ZURICH

Claims Judicial and Legislative Affairs Quarterly Digest

October 2025

“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 (CJLA) 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 Office

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

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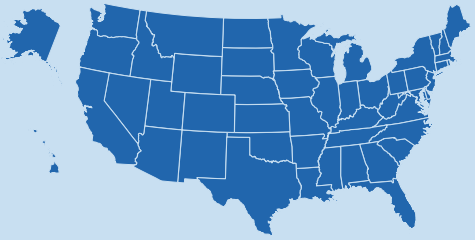


Third-party litigation funding:
Continuing efforts on the national front

Third-party litigation funding (TPLF) continues to be a topic of discussion, even amongst national law makers. There are currently four bills pending in Congress, as well as one recently that did not succeed, which share the same root in attempting to shed light on TPLF. Each of those highlights the issue but from a different perspective.

Disclosure of any TPLF in civil actions

The Litigation Transparency Act of 2025 is a revived effort by Rep. Darryl Issa to require disclosure of any TPLF in writing to the court and all other named parties within a federal civil suit. This legislation also would require the funding agreement be produced in the litigation and incorporate this into the Federal Rules of Civil Procedure. There are of course exceptions to the disclosure, such that neither the repayment of a traditional loan with certain limitations nor the reimbursement of attorneys' fees need be disclosed. The legislation requires the parties to supplement previous disclosures within 10 days if it is learned that the original is incomplete or that there has been a change in the circumstances. The act does not list any sanctions for failure to disclose specifically, nor does it make any reference to consideration of the funder as a party in interest. The legislation was introduced in the House of Representatives in February 2025. As of October 2025, there are 25 co-sponsors to the bill but it does not yet appear to have bipartisan support. Previously, the Litigation Transparency Act of 2024, which was identical to the 2025 bill, had been introduced to the House and referred to Committee, but did not advance further.

Focusing on foreign funding in the U.S. legal system

Focusing on TPLF involving foreign funders, the Protecting our Courts from Foreign Manipulation Act of 2025 was introduced by Rep. Ben Cline on April 7, 2025. The same text was introduced in the Senate in September 2023 with a referral to the Senate Committee on the Judiciary and no further action. Under this bill, TPLF, specific citizenship or registration information regarding foreign persons, foreign states, or sovereign wealth funds which are not parties to the federal civil litigation but have a right to payment from the outcome of the litigation must be disclosed to the court and the parties. This information must also be disclosed to the Attorney General and the Principal Deputy Assistant Attorney General for National Security. The disclosure requirements include the funding of a portfolio of cases which includes the specific civil case. Similar to the Litigation Transparency Act, the proposed legislation requires the disclosure of the actual agreement. The bill has timing requirements and also outlines the method by which the information needs to be disclosed. Most importantly, the Act would prohibit TPLF by a foreign state or sovereign wealth fund. The disclosure of this information is to be assimilated by the Attorney General who would report annually to congressional committees the activities and identities of those foreign funders. This bill has bipartisan co-sponsorship and currently sits with the House Committee on the Judiciary.

Doubled efforts to tax funders

Another bill aimed at TPLF was the Tackling Predatory Litigation Funding Act, introduced to both chambers of Congress in an effort to combat what one of its sponsors considered the funders ability to "meddle tax-free in the American legal system" while also providing relief to middle class Americans. Rep. Kevin Hern posited that this bill, which would amend the U.S. Tax Code, garnered support from 18 consumer, free-market and taxpayer organizations. Sen. Thom Tillis submitted this legislation, noting that, "Foreign investors in U.S. litigation don't have to pay tax on lawsuit proceeds because the tax code exempts foreigners from paying U.S. capital-gains tax, and their legal payouts are treated as capital gains." The House and Senate bills would require both domestic and foreign litigation funders to pay the ordinary income rate (usually 37%) on their earnings, plus a 3.8% surcharge. This has been called an "excise tax" of 40.8%, highlighting that 20.4% of any payment made to a funder must be withheld by any party or firm which has the agreement with the funder in order to enforce the new rule.

The language of this proposed legislation was added to the senate's version of the One Big Beautiful Bill before it made its way to the president's desk. However, the final version of the One Big Beautiful Bill did not contain this effort to tax litigation funding proceeds as the Senate parliamentarian deemed it was a regulatory provision and therefore violative of the reconciliation process under the Byrd rule. Although not included in the new law, both versions of the proposed legislation remain in in their respective committees.

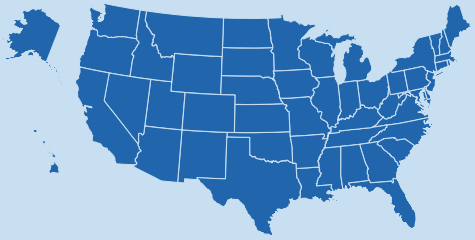
Stricter sanctions for frivolous lawsuits

Critics of TPLF have commented that it allows for frivolous and potentially fraudulent litigation. While taking aim specifically at frivolous cases, the Lawsuit Abuse Reduction Act of 2025 simultaneously targets TPLF. This legislation, introduced by Rep. Mike Collins, seeks to modify existing Federal Rule of Civil Procedure (FRCP) 11 to impose mandatory sanctions for the filing of frivolous lawsuits rather than leave the sanctions to the discretion of the court. Additionally, the modifications would include eliminating the 21-day "safe harbor" that allows pleadings to be withdrawn or corrected once challenged so that the allegedly offending party evades sanctions. The change would require payment of attorney fees and reasonable expenses to the prevailing party and permit other sanctions, such as striking pleadings or even dismissing cases outright. Monetary sanctions would also be available.

While these bills have not yet become law, their introduction demonstrates that TPLF is being considered by federal lawmakers, placing the issue before a national audience. The ongoing debate over TPLF continues to shed light on this otherwise hidden issue, exposing it more with each new legislation proposed.

By: Lisa M. Bellino, Zurich CJLA

National news



Beyond borders:
The push to expand general jurisdiction

The United States Supreme Court's decision in *Mallory v. Norfolk Southern Railway Co.*, upheld the constitutionality of Pennsylvania's law allowing general jurisdiction over any company that registers to do business in the state. The *Mallory* decision has encouraged other states to explore expanding general jurisdiction by enacting similar "consent by registration" statutes. The *Mallory* decision was previously discussed in the *Quarterly Digest* article entitled "The Cost of Doing Business" (September 2023 ed.)

> *Registering to do business in a state now subjects a company to suit in the courts of that state by a plaintiff who lives anywhere, for an occurrence that doesn't even happen there. In Mallory v. Norfolk Southern Railway, a fractured U.S. Supreme Court decided that a state may write laws that subject a company to its jurisdiction without even making that requirement part of the registration process. Thus, Mallory factors the litigation climate of a state into a company's decision to do business there.*

As noted in the article, the *Mallory* decision has far-reaching implications for businesses:

> *Where to do business is an important consideration for any company. The factors that influence the decision include supply and demand, the costs of goods and transportation, and of course, the laws that govern. Now, the United States Supreme Court has changed the game by adding "litigation climate" to the list of considerations.*

The *Mallory* decision has led to some states broadening their jurisdictional reach by enacting similar "consent by registration" laws.

Broadening jurisdictional boundaries encourages forum shopping as such laws allow out-of-state plaintiffs the opportunity to sue out-of-state companies in a forum they perceive as favorable, regardless of where the specific injury occurred. Pushing such jurisdictional boundaries may result in increased litigation in such jurisdictions, not only burdening busy courthouses with additional lawsuits but may also saddle businesses with additional risk and liability exposure, especially those that operate in multiple states.

Illinois

At the close of the 2025 Illinois legislative session, the Illinois General Assembly passed Senate Bill 328. Senate Bill 328 is a "consent by registration" bill respective to toxic torts. The bill was delivered to Governor Pritzker and signed into law on August 15, 2025 (the effective date of the bill). The bill expands the jurisdiction of Illinois courts by amending the long-arm statute found in Illinois Code of Civil Procedure (Section 2-209) and the Illinois Business Corporation Act of 1983 (Sections 13.20 and 13.70) to allow the courts to exercise general jurisdiction over "foreign corporations" in lawsuits alleging injury due to exposure to "toxic substances" as defined by the Illinois Uniform Hazardous Substances Act (430 ILCS 35/2-5). Illinois law generally defines a "foreign corporation" as a for profit corporation organized under laws other than Illinois. The Illinois Uniform Hazardous Substances Act defines a "toxic substance" as any substance (other than a radioactive substance) that can produce bodily injury or illness through ingestion, inhalation, or absorption through any body surface.

With the enactment of this legislation, an out-of-state plaintiff can sue a foreign corporation if the corporation registers to do business in Illinois or transacts business in Illinois, the lawsuit alleges injury to a toxic substance, and at least one co-defendant is properly subject to jurisdiction under the long-arm statute set forth under Section 2-209(a). This departs from the Illinois Supreme Court's decision in *Aspen Am. Ins. Co. v. Interstate Warehousing, Inc.*, which requires a corporation have minimum contacts with the state. In *Aspen*, the Illinois Supreme Court held that "the fact that a foreign corporation has registered to do business under the Act does not mean that the corporation has thereby consented to general jurisdiction over all causes of action, including those that are completely unrelated to the corporation's activities in Illinois."

The business community, including the Illinois Manufacturers' Association, strongly opposed this bill as it reshapes Illinois' jurisdictional rules and exposes companies to liability simply for registering to do business in Illinois. The enactment of Senate Bill 328 has made Illinois an outlier as it is only the second state in the nation (aside from Pennsylvania) with a "general jurisdiction" law. It is anticipated that the enactment of this legislation may lead to litigation tourism and an increase in toxic tort lawsuits filed in counties perceived to be more plaintiff friendly such as Cook, Madison and St. Clair counties. The impact on the business community remains to be seen. There is potential that the enactment of this legislation may deter businesses from doing business in the state as it creates an unpredictable risk and greater exposure.

New York

New York legislators have also passed a bill attempting to expand civil jurisdiction (A8303 / S8186). The proposed legislation provides that a foreign corporation's (for profit or non-profit entity) application to do business in New York constitutes consent to general jurisdiction by New York courts. The bill is a modified version of prior "consent to jurisdiction" legislation that Governor Hochul vetoed in 2021 and in 2023. It is anticipated that the bill will be delivered to Governor Hochul later this year.

Contrary to prior versions of the 2021 and 2023 bills, the 2025 general consent bill narrows the ability to file litigation to New York residents, an entity organized under the laws of the state (including corporation, non-profits, partnerships, and individually owned businesses), and out-of-state businesses authorized to do business in New York. However, the proposed legislation still authorizes lawsuits for claims that are unrelated to New York, but for the fact that the defendant is authorized to do business in the state.

The Governor vetoed the prior 2021 and 2023 versions' similar jurisdiction expanding legislation, recognizing such legislation would likely overburden the courts and create a chilling effect on the development of business opportunities and growth in New York:

> Veto #147, December 2023:
> *I vetoed substantially similar legislation in 2021 due to concerns that the proposal would represent a massive expansion of New York's laws governing general jurisdiction, likely deterring out-of-state companies from doing business in New York because it would require them to be subject to lawsuits in the State regardless of any connection to New York. The bill would cause uncertainty for those businesses and burden the judicial system.*

Federal courts

Judicial decisions concerning forum shopping have recently come to the forefront. Forum shopping may occur horizontally, with plaintiffs seeking to position their cases in the most favorable state or county. However, it may also occur vertically, between federal and state courts where defendants may be improperly joined with the objective of destroying diversity jurisdiction, preventing removal to federal court and allowing the case to remain in state court. Two matters have recently brought this type of vertical forum shopping and improper joinder to the forefront.

The United States Supreme Court recently granted a writ of certiorari to hear *The Hain Celestial Group, Inc. v. Palmquist* involving the concept of fraudulent joinder. The underlying lawsuit, *Palmquist v The Hain Celestial Group, Inc*., alleged the defendant's baby food contained harmful levels of heavy metals causing the minor plaintiff's mental and physical decline. The case was originally filed in Texas state court against the baby food manufacturer (a citizen of Delaware and New York) and the grocery store distributor of the formula (a citizen of Texas). The United States District Court for the Southern District of Texas (Galveston) dismissed the grocery store defendant on improper joinder grounds. The case against the manufacturer proceeded to trial. At the conclusion of trial, the district court granted judgment as a matter of law in favor of the remaining manufacturer defendant, holding that plaintiffs could not prove causation.

On appeal, the United States Court of Appeals for the Fifth Circuit did not reassess the causation arguments but rather reversed the district court's judgment denying plaintiffs' motion to remand to state court, vacated the final judgment of the district court, and remanded the case to proceed in state court. In short, the Fifth Circuit's decision added the grocery store distributor back into the case and allowed the plaintiffs a do-over in state court, forcing the manufacturer to re-litigate a case it had already won on the merits. The United States Supreme Court will address whether a federal court's final judgment as to diverse parties must be vacated when an appellate court later determines that the federal court erroneously dismissed a non-diverse party at the time of removal. The matter was argued on November 4, 2025.

The U.S. District Court for the Northern District of Illinois (Judge Rebecca Pallmeyer) also examined the issue of fraudulent joinder in several multidistrict litigation ("MDL") cases she oversees alleging cow's milk-based infant formula caused necrotizing enterocolitis *In Re: Abbott Laboratories, et al. Preterm Infant Nutrition Products Liability Litigation*. Several of the MDL cases originally filed against the baby food manufacturer also named Pennsylvania-based hospitals as defendants. The manufacturer defendant attempted to remove these cases from state court to federal court on two prior occasions, citing fraudulent joinder of the hospitals. The Court previously rejected these attempts. However, once the Pennsylvania state court dismissed the hospitals, the manufacturer defendant attempted removal for a third time. This time defendant's removal argument gained traction with Judge Pallmeyer. She noted that it appears the Pennsylvania hospitals could have been fraudulently joined as there was a lack of intent to pursue claims against them, noting Plaintiffs did not pursue discovery against the hospitals in the years since they filed suit. Pallmeyer certified her order for immediate appeal to the United States Court of Appeals for the Seventh Circuit as there is little developed legal precedent on "no real intent" basis for fraudulent joinder. Meanwhile, there are hundreds of infant formula cases pending in state courts across the county, making the Seventh Circuit's opinion impactful. The Seventh Circuit entered a briefing schedule concluding in early November 2025. To date, no oral argument has been scheduled.

By: Rebecca Fozo, Zurich CJLA

Wildfires and workers' compensation:
Continuing opportunities for 2026

September brings the first year of a two-year legislative session in California to a close. The year was dominated by discussion of the 2025 catastrophic wildfires and surrounding questions of insurance availability in the state. Next year's discussion will bring another opportunity for California's legislature to address this complicated issue as well as simplify another equally complicated issue.

Ballot Proposal Addressing Proposition 103

As mentioned above, the devastating wildfires in Malibu and Altadena brought frustrations with the process of insurance rate regulations to the front. An independent insurance agent has proposed a new ballot initiative to repeal Proposition 103, approved by voters in 1988. Currently, insurance carriers must file an application with the Department of Insurance to raise premiums. The process can be lengthy and allows the public or advocacy groups to object. The proposed ballot would eliminate a great deal of the existing process and create stricter limitations on the approval to increase rates.

Meanwhile, Insurance Commissioner Lara has made "concessions" to the insurance industry under the assumption that the current regulations remain intact. For example, he has allowed the use of catastrophe modeling and reinsurance costs in determining rates. In return, his department has asked insurers to continue to insure or increase policy offerings to customers in wildfire vulnerable areas.

The ballot initiative process itself will require more than half a million signatures by April 2026 and significant funds to be successful on election day. Consumer groups have claimed removing Prop 103 would allow insurers to raise rates unchecked while insurance agents have indicated residents are unhappy with the current state. Regardless of the ballot's success, it has prompted a robust discussion around the state of the insurance market in the state.

Post Termination Cumulative Trauma Claims

Every 10 years or so, there is a push for change in the worker's compensation space such as SB 863 passing in 2012 and taking effect in 2013. At the time, changes to the voucher system and psychological claims created more simplicity for case resolution. While it may not have been a focus of this year's legislative session, one key area of workers' compensation has remained a frontrunner for next year's discussions: cumulative trauma.

Cumulative trauma is defined by California Labor Code section 3208.1 as "repetitive physically or mentally traumatic activities extending over period of time, the combined effect of which may cause any disability or need for medical treatment." The "traumatic activities" need not be dramatic with the quintessential injury being carpal tunnel syndrome resulting from constant typing. The other way to conceptualize these types of injuries is to consider them "wear and tear" from consistent type of work as opposed to a specific injury that results from a specific event such as a trip and fall accident. This makes defining a "date of injury" for a cumulative trauma much more difficult.

To determine date of injury, California Labor Code section 5412 (LC 5412) provides "that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." Under this definition, an employee may file a claim for cumulative trauma after leaving the employer. In addition, it necessitates testimony about the employee's disability and when the employee knew or should have known that the disability was work related. Many laypersons may claim they lack the requisite medical knowledge to realize the cause or origin of a disability.

The above code sections and California Labor Code section 3600(a)(10) may bar recovery to the claimant in post-termination cases unless the worker can demonstrate one or more of the following:

- The employer had prior notice of injury before termination
- The employee has medical records demonstrating there was an injury
- The LC 5412 defined date of injury was found to occur *subsequent to* notice of termination or layoff.

Using the example of carpal tunnel syndrome, an employee may have purchased a wrist brace for wrist pain from a local pharmacy at some point in the employment without seeing their doctor, but the question is whether this is enough for the employee to know the wrist pain is caused by work-related typing. Even though a worker's compensation judge can make a factual determination from the employee's testimony and records as to the LC 5412 date, and therefore apply the employee post-termination exception, many judges will require some medical reporting to prove that the employee knew that the wrist pain was work-related. If a worker is terminated, and then hires an attorney who refers the client to a treating physician, then the argument may be that the first time they may have known would be after termination.

Practically speaking, the scenario allows terminated employees to file cumulative trauma claims often long after leaving the employer. Even though the law provides a 1-year statute of limitations to seek benefits, the time begins from the date of injury. In part, the claims are often confusing for the parties and judges to decipher and argue due to the structure of the California Labor Code section 3600(a)(10). The analysis may be convoluted, which might then work to the detriment of the defendant since it must expend time and energy to litigate.

According to a California Workers' Compensation Institute study from 2024, cumulative trauma claims rose from 29.4% to 37.5% of all litigated claims from 2010 to 2022. The rise occurred most sharply in Southern California with almost half of all litigated claims in the Los Angeles Basin being filed as cumulative traumas. The region in which the claim was filed was found to have a big impact on whether the claim was filed as cumulative trauma. Two other factors were the length of time an employee worked and the industry sector. Thus, cumulative trauma claims seem to be growing in proportion and are more concentrated in areas where they are filed as a routine matter.

For 2026, there are opportunities to address both wildfires and cumulative trauma claims. From analyzing the past issues, it seems that simplifying the complex may be the best solution.

By: Mahima Raghav, Zurich CJLA

Applying the law to the facts:
The High Court changes its historical approach

In contrast to its previous decisions over the last 25 years, the Supreme Court of Ohio seems to have adopted an ideology that will now strictly apply the law to the facts – even when the facts appear to evoke deep sympathy. Two recent Ohio Supreme Court decisions underscore this shift in judicial philosophy.

In *State Ex Rel. Culver v. Industrial Commission of Ohio*, Ohio's highest court overruled the Court of Appeals and held that the widow of a decedent who died from asphyxiation after entering a room filled with dangerously high levels of nitrogen gas due to a malfunctioning system was not entitled to an additional award for a Violation of a Specific Safety Requirement ("VSSR") because nitrogen was not a "toxic gas." Under Ohio workers' compensation law, if a claimant can establish a VSSR, claimant is entitled to additional damages as a means to punish or deter the employer in its failure to comply with a specific safety requirement as defined by the administrative code, akin to punitive damages in a civil action.

The facts of *Culver* were considered tragic. Decedent, Kenneth Ray, was a security guard for a steel company. As part of his job duties, he was responsible for conducting safety checks and inspecting fire extinguishers. On the date of the incident, he inspected a fire extinguisher in an elevator control room that was pressurized and sealed to prevent contaminants from interfering with the machinery. An air-handling unit filtered outside air into the room and contained a pulse-cleaning system which used bursts of nitrogen gas. The unit malfunctioned and continually released nitrogen into this sealed room thereby displacing the oxygen from the room. Ray died of asphyxiation seconds after he entered the room and closed the door behind him. At the time of his death, the room contained only 4.7% oxygen. The undisputed dangerous threshold for oxygen in the air is under 19.5% percent.

The widow contended that the extremely high level of nitrogen present in the room amounted to a toxic gas as defined by the Administrative Code. If she established the nitrogen was a "toxic gas," it fell within the definition of an "air contaminant" for which the employer was required to provide a safety device. In a 6-to-1 decision, the Supreme Court reversed the Court of Appeals and held that the high levels of nitrogen present in the room did not meet the definition of a toxic gas. In reaching its conclusion, the majority found that nitrogen, in and of itself, is not necessarily toxic, and that it only presents a hazard when it displaces oxygen making the overall atmosphere hazardous to humans. Because nitrogen as a gas is not "toxic," it therefore did not fit the definition of an "air contaminant" that would require the employer to take steps to prevent or minimize exposure.

The dissent utilized the dictionary definition of "toxic" which means "extremely harsh, malicious, or harmful." More specifically, it means a substance "having the character inducing the effects of a poison; produced by or resulting from a poison; poisonous." The dissent further concluded that the high concentration of nitrogen present in the room made it a poison, and therefore, the level of nitrogen concentration was toxic. In addition to utilizing the dictionary definition of toxic, the dissent also noted that nitrogen gas is currently used to conduct executions of death row inmates by the United States and at least two other states. In contrast, the Ohio legislature has introduced a bill proposing to use nitrogen gas for its executions as well.

A second notable decision is *Berkheimer v. REKM, LLC*. In *Berkheimer*, the Ohio Supreme Court was asked to decide whether a restaurant can be held liable for serving a boneless chicken wing with bones in it resulting in injury to the plaintiff. The Court held that a restaurant is not liable to a customer for unknowingly serving bones in chicken wings it advertised as boneless.

Applying the law to the facts: *The High Court changes its historical approach*

Michael Berkheimer sued a restaurant, food supplier and chicken farm after suffering an esophageal tear from getting a chicken bone lodged in his throat while eating a boneless wing served by the restaurant. On appeal, the Court of Appeals focused on whether the bone that injured him was natural to a boneless wing. Plaintiff maintained that the issue should have been whether he expected to find a bone in a boneless wing. The Supreme Court held that the first question controlled the outcome – whether a bone was natural to the boneless wing. The Supreme Court noted prior established case law provided that whether a breach of care is established against a supplier of food depends on whether the consumer could have reasonably expected the presence of the injurious substance in the food and thus could have guarded against it. That consideration is formed by whether the injurious substance is foreign to or natural to the food. Because bone is natural to chicken, the Supreme Court was asked to determine whether a consumer should reasonably expect to anticipate and guard against an injurious substance that has specifically been disclaimed by the seller, such as bones in boneless wings. In short, the Supreme Court concluded that the chicken bone was natural to the food because it was natural to the chicken meat used to produce the boneless wings. Finally, the Court indicated that the size of the bone identified in the record was quite large compared to the size of the wing itself. As such, it was so large that, as a matter of law, the plaintiff reasonably could have guarded against swallowing it. Finally, the Supreme Court held that the term "boneless wing" is not a warranty of the absence of bones, but rather the label identifying a cooking style.

Both decisions received a fair amount of criticism in the media, but are exemplar of how the Ohio Supreme Court has taken a strict approach to applying the law to the facts.

By: Jonathan Philipp, Zurich Staff Legal

All roads lead to Philadelphia:
But now there may be an exit ramp

The year was 2023 – one that Philadelphia sports fans may not have seen coming: the soaring Eagles lost the Super Bowl in the final seconds; the team-to-beat Phillies were knocked out of the National League series losing 4 out of the last 5 games; and the red-hot Sixers dropped a 3-2 series lead in the semi-finals to end their bid for the championship. But Philly sports fans weren't the only ones who may not have seen things coming that year. Pennsylvania jurisprudence, which directly impacted Philadelphia, also underwent changes that many may not have seen coming: the U.S. Supreme Court decided that any company that registered to do business in Pennsylvania was subject to personal jurisdiction despite a lack of precedentially significant contacts, which meant that more cases could be filed in Philadelphia; venue requirements relaxed so that more cases could stay in Philadelphia once filed there; and, *forum non conveniens* no longer appeared to be a viable means to transfer cases out of Philadelphia although they seemed to belong elsewhere.

All roads led to Philly and then dead ended there – until now. In the short span of a month, those 2023 roadblocks have been breached and cases may begin flowing out of Philadelphia.

The jurisdictional log jam

The traffic jam started with *Mallory v. Norfolk Southern Railway*, decided in 2023 and previously discussed in the *Quarterly Digest*, which opened the gates for more out-of-state plaintiffs to hail non-Pennsylvania defendants into Philadelphia's Court of Common Pleas, already termed a "plaintiff-friendly" jurisdiction. At the time, Pennsylvania was the only state to have a registration law that bestowed personal jurisdiction over any entity that registered to do business there. Over the course of the years since *Mallory*, the Pennsylvania courts have found personal jurisdiction over defendants in cases filed in Philadelphia despite negligible contacts.

The venue obstacle

Side streets were blocked out of Philadelphia when the Pennsylvania Supreme Court determined an out-of-county corporate defendant seemingly lacking sufficient contacts "regularly conducts business" there, halting the effort to object to venue. Previously, objections to venue in a specific county were sustained if the corporate defendant could pass the "quality – quantity test" which developed and had long standing roots in case law. The test requires that:

> *the business engaged in must be sufficient in quantity and quality…The term 'quality of acts' is meant those directly furthering or essential to, corporate objects; they do not include incidental acts… By 'quantity of acts' is meant those which are so continuous and sufficient to be termed general or habitual. A single act is not enough.'*

However, in 2023, the long-standing test seemed to be rewritten, so that venue in Philadelphia was almost guaranteed. On its face, the Pennsylvania Supreme Court's decision in *Hangey v. Husqvarna Professional Products, Inc.*, held that even though only 0.005% of the defendant's direct sales from an authorized dealer were within Philadelphia, that was a large enough quantity and quality to constitute "regularly doing business." The *Hangey* decision was used to keep cases in Philadephia by opposition to the objections simply stating that any sales in Philadelphia was enough to establish venue. In addition, it was argued that those defendants who shipped goods and products to "big box store" depots, even though the depots were outside of Philadelphia, were still doing business there since ultimately the merchandise might be shipped within the city limits. Given that jurisdiction and venue were seemingly stacked against the defendant, many cases remained in Philadelphia that might otherwise have been more suitably filed elsewhere.

The *forum non conveniens* barrier

Compounding the issue was the 2023 holding by the Pennsylvania Superior Court (intermediate appellate court) that the *forum non conveniens* avenue for transferring properly venued cases was almost completely unavailable as well. Previously, a showing by a defendant that the venue was "oppressive" or "vexatious" would have been grounds for a transfer. In *Tranter v. Z&D Tour, Inc., et al.*, despite the witnesses being almost 300 miles and about 5 hours from Philadelphia, the Superior Court reversed the trial court's transfer. It held that now, potential witnesses would need to establish within their own affidavits how they were key to the defense of the case *as well as* how the current venue was oppressive to them. This new requirement seemingly sealed those cases that were venued in Philadelphia within the city limits.

The breach in the venue blockage

In the past few months, however, Pennsylvania appellate courts have twice clarified the *Hangey* decision by explaining how the quality – quantity analysis is still the appropriate test for determining whether venue is proper. In *Pickering v. Associated Realty Property Management*, the Pennsylvania Superior Court (intermediate appellate court) held that the plaintiff's decedent, who lived in and was injured in Centre County, PA, did not have a claim that was properly venued in Philadelphia. The Superior Court determined, using the *Hangey* analysis, that the quantity of business by the *Pickering* defendants in Philadelphia County did not rise to the level required under the test. Most importantly, the *Pickering* Court noted that under *Hangey*, the determining factor was not the percentage of annual sales done in Philadelphia County, but that two authorized dealers of the defendant were physically located in Philadelphia County and endeavored to do the defendant's business in Philadelphia County. This, the Superior Court noted, was tantamount to a "regular and continuous act" which satisfied the quantity prong. This "constant presence" in Philadelphia lent to proper venue, not just the amount of sales. This precise clarification by the *Pickering* Court plows a new venue road out of Philadelphia as it specifically reminds litigants and their attorneys that venue does not rest solely on numbers as was the predominant argument after *Hangey*.

In *Ojo v. Hanover Foods Corporation, et al.*, the Superior Court revisited venue, again offering clarity regarding *Hangey*. In *Ojo*, Plaintiff claimed that Hanover Foods "regularly conducts business" in Philadelphia because its products were ultimately sold there. Factually, Hanover Foods shipped products from outside the United States through the port of Philadelphia to the distribution centers of "big box" retailers which were located outside of Philadelphia. The retailers then decided which stores received the products. The *Ojo* Court held that the passing of goods through the port of Philadelphia was distinct from Hanover Foods' business purpose and therefore not of sufficient quality to establish venue. Moreover, a big box retailer's subsequent sale of Hanover Foods' products to consumers does not establish the quality of contacts required for venue. Although *Ojo* is an unpublished, non-precedential memorandum decision, it may be cited for its persuasive value per the court's operating procedures.

The *forum non conveniens* break out

Most recently, the Pennsylvania Supreme Court reversed the Superior Court in *Tranter*. First, the High Court noted that the witnesses need not put any specific language in an affidavit, let alone how the witness feels it is essential to the defense. There is nothing in the rule allowing transfer that the defense provide any affidavits at all. Additionally, while 100 miles distance is not the watershed for determining oppressiveness, the rationale of the court made it a consideration in such determination. Furthermore, the court made it clear that remote testimony as a way to obviate a *forum non conveniens* transfer is wholly inappropriate. Not only is there no ability to have live remote testimony during trial under the Rules of Civil Procedure, but the defendant may not be prejudiced to try a case by video rather than have live witnesses. To allow for such trial by remote testimony would do away with "one of the only avenues available to challenge the plaintiffs' selection" of a venue.

The road ahead

While *Mallory* still allows for personal jurisdiction over out-of-state defendants who may not have significant contacts within the Commonwealth, the latest decisions allow for those who may have been hailed into Philadelphia to find a way out. Objections to venue may have more of a chance in succeeding. A request to transfer venue under *forum non conveniens* has fewer impediments. Maybe more defendants will have the opportunity to escape the plaintiff-friendly jurisdiction. And who knows, maybe Philly sports fans will have a better year, too.

By: Lisa M. Bellino, Zurich CJLA

Trending topics

Efficiency in action:
How pretrial orders are shaping the Depo-Provera MDL

Multidistrict litigation ("MDL") has grown considerably over the past decade and now makes up a large portion of the federal docket. However, MDLs are faced with unique challenges that distinguish them from individual lawsuits or even class action litigation. As discussed in prior editions of the *Quarterly Digest*, the Judicial Panel on Multidistrict Litigation ("JPML") may decide to consolidate or transfer thousands of cases into one federal district court, creating an MDL. The sheer volume of cases that may be directly filed or transferred into an MDL proceeding can allow for meritless claims to infiltrate the MDL and remain camouflaged among other claims. While to date no specific rules governing MDLs have been enacted (although one is on the horizon), the Depo-Provera MDL judge has tried to shape management of the Depo-Provera MDL efficiently and effectively through issuance of a series pretrial orders.

On February 7, 2025, the Judicial Panel on Multidistrict Litigation ("JPML") entered an Order centralizing 27 cases pending in 8 districts into multi-district litigation ("MDL") before Judge M. Casey Rodgers in the Northern District of Florida (In re Depo-Provera Products Liability Litigation, MDL No. 3140). Judge Rodgers previously managed the 3M products liability earplug litigation – one of the largest MDLs in history (3M Products Liability Litigation, MDL No. 2885).

Plaintiffs whose cases have been consolidated into the Depo-Provera MDL allege they used the injectable contraceptive Depo-Provera and claim recent scientific studies demonstrate that long-term use of Depo-Provera can result in an increased risk of developing meningiomas (a type of brain tumor). The JPML determined that common questions of fact include whether defendants knew of the alleged risk, whether they failed to adequately warn of the risk, whether defendants failed to promote safer alternatives. The centralization of the matters "will eliminate duplicative discovery; prevent inconsistent pretrial rulings; and conserve the resources of the parties, their counsel, and the judiciary."

Judge Rodgers has taken steps to efficiently and effectively manage against the potential for potentially abusive practices in the Depo-Provera MDL. Judge Rodgers implemented Pretrial Order No. 17 and Pretrial Order No. 23 aimed at requiring up front proof that each plaintiff used the alleged product and was diagnosed with a specific meningioma. Pretrial Order No. 17 requires that every complaint filed provide:

(a) Initial documentary proof of use for each named Defendant's product, and

(b) Initial documentary proof of their alleged meningioma injury

Attached to Pretrial Order No. 17 is the Plaintiff Proof of Use/Injury Questionnaire due 120 days from the date the case was filed or transferred into the MDL. The questionnaire requires plaintiffs list the name of product used, dates of use, diagnosis of meningioma and the dates of diagnosis. Accompanying the questionnaire, is the requirement that plaintiff provide the court with documents supporting the use and diagnosis.

Pretrial Order No. 23 requires that complaints filed in the MDL contain allegations of:

(1) "Requisite Physical Injury" from a list of specifically identified tumors or meningiomas

(2) "Requisite Physical Product" from a list of specified products

(3) Citizenship of the Plaintiff

(4) Citizenship of each named Defendant

In Pretrial Order No. 23, Judge Rodgers notes that "a majority of the Complaints already filed in this Court or in other district and transferred to this MDL do not contain the requisite threshold allegations." However, rather, than straining the Court or the defenses' resources with this vetting process, Judge Rodgers has appointed the firm BrownGreer PLC to review the complaints for deficiencies. If the pleadings are identified as insufficient, the plaintiff has an opportunity to cure the defect by submitting an Amended Complaint. If plaintiff fails to file an Amended Complaint curing the deficiency, the Court indicated it will issue an Order to Show Cause for plaintiff to demonstrate why the deficiency was not cured and may sanction plaintiff or dismiss the claim.

The judge's pretrial orders also reflect concern that plaintiffs may be targeted by predatory lenders and the impact this practice may have on the MDL. Judge Rodgers issued Pretrial Order No. 25 requiring third-party litigation funding disclosure. In her Order, the judge states concern that plaintiffs within the Depo-Provera MDL may be vulnerable to exploitation of predatory lending practices. Judge Rodgers' Order cites to the December 2022 report of the United States Government Accountability Office (GAO) for support that third-party litigation funding can "create conflicts of interest between plaintiffs and their attorneys" and it can "deter plaintiffs from accepting a settlement offer because they may want to make up the amount they will be forced to repay the funder." As such, all counsel and *pro se* plaintiffs are required to disclose to the court all third-party litigation funding agreements. This *in camera* disclosure must include:

(1) Plaintiff's name;
(2) The name, address, and telephone number of the lender;
(3) The date(s) on which all loans were made;
(4) The total amount of funding received by the Plaintiff;
(5) The fees and rate(s) of interest on any funds lent; and
(6) All other material terms of the funding arrangement.

While the vetting capabilities of Judge Rodgers' pretrial orders remain to be seen, it is clearly a novel approach and step toward effective management. In light of the enactment of proposed Rule 16.1, similar approaches to the rule's requirements for early product identification and proof of injury may be seen. Similarly, while there is no standard federal rule requiring disclosure of third-party litigation funding, an increasing number of federal districts and states are pushing for transparency in litigation. The judge's implementation of a pretrial order setting forth a disclosure requirement shows foresight into an issue that could impede efficient management of the MDL.

By: Rebecca Fozo, Zurich CJLA

Trials & tribulations

Piecing it all together:
How many different sources combine for one great defense

It started with three different plaintiffs with three distinct types of injuries, but only one occurrence. A shooting outside a nightclub in Memphis, TN stemmed from a physical fight that had occurred inside that same club. After the fight, the individuals moved outside into the parking lot where a shootout between them ensued, resulting in multiple casualties and injuries. As a result, three plaintiffs emerged: a wrongful death claimant, a bystander who was shot in the leg, and a woman who allegedly suffered quadriplegia after being shot. All attempted to sue the shopping center and parking lot owner where the incident occurred, claiming they were innocent victims.

Surveillance footage from outside of the nightclub existed which actually showed the shooting itself was the first piece of the puzzle. Scouring the national tabloids for video posted about the incident also provided an angle. Information gathered from the claimant attorneys and the complaints yielded more clarity. Obtaining information about each of the plaintiffs was enlightening. Then, dissecting each claim carefully and applying the appropriate case law provided the rest of the picture. After all of the pieces fell into place, the three claims were dismissed.

The wrongful death claimant

Reviewing the national tabloid video assisted in negating the wrongful death claim as to the owners of the shopping center and parking lot. This film evidenced that the decedent was one of the main instigators of the physical fight inside the club. Piecing together the outside footage showed his next movements. For example, he exited outside the rear of the building. He then went to his truck, got a gun and laid in wait for the other party to approach who had also gone to his vehicle to get a gun. He could have left after the physical fight inside the club, he could have stayed in the club, or he could have done any number of things. Instead, he not only participated in the events that unfolded, but he was the primary aggressor. His claim no longer existed once both sources of information were merged.

The innocent bystander

The individual who was shot in the leg was not actually involved in the physical fight inside the club and did not specifically participate in the shooting. He claimed in his complaint that the basis for liability was that he tried to go back into the club for safety but was denied access. However, the video and the screenshots obtained from it demonstrate what he actually did after he went outside. Not only did he not attempt to go back into the club, but the door was seen open. In the footage, people were entering and exiting freely. His version of the story, contained in the verified, complaint was obviously inconsistent with what the video showed.

Additionally, after the shooting began, he stood still and watched the physical altercation take place outside where the club's security guard was then struggling with the perpetrator over a gun. It was during that physical struggle that a stray bullet hit him in the leg. Further investigation determined that this bystander was the half-brother of the main shooter, explaining why he did not run from the gunfight, as he was not afraid that his half- brother would shoot him. Thus, this plaintiff put himself in harm's way rather than being an innocent bystander as he claimed in his complaint. So, another claim was dispelled by combining the various pieces of evidence.

The paraplegic shooting victim

The woman who suffered paraplegia claimed it was due to a security guard following her from the parking lot, shooting at her, and causing her to wreck her vehicle. The lone security guard for the property did indeed have a vehicle, which was captured on the surveillance video. The video clearly demonstrated that the blinking lights from the security vehicle were present in the distance and remained far from the shooting scene for over 10 minutes. The footage further revealed that the woman had driven her car from the parking lot after the shooting occurred. Given the timeline and the relative positions of the vehicles and occupants, the security guard could not have been her assailant.

The lack of causation

Moreover, had the parking lot or the nightclub any duty to protect persons from the criminal acts of third parties, this combined evidence provided no ability for anyone to demonstrate a breach of said duty. In conjunction with case law that considered security cameras, clear sight lines, and lighting as consideration against liability, the video footage screenshots again reflected all of these items. Even if a plaintiff could prove a breach of some duty with respect to adequate security or adequate lighting, it would never have made a difference when all of this was assembled.

So, gathering available information, digging for more, and fitting together the pieces provided a complete defense in all three claims. In this instance, it was all the different sources that made all the difference.

By: Danielle Cheney, Zurich Staff Legal

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