For The Defense™

dri
The magazine for defense, insurance and corporate counsel

September 2024

Product Liability and Medical Liability and Health Care Law

Including . . .

Self-Driving Vehicles and Questions of Product Liability

Also in This Issue . . .

Be Informed on Informed Consent

2024 Election Feature

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

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

Embracing Innovation
The Future of the Legal Profession

DRI Secretary/Treasurer Sara M. Turner is a shareholder in Baker, Donelson, Bearman, Caldwell & Berkowitz's Birmingham, Alabama office. Serving as the chair of the firm's Hospitality Industry Service Team, Sara proactively connects with in-house counsel and other professionals to exchange insights and promote growth.

The legal profession, like many others, is at a pivotal point where tradition intersects with innovation. To remain relevant in the 21st century, we must embrace new technologies and innovative practices that enhance efficiency and improve client service. This transition is far more profound than merely shifting from book-based research to using internet research tools like Westlaw and Lexis. The current wave of technology has the potential to transform the role of "lawyer" itself, fundamentally changing the landscape of our profession.

DRI's Historical Commitment to Innovation

One of the first DRI committees I joined and later chaired was DRI's Technology Committee, a group dedicated to exploring and integrating technological advancements in our profession. Although the Technology Committee no longer formally exists within DRI, its legacy endures throughout our organization. My early experiences working with visionary leaders of that committee like Mike Brewer and others instilled in me a lasting appreciation for the transformative power of technology in the practice of law. DRI has long been dedicated to embracing and educating its members on important cutting-edge issues, and it continues to uphold this commitment today.

The Time to Leverage Technology is Now

Technology is advancing at an unprecedented pace, and adapting to these changes is more crucial than ever. Artificial intelligence-powered research tools and digital case management systems are revolutionizing how we practice law, streamlining workflows and improving client outcomes. By integrating these tools, we can enhance efficiency and productivity while also achieving a better work-life balance.

Consider the potential of immersive tools like Apple Vision Pro, which already allows for meetings and collaborations from various locations. Imagine working with your team at the top of Mt. Kilimanjaro or even the surface of the moon! While not everyone may be ready to adopt such tools today, they illustrate how technology can offer flexibility and new ways of working. This flexibility has the potential to enhance productivity and support healthier work-life integration as well as addressing important law firm management challenges like retention.

DRI's Role in Advancing Technology in Law

DRI is at the forefront of these changes, actively working to integrate emerging technology into the legal profession. We are excited about the upcoming rollout of our new software platform, designed to enhance connectivity and efficiency for our members. Additionally, DRI's ***Center for Law and Public Policy*** is committed to educating legal professionals on the use of AI through initiatives such as their comprehensive white paper, ***Artificial Intelligence in Legal Practice***. This paper provides valuable insights into the benefits, considerations, and best practices for implementing AI in legal practice. DRI is also leveraging technology to improve continuing legal education (CLE) and networking opportunities online and in person. Programs like CLE on the Go provide continuing legal education in a flexible, accessible format, allowing our members to get the educational benefits outside of the traditional conference room model. Pro Tip: Don't miss out on the opportunity to participate in ***CLE on the Go*** and more at the ***DRI Annual Meeting*** in Seattle this year!

If you're looking to engage remotely, access on-demand programming and engaging webinars on topics including "Employment Discrimination Via Artificial Intelligence (AI)," "Know the Role: The Ethics of AI in the Law," and "Marketing in a Hybrid World" to stay current on the latest in game-changing technology. Through our ***Free Webinar Series***, DRI members can earn up to eight hours of CLE credit this year at no additional cost—that's a savings of $1,350! **Not a DRI Member?** ***Learn more and join our community*** of civil defense attorneys and in-house counsel.

Embracing Rapid Change and Ethical Responsibilities

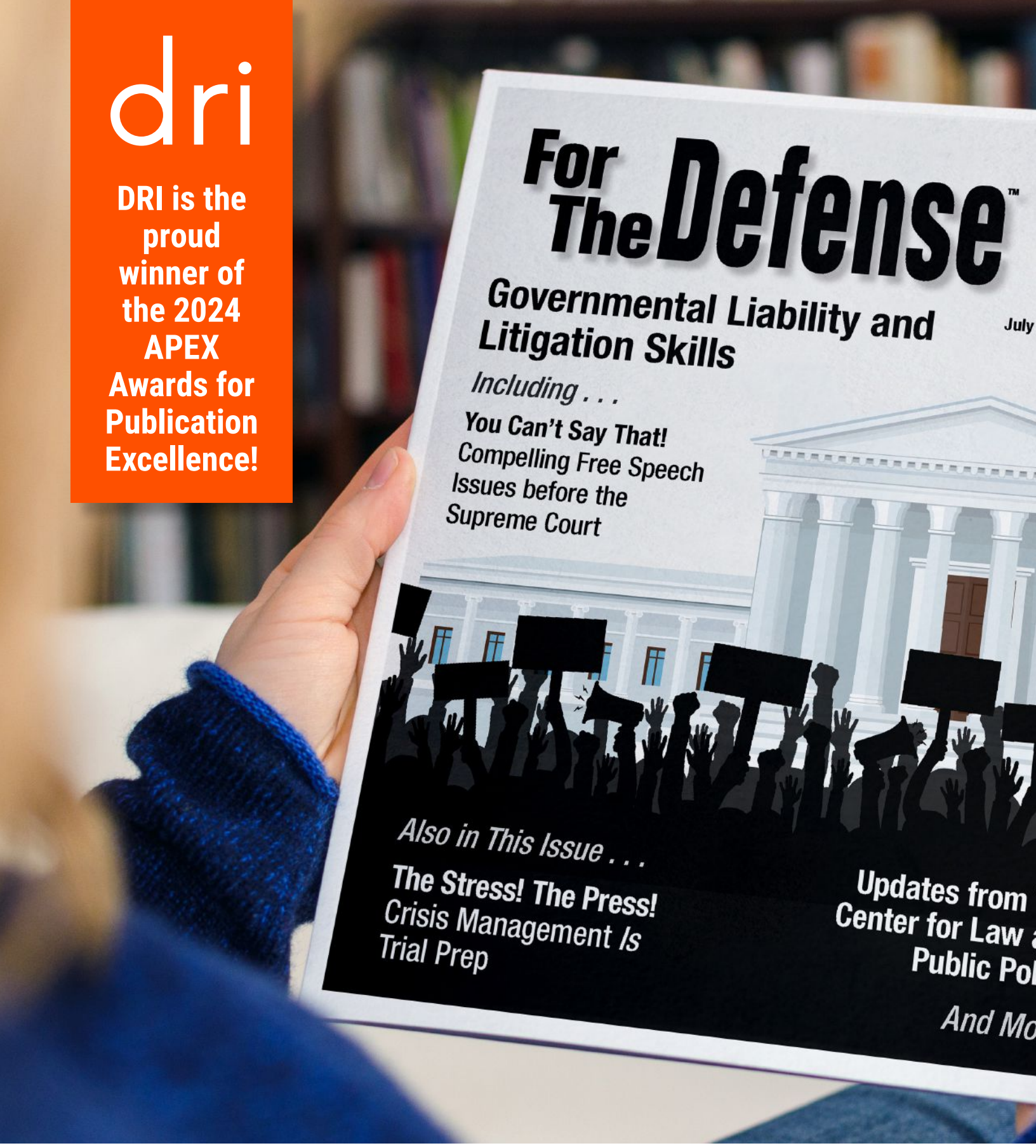
In today's fast-paced world, the speed of innovation is truly remarkable. Just five years ago, working from home was often viewed with skepticism, but now it has become a standard practice that has revolutionized our professional lives. Entire industries like AI have emerged rapidly, fundamentally changing how we work and interact.

As we navigate these changes, it's crucial to address the ethical responsibilities that come with using new technologies. Ethics bodies are increasingly focusing on the numerous ethical considerations lawyers face when using tools like generative AI. Competence, confidentiality, and proper communication with clients are paramount when integrating these advanced technologies into our practice. Lawyers must be fully aware of the capabilities and limitations of AI tools to provide competent legal representation and safeguard client information. DRI has been at the forefront of educating the defense bar about these critical considerations, ensuring we remain not only innovative, but ethical in our practices.

Over the years, I've seen firsthand how embracing innovation can bring significant benefits to our members and clients. As someone balancing a demanding trial practice while raising six children with my equally dedicated lawyer spouse, I have had the chance to experience firsthand the importance of leveraging technology to manage both professional and personal responsibilities effectively. Embracing these changes not only positions us for success in a dynamic landscape but also reinforces our commitment to excellence, client service, and equity. Looking ahead, I am excited about DRI continuing to champion innovation and lead the way in transforming the legal profession.

dri

DRI is the proud winner of the 2024 APEX Awards for Publication Excellence!



2024 APEX® AWARDS FOR PUBLICATION EXCELLENCE

The 36th annual APEX Awards received more than 1,100 entries from across the US, and DRI is honored to be recognized among this select group of award recipients.

New Leaders to Be Elected Next Month in Seattle

EACH YEAR, THE DRI ANNUAL MEETING serves as the venue for the organization's election of new leaders. At the ***2024 DRI Annual Meeting in Seattle***, October 16–18, the DRI Board of Directors will name four individuals to join them as national directors (each serving three-year terms). The final candidates are presented to the board upon the recommendation of the Nominating Committee. In addition, an individual will be elected as the next DRI second vice president, which begins his or her track to the presidency after serving subsequent years as first vice president and president-elect. Also, one candidate will be elected to serve a one-year term as secretary/treasurer. The final candidates are presented to the board upon the recommendation of the Nominating Committee, chaired this year by DRI Past President Philip L. Willman.

Four DRI members have declared their candidacy for second vice president, and another four will be seeking roles as a national director. The 2024 DRI Annual Meeting will be held in person on October 16–18. Immediately after the final board meeting related to the 2024 election, a blast email will be sent to DRI's entire membership with the election results.

To inform all DRI members about the upcoming elections, *For The Defense* presents a brief profile of each candidate. This information was gathered from the candidates' own responses in the Declaration of Candidacy that each one completed for DRI. These declarations in their entirety have been made available online to DRI members. ***Read the complete Declarations of Candidacy to learn more about the candidates' plans and goals for the future of DRI and its role in the defense bar and the civil justice system.*** The first four individuals profiled—Michael D. Carter, David L. Jones, Sara M. Turner, and Ricardo A. Woods—are candidates for second vice president. They are followed by profiles of the candidates for national director: Michelle Thurber Czapski, Juan M. Marquez, Morgan J. Milner, and Christopher B. Turney.

THE NATIONAL NOMINATING COMMITTEE

The DRI Board of Directors will elect the second vice president, secretary/treasurer, and national directors at the DRI Annual Meeting in Seattle. In making its selections, the board will give serious consideration to the recommendations of the Nominating Committee.

After receiving the input from those appearing before them ***during nominating committee meetings at the DRI Annual Meeting***, and from emails and letters of support, the Nominating Committee will deliberate and then report to the DRI Board of Directors its nominees for each position to be filled. The board then votes on each of the candidates recommended by the Nominating Committee.

The members of the 2024 Nominating Committee are Chair Philip L. Willman, Past President Emily G. Coughlin, Past President Douglas K. Burrell, At-large Member Christopher T. Sheean, and At-large Member Ashley Brathwaite.

Philip L. Willman

Emily G. Coughlin

Douglas K. Burrell

Christopher T. Sheean

Ashley Brathwaite

Philip L. Willman is a principal at Brown & James PC, where he devotes his trial practice to defending physicians, medical schools, nurses, hospitals, nursing homes, psychologists, and other healthcare providers in medical negligence and healthcare lawsuits and medical device manufacturers in medical device litigation. He is a past president of DRI and has served on the Executive Committee of DRI as an officer for several years. Currently, he serves as the president of the DRI Center for Law and Public Policy. He also serves on the Executive Committee of the National Foundation for Judicial Excellence, which provides state supreme court and appellate judges with educational programs that enable them to perform at their highest level. Furthermore, he is a past director for Lawyers for Civil Justice, a national organization that promotes excellence and fairness in the civil justice system.

Emily Coughlin served as president of DRI from 2020 to 2021. She is a founding partner of the firm of Coughlin Betke LLP. Her practice includes over thirty years of broad-ranging civil litigation experience on behalf of small and large businesses, healthcare providers, and insurers. Her extensive state and federal trial court experience includes construction-related and commercial litigation, employment and professional liability litigation, and premises and products liability litigation. Emily has received numerous honors and awards, including the Massachusetts Top Women of Law Award; Massachusetts Defense Lawyer of the Year Award; DRI Mary Massaron Award for the Advancement of Women along with the three other female defense bar leaders of the ADTA, FDCC, and IADC; and more. Emily is also a past president of the Massachusetts Defense Lawyers Association, served on the Massachusetts' Joint Bar Committee on Judicial Appointments, and is active in several defense bar associations, including the International Association of Defense Counsel, where she served on the 2015 Trial Academy Faculty at Stanford University Law School.

Douglas K. Burrell is a past president of DRI (2021-2022) and partner at Chartwell Law based in Atlanta. His practice covers a vast number of areas including but not limited to wrongful death and catastrophic injury matters, construction defect litigation, premises liability, product liability, rideshare and transportation and trucking negligence. His clients come from many industry sectors, including national retailers, manufacturers, businesses in the hospitality and restaurant sector and transportation Douglas is a long-time faculty of Georgia Defense Lawyers Association Trial Mediation Academy; serving as Chair of the faculty in 2014 and 2015. Douglas also held a faculty position for the National Institute for Trial Advocacy (NITA) from 2010-2014, teaching the deposition skills program.

Christopher T. Sheean is a partner at Swanson, Martin & Bell, LLP. Chris defends products manufacturers in lawsuits and counsels companies on various regulatory and governmental matters. He also represents national and international corporations in various types of commercial, corporate and intellectual property litigation matters throughout the United States. His intellectual property practice involves issues of trademark and trade secret misappropriation, copyright infringement, unfair competition, and advertising injury claims. He also handles a broad spectrum of general corporate issues and disputes including complex breach of contract claims and multidistrict consumer class actions. As the lead trial lawyer in many cases, Chris has successfully litigated often complex and cutting-edge commercial and intellectual property claims in both federal and state courts. Chris has served as an adjunct professor of trial advocacy at Northwestern University Law School since 2009.

Ashley Brathwaite of Ellis & Winters is an experienced litigator and trial lawyer who helps clients protect their business interests in disputes related to product and premises liability, professional malpractice, business torts, and other claims alleging significant damages. She also serves as national counsel for clients in toxic tort litigation. Ashley is currently a member of the DRI Women in the Law and Drug & Medical Device steering committees, a member of DRI for Life, and an at-large member of the DRI Foundation Board of Directors. She is a past president of the North Carolina Association of Defense Attorneys.

GUIDELINES FOR APPEARING BEFORE THE DRI NOMINATING COMMITTEE

The following guidelines have been designed to assist DRI members appearing before the Nominating Committee. Every member of DRI is encouraged to participate in the election of the DRI leadership. **The opportunity to appear before the Nominating Committee is open to all DRI members**. Your appearance before the Nominating Committee is important, as it provides information necessary for the committee to make its recommendations to the DRI Board of Directors. It also provides an opportunity for members of the Nominating Committee to ask questions about the candidates. The committee encourages each person appearing before it to speak openly and candidly about a candidate's qualifications and abilities. All discussion and communications within the Nominating Committee are strictly confidential and will not be revealed to anyone outside the Nominating Committee. Comments should focus on the particular traits, attributes, and qualifications of the candidate that qualify him or her for the elective position sought. Negative comments about candidates are discouraged unless specifically solicited by a member of the Nominating Committee.

The list below is not all-inclusive; it is designed to serve as a guide to help identify points that are considered significant by the Nominating Committee. While the committee members have general information and knowledge about each of the candidates, they are looking for firsthand information that may have been gained by either working directly with the candidate or through personal observation. The following tips represent ideas from former members of the Nominating Committee, learned through many years of service, and are suggested to make the appearance process more efficient and compatible to the DRI election process.

In no particular order, here are a few suggestions:

1) Before appearing before the Nominating Committee, please have your comments organized and thought out. Time is limited to allow everyone the opportunity to appear before the committee, and it is necessary to adhere strictly to the schedule.
2) It is important to identify at the outset the candidate (or candidates) you support, how long you have known the candidate, the contact that you have had with the person (e.g., experience working with him or her in a state or local defense organization, a DRI committee, other professional organizations, co-counsel in a case, etc.), and your personal knowledge as to the candidate's leadership qualities.
3) Describe for the committee the personal interests of the candidate (if you know) in DRI compared to other professional organizations in which he or she may be active, and why the candidate has a specific interest in DRI.
4) Identify the specific attributes of the candidate that are or should be important to DRI (e.g., geographical balance, diversity, corporate law relationship, important state or regional profiles, etc.)
5) Describe the candidate's prior leadership experience, of which you have firsthand knowledge, in any other professional organization, state or local defense organization, committee activity, community association, position in his or her law firm, co-counsel in a case, etc., where the candidate has demonstrated prior leadership experience.
6) Comment upon the candidate's ability to carry out and perform tasks assigned to him or her effectively and efficiently.
7) Describe for the committee any observations that you might have about the candidate's leadership abilities and the respect that others have for him or her.
8) Describe any other attributes or information that you feel are or should be important to the committee in determining whether the candidate should be recommended to the DRI Board of Directors for the elected position sought.

DRI appreciates your taking the time out of your schedule to appear before the Nominating Committee and share your thoughts and opinions. Without your interest and contribution, DRI would not be able to elect the best possible leaders.

CANDIDATES FOR SECOND VICE PRESIDENT

Michael D. Carter

Hall Booth Smith PC | Oklahoma City, Oklahoma

Michael D. Carter is a partner at *Hall Booth Smith PC* based in Oklahoma City, Oklahoma. He has been a member of DRI for 36 years and practices in asbestos, talc, and silica litigation; product liability; environmental; workers' compensation; and employment law. He currently serves on the DRI Board of Directors as the Southwest Region Director (2021-2024). Mr. Carter has also served as: DRI Membership Committee Chair, 2024; DRI Membership Committee Vice-Chair, 2023; Board Liaison to DRI Asbestos Litigation Committee, 2024; Board Liaison to DRI Governmental Liability Committee, 2022-2023; National Foundation for Judicial Excellence, Member, 2021-2024; DRI State Representative for Oklahoma, 2018-2021; DRI Kevin Driskill Outstanding State Representative Award, 2021; DRI State Membership Chair for Oklahoma, 2017-2018; DRI Exceptional Performance Citation, 2017; DRI Membership Committee Liaison to Governmental Liability Committee and Asbestos Litigation Committee, 2024; The Defense Never Rests, Organizer and Band Leader. 2021-2024; and DRI Asbestos Litigation Committee Membership Chair and Steering Committee Member, 2024.

If elected, Mr. Carter is motivated to make DRI the foundational civil defense association among the civil defense community. "The question for DRI becomes, in addition to expanding and improving the 'value proposition,' how does DRI become the organization you join because that's what you do if you're a civil defense attorney?", ***he wrote in his declaration***. "As Membership Committee Chair and Vice-Chair, I am proud of our record in innovating new membership strategies such as the Seminar Membership Program, the Membership Committee SLC liaison program (which has resulted in action plans for meeting membership goals from several DRI SLCs) and initiating a monthly Membership Minute to keep the Board and EC informed of Membership Committee asks and accomplishments."

Mr. Carter believes that DRI has positive momentum following the COVID-19 pandemic and can leverage this momentum to become the foundational civil defense association among civil defense attorneys. He also advocates for DRI strengthening its partnerships with State and Local Defense Organizations (SLDOs) and National Defense Organizations (NDOs), as well as DRI's sister organizations—the Association of Defense Trial Attorneys, International Association of Defense Counsel, and Federation of Defense & Corporate Counsel.

David L. Jones

Wright, Lindsey & Jennings LLP | Little Rock, Arkansas

A DRI member of 16 years, David L. Jones is a partner at *Wright, Lindsey & Jennings, LLP* in Little Rock, Arkansas. His areas of practice include business law and litigation, commercial litigation, and construction law. He has served as on the DRI Board of Directors as a National Director since 2021 and is the DRI Foundation DRI Cares Chair. Mr. Jones has also held leadership positions on the Construction Law Committee, DRI Annual Meeting Steering Committee, Commercial Litigation Committee, and more. While in these positions, he has also been a frequent contributor to DRI programming via publications and seminars. At his firm, he is the Diversity, Equity, Inclusion & Belonging Partner and Committee Chair. He is an active member of the Arkansas Bar Association, American Bar Association, and Construction Lawyers Society of America.

If elected, Mr. Jones is focused on the potential for future leaders to join and engage with the organization. "As the viability of professional organizations are threatened by market forces and shifting realities of the practice of law, I believe that it is imperative that DRI be preserved for future generations of young attorneys," ***he wrote in his declaration***. "These present and future young attorneys include my own daughter, who is currently a 3L. For these reasons, I have been and remain committed to DRI and have undertaken increasingly important leadership roles over time."

Additionally, Mr. Jones serves as outside general counsel to and regularly provides advice to many non-profit and public sector clients. He notes that success in these roles requires a strong understanding of governance and governance models, as well as the ability to navigate internal conflict and influence decision-making. To secure its future success, he believes DRI must adapt to the nation's changing demographics and train leaders to meet the challenges of the future. "If we are to ensure that DRI is sustainable into the future, we must seek to show constituencies that align with trending demographics that ours is an inclusive organization and aligned with their individual values," he added.

CANDIDATES FOR SECOND VICE PRESIDENT

Sara M. Turner

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC | Birmingham, Alabama

Sara M. Turner is a shareholder at *Baker, Donelson, Bearman, Caldwell & Berkowitz, PC*, in Birmingham, Alabama. A DRI member for 21 years, Ms. Turner is currently DRI's Secretary-Treasurer and has served as a National Director (2020-2023) Women in the Law board liaison (2020-2023), Annual Meeting Chair / Vice Chair (2022-2023), Retail and Hospitality Chair / Vice Chair (2016-2020), Technology Chair / Vice Chair (2008-2013), and DRI for Life Chair (2020-2022). She has also been a member of the Product Liability, Young Lawyers, and Trucking Law Steering Committees, including chairing several Seminars and Specialized Litigation Groups. She participates in the IADC, FDCC, and Alabama Defense Lawyer's Association. At Baker Donelson, she Chairs the Hospitality Industry Service Team and is on the Women's Initiative Committee.

If elected, Ms. Turner would focus on adapting to technological advances; enhancing member engagement; creating innovative educational and networking programs; strengthening DE&I efforts; securing strategic partnerships; and expanding member support and wellness. "With 21 years of active membership and a variety of leadership roles within DRI, I have developed a comprehensive understanding of the organization's strategic goals and operational needs," ***she wrote in her declaration***. "My experience as Secretary-Treasurer this past year has equipped me with firsthand knowledge of DRI's financial and administrative functions, further preparing me for the responsibilities of Second Vice President."

Ms. Turner leads a high performing trial team as national counsel; she looks forward to using her experience by expanding DRI's resources regarding the use of technology to improve client service and lawyer retention. She believes there is a strong opportunity to expand DRI's reach by increasing its presence, and attracting new members from nascent practice areas, regions, and firm sizes. Ms. Turner believes this would strengthen the organization and enhance its ability to achieve its mission. "Throughout my 21 years of membership and extensive involvement in DRI, I have developed a profound appreciation for our organization's mission and the incredible impact it has on the legal profession," she noted. "Now, more than ever, I am committed and able to serve our members with integrity, dedication, and a forward-thinking approach."

Ricardo A. Woods

Burr Forman LLP | Mobile, Alabama

Ricardo A. Woods of *Burr Forman LLP* in Mobile, Alabama, is an 18-year member of DRI who practices in the areas of toxic tort, product liability, insurance litigation, and government liability law. He is a partner at his firm and a National Director on the DRI Board of Directors (2021-Present). Additionally, he is the Chair of the 2025 DRI Annual Meeting, ADR Committee Board Liaison, Vice Chair of the 2024 DRI Annual Meeting, DRI Foundation DRI for Life Chair, and has been actively involved with DRI's Diversity & Inclusion Committee, Government Liability Committee, Toxic Tort and Environmental Law Steering Committee, and more.

If elected, Mr. Woods would like to ensure DRI's mission reflects that as DRI members, our community members serve more than one role for the defense bar. "We are a locally known, nationally recognized, and internationally respected platform for the lawyers who represent the collective interest of the business community," ***he wrote in his declaration***. "To others we are a think tank full of professional advocates and a network of people striving to improve the way we practice law."

In order to move DRI forward, Mr. Woods is interested in expanding DRI's leadership meetings to a leadership academy. This academy would focus on the master calendar with a common ground in mind for the SLCs/SLDOs; use the information gathered by the SLDO engagement committee to make meaningful changes; and consider giving the SLDO members something no other organization can provide: full on access to DRI.

Mr. Woods believes DRI faces future challenges including mental health crises in the profession, the commoditization of professional legal services, and redefining the value and meaning of membership. "Without real solution collaboration, a strong leadership team, a strong network, and the ability to confront this issue using our platform, we stand to lose the ground DRI has gained in the business community over the last 60 years," he noted. "I am prepared to serve."

CANDIDATES FOR NATIONAL DIRECTOR

Michelle Thurber Czapski

Bodman PLC

Detroit/Troy, Michigan

Michelle Thurber Czapski has been a member of DRI for 23 years, currently based in Detroit and Troy, Michigan. She has served as Chair of the Life, Health, and Disability Committee, and the Commercial Litigation Committee, and has also served on the Membership Committee, Class Action Program and Center for Law and Public Policy. She is also actively involved in the Women Lawyers Association of Michigan and the Detroit Chapter of the Federal Bar Association, is a certified mediator, and chairs Bodman's Litigation and Alternative Dispute Resolution Practice Group.

If elected, Ms. Czapski is especially interested in increasing DRI's membership base and engagement among young lawyers. "New lawyers in recent years have brought us a new kind of professional mindset, and they do not necessarily play by our rules," ***she wrote in her declaration***. "Forward movement by any organization that wants a future run by this generation will require an acceptance and understanding of their priorities." Ms. Czapski believes the future is bright for DRI because it has shown the ability to pivot during the past few difficult years, and that agility will help it to thrive as the future brings the next set of challenges, opportunities, and member needs.

Juan M. Marquez

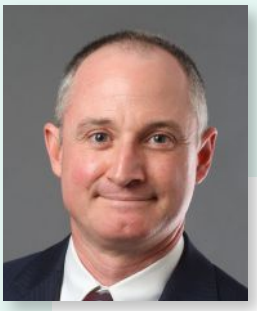
Rodey, Dickason, Sloan, Akin & Robb, PA

Albuquerque, New Mexico

A DRI member of 11 years, Juan M. Marquez currently serves as the DRI State Representative for New Mexico. He is actively involved in the Litigation Skills Committee and is the 2024 Annual Meeting Chair for that group. Mr. Marquez is a part of the Board of Directors for the New Mexico Defense Lawyers Association (NMDLA). He has previously served in various executive committee positions with the NMDLA, including treasurer, president-elect, and president. He has been actively involved with the NMDLA since February 2016.

If elected, Mr. Marquez would put a strong focus on membership involvement at DRI. "While DRI has many active members across the country, I believe there are many untapped resources in the form of DRI members who are not actively involved in the organization," ***he wrote in his declaration***. "This is evident from the many networking events that occur during DRI meetings and seminars where I have personally engaged with individuals who have good ideas and suggestion but who are not ever really seen in leadership or committees."

CANDIDATES FOR NATIONAL DIRECTOR



Morgan J. Milner

Modern Woodmen of America

Rock Island, Illinois

Morgan J. Milner is a 15-year member of DRI and serves as Assistant General Counsel for the Modern Woodmen of America. He currently leads DRI's Corporate Counsel Committee as the chair, and he has served on the steering committee for that group since 2020. He has also been involved with the Association of Fraternal Benefit Counsel, serving as secretary-treasurer from 2014-2022, and the American Fraternal Alliance.

If elected, Mr. Milner is interested in growing DRI's reach among corporate counsel. "I am seeking to join the board to be a voice for corporate counsel and to ensure this important component of the membership is effectively heard and included," ***he wrote in his declaration***. "I will bring to this role experience and competencies gained not only through my years of service to DRI but also through other personal and professional opportunities." Mr. Milner believes that if DRI can situate itself as one of the "must have" memberships of corporate counsel, the organization can anticipate greater engagement from corporate counsel, as these members will have fewer outside obligations or opportunities to network and earn continuing legal education (CLE).

Christopher B. Turney

Turney LG

Kansas City, Missouri

Christopher B. Turney is a 10-year member of DRI with leadership experience on the Litigation Skills and within the Center for Law and Public Policy. As the chair of the Social Inflation Task Force, Mr. Turney's primary goal was assembling a skillful and innovative team to focus on solutions as much as focusing on problems while producing high-quality publications and resources for defense attorneys. He is a frequent contributor to DRI programming through publications and seminar presentations. He also is active within the Missouri Organization of Defense Lawyers and Kansas Association of Defense Counsel.

If elected, Mr. Turney is looking forward to developing teams to tackle complex challenges to the profession and within DRI. "As seen by the quick growth of the Social Inflation Task Force and the steady re-engagement of the Litigation Skills Committee, one of my leadership qualities is building bridges with the right people to charge into battle," ***he wrote in his declaration***. "In order to build that momentum among volunteering billable hour defense attorneys, we must define the legitimate and serious threats that must be addressed. Then, we must find the creative and strategic plan and sell the problem – and solution – to the key stakeholders."

ANNUAL MEETING

Save Your Spot in Seattle!

Join us at the flagship event of the year for civil defense practitioners.

Join us this fall and hear from blockbuster speakers:

DRI's Annual Meeting always features a lineup of stellar keynote speakers who will help take your practice to the next level. This year is no exception.

BILL BRADLEY

Two-time NBA champion and former US Senator

We Can All Do Better

Hear from Bill Bradley as he teaches us how to meaningfully connect with those around us.

RICK STEVES

Popular public television host, best-selling author, and activist

Travel as a Political Act

Embark on a journey with Rick Steves as he delves into the intersection between travel and politics.

Where Relationships Build Business!

DRI has a fantastic lineup of networking opportunities, speakers, Continuing Legal Education (CLE) offerings, and more!

Discover new ways to learn, engage, and connect with your DRI community at these sessions:

- **Artificial Intelligence (AI) – The Future is Here: These are the Practical Tips You Need Now** with Alison Grounds, Linda Mancini, and Joe Salvati
- **Implementing a Culture of Innovation** with Dan Slater and Anne M. Talcott
- **Improving the Behavioral Health and Well-Being of Lawyers** with Bree Buchanan
- **Creating a Culture of Collaboration for Navigating Disputes** with Mark C. Fava and James E. Weatherholtz

SLC CLE Sessions:

- **E-Discovery: Tips, Trick and Tactics for the Young (or Young at Heart) Lawyer** with DRI's Young Lawyers Committee
- **Failure Analysis: Helping You Close Your Claims** with DRI's Construction Law Committee
- **A Flameless Fireside Chat About Next Gen Trial Experience** with DRI's Litigation Skills Committee
- **Walking the Line: Discovering and Admitting Social Media Evidence with your Ethics Intact** with DRI's Lawyers' Professional & Ethics Committee and Workers' Compensation Committee

DRI 2024 ANNUAL MEETING

SMELLS LIKE DRI SPIRIT

Join us for the DRI for Life Grunge Run/Walk!

October 17 at 7:00 a.m.
Hyatt Regency Seattle Lobby

Get your grunge on for DRI for Life's legendary run/walk!

For The Defense
Vol. 66, No. 8 September 2024

For The Defense, September 2024, Vol. 66 Issue 8 (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.***

ON THE RECORD

2024 ELECTION FEATURE

PRODUCT LIABILITY

MEDICAL LIABILITY AND HEALTH CARE LAW

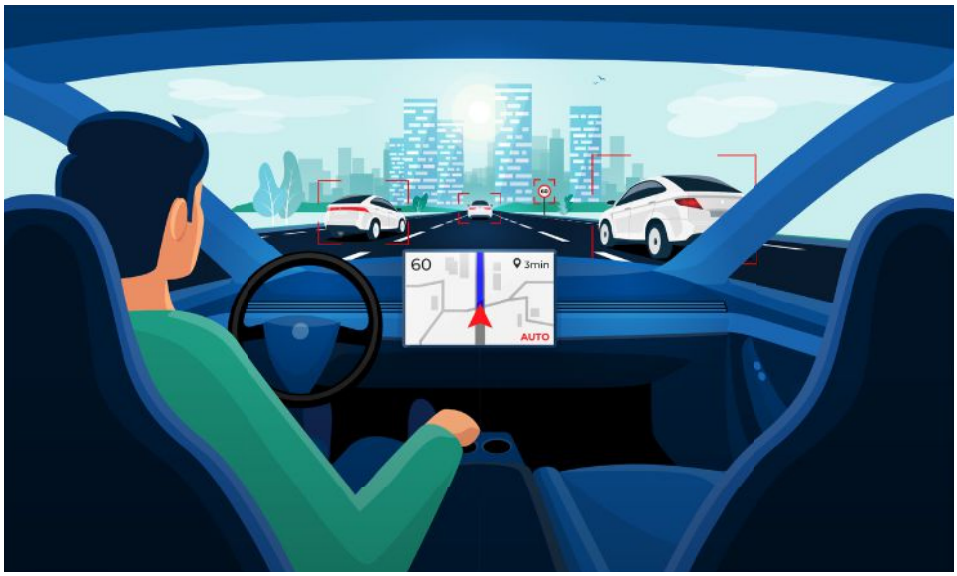
RETAIL AND HOSPITALITY

PROFESSIONAL LIABILITY

Self-Driving Vehicles and Questions of Product Liability

By Denis F. Alia

... autonomous vehicle litigation...raises interesting questions the defense bar should consider as it continues providing effective defense strategies for its clients.



Vehicle automation is defined based on the extent to which a car's integrated technology performs a variety of driving functions with or without the presence of a human operator behind the wheel. Levels of automation fall on a broad spectrum, with vehicles that provide human drivers with simple warnings or alerts at one end, to vehicles that are considered fully autonomous at the other end. Vehicles first included automated technology as early as the 1950s, and that technology continues to advance rapidly today. Due to these rapid technological advances, legislatures and judiciaries across the United States are working to pass regulations and develop a body of precedent to respond to questions of products liability raised when automated vehicles are involved in accidents. Although there are few clearly-defined legal conclusions at the intersection of products liability and autonomous vehicles today, those that exist illustrate courts' reluctance to apportion liability to autonomous vehicle manufacturers. Nonetheless, autonomous vehicle litigation today, as well as the mounting body of law concerning products liability and general automation technology, raises interesting questions the defense bar should consider as it continues providing effective defense strategies for its clients.

Vehicle Automation

Vehicle automation is generally defined as a vehicle's technological ability to perform the functions of a human driver with or without human aid. *See* SAE Int'l, J3016 APR2021, Surface Vehicle Recommended Prac. 6 (2021); Alexander S. Gillis & Ben Lutkevich, *Self-Driving Car (Autonomous Car or Driverless Car)*, TechTarget, ***https://www.techtarget.com/searchenterpriseai/definition/driverless-car*** (last updated June 2024). SAE International (f/k/a the Society of Automotive Engineers), in conjunction with the International Organization for Standardization

Denis F. Alia is a partner at Cetrulo LLP's Boston, Massachusetts office. He concentrates his practice on the defense of litigation matters, including claims arising from products liability, toxic torts, automotive accidents and insurance claims, and premises litigation. Denis has represented a broad range of companies, including manufacturers of heavy industrial equipment and automotive friction parts, and ride-sharing companies. Denis is also a member of the national coordinating team that manages multi-jurisdictional toxic tort litigation for a Fortune 500 company.

("ISO"), recommends standards by which vehicle automation is defined. *See* Surface Vehicle Recommended Prac., *supra*, at 1-2; *About SAE International*, SAE Int'l, ***https://www.sae.org/about/history*** (last visited July 8, 2024). A vehicle considered "fully autonomous" or "self-driving" is one that operates completely without the aid of a human driver. *See* Surface Vehicle Recommended Prac., *supra*, at 34; Lutkevich, *supra*. Because those cars are generally not available in today's market, SAE International prefers the term "automation" to describe the technological abilities of cars produced in the US today. *See* Surface Vehicle Recommended Prac., *supra*, at 34; *Automated Vehicles for Safety*, NHTSA, ***https://www.nhtsa.gov/technology-innovation/automated-vehicles-safety#resources*** (last visited July 8, 2024).

Levels of Automation

SAE International defines six levels of vehicle automation; the levels range from L0, where a human driver performs all driving functions with some technological assistance, to L5, where the vehicle is fully autonomous. *See Automated Vehicles for Safety, supra; What is an Autonomous Car?*, Synopsis, ***https://www.synopsys.com/automotive/what-is-autonomous-car.html*** (last visited July 8, 2024). As previously mentioned, L0 vehicles provide basic technological assistance to the driver, such as warnings and alerts, like blind-spot monitoring. *See Automated Vehicles for Safety, supra;* Surface Vehicle Recommended Prac., *supra*, at 6. L1 vehicles assist the driver with acceleration, braking or steering, but not both, while L2 vehicles assist the driver with those three tasks simultaneously. *See Automated Vehicles for Safety, supra*. Some of Tesla's models can be classified as L2 vehicles, however these vehicles also require a driver-monitoring system (i.e., touch-sensitivity on the steering wheel). *See Automated Vehicles for Safety, supra*. L3 vehicles, which are generally unavailable in the US today, assist the driver by controlling specific driving functions such as navigating through traffic at low speeds. *See* Surface Vehicle Recommended Prac., *supra*, at 31; *Automated Vehicles for Safety, supra*. In an L3 vehicle, the human driver must monitor the vehicle's movements at all times. *See Automated Vehicles for Safety, supra*. L4 and L5 vehicles, which are unavailable in all car markets today, are essentially fully autonomous. *See Automated Vehicles for Safety, supra*. An L4 vehicle performs many driving functions, without human intervention, in specific geographic areas, whereas L5 vehicles perform all driving functions, anywhere, without human intervention. *See Automated Vehicles for Safety, supra*; Surface Vehicle Recommended Prac., *supra*, at 26, 32. Currently, L4 vehicles are being tested for market production, while L5 vehicles will likely remain in development for at least the next decade. *See* Mark Fagan et al., Autonomous Vehicles Are Coming: Five Policy Actions Cities Can Take Now to be Ready 6 (2021).

A Brief History of Vehicle Automation

Automation technology first appeared in vehicles in the 1950s with the advent of safety features such as cruise control and anti-lock brakes. *See Automated Vehicles for Safety, supra*. Shortly thereafter, in 1966, the National Traffic and Motor Vehicle Safety Act was passed in the US, mandating the first set of rules for vehicle safety. *See* National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718. In the early 1980s, a German company developed a vehicle that used a computerized vision system to operate on the highway, without traffic, at highway speeds. *See* James M. Anderson et al., Autonomous Vehicle Technology 56 (2016). By the 1990s, technology in the US further advanced the pursuit of self-driving cars when researchers in California tested a car that was guided by magnets embedded into the highway. See *id*. It was around this same time that Congress directed the Department of Transportation and the National Automated Highway System Consortium to develop an "automated highway system," while companies in Europe and Japan developed adaptive cruise control functions that further advanced vehicle automation. *See* Keith Barry, *Big Bets and Broken Promises: A Timeline of Tesla's Self-Driving Aspirations*, Consumer Reps. (Nov. 11, 2021), ***https://www.consumerreports.org/cars/autonomous-driving/timeline-of-tesla-self-driving-aspirations-a9686689375/#:~:text=Big%20Bets%20and%20Broken%20Promises%3A%20A%20Timeline%20of,2014%20...%208%20October%202015%20...%20More%20items***. These advances paved the way for Tesla to create their "Autopilot" feature, which debuted in the mid-2010s and continues to be refined to this day. *See id*. This technology provides a variety of automated assistance to the human driver including a self-driving system where the human driver is still responsible for most driving functions. *See id*.

Currently, L4 vehicles are being tested for market production, while L5 vehicles will likely remain in development for at least the next decade.

Legislating Vehicle Automation

At least 27 states, and the District of Columbia, have enacted legislation relating to autonomous vehicles. *See* Justin Banner, *Are Self-Driving Vehicles Legal in My State?*, Motortrend (Jan. 6, 2023), ***https://www.motortrend.com/features/state-laws-autonomous-self-driving-driverless-cars-vehicles-legal/*** (stating 27 states have enacted autonomous vehicle legislation); *Autonomous Vehicles – Self-Driving Vehicles Enacted Legislation*, NCSL, ***https://www.ncsl.org/transportation/autonomous-vehicles#state*** (last updated Feb. 18, 2020) (stating 29 states have enacted autonomous vehicle legislation). At least six states regulate autonomous vehicles by executive order, and at least five states regulate autonomous vehicles by both legislation and executive order. *See Autonomous Vehicles – Self-Driving Vehicles Enacted Legislation, supra*. Of the states with autonomous vehicle legislation, California's regulations are among the strictest, while Florida's are more lenient. *See* Roy Furchgott, *Public Streets Are the Lab for Self-Driving Experiments*, N.Y. Times (Dec. 23, 2021), ***https://www.nytimes.com/2021/12/23/***

business/tesla-self-driving-regulations.html?searchResultPosition=24.

As an example, California requires a driver to be "seated in the driver's seat, monitoring the safe operation of the autonomous vehicle, and capable of taking over immediate manual control of the vehicle in the event of an autonomous technology failure or other emergency." Cal. Veh. Code § 38750(b)(2) (West 2022). In contrast, Florida does not require the presence of a human operator in a car that is "fully autonomous." *See* Fla. Stat. Ann. § 316.85 (West 2019); Evan P. Dahdah, *An Attempt to Control What Controls Itself: Unraveling Florida's Autonomous Vehicle Laws*, 38 Trial Advoc. (FDLA) 31, 34-36 (2019). Moreover, when compared to Florida, California more clearly apportions liability to vehicle manufacturers in the event that the autonomous driving system fails, causing damage. *See* Cal. Veh. Code § 38750(G)(3) (West 2022); Dahdah, *supra* at 36. California law requires manufacturers to certify that their autonomous vehicles have been tested on public roads in compliance with state testing standards, *see* Cal. Veh. Code § 38750(G)(2)-(3) (West 2022), while Florida law protects manufacturers against defects in the autonomous vehicle technology caused by third-party modifications. *See* Fla. Stat. Ann. § 316.86 (West 2016); Dahdah, *supra* at 36.

Case Law Survey of Self-Driving Cars and Products Liability

As a result of the continuous technological leaps being made in the autonomous vehicle industry, there are few, if any, settled legal conclusions regarding products liability and autonomous vehicles. *See* Julia Doskoch, Note, *"Your Honor, the Car Crashed Itself": Navigating Autonomous Vehicle Liability in the Age of Innovation*, 2023 B.C. Intell. Prop. & Tech. F.J. 1, 5 (2023); Atilla Kasap, *States' Approaches to Autonomous Vehicle Technology in Light of Federal Law*, 19 Ohio State Tech. L.J. 315, 321 (2023). Some unsettled questions include whether, and to what extent, federal law preempts state regulation when applied to products liability cases, *see* Kasap, *supra*, at 410, and to what extent federal regulations, rather than common law tort theories, are better equipped to adapt and decrease the risk of autonomous vehicles crashes. *See generally* Kevin M.K. Fodouop, Note, *The Road to Optimal Safety: Crash-Adaptive Regulation of Autonomous Vehicles at the National Highway Traffic Safety Administration*, 98 N.Y.U.L. Rev. 1358 (2023) (proposing development of data tracking system the NTSB could use to adapt and improve autonomous vehicle regulations to reduce risk of autonomous vehicle crashes). Although the question of who is liable when an autonomous vehicle crashes and causes damage is currently academic in nature, *see* Doskoch, *supra*, at 6-7, the several cases that are available generally illustrate that, currently, courts are reluctant to apportion liability to manufacturers when an autonomous vehicle is involved in an accident.

In some cases where an autonomous vehicle was involved in an accident, courts dismissed the matters before addressing products liability issues or theories specifically relating to the autonomous vehicle at issue. For example, in *Wang v. Tesla, Inc.*, 20-CV-3040 (NGG) (SJB), 2021 WL 3023088 (E.D.N.Y. July 16, 2021), the court dismissed the case because the Plaintiff insufficiently pleaded fraud and failed to certify an alleged class. Additionally, in *Umeda v. Tesla Inc.*, No. 20-CV-02926-SVK, 2020 WL 5653496 (N.D. Cal. Sept. 23, 2020), the court dismissed the case based on *forum non conveniens*. For those cases where questions of liability and other issues relating to autonomous vehicles were reached, courts decided against apportioning liability to vehicle manufacturers for various reasons.

In California, a Car Manufacturer is not a "Driver"

In *Escudero v. Tesla Inc.*, No. RG21090128, 2021 WL 2772434 (Super. Ct. Cali. Feb. 26, 2021), a California court dismissed a negligence action, with prejudice, after concluding that liability rests on the human driver physically operating the car, not the car's manufacturer, even if the car operated mostly without the driver's aid. Id. Interpreting the California State Vehicle Code, the court concluded that a car's "driver", even one operating autonomously to a certain extent, is the person who is in "actual, physical control of the vehicle." *See id.* The court reasoned that, without precedent establishing otherwise, they could not apportion liability to the car's manufacturer when the human occupant had the opportunity to override the vehicle's automation features. *See id.*

Marketing Materials do not Constitute a Warranty

In *Son v. Tesla Motors*, No. SACV 16-02282 JVS, 2019 WL 4238874, at *5-6 (C.D. Cal. Apr. 15, 2019), the Federal District Court for the Central District of California dismissed a breach of contract action against a car manufacturer because the marketing materials for a car's automation features did not create a warranty between the manufacturer and the consumer promising that the car would stop itself to prevent a collision. Id. Plaintiff alleged that the car manufacturer's marketing materials, advertising automatic breaking and forward collision warning, warranted that the car would actually prevent a forward collision. *See id.* at *1, *4-6. The court dismissed the case without prejudice, reasoning that the marketing materials indicated only that the automation features were *designed* to prevent collision; those materials did not promise that the automation features would *actually* prevent a collision. *Id.* at *5-6 (emphasis added).

Consumers do not Expect an Autonomous Vehicle to Prevent a Collision

In *Youngberg v. Gen. Motors LLC.*, No. 20-339-JWB, 2022 WL 3925272, at *3 (E.D. Okla. Aug. 24, 2022), the Federal District Court for the Eastern District of Oklahoma dismissed a product liability claim because a reasonable consumer in 2013, the year of the vehicle involved in the accident at issue in this case, would not expect an autonomous vehicle to avoid a collision. Id. Rather, a consumer in 2013 would expect that responsibility to fall to the vehicle's human driver. *See id.* In this case, Plaintiffs alleged that the vehicle in question was defectively designed and unreasonably dangerous because it was not equipped with automation technology such as a forward collision warning system and an automatic breaking system, even though it was technologically and economically feasible for the vehicle's manufacturer to install those systems in the vehicle at issue. *See id.* at *1-3. The court concluded that, even if it was technologically feasible to make the vehicle at issue safer by providing some level of

automation, that fact alone is insufficient to establish that the vehicle was unreasonably safe when it let the manufacturing plant. *See id.* at *4. Consumers in 2013 would expect human drivers to take responsibility for front-end collisions while traveling at highway speeds rather than a vehicle's automatic safety features. *See id.*

Product Liability and Automation: Beyond Vehicle Automation

Beyond vehicle automation, artificial intelligence ("AI") is one technological development where product liability and automation may intersect. Foundationally, AI, and AI enabled technologies, are designed to function like a human brain and, using sophisticated computer software, learn new tasks, engage in reasoning, and problem-solve to complete new functions. *See* Kevin Roose & Cade Metz, *How to Become an Expert on A.I.*, N.Y. Times (Apr. 4, 2023), ***https://www.nytimes.com/article/ai-artificial-intelligence-chatbot.html?searchResultPosition=16***. Automation alone is distinct from AI because, unlike AI, automated systems do not learn how to complete tasks, but rather their systems are manually configured to complete certain tasks. *See* Jody Glidden, *Understanding What Artificial Intelligence is, and what It's Not*, Forbes (Apr. 14, 2021), ***https://www.forbes.com/sites/forbesbusinesscouncil/2021/04/14/understanding-what-artificial-intelligence-is-and-what-its-not/?sh=7d8b758248cd***. However, when combined, AI and automation create an intelligent form of automation, where an automated machine can learn how to complete certain tasks based on an integrated AI system. *See What is Automation?*, IBM, ***https://www.ibm.com/topics/automation*** (last visited July 8, 2024). For example, car manufacturers may use intelligent automation to regulate a robotic system's production of vehicles based on an integrated AI's analysis of supply and demand. *See What is Intelligent Automation?, supra.*

Beyond vehicle automation, artificial intelligence...is one technological development where product liability and automation may intersect.

Product liability and intelligent automation may intersect when courts apportion liability to AI manufacturers when their products fail to function as promised. For example, in *Conn. Fair Hous. Ctr. v. Corelogic Rental Prop. Sols., LLC*, 369 F. Supp. 3d 362 (D. Conn. Mar. 25, 2019), the court held the Defendant software company liable because its software violated the Fair Housing Act ("FHA") by discriminating against individuals with arrest records. *See id.* at 372. Here, Defendant's software analyzed a tenancy applicant's criminal record and, using an algorithm, determined that the applicant was disqualified to become a tenant because of a prior arrest. *See id.* at 367-68. In a series of publications, the US Department of Housing and Urban Development ("HUD") issued guidance stating that landlords who own federally-assisted housing units cannot disqualify housing applicants based on arrest records alone, because arrest records disproportionately affect African American and Hispanic rental applicants. *See id.* at 371. Therefore, use of those records to screen housing applications violates the Fair Housing Act ("FHA"). *See id.* Because Defendant held out its software as one capable of screening housing applications in compliance with the FHA, and because that software failed do so, causing the landlord to disqualify a housing applicant in violation of the FHA, the court apportioned liability to the Defendant for those discriminatory actions. *See id.* Defendant's liability was partially based on agency principles, where the court concluded that the Defendant, in employing its tenant screening software, acted as the landlord's agent, and was liable as the landlord's agent. *See id.* at 373-74.

Conclusion

There are few, if any, well-defined legal conclusions to questions regarding autonomous vehicles and products liability. However, as the current cases discussed above illustrate, courts are reluctant to apportion liability to vehicle manufacturers when their vehicles are involved in accidents for a variety of reasons. In developing precedent to apply to current issues of products liability and vehicle automation, courts around the country are: (1) defining ambiguous terms in statutory compilations to better determine who is liable when an autonomous vehicle is involved in an accident; (2) applying contract law to examine alleged warranties made by autonomous vehicle manufacturers; and (3) courts are looking to common law tort theories, such as consumer expectations, when apportioning liability. With an industry that is rapidly changing, and a corresponding body of precedent developing just as quickly, it is important for defense counsel to take each of these considerations in turn and ask questions such as: (1) how will changes to state autonomous vehicle regulations effect my client's defense strategies?; (2) what warranties must my client navigate to ensure accurate representations as to their products' level of automation?; and (3) how will consumer expectations change as to their reliance on vehicle automation to prevent crashes and other various accidents? These and other questions will be important for the defense bar to consider as it continues providing effective defense strategies for its clients in this age of technological advances in vehicle automation.

...courts are reluctant to apportion liability to vehicle manufacturers when their vehicles are involved in accidents for a variety of reasons.

Deal or No Deal?

Fictitious Pricing Class Actions

By Ryan Savercool

Recently...there has been an uptick in publicity regarding allegedly fictitious pricing schemes employed by retailers.

Retailers' efforts to attract customers via discounted price sales and related promotions have been a common sales practice for decades. Recently, however, there has been an uptick in publicity regarding allegedly fictitious pricing schemes employed by retailers. *See, e.g.*, Patrick Coffee, Thought You Saved $60 on that Vacuum Cleaner? Think Again, Wall St. J. (Aug. 24, 2023), https://www.wsj.com/articles/thought-you-saved-60-on-that-vacuum-cleaner-think-again-c89ce344 (highlighting that deceptive or fictitious pricing is "making a comeback" and that there is now increased litigation around deceptive pricing practices for large retail stores). Class action attorneys have targeted this basic marketing tool through sophisticated pre-suit investigations and lawsuits challenging these discounts as "fake" or "illusory" based on allegations that these consumer products were not sold at their original price.

A core defense theme in this litigation rests on whether the plaintiff suffered any harm in connection with the purchase of a non-defective, and otherwise conforming, product at the price they agreed to pay. Retailers should welcome the New Jersey Supreme Court's recent decision in *Robey v. SPARC Grp. LLC*, 311 A.3d 463 (N.J. 2024), holding that consumers failed to state a claim under New Jersey's Consumer Fraud Act. That decision provides meaningful guidance regarding when a plaintiff suffers an out-of-pocket loss or deprivation of the benefit of a bargain, which are the two main damages theories applicable to these types of cases as well ordinary product liability cases in which plaintiffs attempt to plead consumer protection violations and breach of warranties.

Statutes and regulations proscribing fictitious pricing are commonplace across the country. Many state statutes align with the Federal Trade Commission's Guides Against Deceptive Pricing, 16 C.F.R. § 233.1, which provides that a former price comparison is legitimate as long as the former price is the actual, bona fide price at which the article was offered to the public on a regular basis for a reasonably substantial period of time. If the former price is genuine, the advertised bargain is considered true. However, if the former price is fictitious, such as an artificially inflated price established to enable a subsequent offer of a large reduction, the advertised bargain is false, and the purchaser is not receiving the expected value. Similarly, California's Unfair Competition ("UCL") and False Advertising Laws ("FAL"), Business & Professions Code §§ 17200 and 17500, prohibit unfair, deceptive, untrue, or misleading advertising, and make it unlawful to make or disseminate any statement concerning real or personal property or services that is untrue or misleading, and which is known or should be known to be untrue or misleading, respectively. By the same token, the New York General Business Law prohibits "[d]eceptive acts or practices" and "false advertising" "in the conduct of any business, trade or commerce or in the furnishing of any service." N.Y.G.B.L §§ 349, 350. "False advertising" includes "advertising, including labeling, of a commodity,... if [it] is misleading in a material respect." *Id.* § 350-a(1).

The central issue in these class actions does not always come down to whether there has been unlawful or misleading sale—an issue that must often be the subject of discovery. Instead, defendants can seek a quick exit to these lawsuits by challenging whether the plaintiff suffers an actionable injury or harm under the relevant state's consumer protection statute.

Some courts initially sided with plaintiffs in these deceptive pricing class actions. In *Munning v. Gap, Inc.*, 238 F. Supp. 3d 1195, 1198 (N.D. Cal. 2017), for example, the plaintiff alleged "upon information and belief" that the three articles of clothing she purchased "were never sold or offered for sale at the non-discounted, base prices listed on Defendants' websites...." *Id.* According to the plaintiff,

Ryan Savercool is an associate in McCarter & English's Products Liability, Mass Torts and Consumer Class Actions group, where he represents companies of all sizes in complex product liability and consumer fraud matters.

the items were always sold and offered for sale at a price at or near the purported 'sale' price that Plaintiff paid." *Id.* The United States District Court for the Northern District of California held that the plaintiff adequately alleged an "ascertainable loss" under the New Jersey Consumer Fraud Act, and adopted the plaintiff's position that "an out-of-pocket loss can occur even where a plaintiff is misled into purchasing something of value." *Id.* at 1201.

In June 2023, the Oregon Supreme Court adopted a "purchase price theory" as a means to establish "ascertainable loss" under Oregon's Unlawful Trade Practices Act. *See Clark v. Eddie Bauer LLC*, 532 P.3d 880, 882 (2023). In that case, the plaintiffs alleged that the clothes at outlet stores were never offered for sale elsewhere—let alone at the "list" price from which the putative discount was predicated on. *See id.* at 883. The Oregon Supreme Court likewise sided with the plaintiff. It explained:

> At its essence, the purchase price theory is that one person has been induced by another person's unlawful activities to pay money for something that the first person would not otherwise have bought. In plaintiff's case, what she wanted was items of clothing whose selling price had, at some earlier time, been what defendants' false price listings indicated. What she received, on the other hand, was merchandise that had never been offered for sale at those prices. Thus, whether or not those items ever *sold* at those higher price points, and whether or not defendants' alleged pricing scheme can be viewed as representing that the items previously had retail or market values equivalent to the prices shown on their product tags, plaintiff paid money to defendants for articles of clothing that she would not have bought had she known their true price history. The money that plaintiff is out as a result is her "loss."
>
> [...]
>
> To hold that there is no ascertainable loss under those circumstances would suggest one of two things: either (1) the legislature, despite rendering this very practice unlawful and authorizing private citizens to enforce the UTPA, intended for a person in plaintiff's shoes to be left without recourse under the UTPA; or (2) the parties' transactions took place in a perfectly efficient economy, one in which a person deceived into buying an unwanted product could, entirely without financial or personal cost, resell the item for exactly the price that she had paid for it.
>
> Neither view is tenable.

Id. at 891.

The Oregon Supreme Court's holding accurately captures plaintiffs' theory of these cases. Fortunately, there are decisions on the other side. A pivotal shift has occurred in New Jersey, a state with some of the strongest consumer protection laws in the nation. In a landmark 4-3 decision in *Robey*, the New Jersey Supreme Court set a new precedent favoring retailer defendants in cases involving illusory discounts. The Court found that, although plaintiffs may have been victims of deceptive advertising, they did not suffer an ascertainable loss. *See Robey*, 311 A.3d at 467. A deep dive into the *Robey* decision will reveal valuable insights for defense attorneys.

The case was a putative consumer class action alleging that the retailer's illusory discounts violated New Jersey's Consumer Fraud Act (CFA). Plaintiff Christa Robey purchased a sweatshirt for $23.98 that was advertised as being 60 percent off an original price of $59.95, and three t-shirts advertised as "Buy 1 Get 2 Free" for $29.95. *Id.* Plaintiff Maureen Reynolds purchased a pair of pants for $18.25 that were advertised as being 50 percent off an original price of $36.50. *Id.* Plaintiffs claimed that the items they purchased "on sale" are never offered for purchase at the "original" or reference prices listed on the price tag, thereby rendering the advertised "markdowns" illusory and the reference prices fictitious. *Id.* at 467-68.

The trial court found plaintiffs failed to plead sufficient facts to establish either an "out-of-pocket" loss or a loss of the "benefit of [their] bargain." First, the trial court found that there was no out-of-pocket loss given that plaintiffs did not receive "products that were unsuitable for their intended use, or [plead] that they needed to incur extra expenses because of defendant's alleged misrepresentations." Second, absent a showing that the goods were defective, nonconforming, or worth less than what plaintiffs paid, the trial court determined the losses were illusory and hypothetical under the benefit-of-the-bargain theory. Thus, the court found no ascertainable loss under the CFA.

A pivotal shift has occurred in New Jersey, a state with some of the strongest consumer protection laws in the nation.

The intermediate appellate court reversed. The panel of three judges that plaintiffs sufficiently pled an ascertainable loss under the CFA, finding that plaintiffs were denied the benefit of their bargain and suffered a "real and quantifiable" loss -- in the amount of the supposed markdowns, or "illusory discounts" -- because they "received no value for the offered discount." *See Robey v. SPARC Group LLC*, 290 A.3d 593, 204 (N.J. Super. Ct. App. Div. 2023).

The Supreme Court in turn reversed the Appellate Division and reinstated the dismissal of the CFA claim. *See Robey*, 311 A.3d at 478. The Court acknowledged that the fictitious pricing at issue violated the CFA, but reached the opposite conclusion of the Oregon Supreme Court and Northern District of California regarding the ascertainable loss element.

To state a CFA claim under New Jersey law, a plaintiff must allege unlawful practice, ascertainable loss, and a causal nexus. *See Dugan v. TGI Fridays, Inc.*, 171 A.3d 620, 636 (N.J. 2017). The *Robey* Court explained that in CFA cases alleging fraud, misrepresentation, or deception in selling or advertising, demonstrating "either out-of-pocket loss or... loss in value will suffice to meet the ascertainable loss hurdle and will set the stage for establishing the measure of damages." *Robey*, 311 A.3d at 471 (quoting *Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783, 792 (N.J. 2005)).

To establish an ascertainable loss, plaintiffs must thus show either an out-of-pocket loss or a deprivation of the benefit of the bargain. The Court defined the relevant theories of loss as follows: First, out-of-pocket damages reflect the difference between the price paid and the actual value received. *Id.* at 467. According to the *Robey* Court, "[a] consumer suffers an immediate, out-of-pocket loss or expense when an item purchased is essentially unusable for its intended purpose or causes buyers to incur additional costs." *Id.* at 471. Second, benefit-of-the-bargain damages cover the difference between the price paid and the value of the property had the representations been true. *Id.* at 467. "When a consumer claims that there is a difference in value between an item as advertised and the item as delivered, but the item is not worthless, the benefit-of-the-bargain theory of damages is applicable." *Id.* at 472.

The *Robey* Court held that plaintiffs failed to prove an ascertainable loss under either theory in the case at hand. The Court found that the plaintiffs did not adequately allege an out-of-pocket loss because they never claimed that the items they purchased were defective, worthless, or worth less than the price paid. *See id.* at 474. They also did not attempt to return the items or claim that the defendant refused returns. *Id.*

Furthermore, plaintiffs did not adequately argue that they were denied the benefit of the bargain, as they did not claim the items purchased were materially different from what was advertised nor did they allege any dissatisfaction with or defects in the items purchased. As the Court put it, the plaintiffs still received "wearable pants, t-shirts, and a sweatshirt, as advertised." *Id.* at 474. Without proving an ascertainable loss, the CFA claim could not succeed.

The *Robey* decision is a significant victory for retailer defendants and defense attorneys for several reasons. The ruling provides much-needed clarity regarding the legal standards that plaintiffs must meet to prevail in consumer fraud actions.

By emphasizing the necessity of proving an ascertainable loss, the Court sets a clear benchmark that prevents lawsuits based solely on deceptive advertising practices without actual harm. It ensures that only those who have genuinely suffered a loss can proceed with their claims, thereby reducing the burden on the judicial system and the costs associated with defending meritless lawsuits. In fictitious pricing class actions involving non-defective consumer products, a plaintiff cannot state a CFA claim based on allegations that they would not have purchased the items at the prices they ultimately paid or receive the savings that the defendant advertised. *See id.* at 475-75.

For defense attorneys, this ruling provides a stronger framework to argue for the dismissal of claims lacking concrete evidence of harm. It bolsters defense strategies by reinforcing the importance of the plaintiff's burden to prove an ascertainable loss. Defense attorneys should leverage this precedent to protect their clients more effectively against unfounded claims early on the litigation, thereby avoiding costly discovery regarding the alleged sales practice at issue.

The New Jersey Supreme Court's decision in *Robey* marks a pivotal moment in consumer fraud litigation and hopeful continues the trend in favor of demanding proof of an ascertainable loss that is equivalent to more commonly recognized damages theories. Companies and counsel alike should continue to follow these decisions given the state-specific application of concepts such as ascertainable loss for consumer protection statutes.

Be Informed on Informed Consent

By Scott A. Jurchisin

When presenting their defenses, lawyers need to understand how the different elements of informed consent interact, not just in the legal field, but in the medical field.

Informed consent is a medical concept giving rise to a legal claim. Defense attorneys can present better defenses to informed consent claims if they ensure that nothing is lost in translation from the medical field to the legal field. This will allow attorneys to convey to the jury more than just what was communicated to the patient, but why and how. Giving the jury this greater understanding is key in the jury understanding the medical provider's position and avoiding the mistrust and anger that lead to juries awarding larger verdicts.

Informed consent, in medical practice, is made up of three elements: communication, documentation, and a consent form. It is important to not lose sight of any of these elements as defense attorneys evaluate and litigate an informed consent case. Informed consent cases come in all shapes and sizes, but they all hinge on at least one of these three elements.

Informed consent, in medical practice, is made up of three elements: communication, documentation, and a consent form.

Why Do Informed Consent Cases Arise?

Providers do not like talking about what may go wrong, and patients do not like hearing about what may go wrong. But patients need to be given appropriate expectations about the possible outcomes and alternative options for their medical care. When there is a disconnect between what the patient understands or expects and what the patient experiences, informed consent cases arise. Informed consent cases are not merely an indication that the procedure went wrong, but that the patient did not understand that their outcome was possible.

Communication

Prior to proceeding with a medical plan, providers should have a conversation with their patients to obtain their informed consent. In this conversation, providers should discuss everything necessary for a patient to have an understanding of their course of treatment, the benefits and risks of that course (including their potential outcomes), and their other treatment options. This includes more than just listing medical terms the patient may not understand; it requires the provider to explain it such that the patient understands what they are agreeing to. The conversation should be reasonably detailed and comprehensive.

This conversation between the physician and the patient is the crux of informed consent—and thus the crux of an informed consent case. It is during this conversation that the provider will give the patient an understanding of the medical care they will receive. It is during this conversation that the patient will ask the questions that concern them. And it is during this conversation that the patient will develop their expectations for their medical course. Any other piece of evidence regarding informed consent is just an echo of this conversation.

Scott A. Jurchisin is an attorney with Larson King, LLP in Minnesota. Scott practices in the areas of professional liability, construction litigation, and business litigation. Prior to joining Larson • King, Scott served as trial counsel for individuals and companies in business and construction cases. Before that, he specialized in medical malpractice litigation at a nationally recognized Minneapolis law firm. Scott used his passion for trial and trial management to develop a career focused on trial advocacy.

But this conversation is often overlooked by medical malpractice lawyers. Medical malpractice lawyers hold firm to the axiom: if it is not in the medical record, it did not happen. Lawyers will often shift their focus to what the medical record supports and abandon the actual conversation itself. While this may seem practical for trial lawyers, it is important to realize that this shift takes us further away from what the case is actually about. The better practice is to stay focused on the conversation and use the documentation on informed consent to bolster the topics covered in the conversation to which the provider will testify.

Documentation

After having the informed consent conversation with the patient, providers should include documentation in the medical record indicating that the conversation was had and the topics discussed. Lawyers defending an informed consent claim need to identify the location or locations where the informed consent conversation is documented to evaluate the claim. The documentation of the informed consent conversation may located in a few different areas—or in multiple areas—of the medical record.

Where the documentation of the informed consent conversation appears in the medical record may be the result of where the conversation was physically held. Often, the informed consent conversation happens in the clinic. Having the conversation in the clinic promotes an environment where patients feel comfortable asking questions and alleviates the feeling that the patient may be making a quick decision. It is also practical for the provider to have the conversation in the clinic because that is where the provider will have enough time to allocate toward an in-depth conversation with their patient. When the informed consent conversation occurs in the clinic, the documentation of the conversation will likely appear in one of two locations: a clinic note, or a progress note. Both locations should be checked because each provider may document the informed consent conversation differently. The documentation may also appear in the operative note. This is especially true when the conversation happens the day of a procedure.

Complicating matters further, documentation of informed consent may occur in multiple locations in the record. Lawyers who stop searching for documentation of informed consent when they have located one informed consent record may not have the full picture. This is because there may be follow up conversations between the providers and patients, and those conversations will be documented separately.

When it comes to the content of the documentation, the spectrum is wide. It can range from noting every topic discussed to: "Informed consent was obtained." Though the conversation is where informed consent is obtained, the documentation is where the strength of the informed consent case will be determined. A detailed documentation of informed consent will bolster the provider's testimony of the conversation. A detailed documentation of informed consent that omits the risk or alternate treatment that is the subject of the case will likely make the patient's claim stronger. A general informed consent documentation will likely be inconsequential. It is important for lawyers to determine the breadth of the informed consent documentation in their case, and whether it helps or hurts their defense.

Consent Form

In addition to documentation in the record, patients are often required to sign consent forms before undergoing a procedure. Policies and state and federal law govern procedures for which patients must sign consent forms. 42 C.F.R. § 482.24(c)(4)(v) ("All records must document the following, as appropriate: ... Properly executed informed consent forms for procedures and treatments specified by the medical staff, or by Federal or State law if applicable, to require written patient consent.") Consent forms should function to memorialize what the provider and patient discussed.

There is significant variation in consent form language. Generally, consent forms are written vaguely or broadly to encompass all possible outcomes for a patient's procedure—the same consent forms are commonly used for multiple procedures. The thought from the medical perspective is that the broader consent forms are, the more they protect the organization from a lawsuit. This is not necessarily true in legal practice. In the legal field, consent forms are not viewed as providing immunity for anything included therein, but as evidence of what a patient understood prior to their procedure.

The problem with vague and broad language is that it does not clearly indicate what the patient understood prior to their procedure. For example, many consent forms contain language essentially stating that the doctor communicated and the patient understood "all of the risks" associated with the procedure. But patients do not know what patients do not know. How could a patient know that *all* of the risks were communicated to them if they do not know what all of the risks are? Without more detail, these types of consent forms are unhelpful, even when admitted.

The problem with vague and broad language is that it does not clearly indicate what the patient understood prior to their procedure.

With this type of language, plaintiff's attorneys will try to prevent the jury from ever seeing or hearing of these types of consent forms. Plaintiffs usually move for exclusion of the consent form in their motions in limine. They argue that due to the lack of detail—the omission of Plaintiff's outcome from the general language about risks—the consent form is not helpful to the jury in determining whether the particular risk at issue was ever communicated to the patient. Plaintiffs will argue that admission of the consent form would mislead the jury or be unfairly prejudicial because it risks the jury placing too much weight on a nonspecific form. They argue that the jury may see the word "consent" and end their analysis, instead of

determining exactly what the patient consented to.

Defense attorneys should carefully read the consent forms relevant to their cases to determine whether this issue will arise in a particular case, and how best to argue for its admission. If the consent form is detailed and includes the outcome experienced by the patient, be prepared to argue that it contains sufficient detail to be helpful to the jury. If it is vague and broad, be prepared to argue that consent form should be admitted as one part of the informed consent picture, and that plaintiff's argument for exclusion goes to the weight the jury should give to the consent form, not its admissibility.

Defense attorneys should also be aware of how the consent form interacts with the other informed consent communication and documentation. If the provider will testify that they explained the outcome the patient experienced while discussing a specific part of the consent form, that testimony may help in determining whether the consent form is helpful. If the provider's documentation in the medical record provides more details about the informed consent communication, that can be used to bolster the argument that the client was informed as to the procedure and its potential outcomes before signing the consent form.

Patients bringing informed consent cases will, of course, allege that informed consent was not obtained. Defense lawyers will need to determine how their informed consent evidence fits together. All of the informed consent evidence may be consistent, at which point a defense lawyer will have a cohesive defense to present to the jury. If the evidence is inconsistent, the lawyer will have to determine whether their best defense arises from the informed consent communication, documentation, or consent form, and attempt to focus their case on that evidence.

Elements of an Informed Consent Claim

To prevail on an informed consent claim, a plaintiff will have to establish that: (1) the provider had a duty to disclose information that they knew or should have known would be significant to a reasonable person in the patient's position, (2) the provider failed to disclose the information, and (3) the failure to disclose caused the patient's harm. States apply one of two approaches to causation: objective or subjective. In the objective test, the question is whether a *reasonable person* in the patient's position would have made a different treatment decision if properly informed. The subjective test asks whether the plaintiff would have made a different decision had they been properly informed. Defense lawyers should limit the testimony plaintiffs present to that which is relevant in the jurisdiction.

Emergency Care Provision

A prevalent exception to the requirement to obtain informed consent is the emergency care provision. This provision permits providers to provide medical care, including procedures, when informed consent cannot be obtained and it is necessary to save a patient's life or limb. 42 C.F.R. § 482.51(b)(2) ("A properly executed informed consent form for the operation must be in the patient's chart before surgery, *except in emergencies*." (Emphasis added)).

Lawyers should explore this exception with their expert witnesses to determine whether the plaintiff's situation was an emergency that permitted application of this exception. If it applies, any evidence supporting informed consent will not be relevant.

Minor Patients

Informed consent cases involving minor patients will have another wrinkle: individuals other than the patient can give consent. For minor patients—and for patients who otherwise lack capacity—informed consent must be given by their legal guardian. This is often one of the minor's parents. The informed consent of both parents is not necessary. However, because there may be more than one legal guardian, informed consent conversations may be had and documented multiple times. Defense lawyers should start their analysis of minor informed consent cases by ascertaining with whom the informed consent conversation was had, and who else was present for the conversation.

Conclusion

Defense lawyers need to be able to navigate the complexities of an informed consent claim with an eye toward the underlying medical realities of the situation. It may seem simple to have providers include greater detail in their informed consent conversations, documentation, and forms. But the reality is that it is impractical for providers to document, in detail, all of their conversations with patients. Defense lawyers need to understand this to be able to effectively present informed consent defenses to a jury.

When presenting their defenses, lawyers need to understand how the different elements of informed consent interact, not just in the legal field, but in the medical field. Only with a clear understanding of informed consent through a medical lens can an attorney navigate and get to the heart of such a case.

The Controversy Surrounding Noncompete Agreements

By Megan L. Adkins

Noncompete agreements have become more common in the healthcare field as physicians become increasingly likely to change employers and as private equity firms are acquiring healthcare organizations.

Main Points

- *Noncompete agreement: anything penalizing an employee for accepting other work.*
- *The "Final Rule" was implemented by the FTC on April 23, 2024, prohibiting noncompete agreements for any for-profit companies, as an interpretation of the FTC Act's ban on unfair methods of competition.*
- *Noncompetes for "senior executives" that were entered into before the Rule takes effect will be enforceable. However, no new noncompetes with senior executives may be entered into after the Rule's effective date.*
- *Violations of noncompetes that occurred prior to the Rule's effective date will remain enforceable.*
- *Noncompete agreements attached to the bona fide sale of a business or a person's ownership interest in a business entity will remain enforceable after the Rule's effective date.*
- *The Rule will not apply to nondisclosure and nonsolicitation agreements, requiring employees to repay training expenses (commonly called TRAPs), and similar conditions so long as they do not function as noncompete agreements.*

On April 23, 2024, the Federal Trade Commission ("FTC") announced a Final Rule (16 C.F.R. § 910) prohibiting employers from entering into noncompete agreements with workers, including employees, independent contractors and interns. This announcement was made during a live broadcast of a Commission meeting. The Rule was initially proposed in January 2023.[1] Following the proposal, the FTC provided an extensive public comment process in which approximately 26,000 comments were received.[2] According to the FTC, 25,000 of these comments supported a total ban on noncompete agreements.[3] The Rule was published in the Federal Register on May 7, 2024, and was scheduled to be effective on September 4, 2024.

However, on August 20 ,2024, the U.S. District Court for the Northern District of Texas held the Rule was unlawful and set aside the Rule with nationwide effect. Now that there is a nationwide judicial ruling, the Rule will not go into effect on its original effective date of September 4, 2024. However, as this is not a final decision, it is helpful to review the Rule and what it could mean for the healthcare industry in terms of compliance with these types of agreements.

Noncompete agreements have become more common in the healthcare field as physicians become increasingly likely to change employers and as private equity firms are acquiring healthcare organizations. The Rule defines a noncompete clause as "a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from: (i) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (ii) operating a business in the United States after the conclusion of the employment that includes the term or condition." 16 C.F.R. § 910(1)(1).

1 ***FTC Announces Rule Banning Noncompetes.*** https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes (April 23, 2024).

2 ***Id.***

3 ***Id.***

Megan L. Adkins is an attorney at Sturgill, Turner, Barker & Moloney, PLLC, focusing on civil litigation, insurance defense and medical negligence defense. Her experience spans a wide variety of cases, including insurance defense and coverage, premises and automobile liability, and representation of health care providers and facilities in defense of medical negligence claims. She is a 2025 Best Lawyers Ones to Watch® honoree in Health Care and Insurance Law.

Put simply, a noncompete agreement is a provision in an employment contract that prevents a former employee from working for an organization that competes with their former employer. The agreements are for a specified time, across a specified geographic area, and/or in a particular specialty. An estimated 30 million workers—nearly one in five Americans—are subject to a noncompete.[4] When the FTC's Rule published, five states (California, Minnesota, North Dakota, Nebraska and Oklahoma) had already prohibited noncompete clauses.[5]

The FTC interpreted the Federal Trade Commission Act's ban on unfair methods of competition to prohibit employers from entering into or enforcing noncompete agreements against employees.[6] The Commission found that noncompete clauses have an anti-competitive effect that calcifies labor markets and results in inferior products and services being available to consumers.[7] They also have an exploitative effect, as the average worker has unequal bargaining power compared to their employer.[8]

If the Rule goes into effect, it will bar the enforcement of contract terms prohibiting, penalizing for, or functioning to prevent an employee from seeking or accepting employment with a different business after the conclusion of one's employment. The Rule provides that noncompete clauses are an "unfair method of competition" and in violation of Sections 5 (15 U.S.C. § 45) and 6(g) (15 U.S.C. § 47(g)) of the FTC Act. 16 C.F.R. § 910.1.

In drafting the Rule, the FTC was conscious of the prevalence of these agreements in the medical profession. Many of the comments noted in the Rule are healthcare related, and one of the primary justifications for the Rule is that it will dramatically reduce healthcare costs.[9] Specifically, several of the Commissioners indicated during the April 23 meeting that the Rule will save approximately $74-194

4 ***Id.***

5 Robert W. Horton, ***Restrictive Covenants in Physician Employment Relationships***, Am. Health Lawyers Association: Member Briefing, at 56-66, (Apr. 2013) https://www.bassberry.com/wp-content/uploads/AHLA_Article_Horton_and_Padgett_April_2013.pdf (surveying states).

6 16 C.F.R. § 910.2(a) (2024).

7 89 Fed. Reg. at 38374.

8 ***Id.*** at 38375.

9 ***Id.*** at 38345; ***Id.*** at 38478.

billion in reduced spending on physician services in the next decade.[10]

Indeed, the American Medical Association (AMA) reported that the agreements affect between 37%-45% of physicians.[11] The percentage is higher for certain specialties, such as cardiology, and with mid-level practitioners.[12] Historically, critics have argued that noncompete agreements in physician employment contracts stifle competition and patient access to care. Conversely, healthcare organizations have countered that they utilize these agreements in an attempt to protect their investments in their clinicians and care teams.

The AMA's opinion on noncompete clauses has been fluid. The Association considered noncompete agreements unethical until 1960.[13] At that time, the Association stated that noncompete agreements with reasonable terms were not unethical.[14] In other words, the Association reasoned that noncompete clauses "based on such factors as quality of services, skill, experiences, conveniences offered to patients, fees, or credit terms" and that did not "unreasonably restrict the right of physicians to practice medicine" or fail to "make reasonable accommodation for patients' choice of physician" were not unethical.[15]

In 2023, the AMA backed an effort to ban noncompete agreements for physicians in clinical practice employed by hospitals.[16] In that same year, a study found that the number of states without statutory restrictions on physician noncompete agreements had fallen to twenty.[17] Regardless of the state's specific approach, courts generally disfavor restraints on trade and strictly construe noncompete clauses against employers.[18]

As it currently stands, the regulation of physician noncompete agreements is a matter of state law, with states adopting one of three approaches. The first approach applies general common law limits to noncompete agreements.[19] This approach was adopted by nineteen states and Puerto Rico.[20] Under this standard, noncompete agreements need only be supported by a legitimate business interest, be reasonable in time and geographical reach, and not be contrary to the public interest.[21]

The second approach generally prohibits physician noncompete agreements.[22] A dozen states have adopted this approach.[23] Some states have blanket bans, while others have exceptions permitting damages lawsuits related to competition or the enforcement of noncompete agreements as a condition of sale or disassociation from a partnership.[24] In between these approaches, nineteen states and Washington DC permit physician noncompete agreements within statutory limits.[25] Some of these statutes mirror common law restrictions, while others specify the scope and duration of acceptable restrictions.[26]

Impact of the Rule

If the nationwide ban is reversed and the Rule goes into effect, it will prohibit hospitals and other healthcare employers from negotiating noncompete agreements in their employment contracts. It will free physicians from existing noncompete agreements, provided the physicians lack significant policy-making authority and the noncompete was not a term of sale. An independent physician seeking contracts with multiple local hospitals, a hospital physician hoping to start a solo practice in the area, or a younger physician wanting to become a partner at a health practice across

10 ***Id.*** at 38345; Id. at 38478.

11 ***Id.*** at 38342; Id. at 38346-47.

12 ***Id.*** at 38342; Id. at 38346-47.

13 ***Paula Berg, Judicial Enforcement of Covenants Not to Compete Between Physicians: Protecting Doctors' Interests at Patients' Expense,*** 45 Rutgers L. Rev. 1, 6-9 (1992).

14 ***Id.***

15 AMA Code of Med. Ethics § 11.2.3.1 (2014).

16 Andis Robeznieks, ***AMA backs effort to ban many physician noncompete provision,*** AMA, (June 13, 2023) ***https://www.ama-assn.org/medical-residents/transition-resident-attending/ama-backs-effort-ban-many-physician-noncompete***.

17 Jeffrey Marshall et al., ***Restrictive Covenants and Noncompete Clauses for Physicians***, 2 J. Am. Coll. Cardiology: Advance, no. 10 (Sep. 1, 2023).

18 ***Wigton v. University of Cincinnati Physicians, Inc.***, 179 N.E.3d 241, 244 (Ohio Ct. App., 2021).

19 Marshall, ***supra*** note 7 at 1-3.

20 ***Id.*** at no. 7 at 1-3.

21 ***Id.***

22 ***Id.*** at no. 10 at 1-3.

23 ***Id.***

24 ***Compare*** Del. Code Ann. tit. 6, § 2707 (permitting suits for damages), ***and*** Cal. Bus. & Prof. Code § 16600-02 (prohibiting noncompete agreements except as conditions of sale or dissociation from partnership), ***with*** Mass. Gen. Laws ch. 112, § 12(x), ***and*** N.H. Rev. Stat. Ann. § 329:31-a (broadly prohibiting physician noncompete agreements).

25 Marshall, ***supra*** note 10 at 1-3.

26 ***Compare*** Conn. Gen. Stat. § 20-14P (restriction cannot exceed one year or exceed a fifteen-mile radius), ***and*** Tenn. Code Ann. § 63-1-148 (restriction cannot exceed two years or exceed certain geographic limits), ***with*** Fla. Stat. § 542.335), ***and*** Ga. Code Ann. § 13-8-50 (restrictions must be reasonably necessary to protect legitimate business interests).

town can do so freely despite noncompete agreements if the Rule becomes effective. An employer's failure to comply with the Final Rule may subject the employer to an FTC enforcement action, potentially resulting in the imposition of penalties and/or injunctive relief.

For hospitals and other employers, the Rule will not leave them without recourse. Hospital systems buying rival practices can negotiate noncompete agreements as a condition of sale to the extent permitted by state law. A noncompete agreement if a partner disassociates can remain a condition of partnership. Noncompete agreements could still be enforced against physicians who violated their contracts prior to the Rule's effective date.

Additionally, the Rule is silent about other restrictive covenants. Nothing in the Rule will prohibit employers from protecting their trade secrets. The Rule will not apply to nondisclosure and nonsolicitation agreements, requiring employees to repay training expenses (commonly called TRAPs), and similar conditions so long as they do not function as noncompete agreements. The FTC noted that the courts have already formulated tests to determine when a contract term functions as a noncompete agreement, citing to three cases in which overbroad nondisclosure or nonsolicitation agreements were deemed noncompetes.[27] Courts commonly recognize three legitimate interests served by noncompete agreements: the protection of a business' proprietary information, an employer's investment in training, and the protection of client relationships.[28] If carefully drawn to protect these interests without preventing former employees from practicing in the area, employers may still protect these interests through trade secret protections, TRAPs, and nonsolicitation agreements without running afoul of the Rule. The Rule will provide employers freedom to attempt to enforce these conditions so long as they have a good faith basis to believe they are outside the Rule.

Noteworthy Exceptions

The Rule will not apply to non-profit organizations.[29] The Rule originates from Section 5 of the FTC Act, which does not apply to non-profits. Thus, a non-profit health organization that has noncompete agreements with physicians or other workers will not be impacted by the Rule.

The Rule will ban all other noncompete agreements for any worker, regardless of title, job function, or compensation, after its effective date. If deemed effective, a for-profit health system or for-profit physician practice that uses noncompete agreements will be significantly restrained in enforcing these agreements. The only noncompete clause that will be enforceable are noncompete agreements for "senior executives" that were entered into before the Rule becomes effective.[30] The Rule defines a "Senior Executive" as anyone in a policy-making position who made at least $151,164 the preceding year. 16 C.F.R. § 910(1)(1). "Policy-making position" is defined as President, CEO or equivalent, or other person who has policy making authority, i.e., decisions that control a significant aspect of a business entity. 16 C.F.R. § 910(1)(1). Notably, most healthcare providers will not meet the definition of "Senior Executive" and, thus, this exception will likely not have a meaningful impact on the healthcare industry.

The Rule will provide employers freedom to attempt to enforce these conditions so long as they have a good faith basis to believe they are outside the Rule.

The FTC created this exception as it found that noncompete agreements with senior executives lack the exploitative effect of other noncompetes, even if they retained the restrictive effect harmful to labor, product, and service markets.[31] While no new noncompete clauses with senior executives may be entered into after the Rule's effective date, the Rule will not prohibit the enforcement of noncompete agreements against senior executives that exist prior to the effective date of this Rule.[32] The enforceability of those clauses will remain subject to existing state law.

Importantly, the Rule will require that employers provide non-senior executives—who are currently under a noncompete—notice by the Rule's effective date that their noncompete will not be, and cannot legally be, enforced.[33] The notices must be provided in writing and may be delivered

27 89 Fed. Reg. at 38364 (***citing TLS Mgmt. and Mktg. Servs., LLC v. Rodriguez-Toledo***, 966 F.3d 46, 57-60 (1st Cir. 2020) (holding that NDA functioned as noncompete because it applied to general knowledge, publicly known information, and information provided by third parties); ***Wegmann v. London***, 648 F.2d 1072, 1073 (5th Cir. 1981) (granting federal jurisdiction over solicitation penalty because size of liquidated damages provision and effect of agreement functioned as noncompete covered by Sherman Act); ***Brown v. TGS Mgmt. Co, LLC***, 57 Cal.Rptr.3d 303, 315-317 (Cal. Ct. App. 2020) (holding that NDA prohibiting employee from working in his field with exceptions only for what was generally known and what he could prove he knew prior to employment amounted to a noncompete barred by state law)).

28 Robert W. Horton, ***Restrictive Covenants in Physician Employment Relationships***, Am. Health Lawyers Association: Member Briefing, at 56-66, (Apr. 2013) ***https://www.bassberry.com/wp-content/uploads/AHLA_Article_Horton_and_Padgett_April_2013.pdf*** (surveying states).

29 89 Fed. Reg. at 38357.

30 ***Id.*** at 38342.

31 ***Id.*** at 38375.

32 16 C.F.R. § 910.2(a)(2)

33 ***Id.*** at 38342.

by hand, mail, email, or text message. § 910.2(b)(2)(i). Model language for these notices is in the Rule. § 910.2(b)(2)(iii).

Additionally, there is an exception for noncompete agreements entered into incident to the sale of business. § 910.3. Specifically, noncompete agreements can be attached to the bona fide sale of a business or a person's ownership interest in a business entity. Unlike the FTC's Notice of Proposed Rulemaking on this subject, this restriction has no ownership threshold. The FTC was clear that it does not bless these agreements, just that they "may implicate unique interests and have unique effects that this rulemaking does not address."[34] Noncompete agreements will remain enforceable as a condition of sale or a condition of disassociation from partnership in all but the handful of states that already prohibited them.[35]

Lastly, the Rule will provide an exception for causes of action related to a noncompete agreement that accrue before the Effective Date. 16 C.F.R. § 910.3(b). Accordingly, employees who breach noncompete agreements before the Effective Date may still be subject to liability after the Effective Date. In other words, while the Rule frees employees from noncompete agreements that pre-exist the regulation, it does not shield litigation regarding pre-existing violations of those agreements.

Importantly, there is a good faith exception to the prohibition on enforcing noncompete agreements. 16 C.F.R. § 910.3(c). While the Rule's bright line prohibition leaves little gray area, it does provide employers some freedom to attempt to enforce noncompete clauses that are arguably outside the Rule or officers who are arguably senior executives.

Litigation

All is not yet settled. Within hours of the FTC's announcement on April 23, the first lawsuit challenging the legality of the Rule was filed. A tax services firm in Texas, Ryan, LLC, filed a lawsuit against the FTC in the United States District Court for the Northern District of Texas. *Ryan, LLC v. FTC*, Case No. 3:24cv986 (N.D. Tex. Apr. 23, 2024). Shortly thereafter, the Chamber of Commerce and several other entities filed a lawsuit against the FTC in the United States District Court for the Eastern District of Texas. *Chamber of Com. of United States v. Fed. Trade Comm'n*, No. 6:24-CV-00148 (E.D. Tex. May 3, 2024). The Plaintiffs in that matter intervened as Plaintiffs in the *Ryan, LLC*, litigation. Lastly, a tree services company, ATS Tree Services, LLC, filed an action against the FTC in the United States District Court for the Eastern District of Pennsylvania. *ATS Tree Servs., LLC v. Fed. Trade Comm'n*, No. CV 24-1743 (E.D. Pa. July 23, 2024).

The lawsuits allege, among other things, that the FTC lacked constitutional and statutory authority to promulgate the Final Rule and seek Orders vacating the Final Rule and setting it aside.

On July 3, 2024, the *Ryan, LLC*, Court preliminarily enjoined the implementation and enforcement against the Plaintiff and Plaintiffs-Intervenors of the Rule which banned almost all noncompete agreements between employers and workers. The court also stayed the Rule's September 4, 2024, effective date as to the plaintiff and plaintiffs-intervenors. The district court limited the preliminary injunctive relief to the plaintiff and four plaintiff-intervenors, declining to enter a universal injunction or to extend the injunction to members of the plaintiff-intervenor business associations.

On August 20, 2024, Judge Ada Brown from the Northern District of Texas held that Congress only authorized the FTC to issue procedural rules to address unfair methods of competition, not substantive rules. Judge Brown also found that the Rule itself was arbitrary and capricious.

Specifically, the *Ryan, LLC*, Court reviewed the "text, structure, and history" of the FTC Act and ruled that the FTC lacked authority to issue the Rule because the agency "lacks substantive rulemaking authority with respect to unfair methods of competition." The Court also concluded that the Rule was arbitrary and capricious under the Administrative Procedure Act (APA), because the agency provided no evidence or reasoned basis for why it chose to impose such a sweeping prohibition instead of targeting specific, harmful non-competes."

It remains to be seen whether the FTC will file an appeal of this decision in the coming weeks. Alternatively, the FTC could seek an emergency order from the appellate court. As of now, the Rule will not go into effect on September 4, 2024.

Conclusion

In sum, if the Rule goes into effect, it will prohibit noncompete agreements from being a condition of employment for any employee, whether a cardiologist, cab driver, or fry cook. This applies to enforcing existing noncompete agreements against any employee who is not considered to be a Senior Executive. Additionally, because the Rule broadly defines a noncompete agreement as anything penalizing an employee for accepting other work, the Rule will prohibit lawsuits for damages that some states, like Delaware, permit while otherwise barring the enforcement of physician noncompete agreements. Importantly, the Rule will only affect state law to the extent that state law permits what it prohibits. In other words, where the Rule will not apply, state law regarding noncompete agreements will remain.

...if the Rule goes into effect, it will prohibit noncompete agreements from being a condition of employment for any employee, whether a cardiologist, cab driver, or fry cook.

34 ***Id.*** at 38437.

35 ***Id.***

New Milestones in Slip & Fall Science & Standards

By John Leffler, Michael Edwards and David Pritchett

The science is progressing, but experts, attorneys, and courts are not keeping up.

Pedestrian fall events are frequently linked to allegedly "slippery" walkway surfaces. This is as true now as it was back in February 2013 when the *For The Defense* article *The Changing World of Slip and Fall Defense* was published by Leffler, Barré, and Reneau. That article pointed out significant milestones that had occurred in the world of walkway friction analysis, and here in 2024, there are many new milestones to report. Perhaps more importantly, this article will discuss the ongoing confusion in the courtroom about *tribometry*, the study of walkway friction. The science is progressing, but experts, attorneys, and courts are not keeping up.

A Preface: Intrinsic Factors of Pedestrian Slip Events

This discussion focuses on the friction of walkways, but in a particular incident the intrinsic factors pertaining to the pedestrian may be just as important. Medical conditions, medications, alcohol, ambulatory aids, distractions, vision, active tasks and other factors may play a significant role in a slip incident. Getting the opinion of experts in biomechanics, injury causation or human factors may be advisable for certain cases.

Key Terminology

Terms that arise in slip & fall cases include *tribometer, Coefficient-of-Friction or COF, slip resistance, slip resistant, and available friction.* A *tribometer* is a walkway friction test device, which uses a polymer *slider* to sample the friction. *COF* is a force ratio between 0 - 1: the amount of horizontal force trying to slide an object on a surface divided by the weight of that object. *Slip resistance* is a continuum; one can have more or less resistance to slipping, but this term has various subjective definitions. *Slip resistant* means the achievement of friction adequate for pedestrians. The term *available friction* was defined by Leffler for ASTM (formerly the American Society for Testing and Materials) standard *F3132* because a method-independent term was needed; the definition is illustrative: *"an inherent characteristic of a walkway surface that would result in measurable friction upon the attempted or actual sliding of another object across that surface; can only be measured using a method, apparatus and contaminant (if any) that have their own inherent influences on the measurement value itself."* The justification for such a wordy definition may become apparent.

One major point of court confusion stems from the fact that different tribometers are claimed to measure different quantities (e.g., SCOF, DCOF, TCOF, BPN, PTV, slip resistance index – all discussed later). All tribometers measure *available friction*, but beyond that (and the fact that a higher value means higher friction), the imprecise use of friction terminology in peer-reviewed papers, standards, regulations, expert reports & testimony, and case law is indeed problematic. In *Atkinson v. Car-*

John Leffler, PE is a Senior Managing Engineer with YA Engineering Services in Philadelphia. He is an internationally recognized leader in pedestrian friction research and standards development, and Chair of ASTM committees on bathing surface safety and walkway friction. John has investigated over 400 pedestrian fall cases. **Michael Edwards** is Office Chair of Freeman Mathis and Gary's Nevada office. Licensed in state, federal and appellate jurisdictions throughout Nevada, California and Arizona, ASTM F13 Committee member on pedestrian/walkway safety and certified tribometrist/CXLT designation. Areas include professional and premises liability, employment, construction, for strip resort properties, businesses and municipalities. **David Pritchett** is Senior Counsel in Freeman Mathis & Gary, LLP's Las Vegas office. He was admitted to the Nevada Bar in April 2008 and has extensive civil litigation experience in several areas of law, including professional negligence (medical malpractice), healthcare litigation, premises liability, product liability, auto negligence, and mass-tort litigation..

nival Corporation, 2021 WL 8534238, the expert tested *slip resistance* (per his tribometer's manufacturer), citing the generic 0.6 COF minimum from an ASTM standard. When challenged, the expert "*acknowledged that slip resistance and COF are separate measurements and explained that he had not compared them.*" Here, *COF* is a traditional scientific measurement (force ˜ force), while *slip resistance* is not – so no expert could compare them in a scientific way. More typically, as in *Piazza v. Target*, 2022 WL 16923867, *Feuerstein v. Home Depot*, 2014 WL 2616582, and *Stern v. NCL Bahamas*, 2020 WL 6820877, the court equates the terms. But at an even more basic level, *COF* is too generic a term, because one must define whether the slider is stationary (*static COF* or SCOF) or moving (*dynamic COF* or DCOF) during force measurement - or transitioning from static to dynamic (*transitional COF* or TCOF). The results differ. Regardless, the list of references and case law that use the underspecified term *COF* or co-mingle the terms *COF* and *slip resistance* is very long.

The Continuum of Authority

There are many reference documents that a party in litigation may claim to be authoritative. Trickling down, however, we first have codes, ordinances, and federal regulations, which are laws. Below that we have standards cited within these laws - though standards cited by laws are not typically enforced as laws themselves. And here, the term *standard* takes the normal meaning: a consensus-approved document produced by a Standards Development Organization accredited by the American National Standards Institute (ANSI). Distinct from standards are publications from organizations such as the National Floor Safety Institute (NFSI), which refer to their documents as standards despite not being an ANSI-accredited developer. Below standards are publications from "unbiased" entities, for example the Consumer Product Safety Commission. And below that are publications from potentially-biased entities, such as private- or industry-funded organizations, or service providers like NFSI. The further down this continuum one gets, the less likely that the document at issue represents the "standard of care" in a particular context.

The Codified "Slip Resistant" Walkway Requirement

For decades, building codes, life safety codes, and accessibility standards have required walkways in means-of-egress or along accessible routes to be *slip resistant*. The means-of-egress is the path used to escape from a building during an emergency. An accessible route is a route that those with disabilities can use within a building or facility.

The problem with these *slip resistant* code requirements is that most surfaces lack code-defined friction test methods or minimum values for verification. Experts may testify a surface was or was not *slip resistant* per code, but without a scientifically reliable, code-cited method for testing walkway friction, this testimony may be *ipse dixit*. Below are the three types of underfoot surfaces with a code-adopted method and goal value, but for other surfaces, no expert can defensibly testify whether this code requirement was met.

- New porcelain ceramic floor tile: The International Building Code (*IBC*), adopted in most jurisdictions for at least two decades, began in 2015 to require porcelain ceramic tile products in new buildings to meet the *ANSI A137.1* standard, specifying a DCOF of 0.42 measured with a BOT-3000E tribometer. IBC requirements are typically not retroactive; floors in buildings built before the 2015 IBC do not need to be replaced or "brought up to code," and there is no requirement for friction testing of installed flooring. Details about tribometers will come later in this article.
- New pool decks and aquatic facility surfaces: Jurisdictions with a pool/spa code adopt the International Swimming Pool and Spa Code (*ISPSC*) or the Uniform Swimming Pool, Spa and Hot Tub Code (*USPSHTC*). Starting with the 2021 USPSHTC, new walking surfaces must have a DCOF of 0.42 measured with a BOT-3000E, using the *ANSI A326.3* method. Starting with the 2024 ISPSC, new walking surfaces need this same 0.42 DCOF using ANSI A326.3, or by testing with a British Pendulum tribometer per Australian standard *AS 4586*, with a minimum British Pendulum Number (BPN) of 45. These requirements are also not retroactive.
- Porcelain-enameled metal bathtubs/showers: Since 1979, the plumbing code requires porcelain-enameled metal bathing surfaces to meet American Society of Mechanical Engineers (ASME) standard *A112.19.1*, which cites ASTM *F462*, a friction test standard first published in 1979 and withdrawn in 2016. The F462 standard uses a flawed test method and an unreliable tribometer design, the NBS-Brungraber Mark I. Nevertheless, F462 still applies to new products within the manufacturer's "guarantee" period, usually one year, and after that there are no requirements for friction testing or maintenance. In contrast, plastic bathtub and shower pan products, which make up about half the US market, carry no code-adopted requirement for friction.

Standards That Cite Friction Test Methods

Moving further down the "continuum of authority," there are voluntary (non-codified) standards that cite test methods. For example, the latest ASTM *F1166*-2023 standard for marine facilities cites two specific friction test methods, but it does not appear to yet be adopted by the US Coast Guard, which adopted the 2007 version. ASTM *F2772*-2019 cites a friction test method for indoor athletic floors (e.g., basketball courts), but it does not appear to be adopted by code. Whether such standards represent "the standard of care" in the client's industry should require the expertise of someone in that industry. In *Darby v. Carnival Corporation*, 2021 WL 6428039, and *Atkinson v. Carnival Corporation*, the Defendants argued that ASTM *F1166*-2007 (with its generic 0.6 *COF* requirement), as cited by the Plaintiff's expert, was not a standard utilized in the cruise ship industry.

Surfaces with No Accepted Friction Test Methods

The three types of surfaces with code-adopted friction test methods were discussed earlier. Friction testing of the myriad other surface types out there may struggle for relevance – depending upon what is being claimed by the expert. Two common underfoot surface types warrant further discussion.

- Fabricated-in-place surfaces: Unlike factory-made ceramic and vinyl tiles, concrete, asphalt, and unfinished wood walkways are fabricated on-site, resulting in varying friction levels. Coatings like paint, epoxy, and methyl methacrylate (*MMA*) also create location-specific friction, influenced by substrate roughness, coating thickness, and the presence of abrasive additives. This variability precludes the standardization of friction level creation. Many slips are blamed on parking lot striping paint, for example, with experts opining on the usage of abrasive additives. But painted walkways may have adequate friction without abrasive additives, and in general, there is little point in reactively testing the friction of such surfaces, if the testing does not represent the accepted standard of care for a property holder.
- Surface with "3D" friction features: Friction testing is challenging for surfaces with 3D geometric features, such as detectible warning surfaces, diamond plate, and plastic bathing surfaces. The hard shoe polymers used for most sliders don't really conform to 3D features, and most tribometers work best on planar, uniformly rough surfaces. As well, tribometers that traverse the surface have measurement issues on certain non-flat surfaces.

Tribometers

There are many tribometers in use worldwide; this article will discuss devices seen in the US – though some are rare. If attending an inspection, taking photos of an opposing expert's tribometer can be helpful - even better is to have the testing recorded by a videographer, if the client's expert cannot attend. A knowledgeable expert can identify mistakes in another expert's testing. Videographers can be hired through a court reporter; have them hand-hold the camera and record all the expert's setup, slider prep, testing, contaminant application, and steps in between, from about six feet away. Opposing counsel may object; it could be worth clearing this in advance.

Figure 1: Detectable warning, diamond plate, and plastic bathtub surfaces

Each tribometer design uses unique slider geometry, applied forces, slider velocities, and means of slider actuation, which is why different tribometers get different measurement values on the same surface. Physics dictates that friction measurement will be device-design specific.

The review of tribometer models will begin with the devices adopted (directly or indirectly) by code:

- Regan Scientific ***BOT-3000E***: The BOT is a *motorized dragsled*: it traverses the test surface "dragging" its slider underneath. It has a small semi-cylindrical slider contact surface, which is rapidly changed (abraded, polished, grooved) by certain walkways, but over time, its slider refinishing procedures in standards have improved. The BOT has issues measuring across tile grout joints and certain uneven surfaces. It measures DCOF and SCOF.
- ***British Pendulum***: This uses a swinging pendulum arm that rubs the slider across the walkway; the higher the friction, the more the slider is slowed, and the higher the measurement. The Pendulum has been around for 60+ years, and is available from numerous ***manufacturers***. It is the primary tribometer used around the world (except in the US), despite its bulkiness. It measures energy dissipation, with a scale between 0 – 150 in units of British Pendulum Number (BPN) or Pendulum Test Value (PTV), which are equivalent.
- NBS-Brungraber ***Mark I***: This tribometer (used for ASTM F462) is obsolete, unreliable and lacks statistical pedigree, and the rarely-seen device was last made in 1992. A detailed discussion of the problems with this tribometer can be found in a 2016 ***paper*** by Leffler and Blanchette. This device measures SCOF.
- ***James Machine***: This tribometer is cited by ***ASTM D2047***, the 60-year-old standard for the friction of dry floor polish coatings. The lab-only device cannot be used on installed flooring. It uses a leather slider subject to organic variability. Experts using other tribometers occasionally cite ASTM D2047's requirement for a SCOF of 0.5, but D2047 clearly states the requirement is only valid using the James Machine. This device measures SCOF.
- Slip-Test ***Mark IIIB***: This device is not cited by any code or standard. It is a *variable angle tribometer* that projects its slider down at the walkway surface at increasingly-steep angles until the slider slips. The Mark IIIB uses a spring-actuated flat slider that is grooved similarly to a shoe tread. It measures TCOF.
- Excel Tribometers ***English XL VIT***: This popular device is not cited by any code or standard. It is also a *variable angle tribometer*, and it uses a CO2 gas cartridge for its actuation. The English XL VIT uses a round, slightly convex slider. The manufacturer states the XL measures *slip resistance, slip resistance index or slip index*, all called equivalent, and that if the test surface is "clean and dry", *slip index* equates to SCOF.

Figure 2: BOT-3000E, Pendulum, Mark IIIB, English XL tribometers

- American Slipmeter ***ASM 825, 925***: These devices are not cited by any code or standard. They are both dragsleds; the low-priced ASM 825 measures SCOF and is manually operated by pulling the device by its "leash." How the leash is pulled can affect measurements. The ASM 925 is motorized and measures SCOF and DCOF. They use small flat disc-shaped sliders.
- NFSI "approved tribometers": These devices are not cited by any code or standard. In addition to the ASM 925, NFSI (discussed previously) also promotes the ***TRACSCAN*** and ***GS-1*** tribometers as "approved" for testing to its various "B101" methods, which are not standards. The TRACSCAN is functionally identical to the BOT-3000E (but in yellow), while the GS-1 uses a motor-actuated "leash" to pull a small block of metal (with slider discs under it) across the walkway. The NFSI devices measure SCOF and DCOF. Though NFSI states any of these "approved" devices can test to its methods, they have never published a statistical correlation between them. This general topic will be discussed next.
- Lack of interchangeability: As mentioned, different tribometers expectably

Figure 3: GS-1 and ASM 925 tribometers

get different results. Indeed, selected data from a 2010 research ***paper*** by Dr. Christopher Powers at University of Southern California (USC) shows how different the measurements are between five devices tested on the same four tiles. Unfortunately, there are still experts who claim that a *COF* of 0.5 is the generally accepted "industry standard" minimum friction threshold for a walkway, independent of tribometer and method, though this concept is a dozen years obsolete. For any such generic value to be possible, the colored lines in the chart would be horizontal. Another generic threshold occasionally cited is 0.6 *COF*, from when ADA regulations (1991 - 2003) *recommended* this minimum value for accessible routes.

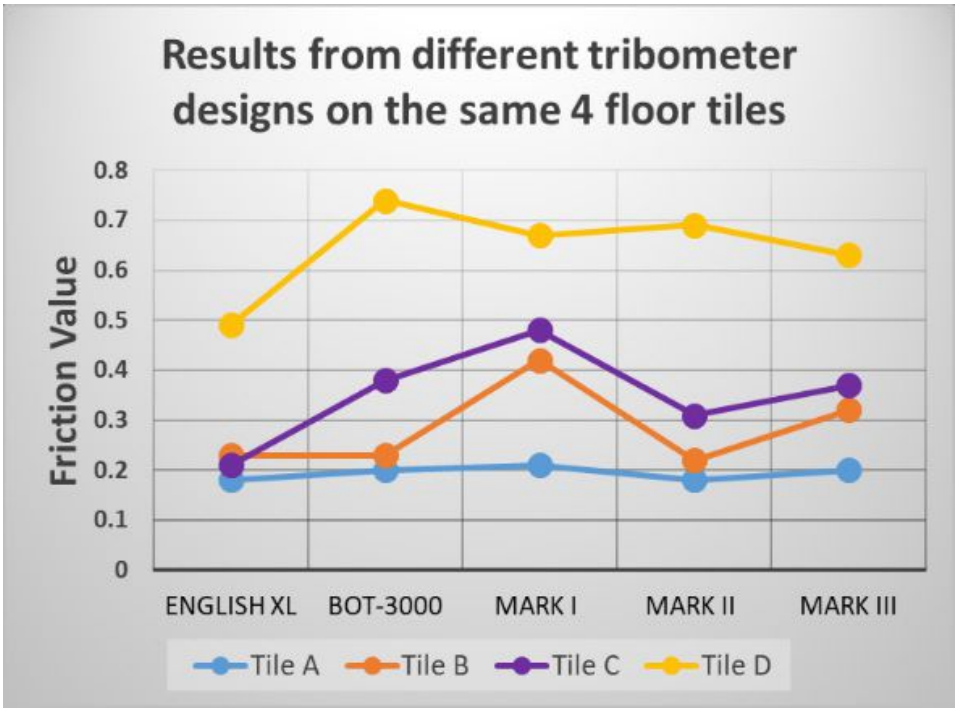


Figure 4: Differences in tribometer results

Experts promoting the generic 0.5 *COF* often cite the ***2012 ANSI A1264.2***, a voluntary standard for safety professionals, which had a *recommendation* (not a requirement) for walkways to have a *slip resistance* of 0.5; that standard had its own subjective definition for the term. Fortunately, the revised ***2022 A1264.2*** addressed this, stating, in relevant part, as follows: *"A minimum coefficient of friction value of 0.5 has been referenced as a generally applicable goal for decades…independent of apparatus and method. This is scientifically unsupportable. Any single universal reference value will not accommodate the functional differences between various tribometer models…which in turn may lead to measurement values which differ depending upon the tribometer model used."* Some experts still cite the 2012 standard if the incident occurred before the 2022 standard was published, but the 2022 points out that the 2012 recommendation was unsupportable (regardless of incident date).

Another common justification for a generic 0.5 *COF* is based on gait testing, wherein humans step on an instrumented ***forceplate*** and the *utilized COF* is calculated from the forces applied while walking (not slipping). Typical *utilized COF* is 0.25 or less. Some experts double this value (a nonscientific "fudge factor" of 2) to get the generic 0.5 *COF* for tribometry, and may also claim that any of their measurements below 0.25 show the walkway has less friction than needed for human ambulation – despite the obvious disconnect between the forces a non-slipping human applies to a walkway and the forces a small machine measures during a slip.

A correlation study can create a statistical relationship between the measurements of different tribometers, but it will be limited to the specific flooring surfaces tested – there have been few such studies done. And different tribometers have different statistical *precision* (repeatability and reproducibility). At a more basic level, if a code or standard says one particular tribometer is to be used, the use of a different one may be hard to justify.

Past OSHA Adoption of English XL VIT and Slip-Test Mark II Methods

From 2001 to 2006 OSHA cited the use of the English XL VIT and Slip-Test Mark II tribometers for testing structural steel surfaces, per test methods ASTM ***F1679*** and ***F1677***, respectively. The Mark II was a predecessor of the Mark IIIB, though they get significantly different results – and the English XL VIT "borrowed" key design concepts from the Mark II. As background, ASTM requires that a *precision* and *bias* statement (discussed below) be included in test methods within 5 years of initial publication, and that a patented device cannot be cited by a test method if "alternate" devices exist. In the case of F1677 and F1679, there was no objective argument that the patented Mark II and English XL VIT could not be considered "alternates" to each other, despite their differences in design and results; *precision* & *bias* statements were put before the ASTM committee before 2006 but ultimately not balloted. As a result, ASTM F1677 and F1679 were withdrawn in 2006, and OSHA regulations stopped citing them. There are experts that use these events to claim that OSHA found these devices to be unreliable and to "lack precision," but the ***Federal Register*** indicates otherwise. Regardless, one can do the work needed for a robust *precision* & *bias* statement, but getting a 300-member consensus committee to approve it is another matter.

Tribometer Training

Various entities offer training courses and certificates (one-time) or certifications (ongoing) in tribometer usage. These courses vary in content and rigor. The ***ASTM F2948*** *Standard Guide to Walkway Auditor Qualifications* provides a comprehensive outline for training; it was origi-

nally created (by Leffler) in 2013 to counter a non-profit organization's assertion that taking their four-day tribometry/auditing course made one an expert (no experience necessary). But even so, the court in numerous cases (e.g., *Michaels v. Taco Bell*, 2012 WL 4507953, *Bunting v. District of Columbia CVS Pharmacy*, 2024 WL 474159, *Ward v. Carnival*, 2019 WL 1228063, and *Stern v. NCL Bahamas*) has found that the one-day training for the English XL VIT qualifies a person to testify as a walkway friction expert – though the slides for this certification course (at least in 2022) did not even mention *reproducibility*, a key factor in scientific reliability, as discussed next. Indeed, the significance of this credential was misunderstood in *Ward v. Carnival*, a case in which a PhD defense expert did no friction testing. The court nevertheless held that the one-day course she had taken (featuring a few slides on human gait) *"qualifies her to render 'expert' opinions on the biomechanical circumstances surrounding Plaintiff's fall"* – incidentally ignoring her legitimate biomechanical qualifications. This one-day course has no stated prerequisites for education, training, experience, or tribometer usage, and while the course teaches important topics, it is questionable whether an "expert" in this complex science can be minted in a day.

Accuracy, Repeatability, and Reproducibility

Rule 702(c) of the Federal Rules of Evidence (FRE) states that expert testimony must be based on reliable principles and methods. The *Daubert* "tests" include whether an expert's technique can be tested, its error rate, and its acceptance in the relevant community, *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 US 579 (1993). These can be sequenced: if a method can be tested, its reliability is shown by its error rates, and acceptance in the community is based on understanding the method and its reliability. Errors are usually classified as random or systematic.

For thousands of standard test methods spanning scientific disciplines, error is expressed in terms of *precision* (random error) and *bias* (systematic error). *Accuracy* combines random and systematic error. Both *accuracy* and *bias* are defined as the difference between a test result and an *accepted reference value*. Some experts and tribometer ***manufacturers*** discuss the *accuracy* of their devices, but there are issues. First, the statistical reliability of a tribometer differs on different surfaces, so *accuracy* on one surface would be specific to that surface. Second, there is no *accepted reference value* for the friction of any surface without extensive multi-laboratory *proficiency testing* – because there is no "golden tribometer" capable of establishing a "known value." Friction test methods often state that the *bias* of the method is unknown for these reasons. *Precision* is shown as *repeatability* and *reproducibility. Repeatability* can be calculated from one person testing in one session, while *reproducibility* calculations require an Interlaboratory Study (ILS) involving at least six independent labs testing the same sample. ILS stats allow a tribometer operator to know how closely their results should match another operator's using a different unit of the same tribometer. ILS stats also show how an operator's test results compare to a specific friction threshold within a code or standard. ASTM ***E691*** and ISO ***5725-2*** are internationally recognized standards for conducting an ILS.

ILS statistics should be crucial for several FRE 702(c) and *Daubert* questions: whether a method is generally accepted in the technical community relates to the ability for different parties to use it in case-related testing. ILS results create the link between an individual's testing and the technical community; without *reproducibility* stats, an expert's testing may be considered *ipse dixit*. Tribometers with published precision statistics include the BOT-3000E, Pendulum, James Machine, Mark IIIB, and English XL VIT. No such information is published for the NFSI "approved" tribometers.

The Original ASTM F2508 Standards and Updated F2508-2023

The 2011 version of ***ASTM F2508*** was discussed in the Leffler/Barré/Reneau 2013 paper; an ILS subsection was added in 2013, then minor updates in 2016. Unlike other standards, F2508 links tribometer measurements to actual human slips. The 2011 – 2016 versions were based on 2010-published ***research*** at USC by Dr. Christopher Powers (mentioned previously). This research tested four floor tiles with humans and tribometers to see which tribometers could rank the tiles' friction in the same order as the humans, with statistical differentiation. A method for tribometer suppliers to perform this "Validation" was formalized in ASTM F2508-2011, and "replicates" of the four tiles have been sold since 2011 as reference surfaces. Tribometers successfully Validated to the original ASTM F2508 include the BOT-3000E, Pendulum, Mark IIIB, and English XL VIT. An F2508 Validation is specific to a tribometer unit, not applicable to all units of the same model.

The four original F2508 reference tile replicates showed some variability, warranting new research and a standard update. New human & tribometer ***research*** was done in 2018-2019, led by Dr. Mark Blanchette at USC, with four new tiles and refined methods for the 148 human subjects. The resulting revision (led by Leffler) of ASTM ***F2508-2023*** is significantly more rigorous, in that it evaluates reference tile variability and statistically supports tribometer operators doing their own Validations.

Often misunderstood is the significance of ASTM F2508 Validation. It provides Validated tribometers with a direct and unprecedented scientific link to human slip events – which goes to the relevance of friction testing for a particular incident. ASTM F2508 remains a tribometer-nonspecific standard; opposing experts may use two different F2508-Validated tribometers, and (expectably) get different results on the incident surface. If both experts did their testing properly, the answer to "who's testing is correct?" could be "both of them." Then it will go to how each expert explains their results – which should tie back to the scientific methodology of their Validated tribometer's measurements on the human-tested F2508 reference tiles. Because these tiles are F2508's frictional references (not some *COF* value), experts that claim F2508 Validation legitimizes their reliance on a specific generic friction value (like 0.5 or 0.6) do not understand the standard. Regrettably, the 2012 ANSI A1264.2 standard (discussed above) both required tribometers to meet ASTM F2508 and recommended a generic minimum *slip resistance* of 0.5 – these are patently con-

flicting concepts. Also, F2508 Validation is not code adoption, and it does not legitimize testifying that (for example) Mark IIIB testing can show whether a walkway is *slip resistant* per code.

Confusion in the Courtroom

A necessary synthesis of the science of tribometer reliability and human slips is unfortunately absent from the case law.

A necessary synthesis of the science of tribometer reliability and human slips is unfortunately absent from the case law.

Often cited as precedent is *Michaels v. Taco Bell*, with a friction expert who before his May 2011 testing calibrated his English XL VIT to ASTM F1679 (years after that standard's withdrawal), and not in accordance with ASTM F2508-2011 which had been first published a few months earlier. The court held that the F1679 methodology the expert "*used **is reliable** and that his opinion should not be excluded for failing to use the F2508 standard"* [emphasis added]. However, as mentioned ASTM F1679 included no repeatability/reproducibility statistics, nor any link to human slip testing – even the XL operator instructions in 2010 were more rigorous than F1679 – but nevertheless *Michaels* set the precedent for calling English XL VIT testing "reliable," going well beyond a ruling that the expert's testimony was "admissible."

Case law points to questionable use of the word "reliable," when it comes to tribometry. In the 2024-decided *Bunting v. CVS*, the court states *"Indeed, numerous federal courts have ruled that* [English XL] *VIT testing is reliable under Rule 702. See, e.g., id.; Barnes v. Malinak, 320 F.R.D. 130, 139 (E.D. Tenn. 2017)…,"* but in *Barnes* the court did not find the expert's testing reliable per se; they instead denied a defense motion to exclude his testimony on reliability, citing to *Daubert's "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."* And while *Bunting* cites *Barnes* as showing reliability of the English XL VIT, in *Barnes* the expert actually used a different tribometer – incorrectly – and even the *Barnes* court did not expressly conduct an evaluation of the expert's methodology under the *Daubert* factors. In *Feuerstein v. Home Depot*, the court held that the defense expert's testimony about his obsolete F1679-based method was *"sufficient to persuade the court that his methodology **is reliable**. Any issue Plaintiffs may have with his methodology or his calculation of the standard deviation goes to weight and can be addressed during cross examination."* [emphasis added]. With respect to these Daubert challenges to expert opinions regarding tribometer testing, courts continually avoid a substantive analysis of the *Daubert* factors, and continually rely on prior court rulings as support for conclusions that such testing (or opinions based thereon) are "reliable." In *Armas v. Costco Wholesale Corporation*, 2022 WL 17982239, the court ruled *"case law also establishes the admissibility of use of an English XL Variable Incidence Tribometer in accordance with the requirements of ASTM F2508"*, however, the experts in the three cases they cite, *Michaels v. Taco Bell, Feuerstein v. Home Depot*, and *Steffen v. Home Depot*, CV-13-199-JLQ (E.D. Wash. Apr. 16, 2014), do not use ASTM F2508. Here, the *Bunting* and *Armas* courts appear to rely upon case law that does not support the conclusions reached.

In *Sudre v. Port of Seattle*, C15-0928JLR (W.D. Wash. Dec. 2, 2016), and *Armas v. Costco Wholesale Corporation*, both experts testified that their English XL VITs were Validated to ASTM F2508 and that a measurement of 0.5 was the generally accepted minimum friction. But for these two cases, actual incorporation of the human & tribometer science of ASTM F2508, combined with the XL's *reproducibility* statistics, indicates that a minimum adequate friction level would be a *slip index* of perhaps 0.34. And because friction measurements are device-specific, 0.34 would be the goal value for the English XL VIT alone; by the same F2508 yardstick, the BOT-3000E goal value would be a DCOF of 0.65, and the Mark IIIB would be a TCOF of (wait for it) 0.5 – but not the "generic" 0.5, instead an 0.5 value directly based on human slip testing and Mark IIIB reliability statistics. These are forays into actual science, versus the outdated "fudge factor" justifications for the generic 0.5 *COF* goal. The revised ASTM F2508-2023 throws even more rigorous science into walkway friction analysis – it is up to the experts to use it and the courts to expect it.

For walkway surfaces without codified friction methods, experts claiming a deficiency should provide tangible evidence that their friction testing represents a standard of care generally accepted in the industry of the defendant. In *Lennon v. Pistley*, 2022 WL 1051120 unpublished, the experts argued whether English XL testing to 0.5 *COF* or BOT-3000E testing to 0.42 DCOF was the industry standard for a private residence's wood porch stairway – but neither test was, in the "industry" of the defendant homeowner. Independent of all this, of course, codes may adopt tribometry methods unrelated to human slips, or lacking reliability statistics – but the code is an obvious standard of care.

Despite the dozen years of scientific advancement in the relevance and reliability of walkway friction analysis, in many respects federal jurisprudence (and that of certain states) is stagnant with respect to understanding and integrating this advancement into the tests for expertise and admission of testimony.

The 2024 Transformative Trio

How Three SCOTUS Rulings Are Reshaping Administrative and Regulatory Law

By Mark Perkins

With this trio of rulings, one can imagine the following scenario, companies impacted by various administrative agencies could create a subsidiary for the sole purpose of litigating regulations.

The United States Supreme Court ended the 2024 session on July 1 with a decision that gave the executive branch sweeping immunity; however, there were three other rulings that generated little attention, but could reshape the American government, law, and society.

In summary, the *"Chevron doctrine"* was overruled in *Loper Bright*, so deference to administrative agencies is now to reviewed judicially without automatic deference.

Perhaps the first paragraph of this article is somewhat hyperbolic. Pamela Bracher, Deputy General Counsel for the American Trucking Association, is cautious and states the immediate impact is uncertain. *"I don't believe that Loper Bright stands for the proposition that there is no deference to administrative agencies moving forward. The Loper Bright decision overruled the Chevron methodology Courts had been using to review agency interpretation of ambiguous statutory language - it overruled the doctrine of judicial deference to a federal agency's interpretation of an ambiguous statute."*

On the other hand, numerous organizations are already offering webinars and seminars on the impact to the EEOC, DOL, FLSA, OSHA, FMCSA and a plethora of other "alphabet soup" agencies affecting the day to day operations of business and industry.

Not only is there the impact from *Loper Bright*, but the statute of limitations to contest regulatory decisions has been upended in *Corner Post*. The six-year statute of limitations under the Administrative Procedure Act (APA) for challenging a rule begins to run upon the publication of the rule or when a challenger is injured by the rule; however, the holding of the Corner Post was that the six-year statute of limitations begins to run when a challenger is injured by it and not upon the publication of the regulation.

Lastly, *SEC v Jarkesy*, the Supreme Court found that the SEC's in-house adjudication process violated the right to a jury trial and constituted an unconstitutional delegation of legislative power to the SEC without sufficient guiding principles from Congress. SEC v. Jarkesy, 219 L. Ed. 2d 650, § 2023-7.03 US Supreme Court Clears Way for Constitutional Challenges to Administrative Enforcement Actions.

We take each decision and break it down and provide some potential impact to the Federal Motor Carrier Safety Admin-

Not only is there the impact from *Loper Bright*, but the statute of limitations to contest regulatory decisions has been up-ended in *Corner Post*.

Mark Perkins of Perkins & Associates graduated magna cum laude in journalism from Northeast Louisiana University in 1983. He graduated law school in 1987 from Paul M. Hebert School of Law at Louisiana State University. Beginning his legal career as a prosecutor in Caddo Parish, he has litigated hundreds of bench and jury trials. As a prosecutor, Mark was one of the first prosecutors in Louisiana to use DNA evidence, which was novel evidence at the time.

istration and the Occupational Safety & Health Administration. Special thanks to 2L student Blaine Warren at the Paul Hebert School of Law at Louisiana State University.

Loper Bright Enters v. Raimondo

Factual Background: A group of commercial fishermen who regularly participate in the Atlantic herring fishery sued the National Marine Fisheries Service after the Service promulgated a rule that required industry to fund at-sea monitoring programs at an estimated cost of $710 per day. The fisherman argued that the Magnuson-Stevens Fishery Conservation and Management Act of 1976 did not authorize the Service to create industry-funded monitoring requirements and that the Service failed to follow proper rulemaking procedure.

The district court granted summary judgment for the government based on its reasonable interpretation of its authority and its adoption of the rule through the required notice-and-comment procedure. The US Court of Appeals for the DC Circuit affirmed. See *Loper Bright Enters. v. Raimondo*, No. 22-4751, 2024 WL 3208360 (US June 28, 2024).

Issue & Holding: Whether the Chevron doctrine, which required courts to defer to a federal agency's interpretation of an ambiguous statute, should be upheld. The Supreme Court held that the Chevron doctrine was overruled.

Implications for OSHA: The decision in *Loper v. Raimondo* will significantly impact OSHA regulations by altering the level of judicial deference given to OSHA's interpretations of its own statutes.

Previously, under the Chevron doctrine, courts would defer to an agency's interpretation of a statute if the statute were ambiguous, and the agency's interpretation was reasonable. However, the *Loper v. Raimondo* decision rejects this Chevron deference, requiring courts to independently interpret statutes without giving special weight to the agency's interpretation This means that OSHA will now have to defend its regulations as the "best" interpretation of the statute, rather than merely a "reasonable" one, placing it on equal footing with parties challenging its rules.

This shift will make it more challenging for OSHA to implement and defend its regulations, as courts will no longer automatically defer to OSHA's expertise. Instead, courts will independently determine the meaning of statutory provisions and the boundaries of OSHA's delegated authority, ensuring that OSHA's decisions are within those boundaries and are the result of reasoned decision-making *Loper Bright Enters. v. Raimondo*, 2024 US LEXIS 2882.

Implications for FMCSA: The *Loper v. Raimondo* decision will likely have significant implications for FMCSA regulations. The case addresses the scope of agency authority and the limits imposed by statutory terms, which could affect how FMCSA promulgates and enforces its rules.

In *Kansas v. Garland*, the court noted that statutory authority is typically broad enough to authorize agency actions, but it also highlighted that Congress may impose limits on this authority through specific terms or phrases like "appropriate" or "reasonable." *Kansas v. Garland*, 2024 US Dist. LEXIS 121829. This suggests that FMCSA's ability to issue regulations could be scrutinized more closely to ensure they fall within the bounds of their statutory authority.

The *Loper Bright* decision emphasizes that agencies must operate within the limits of their delegated authority, which could lead to challenges against FMCSA regulations that are perceived as overreaching or not explicitly authorized by Congress. This could result in a more constrained regulatory environment for FMCSA, requiring more precise justifications for its rules and potentially limiting its ability to implement broad regulatory changes.

Chevron, basically, had required courts to first assess whether the statute was ambiguous, and if so, to defer to the agency's interpretation. Certainly, the Loper Bright decision means less deference to agencies in the aggregate, and we will see lots of regulatory cases in which challengers push the argument that the regulation turns on an ambiguous statutory provision and that the agency resolved the ambiguity incorrectly—that's an easier hurdle to clear than the Chevron standard, under which a challenger had to show that the agency was not merely incorrect, it was unreasonable altogether.

"Assuming that Courts must now exercise independent analysis and giving this discretion to Courts to accept or reject the agency's interpretation does not necessarily mean that the Courts will always reject the agency's interpretation. This could cut for or against pro-transportation interests. How this will play out is the open question right now," says Bracher.

Consider the potential broad impact:

- More agency actions may be challenged in court. This could cut for or against pro-transportation interests.
- It will lead to Courts issuing conflicting decisions.
- Resolutions of lawsuit challenges will be more permanent and thus incoming presidential administrations cannot use the principle of Chevron deference to adjust the interpretations of prior administrations (less "wiggle room" from one administration to another)
- It puts pressure on Congress to legislate with greater specificity by asking that congressional members to be good students of statutory constructions and write unambiguous statutes.

Corner Post v. Board of Governors

Factual Background: The case concerns the interchange fees associated with debit card transactions, which generate billions of dollars in revenue for issuing banks. The regulatory agency, the Board of the Federal Reserve System, promulgated a rule ("Regulation II") to govern these fees. Regulation II caps the fees that banks can charge for each debit card transaction. Petitioners in the case include Corner Post, a convenience store, the North Dakota Retail Association (NDRA), and the North Dakota Petroleum Marketers Association (NDPMA), all of whom accept debit card payments and are thus affected by interchange fees.

On April 29, 2021, the NDRA and the NDPMA challenged Regulation II as arbitrary and capricious, in violation of the APA. After the Board moved to dismiss the case based on the statute of limitations, NDRA and NDPMA amended their complaint to add Corner Post, Inc. as an additional plaintiff. The district court dismissed the case, ruling that the 2015 clarification to Regulation II did not reset the statute of limitations, that Corner Post's statute of limitations began in 2011 with

the original publication of Regulation II, and that none of the plaintiffs' claims warranted equitable tolling. The Merchants appealed, and the US Court of Appeals for the Eighth Circuit affirmed.

Issue & Holding: Whether the six-year statute of limitations under the APA for challenging a rule begins to run upon the publication of the rule or when a challenger is injured by the rule. The specific challenge to Regulation II governs debit card interchange fees. The holding of the case was that the six-year statute of limitations begins to run when it injures a challenger not upon the publication of the regulation. See *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 2024 US LEXIS 2885.

Implications for OSHA: The ruling in *Corner Post*, involves the application of the APA provisions, specifically 5 U.S.C. §702 and §704, and the statute of limitations under 28 U.S.C. §2401(a). Section 702 authorizes judicial review for persons injured by agency action, requiring a litigant to show injury in fact by agency action.

This ruling emphasizes the necessity of demonstrating actual injury to bring an APA claim. OSHA regulations are used as evidence of the standard of care in civil litigation, and violations may be evidence of negligence or negligence per se. However, some courts prohibit using OSHA regulations to indirectly create civil causes of action ***§ 12.01 The Influence of OSHA on the Law of Torts***.

OSHA jurisdiction is not preempted by other federal agencies unless the agency's enabling legislation aims to ensure employee safety and health ***§ 3.02 Exceptions to Coverage***. This strict interpretation allows other federal agency standards to apply where OSHA standards do not ***§ 3.02 Exceptions to Coverage***.

The Federal Reserve Board has extensive authority to regulate and enforce compliance with banking regulations, including imposing restrictions on transactions and relationships involving depository institutions and affiliates to prevent evasion of laws and ensure safety and soundness. Consequently, the ruling in *Corner Post* may influence how agency actions, including those by OSHA, are reviewed and challenged, emphasizing the need for demonstrable injury and adherence to statutory authority. This could impact the enforcement and applicability of OSHA regulations in contexts where other federal agencies have overlapping jurisdiction ***§ 3.02 Exceptions to Coverage***.

Implications for FMCSA: The ruling in *Corner Post* could potentially affect FMCSA regulations by expanding the window for challenging agency rules under the APA.

In *Corner Post*, the Supreme Court held that the six-year statute of limitations for challenging a rule under the APA starts running only when the challenger is injured by the rule, rather than when the rule is promulgated. This means that individuals or entities affected by FMCSA regulations could have a longer period to file lawsuits challenging those regulations, provided they can demonstrate that they were injured by the rule within the six-year period.

This ruling emphasizes the importance of the timing of injury in determining the statute of limitations for APA challenges. For FMCSA regulations, this could lead to prolonged periods during which regulations can be contested, potentially resulting in increased litigation and a need for the FMCSA to be more vigilant in ensur-

ing their regulations are robust and defensible against such challenges.

SEC v. Jarkesy

Factual Background: George Jarkesy established two hedge funds, with Patriot28 as the investment adviser, managing $24 million in assets from over one hundred investors. The SEC initiated an investigation in 2011, eventually bringing an in-house action alleging fraud under multiple acts. Jarkesy challenged the SEC's proceedings in the US District Court for the District of Columbia, citing constitutional infringements, but both the district court and the US Court of Appeals for the DC Circuit denied the injunction, finding that the district court lacked jurisdiction.

The ruling in Corner Post could potentially affect FMCSA regulations by expanding the window for challenging agency rules under the APA.

After an evidentiary hearing by an Administrative Law Judge (ALJ), Jarkesy was found guilty of securities fraud. Jarkesy sought review by the Commission, and while that petition was pending, the US Supreme Court decided Lucia v. SEC, holding that SEC ALJs were improperly appointed. Jarkesy, however, waived his right to a new hearing. The Commission affirmed the fraud findings, imposed penalties, and rejected several constitutional arguments. He then filed a petition for review in the US Court of Appeals for the Fifth Circuit, which reversed and remanded, finding multiple constitutional violations.

Issue & Holding: Whether the use of ALJs was allowable under the Seventh Amendment. The Court found that when the Securities Exchange Commission seeks civil penalties against a defendant for securities fraud, the Seventh Amendment entitles the defendant to a jury trial and thus the SEC must bring the action in federal court. See *Securities & Exch. Comm'n v. Jarkesy*, No. 22-859 (2024).

Implications for OSHA: The ruling in *Jarkesy* could potentially affect OSHA regulations by challenging the constitutionality of administrative adjudications and the delegation of legislative power to administrative agencies.

In *Jarkesy*, the Supreme Court found that the SEC's in-house adjudication of securities fraud violated the Seventh Amendment right to a jury trial and that Congress had overreached by granting the SEC the power to choose between administrative and judicial forums without clear guidelines. ***United States v. Empire Bulkers Ltd., 2022 U.S. Dist. LEXIS 151817***, ***Jarkesy v. SEC, 34 F.4th 446***.

This ruling emphasizes the need for clear legislative guidance when delegating authority to administrative agencies and could prompt similar challenges to other agencies' adjudicative processes, including OSHA.

OSHA regulations, like those of the SEC, involve administrative adjudications and enforcement actions. If the principles from *Jarkesy* are applied to OSHA, it could lead to increased scrutiny of OSHA's administrative processes and the potential for more cases being required to be heard in federal courts rather than through ALJs. This could fundamentally alter how OSHA enforces its regulations and handles disputes. See *Frank's Nursery, LLC v. Walsh*, 2022 US Dist. LEXIS 124608, *Goodrich v. John Crane Inc.*, 2018 US Dist. LEXIS 168355

Furthermore, the *Jarkesy* ruling underscores the importance of having an intelligible principle guiding the delegation of legislative power to administrative agencies. If OSHA's regulations or enforcement actions are found to lack sufficient legislative guidance, they could be subject to similar constitutional challenges under the non-delegation doctrine. See *United States v. Yazzie*, 2023 US Dist. LEXIS 132970, *United States SEC v. Day*, 2023 US Dist. LEXIS 68163.

Implications for FMCSA: *Jarkesy* could affect FMCSA regulations by challenging the constitutionality of administrative adjudications and the delegation of legislative power to administrative agencies.

In *Jarkesy*, the Supreme Court found that the SEC's in-house adjudication process violated the right to a jury trial and constituted an unconstitutional delegation of legislative power to the SEC without sufficient guiding principles from Congress. *SEC v. Jarkesy*, 219 L. Ed. 2d 650 raises questions about the validity of similar administrative processes used by other federal agencies, including the FMCSA.

The FMCSA, like the SEC, operates under a framework where it can issue regulations and enforce them through administrative proceedings. If the principles from *Jarkesy* are applied broadly, it could mean that FMCSA's administrative enforcement actions might also be subject to constitutional challenges. Specifically, if FMCSA's procedures are found to lack sufficient guidance from Congress or if they deny the right to a jury trial in a manner similar to the SEC's procedures, they could be deemed unconstitutional.

Jarkesy emphasizes the need for clear legislative guidelines when delegating authority to administrative agencies. This could lead to increased scrutiny of FMCSA regulations to ensure they are backed by clear and specific congressional mandates, thereby avoiding the pitfalls identified in *Jarkesy*. *United States v. Yazzie*, 2023 US Dist. LEXIS 132970, Burgess v. FDIC, 639 F. Supp. 3d 732.

Conclusion

With this trio of rulings, one can imagine the following scenario, companies impacted by various administrative agencies could create a subsidiary for the sole purpose of litigating regulations. Since there is no longer an automatic deference to the administrative guidelines, perhaps a trucking company affected by a long-standing regulation wants to challenge it. It creates a subsidiary company. The subsidiary will have a six-year statute of limitations which begins to run from the date the challenger is injured by the regulation and these challenges must be considered in an Article III federal court rather than an Administrative Agency. US Supreme Court cleared the way for Constitutional challenges to Administrative Enforcement Actions.