandates including cross-broader regulatory matters pertaining to the movement of military and dual-purpose materiel from the United States into Canada. **Emily Paslawski** is an associate in BLG's Toronto office. Emily maintains a general litigation practice with a focus on commercial disputes, aviation, and defense and security matters. She acts as counsel to international and American OEMs seeking to enter Canadian the Canadian defense sector.

enhance the armed forces' capabilities, fixing defense funding, and global defense engagement. Pursuant to *Strong, Secure, Engaged*, the Canadian approach to defense has been described as "anticipate, adapt, act." Through *Strong, Secure, Engaged*, the DND aims to identify potential threats to the country, enhance Canada's ability to identify, prevent, prepare, and respond to a wide range of contingencies, adapt proactively to emerging challenges by harnessing new technologies, foster a resilient workforce by leveraging innovation, knowledge and new ways of doing business, and act with decisive military capabilities to defend Canada and protect Canadian values.

Despite the goal of economizing and streamlining procurement among these departments, the use of a tri-partite structure has come under significant criticism.

There are currently three federal agencies responsible for defense procurement in Canada: the DND, Public Services and Procurement Canada ("**PSPC**"), and Innovation, Science and Economic Development Canada ("**ISED**"). Despite the goal of economizing and streamlining procurement among these departments, the use of a tri-partite structure has come under significant criticism.

The DND (along with the Canadian Coast Guard), is responsible for defining requirements, developing specifications, analyzing cost estimates, obtaining policy and funding approval, as well as providing technical expertise and managing the integration of equipment or services during procurement. PSPC leads stakeholder and industry engagement before and during the procurement process, develops the procurement strategy, leads the solicitation process, oversees an evaluation of technical benefits and prices, and manages the resultant procurement, contract and vendor performance. ISED is responsible for administering the Industrial and Technological Benefits Policy (discussed later in this article) and makes recommendations on the application of this policy to procurements.

Procurement Process

Defense purchasing and military equipment acquisition is additionally governed by policies set by the Treasury Board of Canada. The Treasury Board requires "that projects achieve value for money, sound stewardship of project funds is demonstrated, accountability for project outcomes is transparent, and outcomes are achieved within time and cost constraints". To that end, the procurement process follows five distinct stages:

1. Identification
2. Options Analysis
3. Definition
4. Implementation
5. Closeout

Identification requires the Canadian Navy, Canadian Army or Royal Canadian Air Force to show that there is a deficiency, that new equipment and services are required to meet operational requirements, and that the deficiency cannot reasonably be remedied any way other than by procurement. The focus at this stage is on identifying and confirming a need, rather than identifying what the solution will look like. The procurement project team will develop a list of the capabilities that the proposed equipment or service must be able to deliver and set out a preliminary timeline including the earliest date by which the equipment or service should be ready to use.

The Options Analysis stage considers the business case for each of the options that would satisfy the capability requirements (ascertained during the Identification stage), and is used to decide which options demonstrate value for money. The Defence Capabilities Board and Programme Management Board review the business case for the procurement, and project allocation funding is allotted.

The third stage, Definition, determines how the preferred option will be implemented in a way that is affordable and achievable. The Definition stage results in a detailed description of the project and finalizes the statement of operational requirement and a project management plan. Pending approval by the Minister of National Defence or the Treasury Board of Canada, the project will receive expenditure authority to proceed.

The Implementation stage marks the point at which proponents submit their bids. The bids are carried out in collaboration with PSPC. Once a bid is selected, the proponent delivers the goods or services, and trains service members as required. Implementation is a collaborative effort between the project team and other government departments to ensure that the project remains within scope, on time, and within budget.

By the final stage, Closeout, the new equipment and services will be fully operational. The project team will give notice to DND management that the project has been completed, and the procurement will be formally closed.

Industrial and Technological Benefits Policy

The Industrial and Technological Benefits Policy ("**ITB Policy**") applies alongside the formal procurement process. As described in the ITB Policy, and as a function of a policy goals that are focused on developing the Canadian defense sector, an underlying principle of Canadian procurement is that a successful proponent in a Canadian procurement initiative must undertake business activity in Canada that is equal to the value of the contracts they have been awarded. This concept is termed the "Value Proposition." The Value Proposition can be comprised of both direct and indirect investments. Direct investments are transactions that relate to the equipment or service being procured. Indirect investments involve business activities which are related to the bidder's product or business lines, but are not directly related to the equipment or services being procured by Canada. While it is generally recommended that a bidder will be able to identify specific transactions that are equal to at least 30% of the bid price, the

ITB Policy also includes a banking feature, which allows bidders to use previous investments in Canada for their benefit in the procurement process.

The Banking feature is available to potential contractors, and Tier 1 sub-contractors either in advance of an upcoming procurement, or as an overachievement on a completed obligation. Transactions can be banked for up to ten years and are deemed to have met the eligibility criteria upon being deposited. The credits can only be used once. Eligibility hinges on causality: whether the company banks a transaction in connection to a current or anticipated obligation to Canada, or whether the banked transaction involves the purpose of goods or services from an existing Canadian supplier to the company. Proponents should be aware that banked credits are only available for the portion of the work that occurs after the date that the transaction is submitted to the bank for consideration. Further, banked transactions should have a Canadian content value no less than 30% of the total value of the transaction.

American firms with an established presence in Canada should involve specialist counsel early to ensure that investments being made in Canada can be invested toward a potential defense procurement bid. Organizations without a Canadian presence should take steps to properly set up an effective corporate structure that maximizes the benefit received from any investment into Canada.

Value Proposition – Evaluation Criteria

There are several key areas of particular focus, referred to as "pillars" in the Value Proposition that are used to evaluate the strength of a bid:

- Work in the Canadian Defence Industry: This criterion considers the economic development of Canada's defense industry. This pillar considers the use of existing services on Government of Canada platforms to assist a company in capturing future business opportunities by demonstrating the government's confidence in its products, enabling cost reduction through economies of scale and providing opportunities to further develop specialized capabilities.
- Canadian Supplier Development: Bidders should consider providing work to companies in Canada beyond their own Canadian facilities and undertake supplier development activities that would enhance the productivity and competitiveness of Canadian-based suppliers. When a procurement relates

to in-service support, this pillar will be heavily weighted.
- Research and Development in Canada: This area is focused on innovation as a determinant of economic growth, with the goal of advancing Canadian companies to be at the leading edge of advanced technologies, allowing them to capture high-value market opportunities.
- Exports from Canada: When there is an international export strategy as part of the value proposition, bidders should demonstrate that they and their suppliers can tie the value of the export success to a Canadian base. Part of satisfying the criteria under this pillar is for a supplier to demonstrate that they have the capacity to carry out their plans.
- Skills Development and Training: This Pillar seeks to leverage opportunities for skills development and training to advance employment opportunities for Canadians.

In addition to the above, American firms must be aware of several key regulations and policies governing defense sector procurement that are materially different than state-side defense sector regulations and procurement rules.

Code of Conduct for Procurement

The Code of Conduct for Procurement (the "**Code**") sets out the minimum acceptable standards when contracting with the Canadian government, with the aim of ensuring that government contracting is conducted to the highest standards of integrity in an open, fair and transparent manner. The Code applies to all vendors and sub-contractors who respond to bid solicitations or provide services through Public Works and Government Services Canada. The consequences of failure to comply with the Code are severe, and could result in bid disqualification or the termination of an awarded contract.

The Code of Conduct was most recently updated in 2021. Additions to the code include human and labour rights, environmental protection, prohibitions on discriminatory practices and the protection of Indigenous peoples.

As in the United States, work within the defense sector often involves sensitive information regarding national security interests. As a result, contractors must comply with strict organizational, facility and personnel security requirements, which will depend on the security level assigned to materials and information that the contractor will work with. Security clearances apply to both organizations, and individuals. Information is ranked according to security level. From lowest security to highest security these levels are Protected A, B. and C, Confidential, Secret, and Top Secret. Bid Solicitation Documents for a contract will include a Security Requirements Checklist ("**SRCL**") which will outline the contract security requirements.

The Contract Security Program ("**CSP**") is administered by PSPC. As of May 2, 2022, organizations working on government contracts with security requirements must:
- have responded to a solicitation with security requirements;
- have responded to a request for standing offer with security requirements;
- have responded to a request for supply arrangement with security requirements;
- be awarded a contract or subcontract with security requirements;
- have signed or will sign a lease with security requirements;
- be underrepresented (an underrepresented supplier must be at least 51% owned by Indigenous peoples, Black and racialized Canadians, women or members of the LGBTQ2+ community);
- be involved in a multinational program.

Organizational Screening

There are several screening levels that apply to an organization: provisional security clearance, designated organization screening and facility security clearance. The lowest level of security screening is a provisional security clearance, which applies when organizations require a security screening in order to prepare a bid. This type of screening is temporary.

The Designated Organization Screening ("**DOS**") allows organizations to get security screening for their personnel at the reliability status level, which allows them to access protected information, assets and work sites. When there are higher security screenings required because the information is classified, the contractor must apply for a Facility Security Clearance ("**FSC**"). FSC Certification is required when an organization is accessing Confidential, Secret, Top Secret, NATO or Communications Security ("**COMSEC**") clearances.

In addition to the above-mentioned clearances, the contracting agency may require that the bidding company or successful bidder develop or confirm the following capabilities:
- a document safeguarding capability ("**DSC**"). A DSC can be granted at Protected A, B, C, Confidential, Secret, Top Secret, NATO Confidential and Control of Secret Material in an International Command Top Secret levels. The level required will be site-specific and contract-specific and is required for each individual business location.
- Production Capability: this designation is required if the organization builds, manufactures, repairs, modifies, or works with sensitive products at its business location. This capability is contract-specific.
- When an organization must destroy sensitive information and assets or store bulk information or assets at its business location, they may require a shredding capability and bulk storage capability.
- When organizations perform a contract requiring information technology security, they must get authority to produce, process, and store or transmit information electronically. This requires the completion of a successful inspection by an information technology security inspector.

There are additional requirements for organizations that require communications security and information security. COMSEC is a security requirement for storing, processing, transmitting, and receiving telecommunications such as a computer network. Information Security ("**INFOSEC**") is a narrower subset of classified-communication electronic-security information. Any organization that is granted security clearance is obligated to comply with the *Security of Information Act* RSC 1985, c O-5, and

the *Personal Information Protection and Electronic Documents Act* SC 2000, c 5.

Security Screening for Personnel/ Individuals

Personnel security screening will be conducted on key senior officials and employees of organizations who are registered in the CSP. Individual screening operates on a "need to know" basis. Therefore, it is not the title of the individual that determines their requisite screening level, but rather the need for them to access sensitive information, assets, and sites. Further, employees who have been identified as a resource during bid submissions may be required to obtain the corresponding levels of security. Procedurally, personnel screening must be completed before project work begins, and must be initiated by the company security officer on that individual's behalf.

There are three levels of security screening for individuals: reliability status (in order to access protected information), security clearance (classified information), and enhanced security screening (personnel who support security and intelligence functions).

Depending on the contract, certain employees of the organization must be security screened in conjunction with the following, mandatory roles:

- Key Senior Official ("**KSO**") are any owners, any officer, directors (of the board), executives and /or partners who occupy positions of control or influence, and are accessing sensitive information;
- Corporate Company Security Officer ("**CCSO**") is a person appointed by the chief executive officer or the designated KSO and is a Canadian citizen or permanent resident and employee of the organization who resides in Canada; and
- Alternate Company Security Officer ("**ACSO**") is a person appointed by the CSO and is a Canadian citizen or permanent resident and employee of the organization.

Beyond these requirements, there are numerous and highly specific document safeguarding, cybersecurity, and privacy requirements that defense firms must be aware of and comply with in order to compete for Canadian Defence Sector projects.

Controlled Goods

In addition to the above-mentioned clearances, separate approval is required when companies seek to handle, examine, use or possess controlled goods. Controlled goods are regulated in Canada by the *Defence Production Act*, 1985 c D-1 ("**DPA**") and the *Controlled Goods Regulations*, SOR/2001-32 ("**CGRs**"). Canadian legislation relies heavily on equivalent American regulations to define what is considered a "controlled good." Specifically, a "controlled good" is defined with the DPA and the CGRs as either a defense article that is controlled by the *International Traffic in Arms Regulations*, 85 FR 3819 ("**ITAR**") or a specific item with strategic or national security implications, regardless of the country of origin, when in Canada. (*Defence Production Act*, s 35; Schedule - Controlled Goods List, s 2) *ITAR* is the United States Regulation which controls the manufacture, sale, and distribution of defense and space-related articled and services as defined in the *United States Munitions List*, 22 CFR 121. The *Export Control List*, SOR/89-202 and its corresponding guide define items, which are considered to have strategic or national security significance. Notably, "strategic significance" and "national security implications" are not defined terms. Rather, they apply in relation to specific items within the *Export Control List*.

The *CGRs* require registration in the Controlled Goods Program ("**CGP**") before any individual or organization will examine (consider in deal or subject to analysis in order to discover essential features or meaning), possess (actual or constructive possession), transfer (including international transfers and disposals), or receive bid solicitation documents containing controlled goods or controlled technology. Preliminary eligibility for enrollment in the CGP is a relatively low standard. It simply requires that a company is incorporated under Canadian law, or that the company is authorized to do business in Canada. (*CGRs*, s 2(b)) Nonetheless, the CGP requires several additional steps and requirements from participants. First, the company must appoint an authorized individual who will sign off on the application, consent to a security assessment and undergo a criminal record check. (*CGRs*, s 3(i)) In addition to an authorized individual, there must also be a Designated Official. Designated Officials are subject to several requirements. They must be an employee of the registered corporation, must be a Canadian citizen (or permanent resident who lives in Canada on a regular basis), and complete designated official training, which is a web-based course that takes approximately 4-5 hours to complete. (*CGRs*, s 11.) Further, security assessments must be completed for individuals who are designated officials, authorized individuals, or company owners (owners being defined as an individual who holds 20% or more of the corporation's outstanding shares). As part of the registration process, the company must provide a description of their business activities relating to controlled goods and a description of the controlled goods they intend to possess, examine or transfer, including information regarding contractual or work commitments involving the goods.

There is no cost to enroll in the CGP. Therefore, from a risk management perspective, companies that are contemplating a bid involving controlled goods, or any other involvement with controlled goods should consider enrollment. The penalty for failure to comply with the CGP is severe, and can include a fine not exceeding $2,000,000 and imprisonment not exceeding 10 years.

There are select exemptions from the controlled goods program. Canadian federal, provincial or territorial government employees, Canadian federal crown corporation employees, public officers and member of visiting forces do not require registration. Certain individuals (rather than corporations) are exempt from registration when they are registered under the *ITAR*. (CGRs, s 16.)

Canada's Defence Production Act

The *Defence Production Act*, R.S., 1985, c. D-1 (the "***DPA***") provides the Government of Canada with sweeping powers designed to ensure the uninterrupted flow of defense material. Defense sector projects with high dollar values, or long durations or that are

highly publicized generally are subject to the *DPA*. While most American defense firms may be familiar with the American *Defence Production Act,* 50 U.S.C. § 4501-4568, its Canadian equivalent can create additional complications and generate risks that require proactivity to effectively mitigate.

American firms looking to do business in the Canadian defense sector should consider the following *DPA* provisions:

- Section 21 of the *DPA* insulates Canada from a claim for damages or loss profit in the event the Subcontract is terminated before it is completed.
- Section 23 of the *DPA* contains a codified audit right. Under this provision, the Federal Government of Canada's ability to demand information from a contractor is grounded in statute rather than a right flowing from a contractual relationship between the parties. This makes it more difficult to resist an audit request made pursuant to section 23 of the *DPA*.

Firms that develop and market dual-use technologies (such as the majority of firms in the aviation-sector) should develop corporate structures that separate and insulate civilian business units, domestic defense sector business units, and international defense sector business units. Maintaining separation of these three business units mitigates the reach of the *DPA's* audit provisions while protecting intellectual property rights and the confidentiality of other defense projects.

- Section 24 of the *DPA* appears to be uniquely Canadian and there does not appear to be an equivalent provision under the American *Defence Production Act*. Pursuant to Section 24 of the *DPA*, the Federal Government of Canada may *unilaterally* adjust the contract price, including profit, during contract execution or after the contract is complete. Moreover, in the event that Canada deems accounts and records kept with respect to the performance of the defense project insufficient, it will not be bound by those records in determining the "fair and reasonable" cost of performing the contract.

In essence, section 24 of the *DPA* is an anti-price gauging provision intended to ensure that Canada can contract to obtain defense supplies while retaining the ability to scrutinize the contract cost at a later date. To hedge against the risks associated with Section 24 of the *DPA*, it is important to note that even if Canada exercises it right under section 24 of the *DPA*, it must adjust the contract price to an amount that is "fair and reasonable." What is "fair and reasonable" is generally determined reviewing the contractor's cost and accounting records. As such, American defense contractors must impose robust accounting and cost monitoring protocols to keep track of project costs before bidding on Canadian defense sector work. In light of the *DPA's* expansive audit rights, contractors should refrain from comingling accounting tools, personnel, and databases between defense and civilian business units.

Government Contractor Defense May Not Apply

Unlike the United States, there is no "Government Contractor Defense" in Canada. In the United States, a contractor will not be liable under tort law for injury caused by a design defect in a military product when the following elements are satisfied: (1) the United States approved reasonably priced specifications for the product being supplied; (2) the product conformed to those specifications; and (3) the supplier warned the United States about any dangers inherent in the use of the product known to the supplier but not known to the United States. A similar defense to product liability claims may not available under Canadian law. Contractors should therefore review bid requirements thoroughly and consider engaging counsel when entering defense contracts with the Canadian government.

Conclusion

Over the next decade, Canada's defense spending is expected to exponentially increase. Canada's relatively small domestic defense sector and the demand for advanced platforms to fill capability gaps across key segments of Canada's defense portfolio likely means that American firms will be well positioned to compete for marquee defense projects in Canada. However, defense sector firms should take proactive steps in advance to mitigate the risks associated with working in Canada's unique and patchwork system of defense sector regulations.

The Great Aircraft Robbery

How Russia's Invasion of Ukraine Inadvertently Created a Flurry of Aviation Insurance Litigation

By Nate Bohlander

Russia's invasion of Ukraine has had a tremendously significant impact on the aviation industry.

In the time since Russia invaded neighboring Ukraine a year ago, a host of impactful images have repeatedly flashed across our television and computer screens: Russian tanks crossing the border; Ukrainians gearing up to fight back; citizens either hunkering down or fleeing the country; Russian President Vladimir Putin boasting about his country's military prowess; Ukrainian President Volodymyr Zelenskyy, clad in his signature green sweatshirt, embodying his constituents' unwavering fighting spirit. Of course, we've also seen the brutal human toll of war through the countless deaths and displacement of Ukrainian citizens. These scenes have left a lasting image on observers around the world.

One image which may not come immediately to mind is grounded commercial aircraft across Russia. After all, the vast majority of media coverage is rightfully focused on individuals' safety and security. However, Russia's invasion of Ukraine has had a tremendously significant impact on the aviation industry. As set forth in this article, international sanctions levied on Russia caused a chain of events which ultimately resulted in President Putin essentially confiscating the foreign-owned commercial aircraft that happened to be located within his country's borders. When the lessors of these aircraft could not recoup the planes, they looked to their respective insurers for reimbursement. After the insurance carriers' denials started pouring in (with the insurers citing policy exclusions), lessors sought relief from the courts. When the first Russian soldiers stepped foot onto foreign land, few – if any – of us imagined that one of the many consequences would be a cavalcade of complex litigation rocking the world of aviation insurance.

Putin and Crimea

President Putin's longstanding obsession with the annexation of the Crimea region of Ukraine has been the subject of intense speculation for many years. Publicly, President Putin states that ***he seeks only to protect ethnic Russians from the far-right element of the Ukrainian government***. However, there are several distinct reasons why scholars and laypersons alike tend to distrust this explanation. First, given Putin's questionable human rights record with respect to his own constituents during his nearly two decades-long reign as the Russian President, the question begs why he would show such concern for the freedoms of another nation's citizenry. Second, while there does exist a neo-Nazi contingent in Ukraine, ***there is no evidence that Crimeans are subject to any widespread ethnic purging*** similar to what Jews and other groups faced during World War II.

Rather, the much more likely explanation is that Crimea represents an economically- and politically-rich prospect for Putin. The area likely contains a treasure trove of hydrocarbons (petroleum and natural gas), ***which President Putin would command should he take control of the region.*** Annexing Crimea would also provide President Putin with another pathway from Russia to the Black Sea, key for import and export purposes, particularly that of energy. President Putin's control of the crucial port city of Sevastopol would allow Russian fleets to easily sail the Black Sea,

Nate Bohlander is a Partner at Morgan & Akins, PLLC in the firm's Philadelphia office. He is the chair of the firm's National Aviation Practice Group and, while licensed in Pennsylvania, New York, and New Jersey, oversees all aviation matters in each of the states Morgan & Akins practices. Nate specializes in aviation personal injury matters both "above" and "below" the wing and regularly writes on issues impacting the aviation insurance industry.

and building the South Stream gas pipeline overland though Crimea, rather than underwater, to Bulgaria would save Russia ***some $20 billion in construction costs.***

Invasion

Ultimately, for Ukrainians suffering because of President Putin's invasion during the past year, the reasons behind the military action matter little. After amassing 100,000 troops around the border with Ukraine, Russia invaded its neighbor ***on February 24, 2022. Russia aggressively pressed forward*** toward the first goal of encircling and capturing Kyiv. Since that time, the Ukrainian forces, largely comprised of volunteers, have fought overwhelmingly admirably, and, against all odds, recaptured much of the land which was initially ***taken by Russian forces***. While the conflict rages on, ***approximately 7.7 million Ukrainians refugees have fled to other nations***, and approximately ***8 million Ukrainians have been displaced within the country.***

The American sanctions levied upon Russia as a result of the invasion were not limited to the financial sector.

Sanctions

The global community's condemnation of Russia's actions was vociferous and swift, and, indeed, even predated the formal start of the invasion itself. On February 22, 2022, two days before the invasion, U.S. President Joe Biden announced ***sanctions*** on four Russian banks, as well as billionaires with close ties to Putin. Then-U.K. Prime Minister Boris Johnson followed suit, ***announcing*** that all major Russian banks would have their assets both frozen and excluded from the U.K. financial system. Four days later, a consortium of countries, including those in the European Commission, as well as France, Germany, Italy, Great Britain, Canada and the United States, ***jointly announced sanctions*** aimed at preventing Russia from accessing $630 billion in central bank foreign currency reserves. These sanctions also included cutting Russia off from the SWIFT system, the world's main international payment network. *Id.*

The American sanctions levied upon Russia as a result of the invasion were not limited to the financial sector. On March 8, 2022, President Biden ***ordered a ban*** on all Russian oil imports. Additionally, these sanctions included, somewhat famously, ***the Nord Stream 2***, a parent company for the Russian pipeline project to bring natural gas to Europe. The sanctions affected public and private entities and individuals alike, and targeted: President Putin himself, as well as his administration and connected oligarchs; Russia's legislature; and defense, technology, and aerospace firms. *Id.* President Biden likewise banned Russian exportation of many products, such as gold, diamonds, seafood, and alcoholic beverages, to the U.S. *Id.* Several other nations followed suit, severely crippling the Russian economy.

Aircraft

While many of the sanctions took weeks to enact, and then another several months to continue to ramp up, Western countries' restrictions with respect to the aviation sector came thick and fast. A mere two days after Russia's invasion of Ukraine, the European Union implemented a complete ban on Russian aviation (which the U.S. joined within a week), including, as ***described*** by EU President Ursula von der Leyen, a complete "shut[ ] down [of] EU airspace for Russian-owned, Russian-registered or Russian-controlled aircraft." The EU's ban on technology and goods imported from, and exported to, Russia, also impacted the aviation industry, since hundreds of leased airplanes were parked on Russian soil at the time of the ban, and, as outlined below, were effectively seized by the Russian government. *Id.*

In response, President Putin took three steps to offset the impact of these sanctions on the Russian economy. First, at least according to the Russian state-run news agency, he earmarked over $300 million to airlines, in order to assist with growing expenses of cancelled flights. *Id.* Second, he announced that over $14 billion will be spent by 2030 in order to meet the goal of having over 80% of aircraft being operated in Russia manufactured domestically. *Id.* Despite these measures, approximately 19 million fewer passengers are estimated to have traveled in Russia in 2022. *Id.* The sanctions undeniably worked insofar as it further squeezed the Russian economy by significantly slowing down both international and domestic travel, which hindered business opportunities and interests. As a result of the foregoing sanctions, an estimated 400 airplanes, ***valued at more than $10 billion***, remained in Russia.

Third, of particular pertinence to this article, President Putin signed a law allowing Russian airlines to operate airplanes domestically which were leased from international suppliers, despite the concern that these flights posed additional dangers, due to the fact that Russia remained cut off from parts and maintenance services. *Id.* Vitaly Seveliev, Russia's transport minister, claimed that ***1,140 new planes*** had been registered in Russia following President Putin's decree.

As noted below, this step, which has resulted in a flurry of lawsuits from aircraft lessors against their insurers, was met with swift and decisive criticism from the International Civil Aviation Organization (ICAO). The ICAO released a statement noting that Article 18 of the Chicago Convention ***states*** that an aircraft cannot be registered by more than one country since this may lead to safety concerns, such as the legality of an aircraft's certificate of airworthiness and radio station license. Some 461 aircraft seized by Russia are dual registered with Bermuda. Id. Many others were co-registered in Ireland, resulting in both the Irish Aviation Authority and Bermuda Civil Aviation Authority ***suspending*** the certificates of airworthiness. The ICAO also ***directly contacted*** Russia to urge the nation to immediately stop the ongoing infractions of the Chicago Convention.

Leases and Claims

Of course, aircraft lessors, losing significant sums of money by the day, began exploring remedies for this situation. Initially, these lessors attempted to terminate the leases

of the aircraft stuck in Russia, as well as ***mandating*** that the airline lessees return the aircraft. When the airline lessees failed to honor the termination and did not return the planes, the lessors then suspended the certificates of airworthiness of the aircraft. *Id*. The lessees, without the lessors' consent, reregistered the aircraft in Russia, which prompted the lessors to turn to filing insurance claims for total losses of the aircraft, which their insurers denied. *Id*. The insurers' reasoning was that the aircraft have not been destroyed and, since the political climate can shift at any time, claimants have not definitively shown that they are permanently deprived of their leased property. *Id*. In response, some lessors' position was that, even if the aircraft are returned, the shoddy recordkeeping and potential lack of required maintenance could result in their unmarketability. *Id*.

Lawsuits

Aercap

Aircraft lessors and their insurers had reached an impasse with respect to these stranded aircraft. The lessors, based in almost every continent, headed to courts around the world for relief. Almost a dozen lawsuits have been filed by lessors against their insurers seeking recoupment of the value of their aircraft in Russia. In June 2022, after filing a $3.5 billion insurance claim which was denied, Aercap, the world's largest aircraft leasing company, ***sued*** AIG and other insurers in the High Court of London. ***Aercap lost $2.7 billion*** during just the first three months of 2022, since 141 planes and 26 engines leased by the company remained in Russia. *Id*. ***Aercap is insured*** against a variety of risks, such as normal damage, war-related damage, and harm to passengers, from separate insurers. AIG provides the "all-risk" cover for Aercap's leased aircraft, which includes insurance for risks specifically excluding war. *Id*. Other insurers of Aercap's planes, a group led by Lloyd's of London, covers the company's war risks. *Id*. In its filings, Aercap ***argues*** that both the "all-risk" and "war risk" insurers should have paid out on Aercap's claims for the total amount of the aircraft. In AIG's filings, the insurer argued that the aircraft's detention in Russia was a political decision, which places it outside of the scope of its coverage. *Id*. The "war-risk" insurers argued that, even if the seizure was an event which it covered, the fact that the aircraft were not lost or destroyed was fatal to Aercap's claim against them. *Id*.

DAE

In August and September 2022, another aircraft leasing firm, Dubai Aerospace Enterprise (DAE), ***filed claims*** under both its War Risks and All Risks policies for its nineteen (19) aircraft remaining in, and being used by, Russia. Just a month later, in October 2022, ***DAE filed suit***, also in the High Court. DAE sued eleven (11) insurers, including Lloyd's of London, for $600 million, based upon these nineteen (19) aircraft which were "***stuck***" in Russia. DAE had written off $576.5 million for these planes and noted that it had "no way to determine whether these aircraft will be returned at any point in the future." *Id*.

BOC

Singapore-based BOC Aviation Ltd. (BOC) likewise ***filed suit*** against sixteen (16) insurers in November 2022 in the Irish

Hight Court. The ***lawsuit is based on seventeen (17) aircraft*** worth more than $800 million, which remain in Russia. This represents ***approximately 4%*** of BOC's entire fleet. BOC's filing came after its CEO Robert Martin stated, in August 2022, that the Russia sanctions were "rushed through approval by governments," and that BOC would "vigorously pursue" the insurance claims for the aircraft which it had submitted to that point. *Id*. Once it became clear that the lawsuit was required, Mr. Martin commented that the chain of cases filed by aircraft lessors against insurers will keep lawyers "busy for many years" and "may require a complete rethinking of aviation insurance." *Id*.

Avolon

Dublin-based aircraft lessor Avolon was one of the companies which was actually able to recover aircraft from Russia. Avolon ***rescued*** four (4) of the fourteen (14) aircraft it had leased within Russia during the short period between the Ukrainian invasion, but before the sanctions permanently grounded its aircraft. Still, the ten (10) remaining aircraft total $261 million in value, which is the basis of Avolon's Irish High Court ***lawsuit*** against its insurers over claims for these planes. After filing suit, the company released a statement indicating that it has "always maintained that we will rigorously pursue our claim and issuing proceedings now is the next stage in that process." *Id*. After Russia seized the aircraft leased by Avolon, Dómhnall Slattery, Avolon's former chief executive regarded the planes as "stolen." *Id*.

SMBC

In late November 2022, SMBC Aviation Capital (SMBC), which is owned by a consortium which includes several Japanese firms, ***filed the second-largest lawsuit*** based on Russia-held aircraft (to Aercap's action). Thirty-four (34) of SMBC's leased planes, worth $1.6 billion, remained stuck in the country following Russia's aircraft seizure. *Id*. SMBC's 2022 annual report referred to the lost aircraft as "***one of the most difficult moments for aviation***." An SMBC spokesperson indicate that "[a]ppropriate insurance is in place" for the "aircraft lost in Russia," and that the lessor "expect[s] to be paid in accordance with our insurance policies." *Id*.

Carlyle

Carlyle Aviation Partners (Carlyle) was not as lucky as Avolon with respect to repossessing leased aircraft following the invasion of Ukraine. Carlyle, which leased twenty-three (23) planes to Russian airlines, including Izhavia and NordStar, was informed by these lessees that the Russian government's ***restrictions prohibited them*** from sending them back to Carlyle. Since these aircraft were effectively stranded, Carlyle filed suit against more than a dozen insurers for breach of contract and violation of good faith duties insofar as they did not evaluate the claims, first made in March 2022, in a "***timely or serious manner.***" Carlyle's suit claims $700 million in damages. *Id*. In its complaint, filed in Miami, Carlyle claimed that, despite the fact that it paid its quarterly insurance premiums, its insurers "***failed to hold up their end of the bargain.***"

Aircastle

Aircastle, a United States-based aviation leasing company, effectively lost nine (9) aircraft and accompanying equipment in Russia following the imposition of the country's seizure of planes, ***totaling approximately $252 million*** in value. After Aircastle submitted claims for the foregoing, which were denied, it filed suit in New York state court against thirty (30) named insurers, alleging that, despite applicable coverages under the All Risks and War and Other Perils sections of its policies, their claims were denied. *Id*. In the filings, Aircastle demands, among other damages, a declaration that its insurers are obligated to provide coverage for these losses, as well as any compensatory and special damages determined by the trier of fact. *Id*.

Conclusion

With more than ten (10) lawsuits pending in courts around the world, airplane lessors are testing judiciaries' opinions regarding whether aviation insurance coverage (as well as any exceptions) apply to the aircraft stranded in Russia. The fallout from these lawsuits will undoubtedly shake the aviation industry in a host of different ways. Preliminarily, there is the issue of whether the insurance carriers will be required to actually make these billions of dollars of payments. In the aggregate the total amount of damages claimed is more than $10 billion. ***As Bill Behan, CEO of Assured Partners Aerospace, put it***, paying these claims would be "thoroughly devastating" to insurers, since the payout would be approximately "two to three times the size of every insurance dollar paid to the insurance industry in the world for all of aviation." This result would substantially impact not only these insurers' bottom lines, but the insurance industry as a whole.

These lawsuits will also fundamentally alter the way both lessors and carriers conduct business in the future. Lessors will be more selective regarding the countries to which they lease aircraft. Armed with the knowledge of what occurred – and is occurring – in Russia, ***lessors almost certainly won't be working with Russian carriers*** moving forward. But they will also more closely examine the political landscape, including the likelihood of wartime activities, before agreeing to leases in the future. Countries with stable economies, leaders, and histories will be more attractive landing spots (no pun intended) for leased aircraft than nations with overzealous chief executives, or with a volatile financial system.

On the carriers' side, there are two (2) likely resultant developments as a result of these lawsuits. First, if the payouts on these claims are mandated by the courts, premiums can be ***expected to increase*** to cover the cost. These premiums will likely be spread amongst all aviation insureds, raising the cost of aviation insurance. Second, aviation insurance carriers will include additional exclusions in their policies. *Id*. The COVID-19 pandemic changed general liability policy language forever, particularly insofar as it related to the public health crises and governmental action exclusions. Russia's seizure of these aircraft will undoubtedly do the same for aviation insurance. Insureds can expect their future policies to contain far broader and more comprehensive wartime and perilous national risk exclusions, in order to specifically exclude a similar development moving forward.

WHO'S YOUR ONE?

GOOD THINGS **MUST** BE SHARED.

Do you have a peer that would benefit from DRI membership? Talk to them about why ***you*** value your DRI membership.

YOU CAN MENTION HOW DRI HAS:

- **ENABLED** you to create business opportunities that helped build your practice.
- **COORDINATED** networking opportunities with potential clients and attorneys for business referrals.
- **FACILITATED** leadership opportunities for new and existing members.
- **AND MORE!**

LEARN MORE!

Both you and the new member will be rewarded if he/she joins DRI ***during the month of May*** with a $100 certificate that can be used on DRI programming.

dri

Understanding Child Sexual Abuse Disclosures And Forensic Interviewing

By Maureen V. Runyon and Thomas J. Hurney, Jr.

As civil defense attorneys involved in these cases, it is important to be able to understand the factors that impact a child's ability to be a reliable, competent witness.

The Scope of the Problem

Child sexual abuse currently impacts one in ten children in the United States. It is estimated that approximately 95% of those who sexually abuse children are someone that the child and their family know, love, and trust. Comprehensive information on the frequency and number of children sexually abused in an organizational setting is lacking, yet here we are. Anecdotally, we know it exists in large enough numbers that a meeting like this is necessary. On the prevention side, organizations are investing significantly in the development of policies, safety, and prevention programs for staff and volunteers that work with children.

Maureen V. Runyon is the Coordinator of the Child Advocacy Center at CAMC Women & Children's Hospital in Charleston, WV. She has worked for CAMC for 30 years and led CAMC's efforts to develop the first hospital-based Child Advocacy Center in West Virginia in 2005. She obtained a BSW from Marshall University and an MSW from the University of Kentucky. All her professional life has been devoted to work and issues related to children and families, particularly child abuse and neglect. Ms. Runyon has testified throughout West Virginia and several courts in Ohio as an expert in child sexual abuse and forensic interviewing. She has taught at local, state, and national conferences as well as at the collegiate level. **Thomas J. Hurney, Jr.** of Jackson Kelly PLLC is a trial lawyer with almost forty years of experience in the defense and trial of health care, class action and complex litigation, including sexual abuse cases. He practices out of the Firm's office in Charleston, West Virginia.

The U.S. Dept. of Education estimates that approximately 9.6% of children have experienced sexual abuse in an educational setting. In 2020, they released data for the 2017-18 school year and reported a sharp increase in the number of reports investigated. Corrected data published in December of 2022 indicated that while the corrected data was lower than previously reported, there was still an increase of 43% from the previous year (***2017-18 Civil Rights Data Collection Sexual Violence in K-12 Schools Issue Brief***, U.S. Department of Education Office for Civil Rights (Errata Sheet Correction issued Dec. 2022).

Much has been learned in the last 25-30 years about child sexual abuse and how best to conduct interviews with children.

Most of the information regarding sexual abuse of children in sports comes from retrospective studies of adults and what they report happened to them as a child involved in youth sports. According to UNICEF Protecting Children from Violence in Sport, published in 2010, it wasn't until the 1990s that researchers began to look at the abuse of children in organizational settings even though it clearly was not a new phenomenon. This international report is striking in its coverage of all sports throughout the developed world. In the United States, reports of sexual abuse by coaches, teachers, church personnel, and others in positions of authority over children that are frequently seen in the headlines (Celia Brackenridge, et al., ***Protecting Children from Violence in Sport***, UNICEF Innocenti Research Center (July 2010).

The trauma that a child experiences and endures during a period of time in which they are sexually abused will significantly impact if and when they tell a trusted adult that they have been abused as well as how they tell them. This article includes an overview of forensic interviewing of children alleged to be victims of sexual abuse. Additionally, the article will discuss the various emotional factors that impact a child's disclosure of child sexual abuse. Current and foundational research will be discussed in addition to practical experience from the field. Various nationally recognized protocols for forensic interviewing and how it impacts a child's disclosure will also be discussed.

How Children Experience Sexual Abuse

Much has been learned in the last 25-30 years about child sexual abuse and how best to conduct interviews with children. Forensic interviewing and investigation of child sexual abuse continues to evolve because through research, we are continually learning better ways to conduct interviews and facilitate children's abilities to provide disclosure. Technology facilitated child maltreatment has also changed the way that cases are investigated.

In 1983, Dr. Roland Summit published a paper on Child Sexual Abuse Accommodation Syndrome ("CSAAS") (Roland C. Summit, ***The Child Sexual Abuse Accommodation Syndrome***, Child Abuse and Neglect, 177 (1983)). At the time - in the late 1970s and early 1980s - there was little research published on how to interview children or the emotional aspects; much of the early work focused on medical aspects of child sexual abuse. Dr. Summit detailed five attributes or characteristics he identified in adult patients he treated over the years: Secrecy, Helplessness, Entrapment and Accommodation, Delayed Disclosure, and Recantation.

> The most typical reactions of children are classified in this paper as the CSAAS. The syndrome is composed of five categories, of which two define basic childhood vulnerability and three are sequentially contingent on sexual assault: (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed, unconvincing disclosure, and (5) retraction. The accommodation syndrome is proposed as a simple and logical model for use by clinicians to improve understanding and acceptance of the child's position in the complex and controversial dynamics of sexual victimization. Application of the syndrome tends to challenge entrenched myths and prejudice, providing credibility and advocacy for the child within the home, the courts, and throughout the treatment process. The paper also provides discussion of the child's coping strategies as analogs for subsequent behavioral and psychological problems, including implications for specific modalities of treatment.

Dr. Summit's paper was not based on clinical research, but rather on his review of prior literature which he correlated with observations from his practice. This study draws in part from statistically validated assumptions regarding prevalence, age relationships and role characteristics of child sexual abuse and in part from correlations and observations that have emerged as self-evident within an extended network of child abuse treatment programs and self-help organizations. The validity of the accommodation syndrome as defined here has been tested over a period of four years in the author's practice, which specializes in community consultation to diverse clinical and para-clinical sexual abuse programs.

While Dr. Summit stated "[t]he syndrome has elicited strong endorsements from experienced professionals and from victims, offenders, and other family members, in 1993, Dr. Summit published The Abuse of the Child Sexual Abuse Syndrome, in which he decried the misuse of his original publication (Roland C. Summit M.D., ***Abuse of the Child Sexual Abuse Accommodation Syndrome***, Journal of Child Sexual Abuse, 1:4, 153-164, (1993) (DOI: 10.1300/J070v01n04 13)).

> It has been 13 years since I observed that victims of sexual abuse are the object of prejudice because they do not meet our artificial standards of disclosure. I thought that better education would correct this secondary' abuse. The CSAAS, written to address that prejudice, was drawn from community resources, and published in the interdisciplinary, international journal for child abuse awareness. Nothing in that history implies that the CSAAS is a medical issue. There are infinite

behavioral variations which can be subsumed under the five categories of the CSAAS, any of which may be vital to understanding a victim's dilemma. To take all such information away from those who can best express it, to consign it to a category of medical evidence because a psychiatrist once Downloaded by [University of Alabama at Tuscaloosa] at 14:15 29 October 2013 tried to summarize it, and then to rule any and every part of such Information forbidden to a trier of fact unless a physician can prove it qualifies as medical evidence is the ultimate expression of the very prejudice which the courts seem so reluctant to acknowledge. Knowledge is not enough. Education is not enough. A good clinical framework like the CSAAS is not only not enough, it becomes worse than nothing if it offends those who are determined not to learn. It can be used as a lock on the secret instead of the key. The problem is not with improper use of expert testimony. The problem is not with skeptical attorneys or recalcitrant judges; they all merely represent our continuing reluctance as an adult society to allow an honest view of our children's continuing silence. The answer lies not in better research or better publications. Scientific progress is no match for prejudicial ignorance. The answer rests with broader acknowledgement that we all need to discard familiar reassurances and struggle together for better answers. We aren't yet willing as a society to prohibit the sexual abuse of children. Why not?

After the high-profile daycare cases in the early 1990s (McMartin and Little Rascals cases) (See, Clyde Haberman, ***The Trial That Unleashed Hysteria Over Child Abuse***, New York Times, March 9, 2014), research in the field focused on looking at the suggestibility and memory of young children. The memory and suggestibility research of Steven Ceci and his colleagues in the 1990s dominated the field and the consensus at that time was that basically children were so suggestible that it was difficult to be confident in a child's ability to tell the truth about sexual abuse in a credible way. (Stephen J. Ceci and Maggie Bruck, ***Suggestibility of the Child Witness: A Historical Review and Synthesis***, 113 Psychological Bulletin No. 3, p. 403 (1993)) (See, e.g., Daniel Goleman, ***Studies Reveal Suggestibility Of Very Young as Witnesses***, New York Times, June 11, 1993)

Today, some of the early research and publications in the field is now known to be less reliable. Dr. Summit's paper was misused by professionals in the field and courts across the country who relied on it to assert that abuse occurred based on the existence of the five characteristics. But courts have found that the use of the CSAAS attributes to prove that abuse occurred is unreliable. *Hadden v. State*, 690 So.2d 573 (Fla. 1997) ("[T]he Florida Supreme Court held that testimony that a child "exhibits symptoms consistent with … CSAAS has not been proven by a preponderance of scientific evidence to be generally accepted by a majority of experts in psychology.") While not admissible to prove a victim has in fact been sexually abused, CSAAS has been held admissible "to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching behavior." *People v. McAlpin*, 812 P.2d 563 (1991); *People v. Slaughter*, 170 N.Y.S.3d 803, 207 A.D.3d 1185 (2022)(CSAAS evidence admissible to explain delayed disclosure - "for the purpose of explaining behavior that might be puzzling to a jury..."); *State v. J.L.G.*, 234 N.J. 265 (2018)(CSAAS "testimony should not stray from explaining that delayed disclosure commonly occurs among victims of child abuse, and offering a basis for that conclusion.")). It is noteworthy that although some of Dr. Summit's original attributes remain controversial, others have been supported with empirical research conducted since then. The early work of Dr. Stephen Ceci and colleagues no longer reflects the way that child sexual abuse cases are investigated, and some would argue it never really was. However, there are important aspects of the early work that laid the foundation for the way we handle child sexual abuse cases today.

Current Practice in Forensic Interviewing

In more recent years, much of the research has focused on how to best obtain detailed, credible, narrative information from children in a forensically sound way. Best practice requires that anyone conducting a forensic interview of an alleged victim is to be trained in a nationally recognized model for interviewing. In the September 2020 edition of the APSAC Advisor, Dr. Kathleen Coulburn Faller provides an update on the major forensic interview structures that currently exist (Kathleen Coulburn Faller, Ph.D., ***Forensic Interview Protocols: An Update on the Major Forensic Interview Structures***, Volume 32, Number 2, APSAC Advisor (2020)). There are approximately eight to ten recognized protocols that meet the criteria for national accreditation for Child Advocacy Centers which include:

- Child First (Formerly Finding Words)
- The National Children's Advocacy Center Forensic Interview Structure
- Childhood Trust
- Cornerhouse Forensic Interview Protocol
- Ten-Step Interview Process
- RADAR Protocol
- National Institute of Child Health & Development (NICHD)
- American Professional Society on the Abuse of Children (APSAC)
- FBI Child Forensic Interview

Of these protocols, approximately 85% of them contain the same stages, phases, or steps in the interview process, with some nuance. The differences are not that significant but do exist. All protocols have specific phases and processes, and most use the same phases. The most distinct differences between the protocols relate to interview instructions, truth-lie discussions in the interview, and how it is conducted. Additionally, there is no universal agreement regarding the use of interview aids such as diagrams and anatomical dolls.

Conclusion

There are many factors to consider in forming an opinion about the credibility of child sexual abuse allegations. As civil defense attorneys involved in these cases, it is important to be able to understand the factors that impact a child's ability to be a reliable, competent witness.

Birth Injury Litigation's New Targets

By Thomas P. Sartwelle and James C. Johnston

Pediatricians, Neonatologists, and Neonatal Hypothermia

When therapeutic hypothermia [TH] became standard of care for neonatal encephalopathy about a decade ago, birth injury litigation's already target-rich environment mushroomed.

Forty or so years ago, the exact time is unclear, an enterprising trial lawyer and his courtroom expert first convinced a jury that an obstetrician and hospital nurses caused a newborn to be sentenced to a lifetime of cerebral palsy [CP]. The theory was that the electronic fetal monitor's [EFM] signals used to monitor the labor were telling the obstetrician and labor and delivery nurses the fetus was in "fetal distress" and the brain was being damaged by "birth asphyxia." The obstetrician and nurses were either too ignorant or inattentive to the monitor's signals and therefore should pay millions for the child's lifetime care. T.P. Sartwelle. *Cerebral Palsy Litigation and Electronic Fetal Monitoring: Alice's Adventures in Wonderland Redux*. 63(5) For The Defense 24-33 (2021).

This liability theory was and is counterfeit. It is based on nothing more than medical myths. But from that point until today, birth injury litigation in all developed nations became a trial lawyer profit center. T.P. Sartwelle, et al. *Cerebral Palsy Litigation: A Hoax On You*. V(4) Indian J Med Ethics 295-301 (2020); Cf. John Edwards, *Four Trials* (Simon & Schuster New York, New York 2003 (Jennifer speaks to the doctors, nurses, and finally the jury through the fetal monitor strip and begs to "get out"). In fact, the world's industrialized countries have an EFM-CP-birth injury litigation crisis on the verge of bankrupting health care budgets, driving obstetricians and midwives out of practice, and making a mockery of bioethical principles and informed consent. E.g., S. Politi, et al. *The Time Has Come for a Paradigm Shift in Obstetrics' Medico-Legal Litigation*. European J Obstet Gynecol and Reproductive Biology (2023) doi:***https://doi.org/10.1016/j.ejogrb.2023.02.018***; T.P. Sartwelle, et al. *Electronic Fetal Monitoring in the Twenty-First Century: Language, Logic, and Lewis Carroll*. 16(3) Clinical Ethics 213-221 (2021); N. Badawi et al. *Causal Pathways in Cerebral Palsy*. 49 J Paediatr Child Health 5-8 (2013) (hereinafter CP Causal Pathways); A.H. MacLennan. *A "No Fault" Cerebral Palsy Pension Scheme Would Benefit All Australians*. 51 Aust NZ J Obstet Gynecol 479-484 (2011).

Until recently, the birth injury lawyers' targets of opportunity were primarily obstetricians, maternal fetal medicine physicians, labor and delivery nurses [hospitals], and midwives. But when therapeutic hypothermia [TH] became standard of care for neonatal encephalopathy about a decade ago, birth injury litigation's already target-rich environment mushroomed to now routinely include pediatricians, neonatologist, nurse practitioners, and any other health care provider involved in clinical assessments and decisions to prescribe or not prescribe TH for any child ending up with deficits like cerebral palsy, epilepsy, developmental delay, autism, poor school performance, and any other possible cognitive impairment.

Thomas P. Sartwelle of Hicks Davis Winn PC has fifty-five years of trial experience, primarily handling complex cases involving business disputes, catastrophic personal injury and death, and more, with extensive experience handling medical administrative, credentialing, and discipline hearings. He is Board Certified by ABPLA in Medical and Legal Malpractice Law by the National Board of Trial Advocacy in Civil Trial Advocacy and Civil Practice Advocacy, and by the Texas Board of Legal Specialization in Personal Injury Trial Law. He is currently on the ABPLA Board of Governors and serves as ABPLA's First Vice President. **James C. Johnston** is a consultant neurologist and attorney. He is a Diplomate of the American Board of Psychiatry and Neurology, Fellow of the American Academy of Neurology, and a Fellow of both the Australasian and American Colleges of Legal Medicine.

Previous efforts to treat NE with a wide variety of interventions were largely unsuccessful. Thus,lawsuits against neonatologists, pediatricians, and other pediatric providers were rare.

But like EFM-CP-birth injury litigation, TH lawsuits are based on pseudo-science. Kept alive by trial lawyer advertising and trial lawyer courtroom "experts" willingly distorting TH's foundations, science, and clinical limitations, TH has become a Catch 22 for the new health care targets as well as the traditional pregnancy-labor-delivery targets—implement TH for any child who ended up with a deficit and that is undeniable proof of birth asphyxia and labor and/or delivery negligence and obviously TH was not implemented soon enough or improperly otherwise the child would not have a neurologic deficit. If TH was not implemented that becomes evidence of all care providers' negligent clinical judgement because obviously the child would not have a deficit if only the NE had been recognized and TH prescribed. Heads I win, tails you lose. J.M. Fanaroff et al. on behalf of the Newborn Brain Society Guidelines and Publication Committee [hereinafter NBS]. *Medico-Legal Considerations in the Context of Neonatal Encephalopathy and Therapeutic Hypothermia*. 26(5) Semin Fetal Neonat Med 101266 (2021) (hereinafter *Medico-Legal Considerations* 2021). [The Newborn Brain Society, an international non-profit society of physicians and researchers devoted to research and education related to newborn neurologic-neurocritical care, clinical NE issues and treatments, ***https://newbornbrainsociety.org/***, edited volumes 26(4) and 26(5) of *Seminars In Fetal And Neonatal Medicine* (2021) devoted to the state-of-the art clinical and research knowledge of NE and TH].

But the real questions are: if there is little science supporting their "experts" how have trial lawyers been so successful in TH lawsuits, *Id*., and how can these TH allegations successfully be countered?

Neonatal Encephalopathy & Therapeutic Hypothermia

NE is now preferred medical terminology for a clinical neurologic syndrome occurring in the first days of life in term and near-term newborns. This syndrome can result in a wide variety of neurologic symptoms ranging from mild irritability, feeding difficulties, abnormal tone and reflexes, difficulty initiating and maintaining respirations, to coma, seizures, and long-term disabilities like CP, cognitive impairments, seizures, and other long-term neurologic disabilities, and death. *E.g., Id*.; S. McIntyre, et al., on behalf of NBS. *Neonatal Encephalopathy: Focus on Epidemiology and Unexplored Aspects of Etiology*. 26(4) Semin Fetal Neonat Med 101265 (2021) (hereinafter Focus on NE); J.B. Russ, et al. *Neonatal Encephalopathy: Beyond Hypoxic-Ischemic Encephalopathy* 22(3) Neoreviews. e148-e162 (2021) (hereinafter *Beyond HIE*).

The term NE is only a description of a newborn's disturbed neurologic function. It can be transient or indicative of a permanent cerebral disfunction. And despite what trial lawyer "experts" say, NE primarily originates in prenatal life unassociated with labor and delivery. In more than half the cases NE causes are unknown and the majority of children with CP after NE did not meet cooling

criteria. *Id*; E.V. Wachtel et al. *Update on the Current Management of Newborns with Neonatal Encephalopathy* 49(7) Curr Probl Pediatr Adolesc Health Care 100636 (2019) (hereinafter *Current Management of NE*); E.J. Molloy et al. *Neonatal Encephalopathy Versus Hypoxic-Ischemic Encephalopathy.* 84 Ped Research 574 (2018); (hereinafter *NE* vs. *HIE*); J. Garfinkle et al. Cerebral Palsy *After Neonatal Encephalopathy: How Much Is Preventable?* 167(1) J Pediatr 58-63 (2015) (hereinafter *How Much Is Preventable*).

NE is associated with increased risk of adverse outcome BUT NE IS NOT a description of etiology or causation, or a description of any care giver's negligence. *Id*., J.H. Ellenberg, et al. *The Association of Cerebral Palsy with Birth Asphyxia: A Definitional Quagmire*. 55 Develop Med & Child Neurol 210-216 (2013) (hereinafter Definitional Quagmire); O. Dammann et al. *Neonatal Encephalopathy or Hypoxic Ischemic Encephalopathy: Appropriate Terminology Matters* 70 Pediatr Res. 1-2 (2011) (hereinafter *Appropriate Terminology*); K.B. Nelson. *Is It HIE*? *And Why It Matters*. 96 Acta Paediatr 1112-1114 (2007) (hereinafter *Why It Matters*). "Although presenting in the neonatal period [commonly in the delivery room], NE often has its origins in prenatal life. The etiology of NE is diverse, and no single test defines it." *Focus on NE*, supra at 1.

Trial lawyers and their "experts" prefer to use antediluvian terms to define a newborn's NE, terminology used long before NE research proved birth care givers rarely caused NE. The "experts'" preferred words are "birth asphyxia," "hypoxic ischemic encephalopathy," [HIE] "birth anoxia," "intrapartum asphyxia," "fetal distress." Why? Because the words are blaming, finger pointing, fault finding terms implying care giver negligence. These terms were used for a century or more based solely on nineteenth century speculation, folklore, and myths to explain to parents the cause of newborn encephalopathy, CP, and other neurologic maladies. M. Obladen. *From "Apparent Death" To "Birth Asphyxia": A History of Blame*. 83(2) Pediatr Research. 403-411 (2018); M. Obladen. *Lame From Birth: Early Concepts of Cerebral Palsy*. 26(2) Child Neurol 248-256 (2010); F.K. Bellar. *The Cerebral Palsy Story: A Catastrophic Misunderstanding in Obstetrics*. 50(2) Obstet Gynecol Surv. 83-84 (1995).

Thus, explaining NE's "definitional quagmire," and research, *Definitional Quagmire*, supra, is one of the important aspects of defending NE-TH lawsuits. Why? Because even today not only the courtroom NE-TH "experts" use the finger pointing rhetoric, many practicing physicians refer to NE as HIE, birth asphyxia, fetal distress, etc., when such single cause attribution is still as unproven today as it was when these terms were first invented in the nineteenth century to explain bad birth outcomes. *Id; Appropriate Terminology*, supra. Physicians continuing to use these terms are compromising birth injury defense despite repeated admonitions from colleagues and professional societies trying to improve research and save lives while at the same time blunt courtroom use of this grossly imprecise language. L. Chalak et al. *A 20 Year Conundrum of Neonatal Encephalopathy and Hypoxic Ischemic Encephalopathy: Are we Closer to a Consensus Guideline?* 86 Ped Research 548-549 (2019) (hereinafter *20 Year Conundrum*); *NE* vs. *HIE*, supra; Am College Obstet Gynecol and Am Acad Pediatrics. *Neonatal Encephalopathy and Neurologic Outcome* 2nd ed (2014) (hereinafter *Neonatal Encephalopathy and Neurologic Outcome*); *Definitional Quagmire*, supra; *Appropriate Terminology*, supra; *Why It Matters*, supra.

And while it is appropriate to blame trial lawyers and their "experts" for keeping the blame-inducing language alive, one must keep in mind that many of today's physicians greatly assist trial lawyer efforts to place undeserved blame on colleagues with unprovoked medical record entries using these inappropriate causation labels. These labels are especially troublesome when they are used by the physicians in TH receiving cooling center hospitals where the receiving care providers have no personal knowledge about the circumstances of birth but who insists on using pejorative causation terminology like HIE, birth asphyxia, fetal distress, etc. These entries provide trial lawyers with medical record evidence of supposed labor/delivery and possibly TH negligence. Once enrolled in the medical records, birth asphyxia becomes a millstone around the neck of all birth lawsuit defendants.

Limitations of Therapeutic Hypothermia

It is essential to defending any TH lawsuit to first recognize that TH is limited to term and near-term infants [36 weeks], with MODERATE-TO-SEVERE NE, usually as determined by Sarnat criteria, implemented within 6 hours of postnatal age, and maintained for 72 hours at 33.5 degrees centigrade. Flibotte et al. *Blanket Temperature During Therapeutic Hypothermia and Outcomes in Hypoxic Ischemic Encephalopathy*. 42(3) J Perinatol 348-353 (2022); H. Sabir et al and NBS. *Unanswered Questions Regarding Therapeutic Hypothermia for Neonates with Neonatal Encephalopathy*. 26(5) Semin Fetal Neonatal Med 101257 (2021) (hereinafter *Unanswered Questions*); S. Chawla et al. *Is It Time for a Randomized Controlled Trial of Hypothermia for Mild Hypoxic-Ischemic Encephalopathy?* 220 Pediatrics 241-244 (2020) (hereinafter *Is It Time for RCT For Mild NE?*); Am Acad Pediatrics. *Clinical Report, Hypothermia and Neonatal Encephalopathy*. 133(6) Pediatrics 1146-1150 (2014) (hereinafter *AAP TH* and *NE*).

All efforts to increase, decrease the parameters initially established for cooling—term-near-term infants, moderate-to-severe NE, 72 hours at 33.5 C etc. —despite what courtroom "experts" say, have not met with success and are not recommended. E.g., *Unanswered Questions*, supra; *Beyond HIE*, supra; *Current Management of NE*, supra; N.J. Roberson et al. *Depth and Duration of Cooling for Perinatal Asphyxial Encephalopathy* 312(24) JAMA 2623-2639 (2014); *AAP TH* and *NE*, supra.

It is important to emphasize that subjecting neonates with only MILD NE to TH, as many trial lawyer "experts" testify, is not an established standard of care treatment because there is "insufficient systematic evidence proving improved neurodevelopmental outcome" and no clear evidence of the "risks and drawbacks." *Unanswered Questions*, supra at 6. E.g., *Medico-Legal Considerations* 2021, supra; British Ass'n Perinatal Medicine, *Therapeutic Hypothermia for Neonatal Encephalopathy, A Framework*

for Practice (November 2020) (available at ***https://www.bapm.org/resources/237-therapeutic-hypothermia-for-neonatal-encephalopathy***; *How Much Is Preventable*, supra; M.T. Berg. *Prevention of Cerebral Palsy: Which Infants Will Benefit from Therapeutic Hypothermia?* 167(1) J Pediatri 8-10 (2015); *AAP TH* and *NE*, supra.

TH is the only treatment for neonatal encephalopathy. But NE mostly occurs from causes unrelated to labor and delivery and TH benefits only a small minority of neonates—1 in 6 or 1 in 7 (14%-17%)—undergoing TH has an improved outcome. E.g., *Focus on NE*, supra; *Unanswered Questions,* supra; *Current Management of NE*, supra; S. McIntyre et al. *Does Aetiology of Neonatal Encephalopathy and Hypoxic-Ischaemic Encephalopathy Influence the Outcome of Treatment?* 57 (Supp 3) Develop Med & Child Neuro 2-7 (2015) (hereinafter *Does Aetiology Influence Treatment?*); AAP TH and NE, supra; S.E. Jacobs et al. *Cooling for Newborns with Hypoxic Ischaemic Encephalopathy (Review)* 1 Cochrane Database of Systematic Reviews Art. No.: CD003311 DOI:10.1002/14651858. CD003311.pub3 (2013); S.E. Tagin, et al. *Hypothermia for Neonatal Hypoxic Ischemic Encephalopathy: An Updated Systematic Review and Meta-Analysis.* 166(6) Arch Pediatr Adolesc Med 558-566 (2012). Importantly, the majority of children with CP after NE did not meet cooling criteria, *How Much Is Preventable?* supra, and only 25% of term infants who develop CP have NE. *CP Causal Pathways,* supra.

When Did Neonatal Hypothermia Become Standard Of Care? Does It Matter?

Previous efforts to treat NE with a wide variety of interventions were largely unsuccessful. Thus, lawsuits against neonatologists, pediatricians, and other pediatric providers were rare. S. M. Donn et al. *Medico-Legal Implications of Hypothermic Neuroprotection in the Newborn*. 11 J Neonat Perinat Med 109-114 (2018) (hereinafter *Medico-Legal Implications 2018*). TH, even with its limited success, changed the equation. And because various states and countries have varying limitation periods for a minor's lawsuit—potentially in excess of 18 years in some jurisdictions—when TH became standard of care [SOC] could be the central issue in some lawsuits. And despite the ubiquitous use of the term SOC there is no medical definition or method of calculating when a therapy became accepted as SOC in particular country, state, or locality. A.A. Fanaroff et al. *The Ongoing Quandary of Defining the Standard of Care for Neonates* 105(9) Acta Paediatr 1009-1013 (2016).

TH as SOC is particularly difficult to pin down. New therapies may receive national publicity but are often slow to be accepted in various communities. Also, because TH can only be delivered with specialized equipment, in specialized tertiary cooling centers within a tight time frame, the date when a receiving cooling center hospital in a particular community was equipped and personal trained, cooling and hospital receiving protocols established and publicized, communications network in place, and transportation networks available, are vital parameters that could change the SOC equation.

The SOC question becomes even more relevant when it is realized that some trial lawyers are warehousing NE cases holding them to determine the child's neurologic/cognitive status years later especially at school age. These lawyers contend TH was SOC by 2010 and advise colleagues to sue for not cooling any child that has any neurologic/cognitive problems and sue even for the child who was cooled but still has cognitive problems.

Hard to Defend? Why?

Any birth injury lawsuit is teeming with the emotional appeal to a lay jury/judge of a lifelong injury to an innocent child. T.P. Sartwelle. *Defending A Neurologic Birth Injury: Asphyxia Neonatorum Redux*. 30(2) J Legal Med 181-247 (2009). Birth injury lawyers count on the fact that sympathy supplies most of the evidence of negligence. The relationship between negligence, causation, and damages is not linear and rarely based on common sense or evidence of actual negligence. Bad injuries generating large recoveries regardless of negligence has empirical support from several sources including the Harvard Medical Practice Study observing that disability results in payments and severe disability results in large payments regardless of negligence. T.A. Brennan et al. *Relation Between Negligent Adverse Events and Outcomes of Medical Malpractice Litigation*. 335 N Engl J Med 1963-1967 (1996). Few hospitals or care providers of any kind want to have a trial with a potential headline making verdict and subsequent adverse publicity the center piece of which is an impaired child. Thus, the incentive for a confidential settlement even at a premium is paramount.

Trial lawyer advertising, on TV and the internet along with articles and blogs, keep the birth asphyxia-fetal distress-HIE myths alive along with the "fact" that TH is a "cure" for all babies with birth asphyxia—examples of negligent actions that can cause or increase the severity of HIE include... failure to give hypothermia therapy. Thus, the general public—the jury pool and judges—are well primed to accept the distortions of the trial lawyer "experts."

The trial lawyer TH expert cadre are willing to ignore research and clinical TH limitations and receiving cooling center hospital limiting cooling protocols and continue to blame their colleagues by distorting the cooling criteria, the clinical trial results, and the benefits and risks of cooling just as are the birth asphyxia-HIE-fetal distress "experts." A.S. Kesselheim et al. *Characteristics of Physicians Who Frequently Act as Expert Witnesses in Neurologic Birth Injury Litigation.* 108(2) Obstet Gynecol 273-279 (2006).

These "experts" are willing to testify TH would "save" an infant even though he/she did not meet cooling criteria, that every child with any degree of NE/acidosis should immediately be cooled, that various cooling center TH guidelines are "antiquated" even though none had been reviewed, and that terms like mild, moderate, severe NE are without meaning and not used in medicine, and SARNAT criteria are too old and not appropriate for use today.

There is some protection from these false prophets if defense lawyers retain informed defense experts and gather up-to-date research literature to use in cross examining the opposing experts. And there is the opportunity for the defense to benefit from a Daubert challenge to the trial lawyer experts. J.C. Johnston et al. *The Expert Witness in Medical Malpractice Litigation: Through the Looking Glass.* 28(4) J Child

Neuro 484-501 (2013). Daubert is intricate and complex, but some courts may be willing to sort through the complexities and apply the junk science label to the outlandish TH concepts put forth by trial lawyer experts.

Finally, part of the difficulty of defending SD-NBPP cases is some defense lawyers' lack of awareness of the experts and research literature available to defend liability. Partly this is a lack of wherewithal of insurers, hospitals, and medical schools to defend liability because the defense of these suits is expert intense and expensive, and a settlement allows closure for all concerned as well as confidentially and as noted, avoidance of negative publicity.

All of these factors play a part in making these cases difficult but not impossible to defend.

Close to the Line and Clinical Creep

Although definitions and criteria have plagued NE and TH research for many years, *Unanswered Questions*, supra; *20 Year Conundrum*, supra; *Definitional Quagmire*, supra; *Does Aetiology Influence Treatment?* supra, most cooling center hospitals today, and for many years, publish specific clinical parameters for those moderate-to-severe NE infants qualifying for TH. The parameters are almost uniform, *Unanswered Questions,* supra; *Medico-Legal Considerations 2021,* supra. E.g., ***https://www.chop.edu/clinical-pathway/therapeutic-hypothermia-hypoxic-ischemic-encephalopathy-hie-clinical-pathway***, i.e., greater than 36 weeks, specific APGARs, modified Sarnat scoring, specific pH or base excess etc. The criteria are essentially based on the clinical trials inclusion criteria. *Id*.

The difficulty is that while the clinical cooling criteria are easy to write down, they present many challenges to implementation because of the often subtle and often evolving NE neurologic signs that can be transient, can evolve quickly from benign to critical, and can be altered by medications given to mom and baby. Adding to the difficult clinical assessment scenario is the limited cooling timeline—six hours after birth—and the fact that transportation time to a cooling center must be added to the timeline. Thus, intensive assessment and observation are required along with timely recording of the clinical details and care provider thinking and conversations especially with any receiving cooling center/transportation personnel. If the care provider thinking, observation, time, clinical details, and conversations are not recorded, many years later, a pediatrician, neonatologist etc. may be defending a CP lawsuit with the banal phrase "not documented not done" being the crux of the plaintiff's case. E.g., *Unanswered Questions,* supra; *Medico-Legal Considerations 2021*, supra. *Medico-Legal Implications 2018*, supra.

The borderline infant is also problematic. The problem arises from two sources: "clinical therapeutic creep,"—the tendency of physicians to overestimate the effects of their therapeutic cures, Id.; *See* D. Casarett. *The Science of Choosing Wisely—Overcoming the Therapeutic Illusion*. 374(13) New Engl J Med 1203-1205 (2016)—and the trial lawyer "expert" testifying that any child with NE or close to the limits deserves TH which if a lawsuit has been filed means the child has a disability that the "expert" will contend could have been cured or ameliorated by TH. *Medico-Legal Considerations 2021*, supra. *Medico-Legal Implications 2018*, supra. This testimony is usually accompanied by the statement that TH is safe and without significant risk so every child with suspected NE should be cooled. *Id*.

TH had strict criteria for the TH clinical trials which ended up in most cooling center criteria for accepting patients, but after so many years there is a tendency to ignore the criteria referring even the borderline baby for TH. *Id*. A referral, however, provides a plaintiff with proof that the baby experienced at least moderate-to-severe NE—HIE, hypoxia, birth asphyxia, fetal distress, as it will be characterized by the trial lawyer "expert"—and the focus becomes the reason TH failed, i.e., failure to closely, timely assess the clinical condition/changes, poor documentation, etc. See, *Medico-Legal Considerations 2021*, supra. *Medico-Legal Implications 2018*, supra, for a discussion of various clinical scenarios.

The testifying "expert" saying every child deserves TH because it is safe and effective with almost no risks must be confronted with current literature and guidelines. While it is true that some clinical trials have included later preterm infants, TH past 6 hours, mild NE, longer cooling etc., there is simply no evidence that TH outside the strict parameters already discussed leads to better clinical outcomes. Id., *Unanswered Questions*, supra. And while TH is generally safe with only mild side effects it is not without risks such as thrombocytopenia, and cardiac arrhythmia. *Current Management of NE*, supra; W. Zhang et al. *Safety of Moderate Hypothermia for Perinatal Hypoxic-Ischemic Encephalopathy: A Meta-Analysis*. 74 Pediatr Neuro 51-61 (2017).

The testifying "expert" saying every child deserves TH because it is safe and effective with almost no risks must be confronted with current literature and guidelines.

Does NE Etiology Matter?

As noted, NE is an umbrella term describing clinical findings of disturbed neurologic functions in the early days of neonatal life. *Focus on NE*, supra; *Medico-Legal Considerations 2021*, supra; *20 Year Conundrum*, supra; *Current Management of NE*, supra; *NE vs. HIE*, supra. NE does not describe etiology or causation, even though trial lawyers and their experts ascribe every NE case as being due to HIE during birth—birth asphyxia—which in turn is said to be caused by health care providers' ignorance or inattention.

So, the questions are, what is HIE, does it cause NE, and how is it actually involved in the birth process?

Hypoxic ischemic encephalopathy is encephalopathy—disturbed neurologic function in the first days of neonatal life—presumptively due to hypoxia—a lack of oxygen—or ischemia—a lack of or low blood flow—which also results in a lack of oxygen. Literally, then, HIE means the

encephalopathy was caused by a lack of oxygen or oxygen deprivation due to a lack of blood flow. Does this happen at birth? Yes. But outside the courtroom true HIE during birth is rarely involved with negligence. HIE is merely a subset and a minor cause of NE due to a sentinel event—ruptured uterus, placental abruption, umbilical cord prolapse—and is dwarfed by similar presentations—reduced blood flow and/or oxygenation—due to PRENATAL causes like infections, coagulation disorders, inflammation, inborn errors of metabolism, toxins, metabolic disease, stroke, anemia, placental disease-disorders, genetic disorders, abnormal fetal growth, and congenital abnormalities among others. *Id*.

> "Although NE is traditionally attributed to birth asphyxia, population-based studies have consistently observed that most NE and some of the subset of NE considered to be hypoxic-ischemic in origin occurs in infants who have not experienced acute peripartum or intrapartum events.... In most neonates with NE, onset is in the first 24 h of life, commonly in the delivery room.... Although presenting in the neonatal period, NE often has its origins in prenatal life. The etiology of NE is diverse and no single test defines it." Focus on Epidemiology, supra, at 1.

Important to a defense of a claim of HIE as the cause of NE is the fact that now in the third decade of the twenty-first century, the amount and duration of hypoxia and the degree of ischemia necessary to injure a developing neonatal brain is not only clinically imprecise it is unknown! *Neonatal Encephalopathy and Neurologic Outcome*, supra at xx. Thus, the ACOG and AAP Neonatal Encephalopathy Task Force set forth a set of markers, events, and developmental outcome that should be used to determine if NE is due to HIE during labor and birth. *Id*. "The more criteria fulfilled the more likely it is that hypoxia-ischemia has played a major role in the etiological pathway to NE." *Focus on NE*, supra, at 1-2; *Accord, Medico-Legal Considerations 2021,* supra. The obverse is also true. And an algorithm exists to interpret fetal base deficit values to determine a time when base deficit exceeded the 12 mmol/L value. *Medico-Legal Considerations 2021*, supra.

The point is that although NE may first present in the neonatal period, and seemingly be connected to birth events, more often than not NE actually has its origins in prenatal life. Thus, the diverse NE etiological pathways should be thoroughly explored. Investigating etiology is the solution to many NE-TH lawsuits.

Conclusion

Despite some limited success treating NE with TH over the last decade, the reality is that this success is not only limited but as often occurs with newly developed therapies TH has raised more questions than answers. These shortcomings, however, do not deter trial lawyers and their courtroom "experts." And as has so often been the case in the past, cures in the courtroom become profitable miracle cures for all comers years before the science is settled. Bendectin and birth defects. Breast implants and unidentified autoimmune disease that only gnostic like courtroom experts can diagnose. Thimerosal and vaccines cause autism. And so many other examples of courtroom verdicts based on "science" which years later is proven incompetent when the real science matures.

While Daubert has perhaps ameliorated some of the courtroom problems with junk science, Daubert is far from perfect because science is often complex, difficult, and only partly understood as with TH and NE in the decade of the 2020's. Thus, the only way to defend the new birth injury targets is to have an understanding of TH and its limitations and have access to knowledgeable experts who can debunk the claims of the courtroom experts who ignore reality in favor of an alleged one-size-fits-all miracle therapy.

A Framework for Drafting Product Liability Verdict Forms

By Daniel A. Rock, Patrick M. Bailey, and Trevor W. Carolan

There is no such thing as a perfect verdict form for all cases, but there are ways to evaluate potential benefits and risks in a particular case.

The verdict form is not always given the attention it deserves. This short document—typically only a few pages long—is the vehicle by which the jury reaches its decision. If poorly drafted, it can cause jury confusion or even require a new trial. On the other hand, a well-drafted verdict form can provide strategic advantages, depending on the requirements of the case. This article explores some legal and tactical considerations when framing the verdict form in product liability cases.

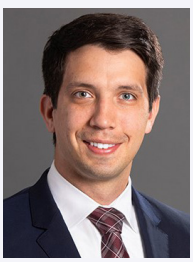
The General or Specific Framework

There are two major types of verdict forms: general and special. A general verdict provides the jury with the option to find in favor of one party or the other—broadly encompassing the claims, issues, and affirmative defenses in one question. *Team Contractors, L.L.C. v. Waypoint Nola, L.L.C.*, 976 F.3d 509, 514-15 (5th Cir. 2020). A special verdict is one in which the jury answers specific questions of fact related to the claims and defenses in the case. *Id.; Johnson v. Ablt Trucking Co.*, 412 F.3d 1138, 1142 (10th Cir. 2005). There are also hybrids where, for example, a jury enters a general verdict that completely resolves the case, but it also answers special interrogatories that provide the jury's thinking. *See, e.g., Blue Envtl. Eng'g, Inc.*, 828 N.E.2d 1128, 1150 (Ill. 2005). While each jurisdiction frames these terms slightly differently, the bottom line is that some verdict forms ask the jury to consider a general question that encompasses two or more issues (e.g., "was the product defective" in a case where there is a claim that there is more than one defect theory), while others ask for separate and specific responses to each issue.

When considering whether to include general or specific questions on the verdict, it is important to keep in mind how that decision might affect a party's arguments on appeal. For instance, the "two-issue" rule provides that where a jury renders a verdict on a single question that implicates two issues, the party against whom the verdict is rendered cannot obtain a reversal unless error can be shown as to both issues. *See, e.g., Lucarell v. Nationwide Mut. Ins. Co.*, 97 N.E.3d 458, 470 (Ohio 2018); *Cole v. Raut*, 663 S.E.2d 30, 34 (S.C. 2008).

Courts have applied the two-issue rule when multiple causes of action are involved. For example, when a plaintiff sues a manufacturer on theories of strict liability, manufacturing defect, negligent failure to warn, and negligent design, the jury's general verdict, which is conclusive as to all claims, will be upheld if the verdict can be upheld on one or more of the theories. *Rimer v. Rockwell Intern. Corp.*,

Daniel A. Rock of Bowman and Brooke LLP is senior counsel in the firm's Appellate and Advanced Motions practice group. He is a skilled writer and orator who focuses on resolving his clients' most complex legal challenges both at trial and on appeal. He has experience in a variety of practice areas, including product liability, professional liability, and insurance disputes. **Patrick M. Bailey** of Bowman and Brooke LLP is an associate focusing his practice on the defense of product liability matters, as well as advanced motion and appellate litigation. He has experience drafting dispositive motions in state and federal court, drafting appellate filings for appeals and attending hearings for trial support. **Trevor W. Carolan** of Bowman and Brooke LLP is an associate in the firm's Appellate and Advanced Motions practice group. He is a skilled writer and researcher who diligently works to resolve his clients' complex legal matters. His extensive legal writing experience includes drafting dispositive motions in state and federal courts and drafting briefing for cases on appeal.


739 F.2d 1125, 1129-30 (6th Cir. 1984). This might also apply in a case in which there are two defect theories (e.g., a defective steering column and a defective transmission). If the jury responds "yes" to the question, "Did Defendant place product X on the market with a defect which was a legal cause of injury?" then under the two-issue rule, the judgment could stand as long as there is evidence sufficient to support one of the defect theories.

There are several justifications for the rule. For example, the two-issue rule comports with the notion that appellate courts "exercise every reasonable presumption in favor of the validity of a general verdict," and will therefore presume the jury found for the prevailing party on all elements of the claims (e.g., causation and defect) and affirmative defenses raised. *See Cole,* 663 S.E.2d at 34; *Holloway v. Sprinkmann Sons Corp. of Ill.*, 23 N.E. 3d 597, 615 (Ill. App. Ct. 2014). Relatedly, if a general verdict could be supported by two or more causes of action, and there is error as to only one of them, then it will be difficult for the appellant to show that the error was prejudicial. *See Wagner v. Roche Labs.*, 709 N.E.2d 162, 165 (Ohio 1999). The rule is also rooted in principles of efficiency because litigants ultimately have some control over the issues they think are important in the case, and "litigants may avoid application of the rule by simply requesting a special verdict that would illuminate the jury's decision making process." *Barth v. Khubani,* 748 So. 2d 260, 261 (Fla. 1999).

However, one must know the governing law in a particular case because some jurisdictions do not always apply the two-issue rule. For example, some courts will reverse a general verdict where any one of the subsumed theories of liability are unsupported. *See, e.g., Deere & Co. v. Grose,* 586 So. 2d 196, 200 (Ala. 1991) (explaining that when the jury returns a general verdict in a case that contains a "good count" and a "bad count," the judgment must be reversed because the court cannot presume the verdict was returned on the good count). Some federal courts have held that the two-issue rule applies to the denial of a motion for judgment notwithstanding the verdict but does not apply to a motion for new trial. *See Richards v. Michelin Tire Corp.,* 21 F.3d 1048, 1054 (11th Cir. 1994). Similarly, others have held that by accepting a general verdict and failing to seek a special verdict form with each factual issue might amount to a "waiver" as to arguments contesting the sufficiency of the evidence on those factual issues. *Pratt v. Petelin,* 733 F.3d 1006, 1012 (10th Cir. 2013) (collecting cases). And others have noted that there is not always a "rigid" answer to whether the use of a general verdict will amount to a waiver. *Gillespie v. Sears, Roebuck & Co.*, 386 F.3d 21, 30 (1st Cir. 2004) (noting that "not all circuits follow our practice," but explaining that the court has applied a harmless error analysis, the effect of which is similar to the two-issue rule).

Apart from the application of the two-issue rule, it is also important to consider

the practical effects of a general or specific verdict question. On the one hand, if the verdict only has one general question that combines two causes of action, then that means the jury has one less opportunity to find the defendant liable. On the other hand, plaintiffs can use this to their advantage as well—if there is one general question on strict liability, for example, then the jury will not be faced with separate questions on each element of the claim, which means fewer opportunities for a defense verdict.

Ultimately, adding more detail encourages the jury to carefully consider each element of proof and—when coupled with clear jury instructions—provides a roadmap for the jury to decide the issues. However, in any given case there may be practical benefits to using a general verdict. It is advisable to consider both the legal consequences and practical consequences, along with the particular requirements of the jurisdiction, when deciding which verdict fits the needs of a particular case.

Inconsistent Verdicts in Product Liability Cases

Apart from the question of *specificity*, litigants should consider the issue of *consistency* within the four corners of a verdict. A verdict is inconsistent "when two definite findings of fact material to the judgment are mutually exclusive." *Coba v. Tricam Indus., Inc.,* 164 So. 3d 637, 643 (Fla. 2015). In other words, a verdict is inconsistent when "there is no rational, non-speculative way to reconcile two essential jury findings." *Christiansen v. Wright Med. Tech., Inc.,* 851 F. 3d 1203, 1213 (11th Cir. 2017) (internal quotations omitted). In product liability cases, the potential for inconsistent verdicts is amplified when there are multiple theories of liability and defect. Consider the following common topics involving products.

First, the potential for inconsistent verdicts arises when a plaintiff claims a design defect under both strict liability and negligence theories. Many jurisdictions hold that if the jury finds a product is not defectively designed, it is fatally inconsistent for the same jury to find that the defendant was negligent in designing the product. *See, e.g., Lambert v. Gen. Motors*, 67 Cal. App. 4th 1179, 1184 (1998) (collecting cases); *Mello v. K-Mart Corp.,* 792 F.2d 1228, 1233 (1st Cir. 1986). The reason for this inconsistency has to do with the elements of the two causes of action. Generally, a jury may find a manufacturer ***strictly liable*** for a design defect only if the plaintiff proves that product was defective—using the appropriate test for "defect" in the jurisdiction. In order to find the manufacturer liable for a design defect under principles of ***negligence***, the plaintiff must prove the same element of "defect." However, the plaintiff must also show that the manufacturer acted negligently when designing the product. *See Tipton v. Michelin Tire Co.,* 101 F.3d 1145, 1150 (6th Cir. 1996) ("[I]n negligence claims, the focus is on the conduct of the actor, whereas in products liability cases, the focus is on the condition of the product."). Because both claims require proof of a "defect," a jury finding that the product was not defective under strict liability is inconsistent with a jury finding that the product was negligently designed. *Id.; see also Witt v. Norfe, Inc.*, 725 F.2d 1277, 1278–79 (11th Cir. 1984).

Second, there is also potential for inconsistent verdicts when a plaintiff asserts a design defect claim and a failure to warn claim. For instance, if the plaintiff's claim is that the defendant failed to warn that the product was defectively designed, then the warning claim depends on and is duplicative of the design defect claim. In that context, as one court explained:

> The fallacy of the warning argument in the instant case is that it begs the question. If there were a defect in the [product] that caused the injuries to plaintiffs, [the manufacturer] is liable, irrespective of any warning; if there were not, there is no liability, irrespective of any failure to warn. Consequently, the warning issue, under these facts, is irrelevant.

Am. Motors Corp. v. Ellis, 403 So. 2d 459, 467 (Fla. Dist. Ct. App. 1981); *see also Mack v. Deere & Co.*, 2013 WL 5945079 (S.D. Tex. Nov. 6, 2013) ("The issue of a warning becomes irrelevant... when a plaintiff contends, as Mack does, that defendants should have warned customers of alleged design defects in the product."). A verdict that permits the jury to find that there was no design defect, but also to find that there was a failure to warn about that same alleged design defect could result in inconsistency.

Also consider whether the failure to warn claim requires a finding that the product was defective or unreasonably dangerous. In such contexts, if the jury does not find that the product was defective, then a finding that the defendant failed to warn would be inconsistent. *See generally Stockton v. Ford Motor Co*, 2017 WL 2021760, at *9 (Tenn. Ct. App. May 12, 2017) ("In the absence of a defective or unreasonably dangerous finding, the jury could not have properly found that Defendant Ford was negligent in failing to adequately warn [plaintiff]. In this regard, the jury's verdict is inconsistent, and... irreconcilable.").

Note that in many jurisdictions, inconsistent verdicts must be raised before the jury is discharged. *See, e.g., Kosmynka v. Polaris Indus., Inc.*, 462 F.3d 74, 83 (2d Cir. 2006). But potential inconsistencies can and should be addressed earlier in the case. First, strategically use dispositive motion practice to attempt to dispense with duplicative or potentially conflicting claims before trial. Second, consider proposing instructions to the jury on the verdict form itself to assist in deliberations. For instance, if the first question on the verdict form is whether a product is defective under strict liability, the verdict form should instruct the jury not to proceed to the following questions about negligence if they find the product was not defective. Third, read proposed verdict forms drafted by the plaintiff or the court with a skeptical eye. Objecting to the form of the verdict helps preserve the issue in the event of an inconsistent verdict and the need to appeal.

Conclusion

There is no such thing as a perfect verdict form for all cases, but there are ways to evaluate potential benefits and risks in a particular case. From there, it is possible to maximize the benefits and minimize those risks, on balance, by using the concepts of specificity, generality, and consistency.

Who Needs Evidence? The Rise of Conspiracy-Minded Jurors

By Nick Polavin

Knowing our audience allows us to adapt our jury selections and case arguments accordingly, and it seems we may find new, unexpected allies in the process.

Consider this recent example of two jurors, one a trial juror and one a mock juror. In both cases, the defendants' arguments relied largely on the Environmental Protection Agency (EPA).

1) The trial juror:
   - o A very liberal, millennial female with blue hair and multiple facial piercings. She had made multiple donations to various health and human rights organizations and indicated a preexisting negative opinion of the defendant. She also had high education levels, and her social media suggested support for the World Health Organization (WHO) and Food and Drug Administration (FDA).
2) The mock juror:
   - o A Republican, baby boomer male. He was a self-employed, blue-collar worker with low education who had indicated a "favorable" opinion of the defendant. He believed there are too many lawsuits, though he also responded that he might be more likely to believe an individual's version of events over a corporation's. Finally, he thought COVID-19 fears had been overblown and he lacked trust in the Centers for Disease Control and Prevention (CDC).

Nick Polavin, Ph.D. is a senior jury consultant at IMS Consulting & Expert Services. Dr. Polavin assists clients with a variety of jury research services, including focus group and mock trial facilitation, research design development, statistical analysis for creating juror profiles, and crafting themes and recommendations for trial. He regularly supports attorneys in court with voir dire strategies and jury selection, having worked on more than 60 in his career. In the last two years alone, Dr. Polavin selected juries in four cases that were rated in the annual Courtroom View Network's Top 10 Most Impressive Defense Verdicts. He is based in Columbus, Ohio and works across the United States on a variety of matters, including product liability and mass torts. Dr. Polavin is also a past speaker for DRI's Litigation Skills Seminar (2022) and Young Lawyer's Seminar (2022).

One of these jurors ended up being the strongest defense supporter on the jury and did not want to award any damages to the plaintiffs. The other ended up being one of only two plaintiff jurors and refused to give in to the defense majority. So, which juror was which?

If you can see where this is going—yes, the liberal, millennial female was the staunch defense juror, and the conservative, baby boomer male was the plaintiff diehard. These jurors behaved in opposition to several statistical predictors: political orientation, opinion of the defendant, and certain other demographics (granted, demographics should rarely be relied upon). So, as consultants for both defendants, why had we not recommended striking the liberal trial juror, and why were we not especially surprised to see the conservative mock juror vote plaintiff? Because times are changing in ways that force us to question conventional wisdom.

Regarding political orientation, we have seen increasing anecdotal evidence that it is no longer the same predictor. It is important to note that political orientation was never a *strong* predictor; it depended on the case facts and the venue, and, ultimately, has always been worth confirming through jury research. But it traditionally has been a moderate predictor because, for one, people who identify as Republican tend to put a greater emphasis on "personal" responsibility—meaning, for example, they pay attention to whether the plaintiff misused a product or did not read its instructions or warnings (a "buyer beware" mindset). In contrast, people who identify as Democrat tend to emphasize what is known as "social" responsibility; that is, they look for whether society, the government, and/or a defendant have done enough to set people up for success (a "seller be fair" mindset).

What has changed in the past few years? Well, for a variety of reasons, certain conspiracy theories have been embraced by a large segment of the population, particularly among Republicans. Conspiracies are no longer limited to people who believe the moon landing was faked or that the FBI assassinated JFK. Throughout 2020 and 2021, there was a great deal of misinformation and disinformation spread regarding the COVID-19 pandemic and the 2020 presidential election. This led to a significant portion of the public buying into beliefs that lacked confirming evidence. As recently as November 2022, 40% of Americans believe the 2020 election was stolen (Carbonaro; *40% of Americans Think 2020 Election Was Stolen, Just Days Before Midterms*; Newsweek, 2022). Among Republicans, 61% believe that Joe Biden did not win the election legitimately (Kowalsky; *Poll: 61% of Republicans Still Believe Biden Didn't Win Fair and Square in 2020*; NBC News, 2022). Additionally, our own data shows that Republicans are more likely to believe that COVID-19 originated in a biological warfare lab, that the COVID-19 vaccine has caused significant health issues that are not being reported to the public, and that the data on COVID-19 deaths has been fabricated to make the pandemic sound much worse than it is in reality.

The purpose of this article is not to debate the validity of any beliefs. Rather, it is to understand why certain predictors are proving less reliable. To that end, it appears that there is something unique about the decision-making process of people who hold a belief with little to no supporting evidence. The fact that this recent willingness is focused among a subgroup of Republicans is why jury profiles may be changing. Seeing as these new findings could have a significant impact on jury selection and exist alongside an increase in the amount and size of nuclear verdicts, it is critical that defendants facing trial understand these changes. A fully informed jury selection could be the best opportunity to evade these concerning trends.

Why Might Conspiracies Create Plaintiff Jurors?

Psychological research has shown that a current belief in conspiracies predicts a greater tendency to believe in more conspiracies in the future (Granado Samayoa, et al.; *A Gateway Conspiracy? Belief in COVID-19 Conspiracy Theories Prospectively Predicts Greater Conspiracist Ideation*; PLoS ONE, 2022). In other words, holding a belief with little to no evidence makes people more likely to buy into additional beliefs with little to no evidence. With indications that a sizeable portion of the US population is willing to hold beliefs with little to no confirming evidence (and even in the face of significant contradicting evidence), civil defendants have fair cause for alarm. After all, they bank on jurors' adherence to the plaintiff's burden of proof.

Many elements in a given case can invite susceptible jurors to see conspiracies. Based on mock trial research and post-trial juror interviews, here are just a few circumstances in products liability litigation where we have seen jurors engage in conspiracist ideation:

- When the defendant is relying on the EPA, FDA, or Occupational Safety and Health Administration (OSHA), be it a permissible exposure limit or an approved product
- When the International Agency for Research on Cancer (IARC) classifies something as a "possible" or "probable" human carcinogen, but the EPA or FDA has stated there is no conclusive evidence that the substance causes cancer in humans
- When a study of questionable reliability (e.g., with an improper control group, test method, or analysis) shows a link between exposure to a chemical and cancer/injury, despite numerous studies finding no significant results
- When studies have shown that exposure to extreme amounts of a chemical can cause cancer in animals, despite no epidemiological data showing such a link in humans

When relying on FDA and EPA standards or approval, some jurors see a conspiracy that these regulators are bought out by large corporations to allow those companies to profit at the expense of public health. Similarly, when there is just one study showing a link between exposure to a substance and cancer/injury, jurors can view that study as the one the defendant did not "pay for," or that the existence of competing findings shows the link is, at the least, possible (recall that such jurors require little, if any, supporting evidence).

Linking Conspiracies to Verdict Decisions

To move beyond anecdotal evidence, however, we tested our hypothesis by administering an online survey to 258 jury eligibles across the country. Participants

read a summary of a fictional lawsuit, wherein the plaintiff claimed that her migraine medication could contain a carcinogenic substance and that it caused her cancer. The defendant claimed that the migraine medication does not cause cancer and that the plaintiff's cancer was likely due to one of several alternative causes. The case included some of the potential sources of conspiracy mentioned above: IARC classified the substance as a "probable human carcinogen" based on animal testing that involved extreme doses of the substance, while the FDA determined that human-based (i.e., epidemiological) research demonstrated no link between the substance and cancer. Participants then selected a verdict for the plaintiff or for the defendant and answered various additional questions that measured their belief in conspiracies along with a variety of other factors that can often affect verdicts.

The results? A belief in conspiracies was the strongest predictor of verdicts. Our hypothesis was confirmed—those with a stronger belief in conspiracy theories tended to support the plaintiff and those will little to no belief in them tended to support the defendant.

The second strongest verdict predictor we saw in our study was the "harm moral foundation." Moral foundations are six distinct sets of moral reasoning that people often cite as motivating factors for decisions they make in life. The "harm moral foundation" is the extent that someone acts or decides based on whether someone has been harmed or someone weak is cared for. For our purposes, this refers to jurors who are extremely sympathetic to plaintiffs and want to help someone who has been harmed, regardless of the evidence. Jurors who score high on this trait tend to side with the plaintiff, while those with lower scores tend to side with the defendant.

The third-strongest predictor is what is known in psychology as "cognitive reflection." This is a person's ability to override their emotion-based reasoning with rational thought. It is another relatively consistent predictor in trials, in that jurors who are high in cognitive reflection often side with the defense, and those who are low often side with the plaintiff. The fact that participants' belief in conspiracy theories had a stronger effect on their verdict than these two common civil-lawsuit predictors shows the significance of this finding.

Political Orientation

What about political orientation? As discussed above, it is not usually a strong predictor on its own, but rather can increase the likelihood that a juror exhibits other attitudes that are stronger predictors. And indeed, at face value, political orientation did not significantly affect verdicts in this study at all. What we found, however, was that belief in conspiracy theories interacted with political orientation in intriguing ways. Namely, when we controlled for the conspiracy variable, Republicans were significantly more likely to side with the defendant than Democrats. But bring that variable back in, and we saw that, as Republicans believed in more conspiracies, they became more likely to side with the plaintiff. A deeper look at the data showed that far right-wing Republicans were more likely to find for the plaintiff, while moderate Republicans were more likely to find for the defense.

Interestingly, jurors' opinions of Donald Trump in comparison to Liz Cheney seemed to confirm this notion:

- Jurors with a positive opinion of Liz Cheney and a negative opinion of Donald Trump were very likely to support the defendant. (The data showed these were mostly moderate Republicans and even moderate Democrats.)
- Jurors with only somewhat positive opinions of Trump were more likely to support the defendant. (These jurors tended to classify themselves as "moderate" or "somewhat conservative.")
- Jurors with negative opinions of both Donald Trump and Liz Cheney were very likely to support the plaintiff. (These jurors also held very positive opinions of Democratic politicians such as Joe Biden, Kamala Harris, and Elizabeth Warren.)
- Jurors with a very positive opinion of Donald Trump and a negative opinion of Liz Cheney were more likely to support the plaintiff. (These jurors showed significantly stronger belief in conspiracy theories than the overall average.)

What this tells us should not be surprising in light of the predictiveness of conspiracy theories: Moderate conservatives were the best jurors for the defendant in this case. Strong liberal jurors were the worst, but with strong Trump supporters who dislike Cheney not too far behind. The results demonstrate that, depending on how jurors could view the case facts (e.g., if there is a potential conspiracy), *some* Republicans may be particularly bad for corporate defendants and *some* Democrats may be better than anticipated. It is therefore more important than ever to discern between different types of Republicans and different types of Democrats.

Other Influential Factors

Politics and conspiracy theories are only part of the story, however. A complex web of factors shapes the kinds of people who are open to believing something with little to no legitimate evidence. Consistent with prior research, our study identified the following factors that increased susceptibility to conspiracy theories:

- People with a lack of trust in the government and government agencies (e.g., EPA, FDA)
- People with anti-corporate attitudes
- People who have what is known in psychology as "Faith in Intuition for Facts," which measures someone's willingness to believe they can rely on their intuition to tell them if a piece of information is true or not, versus not relying on intuition and instead fact-checking information (Garrett & Weeks; *Epistemic Beliefs' Role in Promoting Misperceptions and Conspiracist Ideation*; PLoS ONE, 2017)
- People with low education

Not only do these factors make people more open to conspiracies, but some of them have an independent effect on verdicts that may also help explain why Republican jurors have become less defense friendly. Specifically, Republicans have a much more negative view of corporations and banks/financial institutions than they did even four years ago. Pew Research found that the percentage of Republicans who believe that large corporations have a positive effect on the country dropped from 54% in 2019 to 26% in 2022. Furthermore, the proportion of Republicans who believe

that banks and other financial institutions have a *positive* effect on the country fell from 63% in 2019 to 38% in 2022 (even lower than the 41% of Democrats who feel that way; Dunn & Cerda; *Anti-Corporate Sentiment in the US Is Now Widespread in Both Parties*; Pew Research, 2022). Therefore, members of both parties may enter the courtroom with the preexisting opinion that the corporation likely did something wrong.

Views of medical scientists have also changed, especially among Republicans. According to Pew, Republicans who have confidence in medical scientists decreased from 83% in 2016 to 66% in 2021. The group with the strongest trust in medical scientists was Democrats with a college degree or higher, at 95% (Kennedy, Tyson, & Funk; *Americans' Trust in Scientists, Other Groups Declines*; Pew Research, 2022). Opinions like this can inform jurors' confidence in researchers and scientists at the EPA and FDA, or how they view epidemiological evidence in the face of a plaintiff's more easily digestible story (e.g., the plaintiff had used a product, one study suggested the product can cause cancer, and the plaintiff now has cancer).

What Does This Mean for Litigators?

Above all, these new findings make jury selection more complicated. Jurors with experiences similar to the plaintiff need to be identified, of course, but we must also prioritize questions that elicit the types of attitudes and opinions discussed in this article.

We cannot likely ask jurors outright if they believe in conspiracy theories, so we will need some workarounds. For instance, be it through voir dire, a juror questionnaire, or jurors' social media, we can seek out information about some of the following factors, which our study found were most strongly tied to a belief in conspiracy theories:

- Positive views of Trump in comparison to Liz Cheney or other "moderate" Republicans
- No COVID-19 vaccination
- Lack of trust in EPA/FDA
- Lack of trust in scientists
- Belief that they can tell if information is true or not right when they hear it
- Low education
- Low income
- High religiosity
- Respect for authority
- Ingroup loyalty (i.e., the extent to which someone believes it is important to be loyal to the groups with which they identify or are involved)

When assessing jurors based on political orientation, social media and background search evaluations need to be more nuanced; it is not just Republican or Democrat. Views of Trump in comparison to Cheney, or Biden in comparison to Warren, will be more informative. Knowing one's voter registration may not be helpful unless you know the year they registered with that party (e.g., a Republican who registered in 2000 may be very different from one who registered in 2016). If a juror has donated to WinRed (a conservative PAC) or ActBlue (a liberal PAC), it can tell you a little bit, but it will tell you more to examine for whom the donations are earmarked—a far right-wing or left-wing candidate, or a more moderate candidate.

Lastly, defense attorneys finding themselves in an especially liberal jurisdiction would do well to offer those jurors a hill to fight on and a way to feel good about supporting the defense. Think back to our liberal, blue-haired juror who overcame her negative opinion of the defendant to be its strongest supporter; she bought into the more scientifically sound defense experts and government regulator's safety threshold, likely because of her high trust in science. Themes leveraging this science have proven particularly strong among Democrats since the start of the pandemic—we might ask jurors to "Follow the Science," to rely on "Facts, Not Feelings," and to remember that "Correlation Does Not Imply Causation."

Going Forward

Our study gauged the extent of jurors' beliefs in 11 different conspiracy theories. More than a third of our participants (33.4%) believed at least one of these conspiracies to be "probably" or "definitely" true. An average of 19.4% believed any given conspiracy to be "probably" or "definitely" true. That is to say, a substantial subset of the population has shown a willingness to embrace particular beliefs despite a considerable lack of hard evidence.

Changes like these are bound to create challenges for corporate defendants—but our data and experiences suggest it is not all bad news. Knowing our audience allows us to adapt our jury selections and case arguments accordingly, and it seems we may find new, unexpected allies in the process.