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Bostock—A Supreme Civil Rights Victory for the LGBTQ Community

W. Barry Montgomery | *Kalbaugh, Pfund & Messersmith, P.C.*

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On June 15, 2020, the United State Supreme Court returned a long awaited decision in the LGBTQ and civil rights community. In the case of *Bostock v. Clayton County, Georgia*, No. 17-1618, decided on June 15, 2020 the issue before the Supreme Court was whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination “because of...sex” within the meaning of Title VII of the Civil Rights Act of 1964, 42U.S.C. § 2000e-2. The Court

decided that, even if Congress did not consider discrimination based on sexual orientation or transgender status when it enacted the Civil Rights Act of 1964, Title VII of the Act extends protection to homosexual and transgender employees from discrimination.

The Court reasoned that an employer violates Title VII when it intentionally fires an individual employee based *in part* on sex. It makes no difference if other factors besides the plaintiff’s sex

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Letter from the President

Lisa Tulk | *Kessler Collins, P.C.*

Greetings, fellow members of PLDF! I hope this edition of the *Quarterly* finds each of you safe and well.

I have given a lot of thought over the past few months to the proverbial curse, “may you live in interesting times.” Well, this year—for better or worse—has certainly been an *interesting* one for us all.

Many of us are adapting to continued long-term remote work for the first time in our careers (while for others it is old hat) and drastically changing everyday routines which we have taken for granted in the past. Many of us are examining our organizations, firms, offices and panel lists with a new eye as to what diver-

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contributed to the decision or that the employer treated women as a group the same when compared to men as a group. A statutory violation occurs if an employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee. Because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently *because of their sex*, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII. Just as sex is necessarily a but for cause when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably intends to rely on sex in its decision making.

The opinion was authored by Justice Gorsuch who framed the question as an uncomplicated one: "Today, we must decide whether an employer can fire someone simply for being homosexual or transgender." Justice Gorsuch concluded that the answer to that question was clear, when an employer fires an employee for being homosexual or transgender, then the employer "fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids." All that matters, Justice Gorsuch stressed, is whether "changing the employee's sex would have yielded a different choice by the employer." Justice Gorsuch offered an example of an employer with two employees who are both attracted to men and are, for all intents and purposes, identical, but one is male and one is female. If the employer fires the male employee only because he is attracted to men, while keeping the female employee that is attracted to men, Gorsuch wrote, the employer has violated Title VII.

Justice Gorsuch recently authored a book, *A Republic, If You Can Keep It*, in which he vigorously explained and defended the concept of textualism; a theory where interpretation of the law is based on the ordinary meaning of the legal text. Supporters of the *Bostock* decision note that it was an exercise in conservative textualism that led to a civil rights victory. Critics, including Gorsuch's Supreme Court brethren, issued a scathing dissent comparing the decision to a "pirate ship" that was sailing under a textualist flag be in fact amounting to legislation from the bench.

Justice Gorsuch rejected the idea that because Congress did not address sexual orientation or transgender status specifically in Title VII, Title VII does not protect LGBT employees. According to Gorsuch, discrimination based on sexual orientation or transgender status "necessarily entails discrimination based on sex; the first cannot happen without the second." Justice Gorsuch also assessed that there is no "such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception." Rather, if Congress establishes a broad rule then "courts apply the broad rule." Title VII's prohibition on discrimination based on gender is such a broad rule.

Three Consolidates Cases

The Court actually considered three consolidated case including *Altitude Express, Inc. v. Zarda* (on appeal from the U.S. Court of Appeals from the Second Circuit) and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, on appeal from the U.S. Court of Appeals for the Sixth Circuit; and *Bostock* from the Eleventh Circuit. The cases represented a split of authority among the lower federal appellate courts, a common basis for the

Supreme Court's decision to accept an appeal.

Gerald Bostock was an employee of Clayton County. In 2013, he joined a gay softball league and promoted it at work. Clayton County conducted an audit of funds controlled by Bostock and fired him for "conduct unbecoming a county employee." Bostock believed that the county used the claim of misspent funds as a pretext for firing him for being gay. The county sought to dismiss the claim of prohibited discrimination. The district court ruled that Title VII does not include protection against discrimination towards sexual orientation. Bostock appealed to the Eleventh Circuit and it affirmed.

Donald Zarda was a skydiving instructor for Altitude Express who told a female customer of his gay identity to make her more comfortable being attached to him during a skydive. The customer and her boyfriend complained and Altitude fired Zarda due to "misconduct." Zarda filed on the basis of employment discrimination. The District Court ruled in favor of Altitude Express and Zarda appealed. The United States Court of Appeals for the Second Circuit overturned, ruling that Title VII protects employees from discrimination based on sexual orientation.

Finally, in the *Harris Funeral Home* case, Aimee Stephens was a funeral home employee who presented herself as male up until 2013. In 2014, she wrote to her employer, the Harris Funeral Homes Group, so that they could be prepared for her decision to undergo gender reassignment surgery, telling them she planned to return dressed in female attire that otherwise followed the employee handbook. She was fired and the EEOC filed suit. The District Court ruled for the funeral homes, stating Title VII did not cover transgender people and that as a religious organization under the Religious Freedom Restoration Act, the com-

pany had a right to dismiss Stephens for non-conformity. The Sixth Circuit Court of Appeals reversed concluding that Title VII provided protection for transgender people.

The Likely Far-Reaching Impact of the *Bostock* Decision

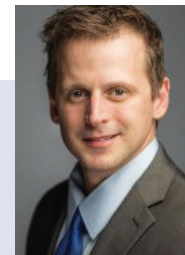
The most obvious impact of the *Bostock* case is that it settled the split of opinion between the U.S. Circuit Courts of Appeal regarding Title VII of the Civil Rights Act. At the time of the ruling, 25 states offered no explicit protections against discrimination on the workplace based on sexual orientation or gender identity. In those 25 states, individuals now have recourse at the federal level, assuming their employer meets the requirements to subject them to Title VII—generally meaning that they employ 15 or more employees each working day for the 20 weeks in the current or proceeding calendar year using the "payroll method." For employees of smaller firms beyond the reach of Title VII located in states without express protections for LGBTQ workers, most states have local law protecting against gender discrimination. Employees will argue that those state courts should follow the lead of the U.S. Supreme Court and interpret the state law prohibitions against gender discrimination to include sexual orientation and transgender status discrimination.

However, numerous other federal laws also ban discrimination "because of sex" including the Fair Housing Act and Title IX barring discrimination in education. Under §703(a) of Title VII, employers are prohibited from discrimination with respect to the employees "compensation, terms, conditions or privileges of employment...because of sex." Health insurance and other fringe benefits are considered compensation and/or privileged of employment. The *Bostock*

decision makes it more likely that a plaintiff could bring a sustainable Title VII claim against an employer to a health plan's exclusion coverage for same-sex spouses or even denying benefits for gender affirmation surgery. As Justice Alito pointed out in his lengthy 100 page dissent, "over 100 federal statutes prohibit discrimination because of sex."

Moving Forward

While the *Bostock* case has far reaching implications as to the reach of Title VII's protections and perhaps that of other statutes, it should have little effect on the merit of employment decisions based upon legitimate, non-discriminatory business reasons. When employment actions are based upon clearly articulated non-discriminatory reasons that are well documented, consistently applied, and evenly applied, an employer will be able to defend its decisions. ■



About the AUTHOR

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One River–Two Currents: How the Standard of Care and Day to Day Reality Differ

Frederick J. Fisher, J.D., CCP | Fisher Consulting Group, Inc.

It wasn't that long ago that my corporate counsel forwarded me an article from the Journal of American Law, "*The Broker as Advisor: When Courts Impose a Duty to Recommend Coverage*." This article was authored by Seymour Everett, Esq., and David Martin, Esq. It was an excellent article, and well researched as to the duties and obligations of insurance brokers. The article was consistent as to the general duties that have been decided throughout most of the United States. The article stated that the duty of an insurance broker is generally limited. The general standard requires the agent/broker to use reasonable care and diligence to procure the coverage requested by client. Most courts have examined the scope of a broker obligations and have concluded that the duty does not include recommending specific types or limits of coverage. The balance of the article analyzed the relationship of the broker and its client to discuss the circumstances under which a duty to advise could or would be imposed.

These duties are fairly universal throughout the United States, beginning with the California case of *Jones v Grewe*, 189 Cal.App. 3d 950, 959 (1987) (a duty assumed by an insurance agents includes "the obligation to use reasonable care, diligence, and judgment in procuring the insurance requested by the insured."). Therein lies the problem, and hence the title of this article. Once *Jones v Grewe* was decided, it caught on like wildfire throughout the West and eventually into the East Coast. The standard was universal, that absent certain activities triggering what has since been called a "Special Relationship", there was no

duty to advise. In fact, many articles and appellate decisions have since concluded that an insurance agent or broker is simply an "order taker." This duty can be elevated by holding oneself out as an expert, asking to do a risk management review which the insurance broker agrees to do after being asked, or, misrepresenting coverage, or charging special fees for additional services. See *Fitzpatrick v. Hayes*, Civil Appeal No. A073106 (Ca. Ct.App. Sept. 16, 1997) (insurance agent incurs liability to a client for an uninsured loss only if he: (1) misrepresented the coverage being offered, (2) failed to procure a specific coverage the applicant requested, or (3) assumed an additional duty by holding himself out as having a specific expertise.). In the East Coast, an additional element has also been introduced into the equation in some states. The new element examines the length of the relationship with the agent or broker who may have an intimate knowledge as to the operations or needs of the client simply based on the length of the relationship. See *Is Your Insurance Agent or Broker Liable When a Loss or Claim Isn't Covered?* General Business Trial Group May 14, 2019.

All the foregoing is, of course, an accurate recital of how legal precedent is evolving and moving, much like a river's current. The problem is, once *Jones v Grewe* was decided, it took on a life of its own. We now have a situation that bears little relationship to the reality of the day-to-day operations of the insurance industry. Therein lies the quandary, we have one river with two different evolutions or "currents" as to how the relationship and day-to-day operations

actually work.

As stated above, once I read the article, I contacted my corporate counsel. I not only thanked him for the article, but I told him I totally agreed with the article's discussion of the law. What I added, however was the other "current." I brought up the reality of my day-to-day operations.

At the time, I owned a Wholesale Insurance Brokerage that *specialized* in the placement of Specialty Lines Insurance, as dangerous a form of coverage that can exist. We advertised that we specialized in professional liability, which was the basis of my counsel's concern, i.e., by holding ourselves out as experts, we would be held to a higher standard of care in providing that expertise. What would happen if we failed to do so on one placement? Would we be looking at a potential lawsuit?

My response was to him was "I'll be happy to have that one lawsuit where we failed to deliver expertise as opposed to the 500 other lawsuits we did not have where we did." My attorney was quite perplexed and responded with "what you mean by that?" It was quite simple; we delivered our expertise. We made recommendations to our retail brokers as what may be needed by the insured after reviewing the application, or even asked deeper questions in order to determine what else might be needed. In other words, we were interested in providing the insured's financial protection, as opposed to simply selling them some insurance. After all, we were experts in professional liability and specialty lines. We would provide guidance and counsel with respect to "gotcha's" that existed in the policies whether it be in the definition of "claim", insuring agreement issues, the usage of absolute exclusions, or onerous conditions or the lack of liberal "Conditions." We would give advice and counsel to our insurance customers. The result was that after 20 years, I can

[Y]our average insurance agent or broker with five years of experience in any line, whether it be personal lines, like homeowners and auto, or commercial lines knows more about the ins and outs and extensions to coverage of the insurance policy and what may be needed by an insured than any insured regardless of sophistication.

represent that not one insurance broker we did business with ever got sued for professional liability for anything my firm did or failed to do. Why? Because we delivered our expertise.

As I pointed out to my attorney, if we were to conduct yourselves consistent with what the cases and the article advised, we would simply be a conduit, or an order taker. We would ask the retail broker and/or insured what they wanted us to do and then do it. Yet, “the goal of insurance is to restore the insured’s financial situation, their balance sheet usually, to the exact amount less a deductible just prior to the loss. People need this protection when they suffer a large loss. When that protection is not provided, what happens?” Wouldn’t we still be sued anyways?

What is better, successfully defending a lawsuit or not having one at all?

Another point was also raised with my attorney. How many times could we successfully defend a lawsuit based on the principles in the case law throughout the United States before our insurance company finally says to us “we’re happy that you are winning every lawsuit, but we need to raise your deductible to \$250,000 per claim so that you are no longer in our pocket for defense costs!” Wouldn’t that be the reality?

What are some of the additional problems raised however by following the concept of being only an order taker?

You have a customer that comes in your office who says I have a business and I need insurance. What do you recommend? How does in the insurance agent or broker therein not give advice by answering the question. Are they supposed to say

“what is it you’re worried about?

We have numerous commercial policies we could provide, then we could confirm we will provide it depending on what your needs are and as you know, you must have worker’s comp. Perhaps you might consider insuring your property or consider insuring your business for liability. What are your concerns and what are your needs?”

I can’t imagine any consumer of any kind would want to do business with a broker that would fail to advise them as to what might be needed. But let’s take it a step further. I don’t know any insurance broker that would advertise that they have no duty to advise, guide or direct clients as to the appropriate types of insurance coverages for its business operations. But there is another reality that is ignored. That is, your average insurance agent or broker with five years of experience in any line, whether it be personal lines, like homeowners and auto, or commercial lines knows more

about the ins and outs and extensions to coverage of the insurance policy and what may be needed by an insured than any insured regardless of sophistication.

This is equally true regarding how specialized the industry has become. There used to be a time when a business only needed property, liability, perhaps a commercial umbrella, worker’s compensation, and employee benefit coverages in the form of group medical and/or group life. That was about it. Now, however, it is gotten far more complex. Hazards have become more complex based on exclusions in the CGL policy for environmental liability, for employment practice exposures, discrimination etc. These exclusions gave birth to whole new industries to satisfy those needs.

Thus, businesses not only need the aforementioned five coverages, but they need director and officer liability coverage, employment practices liability, fiduciary liability, cyber liability, tech liability, crime coverage, and professional liability if they are providing professional services. In fact, I’ve seen “Discussion Lists” on quotes to clients suggesting as many as 53 other P&C Coverage types for a commercial client to consider. Many of these policies are complex, and fraught with peril especially when coordinating current coverages with claims made coverages with all the classes therein contained.

I imagine only the most sophisticated corporate clients have a sophisticated risk management department that can understand these coverages. Many businesses which do have a risk management department and knowledgeable professionals therein, still may not understand the ins and outs of specialty line policies. Such is the conflict of day-to-day operations versus the current of law.

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Another trend is currently appearing in many decisions as well. Simply put, it's a duty of an insured to read the policy. So, what if he does? It's bit absurd to expect the consumer, regardless of sophistication level, to be able to read a 96-page commercial general liability (CGL) policy and understand it all. Insurance Services Office (ISO) has over 1,800 active commercial property policy forms and endorsements countrywide, with any state having up to 200 in effect. Each form has a multitude of coverage options. With respect to ISO's business owner's policy (BOP), there are over 2,300 BOP policy forms and endorsements countrywide with up to 220 being in effect in any one state. This does not include the literally thousands of non-ISO proprietary or enhancement forms. It would take a licensed insurance agent or broker to explain the options might be available such as all the supplemental coverages that can exist in the standard CGL but are not necessarily offered on every account. There are probably 15 or 20 sublimit options and extensions for valuable papers, cleanup costs, the ability to buy up code requirements on a fire policy etc. Only the most knowledgeable insurance agent dealing with this on a day-to-day basis with even know they exist.

Further complicating the duty to read the policy, if such a "duty to read" exists, is whether or not anybody would

even understand what they have read. As an expert witness, I am not allowed to review a policy and offer opinions as to the underwriting intent. Only a court can determine the intent of the written document, yet the consumer is expected to read the policy to determine that themselves? I find that difficult to fathom. More importantly, however, how is any consumer, even a lawyer, supposed to know than in one state, a provision in the Travelers' Cyber Liability policy will not be enforced as to social media fraud, and yet in another state, the courts agree that it is covered. So how can one read the policy and then be able to interpret in such a way to as to know whether it is or is not enforceable in each locale? That too is the absurdity of the argument. Given the above, and the two currents moving in different directions, it is no surprise Chris Burand recently wrote

"If an insured needs to read and understand the policy themselves, then they do not need a professional agent. The professional agent's role is to explain and guide an insured to the coverages they need. If an agent does not fulfill that role, the result is that no one needs an agent. One E&O certainty is this: an agent without clients is unlikely to incur an E&O claim.

At least these agents will be safe from being sued."

There's also the concept of best practices. This is not the standard of care. In fact, I am one of the four professionals that even created the concept known as loss control or Risk Management for Insurance Agents, i.e., how to conduct oneself to prevent claims from taking place. We call it loss control claim prevention, lawyers eventually called it Best Practices. In my humble opinion, Best Practices should be the standard of care thus uniting the two currents. ■



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Development of At Issue Exception to Attorney-Client Privilege

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The scope of the attorney-client privilege and when, and if, it is waived by being put at issue will be an increasing source of litigation as claims for aiding

and abetting become more prevalent. In *Kroll v. Cozen O'Connor*, 2020 U.S. Dist. LEXIS 101341, 19 C 1939 (N.D.Ill. June 10, 2020), the defendant law firm

issued subpoenas to the plaintiff's prior and current counsel to collect information to challenge the plaintiff's claim that he did not discover the alleged wrongdoing within the two year statute of limitations. The court, applying Illinois law to this diversity matter, quashed the subpoenas finding that the plaintiff did not sufficiently place the documents "at issue." As there was no Illinois Supreme Court decision

directly on point, the court analyzed the nearest analog, *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 189 Ill. 2d 579 (2000), and decisions that had been cited in that decision from New York and California.

Facts of the Case and Procedural History

Rabbi Stanley Kroll (“Kroll”), entered into an agreement with the Chicago Loop Synagogue (“Synagogue”) to fund his retirement through deferred compensation at 7.5% interest. The Synagogue sought to cut expenses and asked that Kroll retire at the end of 2016. Kroll agreed and he was to receive his retirement in 15 payments. However, on December 31, 2016, his last day, Kroll was told that there was a tax issue that needed to be resolved.

Kroll eventually sued the Synagogue for fraud and breach of fiduciary duty, among other things, after learning that it had retained counsel to find ways to reduce his compensation. Kroll also learned that the retirement plan had not been in compliance with tax regulations since 2005, and if he was paid in installments as planned he would be subject to 20% tax. Kroll alleged that in July 2017 a lawyer from Cozen O’Connor provided his counsel with an amendment to the retirement plan that eliminated the interest payments and was backdated to the effective date of Kroll’s retirement on December 31, 2016. It is Kroll’s contention that July 2017 was the first time he learned of Cozen O’Connor’s involvement in his dispute with the Synagogue. Ultimately, Kroll and the Synagogue settled their dispute.

On May 10, 2019, Kroll filed suit against Cozen O’Connor alleging, among other things, aiding and abetting the Synagogue’s fraud and breach of fiduciary duty. The law firm asserted

that the suit was barred by the two year statute of limitations, which it claimed began to run in December 2016 when the allegedly actionable conduct occurred. Kroll contended that he did not know of Cozen O’Connor’s actions until July 5, 2017 and thus the statute of limitations was equitably tolled and his lawsuit was timely filed.

The district court found that Kroll had plead sufficient facts to make it plausible that he did not learn of the alleged improper conduct of Cozen O’Connor until July 2017, and denied the law firm’s motion to dismiss based on the statute of limitations.

Shortly thereafter, Cozen O’Connor issued subpoenas to three of Kroll’s current and former lawyers seeking “documents without regard to privilege or work-product claims” for the purpose of discovering communications before May 13, 2017 which would defeat Kroll’s claim under the statute of limitations. Kroll moved to quash the subpoenas or at least to have them modified.

The Court’s Analysis

In analyzing Kroll’s motion to quash, the court focused on the “at issue” exception to the attorney-client privilege. The parties only cited to *Lama v. Preskill*, 353 Ill. App. 3d 300, 307 (2nd Dist. 2004), and dicta from *Daily v. Greensfelder, Hemker & Gale, P.C.*, 2018 Ill. App. (5th) 150384 ¶ 32 n.8. Those cases both hold that “privilege as to communications about claim accrual is waived by

Applying the reasoning of *Fischel & Kahn, Ltd.* and *Miller*, the *Kroll* court likewise found that discovery of the communications with prior counsel was an improper invasion of the attorney-client privilege.

a party who places the discovery rule in issue.” As those decisions are appellate court decisions, the court sitting in diversity jurisdiction with the task of predicting what the Illinois Supreme Court would do turned its attention to *Fischel & Kahn, Ltd.*

In *Fischel & Kahn, Ltd.*, Court held that the defendant law firm was not entitled to communications between the former client and subsequent counsel regarding the settlement of the underlying claim for the purpose of ascertaining the damages incurred by the plaintiff which were allegedly attributable to the conduct of the defendant law firm. In reaching its conclusion, the Illinois Supreme Court relied on *Jakobleff v. Cerrato, Sweeney & Cohn*, 468 N.Y.S. 2d 895 (1983) and *Miller v. Superior Court*, 111 Cal. App. 3d 390 (1980).

Jakobleff v. Cerrato

In *Jakobleff*, the plaintiff sued her former lawyers in a divorce proceeding for failing to include a provision in the divorce decree that her ex-husband would pay her health insurance premiums. The defendant law firm filed a third-party complaint against the plaintiff current attorney for failing to seek a resettlement of the judgment of divorce and sought his deposition. *Jakobleff*, 468 N.Y.S. at 897. The defendant law firm sought “whether [current counsel] had advised plaintiff of possible remedial actions which could

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have been taken, whether he advised her not to proceed with any such actions, or whether plaintiff, having been advised to proceed with such actions, had refused to do so.” *Id.* The court held that “[t]hese communications were made between the attorney and client in the course of professional employment for the purpose of obtaining legal advice, and therefore fell within the privilege” and there was no waiver because they had not been placed at issue. *Id.* at 897-898.

Miller v. Superior Court

The *Miller* court directly addressed the issue of whether a defendant lawyer is entitled to obtain information and documents from prior counsel related to the application of the statute of limitations, and held that the defendant law firm was not entitled to such discovery. *Miller v. Superior Court*, 111 Cal. App. 3d 390, 392 (1980) citing to *Lohman v. Superior Court*, 81 Cal. App. 90 (1978). Also arising out of a divorce proceeding, the plaintiff in *Miller* sued her former lawyer for malpractice that allegedly occurred in 1971 when the defendant lawyer allegedly undervalued property owned by her husband. *Miller*, 111 Cal. App. 3d at 392. The plaintiff disclosed that she consulted with seven lawyers since the representation had concluded and did not discover the undervaluation until 1977. *Id.* The court concluded that to allow the discovery “would create an intolerable burden upon the attorney-client privilege, making it very difficult for the parties to the relationship to openly discuss matters which might eventually lead to litigation.” *Id.* at 395.

Application to Kroll Case

Applying the reasoning of *Fischel & Kahn, Ltd.* and *Miller*, the *Kroll* court likewise found that discovery of the com-

munications with prior counsel was an improper invasion of the attorney-client privilege. Citing to the purpose of the privilege “to encourage and promote full and frank consultation between client and legal advisor by removing the fear of compelled disclosure of information,” the Court held that simply because the communications “may touch on the issues” of when the plaintiff discovered her cause of action did not make them discoverable. *Fischel & Kahn, Ltd.*, 189 Ill. 2d at 584-585 citing *Waste Mgt., Inc. v. Int’l Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 190 (1991).

The Court then turned to *Lama v. Preskill*, 353 Ill. App. 3d 300, 307 (2nd Dist. 2004), and dicta from *Daily v. Greensfelder, Hemker & Gale, P.C.*, 2018 Ill. App. (5th) 150384 to distinguish them from *Fischel & Kahn, Ltd.* As to *Daily*, the court dismissed the defendant law firm’s reliance on a footnote from that decision which stated:

We note that the record reveals a potential issue regarding whether the plaintiffs brought their breach of fiduciary duty claim against Greensfelder within the applicable statute of limitations. If the plaintiffs were to confront this issue with a claim that the discovery rule applies to toll the statute of limitations, then documents listed on the plaintiffs’ privilege log evidencing communications between the plaintiffs and [the Missouri litigation lawyers] that are relevant to the time frame in which the plaintiffs became aware of a cause of action against Greensfelder for breach of fiduciary duty would also fall within the “at issue” exception to the attorney-client privilege. See *Lama v. Preskill*, 353 Ill. App. 3d 300, 306-07 (2004) (citing *Pyra-*

mid Controls, Inc. v. Siemens Industrial Automations, Inc., 176 F.R.D. 269, 271 (N.D. Ill. 1997).

The *Kroll* court concluded that this dicta did not overrule the conclusion the court had reached on the prediction of what the Illinois Supreme Court would do based upon *Fischel & Kahn, Ltd.*

Likewise, the *Kroll* court discarded *Lama* because it had no discussion of *Fischel & Kahn, Ltd.* that would be of aid in predicting what the Illinois Supreme Court would do if faced with this issue. The *Kroll* court criticized the *Lama* court for relying on *Pyramid Controls, Inc. v. Siemens Indus. Automations, Inc.* 176 F.R.D. 269, 271 (N.D. Ill. 1997), a case which was also cited in *Dailey*, as that court did not analyze Illinois common law on the issue of attorney-client privilege. The *Kroll* court concluded that the defendant law firm was not entitled to the documents and information sought and quashed the subpoenas.

Conclusion

It is clear that there are two different lines of case law that have developed in Illinois and across the country. See *Outpost Solar, LLC v. Henry, Henry & Underwood, P.C.*, 2017 Tenn. App. LEXIS 841 (Tn. Ct. App. 2017) (holding that where plaintiff asserted discovery rule defense to statute of limitations, at issue waiver of attorney-client privilege applies), see also *Memorylink Corp. v. Motorola, Inc.*, 2010 U.S. Dist. LEXIS 80027 (N.D. Ill. August 6, 2010) and *Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP*, 2009 U.S. Dist. LEXIS 102579 (N.D. Cal. October 21, 2009) compare *Rademacher v. Greschler*, 455 P.3d 769 (2020) (holding that no at issue waiver where the plaintiff did not raise discovery rule defense to statute of limitations argument).

A consideration that the *Kroll* court did not take in account is that the *Lama* court looked to the fundamental principal that the privilege is an exception to the rule requiring discovery and, citing to the Illinois Supreme Court, “should be ‘strictly confined within its narrowest possible limits.’” *Waste Mgt., Inc.*, 144 Ill. 2d at 190. Under Illinois law, it is well established that the assertion of a privilege is the exception, not the rule. See *Golminas v. Fred Teitelbaum Const. Co.*, 112 Ill. App. 2d 445, 448-449 (2d Dist. 1969). “[I]n Illinois, we adhere to a strong policy of encouraging disclosure, with an eye toward ascertaining that truth which is essential to the proper disposition of a lawsuit.” *Waste Mgmt., Inc.*, 144 Ill. 2d at 190. Privileges are strongly disfavored under Illinois law. *In re Marriage of Daniels*, 240 Ill. App. 3d 314, 324-25 (1st Dist. 1992). Emblematic of this position, Illinois retains the more narrow control group test for the application of the attorney-client privilege in the corporate context (*Consolidation Coal Co. v.*

Bucyrus-Erie Co., 89 Ill. 2d 103 (1982)) and Illinois has only recently adopted the common interest exception to the waiver of privilege rule (*Selby v. O’Dea*, 2017 IL App (1st) 151572).

That the *Fischel & Kahn, Ltd.* court found that the privilege prevailed to preclude discovery of materials related to damages from prior counsel should not lead to the conclusion that it will always prevail in Illinois, or anywhere else. This is especially so when a party has put the issue sought to be discovered “at issue.” Yogi Berra, among others, is credited with saying that “prediction is difficult, especially about the future” and the future here likely holds that an at issue waiver case is going to reach the Illinois Supreme Court for it to address this issue. In the meantime, lawyers defending lawyers across the country have some support for the proposition that when the plaintiff raises the statute of limitations, communications with prior counsel can be obtained, even if the *Kroll* decision is one case against that position. ■



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Part II—Litigation Funding: Will This Glittering Investment Bring on a Malpractice Gold Rush?

Andrew P. Carroll | *Goldberg Segalla, LLP*

In Part One of this article, we looked at the business model of third party litigation financing and compared its explosion in growth to a historical example of an investment fund with a similarly exponential growth in funding levels. Using this past experience, the current economic climate, and litigation funders’ own statements, I argued that there will be an increase in the funding of professional malpractice claims that would affect both underwriting and the defense of claims. Current figures in professional liability

claims, such as legal malpractice, show that some of that change may already be occurring. In this piece, I explore how litigation finance will affect professional liability underwriting and claims in the future, as well as methods for combatting these changes.

Claim Volume, Complexity, and Costs to Defend Are Rising

It would be difficult, if not impossible, to summarize claim data and trends with

regard to every class of professional who might be sued. However, insurance broker Ames & Gough conducts a fairly comprehensive annual survey of legal malpractice carriers that provides an overview of claims against lawyers, and might even be informative across the professional liability field. According to the most recently available Ames & Gough survey, the volume of legal malpractice claims rose slightly in 2018 and has risen or remained stable since 2013. However, over that same period there has been a significant increase in the complexity of claims, the overall costs of defense, and the amount of large settlements.

For example, in 2013 only six of nine insurance carriers reported participating

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in a claim of \$20 million or greater, and only one participated in a claim exceeding \$100 million. By 2017, every insurer had claims with reserves in excess of \$500,000, five had participated in paying at least one claim of over \$50 million, and one had a claim of over \$150 million. 2019 proved worse, with the majority of responding lawyer professional liability carriers contributing to at least one claim that topped \$150 million and at least two settlements exceeding \$250 million. Notably, survey respondents consistently reported a rise in the costs of defense year over year.

These numbers are dramatic, and include a growing trend of front-of-the-newspaper claims that are sure to garner interest from investment funds. Additionally, the number of jury trials, now well below 1% of cases in state and federal courts, shows that there is little historical data that is useful in estimating potential verdicts. With so few cases going to trial, the importance of properly calculating risk and negotiating settlement has therefore become paramount for every claim. However, attorneys and carriers alike must be prepared for the way in which third party financing will likely result in higher demands and an increase in overall claim value in the coming years.

One method for understanding how and why this trend is expected is through the exploration of expected utility theory, which originated in economics but is now being applied to settlement negotiations. An exploration of this theory not only provides insight into why third party financing will increase claim values, but also a glimpse of what can be done to bring claim values down in the future.

Using Expected Utility in Lawsuit Settlement Negotiations

Every attorney has his own method for reaching the potential settlement

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An exploration of this theory not only provides insight into why third party financing will increase claim values, but also a glimpse of what can be done to bring claim values down in the future.

range in a case, which can only ever be an estimate. However, while it is true that these ranges are imprecise, the economic theory of expected utility is gaining traction as an approximate translation of this process into concrete mathematical terms. By identifying the primary elements of any settlement deliberation, and applying values to each, an expected utility formula allows attorneys to explicitly consider subconscious factors that result in settlement estimates.

At its base level, the expected utility of settlement is expressed using the likelihood of a negative outcome, i.e. an award for the plaintiff, the total potential verdict, and the cost of defense. Expressed mathematically, the formula is as follows: (Probability of a Negative Outcome) x (Estimated Verdict) + (Defense Costs) = Expected Utility. For example, if one estimates that there is a 50% chance the plaintiff wins on a breach of contract claim alleging \$500 in damages, and it costs \$30 to litigate the matter, the expected utility of settling the matter for the defense is $(.50) \times (\$500) + (\$30) = \$280$. Plaintiff has a similar calculation to make, albeit where the costs of trial are subtracted from the award: (Probability of a Positive Outcome) x (Estimated Verdict) - (Litigation Costs) =

Expected Utility. Assuming all figures are equal to those for the defendant, the expected utility of settling the matter for the plaintiff is $(.50) \times (\$500) - (\$30) = \$220$. Any settlement between \$220 and \$280 would therefore be favorable for *both* parties, as it maximizes the theoretical value of outcomes.

This expected utility formula can become quite complicated when various other factors are taken into account, but for the purposes of this article I will focus only on one additional factor - risk premium. Risk premium is the amount a party would either pay (for the defense) or forgo (for the plaintiff) in order to consider the calculation risk neutral. Stated differently, this is the amount that a defendant is willing to pay above the expected utility value in order to sleep at night knowing the case is resolved. For example, a risk averse defendant may understand that the example case is not "worth" more than the expected utility of \$280, but prefers to pay up to \$300 knowing that he would not be taking the risk of a \$500 verdict. Adding the risk aversion variable to the expected utility equation for a defendant would be as follows: $(.50) \times (\$500) + (\$30) + (\$20) = \300 .

Similarly, a plaintiff may believe his case is "worth" at least \$220, but value walking away with \$200 rather than risk

owing costs in the event of a defense verdict. The plaintiff's new expected utility function is expressed below: $(.50) \times (\$500) - (\$30) - (\$20) = \200 . As seen in these examples, the potential settlement range broadens in *both* directions because each party has concerns about the potential for a loss. However, the distribution of risk aversion among the parties can either raise or lower the potential settlement bracket depending on the distribution of risk tolerance.

Third Party Litigation Finance Fundamentally Skews the Risk Calculation in Favor of Plaintiffs

The injection of third-party funding into litigation significantly alters the baseline calculation of a plaintiff by reducing both the litigation costs and risk premium for the plaintiff. In the first example, a risk-neutral plaintiff would be willing to accept \$220 because he must account for the litigation costs, i.e. the \$30 it would cost to reach a successful verdict. However, there was an additional reduction to the "bottom line" because most plaintiffs will have some fear of a defense verdict in which they receive nothing and owe their attorneys litigation costs.

The problem that third party litigation financing creates is that it funds at least a portion of litigation costs, and shifts risk from the plaintiff and his attorney to a non-party. Imagine the scenario above, except that now the plaintiff's litigation costs are partially covered by a third party litigation fund. Here is the plaintiff's revised expected utility equation when \$30 of funding is injected by a third party: $(.50) \times (\$500) - (\$30) + (\$30) - (\$40) - \$20 = \190 . By injecting payment of the litigation costs, the plaintiff who was previously willing to settle for \$200 has now lowered his demand to \$190 because he must pay a portion of the settlement to the funder. Although this may seem

like good news for defense counsel, the analysis is more nuanced.

Third party funding does not just lower the cost variable. It also fundamentally alters a plaintiff's appetite for risk. The traditional method for balancing risk in the American legal system has been the use of contingency fee agreements. Contingency arrangements give plaintiffs who cannot afford legal fees access to the court, while limiting non-meritorious litigation (at least to a certain degree) by making attorney's fees outcome dependent. Further, the plaintiff might remain on the hook for litigation costs. Under this "traditional" approach, both plaintiff and attorney are therefore motivated to avoid the risk of a total loss at trial in which the attorney gets nothing and the plaintiff pays out of pocket expenses. The risk aversion variable in the expected utility equation thus seeks to assign a value to this contingency fee generated motivation.

That variable is changed when the plaintiff is no longer concerned about being responsible for litigation costs and/or the attorney receives partial payment through litigation funding. Taking our example above, assume that a third party offers to fund the entire litigation for a portion of the proceeds. Now, the worst case scenario is that the plaintiff walks away with nothing, but also owes nothing. In other words, the only risk to the plaintiff is of time wasted, rather than cash owed to his attorney. Similarly, the attorney need not be concerned about his client's ability to pay outstanding costs, and may even get partial payment from the third party funding. Now look at how that reduction in risk aversion affects the equation. $(.50) \times (\$500) - (30) + (\$30) - (\$0) - (\$40) = \$230$

The injection of litigation costs *also* removes the plaintiff's skin in the game, motivating him to raise his minimum acceptable settlement to \$210. Absent any

alteration in the defense calculation, the settlement bracket has now narrowed further to between \$210 and \$300. More importantly, the \$10 swing has been entirely one-sided. Using our examples, without third party funding there would be some settlements at \$200, some at \$300, and a presumed average in the middle at \$250. With third party funding, there are *no* settlements at \$200. Instead, there is a sampling of \$210 settlements, some at \$300, and a presumed average of \$255. The exposure to defendants and their insurance carriers therefore increases.

Recalibrating the Expected Utility Function with Modern Litigation Tools

One of the primary drivers of increasing litigation costs is the exponential increase in the amount of document review. Email is now prevalent across all businesses and professional firms, with many people sending hundreds each day. In addition to the reduced cost for electronic data storage, even cases with moderate exposure can therefore create a universe of potentially relevant documents that costs a small fortune to review. However, there is now a wide variety of tools available to minimize the time spent reviewing documents. This includes data visualizations, which will create visual graphs of documents that an attorney can use to narrow the issues and potentially important documents. For document productions in the several hundreds of thousands of pages, artificial intelligence is available that can be trained to pull relevant documents based on a small sample size selected by the attorney. Importantly, tools such as these are now available at different levels of sophistication and price ranges, meaning they can be used for more than just the multi-million dollar exposure cases.

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Similarly, jury analysis services are now able to provide research at various cost levels that in this author's opinion, is far more informative than historical verdict searches. While such services were typically reserved only for conducting mock trials on the biggest cases, quicker and less expensive options are available. Companies are able to take small snippets of a case and present it in a neutral setting to hundreds of potential jurors who are then asked to answer various questions, including what amount, if any, the jury would award in damages. These responses are then plugged into predictive algorithms to determine likely verdict ranges based on hundreds of potential juror responses. These algorithms are so sophisticated they can also take into account the weight of various aspects of the case using juror responses to individual inquiries, thus allowing attorneys to identify the weaknesses in their cases and explore options for strengthening their defense strategy. Importantly, these tools are also available at varying cost levels that make them viable options in many more cases than they used to be.

The key to tools such as these is that they work to restore some balance to the equation for the defense. Saving on defense costs without compromising the quality of representation means that the total exposure is reduced by these litigation cost savings. If it is no longer assumed that an additional \$100 will be spent to continue litigating, there is no need to account for some portion of that amount in the settlement value. Additionally, the use of predictive jury polling increases the precision of the expected utility equation. By testing theories with actual potential jurors, it is much easier to estimate the likelihood of success. Risk aversion can similarly be adjusted using these figures, because the defense can feel far more comfortable

proceeding to trial if it knows that 80% of potential jurors would rule in its favor.

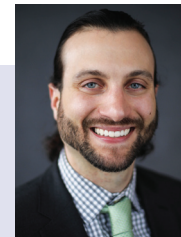
Of course, not all cases will show that the defense is certain to win and result in a lower settlement. However, what does occur regardless is an improved ability to separate the "winners" from the "losers" and avoid settling on plaintiffs' terms when a more favorable outcome was likely at trial. Stated differently, a natural equilibrium is reached when the guesswork of settlement negotiations is reduced.

Conclusion

The importance of this reduction in imprecise evaluations is twofold for the relationship between carriers, professionals, and defense counsel. In addition to avoiding overpayment on weaker claims, and taking unnecessary risks at trial on tougher cases, it adds some level of certainty to the underwriting and claims process. For insurance carriers, underwriters are tasked with assessing and evaluating risk in order to set premiums at profitable levels. At the next stage, claims professionals must evaluate exposure, set reserves, and ultimately, resolve claims at an appropriate cost. Hand in hand with these claims professionals are the attorneys with their boots on the ground, developing the case and providing the information necessary to determine settlement values and the potential exposure. At each stage in the process, accuracy is vital in order to create a coefficient cycle wherein policies are underwritten to reflect what will later occur at the claims level. In essence, we are all tasked with predicting the future.

While it is impossible to do so, the more information available, the more likely it is that each of the players can come as close to accomplishing that goal as possible. We now know that there will be an increase in the volume of claims, why

that increase is coming, and mathematical models that explain how it will raise overall claim values. The best response is to become armed with the most, and more importantly, the *best*, information available. With third-party litigation funding, it is more important than ever to use litigation cost reduction tools to shift the expected utility function back into a more balanced state. By also using jury polling tools to more accurately separate the "winners" from the "losers," it is easier to avoid the outlier overpayments or headline grabbing verdicts. Utilizing this technology is therefore more important than ever in order to optimize the claim handling process and avoid the increasing popularity of lawsuits as an "investment opportunity," rather than a method for resolving legitimate disputes. ■



About the AUTHOR

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Paycheck Protection Program – Be Careful What You Wish For?

Gregg E. Viola and Lauren Marini | Eccleston and Wolf, P.C.

The COVID-19 pandemic created unprecedented public fear for the physical and financial wellbeing of American citizens and their families. The country shut down and employers, including law firms, were forced to assess how the pandemic would impact the financial stability of their business. The questions posed everywhere were: How drastically will this affect our ability to generate revenue? Can we continue to pay our employees? If so, at what rate, and for how long? The ultimate question was how do we survive?

The Paycheck Protection Program appeared to be a lifeline, allowing many businesses and law firms to seek a loan that covered up to two months of a company's average monthly payroll cost, plus an additional 25% up to a \$10 million cap. The loan amounts could be used to cover payroll expenses including benefits, to pay rent, utilities, and mortgage interest, as long as those expenses were in place before February 15, 2020. Equally important, the PPP offered loan forgiveness, such that, if the money was used for the specified purposes, it was not required to be repaid. To many it seemed like free money. The PPP was "first come, first served," with a finite gross amount to be distributed. This left employers scrambling to submit loan applications quickly, with concern that the funds might be gone if they did not apply immediately. At the time, there was often a legitimate fear that the future viability of its business might depend on obtaining such a loan.

In this haste to submit an application, many employers failed to read or fully appreciate the significance of the fact that the submission of a loan application

came with a certification in good faith that the "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." Guidance offered by the Small Business Administration stated that this certification must take into account an employer's "current business activity and their ability to access other sources of liquidity...." More recently, the Treasury Department clarified that the loans were not intended for companies with access to equity markets; and, that companies could suffer consequences

Some sectors have been devastated, but for a large number of sectors of the economy, the impact has thus far been less than initially feared. Many companies acted quickly in good faith in applying for and receiving PPP loans, but later concluded that the pandemic had not caused as much economic damage as originally anticipated. In other words, many businesses and law firms obtained a loan, with the good faith belief at the time of the application that it was necessary to support ongoing operations, but over time, had to rethink if that was

The repercussions to obtaining a PPP loan based upon a false certification are significant and serious, and include both the risk of a False Claims Act claim, as well as negative publicity. Attorneys also face the possibility of charges that they violated the Rules of Professional Conduct.

if they were not facing economic injury. What constituted being "necessary to support ongoing operations" was never defined, but the ordinary understanding seemed to suggest that it required a showing that the business or firm could not have continued its operations absent the loan proceeds. Additionally, the PPP absolved the lender of any responsibility to determine the necessity of the loan, allowing reliance on the certifications of the borrower.

While the pandemic is ongoing and its full impact on any business and the economy as a whole is unknown, it clearly has not impacted all sectors equally.

in fact true. For these businesses, the question loomed whether the loan was "necessary to support [the firm's] ongoing operations," as certified.

These companies faced the difficulty of defining "necessary to support ongoing operations." They also needed to determine whether the loan was indeed necessary to do so and, if not, whether the loan proceeds should be returned. In recognition of this dilemma, the SBA stated in its guidance that any borrower that applied for a loan prior to May 5 and repaid it by May 7, 2020 would be deemed by the SBA to have made the

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required certification in good faith. The SBA subsequently announced that any company that received a PPP loan of less than \$2 million would not be audited, giving some companies comfort who kept loan proceeds that there would be no negative repercussions.

The repercussions to obtaining a PPP loan based upon a false certification are significant and serious, and include both the risk of a False Claims Act claim, as well as negative publicity. Attorneys also face the possibility of charges that they violated the Rules of Professional Conduct.

The False Claims Act

The False Claims Act was first enacted during the Civil War, but has been utilized most frequently in the past 40 years. Under the FCA, an entity or individual can be held liable for submitting, or causing to be submitted, a false claim to the government for payment. The FCA also prohibits knowingly making, using, or causing to be made or used, a false record or statement in connection with a claim for payment. Those who are found liable under the FCA are subject to treble damages, civil penalties, and the prevailing plaintiffs' attorney's fees and expenses.

Because the PPP loan application required the certification discussed at length above, an entity that knowingly misrepresented its eligibility, or made false statements to receive the loan, could be liable under FCA. Commentators have speculated that those who received loans under the PPP could be an enticing target for an FCA action by the Department of Justice and/or a qui tam relator, given the negative publicity surrounding some companies who received loans.

Given that this program was enacted to allow employers to keep employees on

If a company received a PPP loan and, as time goes on, it is becoming increasingly clear that it was not necessary to support the company's ongoing operations; the company should strongly consider returning the funds.

the payroll, there likely will be no target too small if credible evidence exists that it provided false information or did not use the loan for the intended purposes. Additionally, if there is an administration change in November, there could be political motivation to prosecute anyone who did not make accurate certifications or use the money for appropriate purposes. Thus, companies should not rely on recent guidance to believe they will be completely free from an FCA claim if it received a loan of less than \$2 million.

Negative Publicity

Even if the loan does not give rise to an FCA claim, the information is publicly available. Various news outlets aggressively sought publication of companies that received PPP loans. Recently, the Treasury Department and the SBA released a list of businesses to whom they have lent more than \$150,000 as part of the PPP. Early on in the process, several companies that volunteered that they received loans, and for whom the facts suggested that they did not meet the criteria, were lambasted in the media. The negative publicity associated with many of the loans caused a number of businesses to return the loans or pledge to return the loans. It also caused the companies to lose good will in the eyes of the public.

Most news outlets would be more than happy to report about a company

or firm that received a loan then paid out handsome bonuses, added workers, or outwardly made clear that they were not in danger of financial ruin. It should also be noted that this information is also available to competitors, who could use it in marketing efforts targeted at a specific business or firm.

Violations of the Rules of Professional Conduct

There are additional concerns for lawyers and law firms. Virtually all jurisdictions have a rule that mirrors Rule 8.4 of the ABA Model Rules of Professional Conduct, which states that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer or engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Any lawyer subject to an FCA likely will likely also face a bar complaint from his or her local attorney disciplinary body. Such a complaint might also be instituted as a result of a negative news story or complaint from a competitor.

The goal of the PPP loan was to protect the economic viability of the law firm. A disciplinary action that adversely affects or limits the ability to generate income is diametrically opposite to the purpose of applying for the loan. If the charges are public, it also could effect the firm's reputation in the legal commu-

nity and with clients. In such a situation, the loan will have done far more harm than good.

What to Do?

What should a lawyer do if asked by a client for advice on the issue, or if his or her firm faces the situation reflected above? The first thing is to conservatively consider the meaning of what is



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necessary to support ongoing operations. Certainly, if a company's bottom line or revenue for 2020 is not significantly different than historical averages, or if it is adding new employees, acquiring new assets, etc., it is difficult to credibly argue that the loan was necessary for ongoing operations. The company also needs to consider its access to other forms of credit. Does it have an existing line of credit or access to equity markets? If either is true, it makes it more difficult to argue the company met the criteria for the loan. Certainly using loan proceeds to issue bonuses; especially to highly compensated employees would be a sure sign that the loan was not obtained for legitimate purposes.

If a company received a PPP loan and, as time goes on, it is becoming increasingly clear that it was not necessary to support the company's ongoing operations; the company should strongly consider returning the funds. Many companies have done just that. In May, a sizeable percentage of the loans that were made were returned. These companies likely acted in good faith when seeking the loan, out of concern that it was necessary for its ongoing viability, but its initial concerns were never realized. While it might be counter-intuitive to return the loan proceeds, it might avoid future litigation and, for attorneys, it might protect your license and your firm's reputation. ■

Practicing Well: Stick with It!

Patty Beck | *Minnesota Lawyers Mutual Insurance Company*

In March 2020, our lives were upended by COVID-19 and various "stay at home" orders were imposed in our respective states. Suddenly we were expected to practice law from our dining room tables, home school children of all ages (while putting in a full days' work), and keep ourselves and loved ones safe from the virus that was sweeping the globe. For many, this was an obviously stressful transition. I spoke with lawyers who shared the struggles of "doing it all" while keeping their homes from becoming a place of total chaos (endless dishes and clutter, anyone?).

But over time, I noticed that my conversations changed; many people were starting to focus on the positives of their experience working from home, for which their previously busy schedules had not always allowed. For example, instead of the usual rush to wake up and get out the door to the office, people were enjoying the slower pace of eating breakfast as a

family, doing a morning workout, or taking time to meditate before work. Instead of feeling exhausted after a full day of work plus the commute home, people were feeling more energized and better able to plan healthy dinners, tend to yard work, or take an evening bike ride. Some also celebrated virtual platforms like FaceTime and Zoom for allowing them to reconnect and develop deeper relationships with friends and family for game nights or weekly check-ins.

Certainly, working from home has not been great for everyone, and I do not mean to sugar-coat this challenging experience that COVID has brought upon us. It is undeniable that this has been a bizarre and stressful time juggling the various demands of our personal and professional lives. But with that I have learned that lawyers are resilient at our core, and I am encouraged by the positivity and determination that I have

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seen from the legal profession to keep things moving with as few disruptions as possible. For instance, who would have ever thought it was possible to conduct a hearing, mediation, and trial all from their guest bedroom? Not me, but lawyers are doing this every day to continue serving their clients.

Now that law firms and companies are transitioning back to working at the office, I challenge you to continue making time for things that improved your health and well-being while working from home. Stick with your new workout routines, family mealtimes, and virtual visits. Continue exploring ways to connect with yourself and the people around you. It is easy to fall back into the fast-paced lifestyle that many of us used to lead, but if COVID has taught us anything, it is to remember that life is precious and so are the relationships we have with friends, family and ourselves.

So, stick with it. And if you find yourself struggling, I encourage you to talk to

friends, family, a professional counselor or your local lawyers' assistance program. We are all dealing with COVID in our own way, and sometimes we need to lean on others to get to where we need to be to take care of ourselves and those around us. ■



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OUR MISSION



Professional Liability
Defense Federation's
mission is to enhance
the stature and effectiveness of
professional liability defense professionals
through education, training and
the exchange of information.



Letter from the President | continued from page 1

sity *should* look like among renewed and overdue discussions about what equality truly means. Many of us have been spending considerable time discussing what the current state of the country means with respect to risks borne, risks covered, best practices to limit liability exposure, and how our clients and insureds are faring in the current economic climate of uncertainty. Interesting times, indeed, but presenting challenges I am confident each one of us can meet.

I would like to remind our members, however, that taking time to care for your own well-being is an important part of being able to serve the professions we all represent. The *Quarterly* has long included a wellness column (by the

incomparable **Patty Beck**, *Minnesota Lawyers Mutual*) aimed at our membership for this very reason. Though there is very real pressure on claims professionals and counsel to appear "invincible", the fact remains that each of us is human and that times of great disruption can also be times of great stress. In such times it is important to remember that our personal well-being cannot be wholly separated from our professional responsibilities, and that we may be doing our insureds and clients a disservice by insisting on "powering through" such stress rather than addressing it in the context of our own well-being. I truly hope each of you is navigating these uncertain times well, but also hope that

those who are struggling ask for help if it is needed.

While I remain disappointed that we will not be able to gather together this year for the annual meeting, I hope to "see" everyone at this year's **Virtual Annual Meeting on October 2nd**! This virtual meeting will include the annual meeting of the membership to update everyone on the state of the PLDF and provide the opportunity to all members to review the organization's performance over the last year, as well as attend two excellent panel presentations: "**Past is Prologue: the Coming COVID-19 Investor Claims Tsunami**" (**Michelle Arbitrio Wood Smith Henning Ber-**

man, J. Peter Glaws, IV, Carr Maloney,

Many of us have been spending considerable time discussing what the current state of the country means with respect to risks borne, risks covered, best practices to limit liability exposure, and how our clients and insureds are faring in the current economic climate of uncertainty. Interesting times, indeed, but presenting challenges I am confident each one of us can meet.

PC, **Alexandra Gulledge**, *QBE North America*, and **Gary Kessler**, *Kessler Collins, P.C.*) and “**Exploring Pre-Suit Settlement in a High Stakes/Media Legal Malpractice Claim**” (**Jennifer Groszek**, *ProQuest*, **Christopher Vlasich**, *Allianz Global Corporate & Specialty*, and **Jennifer W. Wolak**, *Fields Howell LLP*). It promises to be an enlightening and informative meeting!

I am also pleased to announce that we are in full planning mode for a roaring comeback with the **2021 Annual Meeting**. Though we typically return to our “home base” of Chicago in odd-numbered years, we’re going to break with tradition for 2021. With the enthusiasm for heading to Nashville, the PLDF Board decided that another two years was too long to wait for another opportunity to gather in such a charming and fun location. Please mark your calendars now for **October 6-8, 2021** and plan to join us in **Nashville** for the excellent in-person professional development and networking events which make attending a PLDF Annual Meeting such a valuable experience. If you will be unable to attend, we urge you to consider sending one of your partners or associates — it is truly a conference not to be missed!

I would also like to congratulate and thank our new members of the **PLDF Publications Committee** who have

taken the mantle of leading the *Quarterly* and upholding its high standards. **Alice M. Sherren**, *Minnesota Lawyers Mutual*, and **Rick Perr**, *Kaufman Dolowich & Voluck LLP*, have agreed to serve as Co-Editors in Chief, joined by Executive Editor **Gregg E. Viola**, *Eccleston & Wolf PC*. Together with our extraordinary columnists and guest writers, I know that the *Quarterly* is in excellent hands with Alice, Rick and Gregg at the helm.

Finally, this will be my last letter in the *Quarterly* to you all as the President of the PLDF. As my term comes to an end with the Annual Meeting, **President-Elect Pat Eckler**, *Pretzel & Stouffer*, will be taking the reins into his most capable hands. While this year has been an *interesting* one for us all, it has truly been an honor for me to be entrusted with the PLDF’s leadership and to work with everyone who contributes to the organization — the committee leaders, the writers, the presenters, the directors, and the many others whose devote time and talents to making this organization a professional “home” for those who defend a diverse range of professionals. The PLDF plays an important and growing role to give voice and community to our area of insurance defense and the professionals we all serve — long may it thrive.

But like all communities and organizations, the PLDF depends largely on

the involvement and passion of its members. If I have one parting wish as I leave office, it is that each of you consider how you would like to be involved to maximize the value of your membership and enrich the organization/profession in the coming year. It may be attending committee presentations throughout the year or writing articles for the *Quarterly*. It may be stepping into a leadership role either at the committee level or as a member of the Board of Directors. It may be getting another member of your firm or company involved in the PLDF as a member or panelist for a presentation. It may be taking advantage of any one of the dozens of other opportunities presented by the organization throughout the year. Though I will be standing down from my watch with the transfer of leadership, I plan to continue to serve the PLDF and our profession as an involved member. I hope each of you will join me. ■



About the AUTHOR

Lisa Tulk of *Kessler Collins, P.C.* in Dallas is the current President of PLDF. Her practice focuses on the counseling and defense of architects, engineers, financial advisory firms and accountants. Ms. Tulk may be reached at ltulk@kesslercollins.com.



Defending the Standard of Care.

PLDF Annual Meeting | 10.2.20 | www.PLDF.org

Circumstances may keep us from gathering in person this year, but they can't keep us from our mission to enhance the professional lives of our members. And while we are disappointed that Nashville will have to wait one more year, we are very excited to have the opportunity to virtually bring together our members for some great professional liability education with our first Virtual Annual Meeting.

The PLDF Virtual Annual Meeting will be held **Friday, October 2, 2020** from 1:00 – 3:30 PM EST (12:00 CST; 11:00 MST; 10:00 PST). We hope you will join us for the social events, membership meeting, outstanding speakers, and insightful programming.

Annual Membership Meeting

The PLDF Membership Meeting will kick off our Annual Meeting. This brief meeting will include review of the membership and financial standing of the association, election of the Board of Directors, recognition of committee leaders, and will provide all PLDF members with an opportunity to learn about the association and our goals for the future.

Featured Presentations

Exploring Pre-Suit Settlement in a High Stakes/Media Legal Malpractice Claim

Panelists: **Jennifer Groszek, JD**, ProQuest, a division of Alliant Insurance Services, Inc., Chicago; **Christopher Vlasich, JD**, Allianz Global Corporate & Specialty, Chicago; and, **Jennifer Wolak, JD**, Fields Howell LLP, Atlanta



Jennifer Groszek



Christopher Vlasich



Jennifer Wolak

In this presentation, our featured panelists will discuss the considerations for insureds, defense counsel and claims professionals as they relate to pre-suit settlements. The challenges of evaluating exposure pre-suit, without discovery, and assessing the value of early resolution as well as timing to best leverage an early resolution will be addressed. Attendees can expect a robust discussion of the pros and cons of a "wait and see approach" versus early resolution.

Past is Prologue: The Coming COVID-19 Investor Claims Tsunami

Panelists: **Michelle Arbitrio**, Wood Smith Henning Berman, New York, NY; **J. Peter Glaws, IV**, Carr Maloney, PC, Washington, D.C.; **Alexandra Gullede**, QBE North America, Plano, TX; and, **Gary Kessler**, Kessler Collins, P.C., Dallas, TX



Michelle Arbitrio



J. Peter Glaws IV



Alexandra Gullede



Gary Kessler

We've seen it before: the Great Recession, the Madoff Scandal, the High-Tech Meltdown, the Savings & Loan Debacle. These and other financial downs led to tidal waves of investor claims. Can we use what we learned from these events to predict the magnitude of claims likely to come from the COVID-19 systemic shutdown of the U.S. economy? Will it dwarf the others, combined?

— Continued on next page

Committee Get Togethers

The Committee Luncheons have long been a highlight of our in-person Annual Meetings. Though we can't get together in person this year, we want to ensure that our members continue to have the opportunity to gather, meet others in their practice area, learn about the committees and, if interested, get plugged in to volunteering.

With this in mind, our committees will be hosting Zoom Get Togethers the week of September 28 and October 5. Following is the current schedule of Get Togethers (There will be more to come—be sure to check PLDF.org for more listings in the coming days):

Monday, September 28, 2020

D&O / Trustee E&O Committee Zoom Get Together — 1:00 PM (EST)

Tuesday, September 29, 2020

Financial Professionals Committee Zoom Get Together — 1:00 PM (EST)

Thursday, October 1, 2020

Young Professionals Committee Zoom Get Together — 1:00 PM (EST)

Real Estate Design/Agents Committee Zoom Get Together — 3:00 PM (EST)

EPL Claims Committee Zoom Get Together — 4:30 PM (EST)

Monday, October 5, 2020

Insurance Agent/Broker Claims Committee Zoom Get Together — 1:00 PM (EST)

Healthcare Malpractice Claims Committee Get Together — 3:30 PM (EST)

Trivia Challenge and Zoom Yoga

The Young Professionals Committee (YPC) will help us kick off the Annual Meeting with a virtual Happy Hour and Trivia Challenge. Put your thinking cap on, grab your favorite beverage, and join in the fun — October 1 at 6:00 PM (EST).

NAMASTE, Friends! The YPC will also host Zoom Yoga in conjunction with the Annual Meeting. Start your day off right with a little exercise with your fellow PLDF members. Zoom Yoga will be held Friday, October 2 at 9:00 AM (EST).

Friday Happy Hour

To wrap up the Annual Meeting this year, we will host a virtual happy hour immediately following our Annual Meeting (it's 5:00 somewhere, right?!?). Join us as we wind down the week and network with our PLDF family.

Continuing Legal Education

Attendees will have the opportunity to earn CLE Credit in the following jurisdictions: CA, FL, IL, MN, NJ, NY, PA, and TX.

Please Note: Should you need credit in a different jurisdiction, we will be happy to supply you with a certificate to allow you to self-report your credit.

Invest in Your Professional Development

Opportunities for virtual programming abound. BUT, what is often missing is quality content and camaraderie. The PLDF Annual Meeting substantive programming will be presented by the best and brightest in the professional liability community and our social events are sure to help you develop connections with fellow members. AND, all of it is offered at a reasonable rate.

Registration for the Annual Meeting is just \$50 for members (\$65 for non-members). We hope you will join us for this event! [Register today at www.PLDF.org!](http://www.PLDF.org)

Mission Level Sponsor

Continuing their support of the PLDF as a Mission Level Sponsor, Minnesota Lawyers Mutual Insurance will host the PLDF Virtual Annual Meeting on our behalf. We are very thankful for their continued support of and involvement in the association.



Register Now!

www.PLDF.org





The PLDF Career Center is the premier resource for positions for professional liability professionals.

The PLDF Career Center will allow you to:

- Post your job to the most qualified group of professional liability attorneys, claims professionals and risk management specialists in the industry.
- Promote your jobs directly to candidates via the exclusive Job Flash email.
- Search the anonymous resume database to find qualified candidates.
- Manage your posted jobs and applicant activity easily in a user-friendly site.

Learn more at www.PLDF.org.

There is no "I" in TEAM...
but there is a "U" in
VOLUNTEER!



Pick YOUR passion and get involved with PLDF:

Committee involvement is one of the best ways to get involved and to grow as a professional liability defense professional. Committees of the Professional Liability Defense Federation include:

- D&O / Trustee E&O
- EPL Claims
- Financial Professionals
- Healthcare Claims
- Insurance Agent / Broker Claims
- Lawyers Professional Liability Claims
- Miscellaneous PL & Cyber Claims
- Real Estate Design / Agents
- Young Professionals

Our committees are vibrant communities of attorneys, claims professionals, risk managers, and insurance professionals who devote their time, energy and expertise to advancing the PLDF mission, "to enhance the stature and effectiveness of professional liability defense professionals through education, training, and the exchange of information."

Learn more at www.PLDF.org

Professional Liability Defense Federation

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