CLW
COMMERCIAL
LAW WORLD
MAGAZINE

APRIL/MAY/JUNE 2024
VOL 38 / ISSUE 2

*An Official Publication of the **Commercial Law League of America***

TRENDING NEWS

CLLA
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EXPERTISE • INSIGHT • RESULTS

2024 CLLA EVENTS AT THE NATIONAL CONFERENCE OF BANKRUPTCY JUDGES (NCBJ)

THE ANNUAL CLLA LUNCHEON & HON. FRANK KOGER MEMORIAL EDUCATIONAL PROGRAM

THURSDAY, SEPTEMBER 19, 2024

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FROM THE CO-CHAIR

Since I really meant to be a history professor, you can imagine how I look forward to anniversaries of big events that come in round numbers. For example, this year marked the 80th anniversary of the invasion of D-Day, which left me thinking – as always – that I still have not made my pilgrimage to Normandy to experience it first-hand. A little closer to home, we celebrated the 130th year of the CLLA at this year's national meeting. In this issue, we have not only some photos of the events, but the presentations by the outgoing and incoming Presidents and recipient of the President's Cup award. If you were there, you can look for yourself in photos and compare your memories of the various speeches to the words that were on the speakers' notecards. If you weren't there, and frankly the valid excuses are few, you can see all that you missed.

Looking forward as much as looking back, this issue also presents a handful of topics and trends, from presentations made at the National Meeting and articles on other issues of interest in the industry. I have to extend a special thanks to those presenters and speakers who have allowed us to crib their program work for magazine content – Brian Press for "When Good Forwarding Goes Bad" and Joe Marino, Randall Woolley and Kirk Burkley for "Litigating on Dual Fronts." It isn't always easy to convert a panel program to the blank page, and the effort is appreciated.

In addition to those programs from the National Meeting, we have items on a few trends in the law. There is an update from Danny Ford on the state of implementation of Arizona's "Predatory Debt Collection Act," a recently-enacted statute which continues a trend in states of using the fig leaf of "consumer protection" to write laws that hamper the ability of creditors to recover in the commercial setting.

Marco Alcala writes about a trending area of cyber security dash cyber liability insurance period My IT vendor brought this question up just last week, and now I have a much better understanding of the myriad ways that my office is not up to the mark. Marco's article is a laundry list of the steps that should be taken to protect your electronic files and communications. It is a bracing wake-up call for vigilance in the face of the challenges that cyber-crooks are posing every day.

A couple of issues back, there was a report on the work of the commission drafting a Uniform Assignment for the Benefit of Creditors law. Such assignments are not really a tool for creditors here in Georgia, so I am quite interested in the progress toward getting a uniform law, which greatly enhances the likelihood that the Georgia legislature might then adopt it. This issue includes an update on that effort.

And we are pleased to highlight an article by a new contributor, Edgar Davidson, with an in-depth analysis of freight collections and the interplay of state and federal law. I have had to decline a number of freight claims over the years because they are outside the 18-month statute of limitations under the ICC Act. This article provides guidance and some case authority that might allow creditors a longer time to sue and some additional state law remedies.

As we move into the 131st year of the League being the pre-eminent source of expertise in the areas of commercial law, I invite anyone and everyone to contribute to the trove of institutional knowledge that our century-plus of shared experience has created, and which we hope that this issue can make a small contribution toward. ■

Beau Hays
Co-Chair of the Board of Associate Editors

CALL FOR WRITERS

The Commercial Law League of America and CLW magazine are looking for articles from our membership. We know many of you are subject matter experts in one field or another and we are hoping you will be willing to share your knowledge with your fellow members. ***Our next issue, July/August/September is focused on Bankruptcy. Submission deadline: July 26.*** If you are interested in being a contributing author for CLW, please contact Beau Hays at **beau@hayspotter.com**.

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Marco is the founder and CEO of Alcala Consulting. Marco graduated in 1997 with a Bachelor of Science in computer science from California State College, Northridge. He is the author of the cybersecurity book titled "Cyber Chump!" which is available at https://www.alcalaconsulting.com/cyberchump/. Marco also co-authored the Amazon #1 best-seller book "The Compliance Formula" with 20 other cybersecurity experts from around the world. When he's not diving deeper into technology, Marco also loves dancing salsa and bachata – and when throwing a party, he'll even pull out his conga drums and invite his guests to play along.

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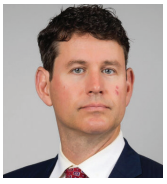

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Edgar Davison is the owner of Davison Law Firm and General Counsel for Baxter Bailey & Associates, a firm focusing exclusively on freight charge collections. Edgar received his B.S. in Human Resources from the University of Tennessee in 2002 and went straight to law school, completing his J.D. at the University of Memphis School of Law in 2005. After practicing employment law for a several years, Edgar focused his practice on freight charge litigation and now focuses on collecting on behalf of the trucking industry. Edgar is admitted in the states of Tennessee and Arkansas. He is also admitted in the United States Supreme Court, Western District of TN and the Eastern District of TN District Courts. Edgar's practice focuses almost exclusively on collecting on behalf of motor carriers.

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Danny is a resident of Cave Creek, Arizona and leads the Commercial Department for Gurstel Law Firm PC for its Arizona, Nevada, Utah, and Wyoming offices. His practice primarily focuses on business litigation and commercial collection. He is an avid car enthusiast and spends free time with his two golden retrievers.

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Beau is a 1986 graduate of the University of North Carolina School of Law, after receiving a B.A. in Political Science from UNC in 1983. He was admitted to the Georgia Bar in 1986, and has been admitted in the federal courts in all three districts in Georgia. He has acted as lead counsel in litigation matters for over twenty years, specializing in commercial disputes and bankruptcy law. Mr. Hays is a Past President of the Commercial Law League of America, having served as Recording Secretary of the League and Chair of the Creditor's Rights Section and chaired numerous committees. In addition to being active in the Bankruptcy Section of CLLA, he is an Associate Member of the National Association of Bankruptcy Trustees, and has been a presenter to that organization on issues involving hiring outside counsel. He has also served as Legislative Liaison for the Georgia Bar's Creditor's Rights Section. Mr. Hays is an editor for the National Association of Credit Management's Handbook of Credit and Commercial Laws, chapters related to materialman's liens and construction bonds.

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Austin J. Peiffer joined Ag & Business Legal Strategies in 2020, after spending a year clerking for the Honorable A. Benjamin Goldgar, Chief Judge of the United States Bankruptcy Court for the Northern District of Illinois in Chicago. He earned his law degree from the Washington University School of Law in St. Louis, Missouri, with a certificate in Business & Corporate Law. While in law school he worked with the school's Low-Income Taxpayer Clinic and served as a judicial extern with the Honorable Charles E. Rendlen III (ret.) with the United States Bankruptcy Court for the Eastern District of Missouri. He is licensed in Iowa and Missouri.

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Joseph A. Peiffer has focused his practice on business bankruptcy for more than 30 years, and established Ag & Business Legal Strategies (formerly Peiffer Law Office, P.C.) in 2016. As someone who grew up on an Iowa family farm in Delaware County, Iowa, Joe Peiffer has a keen interest in agricultural law. He graduated from Iowa State University as the top graduate in his class studying Dairy Science, as well as Public Service and Administration. Peiffer received his law degree, with Distinction, from the University of Iowa.

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Bryan Press has been a practicing attorney for 40 years. He is licensed in Florida (1983) and New Jersey (1984). He is admitted to the Federal District Court and U.S. Bankruptcy Court of the District of New Jersey. He is also admitted to the 3rd and 11th Circuits. He has been engaged in creditor-debtor and insolvency practice for his entire career.

Mr. Press has been with Metro Group of NY since 2016, As Metro Group Maritime's litigation liaison specialist and supervisor of receiving counsel, he undertakes the review of files in-house to ascertain the eligibility and viability of the claim in litigation and then coordinates with receiving counsel to effect prosecution and recovery.

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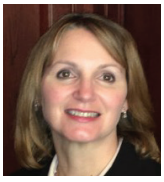
Emory Potter is a construction, commercial and civil litigation attorney with extensive trial experience. His specialties include materialmen's lien and construction bond work, creditor's rights, and commercial collections, handling a large volume of litigation from initiation of suit through post-judgment collection.



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Lorna Walker is the principal of Sweet & Walker, a Professional Corporation. She has practiced law in the San Francisco Bay Area for more than 25 years and focuses on commercial collection litigation, commercial contract litigation, and judgment enforcement. She has handled a variety of commercial matters on behalf of creditors, including breach of contract, commercial code transactions, fraudulent transfer actions, alter-ego claims, successor-in-interest actions, and some bankruptcy matters. Ms. Walker has a high success rate in both her trials and appellate matters.

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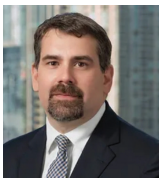

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ABOUT US

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WE MUST ALL EMBRACE THE INEVITABLE

The Greek Philosopher, Heraclitus, is credited with saying "No man ever steps in the same river twice, for it's not the same river and he's not the same man." That quote has been considered a basis for the thought that nothing in life is constant except change. We have all heard that, or something like that, throughout our adult lives. And, of course, we see it every day. Having been in the profession of law for over 30 years, I can remember many changes that have occurred over the span of my career. I have seen, for example, legal research go from traditional paper books, to an extremely slow dial-up modem, to a subscription-based browser interface, to artificial intelligence enhanced research and writing. That is a long way to go in a short amount of time.

But we as lawyers have been historically slow to embrace change. Think about how many of us are still using fax machines, 800 phone numbers, and WordPerfect. How many are not embracing remote workers? Or social media? The list could go on and on. But those who do not embrace the inevitable change are doomed to fail because of it.

Of course, that obviously includes technological changes. I have written before about the benefits of leaning into technology, particularly now at the dawn of the AI movement. But it is more than just that. We as lawyers need to rethink about how we practice. There have been CLEs given by members of the CLLA, myself included, discussing the Rules of Professionalism, for example, and how they are antiquated and need to be modernized. But that change has been slow to come and is being outpaced by technology and the growth of the profession. Only this week (I am writing this in early May 2024) my home state of Maryland finally has its last jurisdiction on board for electronic court filings. But electronic filing has been around for many years. Why did that take so long?

There are other changes coming beyond technology, both big and small. For example, we are only now seeing states start to accept the idea of non-lawyers having an ownership interest in a law firm, which could dramatically change the landscape of how legal services are delivered. In April 2024, the Federal Trade Commission banned non-compete agreements, which will surely change not just the area of employment law but will also have a ripple effect across a great many areas of practice, particularly in the commercial law world. There has also been a movement in recent years away from traditional fee models. Soon we may see a greater prevalence of fixed fees, subscription services, new success-based models, or various combinations of blended rate structures driven by client demand for more predictability and return on their legal fee investment. These are just some examples of changes that are coming.

Closer to home, within the Commercial Law League of America, there are changes on the horizon as well. For example, bankruptcy venue reform has been a huge topic this past year, and will likely continue to be. Also, there will be changes within the League itself. We could see expansion of our League beyond just creditor's rights and bankruptcy, into other areas of commercial law. We could see a restructuring in how, where and when meetings are held. We could (and should) see changes in our diversity. We could see changes in how the league markets itself, how memberships are structured, how the league engages with the membership, or even how regions or sections are managed. All of these possible changes would come in the anticipation of growth.

So, as I sit here in the twilight of my term as President of the CLLA, I am excited about the changes that I see happening within our organization, and without our profession, and the resulting potential we have for growth in the future. And to those changes, I say, lean in. Consider them all. You may not want to accept them all, but at least consider them with an open mind and a fresh perspective. Because growth requires change, and change is inevitable. Let's embrace the possibilities that change can bring. As John Maxwell said, "Change is inevitable. Growth is optional."

Let's opt in. ■

Bill Thrush, Esq.
2023-2024 CLLA President
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FROM THE EXECUTIVE VICE PRESIDENT, CLLA

VIEWPOINT

In mid-May, the Commercial Law League of America held its 130th Annual Convention at the Swissotel in downtown Chicago. Once again this year's convention was presented on a hybrid platform affording members the opportunity to obtain high-level education without physically being in Chicago. Speaking of education, the Education Committee provided an exceptional lineup of educational sessions spanning three days, complemented by new and exciting networking events organized by our Meetings Committee. A heartfelt thank you goes out to all the dedicated volunteers who have devoted their time and energy to ensuring that this event was a tremendous success. Thanks to the generosity of our sponsors and the active engagement of Champion Program participants, all of whom supported the convention.

Below is the speech that I gave at the Annual Business Meeting.

I am delighted to be here with all of you as we gather once again for the 130th National Convention of the Commercial Law League of America. It is fantastic to see so many familiar faces and extend a warm welcome to our first-time attendees.

It's amazing to think that six years have passed since CLLA entrusted Tollview Management Group as its new management company. In fact, the Board and Tollview have just agreed to extend our management agreement for the next three years.

This partnership has been incredibly rewarding, and I believe that the League has flourished and thrived during this period. I trust that you share the same sentiment. There is a palpable sense of rejuvenation within the Association, as we forge ahead under the guidance of the Board of Governors and the dedicated leaders across our Committees, Sections, and Regions.

First, I extend my gratitude to the Board of Governors and Bill Thrush, our outgoing President, for their unwavering leadership during this exceptional year. I also want to express my appreciation to the entire Tollview Management team for their exceptional dedication, particularly Dawn Federico, whose tireless efforts in planning and organizing have been invaluable. I wish Ted Hamilton the best of luck as the incoming President and want him to know that the entire staff and I are here to offer our support throughout the year.

CLLA continues to be financially strong, and we intend to continue our growth both financially and through membership. We received a clean and unqualified opinion from our auditors on our 2022-2023 financial statements and I expect the same for this current fiscal year.

In the upcoming year, we will thoroughly assess all aspects of the League. Our focus will be on enhancing profitability through revenue growth and cost reduction. We aim to improve efficiency and introduce additional benefits to differentiate ourselves from other organizations. Our efforts will also be directed towards growing membership and attracting the next generation of members. This past year, CLLA added 59 new members. Although there has been a slight decrease in membership from the previous year, we are actively working on increasing that number.

The Champion Program remains strong with the addition of two new sponsors for a total of twelve. The Champion Program at any level provides members with an opportunity to showcase their business at all CLLA events. The program is designed to have firms, agencies and organizations enjoy sponsorship benefits throughout the year at one discounted price while getting unlimited exposure to both the CLLA family and the outside world. We would like to see the number of participants grow in the upcoming fiscal year. Last year we enhanced the program by providing our sponsors with more exposure and adding a year-end rebate to those who renew.

The number of Certified Agencies remains at 26 agencies as one agency did not renew this past year, but an international agency was recently added. We continue our marketing initiative under the direction of the Strategic Alliance Advisory Committee. This past year, we have spent approximately $50,000 on marketing the Certified Agencies through digital advertising, trade shows and social media. Our focus is to increase brand awareness of the Certified Agencies to the commercial credit professionals.

Last year, the Board of Governors approved a new membership category called Organizational Membership. This affords members the opportunity to have multiple memberships within the same organization for one flat, discounted annual rate. The more individuals that become members, the greater the discount per member. Since introducing this new offering, we have added 14 new members under this category.

In February, we conducted a Strategic Planning meeting that generated a comprehensive list of ideas, initiatives, and follow-ups to enhance the League's growth. We also discussed crucial matters impacting CLLA and the industry. The Board and staff will utilize this information to strategize and implement projects over the course of the upcoming year. The meeting was extraordinarily successful, leading the Board to decide on holding Strategic Planning sessions annually.

As I conclude, I urge those who are not yet engaged with the League to join us. Share your interests with us and let us know how we can support you. I've mentioned this before, the Commercial Law League boasts the most dedicated and enthusiastic members I've encountered. Don't just watch from the sidelines - get involved and participate. I assure you; you won't be let down.

As always, I would like to express to you that I am honored and privileged to be the Executive Vice President of the Commercial Law League of America. If there is anything that I or my staff can do, please do not hesitate to ask. Thank you very much! ■

Phil Lattanzio
Executive Vice President

Oftentimes how much you get out of a business conference depends on how much you put into it. This is true for the CLLA Annual Conference as well. For me, this year's CLLA Annual Conference was exceptionally extraordinary. Last year, I felt the conference was okay but not extraordinary; but then I realized it was me, not the CLLA. Last year, I was facing total knee replacement surgery shortly after the conference and did not feel up to participating in most of the extra-curricular activities available to the membership at the conference. This year I participated in most of those activities. Wow! What a difference a year makes!

But, it was not just me. This year, there seemed to be an energy in the air during each of the conference activities. Starting with the Newcomers welcoming reception, people commented on how the CLLA was vibrant and the people were friendly. Each newcomer with whom I spoke was looking forward to the educational sessions. And, looking around the room, all the mentors had found their mentees and were engaging with them. In fact, later on during the conference, some members commented that they would be glad to be a mentor in the future. I warned them to be careful what they ask for because their names will certainly be submitted to Dawn Federico for future reference.

The educational programs were par excellence. As a member of the National Education Committee, I worried about a few programs wondering whether they would come together. Without exception, each program was well-presented and well-attended. In fact, more than one person flitted from one program to another because he/she wanted to attend both so grabbed a bit of each. The only negative that I heard was from one agency who felt there were not enough agency programs. After the conference, a few of us from the educational committee looked at the program to determine if this was an actual program that needed addressing in the future. What we did find out was that there were sufficient programs addressing agency needs but they were not explained well enough. So, next conference it is up to the education committee to make sure the program descriptions are more detailed as to which section or sections of the League will most benefit from those programs.

The Goosechase was so much fun! Last year, I barely participated in the Goosechase. This year, Michelle Gilbert brought impetus to our team even before the conference by emailing each of us and saying, "Let's win." Well, my team did not win but we came in No. 2. I had never realized how much networking is done by participating in this Goosechase. Regina Slowey (a competing team member) started pointing out photo ops to Michelle and me; and we then reciprocated. What a fantastic way for 3 attorney members to get to know one another while going on this wild goosechase. Regina's team won, by the way! And, approaching CLLA members who had been total strangers in order to get that photo op was a wonderful way to meet new members.

The Women's Empowerment Luncheon, started last year by Maria Kozelek was tremendous. To meet and listen to those women who had been assisted by "Dress for Success" was a heartwarming event in the middle of a busy conference. Many members had contributed in advance of the luncheon, but after listening to these wonderful people share their experiences, Beverly Manne encouraged everyone to open up their purses by offering a matching gift and by the end of the conference, the CLLA had raised more than $9,100 to empower women to achieve financial independence. How fulfilling it is to be part of an organization which not only enables its members to become better I their professional lives but outreaches to other organizations to benefit those in need.

Then there was the Karaoke Event. Although this was labeled as an after-hours networking event, if truth be known, there was more drinking than networking going on. Nevertheless, it was a time for anyone daring enough, to let down their hair and "sing" in front of the crowd. An enjoyable time was had by all and the event had to be extended for an extra hour to accommodate those who had business dinners returning to the hotel. The Karaoke pictures seen in this issue are among the more conservative photos of the evening.

Overall, the feedback from the Conference was "a job well done." While some left the conference to root for their favorite baseball team at the after conference event, everyone left the conference looking forward to the year to come and next year's conference. ■

Wanda Borges, Esq.
Co-Chair of the Board of Associate Editors

Wanda Borges

IT TAKES TWO TO LIE: ONE TO LIE AND ONE TO LISTEN.

In our commercial litigation practice, sometimes we come upon more unusual fact patterns. Even though our practice is predominantly in Gotham City, Gotham has reciprocity with Springfield.

Ned Flanders and Patty Bouvier were equal business partners in an insurance business, where both were licensed, and both generated their own clientele. Ned's from the business community, place of worship, and networking events; Patty's from bars, houses of ill-repute, and sitting on a curb on the side of the road. Ned wanted to part ways with Patty, but rather than retain us, he had gotten a partnership agreement online from LawWoosh. The agreement had glaring holes in it, most notably any sort of termination. So for years, they muddled along in business together, where Ned and his clients generated the majority of the revenue, and yet Ned and Patty shared all revenue and profits equally.

Then came one day that Patty up and skipped town. Ned thought that his prayers had been answered! But unfortunately, in doing so, Patty also called the payment vendor they were using, Burns's Evil Enterprise, and had Burns redirect the commission payments to her personal account.

Ned retained McClure to file suit, and McClure drafted a 75-page complaint, with dozens of exhibits. Patty retained Lionel Hutz as her counsel, and as you would predict, four years of discovery proceedings, conferences, adjournments, conferences, and more adjournments, would ensue.

Ned finally decided to cut McClure loose, and retained our firm to take over. After two years of cleaning up McClure's mess, we were able to come to a principal settlement agreement with Hutz. Quite simply, he would direct Patty to surrender her shares in the company, and tell Burns to re-re-direct the commissions to Ned.

Sounds simple, right? Except, it wasn't.

Patty then insisted that she would not return the commissions for a certain list of clients, which she claimed were hers. Ned acknowledged that Barney, Moe, Nelson, and Sideshow Bob were procured by Patty, and could be excluded from the list of clients to be returned, but there was no way that Patty would be entitled to keep Homer, Reverend Lovejoy, Carl Carlson, or Groundskeeper Willie, since they were all clients that Ned at brought in.

I revised the settlement agreement, to reflect these changes, and I called Hutz to let him know I made the changes. He said he would speak to Patty and get back to me. An hour or so later, he called me to tell me they agreed, and would send the document to me for electronic signature by our clients.

When I received it, Hutz had added Homer and Willie back to the excluded list. And he also added Mayor Quimby and Kent Brockman to the excluded list!

I called him back and told him that I caught the change. Hutz then boldly lied to me, and told me that he didn't make any changes. I literally read him the changes. And he seemed shocked, and then implied that Patty herself, "must have made the changes". I told him to delete those objectionable names, and re-send it to me.

He re-sent it to me, and while everything else seemed right, he added Apu and Dr. Hibbert to the list of excluded clients! I called him back immediately, and this time, I wasn't so kind. I railed into him for his bad faith, lying, and openly trying to slip changes by me.

Ultimately, I revised the stipulation agreement, and the parties signed it, and all was well with the world.

After signatures, I ran into Lionel Hutz, and he said to me, "Can't blame a guy for trying, can you?" I can, sir. I can. ■

Timothy Wan, Esq.
Contributing Editor

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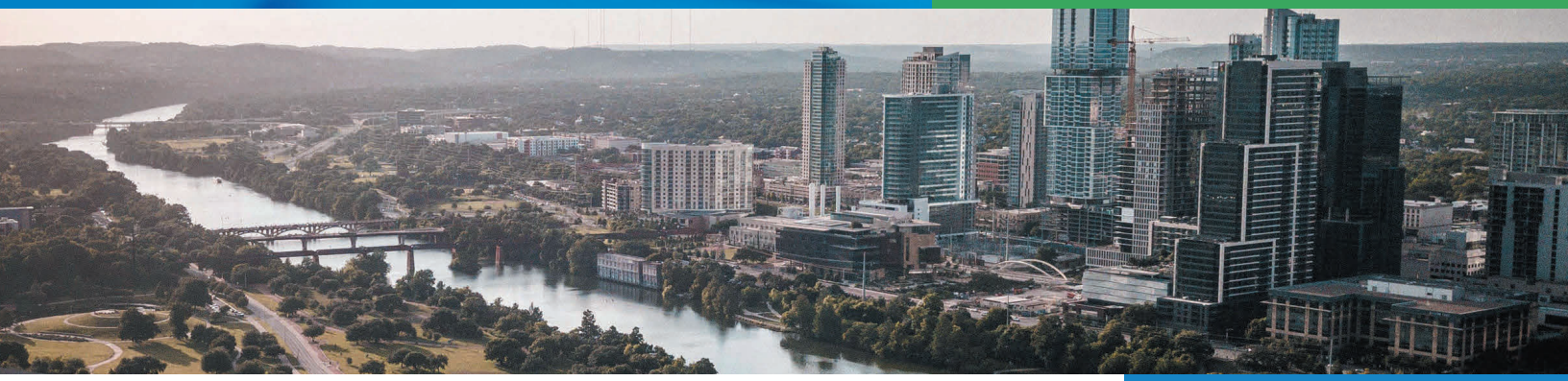

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The CLLA staff would like to take a moment to thank our attendees, sponsors, and speakers. Your continued support and partnership played a key role in the success of our convention. Thank you for your generosity and we look forward to seeing you at future events. View all photos at clla.org/clla-events/.


Beverly
ATTORNEY
Richard

JUDITH K. FITZGERALD'S ACCEPTANCE OF THE CLLA PRESIDENT'S CUP

Beverly, thank you for not telling all the stories you know about me from our long professional relationship. They may have taken the President's Cup away before I had a chance to receive it!

I am honored to accept this award and grateful to the CLLA committee, the President and Board for granting me this recognition.

The League has been an important part of my mission to advance bankruptcy education and the status of commercial law practitioners for the past 40 years. Frank Koger, former President of both the CLLA and the National Conference of Bankruptcy Judges appointed me to be the NCBJ's liaison to this organization and invited me to join. I took him up on his offer and have been a member ever since. I realized soon after taking the oath of office as a U. S. Bankruptcy Judge just how significant participation by judges is to the prestige of a professional organization and I appreciate the CLLA's providing me with the opportunity to serve as an advisor in that capacity and more recently as an advocate, commercial lawyer.

This award really is not just for me but one to share. The League members I have been privileged to join on various tasks, particularly on the Education Committee and the NCBJ Subcommittee, devote many hours to finding the best panelists and producing the best programs for every meeting, and to make the League a welcoming place. Thank you, all, for your efforts to make the CLLA a better organization - a place where members come not just for the excellent programs but for networking and contact development.

I must say that I could not have been as active in this or the other professional organizations to which I've devoted my time without the assistance of my husband, Barry, and the acceptance of my mission by my daughters, Kaelen and Martha – both of whom wanted to be here but could not for various reasons. My life has been enriched by them in so many ways, and I hope that I have been able to share with the CLLA some of the lessons I've learned from them; most of all, the meaning and hard work that comes from doing what you believe in. They have been true role models.

I hope I have been one as well.

I look forward to my continued association with the Commercial Law League of America. Thank you. ■

WILLIAM THRUSH REMARKS AS OUTGOING PRESIDENT

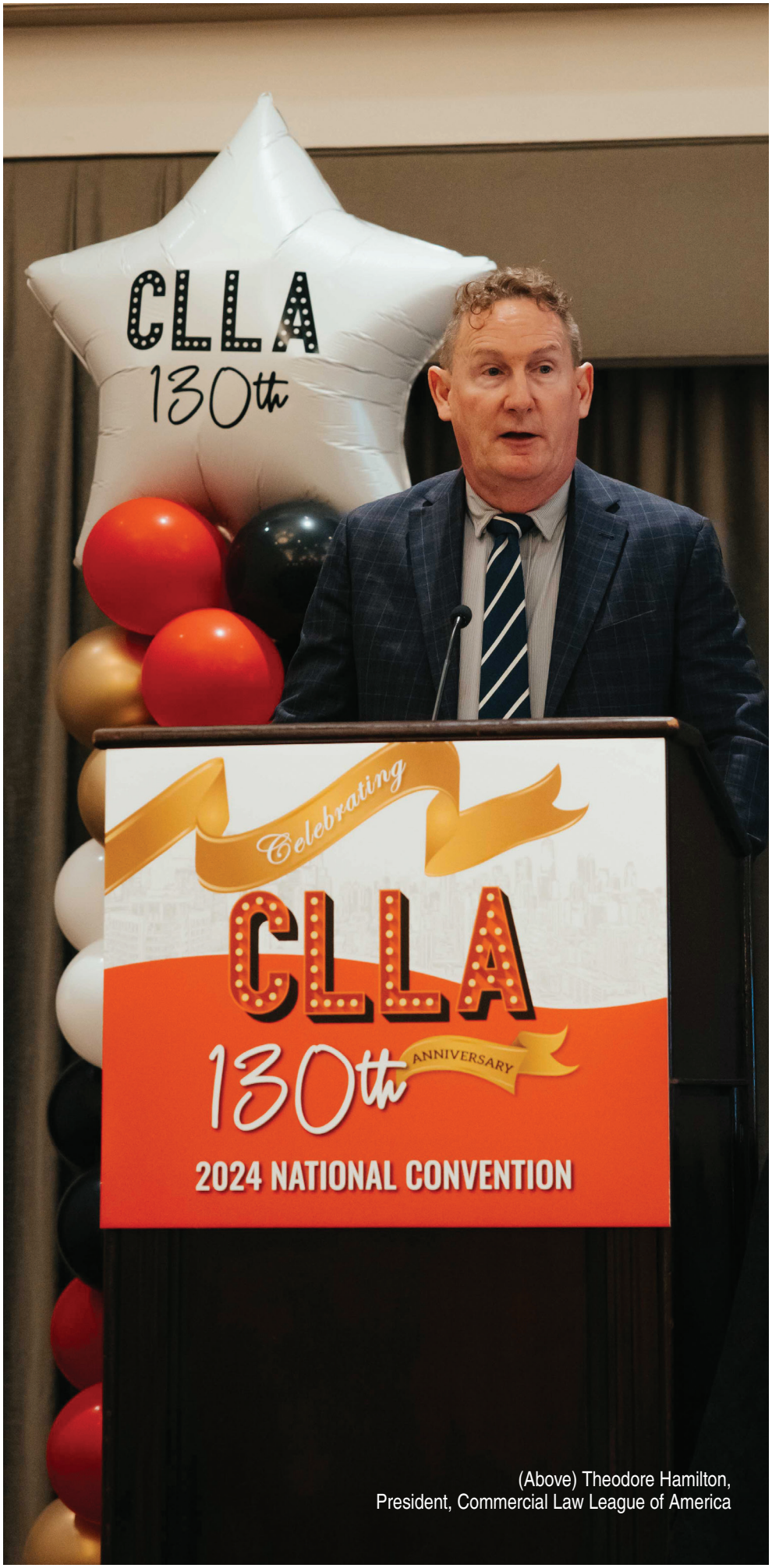
I had a joke idea to start off with about this being a hard job but I didn't know I'd literally have to break my neck doing it, but I couldn't make the punch line land. So instead, I will start by thanking everyone in the CLLA for allowing me to serve as President. I am told that I am the 3rd generation of attorneys in my firm to serve in that role and I am greatly honored to do so.

To say that the last year has been eventful is an understatement. But as I reflected on the past year in preparation for these remarks, it occurred to me that many of you may not know or have a complete awareness of how much goes on behind the scenes and how much work is done by your Board of Governors and your Committees and Chairs. So, I thought I'd hit some of the highlights:

- We published an Opposition statement to the Minnesota Debt Fairness Act which sought to extend FDCPA protections to small business debt;
- We joined in opposition to Michigan legislation that would have set monetary limits and exemptions from judgment execution that would ultimately do more harm than good in the collection industry;
- We conducted a Strategic Planning meeting – the first since 2018 – to refine and reset: Mission, Vision and Value & value propositions;
- We held steady with membership – a lot of work goes into that;
- We maintained a solid financial foundation and responsibility for the league;
- Took significant steps in the fight for bankruptcy venue reform including an amicus brief in the Purdue Pharma case and quoted publicly for our Amicus brief ;
- Created a formal Amicus policy statement for the league;
- Began working on diversification of the league beyond just creditor's rights and bankruptcy to broaden our scope into a true Commercial Law organization;
- Began the process of archiving every issue of CLW Magazine, and creating a record of the CLLA's esteemed history;
- President's challenge put a spotlight on the need for PAC fund donations, enforcing the advocacy position of the league;
- Opened communication with other organizations in our industry to examine the possibility of consolidating meetings.

There was a lot of work behind the scenes for a lot of people whose names you have heard today that make these actions happen for the benefit of the League and our profession as a whole.

And to keep that momentum rolling, we are all lucky to have someone coming into the Presidency with great ideas , energy and vision. Someone that this league is lucky to have as a member and a leader, and someone that I am proud to call my friend. I'd like to introduce your next President, Ted Hamilton, escorted by his wife Sarah. ■



(Above) Theodore Hamilton,
President, Commercial Law League of America

THEODORE HAMILTON REMARKS AS INCOMING PRESIDENT

Ladies and gentlemen, past presidents of the League and esteemed members and guests of the Commercial Law League of America,

It is with immense gratitude and a deep sense of responsibility that I stand before you today to accept the position of President of this esteemed organization. I am truly honored to have been chosen to lead such a distinguished group of professionals in the field of commercial law.

First and foremost, I want to extend my heartfelt thanks to all of you who have placed your trust in me. Your confidence in my abilities is both humbling and inspiring, and I pledge to devote myself wholeheartedly to serving the best interests of our League and its members during my tenure.

The Commercial Law League of America has a rich history of promoting excellence, integrity, and professionalism in the practice of commercial law. As we look to the future, I am inspired by the legacy of our past presidents and am committed to building upon their achievements. I pledge to uphold the values they have instilled in our organization: integrity, professionalism, and a commitment to excellence.

As we look to the future, I am committed to upholding and building upon these core values.

In today's rapidly changing business landscape, it is more important than ever for us to stay ahead of the curve, to adapt to new challenges, and to continue to provide our members with the tools and resources they need to excel in their careers. Whether it's through educational programs, networking opportunities, or advocacy efforts, I am dedicated to ensuring that the Commercial Law League remains at the forefront of our industry.

But beyond our professional responsibilities, I believe it is equally important for us to foster a sense of community and camaraderie within our organization. The friendships and connections we build here are invaluable, and I am committed to creating opportunities for us to come together, share our experiences, and support one another both personally and professionally.

As we embark on this journey together, I invite each and every one of you to join me in shaping the future of the Commercial Law League of America. Your ideas, your passion, and your dedication are what make this organization great, and I am eager to work alongside each of you to ensure its continued success.

To this end, I am excited to announce a bold membership initiative aimed at expanding our reach and ensuring that the Commercial Law League remains a dynamic and inclusive organization.

This initiative will focus on three key areas:

1. **Outreach and Engagement:** We will actively reach out to legal professionals across the country, and internationally, inviting them to join our ranks and become part of our vibrant community. Through targeted outreach efforts, we will seek to connect with attorneys, agencies, advertisers and lists, legal vendors, judges, law students, trade groups and other stakeholders who share our commitment to excellence in all areas of law that deal with commercial law. We will also establish an on line community and measure touch points for membership.
2. **Education and Professional Development:** We will continue to enhance our offerings of educational programs, resources, and networking opportunities to provide even greater value to our members. From webinars and workshops to continued mentorship programs and networking events, we will ensure that our members have access to the tools and support they need to thrive in their careers. We will also continue to expand our law school writing competitions, expand into other areas of commercial law and begin to establish a lawyer certification program. We will also continue to help our agency members develop their business and their knowledge base.
3. **Diversity and Inclusion:** We are committed to fostering a culture of diversity and inclusion within the Commercial Law League. We will actively seek to recruit members from diverse backgrounds and perspectives, recognizing that our strength lies in our diversity. Through targeted outreach and initiatives, we will strive to create a welcoming and inclusive environment where all members feel valued and supported.

By focusing on these areas, we will not only grow our membership base but also strengthen the Commercial Law League as a whole. Together, we will build a community that is diverse, dynamic, and dedicated to excellence in commercial law.

I am excited about the opportunities that lie ahead, and I am deeply committed to working alongside each and every one of you to achieve our shared goals.

Thank you for your support, and here's to a bright and prosperous future for the Commercial Law League of America.

In closing, I want to express my deepest gratitude once again for this incredible opportunity to serve as your President. I am confident that together, we will accomplish great things, and I look forward to the exciting journey ahead.

Thank you. ■

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Editor's Note

We'd Love to See You in the Spotlight!

If you have received honors worth mentioning, or had an achievement worth crowing about please contact ***Beau Hays at beau@hayspotter.com.***

Brian Press
Attorney
Metro Group of NY

WHEN GOOD FORWARDING GOES BAD

There is tension in every business transaction, and in every contract between parties. Every contract comes with a Hohfeldian quartet of right, duty, privilege, and liability. A Receiving Attorney who obtains a claim from a Forwarder, acknowledges receipt and accepts, becomes the third or fourth (if the claim is bonded) contracting party. The CLLA Operative Guidelines recognize these contracts between Forwarder and Receiving Attorney, and set forth the guidelines and guardrails of the Forwarder-Attorney contract, including claim acknowledgment, correspondence requirements, reporting, and billing. All of which guides are in the service of the relationships between the Client who contracted with the Forwarder, and the Forwarder who contracted with the Receiving Attorney, which may also be subject to a bonding contract.

THE CLIENT? WHO IS THE CLIENT?

It may be a little unclear, especially if your practice is dependent upon Forwarders tendering claims to your firm. The person(s) or entity(ies) that tender all these files, the files that allow you as a Receiving Attorney to operate, pay the bills and maintain your practice, may seem the most important party, and you certainly don't want the relationship to end, or "go bad." However, you still have to think about and consider on a higher plane, the Client for whom the Forwarder has tendered the claim that arrives in your hands. When you name them as Plaintiff in a lawsuit, sign the pleadings certifying the facts as true, and then file the case into the court system, the Receiving Attorney is no longer merely operating under a run of the mill business contract. The role of the Receiving Attorney is now intertwined with the fealty to the sovereign, in this case the court, the bar and the ethical precepts that govern the attorney-client relationship.

At the outset, this relationship between Forwarder, Receiving Attorney and Client requires that the Forwarder knows what they are tendering to the Receiving Attorney, and Attorney knows what to do with the" product" that is being tendered to them. The word "product" here is not "merchandise," but is instead akin to a Sum Total. The claim provided is a Sum Total of the efforts made by the Client, the goods/services sold to the Debtor AND any and all of the efforts - up to and after the point of the tender of performance by the Client - to obtain payment. The Forwarder must know the ins and outs of the claim they are tendering, and the Receiving Attorney must know the law and the path forward under the law to move towards the recovery of the funds due. Even with all of the contractual relationships, the overlay of the ethical concepts contained in court and bar rules are paramount to the other codes between the parties and is the "first among equals." (Since the various states may have variants in their rules, we will be citing here the American Bar Association Model Rules of Professional Conduct.)

ABA MODEL RULES

ABA Rule 1.1: A lawyer shall provide competent representation to a client. Competence is fundamental for Forwarders and Receivers. The Forwarder needs to be aware of the business that gave rise to the claim and needs to have access to the contact persons with the Client who may enlighten and aid in the recovery effort. If the receiving Counsel is unaware of the business that gave rise to the claim, Counsel must make some effort to learn, or engage the Forwarder to advise and/or set up a phone or video meeting with the Client. This is a way to "get behind the wheel" with a new client and obtain "coming attractions" related to the claim(s). Forwarding can and may "go wrong" even at this juncture, based on a new and untested Client, or a Client that is uncommunicative, has unrealistic expectations, or who hails from a different country or culture. These problems become the problem of the Receiving Attorney, in the way a cold or a flu is passed. The Receiving Attorney should not look at our work as "easy" or something to augment their "real" work. The field of creditors' rights is not for dilettantes. The Receiving Attorney must persevere, and must continue, especially after suit is filed, despite the "gristle and bone" found along with the meat of the case.

The way forward for a Receiving Attorney is clear. The communication between Receiving Attorney and the Forwarder, through the system (CLLA operative guides) must be prompt, clear, and convincing. ABA Model Rule 1.4 mandates what every Forwarder and their Client want: promptness, proffers of action, advice regarding different courses of action available, status reports, and responses to requests for information. When forwarding "goes bad" the manner of communication and/or exchange of information between Client, Forwarder and Receiving Attorney become the stumbling block to the resolution and/or continuation of the matter. Has the client tendered all of the documents, signed necessary verifications and affidavits, reviewed the disputes, tendered responses, complied and aided in discovery? Is an offer acceptable, and if not, what is the counteroffer? Every one of these stages between the receipt of the claim and the conclusion of the matter, is a "station" that may turn into a stumbling block to communication, action, and recovery on the claim.

Since the forwarder is the "solicitor" to the receiving attorney as "barrister" the fault could lie with same. The instructions and representation of the client is with the "solicitor/forwarder" and the receiving attorney/ barrister proceeds in accord with those instructions, and speaks with "one voice" for the client, in the court of law.

That is not to say that stumbling blocks cannot be made or made larger by the failure of the Receiving Attorney to communicate properly as well. One would

think that an "advocate" should communicate well. However, "well" is a general term. The transmission of information should always be made to aid the parties in the prosecution of the case. Attorneys should always have the correct name the Forwarder uses for the file, the file number (if there is one), and the right contacts on the transmission. *If there is something to aid as to the type and amount of the claim, such as an Excel spreadsheet of the balance, or at the very least a notification of the balance due and owing in the banner of the email, a good practice is to add that as well - especially when referencing offers of settlement,.* This falls into the requirements of thoroughness, and diligence incumbent upon the receiving attorney. ABA Rules 1.1 (5) and 1.3(3). Forwarding may "go bad" when the Forwarder receives incomplete communications that make it hard for them to follow-up, such as the failure to provide the administrative requisites in reporting just discussed.

There may also be problems with the Client, such as contact personnel changing, language issues, and cultural issues. There are cultures where an offer that is not accepted may never be succinctly rejected. The Forwarder watches the communication go into the ether, never to return with a definitive "yes" or "no." Another cultural difference may occur when the contact persons are not the decision makers. Contact people may be good for document requests, but they may not have the authority to make decisions, which in some cases may be made by consensus.

These "failures" can make proceedings difficult. The Receiving Attorney may be left with deadlines imposed by the Court. The cure is communication, but our relationships may limit the direct access that the Receiving Attorney has with the personnel of the Client. That being said, because the PRIMARY obligation of the Receiving Attorney is to the Client, when there is trouble brewing between Receiving Attorney and the Forwarder regarding Client input, if push comes to shove, the Receiving Attorney must make it clear to the Forwarder that direct access is required under the Ethics rules. This should have the effect of moving the matter forward and expediting litigation (ABA Rule 3.2). It should be noted that "rules of the road" regarding direct Client contact with Receiving Attorneys (such as the Operative Guidelines) have benefits, as the Forwarder should be more familiar with the Client, and more familiar with any peculiar requirements in the relationship.

The way forward in the event of such "MayDay" communications is to start by emails, and graduate to calls, and conference calls including the Client. Though conference calls, and "Zoom" or "Teams" meetings are different from a real meeting, it puts the Forwarder and the Client on notice that the "representation" requires more intimacy and direct dialogue. Another interim step to improve forwarder and receiving attorney dialogue is to have monthly calls about the portfolio with a Receiving Attorney. Such a meeting requires preparation, and the time for the call, however, it lays bare those issues which might involve discovery, or witness identification, or the answer to the settlement offer; it also examines the Receiving Attorney's progress moving the case through the court system, highlighting a need to move forward and/or facilitate the conversation with the Debtor to acceptably conclude the matter. The meeting takes time, and the follow up takes time, but it is a cure for most problems, and if it doesn't resolve problems for either side, then there may be cause to pause in sending or accepting additional business by either the Forwarder or the Receiving Attorney.

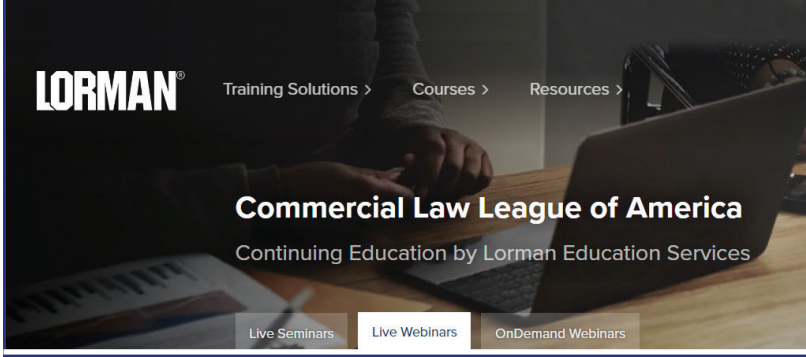
Any rift that may exist between the Forwarder and the Receiving Attorney becomes magnified by the demands of the prosecution of suit, especially if the complaint is disputed. The demands for documentation, discovery, information, intelligence, funds for counterclaim defense, funds for depositions, and the need for witnesses, are a constant in contested litigation, and the Forwarder (or more likely the Client) may be put into a position where they have to work to justify the amounts due. The Client falters, delays, and seeks instructions from higher ups - to the detriment of the Forwarder, the Receiving Attorney, and subsequently the prosecution of the case. The Attorney has a duty to zealously represent the client, if the claim is bona fide, and also a duty to expedite the course of litigation, as delay is construed as a fault that may consciously or unconsciously skew the opposing party and the court in favor of the opposition, and in extreme cases may lead to the dismissal of the claim and even sanctions. ABA Rules 3.1(1)(2), 3.(2)(1) and 3.4(2).

In situations where following the steps mentioned above fail to secure the cooperation of the Forwarder and/or the Client, then the extreme risk to the Attorney justifies an extreme reaction, based upon the primacy in litigation of the relationship of the Client and the Attorney, versus the relationship of the Receiving Attorney and the Forwarder. The only recourse for a Receiving Attorney, faced with failure of the Client and/or the Forwarder to support the efforts for prosecution of the claim, is to file a Motion to be relieved as counsel, on direct notice to the Client, with a copy to the Forwarder. ABA Rule 1.16 (b)1-7. While this is extreme, and it may be damaging to the relationship between the Attorney and the Forwarder, and between the Forwarder and the Client, it is the final step in dealing with "Forwarding Goes Bad" and should only be used in extreme situations.

In conclusion, "When Forwarding Goes Bad" the Receiving Attorney can be the injured party, having to "dance" while somebody is failing to support the effort towards recovery. The Attorney is constrained by the law to place the Client on the pedestal, even if the Client is the root cause of the problem, because the law

requires the upmost fealty to the Client, and bolsters that requirement to the point where the Attorney is in danger of sanction and or other remedies. The way to avoid the problem, is to spot and note communication problems early, and to use documented communication efforts to solve or reduce the problem to manageable levels, in order to avoid the extreme remedy of being relieved and/or terminating the Forwarder-Attorney relationship.

As the title of the article is "forwarding going bad," we may have not discussed too much about when the Forwarder is the hero of the story, and the problem is either with the client who adopts the "hit and run" or "minimalist" philosophy of claims placement, or with the attorney that has gone "bad" due to work or personal deficits. This is not to say that such situations don't arise, and would be a topic for another article down the road. ■



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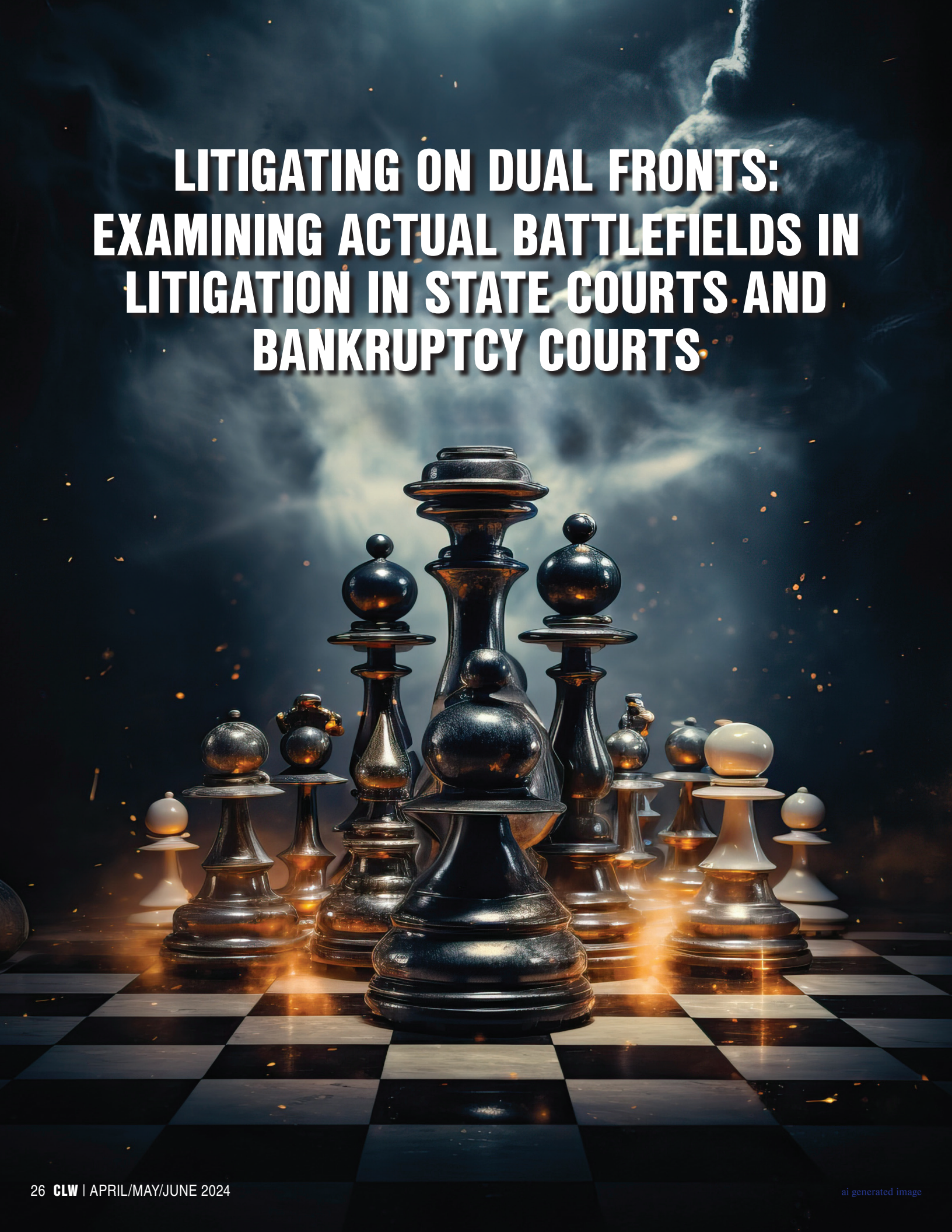
LITIGATING ON DUAL FRONTS: EXAMINING ACTUAL BATTLEFIELDS IN LITIGATION IN STATE COURTS AND BANKRUPTCY COURTS



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This article consists of excerpts taken from the presentation at the CLLA National Conference in May, 2024 and the written materials which accompanied that presentation.

PART I

FRAUDULENT TRANSFERS – STATE LAWS CROSSING INTO BANKRUPTCY COURT & E-COMMERCE TRANSACTIONS

In the case of TransVantage Solutions Inc., et al.,[1] the Debtor was a logistics company which audited and approved invoices. Multiple transportation companies utilized the services of TransVantage. Once TransVantage would clear and approve the invoices, the customers were billed and payments to the transportation companies flowed through the Debtor. In the ordinary course of a legitimate business, the Debtor would receive payments from the customers, deduct its fee for the logistics service it provided and remit the payments to the transportation companies.

Unfortunately, the principal of TransVantage decided to use the TransVantage coffers as her personal piggy bank, ultimately leading to the demise of the Debtor. In March, 2016, Shirley Sooy plead guilty plea in the U.S. District Court for the District of New Jersey on charges of fraud, money laundering, embezzlement and running a Ponzi scheme.

The Trustee of TransVantage commenced more than 500 adversary proceedings against the transportation companies for preferences based on Bankruptcy Code 547 and Fraudulent Transfers under Bankruptcy Code 548 as well as pursuant to New Jersey fraudulent transfer laws. Although the shortfall in the Debtor's estate was $40 million, the preference and fraudulent transfer actions sought more than $600 million from the very businesses who had trusted TransVantage to disburse funds honestly. The Trustee purported to bring those **actions** for the benefit of the creditors of TransVantage but it was those very same creditors which had been defrauded by virtue of the fraud, money laundering, embezzlement and Ponzi scheme conducted by Sooy. One part of the trustee's complaint stated: "Pursuant to these various Transportation Contracts, a Customer would advance funds to TransVantage Solutions, which funds were required to be held in trust and used only for the payment of the particular Creditor's freight bills. TransVantage Solutions was required to audit a Customer's freight bills and use the advanced funds held in trust to pay the freight bills."

Naturally, each of the Defendants defended the actions, in part based on the fact that the funds were not property of the Debtor but were trust funds. The remaining arguments against the trustee included ordinary course of business assertions as well as new-value assertions. Summary judgment was sought on several grounds including:

1) The money which was remitted to TransVantage were trust funds intended to pass through TransVantage to the transportation companies and was never property of the debtor
2) The transportation companies were not creditors of TransVantage. In fact those companies paid TransVantage for its logistics services
3) Any moneys received from TransVantage were received in the ordinary course of the logistics business and were paid to the transportation companies after a freight audit was conducted and approved

Although summary judgment was denied by the court, none of the cases went to trial and each case settled at the end of the day.

E-COMMERCE TRANSACTIONS

E-Commerce transactions have changed the traditional paradigm of commerce and in some

1 U.S. Bankruptcy Court, District of New Jersey, TransVantage Solutions, Inc., et al. 13-19753-KCF

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instances fall outside the principles defining the basis for Preference Claims under the Bankruptcy Code.

In a traditional business format, the manufacturer and/or wholesaler are the vendors/ sellers. They are defined by Article 2 of the Uniform Commercial Code as "Merchants"[2] and "Creditors"[3]. The buyer/vendee is also a Merchant in the sale of goods. Thus, a transaction between any two of these Merchants is deemed a bilateral transaction.

Title for the goods passes from the vendor/creditor to the buyer/debtor upon receipt. Customarily the traditional documents involved consist of: Buyer's Purchase Order ("PO"), and/or Vendor's Acknowledgment, Invoice, Bill of Lading or Delivery Receipt and Packing List. The merchandise is for Buyer's account; i.e. ownership and possession in its warehouse or storage facility for use or subsequent resale. Payments from the debtor to the creditor, during the ninety-day[4] or one hundred twenty-day[5] "preference period", may be attacked as preferential.

In contrast, in an E-Commerce Transaction, ("E-Transaction") Three (3) parties are involved, (1) the e-consumer, (an individual or entity customer) who orders and purchases item(s) on-line, through internet sales portals of the (2) E-Commerce Platform, ("EC Platform") , which facilitates the purchase transaction via numerous (3) Suppliers/Vendors, (manufacturer and/or wholesaler) , who ship the merchandise directly to the e-consumer and is deemed a third-party creditor beneficiary of the e-commerce transaction between the e-consumer and the EC Platform.

This is significant and is distinguishable from the traditional Two Party Sale Transaction. Examples of EC Platforms, are: Apple, Amazon, Wayfair, WalMart. Note: most EC Platforms never takes possession nor title to the Goods, as their Third-Party Suppliers ship directly to the consumer. (This avoids double storage, handling and freight costs).

Here, the voidable Title passes to the e-consumer, subject to the Vendor being paid with the EC Platform serving as the e-Consumer's facilitating agent. This is a significant distinction, as the e-Consumer's funds, via a credit/debit card transferred to the EC Platform constitute the consumer's "Trust Funds" for the benefit of the Supplier/Vendor until the Vendor is paid. Only after Vendor is paid do the excess funds (a fee) become the property of the EC Platform.

Should the EC Platform take funds before paying the Vendor, there would be a Breach of Fiduciary Duty and a wrongful taking; i.e., conversion, embezzlement or theft.

2 UCC 52-104(1)
3 UCC 51-201(13)
4 11 U.S.C. 547(b) and 11 U.S.C.550
5 Preference period under some state statutes for Assignments for the Benefit of Creditors

The co-mingling argument should not hold as the funds are trust funds and not the property of the EC Platform, until a condition precedent occurs, i. e, paying the Vendor in full.

THE MECHANICS OF THE E-COMMERCE TRANSACTION

Prior to any sale, the EC Platform, in order to secure a reliable supply chain, enters into a series of Credit Application/E-Commerce Merchants Agreement "Agreements") with each Supplier/Vendor, which generally provides : (i) terms, such as Net 30 days from date of Invoice; (ii) e-Consumer' s funds, via a credit/ debit card transferred to the EC Platform which constitutes Trust Funds for the benefit of the Vendor until the Vendor is paid; (iii) acknowledgment that future shipments will not be made on accounts past due; (iv) consent that Interest will be charged on all past due accounts at the periodic rate of 1.5% per month (a.p.r. 18% or the maximum as allowed by law at the location of the e-Consumer, if lower) , and; (v) that costs for collections including reasonable attorney's fees will be charged. These Five Essential Provisions should be incorporated in every Vendor's, Credit Application/E—Commerce Merchants Agreements.

The Agreement may and should specifically provide that: the e-consumers credit/ debit card funds are deemed trust funds for the Benefit of the Vendor, and the agreed balance/residue after Vendor is paid, will then become the property of the EC Platform.

There are many unique aspects of E-Commerce. "When EC Platform fails to live up to its obligations and diverts the proceeds of the e-Consumer' s accounts to its own use, it became a constructive trustee for the Vendor"[6].

It is well settled by the great weight of authority in this country that the officers of a corporation (formation entity) are personally liable to one whose money or property has been misappropriated or converted by them for the benefit of the corporation, (formation entity), although they derived no personal benefit therefrom and acted merely as agents of the entity. The underlying reason for this rule is that an officer should not be permitted to escape the consequences of his individual wrongdoing by saying that he acted on behalf of a corporation in which he was interested[7].

Under a factual situation analogous to this discussion, the court stated: "Where there is a fraudulent and unlawful conversion by the corporation (EC Platform), then those who participate therein by instigation, aid or assistance are liable. The mere fact

6 Williston on Contracts, 5445; 1 Restatement, Contracts, 5175(1)(a).
7 City of Kiel v Frank Shoe Mfg. Co. et al., 152 A.L.R. 703; 3 Fletcher on Corporations, 551140-1142

that Bernhardt was acting as the president of the corporation and Weisberg was acting as its treasurer and that they individually did not receive any of this money is immaterial since there was evidence to justify the jury in concluding there was an unlawful and fraudulent conversion by the corporation which was directed by them.

PART II

REAL-WORLD CASES INVOLVING LITIGATION INSIDE AND OUTSIDE BANKRUPTCY

Multiple Bankruptcy Filings by Same Debtor

Rule 109(g) provides that:

(g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if—

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

The Bankruptcy Code contemplates one case addressing estate property. A Debtor is not permitted to file multiple cases regarding same property. Further, a Debtor may not simultaneously maintain two bankruptcy cases. In re Mannucci, 2013 WL 3294093 (Bankr. M.D. Pa. June 28, 2013), In re Clark, 2010 WL 774141, at *1 (Bankr. N.D. Ala. Mar. 5, 2010), In re McDaniels, 213 B.R. 197, 199 (Brktcy. M.D. Ga. 1997), citing Freshman v. Atkins, 269 U.S. 121 (1925), Transamerica Credit Corp. v. Bullock, 206 B.R. 389, 392-93 (Bkrtcy. E.D. Va. 1997). Therefore, the Bankruptcy Code requires a Debtor to identify on its petition: where he/she lives, why a particular district has been chosen by the Debtor and whether any other bankruptcy proceeding has been filed within the last eight years.

The Bankruptcy Code enables a court to restrict these types of multiple cases. 11 U.S.C. §362(d) states:

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, **if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors** that involved either—

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) **shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court**, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

11 U.S.C. §362(c) provides

(3) **if a single or joint case is filed** by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending **within the preceding 1-year period but was dismissed**, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—

(A) **the stay** under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease **shall terminate with respect to the debtor on the 30th day after the filing of the later case**.

Further, 11 U.S.C. (c)(4) addresses a third filing and says:

(A)(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if **2 or more single or joint cases** of the debtor were **pending within the previous year but were dismissed**, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), **the stay under subsection (a) shall not go into effect** upon the filing of the later case;

One court, in particular has issued a local rule to thwart these kinds of repeat debtors. The Northern District of Illinois has its Local Rule 9029-4C which provides clear directives:

A. Restricted Filers

Any party who has abused the processes of the bankruptcy court may be prohibited, after notice and an opportunity to be heard, from filing any documents with the clerk, including petitions, claims, and

adversary complaints, unless permission is granted under section F of this Rule.

B. Procedure

Any judge or judges of the bankruptcy court, any judge or judges of the district court, or the United States Trustee for this region may submit a written request to the chief judge of the bankruptcy court asking the bankruptcy court to declare a party a restricted filer and prohibit that party from filing documents.

Although infrequently necessary, the Bankruptcy Courts have authority under §§105 and 349 to bar future filings for a specific period of time or indefinitely. Section 349(a) allows a bankruptcy court to bar future filings if cause exists to do so. In re McKissie, 103 B.R. 189, 193 (Bankr. N.D. Ill. 1989). Permanent bars to future filings are within the authority of the bankruptcy court in cases involving bad faith by the debtor. In re Class A Properties Five, LLC, 600 B.R. 27, 36-37(Bankr. N.D. Ill. 2019).

Section 105(a) permits a bankruptcy court to enter any Order necessary to carry out the provisions of the code or to prevent an abuse of the process, including dismissal of a case with a bar on refiling exceeding 180 days. In re McKissie, 103 B.R. 189 (Bankr. N.D. Ill. 1989).

First to File Rule

District courts are accorded a great deal of latitude and discretion in determining whether one action is duplicative of another, but generally, a suit is duplicative if the claims, parties, and available relief do not significantly differ between the two actions.

The first to file rule allows courts faced with duplicative litigation to dismiss or stay a second-filed case. See Trippe Mfg. Co. v. Am. Power Conversion Corp., 46 F.3d 624, 629 (7th Cir. 1995).

Abstention/Colorado River Doctrine

A federal court may stay or dismiss a suit in exceptional circumstances when there is a concurrent state proceeding and the stay or dismissal would promote wise judicial administration.

First, the court inquires whether the concurrent state and federal proceedings are parallel.

Second, the court considers: 1) whether the state has assumed jurisdiction over property; 2) the inconvenience of the federal forum; 3) the desirability of avoiding piecemeal litigation; 4) the order in which jurisdiction was obtained by the concurrent forums; 5) the source of governing law, state or federal; 6) the adequacy of state-court action to protect the federal plaintiff's rights; 7) the relative progress of state and federal proceedings; 8) the presence or absence of concurrent jurisdiction; 9) the availability of removal; and 10) the vexatious or contrived nature of the federal claim.

Stay Pending Appeal

The Bankruptcy Courts are reluctant to permit appeals to move forward unless the parties have clear intent to pursue those appeals grounded in good law. Rule 8007 provides one mechanism to assure the appeal moves forward properly. It provides that a party must move first in the bankruptcy court for the following relief:

(A) a stay of a judgment, order, or decree of the bankruptcy court pending appeal;

(B) the approval of a bond or other security provided to obtain a stay of judgment;

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending; or

(D) the suspension or continuation of proceedings in a case or other relief permitted by subdivision (e).

PART III – WAR STORIES

I. INTERSECTION OF BANKRUPTCY AND CREDITORS' RIGHTS LITIGATION

The Bankruptcy Court

1) The Bankruptcy Court may hear, determine, and issue final orders in the following kinds of proceedings as prescribed by 28 U.S.C. Section 157:

i. Matters concerning the administration of the estate;

ii. Allowance or disallowance of creditors' claims against
the estate or the debtor's claimed exemptions;

iii. Counterclaims by the bankruptcy estate against creditors filing claims;

iv. Orders in respect to obtaining credit;

v. Orders to turn over property of the estate;

vi. Proceedings to determine, avoid or recover preferences;

vii. Section 362 automatic stay motions;

viii. Proceedings relating to fraudulent conveyances;

ix. Dischargeability of particular debts;

x. Objections to discharge;

xi. The validity, priority or extent of liens;

xii. Confirmation of Plans;

xiii. The use, sale or lease of property, including the use of cash collateral; xiv. Orders approving the sale of property;

xv. Other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor relationship except personal injury, tort or wrongful death claims.

Subject Matter Jurisdiction and Related to Jurisdiction

1) Article 1 vs. Article 3 Jurisdiction and life after Stern vs. Marshall.

Federal Rules of Civil Procedure Apply

Adversary Actions in Bankruptcy

1) Nondischarge Actions
2) Breach of Fiduciary Duty
3) Breach of Contract
4) Other litigation

Selected Cases

A. Director and officer litigation arising out of bankruptcy cases and judgment collection

1. Nursing Home Case

Background: The Home went into Chapter 11 in 2005 and the officers and directors determined to close it, due to some perceived mismanagement (which may have resulted in the tragic death of a resident). The case had a great deal of intrigue, including a number of broken and disappearing computer hard drives which, when reconstructed, contained damaging evidence. Representing the Official Committee of Unsecured Creditors, the Committee sued the Home's former officers and directors for various actions of breaches of fiduciary duty and deepening insolvency.

a. Litigation: Litigation for eight years funded by firm's own costs and expenses against directors and their insurance company. The case was a precedential decision that endorsed the deepening insolvency as an independent cause of action for corporate creditors in Pennsylvania– a theory regarding the wrongful prolongation of a company's existence beyond insolvency that only some federal courts were identifying as a cognizable injury at the time.

b. Outcome: After five years of litigation and two trips to the Circuit Court of Appeals, a jury trial was held in 2013. The Jury awarded the Committee $5.75 million against the officers and directors including punitive damages. On appeal to the Third Circuit, the Deepening Insolvency was also at issue. Court held that deepening insolvency was still alive in Pennsylvania as measure of damages.

2. Failed Airline case.

a. Initially, represented petitioning creditor (security holder) in filing involuntary Chapter 7. Then represented Chapter 7 Trustee and recovered more than $5.4 million, which after professional fees and direct expenses resulted in almost $3 million being available for distribution to creditors.

b. Sued former D&O and owners for breach of fiduciary duty and running a Ponzi-like scheme

3. Large Food Manufacture.

a. Client filed involuntary petition in DE, which was ultimately transferred venue of a Chapter 11 case filed by its manufacturing company and converted the case to a Chapter 7

b. Purchased rights from trustee and filed complaint against buyer at private Article 9 sale, the directors and officers and the banks that participated in the sale

c. Lengthy opinion on motion to dismiss that allowed vast majority of counts to proceed

d. Simultaneous NY state court litigation for inter alia breach of contract with bankruptcy adversary purchased from Trustee for violating Article 9, successor liability, civil conspiracy , breach of fiduciary duty, fraudulent concealment, aiding and abetting breach of fiduciary duty and fraudulent transfers

i. Stay issues

4. Real Estate Holding Company

Both state court litigation/foreclosure on behalf of bank and bankruptcy

a. Obtained large judgment against principal based on guaranty ■

THE STATUTE OF LIMITATIONS IN FREIGHT CHARGE COLLECTIONS: THE CASE FOR A LENGTHIER STATE LAW APPROACH

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I. INTRODUCTION

The statute of limitations serves as a cornerstone in freight charge collections, decisively impacting the legal terrain of the transportation sector. While many perceive the 18-month window from the delivery date as the standard timeframe for carriers to pursue outstanding freight charges from brokers, shippers, or consignees, it's crucial to examine the benefits of applying a longer state law statute of limitations in these cases. This article embarks on a journey through this multifaceted domain, seeking to understand the nuances of state versus federal limitations and emphasizing the advantage of extending the statute of limitations.

II. THE FEDERAL FRAMEWORK

A. Title 49 U.S. Code § 14705 and Its Implications

Title 49 U.S. Code § 14705, "Limitation on actions by and against carriers," mandates an 18-month period post-delivery for carriers to initiate civil actions in charge recovery endeavors. This framework, established by federal law, prioritizes the swift reconciliation of conflicts, ensuring transportation services remain efficient and streamlined.

However, the strict 18-month federal regulation doesn't always reflect the complexities carriers face in the real world. Disputes in the transportation sector often entail intricate contractual intricacies, demanding an in-depth investigation, negotiation, and evidence gathering—all of which may not feasibly conclude within such a short window.

B. Necessity for a Uniform Rule

The transportation sector operates on intricate networks spanning state borders, making a standardized rule. The federal 18-month statute inherently offers this standardization, presenting carriers with a consistent framework to navigate regardless of where they operate. This not only streamlines operations but also fortifies the overall transportation industry, ensuring swift dispute resolution and bolstering accountability.

However, it is equally important to acknowledge the diverse needs and characteristics of different states. A one-size-fits-all approach, such as the federal 18-month statute, may overlook the unique challenges and requirements of individual states, potentially leading to inefficiencies and operational bottlenecks. A lengthier statute of limitations allows for more comprehensive investigations into grievances. In the intricate realm of transportation, where multiple stakeholders are involved, it is imperative that all angles of a dispute are scrutinized. This ensures that any legal action is grounded in a full understanding of the facts, thereby promoting fairness and justice.

III. STATE LAW: A CASE FOR LENGTHIER STATUTES OF LIMITATION

A. Varying State Laws and Their Potential Benefits

Certain precedent-setting court cases, like *Kennedy Tank & MFG Co., Inc. v. Emmert Industrial Corp.*, 67 N.E.3d 1025 (Ind. 2017), have illuminated the potential benefits of applying state law statutes in place of the federal 18-month regulation. State laws, often shaped by local industrial nuances and intricacies, can be more in tune with the unique challenges and expectations of businesses operating within their jurisdiction.

The Court in *Kennedy Tank* held that state collections actions are unlikely candidates for federal regulation because there is no uniformity vital to national interests. The Court based this conclusion on the fact that the Interstate Commerce Commission Termination Act (ICCTA) removed the federal cause of action for collection of freight charges and that breach of contract collection cases do not demand exclusive federal regulation merely because they involve interstate transportation. The Court noted that when it imposed deregulation Congress foresaw and acquiesced to the application of both federal and state law in the interstate transportation context, which indicated that Congress no longer desired to preempt the field of economic regulation of motor carriers.

After a comprehensive analysis of the preemption issue, Kennedy Tank further held that Indiana's ten (10) year statute of limitations was not preempted by the ICCTA's eighteen-month statute of limitations. *Id.* at 1034. Specifically, in applying a conflict preemption analysis, the Court concluded that "Congress's purpose for section 14705(a) was not to impose a standard national statute of limitations, and therefore Indiana's longer period does not do 'major damage' to the federal scheme." *Id.* at 1029.

Kennedy Tank concluded that Congress did not intend to preempt state law statutes of limitations applicable to actions for the collection of freight charges. *Kennedy Tank*, then, proves to be the rare case in which a holding that federal preemption does not apply in the interstate transportation context is of benefit to motor carriers.

Most states will have statutes of limitation that are longer than the 18-month federal statute, allowing motor carriers more time to file suits to collect freight charges and reducing the ability of shippers to raise the federal statute of limitations as a defense. Take California, for instance, where the statute of limitations spans four years for cases of breach of contract or open book account claims. This extension not only grants plaintiffs a more substantial window to present valid claims but also acknowledges the often convoluted nature of transportation disputes, requiring ample time for adequate preparation and resolution.

B. Championing Justice and Fairness

Choosing between state and federal statutes is not merely a matter of timeframe but also about ensuring justice and equity. A longer state law statute of limitations, such as California's four-year limit, recognizes the need for a comprehensive approach to legal challenges, allowing carriers adequate time to address grievances and seek legal redress.

Furthermore, when carriers operate across different states, the ability to rely on a lengthier state-specific statute can prove invaluable, especially in situations where damages or misconduct become apparent only after an extended period post-delivery. Adopting a longer statute ensures victims aren't denied justice simply due to time constraints. Smaller carriers, which may lack extensive legal resources, can particularly benefit from the additional time afforded by lengthier state statutes, allowing for a more equitable playing field.

IV. THE BROADER IMPLICATIONS OF LENGTHIER STATE STATUTES

A. Legal Consistency and the Balance of Power

While the federal statute provides an overarching framework, longer state statutes can cater to specific local challenges. This duality, however, might lead to a tug of war between federal and state powers. However, as seen in *Kennedy Tank*, courts have sometimes favored the application of longer state laws, emphasizing the value of such laws in the broader legal ecosystem.

B. Economic Impacts on the Transportation Sector

Financial ramifications in the transportation sector, due to unpaid charges, can ripple throughout the industry. A lengthier state statute allows for thorough evaluation and negotiation, potentially leading to more equitable settlements and ensuring the economic stability of the sector.

The extended timeframe facilitates negotiation. Instead of rushing towards litigation, parties can engage in dialogues, exploring common ground and potential solutions. This environment not only fosters collaboration but also paves the way for more equitable settlements. Such resolutions, which prioritize fairness over expediency, can restore faith in the system and ensure that both carriers and clients feel validated.

V. CRITICAL LEGAL PRECEDENTS REINFORCING STATE STATUTES

Several cases, beyond *Kennedy Tank*, have touched upon the interplay between federal and state statutes. For example:

1. *Learning Links v. United Parcel Service of America,* 03 Civ. 7902 (DAB) (S.D.N.Y. Aug. 18, 2006) – "In light of the clear statutory intent that the eighteen-month statute of limitations applies only to published rate overcharges, as well as the case law and treatises evincing such intent, there is not a substantial ground for difference of opinion on this issue."
2. *Owner-Operator Independent Drivers Ass'n v. Mayflower Transit, Inc.*, 204 F.R.D. 138 (S.D. Ind. 2001)
3. *Steve Marchionda & Assocs. v. Weyerhauser Co.*, 11 F. Supp. 2d 268 (W.D.N.Y. 1998)

In these cases, courts have illustrated the potential for state laws to supersede the federal 18-month statute, revealing a growing legal consensus towards the benefits of longer state laws. In essence, these rulings underscore a judicial inclination towards acknowledging state-specific nuances and the inherent value in providing adequate time for thorough examination and redressal of disputes.

VI. CONCLUSION

The freight charge collection landscape, underlined by the statute of limitations, is at a pivotal crossroads. While the 18-month federal window offers uniformity, the increasing recognition of lengthier state laws underscores the necessity for a more flexible, localized approach.

Title 49 U.S. Code § 14705, despite its merits, may not always address the multifaceted challenges carriers face, making the case for states to champion their own lengthier statutes stronger than ever. The quest for legal fairness, combined with the sector's operational nuances, implies that while the federal law lays the foundation, state laws often provide the necessary scaffolding for comprehensive justice.

As the transportation industry continues to evolve, legal paradigms must adapt, ensuring that they not only facilitate operational efficiency but also uphold the sanctity of justice and equity for all stakeholders. Whether governed by federal or state law, the ultimate aim remains unwavering: to bolster justice and fairness in the transportation domain. ■

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FOUR WAYS TO QUALIFY FOR CYBER LIABILITY INSURANCE AND LOWER PREMIUMS

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Getting cyber liability insurance in 2022 is becoming more difficult and expensive. Not only are insurance companies asking applicants to implement a litany of security controls, but they are dramatically raising the cost of insurance premiums anywhere from 75% to 1000%. Last year, there was a 500% percent increase in cyber liability insurance claims. In fact, cyber claims loss ratios hit a whopping 73% in 2021. Insurance companies are getting tired of paying for ransomware claims. They are now evaluating applications very carefully. They are looking at loss history in your industry, the number of employees you have, your cyber security team, your annual revenue, your security controls, the amount of confidential information you have, and your loss history. Underwriting decisions are made on a case-by-case basis. Some insurance companies are declining to cover companies that are not serious about improving their cyber security posture. Will your business survive the financial impact of a cyber attack if you don't have cyber liability insurance?

Here are four categories of cyber security controls that you will see in a typical cyber liability insurance application. By implementing most of them, you will improve your chances of getting coverage at a reasonable cost. In addition, your business will not be a sitting duck and you will be able to find out quickly when someone breaks into your system. The sooner you find out when someone penetrates your cyber defenses, the less damage they will be able to do to your company.

1. EMAIL SECURITY CONTROLS. THERE ARE FOUR EMAIL SECURITY CONTROLS YOU SHOULD IMPLEMENT.

The first one is a banner tagging all inbound emails from external sources. This reduces the likelihood of your team getting phished when an external email comes in pretending to be an internal email.

The second control you should have is a system to screen all email attachments and links before delivering your inbox. This system will detonate email attachments and links in a sandbox in the cloud. If an attachment or link is found to have malware it will not be delivered to your inbox.

The third control you should implement is a combination of three anti-phishing systems: the Sender Policy Framework (SPF), DomainKeys Identified Mail (DKIM), and Domain-based Message Authentication,

Reporting & Conformance (DMARC). SPF is used to publish the list of mail servers used by your organization. Suppose a spammer spoofs your domain and starts sending emails pretending to be from your company. In that case, the recipient's mail servers will recognize those emails as spam because they did not originate from your company's authorized mail servers. DKIM is a system for adding a digital signature to outbound emails to validate the sender's authenticity and that the contents of the email have not been modified. The DMARC is a policy to decide what to do with inbound emails based on SPF and DKIM. For example, DMARC can be configured to do nothing, quarantine emails, or reject them based on SPF and DKIM.

The fourth email control is multi-factor authentication (MFA) for web mail. MFA will prevent 99. 9% of the email compromise attacks.

2. INTERNAL SECURITY CONTROLS. THERE ARE 19 INTERNAL SECURITY CONTROLS THAT YOU SHOULD HAVE IN PLACE.

The first one is multi-factor authentication (MFA) for cloud applications, your VPN, your remote desktop connections, and your system administrator accounts.

The 2nd control you should have is data encryption. For example, your laptops, desktops, servers, and mobile devices' storage devices should be encrypted. Suppose any of these storage devices get lost or stolen. In that case, the data on them cannot be read by a cybercriminal, and you will avoid a data breach and a multimillion- dollar fine if you are in a regulated industry. It is important to note that when your computer or mobile device is turned on, the storage device gets unencrypted so that you can read your files. If your computer, mobile device, or file server gets hijacked by cybercriminals, they will transfer the files to their system to attempt to extort money from you.

This leads me to the 3rd security control that you should have. It is what we call a data loss prevention (DLP) system. With DLP, you can further encrypt your files so that if they get exfiltrated by cybercriminals, they will not be able to read them on their computer systems.

The 4th control you should implement is next-generation antivirus (NGAV). NGAV is better than the previous generation antivirus (legacy) programs because it can recognize viruses it has never seen before. NGAV recognizes the ill-intent behavior of computer viruses. When it sees a virus attacking your computer, NGAV will block it. Legacy antivirus is like the flu vaccine. Every year, there is a new vaccine because the flu virus mutates. Even if you get a flu shot every year, you may not be protected against the latest flu strain because the vaccine may not recognize a newer virus strain. Similarly, legacy antivirus cannot stop viruses it has never seen before.

The 5th control we recommend is endpoint detection and response (EDR). EDR is a tool designed to detect and investigate suspicious activities on your computers and mobile devices. It is super important to have EDR in place to find out as soon as possible when someone breaks into your systems. Organizations without EDR are finding out that they have been breached nine months later on average.

The 6th internal control you need is application whitelisting. This system is designed to keep a list of software authorized to run on your computer systems. Anything that is not on that list will not be allowed to run. Suppose that a ransomware gang compromises one of your software vendor's applications. Next time you update that application, the ransomware gang will be in your system. When they try to run the software to encrypt your files, it will not be on the list of authorized applications, and it will not run. We saw the effectiveness of Application Whitelisting back in July 2021 during the Kaseya supply chain ransomware attack. Companies that used Kaseya VSA software and had application whitelisting deployed did not get their files encrypted.

The 7th internal security control is privileged account management software (PAM). PAM helps you manage and audit your system administrator accounts. It protects the system administrator passwords by rotating them frequently and not displaying them to your system administrators. It will alert you if someone logs in to your systems as a system administrator when your system administrators are not working.

The 8th control is a hardened baseline for your servers, laptops, desktops, and mobile devices. Most hardware and software systems ship in an open and insecure configuration. You should change the default security settings according to your business needs before you put them into production to reduce the attack surface.

The 9th control is an automated hardware and software inventory tracking system. It will help you identify systems that are no longer supported and are not getting security updates.

The 10th control is standard user accounts for non-IT users. Only your IT department should be able to install applications or make changes to your computer systems. Otherwise, your non-IT users will be unwittingly introducing malware into your network. Many software downloads such as freeware, web browser extensions, cracked software, and printer and other device drivers have been tainted with viruses and

trojans. Non-IT users are not trained to verify that the software they are downloading is free from malware.

The 11th control is security patch updates. Ideally, your systems should get security updates installed within one to three days after an update is released.

The 12th control is the segregation of end-of-life or end-of-support software. If a software vendor no longer maintains an application that you must keep in production, it should be segregated from your network.

The 13th control is protective DNS (PDNS). PDNS blocks access to malicious websites and unwanted web content.

The 14th control is endpoint application isolation and containment technology. This technology puts your applications in separate containers. If one application gets hijacked, the remaining applications will be safe. For example, your web browser can be isolated in its own container running in the cloud. From your point of view, the web browser looks like it is running on your computer, but it is not. It is being streamed down to your computer from the cloud. It is like watching movies on Netflix or Amazon Video. The video processing is happening in the cloud, and the movies are displayed on your computer, mobile device, or TV. When you visit a website that has been compromised or click on an ad that is configured to hijack your computer, the malware only affects the web browser in the cloud. The malware cannot make the jump to your computer.

The 15th control is disabling Microsoft Office macros by default. Otherwise, your company will be hacked when a user opens a Microsoft Office file that contains a macro configured to run automatically. Microsoft recently started disabling Microsoft Office macros that come from the internet. However, users can override that setting and still run macros. We recommend implementing a system security policy that prevents end-users from enabling these macros unless there is a business reason why you need to run them.

The 16th control is to follow the PowerShell best practices recommended by Microsoft in its Environment Recommendations. You want this security control PowerShell is one of the favorite tools that cybercriminals use to take over your entire computer network once they hijack one of your computers.

The 17th control is called Security Information and Event Management system (SIEM). This system collects the security events recorded by your desktops, laptops, servers, firewalls, network switches, wireless access points, etc. SIEM allows security to identify and investigate suspicious activities happening in your computer network. SIEM works in connection with EDR.

The 18th security control is called Security Operations Center (SOC). The SOC is staffed by security analysts using EDR and SIEM to find out if your computer network has been breached. Without someone auditing your network you will not find out that you have been breached until it is too late.

Finally, the 19th security control is called Third-Party Penetration Testing. You want an independent cybersecurity team testing your cybersecurity defenses every quarter to find out if they are working as expected or if you need to tweak them to detect the latest and greatest form of attack.

3. BACKUP AND RECOVERY POLICIES.

You should have three backups of your data. The first copy should be onsite on a system that is independent of your company's domain with different login credentials. The second backup copy should be with a cloud provider. The third backup copy should be kept either offline or as in an immutable copy. For cloud applications, we recommend you have cloud-to- cloud backups. Your backups must be encrypted and protected by MFA. You should have a system for testing the restoration of your backups at least every month. In addition to backups, you should do server replication to another data center so that you can recover your servers quickly in the event of a disaster.

4. PHISHING CONTROLS.

You should provide security awareness training to your team at least once a year, and conduct simulated phishing attacks to find out who needs additional training. Your finance team should have a wire transfer or electronic payment protocol to validate the requests for payments. Keep in mind that cybercriminals can modify the ACH information on the invoices that you receive from your vendors, send spoofed emails requesting a wire transfer, and even call you over the phone using DeepFake technology pretending to be your CEO or CFO.

For help in answering the security control questions in a cyber liability insurance application, send your application to info@alcalaconsuting.com. We will help you review your cybersecurity posture and answer those questions for you. If you are missing any of these controls, we will help you choose and implement the right solution for your company.

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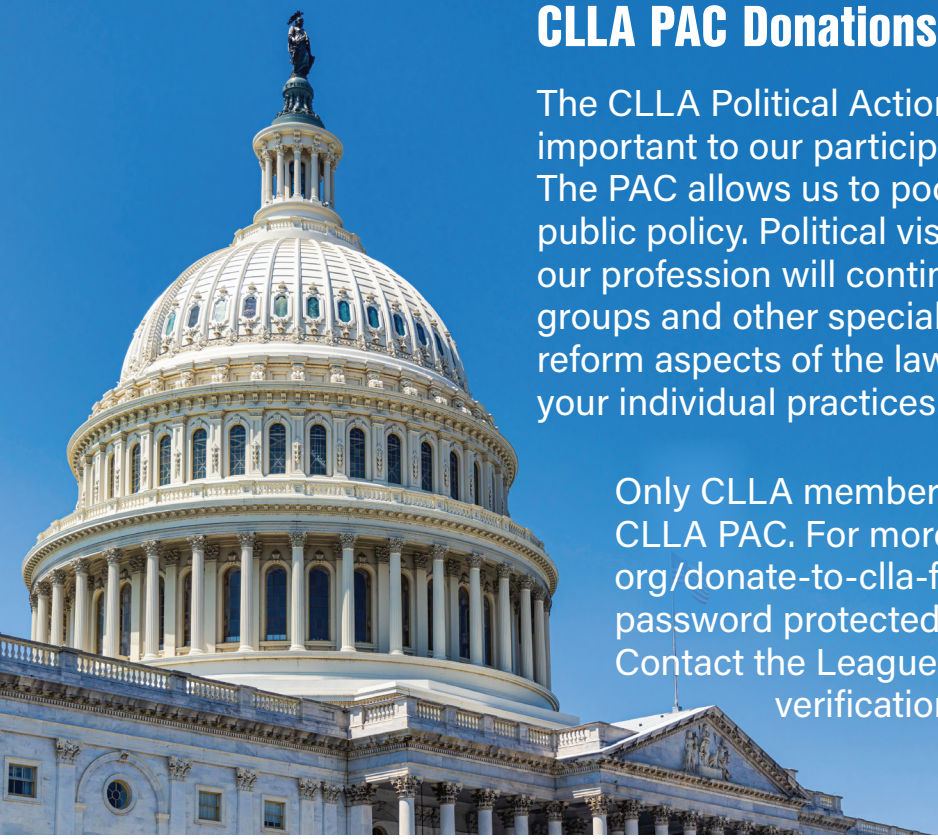

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FURTHER REPORT ON THE UNIFORM LAW COMMISSION'S EFFORTS TO DRAFT A UNIFORM ASSIGNMENT FOR THE BENEFIT OF CREDITORS ACT

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The Uniform Law Commission ("ULC") appointed a study committee to evaluate the need for and feasibility of a uniform act governing assignments for the benefit of creditors. That committee recommended that a drafting committee be appointed, and the ULC followed that recommendation. This endeavor comes over a decade after the 2009 Model Statute for General Assignments for the Benefit of Creditors did not pass in any state despite the endorsement of the Uniform Law Commission, the American Bar Association's Business and Bankruptcy Sections, and the Commercial Law League of America ("CLLA").

A uniform law on Assignments for the Benefit of Creditors ("ABCs") would, if broadly adopted, have many benefits. Caselaw on ABCs is sparse and of little value between states since assignment for the benefit of creditors' regimes differ widely from state to state and a uniform law would greatly increase the persuasiveness of caselaw from other jurisdictions. In some states, ABCs are rarely, if ever, used due to nonexistent or outdated laws governing them and the absence of a community of practitioners who have experience using them. A uniform law would update outdated laws and allow experience with ABCs to apply across state lines. It also could address difficulties that arise in ABCs, including malfeasance by assignees and choice of law

issues. Finally, a uniform law may result in substantive improvements in the ABC process, beyond merely codifying existing practices.

The drafting committee's mandate was to draft a uniform act governing ABCs that addresses

1. How ABCs interact with bankruptcy and other applicable laws;
2. Choice of law rules, including whether an ABC should be treated as a UCC Article 9 security interest;
3. The degree of court involvement in the ABC process; and
4. Transparency, due process, conflict of interest, and adequate notice procedures, particularly regarding assignees' duties.

The main goal is to provide a framework that provides states guidance and options rather than to prescribe a code that addresses every possible circumstance, as doing so would likely make passage difficult. The committee wants to maintain a distinction between ABCs and bankruptcy or receiverships, both to preserve ABCs' distinctive advantages and to avoid issues of federal preemption.

As has previously been reported in Volume 37, Issue 4 of the *Commercial Law World* magazine, the CLLA Board of Governors selected Wanda Borges, Joseph Peiffer, Austin Peiffer, and Lorna Walker to serve as Observers during the ABC Drafting Committee's meeting to discuss a Uniform ABC act.

After several meetings, the drafting committee's reporter created a draft model act that Committee members, Advisors, and Observers reviewed and commented on.

The drafting committee presented its latest version of the draft model act at an informal meeting of the Uniform Law Commissioners on June 6, 2024 for their further review and comments. The drafting committee anticipates formally presenting a revised draft at the 2024 Uniform Law Commission Annual Meeting in July and hopes to present a final draft at the 2025 Uniform Law Commission Annual Meeting.

The drafting committee has had various formal and informal meetings as well as discussions outside of its meetings. Given the broad range of ABC regimes throughout the country, from states like Florida with explicit statutes and heavy court involvement in ABCs to states like California that eschew court involvement and rely on common law, there have been strong opinions and diverging viewpoints on many topics. The topic that has engendered the most discussion and debate, though, has perhaps been court involvement. Practitioners with experience in court-heavy ABCs see great value in court involvement for providing transparency and supervision; practitioners with experience in court-light ABCs argue that court involvement slows down the process, increases costs, is inefficient and unnecessarily public, and is neither helpful nor necessary in nearly all cases. Nonetheless, both camps believe that a uniform act that prescribes either court-heavy or court-light ABCs would stand little chance of adoption in states that currently have a different regime.

The most recent draft uniform act provides state legislatures with two alternatives, one for a court-heavy ABC regime and the other for a court-light ABC regime. Including two options provides a potential solution to the one uniformity problem because states can select the desired level of court involvement in their ABCs. Unfortunately, it raises another question: how "uniform" can a "uniform" ABC act be if states can vary a provision as fundamental as the level of court involvement? However, uniform laws with alternatives are not new. For example, Part 5 of Article 9 of the Uniform Commercial Code includes at least six pairs of alternative language, including two sets of alternatives on the fundamental issue of what suffices for the debtor's name in a financing statement. Even if the ultimate act fails to be completely uniform because of its options regarding court involvement in ABCs, a "mostly uniform act" on ABCs would be significantly superior to the current chaos of ABC laws throughout the country.

The drafting Committee for a uniform ABC act, the advisers, and the various observers, including those from the CLLA, have dedicated considerable time and energy contemplating how to draft a better ABC law. They have discussed a wide range of issues including court involvement, venue selection, and assignee eligibility. The goal is to formulate a uniform ABC act that by the summer or fall of 2025, CLLA members and others can review and proceed to advocate to their legislatures for passage, resulting in improved ABC statutes for everyone. ■

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AN UPDATE ON ARIZONA'S PROPOSITION 209 FOLLOWING COURT OF APPEALS RULING

Last fall, we wrote about the Arizona ballot initiative Proposition 209 ("Prop 209") that passed into law and was coined the "Predatory Debt Collection Act". The Act was presented to Arizona voters as a means of reducing and capping the interest rate on medical debt. As our article explained, however, Prop 209 did far more than that – the little-known effects of the numerous statute edits increased an individual's personal exemption in a bank account from $300 to $5,000, decreased the standard withholding percentage on wage garnishments from 25% of after-tax earnings down to 10%, and nearly doubled Arizona's homestead exemption to $400,000. These along with some other changes have rendered the majority of Arizona residents as "collection proof."

Recently, the Arizona Court of Appeals – Division One affirmed the constitutionality of Prop 209 and in doing so dealt a major blow to the challengers of the new laws. Multiple creditors and creditors' rights groups, including the Arizona Creditors Bar Association, have relentlessly challenged Prop 209 from its inception and before it ever hit the November 2022 voter ballot. These groups attacked the initiative's misleading description, and then the institution of the laws themselves, on multiple fronts including vagueness, ambiguity, and violating the Constitution. While the lower state court battles ensued, different judges from different jurisdictions and venues interpreted the new laws in different ways – some applied the new exemptions and percentages across the board without hesitation, while others attempted to parse through Prop 209's Saving Clause in order to determine when the new laws or the old laws applied. The Arizona Court of Appeals unfortunately offered no relief or direction.

In general, the Arizona Court of Appeals took no action because of longstanding tradition to let the "[lower] courts work through the meaning and application ... in the context of as-applied disputes involving concrete factual scenarios." Unfortunately, the lower Arizona state courts have displayed an unwillingness to do that for the past year and a half, creating confusion and inconsistent results in the process. The Court of Appeals also found the Saving Clause[1] to be neither vague nor unintelligible. While recognizing the great importance of the phrases that make up the Saving Clause, the Court simply stated the language to be similar to other frameworks in other new statutes, and therefore, it is capable of meaning and understanding. Frustratingly, the Court did not bother to explain how the Saving Clause framework ought to be applied, only that courts should be able to follow it.

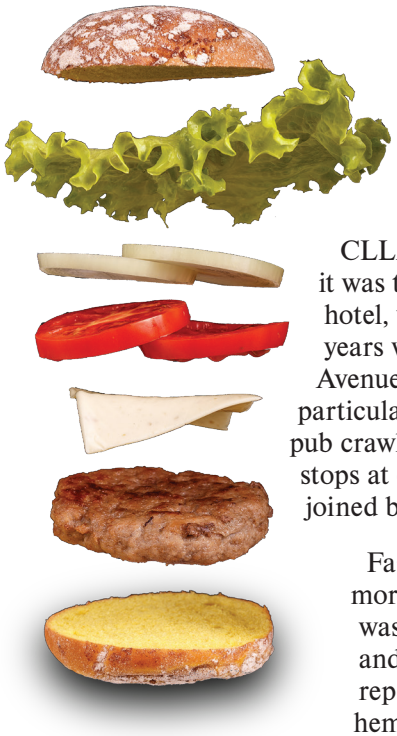
The only item on which groups on both sides can agree is that the effective date of the new law was December 5, 2022. Beyond that, regarding another point of contention, the Court of Appeals offered no guidance on what is meant by "rights and duties that matured," beyond clarifying that the maturation refers to substantive rather than procedural rights and duties. Creditors are still left wondering whether these substantive rights and duties means the ability to sue for breach of contract, to initiate a post-judgment enforcement proceeding, or something else. Similarly, creditors received no help with what is meant by the reference in Prop 209 to a contract being entered into "before the effective date". The initial challenges to provisions of Prop 209 were not only for contracts entered into "before the effective date", but also judgments obtained "before the effective date". Further, the larger question remains of how the new laws are to apply prospectively only when, in practical application, altering the exemptions and withholdings available to creditors on contracts and judgments obtained before the existence of Prop 209 creates a dramatic retrospective effect. The Court of Appeals simply stated the text of the Saving Clause is not unintelligible because it describes how the Act should be applied; in doing so, the Court ignored all of appellants' arguments and evidence that the lower courts do not know how it is to be applied, hence the reason for the appellate action.

The Arizona Court of Appeals also took issue with what it determined to be hypothetical scenarios and "speculative fear" involving a judgment creditor applying the wrong exemption and therefore violating the Fair Debt Collection Practices Act (FDCPA) or another State or Federal regulation. The Court found that none of the appellants had suffered any injury under the new laws so therefore the new laws must not be so vague and ambiguous as to expose judgment creditors to fines and other adverse damages. The reality is that since the effective date, judgment creditors in Arizona have generally taken the most conservative approach to applying Prop 209, erring on the side of caution rather than incurring fines. As noted above, the Court of Appeals believes the lower state courts have the tools and understanding available to deal with *actual* adverse reaction to a judgment creditor's efforts, and that clarification and guidance from a higher court on how to avoid mishandling is not necessary. The Court of Appeals specifically notes the fact that none of the appellants had sought to enforce pre-Prop 209 judgments through post-Prop 209 garnishment proceedings, so there is no actual controversy. The Court of Appeals failed to recognize that judgment creditors would be foolish to knowingly violate the new laws only to create a better fact pattern to present on appeal.

For now, Arizona judgment creditors are left to decide whether to continue their ultra-conservative application of the new statutes due to fear of violating the FDCPA, or to devise new challenges on certain cases so as to create precedent that can once again be appealed. The fight will likely continue for years to come. ■

1 The Saving Clause states: "This Act applies prospectively only. Accordingly, it does not affect the rights and duties that matured before the effective date of this act, contracts entered into before the effective date of this act or the interest rate on judgments that are based on a written agreement entered into before the effective date of this act."

FIVE (NOT SO) EASY PIECES



Long ago at a Chicago meeting, before I became such a respectable pillar of the community, I went to an open bar event sponsored by the CLLA. After two hours of fun, it was time to head back to the hotel, which as always in those years was the Westin Michigan Avenue. Realizing it was not a particularly long walk, I proposed a pub crawl back to the hotel with stops at every corner bar and was joined by a small group.

Fast forward to the next morning. Mr. Sledgehammer was nice enough to stop by and cause what felt like repetitive cerebral hemorrhaging and I was pretty sure I had imbibed water from the Dead Sea. Clearly, in order to function that day, I was going to need the only hangover cure I have always been able to rely upon: A cheeseburger. And a Johhny Rockets that opened early was just 3 blocks from the hotel.

I stumbled through the cold those 3 blocks, walked in and sat at the counter, excited that greasy, gooey relief would soon be making its way into my digestive system. The waitress brought a menu. I smiled and said, no need, I just want a cheeseburger. Then the words I dreaded to hear came out of her mouth and I felt the disappointment the Griswolds must have felt when the moose told them that Wallyworld was closed. She said:

SORRY, IT'S BREAKFAST NOW

I asked nicely again, "Can I please just have cheeseburger?"

"Sorry, you will have to order from the breakfast menu."

"Please do not make me do this" I intoned. Nothing. "Fine, give me the menu".

She took out her trusty order pad.

"I would like to get the cheese eggs plate, is that OK?"

"How do you want your eggs?"

"Hold the eggs, just cheese. I see I get a choice of meats?"

"Yes"

"Great, I will have the hamburger patty. I see I get a choice of breads?"

"Yes"

"Can I have a bun from the large rack of buns over there as my bread choice?"

"Yes"

"Great! Now, I see lettuce, as well as sliced tomatoes, pickles and onions over there, is there any way I could add a little of each to my cheese eggs plate here?"

"Yes, for a small charge. Oh, and fries are not ready yet, all we have is the breakfast potatoes."

"Thanks, that sounds fine."

I was presented with a plate consisting of two slices of American Cheese, a beef patty, bun and garnish, all separately placed on the plate. I got all IKEA and put that baby together and felt my body re-evolving back into human form.

After I finished, she brought the check. It was written as I ordered and cost over 2X what a cheeseburger should have cost. I flagged down the manager and showed him the ticket. When I explained what I had to go through to get a cheeseburger, he comped everything down to the price of the burger, muttering all the while about the inability of some people to think.

Next year when I went back, the problem was fixed. Except, of course, the issue with the wheat toast on the chicken salad sandwich, but that's another story, and I will leave it to Mr. Nicholson. ■

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