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Claims Judicial and Legislative Affairs Quarterly Digest

July 2024

“Recognizing that today’s economic and litigation environments are top of mind for our customers, Zurich has devoted a team of subject matter professionals to address their concerns. The Claims Judicial and Legislative Affairs group studies social inflation and its drivers, providing insights and information to Zurich’s customers and brokers; our claims and risk engineering teams; and others who may influence our industry and the legislative environment. As a founding member and instrumental leader amongst a growing coalition of industry partners, we are proud to share this information in our *Quarterly Digest* and *Regional Recap*.”

Keith Daly
ZNA Chief Claims Officer

Social inflation is increasingly responsible for rising claims costs. This may affect how companies do business, interact with their communities, and connect with their customers. Zurich remains dedicated to working collaboratively with our customers, brokers, and risk mitigation industry members to tackle these challenges.

The **CJLA *Quarterly Digest*** highlights issues which touch the industry on a global, national, and state level. Trending topics as well as successful trial tactics are also shared. The articles contain direct links for more in-depth information. The **CJLA *Quarterly Digest*** publishes once a quarter.

The **CJLA *Regional Recap*** captures the latest legislative enactments and judicial decisions that impact social inflation and the insurance industry. For ease of use, these are indexed by region and by state with direct links to the exact legislation or citation. **The *CJLA Regional Recap*** publishes four times a year.

Education is only the beginning of the solution. Leveling the playing field requires that all be involved.

To join Zurich in combatting social inflation – or for questions or submission of topics for future issues – please contact lisa.bellino@zurichna.com.

Table of contents

In this issue:

Global news

Biometric data protection
A global issue

The European Parliament and Council of the European Union created the General Data Protection Regulations (EU GDPR), in effect as of May 2018, which provides guidelines on how personal data should be handled. The EU GDPR gives special consideration to biometric data which is subject to stricter regulations. EU GDPR Article 4(14) defines biometric data as "personal data resulting from specific technical processing relating to the physical, physiological, or behavioral characteristics of a natural person, which allows or confirms the unique identification of that natural person such as facial images or dactyloscopic data". The EU GDPR protects all EU citizens and long-term residents and applies to non-EU entities, not just companies based in the EU.

Processing of biometric data is generally prohibited with specific exceptions, for example, when explicit consent is given. Individuals also have specific rights with respect to their data. The EU GDPR allows individual member states to issue fines of €20M or 4% of global annual revenue, whichever is greater, against entities violating the regulation. EU member states are permitted to impose additional regulations related to biometric data through their respective agencies regulating data protection ('regulator'). Member countries have acted upon the GDPR when violations have occurred.

For example, France and Spain have established specific regulations for employers with respect to collection of biometric data. The Spanish regulator recently fined a logistics company $391K USD for violations related to handling of biometric fingerprint data of its employees. The employer failed to inform its employees that the data was stored on an employee platform, in violation of the GDPR. The Netherlands regulator has also issued fines in several instances. One company was fined €725K for processing fingerprint data in violation of the GDPR.

The French data protection regulator fined an AI company €20M for its use of facial recognition software to search publicly available images of a specific person by creating a biometric template, which was in violation of the GDPR. The same company was fined by the Italian regulator as well as the Greek regulator. Fines were imposed by multiple member states because the entity was not based in the EU.

Outside of the EU, effective September 1, 2023, Switzerland amended its previously existing data protection law from 1992 to strengthen data privacy protections and address new technologies (the Federal Act on Data Protection (FADP). Like the EU GDPR, the FADP added stricter controls for certain categories of sensitive data, such as biometric data and genetic data. Post-Brexit, the United Kingdom adopted the EU GDPR into its national law (UK GDPR), with some minor differences. Jurisdictionally, the UK GDPR applies to the UK; companies operating in both the EU and the UK must comply with both regulations. The UK has its own regulator to enforce the UK GDPR with the ability to issue fines. However, both regulations provide the same level of protection for biometric data.

Brazil has regulations governing the use of personal data, which includes biometric data; similar to the EU GDPR, biometric data is considered sensitive personal data and can only be used with specific consent to the specified purpose. Fines are allowed under the regulation, but less than what is allowed under the EU GDPR.

In the Asia Pacific region, Australia has a privacy act which includes regulation of biometric data and provides for significant fines of $32M USD or higher. Although not related to collection of biometric data, an Australian federal court fined Google $60M USD for collection of personal location data from Android phones under this statute. New Zealand has introduced draft code regulating biometric processing currently under consideration.

The above article is not an exhaustive list of countries with privacy laws addressing biometric data but examples to raise awareness. While many of the regulations discussed allow only for penalties or fines to be assessed against the non-compliant entity, the EU GDPR also allows for an individual to bring a private right of action as well as collective actions (class actions). In the Netherlands for example, there have been a number of civil cases filed by individuals. While relatively small fines were assessed, the collective action provision of the EU GDPR would allow for a large class of individuals to file a single civil case. Much like in the United States, with the ability of a large class of individuals to bring a single case under the EU GDPR, there is a potential for significant monetary consequences.

National news

Biometric data protection
A U.S. issue

As reported in the 2023 Q3 CJLA *Quarterly Digest*, Illinois' Biometric Information Privacy Act (BIPA) created the ability for private plaintiffs to file lawsuits despite a lack of tangible damages. In 2023, the Illinois Supreme Court decided that the potential $5K fine for violation of the act occurred each time someone's biometrics were scanned in *Cothron v. White Castle Systems, Inc.*, based on BIPA as it was written. In the wake of *Cothron*, the Illinois legislature recently amended BIPA so that each person who alleges biometric information has been scanned or collected may only recover damages once. The amended BIPA has been sent to the Governor who has until August 14, 2024, to respond.

Since *Cothron*, biometric privacy has been spotlighted in several areas. For example, New York City has its own biometric privacy act, which applies to customers and the collection of such data. This statute does not on its face limit who might bring an action as it gives "any person" the right to seek redress for each violation. Each negligent violation may include liquidated damages of $1K or actual damages, whichever is greater, but an intentional or reckless violation allows for $5K or actual damages whichever is greater. Much like the result in the *Cothron*, the results of a class action suit could significantly impact a business or bankrupt it if the law is applied as written. To date, New York City has seen lawsuits against Amazon, T-Mobile, and Starbucks for alleged violations of its biometric privacy act.

Target's surveillance system, designed to detect shoplifters, has also been the basis of a recent Illinois BIPA class action suit. Allegedly, this system's cameras and video surveillance can capture biometric data, including fingerprints and facial recognition. As this acquisition of biometric information is identified and stored without written consent, the allegation is that it violates Illinois' BIPA. The class further contends that this "top of the line" facial recognition is used throughout the United States. As in New York City, Amazon was sued in federal court in Illinois. Much like in *Cothron*, this case alleges that employees' biometric information was collected and stored without their knowledge or consent. Similarly, Facebook, TikTok and Snapchat have paid Illinois' residents claims for multi-million dollar settlements.

Washington state also has these statutes, one which encompasses commercial use and the other for personal health data. Given these statutes, a class action suit was filed and ultimately dismissed, alleging that Amazon's voice activated, digital assistant, Alexa, improperly gathered and stored data. Using this data, the lead Plaintiffs (both from out of state) alleged that they were targeted with Amazon advertisements based upon their voice-activated queries.

Similarly, several other states have privacy acts which may be considered to protect biometric information. California, Colorado, Connecticut, Delaware, Indiana, Iowa, Kentucky, Maryland, Minnesota, Montana, Oregon, Tennessee, Texas, Utah, and Virginia all have some type of state privacy laws. While all may not be biometric privacy acts, they may act similarly. Of these, only California (like Illinois) allows for private complaints to be filed. Colorado's latest statute focuses on protecting consumers from artificial intelligence (AI) data collection.

Along the same lines, the United States House and Senate have jointly released a draft of the American Privacy Rights Act (APRA). APRA protects "covered data" as well as "sensitive covered data," which includes genetic information. If passed, the APRA and the Federal Trade Commission (FTC) would have the ability to enforce violations of APRA and would allow state attorney generals and state privacy authorities to bring civil actions and create a private cause of action for persons who provide the appropriate notice and sustain a "substantial privacy harm."

The eBay of TPLF

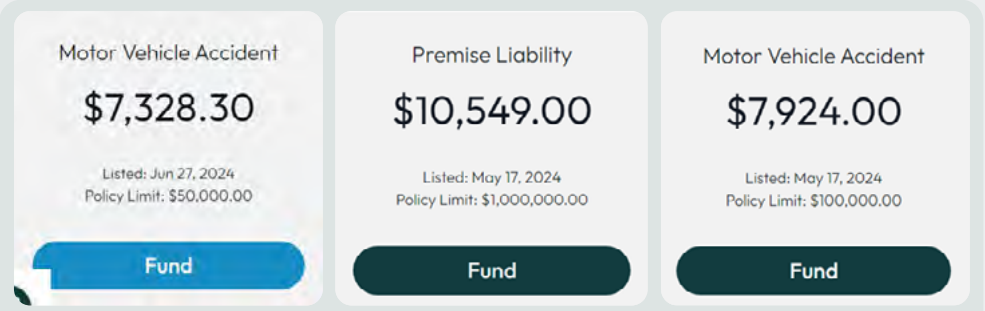
ClaimAngel Touts "Fair Funding for All"

Third party litigation financing (TPLF) is the mechanism for funders to provide non-recourse loans to a litigant or law firm in a lawsuit and, in exchange, receive financial interest in the potential recovery. TPLF is usually commercial or consumer and in either case, the loan need not be repaid if there is no recovery. In 2023, there were 39 known capital sources of TPLF in the U.S. market, which managed $15.2B in U.S. commercial litigation. There are also unknown capital sources since TPLF often need not be disclosed. For example, it was reported that an investment firm of Russian billionaires has been involved in litigation financing around the globe, purportedly to evade sanctions. Funding law firms through portfolio funding, is also a form of TPLF. With portfolio funding of TPLF, funders can finance all or some of cases within a law firm, under the same non-recourse method. Portfolio funding appears to be included in the managed total for the U.S. market.

The amount of lending in the consumer market, however, is not part of the $15.2B figure for 2023. Instead, individual plaintiffs may obtain funding through other companies, sometimes unknown to their lawyers to be repaid from their recovery. To find such funders, a simple Google search into "consumer funding for a lawsuit" produces a litany of financial companies which will lend money to individual plaintiffs. One company, though, does not typically show up on most Google searches: ClaimAngel.

ClaimAngel was founded by South Florida personal injury attorneys Russell Berman and Theodore Berman along with a former licensed Florida attorney Jeremy Alters in 2023. Using the banner "Fair Funding for All," ClaimAngel is an online legal funding marketplace that gives claimants and law firms access to multiple funders simultaneously using legal technology. Put simply, claimants make one application, and similar to an eBay auction, that application goes immediately to all funders on the platform. Funders will have the ability to fund a claim on the ClaimAngel Marketplace and prospective funders do not need to be a U.S. citizen or corporation to become a funder on ClaimAngel. Once the funding request is posted on the ClaimAngel Marketplace, claimants and law firms can then choose a funder based on the commercial terms on an offer, including cost and timescale. When a claim settles, the claimant's attorney will pay the funder the total repayment amount through ClaimAngel.

To obtain funding through ClaimAngel, claimants and law firms must provide and upload case information such as police reports, medical reports, medical billing, insurance information, photos, digital media, and settlement offers received on a case. In addition, claimants waive any right to claim confidentiality or assert attorney-client or other privilege as to claim information posted on the ClaimAngel Marketplace. Only those registered and approved funders have access to all the claim information on the Marketplace. However, the ClaimAngel public marketplace does allow limited access to claim information including the requested funding amount, insurance policy limits, and any settlement offers, as depicted below.



Source: https://claimangel.com/marketplace/claimant

Currently, ClaimAngel funds claims across the United States, excluding Arkansas, Colorado, Kansas, Maryland, Nebraska, New Mexico, Vermont, or West Virginia.

A wave of tort reform

The Pelican State enacts new legislation

In the decades since Hurricane Katrina, statutes specific to insurance have increasingly required more of insurance providers. Four named storms in two years drove almost a dozen insurers into insolvency and, coupled with laws restricting homeowners' insurers from dropping or reducing coverage for long-term policyholders, gave insurers a reason to avoid entering the Louisiana market. This year, legislative changes in Louisiana could lead to recovery of the state's insurance market. A new governor, a new insurance commissioner, and several new legislators came together to enact several years' worth of tort reform and market modernization efforts.

Over the past few years, work to reduce the impact of punitive measures of Louisiana's bad faith statutes has been underway. Compromise measures were negotiated with the trial bar, which successfully resulted in the enactment of measures which simplify the claims process by clarifying the time frames for initiating and/or reopening property claim adjustments and making payments, allowing insurers an opportunity to resolve any disputed payments, offsetting potential penalties by partial payments, and explicitly excluding surety bonds from the bad faith statutes.

Other efforts to reduce the severity of claims resulted in further tightening the circumstances in which an insurer can be directly sued, and excluding the installation (or not) of optional equipment on commercial vehicles as a cause of action. An incorrectly completed uninsured/underinsured motorist coverage selection form will no longer automatically result in a court finding coverage under a new statute. Now, absence of a clear request for coverage coupled with the commercial policyholder's lack of corresponding premium payment, creates a presumption that coverage was not selected. Legislation eliminating the requirement that litigation against insurers not domiciled in Louisiana be brought in East Baton Rouge Parish could move up to 15% of lawsuits against insurers to less plaintiff friendly courts. Further, the statute of limitations has been extended from one to two years in negligence actions.

Finally, third-party litigation financing (TPLF) agreements will be subject to disclosure and are discoverable under the Transparency and Limitations of Foreign Third-Party Funding chapter. Foreign entities providing financing will be required to disclose their involvement in litigation to the Attorney General, who will be required to prepare an annual report to the legislature. Further, this law places limits on the ability of financiers to affect how the litigation or settlement of a claim is conducted and limits their access to confidential information obtained during the course of discovery. The existence of the agreement itself will be subject to discovery.

In contrast to these tort reform measures, the governor vetoed a change to the collateral source rule. As originally enacted in 2020, a jury is only presented with evidence of the billed amount of medical expenses. While a plaintiff's recovery for any amounts actually paid to a medical provider would be limited to the amount paid (plus 40% if paid by a health insurer or Medicare), they would still be able to recover the billed amount if the medical providers had not been paid at time of trial. Arranging for delaying payment of their client's medical bills is a frequent tool employed by Louisiana trial attorneys. The "compromise" in this bill would only have reduced the required 40% award to 30% at the discretion of the trier of fact, but still left the door open for recovery of billed amounts of unpaid medical expenses. The governor's veto message shows that he viewed the bill as unfair to claimants whose medical bills were covered under insurance or Medicare.

Given all of the recent activity in the Louisiana legislature, it is not anticipated that any additional tort reform will occur before the next statewide elections in 2027.

Commercial property owners note:
An expanded sidewalk duty now exists

The Supreme Court of New Jersey has now held that sidewalk liability extends to any commercial property owner who owns a lot zoned for commercial use whether the property is vacant, has a vacant building on it or is an active business. Formerly, owners of vacant property zoned, "commercial," were not liable to maintain the sidewalk because there was no daily business activity upon the property and convenient access was not essential since these vacant properties had no means of generating income.

This new bright-line rule enunciated in *Padilla v. Young* is a change for commercial property owners in New Jersey. The *Padilla* court noted that previously, New Jersey sidewalk liability was determined on a case-by-case basis. In 1981, the New Jersey Supreme Court decided *Stewart v. 104 Wallace Street, Inc.*, holding that commercial landowners were obligated to maintain sidewalks abutting their "active" business properties or properties, with "active" being the key word. Commercial properties were carved out of the general "no liability" rule due to their "nature as profit-making investments and their capacity to spread the risk of injury among tenants and business customers." In 1995, the Court explained its view in *Abraham v. Gupta*, holding that commercial property owners are not responsible for maintaining sidewalks abutting non-revenue-generating vacant lots. In *Gray v. Caldwell Wood Products, Inc.*, the 2012 Court then imposed a duty to maintain the sidewalks where a vacant commercial building "could" generate income. Now, in 2024, the *Padilla* decision expressly overrules the holding in *Abraham*.

Procedurally, Plaintiff, Alejandra Padilla alleged injury after tripping on a sidewalk adjacent to a vacant commercial lot in Camden, New Jersey. The lot, owned by the Defendants, was purchased in 1992 with the intent of constructing a building on it. Although the lot remained vacant for 27 years, the defendants visited and inspected the lot regularly. As the Defendants' economic situation was "really bad," the property remained undeveloped and uninsured.

Plaintiff alleged that the Defendants' failure to maintain the sidewalk caused her injuries. Defendants filed for summary judgment, which the Court granted, citing the precedent set in *Abraham*, that owners of commercial vacant lots did not owe a duty of care. This decision was upheld by the Appellate Division, affirming that there was no duty to maintain the sidewalk because the Defendants' lot was not income generating and there was no daily business upon it. The New Jersey Supreme Court took the matter on *certiorari* and reversed.

The New Jersey Supreme Court reversed the lower courts' rulings in a 4-3 decision penned by Justice Pierre-Louis, establishing that all commercial landowners, including those with vacant lots, have a duty to maintain abutting sidewalks. The Court's decision rests on considerations of fairness and public policy. The Court emphasizes that purchasing a commercial lot is a business decision that embraces the attendant costs and burdens of conduction business, including maintaining adjacent public sidewalks. The Court finds that to base liability on potential profitability will only further confuse commercial sidewalk liability and lead to inconsistent results. The Court states that this new bright-line rule, "will ensure fairness, consistency, and predictability going forward." Recognizing that this is typically an area of legislative concern, the *Padilla* Court recounted that the *Stewart* Court literally asked the legislature to revisit the statute which governed the "no liability" rule but received no response in the 43 years since. Drawing from this silence, the *Padilla* Court asked the legislature to address sidewalk liability law.

This ruling has implications for commercial property owners. While the prior standard was whether or not the property had the capacity to generate income, now any property zoned commercial, whether currently income generating or not, requires the owner to inspect, maintain and manage the commercial sidewalk that abuts the property. This expanded duty was placed on the *Padilla* Defendants retroactively, to the time of the incident in 2019. The question becomes what effect this change in the law will have from then going forward.

Trending topics

The continuing effect of amended FRE 702

The courts are taking a hard look

Amended Federal Rule of Evidence 702 (FRE) clarifies the standard for admissibility of expert witness testimony and emphasizes the role of the Court as a "gatekeeper" to keep out "junk" science. The decision by courts to exclude "junk" science has a significant impact especially in multidistrict litigation (MDL) where the decision can result in the dismissal of hundreds or even thousands of cases. This was examined in the 2024 Q1 CJLA *Quarterly Digest* article, "The Effect of Amended FRE 702: Throwing Out the Junk" which analyzed the Courts' decisions on expert preclusion in two pharmaceutical industry MDLs – In *re Acetaminophen* and *In re Onglyza*. The exclusion of Plaintiffs' general causation experts in these matters ended many cases. Recent MDL decisions springboard off these two pharmaceutical industry opinions and show the significant impact of Amended Rule 702.

Paraquat

More than 5,000 individual Plaintiffs alleged they developed Parkinson's disease because of their exposure to paraquat dichloride ("paraquat"). Paraquat is a restricted use ammonium herbicide used to control weeds in farming operations. The Judicial Panel on Multidistrict Litigation (JPML) consolidated these cases into the U.S. District Court for the Southern District of Illinois MDL *In re Paraquat Products Liability Litigation*. On April 17, 2024, Judge Nancy Rosenstengel issued an opinion granting Defendants' motion to exclude the testimony of Plaintiffs' sole expert witness, Dr. Martin Wells. The court subsequently granted defendants' motion for summary judgment.

Dr. Wells, a biostatistician and epidemiologist, opined that a causal relationship between paraquat and Parkinson's disease exists, and the Plaintiffs were at a "near triple" risk of developing the disease. The Court relying heavily on Amended Rule 702, held that while Dr. Wells was "well qualified to offer a general causation opinion", his methodological failings and the fact that his causation theory was not supported by any scientist outside this litigation could not pass muster. The Paraquat MDL Court acknowledged the parties' briefing was submitted prior to the amendment to Rule 702 taking effect; however, citing to the opinion *In re Acetaminophen- SD-ADHD Prod. Liab. Litig.*, the Court stated the amended rule does not "impose any new, specific procedures" and emphasized the proponent of the testimony bears the burden of compliance with Rule 702 - the expert opinion must "stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology".

The Court excluded the general causation expert for several reasons. First, Dr. Wells proffered a "meandering definition" of "occupational exposure" which he redefined no less than three times. The Court also found Dr. Wells' meta-analysis unreliable and would take a "degree in clairvoyance" to replicate which allowed him to generate a predetermined result. Further, his "weight of the evidence / Bradford Hill analysis was a textbook example of the type of standardless presentation of evidence that courts have cautioned against".

Talc
More than 53,000 women filed lawsuits against Johnson & Johnson alleging long term use of the company's talcum powder increases the risk of developing ovarian cancer. The cases were consolidated into the MDL *In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices and Products Litigation* pending before the U.S. District Court of New Jersey. In this protracted litigation, Johnson & Johnson consistently argued that the studies do not demonstrate a convincing link between ovarian cancer and talcum powder. In April 2020, MDL Judge Freda Wolfson issued an opinion on cross motions to preclude expert testimony. Judge Wolfson denied Plaintiffs' motions to preclude testimony from three Defense experts, but the judge devoted the crux of her opinion to examining and analyzing Plaintiffs' experts. While the judge's opinion was insightful, it did not completely dispose of the "junk science" offered by Plaintiffs, paving the way for thousands of pending talc cases to move forward.

When Judge Wolfson retired, Judge Michael Shipp took over Talc MDL. The Defense argued to Judge Shipp that the opinion authored by Judge Wolfson should be re-examined as many years had passed since the ruling; science had evolved, and Rule 702 was amended since the restart of the MDL after bankruptcy proceedings. Judge Shipp agreed that the amended Rule 702 and new science made it appropriate to revisit expert preclusion and allowed the parties to file expert preclusion motions. The "new science" includes a May 2024 study from the National Institutes of Health which was published in the Journal of Clinical Oncology. This new study supports a positive association between talc use and ovarian cancer. The study does not explicitly establish causation. It has been suggested that given this "new" information, the Plaintiffs will rely on the NIH findings to bolster their case to include expert testimony in upcoming trials. Rule 702 Motions were to be filed by July 23, 2024, and oppositions are due August 2024.

Hair relaxer
In October 2022, the National Institutes of Health published a study concluding women who used chemical hair straightening products were at a higher risk for developing uterine cancer than those who did not use the products. In February 2023, the Judicial Panel on Multidistrict Litigation transferred over 50 products liability and consumer protection hair relaxer lawsuits to the MDL *In re Hair Relaxer Marketing, Sales Practices and Products Liability Litigation* pending in the U.S. District Court for the Northern District of Illinois. By May 1, 2024, the number of lawsuits grew to nearly 8,500.

The lawsuits allege the hair relaxer products contain phthalates or endocrine-disrupting chemicals that cause or increase the risk of developing uterine, ovarian or breast cancer, endometriosis, uterine fibroids or other reproductive injuries. In May 2024, more than 300 Plaintiffs who were not diagnosed with ovarian, uterine or endometrial cancer petitioned the Court to dismiss their cases before the MDL reached motion practice with respect to Rule 702. The Court is entertaining briefing before rendering an opinion. Briefing concluded in late June 2024.

Summary
These recent decisions in the Paraquat and Talc MDLs demonstrate the broad applicability of Amended Rule 702. The Courts are clearly embracing their function as a "gatekeeper" and are examining whether proffered expert evidence passes muster.

Trials & tribulations

Litigation strategy plays a critical role in combatting social inflation. In "Trials and Tribulations," Zurich Staff Legal attorneys share tactics used to secure optimal outcomes for their customers.

Liability challenges in a highway accident

Simple steps overcame a complex lawsuit

Using a series of strategic motions, Defense counsel successfully obtained the dismissal of a Virginia Plaintiff's $20M wrongful death case (with $7.5M pre-suit demand) and a related personal injury case against a Zurich insured general contractor (GC). The case will now only proceed against the co-defendant.

Near midnight one summer night, the decedent and her disabled adult daughter were driving around the Washington beltway when they entered a construction work zone. Minutes earlier, the Traffic Control Subcontractor (TCS) hired by the GC had begun to set up a lane closure for the GC's milling and paving operation taking place the next morning. The Plainiffs alleged that this took place in a particularly dark area of the six-lane highway where the TCS employee stopped his barrel truck in a live traffic lane in the middle of the road without the protection of a shadow truck-mounted attenuator (TMA) with an arrow board. The result was catastrophic; the decedent was killed instantly when she crashed into the back of the stopped barrel truck at highway speed. Her daughter in the seat next to her escaped with relatively minor physical injuries. The entire aftermath was caught on the responding state trooper's bodycam footage.

The decedent's estate and the daughter filed suits against the TCS, its barrel truck driver and his supervisor, and against the GC, asserting claims including negligence and vicarious liability against the GC. Plaintiffs alleged that the work zone as operated, supervised, maintained, and controlled was inherently dangerous. Defense counsel for the GC filed a Demurrer (Motion to Dismiss) as to all counts and Plaintiff's counsel relented and agreed to the dismissal of all claims except those for negligence and vicarious liability.

These claims involved several complex legal doctrines recognized under Virginia law and the analysis of a long line of cases concerning each. Procedurally, memoranda supporting motions was limited to five pages in this jurisdiction and although the case warranted a lengthy memorandum to analyze the issues, there was no advantage in giving Plaintiffs' counsel additional pages to distract the judge.

Initially, Plaintiffs asserted that the GC was liable for the TCS' negligence because the TCS' traffic control work was inherently dangerous – i.e., an activity in which injury to others will definitely occur unless special precautions are taken. In Virginia, general contractor immunity does not apply if inherently dangerous activity is involved, thus it may be liable for the negligent acts of its independent contractor. In that circumstance, the employer is bound to ensure that special precautions beyond doing the work carefully and competently are in place to avoid or prevent injury. However, to constitute an inherently dangerous activity, the work must be dangerous in and of itself and not dangerous simply because of the negligent manner in which it was performed.

Recognizing the appeal of Plaintiffs' argument that traffic control work is inherently dangerous along with the tendency of the courts to deny preliminary dispositive motions if the issues appear complex or fact-driven, success depended on a re-defining of the issue. Making the argument as simple and straight forward as possible, Defense counsel posited that:

1. the inherently dangerous work was the GC's road work itself (i.e., people walking and working in the middle of a highway)
2. in order to safeguard against dangers associated with the work zones, the special precaution – traffic control – was employed; and
3. the crash was caused by the manner in which the TCS performed the work rather than the nature of traffic control work itself (noting that to establish causation, Plaintiffs had to allege that had the TCS done the work properly the accident would not have occurred).

To counter this strategy, Plaintiff's counsel relied heavily on the argument that the Complaint was sufficiently detailed to survive a preliminary motion as it implied that the TCS was involved in traffic control while it was also engaged in other road work for the GC. Agreeing with the GC's position, the court sustained the Demurrer with leave for Plaintiffs to amend to add more factual allegations about what each defendant was responsible for and what the TCS was doing at the time of the accident.

Given their previous argument, Plaintiffs could not in good faith allege that the TCS was involved in something other than traffic control on the project. They then tried a different approach and added three dozen paragraphs to their amended complaint based on the obligations the GC undertook in its prime and sub-contracts. They alleged that the GC owed and breached a duty to Plaintiffs because it was responsible for traffic control (specifically lane closures) pursuant to the Prime Contract, and, that the GC hired and had control over the TCS' work, making the TCS its agent rather than an independent contractor for vicarious liability purposes.

Plaintiffs first challenge was relying on the GC's obligations under its contracts given the ruling on the first Demurrer that traffic control was the special precaution for the inherently dangerous road work. Plaintiffs were further challenged by Virginia's Source of Duty rule which restricts the extent to which a party whose duty arises out of contract can be sued in tort when the injury was caused by an act of omission rather than one of commission. Defense counsel argued that the TCS owed and breached an independent tort duty not to stop a vehicle in the middle of the beltway. In contrast, the source of any duty owed by the GC pertaining to traffic control (and the alleged failure to have done something required by its various contracts) arose solely from its contracts such that it did not create any tort duty owed to Plaintiffs.

In response to the Plaintiffs' agency argument, the Defense needed to file a Motion Craving Oyer in order to attach and incorporate the entirety of the TCS subcontract into the amended complaint. In doing so, the GC was able to argue and demonstrate that the TCS was not the GC's agent because the GC did not have control over the means and methods of the TCS' traffic control or its failure to use a TMA; rather, those obligations were mandated and controlled by Virginia law and regulations. The Court agreed with the Defense analysis across the board and dismissed all claims with prejudice.

Trials & tribulations

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If a picture is worth a thousand words

An Instagram video is priceless

Plaintiff’s claims of soft tissue back injuries and possibly a knee tear from an automobile accident were not all that unusual. In counsel’s – and the claim representative’s – experience, a bicep tendon tear is not typically related to a motor vehicle accident. That, coupled with the minor impact and that Plaintiff struck the defendant’s vehicle in the rear, raised suspicion from the onset.

Defense counsel conducted a social media search and found Plaintiff’s Instagram account. It revealed videos showing Plaintiff performing weight-lifting workouts. Sharing this with the claims partner, both agreed that Plaintiff’s tear could have resulted from this gym activity.

During the Plaintiff deposition, Defense counsel questioned Plaintiff about her gym activities. Plaintiff testified that she could no longer lift weights at the gym as a result of this incident. Once that response was documented, Defense counsel demonstrated for Plaintiff and her attorney, on the record, the Plaintiff’s Instagram account, marking as an exhibit every video that Plaintiff had posted of herself lifting weights. Plaintiff considered that “private information” and therefore not appropriate for questioning. Upon further questioning, Plaintiff tried to backtrack and then said that the videos were taken before the accident but posted after the accident so that people wouldn’t know about her injury.

Having made sure that Plaintiff and her attorney knew that the Instagram account and all of its videos needed to be preserved, Defense counsel hired an investigator to secure all of the video footage and its metadata, as well as conduct surveillance of Plaintiff at the gym. Defense counsel requested the metadata from Plaintiff’s cell phone, with the intent that it would demonstrate when the videos were actually taken. Plaintiff’s council objected to the request for the metadata and the issue was brought before the court. The judge sided with Defense counsel and directed Plaintiff’s counsel to have his client turn over the metadata.

Shortly after the judge’s directive, Plaintiff’s counsel voluntarily discontinued the case.

Update: Most recently, Defense counsel learned that Plaintiff would not give the metadata to her attorney as it would contradict her testimony that the videos were taken before the incident.

Disclaimer and Antitrust Compliance Statement:

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Antitrust compliance is everyone's responsibility; however, ZNA's CJLA will monitor this publication and address any questions or concerns related to same.

For questions, submissions, or topics for discussion, contact lisa.bellino@zurichna.com.

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