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Editor's Note

Disruption Comes in Many Flavors, and Not All of Them Are Delicious

Some seemingly happen overnight; some loom for decades undetected until one day—*bam!*—our money is gone, our water is undrinkable, our intestines are full of plastic, and our hair is on fire. On the other hand, the old way of doing things just wasn't working for us. While they can spell disaster, disruptions can also make our lives better. Infinitely better. Either way, one thing you can always count on: there will be legal ramifications. Lawyers, courts, legislators, regulators, corporations, and advocacy organizations are among the responders, and rarely are they rowing in the same direction. In this issue, we address several varieties. In two cases, our authors advocate a disruption in the way individuals are monitored for potential health issues arising from exposures to toxic substances—the tort remedy itself a one-time disruption in the law (a positive one in the view of many, including your Editor). Miraculous new chemical compounds that disrupted the garment industry, for example, by ensuring your necktie will repel red wine, are also now disrupting—potentially and actually—our health and the environment. As any follower of toxic mass torts knows, and as another author explains, these things also disrupt the global insurance industry. Stepping away from mass torts, we move to self-driving vehicles, a disruption that inspires as much dread as it does excitement. The possibilities are incredible in terms of safety and economy. Your friendly Editor cannot wait. But detractors see a great deal of risk as this machinery is in its infancy, still wobbling on its unsteady autonomous legs. And when it comes to risk, once again we come to a conversation about insurance. Another flavor of disruption arises with changes in society's norms and subsequent changes in laws. Cannabis is the main character in this story, the varying degrees of legalization causing headaches for

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many, including varied employers whose varied workforces reside in several states. Depending on where you live, workers fighting mental or physical illness may benefit, while workers fighting tedium may abuse the privilege and arrive impaired. Workforces and employers are experiencing disruption in nonmedicinal ways too, with momentum behind a ban on pro-employer, anti-employee, and anticompetitive noncompete or no-poach clauses in employment agreements. Frustrated by these restrictions and other burdens imposed by powerful employers, it should surprise no one that employees are turning once again to collective action, reversing several decades of decline in organized labor—all with the support of the Biden administration. Also backed by the Biden administration—and made more urgent by recent disruptions caused by everything from disease to war—one author explains that companies can expect increased scrutiny for misconduct in the global supply chain, the complex, multilayered, multinational network that keeps our economies and lives humming. Across several of these topics, the pandemic was a powerful contributing disrupter. For all the good and bad that dramatic change can bring, once again our authors deal with the legal fallout.

The Medical Monitoring Tort Remedy

We start off with a review of the status and history of medical monitoring, known claimant medical monitoring participation rates, the rationale for the remedy, arguments for and against its implementation, and its execution in practice. Author Ed Gentle, of Gentle, Turner, Sexton & Harbison, LLC, suggests—in "The Medical Monitoring Tort Remedy: Its Nationwide Status, Rationale and Practical Application (A Possible Dynamic Tort Remedy for Long-Term Tort Maladies)"—a more holistic medical monitoring remedy, which includes not only testing for disease but paying claimants for personal injury when they get sicker later, from a capped fund and under an agreed payment matrix, to provide closure to defendants and class members for claims resulting from toxic substances and product defects, which have long-term and often unknown effects on Plaintiffs. Gentle suggests that this remedy is the logical

long-term result of the evolution of medical monitoring and will provide a much-needed dynamic remedy for long-term maladies.

Monitoring PFAS

As discussed in the previous article, medical monitoring as a tort claim is receiving ever-increasing attention with courts, legal experts, and practicing attorneys as the number of cases filed in the toxic torts, personal injury, and products liability areas increasingly contain prayers for relief for medical monitoring. Perhaps no area of the law has seen a more significant increase in medical monitoring claims that per- and polyfluoroalkyl substances (PFAS) litigation. What is noteworthy about the trend is that the growth in the number of these claims in PFAS litigation has dramatically increased in just the past two years. It is also important for practitioners to be aware that there are several significant pending cases before appellate courts or state Supreme Courts in which the viability of medical monitoring claims specific to the PFAS litigation is directly at issue. The importance of the rulings from these decisions cannot be emphasized enough, as they will have direct effects on how other courts address the medical monitoring issue. In "Medical Monitoring and PFAS Litigation—A Significant Growing Trend," John P. Gardella of CMBG3 Law provides an explanation of PFAS, a brief overview of medical monitoring claims, how PFAS medical monitoring claims have impacted the litigation thus far, and what legal cases are pending that could alter the course of traditional medical monitoring litigation in the future.

A New Toxic Wave

To remain profitable and viable, the insurance and reinsurance industry must rely on estimated forecasts of potential claims many years out to establish an appropriate level of reserves. They rely on data from rating agencies and, based on these estimates, ratchet their reserves up or down accordingly. In past years major and once unforeseen developments like massive asbestos and environmental litigation provided urgent reasons to cast an especially critical eye

on the adequacy of industry reserves. In "Will a New Wave of New Environmental/Toxic Tort Litigation and Claims Upend Insurance Industry Environmental Reserves?," author and former insurance industry emerging issues officer Charlie Kingdollar explains why it is that time again. In light of several potentially calamitous emerging global liabilities, particularly if they land with the impact he fears they might, Kingdollar believes the insurance industry and its policyholders may be in for a jolt in a few short years.

New Driving Technology

Congress has not been able to pass regulations governing the emergence of self-driving or autonomous vehicles. Instead, 21 states and the United Kingdom are leading the way. As more of these vehicles take to the highways, implications will emerge for the insurance industry. Auto insurance policies will have to determine how to insure against losses caused by nonhuman operators, commercial general liability policies will be affected when technology developers and car makers are sued for bodily injury and property damage arising from malfunctioning technology, and cyber policies could be implicated in the event of hacks or data breaches. In "Autonomous Vehicles: The New Technology Driving the Litigation Conversation," authors Cort T. Malone, John M. Leonard, and Joshua A. Zelen, of Anderson Kill, review these subjects and share their insights into what autonomous vehicle producers should consider when it comes to mitigating their risk.

Cannabis at Work

Recreational cannabis use for adults is legal in 21 states, having made its way eastward from Western jurisdictions that first addressed the issue. But these laws govern personal use during personal time. While they generally prohibit discrimination based on such use, these laws do not greenlight consumption at work or going to work under the influence. But with so many jurisdictions and job types, and variance among state laws, there aren't simple answers for employees or workers. This is especially true for employers who

conduct business nationwide, and because cannabis continues to be a Schedule I substance on the federal Controlled Substances Act. What rights and remedies do companies and workers have to resolve disputes? Are employers permitted to conduct drug tests? What about low-THC products and CBD? In "Potential Pitfalls with Adult-Use Cannabis: What Both Employers and Employees Should Know," authors Adam R. Dolan and Kaylee Navarra of Gfeller Laurie LLP discuss these and several other important questions.

Competition at Work

On January 5, 2023, the Federal Trade Commission published a Notice of Proposed Rulemaking that would ban the use of noncompete agreements between employers and workers and would create an affirmative obligation for employers to void existing noncompete agreements. The rule would also prohibit contractual clauses in other agreements or employment policies that have a similar effect. The proposed rule applies categorically to all workers, including independent contractors, without regard to a worker's earnings or job function. In "New Year, New Rules: FTC Proposes Sweeping Ban on Non-Compete Agreements," author Andreya DiMarco of Hatfield Schwartz Law Group LLC discusses the nuances of the proposed rule as well as the legal and practical impact it will have if adopted.

Organizing at Work

Until recently the existence of and participation in labor unions in America had been in a long, slow decline since their peak in the 1940s and 1950s. That trend is reversing. More unions are winning elections, and more workers are striking. Pressure placed on "essential workers" during the pandemic, coupled with changes in the social, economic, and political landscapes, plus fear of job losses and reduced wages, have reinvigorated the labor movement. There also has been a pro-union policy shift ushered in by the Biden administration. The public overwhelmingly supports unions as well, as new organizations have emerged. With the wind at their

backs, homegrown unions are demonstrating their effectiveness and will play a significant role in the retail industry. Further, the National Labor Relations Board is expected to reduce employer rights through its decisions in various cases. In "Labor Organizing in Retail: Conditions Remain for Continued Momentum," authors Amber Rogers and Kurt Larkin of Hunton Andrews Kurth give retailers reasons to prepare for a new age of labor.

Investigations at Work

Challenged by the pandemic, the global supply chain has generated a heightened amount of scrutiny for its impact on the economy, the labor market, the delivery of goods and services, and national security. Attention from the Biden administration portends an era when the federal government will shine a spotlight on the supply chain to root out misconduct. In "Supplier Beware: The DOJ and FTC Are Investigating Manufacturing and Supply Chain Issues," author Jennifer M. Driscoll of Robinson+Cole reviews recent supply chain disruptions and reactions from the DOJ and FTC, as well as the government's efforts to support competition in the labor markets by eliminating noncompete agreements in employment contracts. Finally, Driscoll discusses proactive steps companies can take to mitigate the risk that they will find themselves the subject of a government investigation.

Conclusion

I wish to thank all of our authors and advisors for taking the time to share their insights in these original pieces. If any of our readers wish to elaborate on any of these subjects—or provide different or opposing perspectives—please write to me at editor@litigationconferences.com.

Tom Hagy
Editor-in-Chief

The Medical Monitoring Tort Remedy: Its Nationwide Status, Rationale, and Practical Application (A Possible Dynamic Tort Remedy for Long-Term Tort Maladies)

Edgar C. Gentle III*

Abstract: *The author administers six mass tort settlements with a medical component, including two with medical monitoring. This article reviews the status and history of medical monitoring, known claimant medical monitoring participation rates, the rationale for the remedy, arguments for and against its implementation, and its execution in practice. The author suggests a more holistic medical monitoring remedy, which includes not only testing/or disease but paying claimants for personal injury when they get sicker later, from a capped fund and under an agreed payment matrix, to provide closure to defendants and class members for claims resulting from toxic substances and product defects, which have long-term and often unknown effects on plaintiffs. It is suggested that this remedy is the logical long-term result of the evolution of medical monitoring, and will provide a much needed dynamic remedy for long-term maladies.*

Introduction

The medical monitoring remedy is an evolving tort with differing levels of acceptance in the states, being law in 14 states and being rejected so far by 23 states. Eleven states have not addressed the issue and two states have divided decisions.

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In a nutshell, medical monitoring has been implemented where a population has been exposed to a toxin or defective product, but not all exposed persons manifest personal injury. States implementing medical monitoring require the defendant to provide testing of the population over time to see if the personal injury occurs, and states rejecting medical monitoring do so based on the argument that, without personal injury, there is no tort claim.

In this society, toxic substances are released and medical products are used without knowing fully their long-term effects. It is therefore suggested that, instead of applying the classic tort barrier to recovery based on lack of personal injury, courts should embrace the need to have a current remedy for unknown long-term effects of exposure to toxic substances or dangerous products with both a testing and a payment component, in order to provide the plaintiff with a long-term remedy, allow the defendant closure on its legal exposure, and to circumvent the statute of limitations problem that will be encountered if such a holistic remedy is not implemented, if a plaintiff must first be injured to file a claim.

Currently, this suggested long-term remedy has not been implemented. It is suggested, however, that without developing medical monitoring to this logical policy conclusion, it will remain a hollow remedy: What good is it to know that you are injured if you are not compensated?

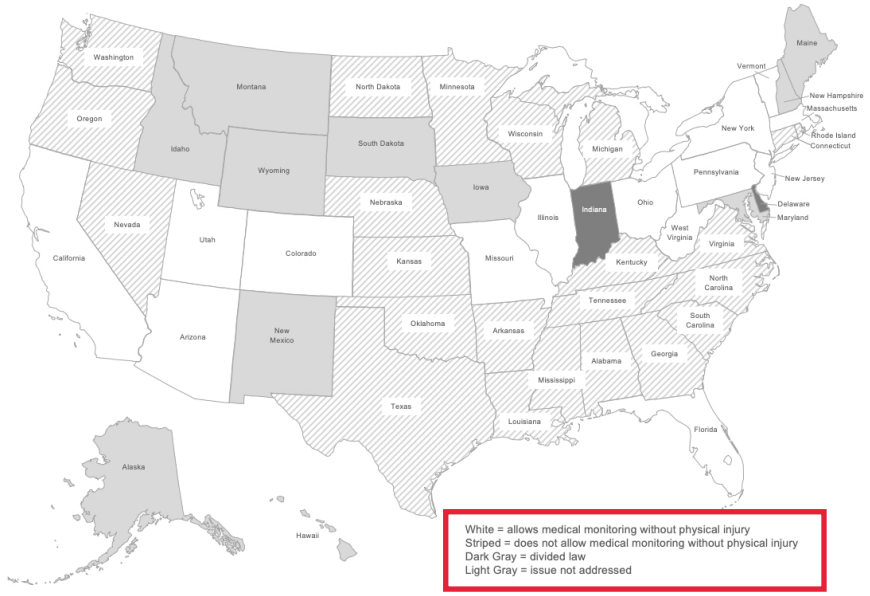
The Rationale and Beginnings of Medical Monitoring and a Geographic Survey

Looking at the map in Figure 1, the 14 states allowing medical monitoring do not follow a clear political pattern. We have California, thought to be a blue state. But Arizona and Utah honor the tort, as well as Missouri. Florida is thought to be politically divided, but it is in the medical monitoring bracket.

There are at least three useful 50-state surveys of medical monitoring.[1]

To show how medical monitoring keeps evolving, the BP oil spill disaster, much as the *Friends for All Children* case described below involving Vietnamese children, provided such a compelling set of facts that Judge Barbier allowed a medical benefits class

Figure 1



Legend: White = allow medical monitoring without physical injury—14 states (Arizona, California, Colorado, Florida, Illinois, Massachusetts, Missouri, New Jersey, New York, Ohio, Pennsylvania, Utah, Vermont, West Virginia); Striped = do not allow medical monitoring without physical injury—23 states (Alabama, Arkansas, Connecticut, Georgia, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, Wisconsin); Dark gray = divided law—2 states (Delaware, Indiana); Light gray = not addressed by the state yet—11 states (Alaska, Hawaii, Idaho, Iowa, Maine, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, South Dakota).

action settlement, applicable to claimants not only in Florida, where medical monitoring has been approved, but in Louisiana, Alabama, and Mississippi, where it is has not.[2]

So, the law may continue to evolve to meet society's needs in this field.

Simply put, states that allow medical monitoring do so when a group of claimants has been exposed to a known hazardous substance, such as lead, or a dangerous product, such as football helmet concussions, or air decompression in an airplane, through the conduct of the defendant, with the claimants therefore being at increased risk of contracting disease. Under this tort remedy,

claimants are tested periodically, for an agreed or decided period, usually between 10 and 40 years, to see if they contract the disease linked to the toxic substance or dangerous product.

Thus, medical monitoring recognizes the long-term harmful nature of toxins and man-made products, thereby matching a remedy with the malady.

The tort is 30 years old. Medical monitoring, like many torts, got its start with a sympathetic set of facts, in *Friends for All Children Inc. v. Lockheed Aircraft Corp.*[3] In *Friends for All Children*, the court evoked public policy to create a remedy for 149 Vietnamese orphans who were injured in an aviation accident in Vietnam.

Most know the case: a plane loaded with Vietnamese orphans to be adopted in America crashed, resulting in cabin decompression and neurological disorders, known as minimal brain dysfunction (MBD), in the children. Lockheed argued that tort law in the District of Columbia did not recognize a cause of action for diagnostic exams. The court ignored Lockheed's argument and established a half million dollar fund to conduct long-term brain exams of the children to determine if they were hurt.

The District of Columbia Circuit Court upheld the District Court's decision, with the following two quotations being frequently cited to justify the tort:

> Jones is knocked down by a motorbike when Smith is riding through a red light. Jones lands on his head with some force. Understandably shaken, Jones enters a hospital where doctors recommend that he undergo a battery of tests to determine whether he has suffered any internal head injuries. The tests prove negative, but Jones sues Smith solely for what turns out to be substantial costs of the diagnostic examinations.[4]

> It is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury. When a defendant negligently invades this interest, the injury to which is neither speculative nor resistant to proof, it is elementary that the defendant should make the plaintiff whole by paying for the examinations.[5]

The second most famous medical monitoring case is *Ayers v. Jackson Township*,[6] a classic community toxic tort medical monitoring case. Here, a township in New Jersey contaminated water with toxic pollutants reaching into an aquifer from the township landfill. In finding that the residents were entitled to the cost of medical surveillance based on enhanced risk of disease as a result of exposure to the toxic chemicals, the New Jersey Supreme Court held:

> That the cost of medical surveillance is a compensable item of damages where the proofs demonstrate, through reliable expert testimony predicated upon the significance and extent of exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, that such surveillance to monitor the effect of exposure to toxic chemicals is reasonable and necessary. The medical surveillance claim seeks reimbursement for the specific dollar costs of periodic examinations that are medically necessary notwithstanding the fact that the extent of plaintiffs' impaired health is unquantified.
>
> We find that the proofs in this case were sufficient to support the trial court's decision to submit the medical surveillance issue to the jury, and were sufficient to support the jury's verdict.[7]

In noting that medical monitoring usually does not adjudicate personal injury claims and allows the medical monitoring claimants to reserve them for the future, the New Jersey Court blessed the "discovery" rule for toxic tort–related statutes of limitation.[8] This construction of the relevant statute of limitations works hand-in-glove with medical monitoring, allowing a claimant who discovers that he or she is sicker later still to file a claim for personal injury in the courts.

The evolution of this tort is not different from the creation of negligence law during the industrial revolution in England.[9] Prior to the industrial revolution, English tort law was limited to intentional harm. However, as people began to live closer together, factories were created and modes of transportation became increasingly

dangerous, and a duty of care in negligence was invented to adjust the law of torts to factual reality.

Arguably, the same is occurring or should occur with medical monitoring. We, as lawyers, devote much of our practice to latent injuries in our current society, from toxic chemicals, pharmaceutical drugs, and other human-created substances or products. Thus, tort law may need to accommodate these changes, if it is to continue to maintain its role of adjudicating disputes resulting in injury or potential injury.

So, this article is a mere snapshot. Fifty years from now there may be ubiquitous medical monitoring with the holistic approach suggested in this article, or no medical monitoring at all.

An Ideal Case Study

The Fernald Uranium Plant Medical Monitoring Program in Ohio is a classic case with all of the ideal elements for a successful medical monitoring program,[10] except paying claimants if they get sick later.

In the case, 11,000 people were exposed to radiation in uranium dust from a plant that converted uranium ore to metal for use in nuclear plants and for nuclear weapons, but had no apparent physical injury.

There was a $78 million settlement fund for a medical monitoring program. Detailed testing was conducted and many people discovered that they had latent diseases in time to cure them. In addition, the population actually became healthier because people had medical checkups and took the doctors' advice. Turnout was the highest reported for any medical monitoring case.

Rationale for Medical Monitoring

The nearby residents' emotional distress was related primarily to the potential harmful health effects resulting from plant environmental releases. An annual medical monitoring program to identify disease if present or to reassure those claimants found to be healthy was one way to mitigate the emotional distress suffered by class members. The medical monitoring tests were available, whether

harmful health effects occurred or not, thereby mitigating the distress related to uncertainty. It continues to be one of the largest and most extensive medical monitoring programs in the country.

The program focused on testing that had the most potential to improve subsequent health without regard to whether those conditions were potentially related to exposures to hazards from the plant. By contrast, most medical monitoring programs try to match the testing regimen with the expected etiology of the toxin or harmful nature of a product.

In legal terms, then, the benefit to the claimants was indirect. The rationale was that health screening and health promotion activities for common health conditions would balance or offset those exposure-related harms that could not be mitigated.

The medical monitoring program was administered by the University of Cincinnati. Surprisingly, 9,700, of the 11,000 eligible claimants, or 88%, participated. In my experience, a medical monitoring settlement is fortunate if half of the claimants participate, with a third sometimes being the case. See the Medical Monitoring Settlement Administration Tips section, below.

Health Benefits for the Participant Population

By the end of the seventh annual examination cycle, in November 2006, a total of 1,688 "major" adverse health findings for just a 11,000 people, or 15% of the population, had been made as a result of the medical monitoring examinations. The most common "major" finding was diabetes (486 cases). Others include 229 skin cancers, 145 breast cancers, 107 prostate cancers, 41 colon cancers, 38 lung cancers, and 37 urinary system cancers diagnosed as a result of examination findings. There were 8 cases of leukemia and 7 cases of lymphoma diagnosed as a result of the program.

Among those enrolled in the program as adults, life table analysis predicted 947 expected deaths (11%) by 2004, but, in fact, only 705 participants (8%) died.

In addition to improved mortality, there is evidence of reduction in cardiovascular risk factor levels, that may, with time, result in less heart and other cardiovascular diseases. In adult males who came to at least five of the first seven exams offered, mean total serum

cholesterol levels decreased by about 30 mg/dL, across almost all age groups (age group assignment based on age at each exam). The same cholesterol finding was noted in women age 55 and older.

Possible Value of the Program as a Research Resource

The database and archived biospecimens represent a rich resource for future research of both health effects related to the environmental exposure and a wide range of nonexposure questions. For example, risk factor matrices have been developed from questionnaire information, such as a matrix of cumulative cigarette pack-years for all participants, for each calendar year. There are also matrices for family history for each type of cancer for each program participant.

Claimant Medical Monitoring Participation Rates in Two Cases

Because this remedy does not include medical care but only diagnosis, it is often difficult to convince claimants to participate. Below is a summary of medical monitoring participation rates in a Clarksburg, West Virginia, defunct zinc smelter settlement and a Mingo County, West Virginia, coal slurry water contamination settlement during the first round of testing, with each program scheduled to last 30 years, and with testing to be conducted every other year.

Settlement	Number of Eligible Claimants	Number Participating in the First Round of Testing	Participation Rate
Clarksburg (first round of testing in 2011)	4,148	2,040	49%
Mingo County (first round of test in 2014)	714	92	13%

Subsequent rounds of testing for both programs have seen reduced participation rates, so that they are now between 5% and 10%. One reason is COVID-19, with the programs essentially not having a round during the pandemic. Rounds being carried out now will help us determine if the impact of the pandemic was temporary or is permanent.

Suggested methods to incent claimants to participate in medical monitoring ethically are outlined in the Medical Monitoring Outreach subsection.

Elements Necessary to Prove Medical Monitoring

The widely cited Bowers[11] test lists the following elements required to make a medical monitoring case:

1. the claimants have been significantly exposed, relative to the general population;
2. to a proven hazardous substance;
3. through the tortious (wrongful) conduct of the defendant (by the violation of environmental laws for example);
4. the exposure has proximately caused the claimants to suffer an increased risk of contracting a serious latent disease;
5. the increased risk makes it reasonably necessary for the claimant to undergo periodic diagnostic examinations different from what would have been prescribed in the absence of the exposure; and
6. monitoring procedures exist that make the early detection of the disease possible.

Currently I administer two medical monitoring settlements in West Virginia, and there are others. But, if you think that West Virginia is the golden arches of medical monitoring, look at *Dillon v. Goals Coal Company*, in the Raleigh County, West Virginia Circuit, Court Case Number OV-C-781, where a jury agreed with *Massey Energy* that a medical monitoring claim in connection with a coal silo near an elementary school emitting dust and possibly causing

lung disease was not appropriate, due to the lack of evidence of exposure and increased risk under the Bowers test.

Legal Background and Implementation

Legal Background

Medical monitoring typically does not include a personal injury claim, with this claim being preserved for the future. Also, punitive damages may not be available, as the defendant arguably acts somewhat responsibly in providing medical monitoring.[12]

The majority rule favors "the use of court-supervised funds to pay medical-surveillance claims as they accrue, rather than lump-sum verdicts."[13] Other courts have suggested that lump-sum damages may be an acceptable remedy in medical monitoring suits.[14] The damage award is usually placed in a court-administered fund, and plaintiffs only collect money for testing they actually undergo. The establishment of such court-supervised funds designated specifically for reimbursement of medical testing may lessen the attractiveness of these claims to plaintiffs as well as their counsel.

In my experience, medical monitoring turnout usually doesn't approach the 88% claimant participation rate as seen in *Fernald*.[15] One-third is more like it, and you can expect a battle over whether a legal fee should be paid to plaintiffs' counsel for the claimants that don't show up. Contrast *Van Cylinder Gernert v. Boeing Co.*[16] with *Attorneys' Fees, Unclaimed Funds, and Class Actions: Aimlication of the Common Fund Doctrine*.[17]

Typical Implementation

The medical monitoring program is designed by experts. Typical procedures involve a blood test and a urinalysis, and a follow-up appointment to visit with a medical monitoring physician, to review the test results, and possibly to obtain recommendations for further care if any of the tests are positive.

Based on my experience in the Alabama PCB settlement and the *Perrine v. DuPont* settlement, I have found that medical provisioning for large groups of claimants is a lot cheaper if you follow a "retail" method, paying for units of medical service, or clicks, as

opposed to a wholesale method, staffing a medical clinic, or bricks. Often, a third-party medical administrator is used, with experience in negotiating rates with medical providers.

Types of Medical Monitoring

Medical monitoring has been implemented in the following areas:

1. community toxic exposure from zinc, PCBs, fertilizer, creosote, dioxin, PFOA, or other defunct plants;[18]
2. lead paint–coated toys;
3. tobacco;[19]
4. medical device implants;
5. emissions from Chinese drywall;
6. radiation from cellular phones;
7. April 2010 BP oil spill disaster;[20]
8. September 11, 2001, New York City terrorists attacks;
9. mining;
10. animals—tainted pet food.[21]

However, medical monitoring has been largely unsuccessful with pharmaceuticals. Contrast fen-phen, where it was successful,[22] with Baycol, Rezulin, and Vioxx, where it was unsuccessful.[23]

Apparently, no medical monitoring is allowed under federal common law. The Supreme Court has spoken on this issue, and medical monitoring without personal injury doesn't appear to be a viable theory of liability in those areas (such as railroad law) governed by federal common law.[24]

Arguments For and Against Medical Monitoring

Below is an outline of arguments typically made for and against implementing this remedy.

For Medical Monitoring

1. Early detection is the key to the cure for many diseases, the old "ounce of prevention" argument.[25]

2. A "pure" medical monitoring claim, that requests no personal injury, should enable the claimant to litigate a damages claim in the future despite typical claim-splitting (one bite at the apple) defenses.
3. Although there are costs associated with litigating a second, personal injury claim, they may be small in comparison to the societal and human costs avoided due to early detection of disease though medical monitoring.
4. Medical monitoring provides deterrence to defendants' bad conduct, so that they do not avoid paying all the costs resulting from their negligence.
5. Savvy defendants may benefit because medical monitoring may provide enough notice to close out claims for punitive damages, and successful treatment in the early stages of disease may reduce overall damage claims.
6. Savvy defendants could couple a medical monitoring program with a personal injury payment grid to sew up the case. However, this has never been done.

Against Medical Monitoring

1. The two big defenses:
   a. No physical injury. (See the next section: A Possible Cure for the Requirement for Physical Damage Prior to Having Medical Monitoring: Subcellular Damage Proof.)
   b. Class certification should not be granted because individual proof would be required to determine and administer such claims. (See the subsequent section: The Increasingly High Bar: Denial of Class Certification.)
2. Legislatures, not courts, should resolve the type of "far-reaching and complex public policy issues" raised by plaintiffs' requests for medical monitoring.
3. Medical monitoring is an illegal expansion of tort law.
4. Requiring physical injury for medical monitoring reduces fraudulent claims and provides a clear line

allowing fact-finders to distinguish between plaintiffs who have a claim and those who do not.

5. A medical monitoring claim runs afoul of the economic loss doctrine: the plaintiff is not hurt.
6. "Undesirable effects" could flow from a medical monitoring claim, such as, it could "drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care," monitoring does not provide "an unmitigated benefit for all concerned," and could "wreak enormous harm" on the economy.
7. Medically necessary monitoring may be paid for by claimant insurance anyway. What about the Affordable Care Act?
8. The underlying conduct of the defendant was not tortious.
9. The plaintiff cannot establish that he or she is at a significant increased risk of injury.
10. The proposed monitoring is not capable of detecting the condition earlier than without monitoring.
11. The proposed monitoring is not reasonably necessary: Would a reasonable physician prescribe the proposed monitoring?[26]
12. The proposed monitoring is recommended/provided already even without the claimed increased risk of injury.[27]

A Possible Cure for the Requirement for Physical Damage Prior to Having Medical Monitoring: Subcellular Damage Proof

It is still the majority rule that medical monitoring without personal injury is not a good tort. Of course, medical monitoring with personal injury is an oxymoron, because the purpose of medical monitoring is to detect future injury.

A typical rationale is found in the Alabama Supreme Court case of *Hinton v. Monsanto Co.*,[28] in rejecting a medical monitoring claim brought by a claimant exposed to PCBs. The court reasoned:

> To recognize medical monitoring as a distinct cause of action . . . would require this court to completely rewrite Alabama's tort-law system, a task akin to traveling in uncharted waters, without the benefit of a seasoned guide . . . we find it inappropriate . . . to stand Alabama tort law on its head in an attempt to alleviate [plaintiff's] concerns about what *might* occur in the future . . . *That law provides no redress for a plaintiff who has no present injury or illness*.[29]

See also the more recent Wisconsin case of *Alsten v. Wauleco*,[30] denying medical monitoring without personal injury based on this rationale: "We are persuaded by the United States Supreme Court's decision in *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424 (1997), which held that an asymptomatic railroad worker who has been exposed to asbestos could not recover medical monitoring expenses under the Federal Employees' Liability Act, and by several other jurisdictions that have articulated compelling reasons not to recognize medical monitoring claims in the absence of actual injury." [Emphasis added]

Similar findings are made by the Supreme Courts of Kentucky, Louisiana, Michigan, Mississippi, Nevada, and Oregon.

If physical injury is required, for medical monitoring, why not look for physical sub-cellular change that is a badge of future injury? In 2009, Massachusetts did just that in *Donovan v. Phillip Morris*.[31] A medical monitoring program for cigarette exposure was allowed to proceed despite the defendants' argument that there was no physical damage, based on the rationale that:

> [n]o particular level or quantification of increase in risk of harm is necessary, so long as it is substantial and so long as there has been a *corresponding subcellular change*.[32]

Better scientific proof might help clear the *physical injury* hurdle to medical monitoring. Advancements in diagnostic technologies may allow more plaintiffs to show present physical injury. Scientific advances are expanding diagnostic capabilities. These advances may have a positive effect on the utility of medical monitoring in litigation.

The Increasingly High Bar: Denial of Class Certification

The United States Supreme Court case of *Dukes v. Wal-Mart Stores, Inc.*[33] may chill certification of medical monitoring claims in Federal Court.

For medical monitoring to be a practical remedy, it usually requires class certification, as the per-claimant recovery is relatively small. The threshold decision in bringing the tort claim is to decide whether to ask for a 23(b)(2) or a (b)(3) class. The expected favorite is Rule 23(b)(2), because no prior putative class member notice is required, saving expenses, and no opt-outs are allowed, providing class closure. However the *Perrine v. DuPont* case has a Rule 23(b)(3) medical monitoring class. Below is a medical monitoring Rule 23(b)(2) and (b)(3) class comparison:

Rule 23(b)(2)

- No prior notice and no opt-outs.
- Applies when the party opposing class certification acted or refused to act on grounds that apply generally to the class so that injunctive or declaratory relief is appropriate respecting the class as a whole.
- Most courts have interpreted certification under this subsection as requiring "cohesion" among class members.

Rule 23(b)(3)

- Predominance—common issues among class members predominate over individual ones.
- Superiority—class treatment is superior to other methods of adjusting the issues.

The findings in *Dukes* may eclipse Rule 23(b)(2) medical monitoring classes. *Dukes* was a California case that involved a class of female Wal-Mart employees alleging sexual discrimination against Wal-Mart and seeking injunctive and declaratory relief, back pay, and punitive damages. The significance of *Dukes* is that it made clear that claims for monetary relief that are not incidental to the

injunctive or declaratory relief sought cannot be certified under Rule 23(b)(2).[34] This clarification in *Dukes* that Rule 23(b)(2) classes must seek injunctive, rather than simply "equitable," relief reopens the debate about whether a court can ever certify medical monitoring claims to form a mandatory 23(b)(2) class. Is medical monitoring injunctive relief or damages? If it is merely damages, then the claim may not be classable under 23(b)(2) because of the underlying findings in *Dukes*.

The Class Action Fairness Act (CAFA) expanded the Federal Courts' diversity jurisdiction to cover, with limited exceptions, most class actions against nonresident defendants, worth more than $5 million, so any significant medical monitoring case will probably be in Federal Court.[35] Although several Federal District Courts have certified medical monitoring classes, Federal Appellate Courts that have examined proposed medical monitoring class actions have often refused.[36] With the addition of Federal Rule of Civil Procedure 23(f) in 1998, the threat of appellate review became more potent. Federal Rule 23(f) authorizes parties to petition for immediate appellate review of a certification decision without leave of the District Court.

These federal developments may impede class actions for medical monitoring for the time being.

If *Dukes* precludes any request for monetary relief by a Federal Rule 23(b)(2) class, then a court may need to determine whether the medical monitoring relief requested by the class is merely monetary. A defense attorney will argue that medical monitoring is a claim for monetary damages that has often been equitably administered by the courts. Again, is medical monitoring injunctive relief or damages?

As a Supreme Court case, *Dukes* has been cited frequently. Of the 3,837 times it was cited, 108 of them were in reference to the above holding regarding the certification of classes seeking monetary damages. Of those, two did so with respect to medical monitoring.[37] The first of those cases was the 2012 ruling from *Donovan v. Philip Morris, USA, Inc.*[38] There, the court determined that the *Dukes* holding did not prevent the class in the case from being certified under Rule 23(b)(2), as the class was seeking no damages beyond medical monitoring, there was no adequate

monetary remedy, and the medical monitoring remedy was specific, requiring that funds be used only for the medical monitoring and noting that any funds not used for medical monitoring would be returned to the defendant. The court stood by its earlier decisions that the relief sought by the *Donovan* class was "wholly injunctive."[39]

The second case to cite *Dukes* is *Gates v. Rohm and Haas Co.*[40] There, the court noted *Dukes* and questioned whether the relief sought by the plaintiffs could be certified under 23(b)(2), as the types of medical screenings and costs required by the class would vary, so that they could not all be covered by a single injunction or declaratory judgment as required by Rule 23(b)(2).[41] However, as the plaintiffs' claims failed for other reasons, the court did not formally decide the issue.

The primary case discussing whether or not medical monitoring is injunctive or monetary relief appears to be *Day v. NLO, Inc.*[42] (overturned in part on other grounds). There, the court noted that there were many schemes by which medical monitoring could be structured, including ordering the defendant to pay the plaintiff directly, or ordering the defendant to pay the plaintiff's medical bills, neither of which would constitute injunctive relief as required by Rule 23(b)(2).[43] However, a court-established program, managed by a court-appointed, court-supervised trustee, under which the plaintiff was monitored by particular physicians and the medical data was produced and utilized for group studies, and financed by the defendant, would constitute injunctive relief.[44]

Does a Medical Monitoring Claim Trigger Insurance Coverage (Or, Can the Defendant Have It Both Ways)?

Most courts have found that exposure to a harmful substance known to increase the risk of future illness is sufficient to trigger an insurer's duty to defend based on bodily injury.[45] At least one court has held that a medical monitoring claim also triggers general liability.[46]

More cleverly drafting a complaint may help trigger liability: medical monitoring putative class action complaints, by design, frequently exclude from class membership any person making

claims for personal injuries because such claims necessarily entail individualized inquiry that is often fatal to class certification. Accordingly, the omission of allegations relating to physical injury in a medical monitoring class action suit may be grounds for denial of defense or indemnity to those claims. But, adding the claim may prevent two bites of the apple.

One might ask whether a defendant may have it both ways. The defendant may argue that physical injury is required to trigger medical monitoring but also tell its insurance carrier that there is physical injury to trigger coverage.

Medical Monitoring Settlement Administration Tips

Based on work on three medical monitoring or quasi-medical monitoring cases, I have the following settlement administrative suggestions.

Medical Monitoring Outreach and Compensation

To generate claimant interest in participating in medical monitoring, the following steps are recommended:

1. A local claims office staffed in part by locals, town meetings, and outreach using medical professionals.
2. Facilitate a claimant "buy-in" by having the claimants help design the program, and by implementing the program by collaboration: claimants pick the doctors (their choices may be counterintuitive). In the *Perrine v. DuPont* case, the claimants wanted local doctors who already serve them. In the Mingo County case, the claimants didn't trust local doctors. Without this collaborative step, we may never have detected this difference.
3. Make the program simple, easy to understand, and accessible:
   a. Website to update claimants.

b. Simple medical monitoring claimant questions and answers, and an understandable schedule of medical monitoring benefits. (See www.perrinedupont.com.)
c. In order to encourage doctors to participate, and not to shy away from a program that is related to "litigation," design a simple description of the plan and its implementation that is doctor friendly. (See www.perrinedupont.com.)

4. Claimants seldom do anything solely for their own benefit, so monetary benefits should be considered.
   a. Cash incentive payments are successfully used to recruit claimants to sign up for medical monitoring. However, there are ethical problems in paying people to take medical tests, though compensation for travel and perhaps a meal ($100 to $200 per round of testing) is common.
   b. One ethical incentive for medical monitoring is to combine it with medical care, such as in the Tolbert Anniston, Alabama Settlement, where free primary care and prescription drugs are provided.
   c. The medical monitoring long-term participation hurdle is difficult to clear. Initial enthusiasm at the onset is usually reduced in each succeeding round of testing. If monitoring were paired with monetary recovery, for claimants that get sicker with disease possibly linked to the toxigen, as suggested in this article, participation may remain more robust. We are trying a new approach in the Hoosick Falls, New York, Program. The Medical Monitoring Fund surplus at the end of testing will be shared ratably by the claimants to the extent they participated. (See Hoosick Falls PFOA Settlement Website, www.hoosickfallspfoa.com, Final Approval Order at pp 20-21.)
5. Newsletters will generate interest in medical monitoring. Here are two examples:
   a. *The Medical Monitor* (*Perrine v. DuPont* case), found at www.perrinedupont.com. As noted in the newsletter, approximately half of the claimants who signed

up for medical monitoring showed up to be tested. In this case, claimants were given the choice of merely receiving $400 and checking a no box for medical monitoring or receiving $400 and checking a yes box for medical monitoring. One-third chose the no box and the money. Of the remaining two-thirds who checked the yes box to participate in the program, only half went through with medical monitoring, so that approximately one-third of the class benefited from the program.

   b. *The Tolbert Newsletter* (Tolbert Anniston, Alabama, PCB case), found at www.tolbertqsf.com.

6. Consider bringing testing to the claimants with a mobile clinic. A mobile clinic is being used in the Mingo County medical monitoring case, with costs that approximate those incurred with traditional standing clinics in the Anniston, Alabama, and Clarksburg, West Virginia, settlements. Where claimants are scattered or elderly, a mobile clinic is more convenient and may increase program participation.

Bridging the Disconnect Between Medical Monitoring to Determine a Claimant's Health and for Epidemiological Studies

As suggested in the *Fernald* case, one purpose of medical monitoring is to determine if there is linkage between the toxic substance or the dangerous product and disease. This usually requires an epidemiological study. However, most medical monitoring programs do not provide funding for epidemiological studies. Almost invariably, researchers want a grant before they do any work. The result may be that beautiful medical monitoring data may never be examined to determine possible linkage between the toxic substance and health.

Often, the data collected in monitoring for human health is inadequate for epidemiological studies, because the experts that designed the medical monitoring program only focused on health

and not scientific study. An epidemiologist should be involved in the case at the early stages to help design and fund the remedy, and the consequent medical monitoring test (and hopefully research) regimen.

Conclusion

Surprisingly, in all the reported litigation involving medical monitoring, no one representing either plaintiffs or defendants has suggested the commonsense holistic remedy of coupling testing with payment for injury if the testing is positive later. In my opinion, this approach would best serve the interests of both plaintiffs and defendants by providing a total plaintiff remedy for exposure to toxic substances or dangerous products and defining the defendants' monetary exposure.

It is my hope that this is the future of medical monitoring.

Notes

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2. *Deepwater Horizon* Medical Benefits Class Action Settlement Agreement, As Amended on May 1, 2012, and January 11, 2013, Order and Judgment Granting Final Approval thereof, *In Re Oil Spill, MDL 2179*.
3. 746 F.2d 816 (D.C. Cir. 1984).
4. *Ibid.* at 826.
5. *Ibid.*

6. 106 N.J. 557 (1987).
7. *Ibid.* at 22-23.
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9. *History of Negligence in the Law of Torts*, Percy H. Winfeld, 42 Law Quarterly vol. 184 (1926).
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14. Bowers, *supra*.
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16. 590 F.2d 433, at 435 (2nd Cir. 1978), granted, 99 2158 (1979).
17. Anita R. Golbey 48 Fordham Law Review Issue 3 Article 5.
18. Perrine, *supra*.
19. 914 N.E. 2d 891 (Ma. 2009).
20. *Ibid.*
21. No. 12-3299 (E.D. N.Y. 2012).
22. Re Diet Drugs, 2000 W.L. 1222042 (E.D. Pa. 2000).
23. Re Baycol, 218 F.R.D. 197 (D. Minn. 2003); Re Rezulin, 210 F.R.D. 61 (D. Minn. 2003); and Sinclair v. Merck, 195 N.J. 51 (2008).
24. Metro-North Commuter Railroad Co. v. Buckley, 521 U.S. 424, 441-44 (1997); see Norfolk & Western Railway. Co. v. Ayers, 538 U.S. 135, 156-57 (2003) (reaffirming Metro-North in dictum); June v. Union Carbide Corp., 557 F.3d 1234, 1249-51 (10th Cir. 2009) (no medical monitoring with respect to nuclear radiation under Price-Anderson Act); In re Hanford Nuclear Reservation Litigation, 534 F.3d 986, 1009-10 (9th Cir. 2008) (same); Syms v. Olin Corp., 408 F.3d 95, 105 (2d Cir. 2005) (no medical monitoring as "response costs" under CERCLA).
25. The Emperor of All Maladies by Siddhartha Mukherjee, published by Scribners, November 2010.
26. In re Propulsid Prods. Liab. Litig., 208 F.D.R. 133 (E.D. La. 2002) (denying certification of medical monitoring class action in pharmaceutical case because "[n]either the FDA, nor any medical organization or institution, nor anyone else for that matter, except the plaintiffs has recommended or suggested that a program of medical monitoring or a group study of all former Propulsid users be undertaken").
27. E.g., Sheridan v. NGK Metals Corp., 609 F.3d 239 (3d Cir. 2010) (affirming summary judgment for manufacturer of beryllium-based

products because plaintiff failed to show that he was "sensitized" to beryllium).

28. 813 So. 2d 827 (AL 2001).

29. *Ibid.* at 830-32 (emphasis added).

30. 2011 W.L. 2314988 (Wisc. APP 2011).

31. 914 N.E. 2d 891, 901 (Mass. 2009).

32. *Ibid.* (emphasis added).

33. 131 S. Ct. 2541 (2011).

34. *Ibid*. at 2557.

35. 28 U.S.C. Section 1332(d).

36. See Barnes v. Am. Tobacco Co., 161 F.3d 127 (3d Cir. 1998), cert. denied, 526 U.S. 1114 (1999); Ball v. Union Carbide Corp., 385 F.3d 713, 728 (4th Cir. 2004); In re St Jude Med., Inc., 422 F.3d 1116, 1120 (8th Cir. 2005); In re St Jude Med., Inc., 522 F.3d 836, 840 (8th Cir. 2008), reh'g denied, 522 F.3d 836 (8th Cir. 2008); Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1196, amended, 273 F.3d 1266 (9th Cir. 2001); Boughton v. Cotter Corp., 65 F.3d 823 (10th Cir. 1995).

37. A third case, In re Ford Motor Co. E-350 Van Products Liability Litigation, appears in the references, but did not actually involve medical monitoring.

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39. *Ibid.* at 9.

40. 655 F.3d 255 (3rd Cir. 2011).

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Medical Monitoring and PFAS Litigation—A Significant Growing Trend

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Abstract: *Medical monitoring as a tort claim is a hot-button issue in toxic torts, personal injury, and product liability litigation. The ubiquity of PFAS chemical compounds and the real and potential harm to health and the environment they create make examination of the medical monitoring debate specific to this burgeoning litigation worthy of individual attention. This article provides an explanation of PFAS, a brief overview of medical monitoring claims, how PFAS medical monitoring claims have impacted the litigation thus far, and what legal cases are pending that could alter the course of traditional medical monitoring litigation in the future.*

Medical monitoring as a tort claim is receiving ever-increasing attention with courts, legal experts, and practicing attorneys as the number of cases filed in the toxic torts, personal injury, and products liability areas increasingly contain prayers for relief for medical monitoring. In short, the claims ask for relief in the form of a paid medical program that monitors allegedly impacted classes of plaintiffs due to exposure to an alleged toxin or defective product. In virtually all instances, the medical monitoring claims are brought not on behalf of plaintiffs who suffer actual injury from the alleged toxin or defective product, but rather are at some degree of risk for the development of a health issue due to exposure to the toxin or product. Perhaps no area of the law has seen a more significant increase in medical monitoring claims that per-and poly fluoroalkyl substances (PFAS) litigation. What is noteworthy about the trend is that the growth in the number of these claims in PFAS litigation has dramatically increased in just the past two years. It is also important for practitioners to be aware that there are several

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significant pending cases before appellate courts or state Supreme Courts in which the viability of medical monitoring claims specific to the PFAS litigation is directly at issue. The importance of the rulings from these decisions cannot be emphasized enough, as they will have direct impacts on how other courts address the medical monitoring issue. This article provides an explanation of PFAS, a brief overview of medical monitoring claims, how PFAS medical monitoring claims have impacted the litigation thus far, and what legal cases are pending that could alter the course of traditional medical monitoring litigation in the future.

What Are PFAS?

Per- and polyfluoroalkyl substances (PFAS) are a class of over 12,000 man-made compounds.[1] Chemists at DuPont developed the initial PFAS chemical (polytetrafluoroethylene, or PTFE) by accident in 1938 when researching carbon-based chemical reactions.[2] During one such experiment, an unusual coating remained in the testing chamber, which upon further examination was completely resistant to any methods designed to break apart the atoms within the chemical.[3] The material also had the incredible ability to repel oil and water.[4] After World War II, DuPont commercialized PTFE into the revolutionary product that the company branded "Teflon."[5]

A short while later, 3M invented its own PFAS chemical—perfluorooctane sulfonate (PFOS), which the company also commercialized and branded "Scotchgard."[6] Within a short period of time, various PFAS chemicals were used in hundreds of products—today, it numbers in the thousands.

The same physical characteristics that make PFAS useful in a plethora of commercial applications, though, also make them highly persistent and mobile in the environment and the human body—hence, their nickname, "forever chemicals."[7]

Traditional Medical Monitoring Claims

Medical monitoring claims are not a new phenomenon in American tort law, as they have their origins in the *Friends for All Children Inc. v. Lockheed Aircraft Corp.* ruling from 1984.[8] The case

involved a plane of Vietnamese orphans that crashed, during which the cabin experienced violent decompression and loss of oxygen. The plaintiffs alleged that the children were likely to suffer from brain impairment due to the circumstances. The court determined that medical monitoring was appropriate to follow the children for a period of years to determine if there was any harm, and the defendant in the case was required to fund the monitoring program. While many specific limitations and logistical requirements were part of the court's order that were specific to the case, the *Friends for All Children* case nevertheless serves to this day as the seminal medical monitoring case cited frequently in the legal community.

The arguments in favor of medical monitoring as a cause of action in lawsuits stem from the notion that having such programs funded by allegedly tortious companies promotes the public health benefit of early detection, which in turn often results in lower health care costs to plaintiffs and society at large. In addition, proponents point to the argument that absent conduct by a defendant, the potential for harm or injury would not have occurred, so it is justifiable to require the tortious defendant to pay for medical monitoring that the defendant would have to pay himself to ensure that there are no adverse health effects. Opponents of medical monitoring as a recognized tort claim point to the tenants of tort law, under which proof of some harm is required in order to successfully litigate a case. "Fear of future injury," it is argued, is not an injury and should therefore not be compensable under the law.

Similar to the split in arguments for and against medical monitoring as a remedy under the law, courts are also split on whether medical monitoring claims should be allowed in tort law. While a handful of states have either remained neutral on the issue or have a split among their courts on the issue, about half of the states that have ruled on the issue have allowed medical monitoring to be a compensable tort injury, while the other half that have ruled on the issue have declined to allow medical monitoring claims in cases.

Origins of Medical Monitoring Claims In PFAS Cases

It is certainly true that other alleged toxins or chemicals have been the subject of medical monitoring claims in cases since *Friends*

for All Children. However, the driving force behind today's trend of increasing medical monitoring claims in PFAS litigation originates from the most well-known personal injury PFAS lawsuit (featured in the blockbuster film *Dark Waters*) that was brought by attorney Rob Bilott against DuPont on behalf of approximately 70,000 citizens in Parkersburg, West Virginia. Ultimately, the case settled for $670 million in 2017.[9]

What is most notable about the lawsuit, aside from the settlement amount, is that as part of the negotiations between the plaintiffs and DuPont, the company agreed to fund a medical monitoring and science panel program at a cost of over $200 million for the affected citizens. The results of that medical monitoring program and the science panel are now what are commonly called the "C8 Science Panel findings" (C8 being another name for PFOA, or perfluorooctanoic acid, one type of PFAS). It was the results derived from the medical monitoring program and the Science Panel findings that resulted in the settlement of the personal injury claims.

Increasing Medical Monitoring Claims in PFAS Litigation

Since the 2017 Parkersburg settlement, the world has seen unprecedented attention given to PFAS issues from all angles—legal, political, media, citizen awareness. The legal community also recognized that potential harms from certain PFAS may not manifest until many years from the present, akin to the latency period issues associated with asbestos exposures. It is this fact that has been the foundation for plaintiffs' counsel presenting arguments to courts nationally requesting medical monitoring as a remedy. While reports of the increase in the number of PFAS lawsuits that allege claims for medical monitoring are not uniform in the number of cases reported, a clear trend from such reports is that year-over-year from 2018 to the present, the number of such cases is increasing nationally.

As I can attest to from representing companies embroiled in PFAS litigation, the companies targeted for medical monitoring in PFAS cases go well beyond the traditional manufacturers of the PFAS to the downstream corporate users of the chemicals. Case

numbers are increasing against such companies for environmental pollution, contaminated drinking water sources, and property devaluation claims, which are typically brought by private citizens. Intricately tied into any of these claims is a prayer for relief for the funding of a medical monitoring program. While the size of the certified class of plaintiffs in such cases will necessarily drive the cost of such a program, the Parkersburg, West Virginia, case shows just how costly such programs can be for companies.

The increase in number of PFAS lawsuits with medical monitoring components tied to them is leading to challenges being brought in states that traditionally have not permitted medical monitoring claims or that have leaned more toward precluding such claims. One such example is in New Hampshire. In *Kevin Brown v. Saint Gobain*,[10] the plaintiffs' drinking water was allegedly contaminated with PFOA as a result of a Saint-Gobain facility that discharged PFOA into local waterways, which fed drinking water sources. The case made its way through the United States District Court for the District of New Hampshire, but the defendant certified the question to the New Hampshire Supreme Court of whether New Hampshire law permits the plaintiffs, who are asymptomatic, to bring a claim for the costs of their being periodically medically monitored for symptoms of disease caused by exposure to PFOA. In November of 2022, the New Hampshire Supreme Court heard oral argument on the issue and a ruling is expected in 2023.

Even in states where the issue of medical monitoring claims is unsettled as to how the state's highest court would rule, settlements of PFAS medical monitoring cases are taking place that will necessarily drive plaintiffs' counsels' incentives to bring addition claims for medical monitoring. One such example was seen in Hooksett Falls, New York, in 2021. As part of a proposed settlement in *Baker et al. v. Saint-Gobain Performance Plastics Corp.*,[11] the defendant company agreed to a medical monitoring settlement of up to $22.8 million for affected citizens.

Perhaps the most important PFAS medical monitoring case to watch, though, is the *Hardwick v. 3M*[12] lawsuit brought in Ohio (it was filed by attorney Rob Bilott). In the case, the plaintiffs seek to create a nationwide class action for "all individuals residing within the United States who, at the time the class is certified in this case,

have a detectable levels of PFAS material in their blood serum." Scientists estimate that up to 97% of United States residents have a detectable level of PFAS in their blood serum, making this the largest proposed class action to date in the United States. Notably, this suit does not require the class to have an illness or injury past a detectable level of blood in their serum. In addition, the lawsuit seeks a court order creating an independent science panel funded by the 11 defendants sued, whose findings of correlating illnesses will be binding on the parties in the lawsuit. If deemed appropriate by the science panel, the defendants may have to fund medical monitoring. The lower court certified the class of all citizens of Ohio (roughly 12 million people) and invited additional briefing on whether to include other citizens from other states in which medical monitoring is a recognized claim. The ruling was appealed to the Sixth Circuit Court of Appeals, which accepted interlocutory review of the class certification. Anyone involved in the PFAS litigation would be well advised to follow the case closely, as it will not only have ripple effects on class certification issues but also on medical monitoring claims both in the PFAS realm and more broadly.

It is worth noting that the PFAS aqueous film-forming foam (AFFF) multidistrict litigation (MDL) docket out of South Carolina has over 2,500 cases on the docket at the moment. The cases focus primarily on issues related to PFAS contamination or personal injury from the AFFF product; however, many of the cases on the docket include a prayer for medical monitoring funding. With the first bellwether trial set to take place in June 2023 from the AFFF MDL, resulting verdicts or settlements of the claims, including funding of medical monitoring, will have enormous impacts on the PFAS medical monitoring issue nationally.

New Restatement of Torts, New PFAS Medical Monitoring Support

The American Law Institute (ALI) is a prestigious legal organization that develops "Restatements" of various laws in the United States, including tort law. The ALI's work and the Restatements, while not binding on courts, are widely regarded by attorneys, judges, and legal scholars as a comprehensive understanding of

many of the nuanced parts of legal theories. Through decades of work and revisions, the Restatement (Third) of Torts is now nearing the final stages of completion.

Significantly, the Restatement (Third) is contemplating including recommendations that courts allow plaintiffs to recover monetary damages for medical monitoring expenses, even though the plaintiffs do not have any present bodily harm. While several ALI meetings have been scheduled to discuss the specific language of the newly worded medical monitoring section, no final Restatement has been released publicly to date, although one is expected in the next year or two.

The Restatement (Third) approach opens the door to courts that have traditionally ruled against medical monitoring to change their views. Similarly, courts with split decisions or who are neutral on the issue may rely on the Restatement (Third) to find in favor of plaintiffs seeking PFAS medical monitoring claims.

Key Takeaways for Companies

The issue of permitting PFAS medical monitoring claims without any present injury is one that has enormous impacts not only on PFAS manufacturers but on any downstream commerce company that finds itself in litigation (often class action lawsuits) alleging medical monitoring damages. The litigation is already shifting in such a way that downstream commerce companies (i.e., companies that did not manufacture PFAS, but utilized PFAS in manufacturing or products) are being named in lawsuits for personal injury and environmental pollution at increasing rates. Allowing a medical monitoring component to the recoverable costs that can be pled would significantly raise the risks and potential liability costs to downstream companies.

It is of the utmost importance that businesses along the whole supply chain evaluate their PFAS risk and fully understand the legal arguments that plaintiffs could make against companies in litigation. Public health and environmental groups urge legislators to regulate PFAS at an ever-increasing pace. Each year sees increasing numbers of citizen lawsuits against downstream companies in which medical monitoring is sought as a prayer for relief.

Companies that did not manufacture PFAS, but merely utilized PFAS in their manufacturing processes, are therefore becoming targets of costly monitoring programs at rates that continue to multiply year over year. Legal risk analysis steps can be taken now that can mitigate future risks and future business disruption due to PFAS lawsuits, but proactive steps must be taken now to take full advantage of early action.

Notes

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Will a New Wave of New Environmental/Toxic Tort Litigation and Claims Upend Insurance Industry Environmental Reserves?

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Abstract: *To remain profitable and viable, the insurance and reinsurance industry must rely on estimated forecasts of potential claims many years out to establish an appropriate level of reserves. They rely on data from rating agencies and, based on these estimates, ratchet their reserves up or down accordingly. In past years major and once unforeseen developments like massive asbestos and environmental litigation provided urgent reasons to cast an especially critical eye on the adequacy of industry reserves. In this article, the author explains why it is that time again. In light of several potentially calamitous emerging global liabilities he reviews here, particularly if they land with the impact he fears they might, the author believes the insurance industry and its policyholders may be in for a jolt a few short years from now.*

For years, many insurers and reinsurers steadily reduced their environmental reserves, underestimating the ultimate impact of environmental claims. Rating agencies may have also underestimated the ultimate cost of environmental claims facing the property/casualty insurance industry.

Take, for example, A.M. Best, which in 1995 estimated the ultimate total of pre-1985 environmental claims to be $26 billion[1] (which at the time, I thought was way too low). By 2018, the rating agency had increased their estimate to $46 billion[2]—where it still sits today (again, which I still think is way too low). At the time

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of raising their estimate from $42 billion to $46 billion, A.M. Best explained that the increase was necessary because some older contaminated sites were more toxic and would thus cost more to remediate than originally believed. No doubt true, but are there other contaminants/toxins being missed or perhaps their potential impact is being underestimated? Much has come to light since 2018 when their estimate was last increased.

It is not just A.M. Best but other rating agencies as well. Rating agency Milliman's 2020 estimate for the ultimate losses from environmental claims ranges from $45 billion to $55 billion.[3] A little higher than A.M. Best's estimate but does it accurately reflect the ultimate costs of environmental claims facing the insurance industry?

Well, it may be time to begin increasing environmental reserves—*dramatically*—as new wave of environmental litigation, coverage actions, and claims have already begun. Let's just look at a few of the environmental pollutants driving this new wave of activity: glyphosate, paraquat, PFAS (per- and polyfluoroalkyl substances) chemicals, plastics, and ethylene oxide gas.

Glyphosate: Lymphoma Claims and Thousands of Roundup™ Suits

Glyphosate, the active ingredient in the weed killer Roundup™ has been in use in the United States since 1974. Roundup was made by Monsanto Company, which was purchased by Bayer A.G. in 2018. Toxic tort litigation alleging exposure to glyphosate causes lymphoma or chronic lymphocytic leukemia, among other illnesses, is ongoing. Thousands of people have filed lawsuits alleging exposure to glyphosate has caused their illnesses.

Litigation has already begun and some of the verdicts and/or settlements already handed down in glyphosate litigation include:

- An initial $2.055 billion to a couple alleging glyphosate exposure caused them both to develop non-Hodgkin's lymphoma. The verdict included $55 million in compensatory damages and $2 billion in punitive damages,

later reduced to $70 million (*Pilliod v. Monsanto*, 67 Cal. App. 5th 591 [2021]; 282 Cal. Rptr. 3d 679).

- An initial $289 million to another plaintiff who also alleged exposure to the herbicide caused his non-Hodgkin's lymphoma. The jury awarded the plaintiff $39.3 million in compensatory damages, later reduced to $10 million, and $250 million in punitive damages, later reduced to $10 million on appeal (*Johnson v. Monsanto Co.*, 52 Cal. App. 5th 434—Cal. Court of Appeal, 1st Appellate Dist., 1st Div. 2020).
- An initial $80 million verdict was handed down to another plaintiff with non-Hodgkin's lymphoma. The jury awarded $5.3 million in compensatory damages and $75 million in punitive damages, reduced by the district court to $20 million and affirmed by the Ninth Circuit (*Hardeman v. Monsanto Co.*, 997 F. 3d 941—Court of Appeals, 9th Circuit 2021).

Much of the litigation has been consolidated into multidistrict litigation (MDL). Bayer has proposed a $10.9 billion settlement to settle with approximately 100,000 plaintiffs. The company would still face some 30,000 pending lawsuits, with more being filed.[4]

With verdicts like the ones shown above, the costs of 30,000 additional suits could be significant. In addition, while glyphosate litigation has, to date, targeted Roundup's maker Monsanto/Bayer, one has to wonder whether the glyphosate litigation will follow the pattern seen in earlier toxic tort litigation and expand the list of targeted defendants to include others in the liability chain. If so, this could not only drive up the ultimate costs of glyphosate litigation but also result in more insurers and reinsurers seeing demands for defense and indemnity payments.

Paraquat: Allegations of Parkinson's Disease

Glyphosate isn't the only herbicide at the center of mass litigation. Another is paraquat, also known as methyl viologen, first commercially produced in 1961. Farmers are alleging their Parkinson's disease was caused by exposure to the herbicide. Syngenta

A.G., the manufacturer, paid $187.5 million to settle some lawsuits, but now "so many people have recently filed legal claims alleging paraquat caused them to develop Parkinson's that the cases have been consolidated for oversight by a federal judge in Illinois and a state court judge in California."[5]

PFAS: Breakdown Can Take Thousands of Years

PFAS, or per- and polyfluoroalkyl substances, is a family of chemicals comprising between 4,000 and 12,000 members, according to various estimates.

The first PFAS chemical was invented in the 1930s.[6] By 1947, 3M began mass manufacturing PFOA, or perfluorooctanoic acid. In 1951 DuPont used PFOA to make Teflon.[7] From there the list of PFAS chemicals expanded as did the products incorporating these chemical compounds. The properties of PFAS include making products nonstick, as well as oil, stain, and water repellent. It was used to make Scotchgard™, the stain repellent applied to fabrics, sold since 1956. Since the 1960s it has been used in firefighting foam. The compounds can also be found in cosmetics, food packaging, and other products. Biosolids spread on top of farmland as fertilizer also contain PFAS chemicals. One recent study concluded that there are more than 57,400 sites nationwide that are very likely to be contaminated with PFAS.[8]

PFAS chemicals are commonly called "forever chemicals," because once released into the environment they can take hundreds or even thousands of years to break down. They are also, unfortunately, persistent in the human body.

Studies have found that exposure to certain PFAS chemicals is linked to cancer, thyroid disease, reduced immunity, high cholesterol, birth defects, and other illnesses.[9]

Due to the release and disposal of PFAS, the chemicals are prevalent in U.S. surface and drinking water, and in the oceans, atmosphere, and soil. It has been found in rain, snow, and milk. Nearly everyone in the United States has PFAS chemicals in their blood.[10]

There have been more than 6,400 PFAS lawsuits filed since 2005.[11] Plaintiffs are seeking damages for pollution as well as bodily injuries.

Some of the verdicts and settlements reached to date include:

- 70,000 residents of Parkersburg, West Virginia, sued DuPont over exposure to PFAS chemicals. DuPont agreed to settle the medical monitoring portion of the suit for $100 million. Subsequently, three bodily injury suits went to trial and verdict: (1) a plaintiff with kidney cancer was awarded $1.6 million for compensatory damages, (2) a plaintiff with testicular cancer was awarded $5.1 million in compensatory damages and $500,000 in punitive damages, and (3) another plaintiff with testicular cancer was awarded $2.1 million in compensatory damages and $10.5 million in punitive damages. Subsequently, DuPont settled all pending bodily injury lawsuits for $670 million in 2017.
- The state of Minnesota sued 3M Company for contamination of drinking water sources. The suit was settled in 2018 for $850 million.[12]
- Earlier this year, 3M Company and shoe manufacturer Wolverine Worldwide reached a $54 million settlement with the owners of 1,700 residential properties over PFAS contamination of their land and drinking water wells.[13]

The first comprehensive estimate I have seen for the costs of removing PFAS chemicals from drinking water nationwide is some $400 billion (yes, with a "b").[14] Add to that the costs of removing PFAS from more than 57,000 contaminated sites and the potential defense and indemnity costs of future toxic tort bodily injury lawsuits, the ultimate PFAS costs could dwarf the current total A.M. Best estimate of $46 billion.

Plastics: 400 Million Tons a Year

The first fully synthetic plastic was invented in 1907 but production greatly increased during the 1940s.[15] Today, nearly 400 million

tons of plastics are produced annually. Plastics are similar to PFAS in that microplastics and nanoplastics are ubiquitous. Studies have found microplastics in oceans and other waterways, in the air, in salt, seafood, and in bottled water. Scientists estimate that there are between 15 trillion and 51 trillion microplastic particles in surface water worldwide. It has also been estimated that people ingest between dozens to more than 100,000 pieces of microplastics daily.[16]

Researchers are just beginning to look into nanoplastic particles. Given the small size of nanoplastics they may be even more widespread in the environment. In fact, nanoplastic pollution has been detected in both polar regions for the first time, indicating that the tiny particles are now pervasive around the world.

With regard to human exposure, in addition to ingestion as an exposure pathway, nanoplastics are also inhalable. Nanoplastics may be able to be carried through the bloodstream and lodge in a person's organs and/or disrupt cellular functions.[17]

Microplastic particles may be toxic. Added compounds including plasticizers like bisphenol A (BPA) and BPA substitutes, stabilizers like phthalates, pigments, and flame retardants may all be harmful. A recent study found a causal link between phthalates and an increased growth of uterine fibroid tumors.[18] Previous studies have found BPA, BPA substitutes, and phthalates to be endocrine disrupters and may be linked to other illnesses.

While plastics litigation is in its infancy, a new study came up with the first cost estimate for coming toxic tort and environmental remediation actions. The researchers concluded that litigation could cost more than $20 billion over the next eight years—and costing "magnitudes more" thereafter. They predict that most of the litigation will occur in (no surprise here) the United States.[19]

Ethylene Oxide: Hundreds of Millions in Punitive Damages, More to Come

Ethylene oxide gas has been used as a sterilant since the 1950s. In 2018, the U.S. Environmental Protection Agency (EPA) published research that found that people living near sterilization facilities faced some of the nation's highest cancer risks from the ethylene oxide released into the air.

In the first toxic tort lawsuit, a plaintiff alleged her breast cancer was caused by exposure to ethylene oxide emanating from a nearby medical device sterilization facility. An Illinois jury awarded her $363 million ($38 million in compensatory damages and $325 million in punitive damages). Sterigenics International LLC, the former plant's most recent owner, was ordered to pay the plaintiff $220 million in punitive damages. Soteral Health Company, Sterigenics' parent company, was ordered to pay $100 million. Griffith Foods Group Inc., the current name of the plant's original owner, was ordered to pay $43 million ($5 million in compensatory damages and $38 million in punitives).[20]

More than 700 additional lawsuits have been filed against the Illinois medical device sterilization facility.

The EPA has identified at least 23 facilities nationwide where ethylene oxide emissions from sterilization plants "has significantly increased lifetime cancer risks for nearby residents."[21]

Expect more litigation.

"But We Have Pollution Exclusions!"

Paraquat, PFAS chemicals, plastics, and ethylene oxide gas all have been in use for decades—well before insurers began adding the sudden and accidental exception to pollution exclusions in commercial general liability and commercial umbrella policies in 1973. And glyphosate was widely used well before 1985 when the industry started adding absolute pollution exclusions to their policies.

Environmental reserves have been set aside specifically to pay those claims impacting older policies that (1) did not have a pollution exclusion, or (2) have the sudden and accidental pollution exclusion, but cover risks in jurisdictions that have not upheld the efficacy of that exclusion.

Appellate-level courts in some 15 jurisdictions have not upheld the efficacy of the sudden and accidental pollution exclusion, generally finding the "sudden and accidental" exception to the exclusion to be ambiguous. This led to the insurers attaching an absolute pollution exclusion to policies in 1985 (and amended in 1986).

When discussing asbestos and environmental reserves, the ultimate costs environmental claims facing insurers/reinsurers applies to pre-1985 policies. When discussing environmental claims impacting post-1985 polices the answers regarding whether existing reserves account for these environmental claims get more vague. One rating agency told me years ago that post-1985 exposures are included in their estimate. While others state that their estimates are for pre-1985 policies.

This matters because environmental/pollution claims continue to be an issue in the post-1985 world. Unfortunately, appellate-level courts in 17 U.S. jurisdictions have not upheld absolute pollution exclusions under various fact patterns (e.g., was not caused by a "pollutant," substance was not specifically listed in the exclusion as a "pollutant," did not involve damage to the environment, no remediation was necessary, exclusion does not apply to indoor occurrences, exclusion only applies to industrial pollution exclusion, exclusion does not apply to occupational exposure, exclusion does not apply to products). Given this track record, policies from 1985 to the present may be impacted in multiple jurisdictions.

Time to Redefine "Nuclear Verdicts"

Worth mentioning here are "social inflation" and "nuclear verdicts," defined as an award that surpasses $10 million.[22] In the United States, nuclear verdicts and settlements seem to be the norm. A nuclear verdict has been reported in the popular press about every other day this year—and I am sure that is underestimating the number actually adjudicated. Several of the litigation examples I have included above are considered nuclear verdicts and/or settlements. We can expect to see many more handed down in the toxic tort arena. Verdicts and settlements in the $10 million to $20 million range have become so frequent it may be time to revise the definition of nuclear verdict/settlement upward? (I wonder who, or what, organization makes such a decision.) Inflation of medical care prices is driving higher claims costs.

To sum up (and I risk putting too fine a point on it):

- Glyphosate litigation has already resulted in more than $13 billion in verdicts and settlements, plus defense costs, with some 30,000 plaintiffs to go.
- Paraquat has already resulted in $187.5 million, plus defense costs, in settlements, with new plaintiffs still filing lawsuits.
- PFAS chemicals and the estimated cost to remove them from drinking water is in the $400 billion range. And drinking water contamination is just the beginning. Just two PFAS suits already adjudicated resulted in $1.5 billion in settlements.
- Plastics pollution/exposure litigation is estimated to cost $20 billion during the next eight years and "magnitudes more thereafter."
- Ethylene oxide gas litigation saw its first cancer verdict for a single plaintiff of $363 million. Seven hundred more residents have filed suits for illnesses allegedly arising from the same facility. Another 23 facilities nationwide have been identified as emitting ethylene oxide gas into their communities with more likely to be identified.

As if That's Not Enough

Keep in mind that I haven't even discussed the potential for:

- Climate change litigation against greenhouse gas emitters (look at the growing field of attribution science if you doubt the third-party lawsuits are coming).
- Litigation arising from methylene chloride (aka chloromethane), in use since the 1940s, which the EPA has found presents an unreasonable risk of injury.
- Litigation for damage and injury from pharmaceutical contamination of our waterways.
- Litigation from any number of other toxic tort/environmental issues that are coming to the fore that predate the use of absolute pollution exclusions.
- Post-1985's decades of occupational and consumer exposure to engineered nanomaterials which can be inhaled

> or ingested, which a couple of hundred studies have linked to serious adverse health effects.

Estimates that the ultimate costs of environmental claims will land between $45 billion and $55 billion is terribly low. Maybe I am missing something (always a possibility). If not, the insurance industry is in for a rude awakening.

Notes

* Charlie Kingdollar spent his career as emerging issues officer for a major global insurance company, tracking hundreds of future risks like those discussed in this article. Charlie is also a valued member of the Editorial Board of Advisors for the *Journal of Emerging Issues in Litigation*.

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Autonomous Vehicles: The New Technology Driving the Litigation Conversation

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Abstract: *So far, Congress has not been able to pass regulations governing the emergence of self-driving or autonomous vehicles. Twenty-one states and the United Kingdom are leading the way. As more of these vehicles take to the highway implications will emerge for the insurance industry. Auto insurance policies will have to determine how to insure against losses caused by nonhuman operators, commercial general liability policies will be affected when technology developers and car makers are sued for bodily injury and property damage arising from malfunctioning technology, and cyber policies could be implicated in the event of hacks or data breaches. The authors review these subjects and share their insights into what autonomous vehicle producers should consider when it comes to mitigating their risk.*

Introduction

As autonomous vehicle technology has developed, so too have novel accompanying legal issues. Although federal regulation of autonomous vehicles has stalled, many individual states have enacted laws governing this new space. Lack of federal legislative guidance has left determination of legal issues related to autonomous vehicle technology largely with the states and the courts. In 2018, the United Kingdom passed nationwide legislation governing this emerging technology, which may provide guidance for what future U.S. law could look like. In the meantime, several cases pending in U.S. courts can shed light on how courts view legal challenges and issues related to this new technology.

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U.S. Legislation

In 2017, Senator John Thune (R-SD) introduced the American Vision for Safer Transportation through Advancement of Revolutionary Technologies Act (the AV START Act), but it failed to pass the 115th Congress. The bill sought to mitigate cybersecurity risks, increase public awareness of the use of private data in vehicles utilizing autonomous technology, and establish federal oversight of autonomous vehicle safety. The AV START Act would have required manufacturers to send safety evaluation reports to the Secretary of Transportation before road testing autonomous vehicles. Additionally, the AV START Act would have established a committee under the Department of Transportation's control to make recommendations regarding autonomous vehicle safety standards. Under the AV START Act, the federal government would provide oversight, but autonomous vehicles still would be regulated largely by state and local traffic laws.

The AV START Act recognized cybersecurity concerns inherent in a new technology like autonomous vehicles, and would have required manufacturers to implement a written plan to mitigate such risks. A valid plan would have included processes for recovery from cybersecurity breaches, detecting and responding to incidents, and risk-based, prioritized identification and protection of critical vehicle control systems. Additionally, the AV START Act would have established a new database to both monitor personal information collected by autonomous vehicles and track how that information would be used.

In January 2020, the U.S. Department of Transportation and the National Highway Traffic Safety Administration (NHTSA) issued voluntary autonomous vehicle guidance designed to encourage the development of legislation by states. The guidance includes the U.S. government's recommendations concerning safety, provides research data, and highlights important issues concerning the evolving nature of autonomous technology. It also states that autonomous vehicle companies are eligible for a federal income tax credit of up to 20% of the eligible spending for research and developmental activities.

Absent federal legislation, numerous states have enacted their own laws regulating autonomous vehicles. Currently, 29 states and Washington D.C. have enacted laws regulating autonomous vehicle technology.[1] Twenty-one states have authorized deployment of some form of autonomous vehicle technology on public roads, while others restrict operations to testing.[2] Depending on the level of vehicle automation, many of these states do not require an operator to be in the vehicle.[3] Only two states with autonomous vehicle laws—Colorado and Virginia—do not require that the owner have liability insurance.[4] Many states require policy limits on liability insurance to be at least $1 million, with some states requiring as much as $5 million.[5]

Developments in the United Kingdom

On July 19, 2018, Parliament passed the Automated and Electric Vehicles Act (the AEV Act). The AEV Act requires that vehicles designed or adapted to be capable of self-driving must be insured to cover liability for damages caused to person or property, extending the prior mandate issued to individual, human drivers. This requirement applies whether the vehicle is controlled manually or autonomously.

The AEV Act requires a policyholder's insurance company to cover third-party damage caused by a self-driving automated vehicle. A policy may not exclude such damages, except for damages suffered as a direct result of software alterations made without the policyholder's knowledge, or failure to install safety-critical software updates. Generally, for the second exclusion to apply, the policyholder must be reasonably expected to know that the update is safety-critical, and that the absence of the update would render the vehicle unsafe.

The UK's legislation contemplates future liability risks, which will arise as autonomous vehicles become more widespread. While the AEV Act governs insurance concerns nationwide in the United Kingdom, insurance law in the United States generally falls within the purview of state law. But as federal legislators show an increasing willingness to wade into insurance law, perhaps future federal legislation will follow the UK's example of a federal insurance mandate.

Litigation Involving Autonomous Vehicles

Litigation regarding autonomous vehicle technology remains sparse. However, an analysis of several representative cases displays the range of causes of action that parties injured by autonomous vehicles may pursue.

In March 2018, Apple engineer Walter Huang's Tesla Model X veered out of control while allegedly using the "Autopilot" feature, crashing into a highway median and killing Huang. In April 2019, Huang's estate filed suit in the Superior Court of California, County of Santa Clara, alleging causes of action against both Tesla and the state of California.[6] Relevant to autonomous vehicle technology, the Estate alleged negligence and wrongful death against Tesla for carelessly selling the Model X without a properly functioning automatic braking system or a properly designed system for crash avoidance. The Estate also alleged design defect against Tesla due to the lack of an effective automatic braking system, as well as the vehicle's tendency toward unwanted acceleration and lack of adequate sensors to prevent the vehicle from veering from its lane. The third cause of action stated negligence post-sale, alleging that Tesla knew of the defects in the Model X and failed to issue a recall or adequately warn consumers. The Huang action is still pending, so the outcome of the Estate's allegations against Tesla and the state of California is unsettled. However, as discussed below, information revealed during discovery may create liability issues for Tesla that could impact not only the Huang case but potentially others as well.

On April 29, 2018, Yoshihiro Umeda was allegedly struck and killed by a Tesla Model X. At the time of the crash, the Autopilot system allegedly was engaged. The victim's estate filed a lawsuit in the United States District Court for the Northern District of California seeking damages—including punitive damages—from Tesla under theories of strict products liability and negligence.[7] In September 2020 the court dismissed the case, granting Tesla's motion based on jurisdictional grounds, and the case was moved to a Japanese court. The case remains pending in Japan.

In 2019, Benjamin Maldonado was driving his 15-year-old son home from soccer practice when they were struck by a Tesla Model 3 after Maldonado switched lanes. Maldonado's son was

ejected from the car and killed as a result of the crash.[8] Two years after the crash, Maldonado brought a wrongful death action against the driver of the Tesla and Tesla Inc. The complaint alleged that the Tesla's Autopilot system is defective and failed to react to traffic conditions. The case is currently pending in Superior Court of California, Alameda County.

These representative cases set forth a noncomprehensive list of causes of action that a company like Tesla may face when autonomous vehicle technology falters. Manufacturers face potential liability related to personal injury, wrongful death, negligence, property damage, and products liability. Of course, these are just direct actions. Insurance implications could ultimately be more far-reaching.

Insurance Implications for Autonomous Vehicles

As autonomous vehicle technology grows, several implications will emerge for the insurance industry—including for policyholders seeking insurance coverage. Most obviously, auto insurance policies will have to determine how to insure against losses caused by nonhuman operators. Additionally, commercial general liability policies will be affected where, as in the cases above, the technology developers and car manufacturers are forced to defend against bodily injury and property damage claims arising from malfunctioning technology.[9] And, as the AV START Act implied, cyber policies could be implicated in the event of a hack or data breach. Companies providing services in the autonomous vehicle market would be wise to review their insurance programs to plan for and guard against the possibility of future losses.

The growing number of lawsuits involving autonomous vehicles undoubtedly will uncover new information concerning the safety of self-driving technologies. For example, in October 2022 the Department of Justice revealed that it was launching a criminal investigation into Tesla's self-driving claims.[10] As lawsuits and investigations progress, heightened scrutiny of operations at companies like Tesla likely will raise questions concerning leadership practices and decisions on safety or design.

Recent reporting illuminates the potential liability that autonomous vehicle companies may face with respect to representations of self-driving technology to the public. On January 18, 2023, Reuters reported that Tesla released a staged video demonstrating the self-driving capabilities of its vehicles in 2016.[11] This information surfaced after Ashok Elluswamy, the company's director of Autopilot software, testified during a deposition taken as part of the lawsuit filed by the Estate of Walter Huang discussed above. According to this testimony, Elluswamy revealed that drivers in the video intervened to take control during test runs and that "[w]hen trying to show the Model X could park itself with no driver, a test car crashed into a fence in Tesla's parking lot."[12] The 2016 video had previously been the focus of a 2021 *New York Times* article, which reported that Tesla engineers created the video to promote its "Autopilot" feature but failed to disclose that the route the car took in the video was planned in advance or that a car had crashed during the course of the video's filming. Details regarding the possible knowledge and involvement of Tesla leadership remain uncertain but could trigger a future insurance coverage dispute. Tesla's officers and directors could face legal liability as a result of the representations the company made to the public regarding the safety of its self-driving technology. Moreover, the decisions surrounding the production of the video and its release may raise liability for senior leadership depending on their level of involvement.

The new information concerning Tesla's 2016 video uncovered during the Huang action sheds light on the evolving nature of liability that the autonomous vehicle industry faces. As technology giants like Tesla, Google, and Uber enter and cultivate the autonomous vehicle technology industry, insurance analysis will be a critical concern to protect both manufacturers and consumers.

Conclusion

As autonomous vehicle technology continues to grow, so too will the legal issues that it engenders. While we await federal law legislating this new industry, and as state law continues to develop, courts already are being tasked with adjudicating claims arising from the use of autonomous vehicles. Although difficult to tell

where exactly this new technology will lead, corporations and individuals aligning themselves with this new space would be wise to begin evaluating risks, and developing strategies to mitigate those risks, right now.

Notes

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Potential Pitfalls with Adult-Use Cannabis: What Both Employers and Employees Should Know

Adam R. Dolan and Kaylee Navarra*

Abstract: *Recreational cannabis use for adults is legal in 21 states, having made its way eastward from western jurisdictions that first addressed the issue. But these laws govern personal use during personal time. While they generally prohibit discrimination based on such use, these laws do not greenlight consumption at work or going to work under the influence. But with so many jurisdictions and job types, and variance among state laws, there aren't simple answers. This is especially true for employers who conduct business nationwide, and because cannabis continues to be a Schedule I substance on the federal Controlled Substances Act. What rights and remedies do companies and workers have to resolve disputes? Are employers permitted to conduct drug tests? What about low-THC products and CBD? In this article the authors will address these and several other important questions.*

On March 31, 2021, New York State legalized adult-use cannabis by passing the Marijuana Regulation & Taxation Act (MRTA). New Jersey has also legalized adult-use cannabis. Connecticut has legalized adult-use cannabis and had its first retail sales of the product on January 10, 2023. According to the National Conference of State Legislatures, 21 states have legalized the adult use of marijuana for recreational purposes: Alaska, Arizona, California, Colorado, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, New Jersey, New Mexico, New York, Nevada, Oregon, Rhode Island, Vermont, Virginia, and Washington. What does this mean for employers? What does it mean for employees? What rights and/or remedies do each side have if disputes arise?

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Are there exceptions to those rights and rules? Where does the law currently stand?

In New York, the MRTA amended Section 201-D of the New York Labor Law to clarify that cannabis used in accordance with New York State law is a legal consumable product. As such, employers are prohibited from discriminating against an employee based on the employee's use of cannabis outside of the workplace, outside of work hours, and without use of the employer's equipment or property.[1]

However, employers may take employment action or prohibit employee conduct where an employer is/was required to take such action by state or federal statute, regulation, or ordinance, or other state or federal governmental mandate; the employer would be in violation of federal law or would lose a federal contract or federal funding. Employers may also take action when the employee, while working, manifests specific articulable symptoms of cannabis impairment that decrease or lessen the employee's performance of the employee's tasks or duties and/or the employee, while working, manifests specific articulable symptoms of cannabis impairment that interfere with the employer's obligation to provide a safe and healthy workplace as required by state and federal workplace safety laws.[2] That seems fairly straightforward. But what if your company isn't in an industry such as the type to be governed by labor law (think construction); what then?

Can My Employer Drug Test Me?

The first question many ask is "Can my employer drug test me?" The short answer in most states is yes. In California, as of January 1, 2024, AB 2188 will prohibit employers from discriminating against a worker based on their off-the-job use of cannabis. Under the law, employers can only take action against a worker for failing a valid pre-employment drug test if it "does not screen for non-psychoactive cannabis metabolites." The law does allow employers to conduct impairment testing and to terminate and employee who is on-site and who the company determines is impaired by cannabis. However, even once the law goes into effect, it does not preempt state or federal laws requiring employees to be tested for controlled

substances. Also, employees in building or construction trades are excepted from the prohibition on cannabis testing.

California's AB 2188 is not unique, as a handful of states—including New York and its neighbors, Connecticut and New Jersey—have adopted similar laws protecting cannabis users from employment discrimination. But some states still allow employers to take adverse action against employees for off-duty cannabis use. California, before the introduction and signing of AB 2188, was one of the few states that permitted employers to fire employees for off-duty cannabis use—even if the use was for a medical condition with a valid medical marijuana card.[3]

In Colorado, a state statute prohibits employers from interfering with their employees' lawful off-duty conduct,[4] but the Colorado Supreme Court determined in 2015 that off-duty cannabis use is not protected in Colorado because cannabis use, which is still illegal under federal law, could not be considered a "lawful" activity under the state statute. As a result, employees in Colorado can be terminated or disciplined by their employers for off-duty cannabis use, either recreationally or medicinally.[5] However, in the Colorado General Assembly's 2022 regular session, HB22-1152 was introduced in an effort to prohibit an employer from taking adverse action against employees and potential employees who engage in the use of recreational cannabis off-site during nonworking hours.[6] The bill was introduced on February 4, 2022, and the House Committee on Business Affairs & Labor postponed the bill indefinitely.[7]

In Georgia, only low-potency medicinal cannabis oil use is permitted. However, companies are permitted, by statute, to prohibit their employees' off-duty use of such cannabis oils. Georgia's "Regulation of Low THC Oil" states: "Nothing in this article shall require an employer to permit or accommodate the use, consumption, [or] possession . . . of marijuana in any form, or to affect the ability of an employer to have a written zero tolerance policy prohibiting the on-duty, and off-duty, use of marijuana, or prohibiting any employee from having a detectable amount of marijuana in such employee's system while at work."[8]

Reasonable Suspicions

Even in states where employers may not take adverse employment action against their employees, like New York, Connecticut, New Jersey, and soon, California, employers may still drug test their employees. In Connecticut, most employers (excluding certain industries and positions) may not prohibit their employees' off-duty use of cannabis or take adverse employment action against most employees or potential employees for positive drug tests.[9] However, companies may still require drug tests as long as the company follows a specific written policy prohibiting cannabis use.[10] Of course, these companies may also prohibit their employees from on-site cannabis use and from working under the influence of cannabis.[11]

In New Jersey, employers may not take adverse employment actions against an employee because that employee tests positive for tetrahydrocannabinol (THC); drug screenings are still permitted, but THC-positive results must be disregarded.[12] Like Connecticut and California, employers may prohibit their employees from using cannabis or being under the influence of cannabis while at the workplace, and may require that an employee undergo a drug test upon "reasonable suspicion" that the same employee demonstrates observable signs of cannabis "intoxication."[13] Random drug tests are also permitted to determine cannabis use during an employee's work hours.[14] Like Connecticut, employers may continue to maintain a drug-free workspace.[15]

So, are there any industries where cannabis use that occurs during nonwork hours is still banned and/or could result in an employee's firing, even if it is medical marijuana? Yes. One of the largest groups of workers affected by this ban on use are truck drivers. The Department of Transportation's Drug and Alcohol Testing Regulation (49 C.F.R. Part 40, at 40.151(e)) does not authorize "medical marijuana" under a state law to be a valid medical explanation for a transportation employee's positive drug test result.

That section states:

> **§40.151(e): What are MROs prohibited from doing as part of the verification process?** As an MRO, you are prohibited from doing the following as part of the verification process: You must not verify a test negative based on information

> that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (i.e., under a state law that purports to authorize such a recommendation, such as the "medical marijuana" laws that some states have adopted.)

Therefore, Medical Review Officers will not verify a drug test as negative based on information that a physician recommended that the employee use "medical marijuana."[16] All drivers with CDL licenses must note that marijuana remains a drug listed in Schedule I of the Controlled Substances Act and any positive test for THC will result in their suspension and/or termination.

CBD: THC-Free or Not THC-Free?

This leads to one final area that is a corollary to adult-use cannabis: CBD (cannabidiol) use. This specific product's use is important to note for a number of reasons. First, many products out there purport to be THC-free, 100% pure CBD oil, or some variation of that claim. However, many of these products are not THC-free and if you happen to work in an industry such as trucking, construction, law enforcement, or the medical field and you utilize such a product, are drug-tested, and test positive, you can be suspended and/or terminated. How did we get to this point where CBD products and adult-use cannabis "bump" into each other? The Farm Bill.

In 2018, the Farm Bill went into effect. The Agricultural Improvement Act of 2018, Pub. L. 115-334, removed hemp from the definition of marijuana under the Controlled Substances Act. Under the Farm Bill, hemp-derived products containing a concentration of up to 0.3% THC are not controlled substances.[17] THC is the primary psychoactive component of marijuana. Any product, including CBD products, with a concentration of more than 0.3% THC remains classified as marijuana, a Schedule I drug under the Controlled Substances Act.[18]

Why is this important? The Department of Transportation reminded all employers and safety-sensitive employees that:

- The Department of Transportation requires testing for marijuana and not CBD.
- The labeling of many CBD products may be misleading because the products could contain higher levels of THC than what the product label states. The Food and Drug Administration (FDA) does not currently certify the levels of THC in CBD products, so there is no federal oversight to ensure that the labels are accurate. The FDA has cautioned the public that: "Consumers should beware purchasing and using any [CBD] products." The FDA has stated: "It is currently illegal to market CBD by adding it to a food or labeling it as a dietary supplement." Also, the FDA has issued several warning letters to companies because their products contained more CBD than indicated on the product label.
- The Department of Transportation's Drug and Alcohol Testing Regulation, Part 40, does not authorize the use of Schedule I drugs, including marijuana, for any reason. Furthermore, CBD use is not a legitimate medical explanation for a laboratory-confirmed marijuana positive result. Therefore, Medical Review Officers will verify a drug test confirmed at the appropriate cutoffs as positive, even if an employee claims they only used a CBD product.

This is exactly what occurred to Douglas Horn. Mr. Horn brought suit in the Western District of New York, raising various allegations against the defendants, including a violation of New York's false advertising and deceptive business practices statutes.[19] Horn lost his job after allegedly utilizing CBD oil that was allegedly THC-free. However, the oil contained trace amounts of THC in it. He sued the companies he claimed sold the product; that case is still ongoing. Unfortunately for Horn, most of his claims have been dismissed, and as of this article's writing, he only had two remaining causes of action, one of which was currently up in front of New York's Court of Appeals for a decision on a prior motion.[20]

Evolving Landscape with Plenty of Pitfalls

Why is all this important? Ultimately, it is incumbent on both employers and employees to understand the legal landscape in which they operate, specifically as it applies to cannabis and cannabis-related products. Employees in safety-sensitive industries must be extremely careful of what products they utilize and understand that if they violate certain state and/or federal laws, they may be terminated and left with little relief. For example, in Horn's case, he and his wife brought various different claims against the defendants, including civil RICO claims, fraudulent inducement, and deceptive business practices.[21] Unfortunately for Horn, the court held that the plaintiffs did not have statutory standing to bring a cause of action under New York's false advertising and deceptive business practices statute because the statute is intended to police transactions that occurred in New York.[22] The plaintiffs purchased their product online, while outside the state from an out-of-state company.[23] The plaintiffs' fraudulent inducement claims were also partially dismissed.[24] The only actionable statement was defendants' misrepresentation that their product was free of any THC.[25]

All companies and employees must now be aware of where both state and federal cannabis law stands as to the industries in which they work. While general feelings toward cannabis have shifted to a more positive light, there are still industries where use is banned; there are still instances in which off-site use can result in an employee's termination. It behooves everyone to pay attention to court rulings and the application of state and federal law to specific factual situations. The devil is in the details. Make sure you are paying attention.

Notes

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New Year, New Rules: FTC Proposes Sweeping Ban on Noncompete Agreements

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Abstract: *On January 5, 2023, the Federal Trade Commission published a Notice of Proposed Rulemaking that would ban the use of noncompete agreements between employers and workers and would create an affirmative obligation for employers to void existing noncompete agreements. The Proposed Rule would also prohibit contractual clauses in other agreements or employment policies that have a similar effect. The Proposed Rule applies categorically to all workers, including independent contractors, without regard to a worker's earnings or job function. This article discusses the nuances of the Proposed Rule as well as the legal and practical impact it will have if it is adopted.*

For years, noncompete agreements have been a controversial tool used by organizations to stymie unfair competition by preventing, or seeking to prevent, departing employees from accepting employment with a direct competitor or from opening a competing business. Currently, noncompete agreements are commonly used by private entities throughout the country, but the scope, validity, and effectiveness of such agreements varies in each state, industry, and organization.

Historically, the legality of noncompete agreements has been principally left to the states and noncompete agreements have been enforceable in most states to the extent the terms are reasonable and necessary to protect legitimate business interests. Some states, known as "blue pencil" states, even permit courts to modify the terms of the agreement if the court finds the agreement is unreasonable, rather than ruling that the agreement is unenforceable in its entirety. This allows the court to balance the interests of both the

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employer and the former employee. However, in recent years, an increasing number of states, including California and Oklahoma, have passed laws prohibiting the use of employment noncompete agreements. Other states, such as New Jersey, have proposed legislation that limits the scope of noncompete agreements and other restrictive covenants.

This common practice of utilizing noncompete agreements may soon be coming to an end in all states. On January 5, 2023, the Federal Trade Commission (FTC) issued a proposed new rule (Proposed Rule) that would largely ban noncompete agreements between employers and workers and would require employers to rescind any existing noncompete agreements with current and former workers. The Proposed Rule would also ban certain sale-of-business noncompetes. The Proposed Rule would supersede state laws thereby prohibiting noncompete agreements nationwide.

This Proposed Rule does not come as a surprise as the FTC has been alluding to restrictions regarding noncompete agreements since the Biden administration issued Executive Order 14036 Promoting Competition in the American Economy and encouraged the FTC to use its rulemaking authority to "curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."

Why Has the FTC Issued the Proposed Rule?

The FTC offers several reasons in support of the Proposed Rule, including that noncompete agreements often decrease competition, suppress wages, hamper innovation, and hinder the formation of new businesses. The FTC estimates that the Proposed Rule could increase wages by nearly $300 billion per year and expand career opportunities for about 30 million Americans.

Additionally, as stated above, the Proposed Rule has been issued following encouragement by the Biden administration and following an emerging trend by states to limit or prohibit the use of noncompete agreements.

What Are the Key Terms of the Proposed Rule?

Under the Proposed Rule, the FTC deems noncompete agreements between employers and workers "an unfair method of competition" and therefore unlawful under Section 5 of the Federal Trade Commission Act (Section 5 of the Act prohibits ''unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45). More specifically, the Proposed Rule prohibits an employer from (1) entering into or attempting to enter into a noncompete agreement with a worker, (2) maintaining a noncompete agreement with a worker, or (3) representing to a worker that they are subject to a noncompete agreement without a good faith basis to believe that the worker is subject to an enforceable noncompete. As set forth more fully herein, any final rule that may be ultimately adopted by the FTC could be less restrictive than the current Proposed Rule.

Who Is Subject to the Proposed Rule?

Under the Proposed Rule, an "employer" is broadly defined as any person, partnership, corporation, association, or other legal entity who contracts with a worker to perform work for that person or business. Pursuant to this definition, most entities and organizations will be required to comply with the rule, except as noted below. Likewise, the Proposed Rule covers essentially all persons performing work for an "employer." Specifically, the Proposed Rule defines "worker" to include employees, independent contractors, interns, externs, volunteers, apprentices, and sole proprietors. As written, the Proposed Rule does not contain an exception for senior executives, highly paid workers, or highly skilled workers; however, given that there is a 60-day public comment period, and that the Proposed Rule will likely be modified following such period, this could change.

What Is Considered a "Noncompete Agreement" Under the Proposed Rule?

The Proposed Rule defines a noncompete agreement as "a contractual term between an employer and a worker that prevents the

worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer." The Proposed Rule further prohibits any contractual term, in other agreements, which operates as a *de facto* noncompete clause. A *de facto* noncompete clause is a clause that has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer.

The Proposed Rule provides two examples of such *de facto* clauses that would constitute impermissible noncompetes: (1) a nondisclosure agreement between an employer and a worker that is written so broadly that it effectively precludes the worker from working in the same field after the conclusion of the worker's employment with the employer, and (2) a contractual term between an employer and a worker that requires the worker to pay the employer or a third-party entity for training costs if the worker's employment terminates within a specified time period, where the required payment is not reasonably related to the costs the employer incurred for training the worker.

The FTC explains that the definition of a noncompete agreement would generally not include other types of restrictive employment covenants—such as nondisclosure agreements (NDAs) and nonsolicitation agreements—because these covenants generally do not prevent a worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer. However, as set forth, if these agreements contain terms or language that constitute a *de facto* noncompete clause, then the agreement may be prohibited and/or unenforceable, in whole or in part, under the Proposed Rule.

When and How Must Employers Comply With the Proposed Rule?

The final rule is expected to be effective 60 days after it is published. As currently written, the rule would require employers to rescind all existing noncompete agreements and provisions within 180 days of publication of the final rule and provide current and former employees with notice of the rescission. The notice must

be provided in writing "on paper or in a digital format" to current and former workers within 45 days of rescinding the noncompete agreement. The FTC specifically sets forth that issuing a mass notice or publication in the workplace is not sufficient notice under the Proposed Rule. Rather, each current and former worker must be notified individually. Further, the recission must contain clear and simple language explaining that the worker's noncompete clause is no longer in effect and may not be enforced against the worker. The FTC provides sample language that may be used. If employers comply with these two requirements, the Proposed Rule will provide a safe harbor from enforcement.

Are There Any Exceptions?

The Proposed Rule sets forth that it does not apply to "a noncompete agreement entered into by a person who is selling a business entity or otherwise disposing of all of the person's ownership interest in the business entity, or by a person who is selling all or substantially all of a business entity's operating assets, if the person restricted by the non-compete clause is a substantial owner of, or substantial member or substantial partner in, the business entity at the time the person enters into the non-compete clause." A substantial owner, substantial member, or substantial partner is defined as a person holding at least a 25% ownership interest in the entity. Therefore, for sellers who are selling their entire ownership interest or who maintain ownership interest above the threshold, typical sale-of-business noncompetes may be enforced.

Notably, the Proposed Rule does not define what types of ownership interests are considered in calculating this threshold.

Additionally, while the FTC broadly defines "employer" under the Proposed Rule, the FTC states "[s]ome entities that would otherwise be employers may not be subject to the Rule to the extent that they are exempted from coverage under the FTC Act." This includes certain Section 501(c)(3) nonprofit organizations.

Does the Proposed Rule Preempt State Law?

As set forth above, if the Prosed Rule takes effect, it will supersede any state statute, regulation, and order, to the extent that such statute, regulation, order, or interpretation is inconsistent with the final rule, but the rule will not preempt state laws, regulations, or orders that provide greater protections.

How Will the Proposed Rule Be Enforced and Are There Penalties for Noncompliance?

If the Proposed Rule takes effect as written, noncompete clauses and agreements will be unenforceable. Complainants will be able to file a complaint or request for FTC action via the FTC's web-based complaint site or by a signed statement filed with the Office of Secretary. The FTC will have the authority to issue cease-and-desist orders prohibiting the use or enforceability of noncompete clauses, to receive injunctive relief, to pursue redress, and to pursue civil penalties for violating any cease-and-desist order.

When Will the Proposed Rule, If Finalized, Go into Effect?

It could be a year or longer before the Proposed Rule goes into effect. The Proposed Rule is subject to a 60-day public comment period. The 60-day public comment period followed by a potentially lengthy response period must be completed before any version of the Proposed Rule becomes effective. Once the FTC finalizes its views, it will publish a final rule in the Federal Register; however, it is expected that there will be opposition to the Proposed Rule and questions regarding the FTC's authority to create and enforce such a rule. These legal challenges will delay any adoption of a final rule. Even if the rule takes effect, as currently written, employers would not be required to come into compliance with the final rule until 180 days after its publication.

Will There Be Challenges to the Proposed Rule and the FTC's Authority?

This is the FTC's first attempt to ban noncompete agreements and strong opposition to the Proposed Rule as well as challenges regarding the scope of the FTC's rule-making authority are likely to arise especially given the tremendous impact a retroactive and absolute noncompete ban would have. Among the grounds for potential legal challenges are that the FTC does not have authority under Section 5 of the Federal Trade Commission Act to enforce this rule and that the rule violates the Major Questions Doctrine. Accordingly, potential litigation over the FTC's authority to issue and enforce such a rule may cause further delays. Pro-employer groups, such as the U.S. Chamber of Commerce, have already released public criticism of the Proposed Rule declaring that the FTC lacks authority to issue the rule and ignores the benefits of noncompetes. Sean Heather, U.S. Chamber senior vice president for International Regulatory Affairs and Antitrust, issued a statement saying, "Attempting to ban noncompete clauses in all employment circumstances overturns well-established state laws which have long governed their use and ignores the fact that, when appropriately used, noncompete agreements are an important tool in fostering innovation and preserving competition."

Moreover, the Proposed Rule is full of ambiguity that will likely be challenged. For example, while the FTC states that the rule would not ban other agreements, like NDAs, the FTC then provides examples of clauses that would be impermissible, in tandem with banning noncompete clauses, explaining that nondisclosure clauses "would be considered non-compete clauses where they are so unusually broad in scope that they function as such." However, the FTC does not explain what would be considered an "unusually broad" nondisclosure clause, leaving the definition open to interpretation. Unless further explanation is provided, this will certainly lead to challenges and potential litigation. Additionally, this overly broad ban on *de facto* noncompete clauses arguably weakens protection of trade secrets and proprietary information since many employees are subject to NDAs and other confidentiality agreements that may be held unenforceable.

Given the anticipated stark opposition to the Proposed Rule, and consideration to public comments, it is suspected that the final rule may be meaningfully different.

What Does This Proposed Rule Mean for Employers and Other Entities?

Employers should consider whether to submit comments on the Proposed Rule during the 60-day period. The comment period will help inform the FTC of whether it should make modifications to the breadth of the Proposed Rule and clarify ambiguities, including whether the rule should impose a categorical ban on noncompete clauses, establish carve-outs, or create a rebuttable presumption of unlawfulness, and whether the rule should apply uniformly to all workers or whether there should be exemptions for different types of workers or different industries.

If the Proposed Rule is adopted as written, or in substantially similar terms, employers will need to (1) revise their existing restrictive covenant agreements, employment contracts, executive compensation plans, employee policies, and related documents or agreements that contain noncompete or *de facto* noncompete clauses; (2) issue notices to existing workers with noncompete agreements rescinding the noncompete agreements; (3) identify and issue notices to former workers who have unexpired noncompete agreements; and (4) be cognizant of the Proposed Rule's restrictions on noncompete terms entered into in connection with the sale of a business entity.

If the Proposed Rule takes effect, employers should also assess the needs, use, and enforcement of noncompete agreements and consider how the implementation of the Proposed Rule may impact their operations and the reliability of their existing employees. Because employees that are currently subject to noncompetes may no longer be bound by these restrictions, employers need to consider other ways to protect their business, including the use of nonsolicitation agreements, nondisclosure agreements, and confidentiality agreements. Employers may also need to consider ways to entice existing employees to remain loyal to their organizations because other employers will have virtually free rein to poach these

employees. That said, the ban will also provide employers with an opportunity to solicit talent and new hires that otherwise would have been unavailable due to noncompete restrictions.

Takeaways

The Proposed Rule is part of a larger trend toward providing all workers with an unfettered ability to seek career growth and toward promoting competition within various industries. While it is expected that there will be harsh opposition to the Proposed Rule, challenges to the FTC's authority, and modifications to the current Proposed Rule, employers should be prepared to modify existing agreements, to forego the use of noncompetes in the future, and to find other ways to protect their business. In the interim, employers may want to consult with legal counsel to discuss the implications of the rule and explore best practices moving forward.

Note

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Labor Organizing in Retail: Conditions Remain for Continued Momentum

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Abstract: *On January 5, 2023, the Federal Trade Commission published a Notice of Proposed Rulemaking that would ban the use of noncompete agreements between employers and workers and would create an affirmative obligation for employers to void existing noncompete agreements. The rule would also prohibit contractual clauses in other agreements or employment policies that have a similar effect. The proposed rule applies categorically to all workers, including independent contractors, without regard to a worker's earnings or job function. In this article, the author discusses the nuances of the proposed rule as well as the legal and practical impact it will have if adopted.*

2022 Overview of Retail Organizing

In 2022, labor organizing was in the spotlight with workers organizing at a rate not seen in years. Between October 1, 2021, and September 30, 2022—the National Labor Relations Board's (NLRB or Board) fiscal year—2,510 union representation petitions were filed.[1] This is a 53% increase from 2021, and is the highest number of union representation petitions filed since 2016.[2] Further, unions in 2022 have won the most elections since 2005.[3] Among the American public, union approval is hovering around 70%, its highest level since 1965.[4]

The political and social issues of the past few years, inflation, the looming recession, job security, wages, and pandemic-related frustration/unhappiness are just a few of the countless reasons cited for the boom in union support/approval. In addition to an increase in unionization as a whole, 2022 also produced a rise in "homegrown"

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unions rivaling the established blue-bloods. For instance, in mid-November, more than 100 service industry workers gathered in South Carolina (the state with the country's lowest unionization rate) to formally announce the launch of a new union—the Union of Southern Service Workers (USSW). The USSW was created in an effort to increase unionization throughout the South.[5] The USSW will prioritize the service industry as a whole, including retail.[6] The USSW is just one of many homegrown/upstart labor unions making waves in 2022, with others including Starbucks Workers United, Trader Joe's United, and New Seasons Labor Union.

One lesson from 2022 is that organizing can spread like wildfire, as several industries and companies have faced or are currently facing unionization threats for the first time. This includes the retail industry, which did not escape 2022 unscathed, with several major retailers facing unionization threats despite little or no prior union history. Starbucks, REI, Target, Trader Joe's, and Apple are just a few examples of retailers who faced organization efforts over the course of 2022. Notably, many of these retailers enjoy generally positive reputations and did nothing significantly "wrong" to attract unionization efforts. Additionally, with the Biden administration taking full control over the NLRB, the law has vastly evolved over the past year.

The Rise in Strikes

With 2021 seeing a wave of strikes, it might be surprising to learn that, through the first half of 2022, there were three times as many U.S. workers who went on strike than in the first half of 2021.[7] According to Cornell University's labor tracker,[8] between January and June of 2022, there were 180 strikes across the United States and its territories involving 78,000 workers, compared to 102 strikes involving 26,500 workers in the first half of 2021.[9] This trend continued, as the year-end total in 2022 accounted for 385 strikes, up from 270 in the 2021 calendar year.[10] This figure includes 20 major strikes—which are tracked by the Bureau of Labor Statistics and involve 1,000 or more employees—which is a roughly 25% increase from the average of 16 major strikes per year over the past two decades.[11]

Increase in Number of Elections and Union Win Rate

In addition to the increase in strikes, the NLRB reported there were 1,249 union elections in the 2022 fiscal year, which represents a nearly 50% increase from the number of elections held the previous year.[12] Further, workers voted in favor of unionizing in 72% of those elections, up from 61% in 2021.[13] Starbucks' elections played no small part in driving this statistic, as the coffee retailer accounted for almost a quarter of all union elections in 2022, and unionizing efforts were successful in four out of every five of those elections.[14]

Although there are a number of potential explanations for the surging number of elections and increasing union win rates, some experts have identified the pandemic as the primary factor, reasoning that many companies that have seen increased organizing efforts labeled their employees "essential workers" during the pandemic but, in the employees' eyes, failed to adequately increase wages, benefits, or safety precautions to accompany the essential worker classification.[15] These frustrations, coupled with the current social and political landscape, have fueled the recent spike in union support, resulting in nearly 70% of Americans approving of unions despite only 10% of the nation's workers belonging to a union.[16] Time will tell if distance from the pandemic will lead to a decrease in the number of elections beyond 2022; however, employers should remain cognizant and not assume this to be the case given the myriad factors at play.

Rise of Homegrown Unions

One of the most important aspects of current union trends is the national shift away from traditional unions and toward independent, "homegrown" unions. Whereas the traditional union model has featured large, well-funded unions and paid union organizers, many of today's most effective union efforts have come from movements started within companies' own ranks and led by employees. Starbucks Workers United, Trader Joe's United, and Amazon Labor Union are just three of many examples of this phenomenon that

have flooded recent news headlines with accounts of their efforts to organize from within.

These independent unions generally have no official affiliation with larger labor organizations, such as the United Auto Workers or the Teamsters. As a result, independent unions are able to avoid obstacles present to organizers from large organizations, including unfamiliarity with companies' workplaces and employees or other unique challenges present within individual companies. Conversely, independent unions are directed by individuals that possess intimate knowledge of the workplaces they seek to unionize and are able to strengthen their efforts by proposing changes carefully tailored to improve that workplace and address its unique challenges.[17]

Critical to the success of these grassroots union movements has been the involvement of young, college-educated activists, many of whom inherently believe in the power of collective action. For example, a 2021 Pew Research Center survey indicated that 69% of those ages 18 to 29 say unions have a positive effect while fewer than half (44%) of Americans ages 65 and older say the same.[18] These young activists have injected into homegrown unions interests beyond simply wages and benefits, encouraging workers to seek transparency, flexibility, and work-life balance, and greater recognition and appreciation for their work, among other interests. Additionally, the involvement of young activists has led to the increased use of social media to allow independent unions to broadcast their messages efficiently with less hassle than has traditionally been required for more traditional organizing techniques.[19]

Although homegrown unions are a relatively new phenomenon, they have already demonstrated they can be highly effective at targeting specific types of industries, including retail. It will be important for retail employers to understand homegrown unionization efforts because they are likely to play a significant role in the future of the employer-employee relationship within the retail industry.

General Counsel Abruzzo's Agenda

In addition to the increases in union representation elections and work stoppages, 2022 also saw a policy shift favoring unions

over employers. Throughout the course of his presidency, President Biden has stated on a litany of occasions that he intends to be the "most pro-union president" in American history.[20] Indeed, one of his first official acts as president was terminating Peter Robb, the Trump-appointed NLRB general counsel (GC), just minutes after taking the oath of office.[21] President Biden shortly thereafter nominated Jennifer Abruzzo as Robb's successor,[22] who was later confirmed by the Senate. While the GC does not have the power to change or make law, he or she does set the Board's litigation and enforcement agenda and priorities, thereby having a significant hand in shaping the nation's labor policies.

Abruzzo hit the ground running, quickly issuing several interpretive memoranda and otherwise signaling her intent to ask the Board to substantially overhaul well-established NLRB precedent in an effort to diminish employer rights. One of the most significant, and illustrative, memoranda Abruzzo has issued is Memorandum GC 22-04, which states that Abruzzo, as general counsel, would request the Board overrule long-standing precedent and hold that employer-mandated meetings in which employers utilize their right to free speech by communicating their views and stance on unionization violates the National Labor Relations Act (NLRA). GC 22-04 asserts that, since 1948, the Board has incorrectly concluded that an employer does not violate the NLRA by requiring employees to attend these so-called "captive audience" meetings, which Abruzzo claims infringe on employees' Section 7 rights to refrain from listening to employer speech.[23]

This is significant because, for the past 75 years, employers have utilized these meetings to, among other things, (1) lawfully inform employees of their stance on unions; (2) address head-on any misrepresentations, rumors, or other false statements being made by the union; and (3) provide employees with information about unions and the potentially negative consequences of joining a union. Because many of these negative consequences are most commonly *not* disclosed by the union, these meetings equip employees with a full understanding of what it means to unionize, thereby allowing employees to make a fully informed choice.

While GC 22-04 has yet to be tested in court, seeking to overturn more than 75 years of precedent as one of her first acts as GC

signifies Abruzzo's intent to rewrite federal labor law so it protects and favors unions over employers.

Similarly, Abruzzo has expressed that she is looking to simplify the process of unionization by reviving the *Joy Silk* standard—an NLRB standard that was used from 1949 to 1966—which would allow the Board to recognize a union if a majority of workers simply filled out cards of support.[24] This change would signify a drastic departure from the current process required for unionization, as unions would not need to win formal elections in most cases in order to be recognized.[25]

Under the current law, employers retain the ability to force an election by refusing to recognize a union; however, under the *Joy Silk* standard, an employer would be required to demonstrate "good faith doubt" to the Board regarding whether the organizers actually have the support of more than 50% of the workforce.[26] Employers failing to make such a demonstration to the Board would be ordered and required to bargain with the new union.

Abruzzo filed a brief in a pending case in April of 2022 in which she urged the revival of the *Joy Silk* standard, claiming "the Board's current remedial scheme has failed to deter unfair labor practices during union organizing drives and provide for free and fair elections."[27] In Abruzzo's view, the NRLB's current election process accounts for the reduction in private-sector unions, which at the time her brief was submitted represented only 6.1% of the workforce.[28] The reinstatement of the *Joy Silk* standard, as Abruzzo urges, would make it substantially easier for workforces to organize and force employers to recognize unions, even in circumstances where the employer does not have any knowledge of, much less control over, the organizing process.

Changes in Law Via Board Decisions

In addition to GC Abruzzo, the Board is and will likely continue to reduce employer rights through its decision-making in various cases. One example of note for retailers is *Tesla*,[29] wherein the Board ruled that workplace dress codes and uniform policies that prevent employees from wearing pro-union apparel *of any type*, even if facially neutral, are presumptively unlawful unless

such policies are justified by "special circumstances."[30] This is significant because the previous standard drew a distinction between an employer's complete ban on union insignia and an employer's regulation of the type and/or manner in which employees wore union insignia. But now, under *Tesla*, any union insignia donned by an employee is protected unless the employer can demonstrate that there are "special circumstances" that justify the employer's regulation of such.

Notably, this "special circumstances" exception is much harder to meet than may be facially apparent. Despite the *Tesla* Board citing *Komatsu*,[31] which acknowledges employee safety, quality control, public image, and workplace decorum as possible "special circumstances," demonstrating the applicability of the special circumstances exception will be challenging for employers. This is apparent from the *Tesla* decision, wherein the Board rejected Tesla's rule banning employees from wearing metal buttons because they could scratch and/or otherwise damage the cars.

The Tesla plant at issue was not unionized, and thus employers should be mindful that this decision, and the NLRA, impacts both union and nonunion employees equally. Employers with written dress code policies, particularly retailers with public-facing employees, should conduct a thorough review of any such policies.

Further, the NLRB issued a number of employee-friendly decisions over the course of a single week in December to close out 2022. The most notable of these decisions was that in *Thryv, Inc.*,[32] in which the three Democrat-appointed members of the NLRB decided over the dissent of the NLRB's two Republican-appointed members to expand the scope of remedies available to employees where an employer is found to have engaged in unfair labor practices under the NLRA. The NLRA permits the NLRB to order "make-whole" relief for unfair labor practices, and this has traditionally been interpreted as being limited to reinstatement and back pay.[33]

In *Thryv, Inc.*, however, the majority substantially broadened the "make-whole" remedy the NLRB can order, holding that "make-whole relief encompasses, *at a minimum* . . . direct or foreseeable pecuniary harms that are a consequence of a[n] [employer's] unfair labor practices."[34] As a result of this expansion, employers found

to have engaged in unlawful labor practices may be liable for damages not traditionally compensable for such violations, including medical expenses incurred by unlawfully separated employees who would have had those expenses covered by the employer's health insurance plan, credit card interest, or rental car expenses incurred after the loss of an employer-provided vehicle.[35]

Notably, the Board did not address whether other forms of damages, such as those for pain and suffering or emotional distress, were included in the newly expanded definition of "make-whole" relief. However, GC Abruzzo has expressed interest in pushing the Board to include such damages measures in the definition of make-whole relief, and employers should be aware that such an expansion could occur in the future.

2023 Expectations

With inflation and employee satisfaction showing no signs of returning to pre-pandemic levels, and the newfound fear of a looming recession (and, with it, the heightened fear of job loss and/or slashed wages), retailers should expect labor organizing to remain at the forefront of workers' minds and brace for this unionizing trend to continue through 2023.

Notes

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nlrb.gov/news-outreach/news-story/election-petitions-up-53-board-continues-to-reduce-case-processing-time-in.

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5. *See* James Pollard, *New Service Union Seeks to Inspire Labor Movement in South*, U.S. NEWS (Nov. 18, 2022), https://www.usnews.com/news/us/articles/2022-11-18/new-service-union-seeks-to-inspire-labor-movement-in-south.

6. *Id.*

7. *See supra* note 3.

8. CORNELL, *ILR Labor Action Tracker*, https://striketracker.ilr.cornell.edu/ (last visited Nov. 29, 2022).

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14. *Id.*

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16. *See supra* note 7.

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28. *Id.*

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30. *Id.*; *see also* NLRB, *Board Rules Workplace Policies Limiting Wearing Union Insignia, Including Union Apparel, Are Unlawful Absent Special Circumstances*, nlrb.gov (Aug. 29, 2022), https://www.nlrb.gov/news-outreach/news-story/board-rules-workplace-policies-limiting-wearing-union-insignia-including.

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32. 372 NLRB No. 22 (Dec. 13, 2022).

33. *See* Daniel Pasternak & Scott Held, *NLRB Issues Flurry of Blockbuster End-of-Year Decisions (With More to Come?)*, Employment Law Worldview (Dec. 21, 2022), https://www.employmentlawworldview.com/nlrb-issues-flurry-of-blockbuster-end-of-year-decisions-with-more-to-come-us/.

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Supplier Beware: The DOJ and FTC Are Investigating Manufacturing and Supply Chain Issues

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Abstract: *Challenged by the pandemic, the global supply chain has generated a heightened amount of scrutiny for its impact on the economy, the labor market, the delivery of goods and services, and national security. Attention from the Biden administration portends an era when the federal government will shine a spotlight on the supply chain to root out misconduct. In this article, the author reviews recent supply chain disruptions and reactions from the DOJ and FTC, as well as the government's efforts to support competition in the labor markets by eliminating noncompete agreements in employment contracts. Finally, she will discuss proactive steps companies can take to mitigate the risk that they will find themselves the subject of a government investigation.*

The COVID-19 pandemic has had profound and lasting consequences on the manufacturing industry and supply chain operations. As the world shut down to contain the virus, so did production facilities. At the same time, consumer demand for durable goods soared and households increasingly relied on grocery delivery services and distribution channels like Amazon Prime to obtain items they would have previously purchased in brick-and-mortar stores. Although the isolation of the pandemic is subsiding, the resilience of the manufacturing industry and supply chain has been tested by sustained high consumer demand and inflationary pressures that have made the production and transportation of goods more expensive.

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Since taking office, President Biden has argued that government intervention is the most effective way to remedy perceived market inefficiencies. In 2021, President Biden issued two executive orders that directly or implicitly impact the manufacturing industry and supply chain. The first order, issued on February 24, 2021, is aptly titled the Executive Order on America's Supply Chain and aimed at "strengthen[ing] the resilience of America's supply chains" in the wake of pandemics, cybersecurity breaches, and "other conditions that can reduce critical manufacturing capacity and the availability and integrity of critical goods, produces, and services."[1] Six months later, on July 9, 2021, President Biden issued the Executive Order on Promoting Competition in the American Economy to combat "overconcentration, monopolization, and unfair competition in the American economy," including the labor market.[2] Since then, both the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) have taken steps to implement President Biden's policies. These developments, which are summarized below, portend an era in which government agencies will put the spotlight on the manufacturing and supply chain markets to root out any misconduct.

Supply Chain Disruptions and the Manufacturing Industry

On November 29, 2021, the FTC announced its inquiry into "the causes behind the ongoing supply chain disruptions and how these disruptions are causing serious and ongoing hardships for consumers and harming competition in the U.S. economy."[3] Nine companies, including Walmart, Amazon, and Tyson Foods, received orders to file special reports within 45 days of receiving the FTC order that describe, among other things, (1) any disruptions they experienced, (2) the 20 suppliers whose disruptions had the greatest impact on their business, and (3) which of the disruptions generated the most customer complaints.[4] The companies were also required to provide all documents relating to the FTC's investigation. The FTC has solicited comments from the general public and specifically invited manufacturers to submit statements about their experiences with supply chain disruptions. The FTC received 119 comments and published 63 of them on the regulations.gov web

site—many of which came from manufacturers describing lengthy delays both in obtaining materials and critical transportation time. Since then, the FTC has opened investigations into high-profile supply chain bottlenecks such as those in the baby formula industry.

The DOJ has begun its own inquiry into the supply chain. In February 2022, Assistant Attorney General Jonathan Kanter announced that the Antitrust Division of the U.S. Department of Justice was working with the FBI to "deter, detect and prosecute those who would exploit supply chain disruptions to engage in collusive conduct."[5] The Antitrust Division has cast an even wider net to combat supply chain collusion by forming a working group with antitrust agencies in Australia, Canada, New Zealand, and the United Kingdom to facilitate information sharing and international cooperation. To date, the Antitrust Division has not announced any formal investigations; if the agency is considering criminal charges against corporations or individuals, most companies will not know of the investigation until the FBI raids the company to seize electronic and paper files that may contain incriminating evidence.

Although the DOJ and FTC might currently be focused on the supply chain, manufacturing industries have long been vulnerable to antitrust scrutiny on the premise that commodities are interchangeable and producers have to compete on price rather than service or other differentiating characteristics. Accordingly, the manufacturing industry remains a conspicuous target for criminal investigations by the Antitrust Division into price-fixing, market division and customer allocation schemes, and other *per se* antitrust offenses prohibited by section one of the Sherman Act. Of the 25 top criminal fines for antitrust violations, 15 were levied on manufacturers, including several producers of liquid crystal displays, dynamic random-access memory products, and automobile parts.[6] In addition to steep criminal fines from the Antitrust Division, manufacturers that engage in unlawful collusion are subject to treble damages and joint and several liability through civil lawsuits brought by consumers. Given the inflationary pressures and supply chain logjams plaguing manufacturers, the Antitrust Division will carefully watch industry pricing for unusual spikes and trends and weigh opening a formal investigation. If there is evidence of misconduct, litigation—both from companies that purchased the

products from the colluding suppliers (direct purchasers) as well as consumers (indirect purchasers)—will not be far behind.

Competition in the Labor Market

President Biden's Executive Order on Promoting Competition in the American Economy expressly tasked the FTC to consider whether "the unfair use of non-compete clauses and other clauses or agreements . . . may unfairly limit worker mobility."[7] Pursuant to this directive, on January 5, 2023, FTC Chair Lina Khan announced a proposed federal regulation that, if enacted, would invalidate noncompetes and similar restrictive covenants that are routinely used by companies to limit a former employee's post-employment professional activities.[8] The proposed rule would not only ban the future use of noncompete clauses for workers and independent contractors, it would invalidate these clauses retroactively. Furthermore, the FTC signaled that it would also review nonsolicitation clauses to see if they effectively function as noncompetes.

If adopted, the new rule would make it illegal for an employer to (1) enter or attempt to enter into a noncompete with a worker or independent contractor, whether paid or unpaid; (2) maintain a noncompete with a worker; and (3) represent to a worker that said worker was bound by a noncompete. The FTC will look at the contract holistically to see if an employer has effectively implemented a noncompete through overly restrictive nonsolicitation clauses. The requirements would apply retroactively. As with its inquiry into supply chain bottlenecks, the FTC is soliciting public comment on the proposed rule.

The FTC is targeting restrictive covenants that routinely appear in employment contracts, such as:

1. *noncompete clauses*, which prohibit an employee from working in the same business, industry, and/or geographic area as their former employer;
2. *customer nonsolicitation clauses*, which prohibit an employee from seeking business from the former employer's customers, including prospective clients; and

3. *employee nonsolicitation clauses*, which prohibit an employee from trying to hire their former coworkers to work at a competing business.

Traditionally, restrictive covenants have been governed by state law, which is usually stipulated in the employment contract. Although each state retains autonomy to set its own criteria, most courts have required that restrictive covenants be "reasonable." The threshold of reasonableness is not a bright-line rule; it depends on the facts and circumstances of each case. Many state courts, including Delaware, use a test that weighs (1) the geographic scope and temporal duration of the clause, (2) the employer's legitimate economic interest in enforcing the provision, and (3) a balancing of the equities.[9] New York courts also consider whether the clause "harms the public," that is, underlying policy issues.[10] If a restrictive covenant is deemed unenforceable, some courts will "blue pencil" or edit the clause to make it "reasonable" rather than completely striking it.

Although the FTC's sweeping proposal is unprecedented at the federal level, the agency is arguably catching up with several states that have already curtailed the bounds of noncompete clauses. Recently, state legislatures and courts have reconsidered the legality of restrictive covenants. Before 2007, only three states—California, North Dakota, and Oklahoma—banned noncompete clauses. Since then, more than 20 states have adopted measures that curb an employer's ability to enforce these provisions. And this watershed movement shows no signs of abating, with approximately 66 bills pending in 25 states. Among the jurisdictions with the most significant changes are Colorado and the District of Columbia, which have limited noncompetes to "high-compensated employees." Several states, including Illinois, Maryland, Virginia, and Washington, have banned noncompetes for workers earning below a certain threshold. However, consistent with the original intent of allowing restrictive covenants, the majority of states still permit some form of restrictive covenants if deemed necessary to protect an employer's confidential and proprietary information.

Although the FTC's proposed rule has generated controversy, many commentators agree that low-wage workers who do not have access to trade secrets and other proprietary information should

not be subject to covenants not to compete because the lack of mobility depresses wages and limits better job opportunities. For example, the Antitrust Law Section of the American Bar Association submitted comments to the FTC response to a petition to initiate rulemaking on noncompete clauses. Although the Antitrust Law Section did not support a blanket prohibition on noncompetes, it acknowledged that a ban may be warranted in circumstances in which covenants not to compete "almost always restrict competition and lack any redeeming value," indicated by (1) the absence of bargaining over the inclusion or content of a noncompete clause, (2) the absence of significant investment in human capital, and (3) compensation below some specified threshold. In other words, consistent with legislation already adopted by nine states, as discussed above.

The DOJ is also focused on fair competition in the labor market. In 2022, the Antitrust Division brought a civil suit alleging that a group of poultry processors had entered an agreement to fix wages for its workers, and shared detailed information about wages and employment policies to keep wages low for almost 20 years. The case settled for $85 million dollars and the poultry processors agreed to have a court-appointed monitor review practices and records for ten years. In a recent speech, Assistant Attorney General Kanter hinted that the inquiry of labor markets is just beginning as the Antitrust Division shifts more resources to these investigations and "courts are reaffirming that the antitrust laws protect workers too."[11]

Proactive Steps That Companies Can Take

One way supply chain and manufacturing companies can proactively stave off government investigations is by undertaking their own internal measures. The best practice is to implement thorough compliance training addressing fraud, antitrust, and other legal matters for both high-level executives and staff. Alternatively, targeted compliance training for those who are most at risk because they have direct contact with competitors is a second-best strategy. For example, although competitors may attend trade association meetings, the company representative in attendance should be well-versed on the line between lawful discussions and ruses to disguise

unlawful collusion in violation of the Sherman Act. Information sharing on commercially sensitive information about price, costs, customers, and margins can create the appearance of misconduct and should also be avoided, even if those discussions occur in the context of an otherwise legitimate activity such as environmental initiatives. International operations need just as much compliance training, if not more—particularly in countries where U.S. business laws are not as commonly understood or applied. Employees should be encouraged to come forward with information about intra-company issues and any unusual trends they observe at other points of the supply chain.

Even a company with an established compliance program should update materials to reflect the Antitrust Division's recent focus on price-fixing in the labor market. Executives who understand that price-fixing products is illegal may not appreciate that antitrust law also extends to the labor market, and that the DOJ is actively prosecuting these cases. Compliance programs must convey that employer agreements not to raise wages for workers or refrain from hiring each other's employees are subject to the same criminal and civil antitrust penalties associated with any other unlawful agreement among competitors.

In a similar vein, a review of employment contracts is prudent. Regardless of whether the FTC enacts a regulation and what it covers, state laws on restrictive covenants are in flux. At a minimum, covenants not to compete should be "reasonable" in scope and duration. Although the exact parameters of reasonableness will vary from case to case, as a general principle covenants not to compete should not be so broad as to severely limit or prevent a former employee from carrying on his usual vocation and earning a livelihood.[12] Covenants not to compete and nonsolicitation clauses lasting two years or less are generally appropriate for employees who have had access to proprietary information and engaged with customers. However, a two-year covenant not to compete coupled with broad geographic restrictions may be more susceptible to challenge, particularly if the employee did not have access to sensitive information while working for their former employer. More recently, state courts and legislatures have distinguished between executives who are more likely to possess confidential data and,

therefore, should be subject to more stringent provisions, and those who are not.

Notes

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proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

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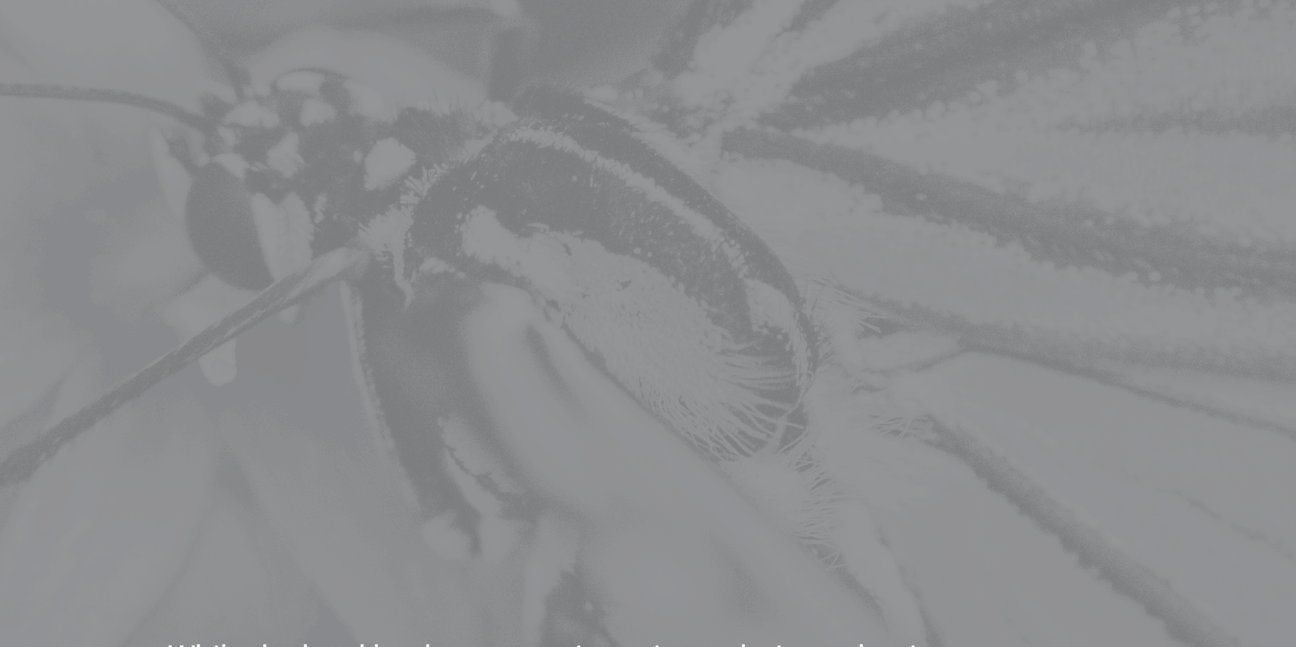

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