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Insurer Subrogation: The Changing Landscape of Legal Malpractice

Richard B. Bush and **Timothy J. Ross II**
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The landscape of legal malpractice has changed in recent years, with new opinions coming out of numerous high courts in states around the country. Notably, the relationship between insurers and attorneys for the insured, hired by the insurer, is seeing major changes around the United States. The most recent upheaval comes out of Florida, in the landmark decision by a unanimous Florida Supreme Court in *Arch Insurance Co. v. Kubicki Draper, LLP*, 318 So.3d 1249 (Fla. 2021).

In *Arch Insurance Co.*, the Court held that insurers have standing to sue attorneys hired to represent an insured, despite a lack of privity between the two parties, through contractual subrogation. Now, in Florida, insurers can sue attorneys hired to represent their insured for legal malpractice if they have included a provision in the policy agreement estab-

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Letter from the President

Andrew R. Jones, Esq. | *Furman Kornfeld & Brennan, LLP*

Hello and welcome to my first Presidential Message! I am honored to step into this prestigious role and excited to tell you about my vision for the coming year.

I feel so lucky to have served in multiple committee and leadership positions during my eight years at PLDF. I really valued the perspectives I gained there as I planned for the year ahead.

As President, my goals for this coming year focus on: (1) Foundation; (2) Inclusion (DEI); and (3) Support.

Foundation

Supporting each other, sharing in-

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lishing a contractual right to any rights, remedies, and recovery of the creditor to whom the insurance company has paid a debt. Before this decision, privity of contract with the attorney was a prerequisite for a cause of action for legal malpractice in Florida.

Florida is not the first state to adopt this new rule, and surely will not be the last, as states around the country begin to follow suit, either by way of contractual subrogation or some other method crafted by state supreme courts to permit actions by insurers against defense attorneys. This new era of legal malpractice could have serious repercussions on practitioners and their own insurance policies, specifically firms who mainly practice insurance defense, with potential increases in rates on Errors and Omissions insurance. This article will explore the recent decision in Florida, as well as similar shifts around the United States on this issue.

An Overview of Subrogation

Subrogation is an insurer's right to proceed against a third party responsible for a loss which the insurer has paid pursuant to its contractual obligation under a policy which depends, among other things, on the existence of the insured's right to proceed against that entity. 16 *Couch on Insurance* § 222:2 (3d ed. 2021). Subrogation is the substitution of one person in the place of another in reference to a lawful claim, demand, or right, so that he or she who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities. *Id.* Essentially, subrogation allows a party to step into the shoes of another and assert the rights of that party to recover any losses the subrogee (the insurer) incurred in paying the debts or losses of the subrogor (the insured). The insurer is recovering the funds it expended in covering the losses of the insured. Subrogation provides an equitable remedy for restitution to a person who, in the performance of some duty, has discharged a legal obligation that should have been met, either wholly or partially, by another. *Tank Tech, Inc. v. Valley Tank Testing, L.L.C.*, 244 So. 3d 383, 389 (Fla. 2d DCA 2018).

Classically, subrogation exists solely in the context of insurance, as a right that arises only with respect to rights of the insured against third parties to whom the insurer owes no duty. 16 *Couch on Insurance* § 222:1 (3d ed. 2021). There are three types of subrogation recognized: 1) Contractual (Conventional); 2) Equitable (Legal); and 3) Statutory. Conventional subrogation comes into existence by way of an express agreement or contract. Equitable subrogation is a form of equitable relief in instances in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter. *Id.* at § 222:24. And finally, statutes affecting subrogation function in the form of a state legislature, or Congress, declaring the right of an insurer to subrogation by statute, and placing any requirements or limitations on the subrogation right. A prime example of statutory subrogation is ERISA, which places certain limitations on how workers compensation insurance plans can seek reimbursement, or subrogation actions.

Subrogation and assignment are often used synonymously, but the two actually differ, and are distinctive legal concepts. CJS SUBROG § 2. The key difference between the two is: "(1) assignment transfers the entire value of the claim, whereas subrogation transfers the claim only to the extent necessary to reimburse the subrogee, (2) assignees are typically voluntary investors, whereas subrogees, usually insurers, are obli-

> Subrogation is the substitution of one person in the place of another in reference to a lawful claim, demand, or right, so that he or she who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities.

gated to pay the insured's obligation to a third party, and (3) assignment is an outright transfer of the claim, whereas subrogation entails a substitution of the subrogee for the subrogor." *Id.*

In essence, the doctrine of subrogation gives insurers the means to pursue causes of action against wrongful tortfeasors for losses in payments to their insured, reimbursing them for their loss.

Contractual Subrogation

Contractual subrogation is certainly not new in the zeitgeist of American jurisprudence. The legal instrument has been employed for many years by contracting parties, particularly insurance companies seeking to recover their losses in covering the debts of their insured. Traditionally, contractual subrogation, also commonly referred to as conventional subrogation, is based on an agreement between two parties in which the party obligated to pay any debts of the other contracting party, commonly an insurance agreement, will be subrogated to the rights and remedies of the original creditor. 6 Fla. Prac. § 8:9.

In the context of torts, contractual subrogation arises when contracting parties agree that when, under certain circumstances, the first party pays some obligation owed to the second party by a third party whose tortious conduct injures the second party, the first party will be placed in the shoes of the second party and will be subrogated to his legal rights and remedies against the tortfeasor. *Id.* This form of agreement is often found in insurance policies, where after the insurer has made payment to the insured to cover any losses suffered from the acts of a third-party, the insurer will stand in the shoes of the insured as they relate to the rights of recovery against the liable third party, or the third party's insurance company.

Thus, an insurer can bring a subrogation action against any alleged tortfeasor for damages, with the same rights and legal standing as the policy holder, although there is variance from state to state in terms of in whose name the Insurer can bring the suit. This legal instrument now provides the foundation for legal malpractice actions by insurers against panel defense attorneys hired to defend an insured in Florida.

Legal Malpractice Jurisprudence in Florida Pre

Arch Insurance Co. v. Kubicki Draper, LLP

In Florida, prior to the decision by the Florida Supreme Court in *Arch Insurance Co.*, legal malpractice suits were limited to those in privity with the attorney, but with two distinct exceptions. Florida's 4th District Court of Appeal took up the intermediate appeal on the issue to the Florida Supreme Court, in which they affirmed the trial court's denial of the insurer's right to sue, relying on two seminal cases in its decision, *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So.2d 1378 (Fla. 1993) and *Angel, Cohen & Rogovin v. Oberon Investment, N.V.*, 512 So.2d 192 (Fla. 1987).

In *Angel, Cohen & Rogovin*, the Florida Supreme Court addressed whether an incidental third-party beneficiary of the attorney-client relationship was entitled to bring a cause of action for legal malpractice. *Id.* at 193. A fiduciary agent of the plaintiff corporation retained the defendant firm to assist him in preparing documents and contracts for the sale of a subsidiary of the corporation, which were bought by said fiduciary. *Id.* The client then arranged concurrently for the subsidiary to be sold for a greater price. *Id.* The corporation brought an action against the fiduciary agent for breach of his duty to them, and against the firm for legal malpractice as a third-party beneficiary. *Id.* The Court held that the respondent, the corporation, lacked the requisite privity required to maintain an action sounding in negligence against an attorney. *Id.* at 194. The corporation did not fit within Florida's narrow third-party beneficiary exception, which only applied where it was the apparent intent of the client to benefit a third-party. Those cases were traditionally reserved for negligence in will drafting. *Id.* (citing *Lorraine v. Grover, Ciment, Weinstein, & Stauber, P.A.,* 467 So.2d 315 (Fla. 3d DCA 1985); *DeMaris v. Asti,* 426 So.2d 1153 (Fla. 3d DCA 1983); *McAbee v. Edwards,* 340 So.2d 1167 (Fla. 4th DCA 1976)).

In *Espinosa*, 612 So.2d 1378, the Florida Supreme Court once again reiterated the bounds of the third-party beneficiary exception for legal malpractice actions previously stated in *Angel*. In *Espinosa*, an attorney drafted a will for a man with multiple children. *Id.* at

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1379. The will as drafted and signed by the testator made no provision for any after-born children. *Id.* A child was born to the testator after signing. *Id.* A new will was drafted to include the new child, but the testator never signed it, instead he signed a second codicil drafted by the attorney that only changed the identity of the co-trustee and co-personal representative, with no new provision for the after-born child. *Id.* The mother of the children brought a malpractice claim on behalf of the after-born child. *Id.* The trial court dismissed the entire action on summary judgment for lack of privity, which the 3d District Court of Appeal reversed in regard to the estate but affirmed the dismissal of the after-born child's claim. *Id.* The Court reiterated its position established in *Angel*, stating that an attorney's liability for negligence in the performance of his professional duties is limited to clients whom the attorney shares privity of contract. *Id.* at 1380. The Court also reiterated the exception for intended third-party beneficiaries to bring malpractice actions in will drafting cases, which did not include the after-born child. *Id.*

As demonstrated in these prior cases establishing the precedent and jurisprudence on legal malpractice actions in Florida, the privity requirement was construed quite narrowly and restrictively. Thus, the following case shakes up this traditional doctrine, but only within the province of insurance law.

Arch Insurance Co. v. Kubicki Draper, LLP

In *Arch Insurance Co. v. Kubicki Draper, LLP*, 318 So.3d 1249 (Fla. 2021), Arch Insurance Co. (Arch) hired Kubicki Draper, LLP (Kubicki) to defend their insured, Spear Safer CPAs, and Advisors (Spear), in a separate suit by a life insurance company for alleged accounting malpractice. *Id.* at 1251. The lawsuit against Spear triggered Arch's duty to defend Spear pursuant to the contract of insured. *Id.* The insurance policy also contained a subrogation provision allowing Arch to step into the shoes of Spear for any rights of recovery against tortfeasors for the extent of any payment under the policy. *Id.* Arch retained Kubicki to defend Spear, to wit, Kubicki settled the case for $3.5 million just prior to trial. *Id*. Arch subsequently filed a legal malpractice suit against Kubicki for failure to raise the defense that the action against their insured was barred by the applicable statute of limitations, causing the settlement cost to be significantly higher than it would have been. *Id* at 1251-1252. Kubicki filed a motion for summary judgment based on Arch's lack of standing due to lack of privity, in keeping with the then existing precedent. *Id.* The trial court agreed and granted the motion. *Id.* Florida's 4th District Court of Appeal agreed with the trial court and affirmed. *Id.*

In a unanimous opinion the Court, without addressing any third-party beneficiary theory, held that insurers have standing to maintain a legal malpractice action against an attorney hired to represent their insured when the insurer is contractually subrogated to the insured's rights under the insurance policy. *Id.* at 1253. The Court focused on the policy's contractual subrogation provision, holding that it included claims for legal malpractice against counsel retained to defend an insured. The Court stated that "where an insurer has a duty to defend and counsel breaches the duty owed to the client insured, contractual subrogation permits the insurer, who—on behalf of the insured—pays the damage, to step into the shoes of its insured and pursue the same claim the insured could have pursued." *Id* at 1254.

The Court distinguished the 4th District's opinion below, which addressed only the lack privity between Kubicki and Arch, with the established principles of subrogation, holding that because the insured is in privity with the law firm, contractual subrogation permits the insurer to step into the shoes of the insured, giving the insurer standing to pursue a legal malpractice claim against Kubicki. *Id.*

The Court went on to address how subrogation exists to hold premium rates down by allowing insurers to recover indemnification payments from tortfeasors who cause their insured injury, and how Florida public policy does not support shielding the law firm from accountability for professional malpractice. *Id.* at 1255.

Ultimately, insurers in Florida now have legal standing to sue attorneys for malpractice in their insured's cases, recovering money which ought not to have been paid but for an attorney's negligent mishandling of a case resulting in a higher settlement or judgment.

Legal Malpractice Actions by Insurers in Other States

Florida is not the first state to allow insurance carriers to bring legal malpractice actions against attorneys retained for their insured and is likely not the last. Other states have already recognized the right of insurance companies, which retain counsel for an insured's defense, to bring an action for legal malpractice against said counsel through contractual subrogation. *See Risk Control Associates Ins. Group v. Lebowitz*, 151 A.D.3d 527 (N.Y. App. Div. 1st Dep. 2017). Granted, not every state has used the same legal instrument to arrive at the same result.

Some states do not require a subrogation agreement for insurers to bring a malpractice action. For example, the South Carolina Supreme Court in *Sentry Select Insurance Co. v. Maybank Law Firm, LLC, and Roy P. Maybank*,

In this rapidly changing landscape in insurance law, insurance defense attorneys are now potentially on the hook not only to the insured, but also the insurer, for malpractice.

826 S.E.2d 270, 272 (S.C. 2019), held that an insurer can bring a direct action against counsel hired to represent its insured. The Court's rationale focused on the unique position of insurers in relation to the attorney-client relationship of their insured, noting the insurer's duty to defend its insured and compensate their attorney for their time in defense of the client. *Id.* The Court held that the insurer could recover only for the attorney›s breach of his duty to his client when the insurer proves the breach is the proximate cause of damages to the insurer. *Id.* Further, if the interests of the client are the slightest bit inconsistent with the insurer's interests, there can be no liability of the attorney to the insurer, for the Court would not permit the attorney's duty to the client to be affected by the interests of the insurance company. *Id.* The Supreme Court of Arizona in an *en banc* opinion in *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 24 P.3d 593, 602 (Az. 2001) adopted a similar approach to South Carolina, recognizing a duty on the part of attorneys to the insurer, and liability for negligent breach of that duty so long as the interests of the insurer and client align.

Both of these holdings appear to mirror the language of the *3d Restatement of the Law Governing Lawyers* § 51(g.), which states that a "lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to matters as to which the interests of the insurer and insured are not in conflict, whether or not the insurer is held to be a co-client of the lawyer."

Many states rely on the doctrine of equitable subrogation to support actions for legal malpractice, largely in the cases of excess insurers. The Supreme Court of Mississippi in *Great American E&S Ins. Co. v. Quintairos, Prieto, Wood & Boyer, P.A.*, 100 So.3d 420 (Miss. 2012), permitted an excess insurer to bring a malpractice claim against a law firm retained by the primary insurer to defend its insured by way of equitable subrogation. The Supreme Court of Texas permitted the same style of action based on equitable subrogation in *American Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480 (Tex. 1992).

Ultimately, the historically strict privity requirements are slowly disappearing in modern American jurisprudence regarding insurers' rights to bring legal malpractice actions against defense attorneys. Twenty-six (26) states now recognize an insurer's cause of action against an attorney hired for an insured.

Fallout: Impact on the Practice of Law and a Word of Caution

In this rapidly changing landscape in insurance law, insurance defense attorneys are now potentially on the hook not only to the insured, but also the insurer, for malpractice. Prior to *Arch*, malpractice claims in insurance defense cases could not be assigned as a financial commodity and insureds could not subrogate their claims to insurers. Ordinarily, if the client is covered fully by the policy, the malpractice of an attorney would not result in any damages to the client, resulting in minimal risk for malpractice insurers with insurance defense policy holders. Now that insurers can bring these claims directly in Florida, insurance defense firms in the state, and their respective insurance carriers, are at greater risk. This could potentially result in higher premiums on policies in respect to insurance defense practitioners. Thus, insurance defense practitioners in Florida, and perhaps eventually in other states as a growing majority rule allowing these actions develops, should be prepared for the enhanced risks that follow these changes in traditional insurance defense and professional liability practice. ■

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2021: A Year of Seismic Change for College Athletes

Robert G. Chadwick | *Seltzer Chadwick Soefje & Ladik,PLLC*

As Justice Neal Gorsuch wrote on June 21, 2021: "From the start, American colleges and universities have had a complicated relationship with sports and money." *NCAA v. Alston*, 141 S.Ct. 2141, 2148 (2021). This relationship has only become more complicated as college sports has become a "massive business." *Id*. at 2150. "Those who run this enterprise profit in a different way than the student-athletes whose activities they oversee." *Id*. at 2151.

It was perhaps inevitable there would come a time when the power and economic disparity between student athletes and universities would be examined under such laws as the Sherman Anti-Trust Act, the Fair Labor Standards Act ("FLSA"), and the National Labor Relations Act ("NLRA"). As it turns out, that time was 2021.

The Tradition of Amateurism

Until 2021, the U.S. Supreme endorsed "the revered tradition of amateurism in college sports." *NCAA v. Board of Regents of Oklahoma*, 468 U.S. 85, 120 (1984). As an example, the Court recognized the unique qualities of college football:

> "… the NCAA seeks to market a particular brand of football—college football. The identification of this 'product' with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the 'product,' *athletes must not be paid,* must be required to attend class, and the like [emphasis added]."

Id. at 101.

As late as a few years ago, federal courts of appeal were likewise defending the tradition of amateurism in college sports. In *Berger v. NCAA*, 843 F.2d 285, 291 (7th Cir. 2016), the Seventh Circuit maintained that this "long-standing tradition defines the economic reality of the relationship between student athletes and their schools." In *O'Bannon v. NCAA*, 802 F.3d 1049, 1076 (9th Cir. 2015), the Ninth Circuit agreed that the history of "[n]ot paying student-athletes is precisely what makes them amateurs.'"

On August 15, 2015, the National Labor Relations Board ("NLRB") acknowledged the instability in college sports which would result from allowing Northwestern University football players to unionize under the NLRA:

> "After careful consideration of the record and arguments of the parties and amici, we have determined that, even if the scholarship players were statutory employees (which, again, is an issue we do not decide), it would not effectuate the policies of the Act to assert jurisdiction. Our decision is primarily premised on a finding that, because of the nature of sports leagues (namely the control exercised by the leagues over the individual teams) and the composition and structure of FBS football (in which the overwhelming majority of competitors are public colleges and universities over which the Board cannot assert jurisdiction), it would not promote stability in labor relations to assert jurisdiction in this case."

Northwestern University, 362 NLRB No. 167 (2015).

NCAA v. Alston

In 2021, college athletics was again examined by the U.S. Supreme Court in *Alston*. In dispute were NCAA rules restricting the education-related benefits member institutions could offer student-athletes. The issue presented was whether the rules violated Section 1 of the Sherman Anti-Trust Act which prohibits any "contract, combination, or conspiracy in restraint of commerce." In a unanimous decision, the Court found the NCAA could no longer enforce these rules.

Perhaps more important than the Court's limited ruling was the underlying analysis. Much of this analysis focused on the previous opinion in *NCAA v. Board of Regents of Oklahoma*. As to such decision, the Court opined:

> "*Board of Regents* may suggest that courts should take care when assessing the NCAA's restraints on student-athlete compensation, sensitive to their procompetitive possibilities. But these remarks do not suggest that courts must reflexively reject *all* challenges to the NCAA's compensation restrictions. Student-athlete compensation rules were not even at issue in *Board of Regents*. And the Court made clear it was only

> assuming the reasonableness of the NCAA's restrictions: "It is reasonable to *assume* that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and are therefore procompetitive ...." [citation omitted] (emphasis added). Accordingly, the Court simply did not have occasion to declare—nor did it declare—the NCAA's compensation restrictions procompetitive both in 1984 and forevermore."

Id. at 2158.

In a concurring opinion, Justice Kavanaugh was even more critical of the NCAA. Noting the limited question before the Court, he opined: "I add this concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws." *Id.* at 2166-67. He added:

> "The NCAA acknowledges that it controls the market for college athletes. The NCAA concedes that its compensation rules set the price of student athlete labor at a below-market rate. And the NCAA recognizes that student athletes currently have no meaningful ability to negotiate with the NCAA over the compensation rules.
>
> The NCAA nonetheless asserts that its compensation rules are procompetitive because those rules help define the product of college sports. Specifically, the NCAA says that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid.
>
> In my view, that argument is circular and unpersuasive. The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality: The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that 'customers prefer' to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a 'love of the law.' Hospitals cannot agree to cap nurses' income in order to create a 'purer' form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition" of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a 'spirit of amateurism' in Hollywood.

Id. at 2167. He further added:

> "The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing. [citation omitted].
>
> Everyone agrees that the NCAA can require student athletes to be enrolled students in good standing. But the NCAA's business model of using unpaid student athletes to generate billions of dollars in revenue for the colleges raises serious questions under the antitrust laws. In particular, it is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes. And if that asserted justification is

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Everyone agrees that the NCAA can require student athletes to be enrolled students in good standing. But the NCAA's business model of using unpaid student athletes to generate billions of dollars in revenue for the colleges raises serious questions under the antitrust laws. — Justice Kavanaugh

> unavailing, it is not clear how the NCAA can legally defend its remaining compensation rules."

Id. at 2168.

New NIL Rules

On June 30, 2021, shortly after the *Alston* decision, the NCAA announced a new name, image and likeness ("NIL") policy for all three of its sport divisions. The new policy allows "college athletes to benefit from name, image and likeness opportunities, no matter where their school is located."

The NIL policy specifically states that "individuals can engage in NIL activities that are consistent with the laws of the state where the school is located." As of October 21, 2021, 28 states have enacted NIL or "fair pay to play laws." The NIL policy also states that "[c]ollege athletes who attend a school in a state without a NIL law can engage in this type of activity without violating NCAA rules related to name, image and likeness."

In the wake of the new policy, several college football athletes signed deals for the use of their name, image and likeness. University of Alabama quarterback Bryce Young is reported to have signed NIL deals nearing $1 million, which is more than most professional football players.

Are College Athletes Employees?

Although *Alston* addressed the question of student-athlete compensation rules, and the new NIL Rules addressed endorsement deals, neither addressed the question of whether student-athletes are employees of their universities. It wasn't long, however, before this question was also being scrutinized.

Johnson v. NCAA

In 2019, a collective action for unpaid compensation was filed in the U.S. District Court for the Eastern District of Pennsylvania by student athletes under the FLSA, the Connecticut Minimum Wage Act, New York Labor Law and the Pennsylvania Minimum Wage Act. The named plaintiffs include a former football player at Villanova University, a former swimmer and diver at Fordham University, a former baseball player at Fordham University, a former tennis player at Sacred heart University, a former soccer player at Cornell University, and a former tennis player at Lafayette College.

Only employees are protected by the statutes alleged to be violated in this collective action. To this point, the First Amended Complaint compares the named plaintiffs to students employed in work study programs who are classified as employees under the FLSA. The First Amended Complaint specifically alleges that "student athletes—engaged in athletic work that is unrelated to academics; supervised by full-time, well-paid coaching and training staff; and integral to the billion dollar Big Business of NCAA sports—are student employees as much as, and arguably more than, fellow students employed in Work Study programs."

A motion to dismiss the collective action was filed by the universities claiming they did not employ the plaintiffs. The motion thus claimed the plaintiffs had not stated a claim under the cited employment statutes. This motion, however, was not decided until after the U.S. Supreme Court decision in *Alston*. *Johnson v. NCAA*, ___ F.Supp.3d ___, 2021 WL 3771810 (E.D.Pa. Aug. 25, 2021).

In denying the motion to dismiss, the Court cited Justice Kavanaugh's concurring opinion in *Alston*. The Court also found:

> "… we find that the Complaint plausibly alleges that NCAA D1 interscholastic athletes are not conducted primarily for the benefit of the student athletes who participate in them, but for the monetary benefit of the NCAA and the colleges and universities that those student athletes attend. We further find that the Complaint plausibly alleges that the NCAA D1 interscholastic athletes are not part of the educational opportunities provided to student athletes by the colleges and universities that they attend but, rather, interfere with the student athletes' abilities to participate in and get the maximum benefit from the academic opportunities offered by their colleges and universities."

Id. The court thus concluded "that the Complaint plausibly alleges that Plaintiffs are employees … for purposes of the FLSA." *Id*.

General Counsel Memorandum GC 21-08

On September 29, 2021, Jennifer A. Abruzzo, General Counsel to the NLRB, issued Memorandum GC 21-08 summarizing her prosecutorial position as to whether certain college athletes are employees of the private universities they represent in athletics. In this regard, the Memorandum addresses a different question than the right to unionize for which the NLRB punted as to Northwestern University football players. More specifically, the Memorandum addresses the issue of whether college athletes have the right under the NLRA, "to engage in … concerted activities for the purpose of … mutual aid or protection." 29 U.S.C. § 157.

If college athletes are employees under the FLSA and NLRA, what does this mean for claims under other federal employment statutes such as Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act, the Family & Medical Leave Act, and the Occupational Safety & Health Act?

Citing *Alston* and the new NIL policy, the Memorandum declares that certain college athletes are employees under the NLRA. The Memorandum even goes far as to announce that "where appropriate, [the General Counsel] will allege that misclassifying such employees as mere 'student-athletes' and leading them to believe they do not have statutory protections is a violation of the" NLRA.

In explaining these positions, the Memorandum also cited the earlier case involving football players at Northwestern University which was dismissed by the NLRB. The Memorandum stated that the evidence supporting the contention the football players were employees of Northwestern included the following:

- the athletes play football (perform a service) for the university and the NCAA, thereby generating tens of millions of dollars in profit and providing an immeasurable positive impact on the university's reputation, which in turn boosts student applications and alumni financial donations;
- the football players received significant compensation … covering their tuition, fees, room, board, and books, and a stipend covering additional expenses such as travel and childcare;
- the NCAA controls the players' terms and conditions of employment, including maximum number of practice and competition hours, scholarship eligibility, limits on compensation, minimum grade point average, and restrictions on gifts and benefits players may accept, and ensures compliance with these rules through its 'Compliance Assistance Program';
- the university controls the manner and means of the players' work on the field and various facets of the players' daily lives to ensure compliance with NCAA rules; for example, the university maintains detailed itineraries regarding the players' daily activities and football training, enforces the NCAA's minimum GPA requirement, and penalizes players for any college of NCAA infractions, which could result in removal from the team and loss of their scholarship.

Lingering Questions

At this juncture, the legal developments of 2021 create more questions than answers. Among these questions are:

- Without caps on athlete compensation, how viable will college athletics be, especially for smaller or financially challenged institutions?
- Without caps on athlete compensation, what does this mean for compliance with Title IX of the Education Amendments Act of 1972?
- Will the decision in J*ohnson v. NCAA* survive summary judgment, become a blueprint for future FLSA jurisprudence, be a judicial anomaly, or become one side of a split in authority?
- How will the NLRB General Counsel's newly articulated position fare before the Board, the federal courts of appeal, or, if it gets there, the U.S. Supreme Court?
- If college athletes are employees under the FLSA, how will their compensation be determined?
- If college athletes are employees under the NLRA, how will the resulting disparity between state and private institutions be addressed, if at all?
- If college athletes are employees under the FLSA and NLRA, what does this mean for claims under other federal employment statutes such as Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act, the Family & Medical Leave Act, and the Occupational Safety & Health Act?

These are not questions which were answered in 2021. Accordingly, 2022 also promises to be an interesting year for college athletics. ■

About the **AUTHOR**

Robert G. Chadwick Jr. is a managing member of *Seltzer Chadwick Soefje & Ladik, PLLC*, and is based in the firm's Collin County office. He is Board Certified in Labor & Employment Law by the Texas Board of Legal Specialization. He may be reached at rchadwick@realclearcounsel.com

The Role of the Wholesale Broker in Procurement of Coverage: What Duties Are Owed and to Whom?

Frederick J. Fisher, J.D., CCP | *Fisher Consulting Group, Inc.*
Peter J. Biging | *Goldberg Segalla, LLP*

Introduction

Fred Fisher is a consultant who has spent decades in the insurance industry, and who has regularly written regarding and lectured on the duties and responsibilities of insurance agents and brokers. He is the current Co-Chair of the Professional Liability Defense Federation ("PLDF") Insurance Agent/Broker Claims Committee. **Peter Biging** is an attorney at *Goldberg Segalla, LLP*, where he devotes a substantial portion of his practice to the representation of insurance agents and brokers, and a past chair of the Insurance Agent/Broker Claims Committee. PLDF has asked Fred and Peter to provide a point-counterpoint discussion of the duties and responsibilities of the wholesale insurance broker in the context of the procurement of insurance, and their potential liability to the customer when the requested insurance has not been procured. They are NOT in agreement! After you have had a chance to review the discussion below, we look forward to hearing your comments. Who's right? Who's wrong? Let the debate begin!

Point: Not "Just a Conduit": the Myth of the Wholesale Broker Debunked

Frederick J. Fisher, J.D., CCP

Like most businesses, wholesale brokers advertise their services on the Internet and in print media, social networking sites and email blasts. Many profess their expertise (as can be seen from some of the following snippets of marketing materials culled from a review of wholesale broker websites; names have been replaced with generic references to fictitious corporate entities for the purposes of this discussion):

> "From autonomous vehicles to zip-line courses, from chemical companies to schools, the industries that require special insurance coverage are countless. … That's where the 47 specialist wholesale brokers featured on the following pages come into play. . . ."

"ABC Networks are specialists in Environmental Insurance and Risk Management."

"Director & Officer Liability is one of the more difficult and complex lines of business we handle at Smith & Associates. Due to the intricacies of the various forms, a retail insurance broker **would** be wise to choose their D&O wholesaler carefully. A generalist will not be equipped to properly market an account or provide the coverage and form guidance that only a D&O specialist can provide, someone such as one of Smith's financial services brokers. ….

"WXYZ is known for doing the right thing even if it means referring business to a competitor. We set our standards high …. With a skilled team of first-class professionals with unrivaled expertise in their specialties… we guided and consulted insurance agents on the best products for companies like yours. Contact us, or have your insurance agent, contact us today so we can get to work on making sure you are properly protected, (signed)John Doe, President"

Yet, when sued for professional negligence, they typically claim they are just a conduit, sometimes proclaiming they have no duty to anyone.

Rubbish!

A wholesale insurance broker is a licensed broker providing specialized insurance products to retail insurance agents and brokers ("retail agents") and supporting those products with specialized expertise as above. To my knowledge, there is not one State that requires a special license. In fact, they are licensed as brokers, producers or intermediaries depending on the State

in which they reside. They also have surplus lines licenses allowing them to place coverage with non-admitted or surplus lines insurers. Some may also have special licenses for re-insurance and railroad rights of way insurance placements.

So do many retail brokers. Simply put, possession of a surplus lines license does not mean one is following a wholesale brokerage model. In essence, being a wholesale broker is nothing more than a business decision that one makes. One wants to place insurance but does not want to have direct contact with the consumer, preferring to work with the customer's representative, commonly referred to as the retail broker/producer, instead. The other works directly with the customer. That's it, that's the distinction. It's simply a business model. Also true is the fact that a "broker" is a representative of the insured, either by statute or by common law.

There are, of course, several models a wholesale firm may follow, just like there are several models retail facilities can adopt. A wholesale brokerage may elect to operate as a 100% wholesale firm so they may shop an account to as many insurers as may be needed. They may also have binding authorities in a separate "division" involving certain specific lines of coverage. However, doing so would probably bar them from" brokering" the risk to other insurers as the others would perceive the submission as an attempt to "block the market" or be perceived as adverse selection, i.e., a poor risk they do not want to place within their own facility. Others may create a separate entity to "exclusively" place business within many different binding authorities they may have for specific types of coverage. Thus, the wholesale organization may be competing with others to get into the binding facility first.

One thing is for certain. It is not true that a wholesale broker is synonymous with being a managing general underwriter, a.k.a. managing underwriter (not to be confused with a managing general agent, a.k.a MGA, as is commonly used. This is because an MGA is usually statutorily defined as an entity with underwriting and binding authority on behalf of an admitted insurer, where the premium is greater than 5% of the capital surplus of said insurance company. This is consistent with the NAIC Model MGA Act of 2005 and adopted by most States).

It is universally held that an insurance broker represents the insured. The standard of care is generally that of being an order taker, i.e., to diligently obtain the coverage requested. There are exceptions that could elevate one to a higher standard of care, such as holding oneself out as an expert as so many do in their advertising as above. Yet, in my opinion, irrespective of whether one is operating in a wholesale or retail capacity, one is a representative of the insured. Thus, one's obligations are to the insured, even if one is not in direct contact with anyone other than the insured's designated representative. This, of course, would be the retail producer. In my opinion, a wholesale brokerage has at least the same obligations to the insured as a retail producer, and often, sometimes more. This is due to the fact that many producers are "a generalist," and the wholesaler may profess its expertise in a given line of coverage. This is not uncommon; the vast majority of retail producers do not necessarily profess their expertise and may often use wholesalers as their "back office" to market the account accordingly.

Numerous articles over the years have been written specifying that the usage of a broker is often twofold. One reason is due to the fact wholesalers may have access to markets the retail broker may not be able to approach for any number of reasons. Number two is the fact that often, as above, wholesale brokers profess to have expertise in a particular line of coverage. Thus, a retail broker may use a wholesaler not only to obtain access to markets the retailer cannot get to, but also to be provided expertise that the retail producers do not themselves have. This is quite common, even when the insurer is admitted, and the retail producer could go directly to that insurer but chooses not to due to their lack of expertise.

In fact, in 2014, the executive director of the National Association of Professional Surplus Lines Offices (NAPSLO) wrote:

> "For the insured, it's important that a retail agent have a relationship with wholesalers so that when a hard-to-place risk walks through the door, the retailer is ready to respond with the help of that wholesale broker. For many agents, beginning with a NAPSLO member is all the due diligence required…NAPSLO-member wholesale brokers streamline and add value to the process of insuring the most complex risks. Just as a medical patient expects a general practitioner to collaborate with a specialist, insurance clients should expect their agent will seek out an expert solution that's tailor-made. Wholesalers fill that role of specialist. They routinely deal in business that is nuanced and as a result are able to help efficiently discern not only what needs to be covered in a policy but also what is of highest importance to the client."

(Please note that in 2017, NAPSLO merged with the American Association of Managing General Agents. Said organization is now known as the Wholesale

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> "…[I]n my opinion, irrespective of whether one is operating in a wholesale or retail capacity, one is a representative of the insured. Thus, one's obligations are to the insured, even if one is not in direct contact with anyone other than the insured's designated representative."

& Specialty Insurance Association (WSIA)).

Generalist producers at the retail level use wholesalers for one of two reasons or both. They want access to markets, and they want expertise. This is well known in the industry and is another reason why the idea of a wholesaler being simply a conduit is nonsense. Given the foregoing, I doubt any wholesale broker would want their competitor to know they lack "expertise" or would take a "conduit" approach in the event of an E&O suit against both the retail producer and wholesale firm. Given the advertising quoted above, more telling is the lack of any advertising that states, in effect, we are not here to help you or educate you, we are here to simply get quotes and place coverage that you order for the insured. Somehow, I seem to have missed such marketing and advertising communications.

As I wrote in a previous PLDF article:

> "I'll be happy to have that one lawsuit where we failed to deliver expertise as opposed to the 500 other lawsuits we did not have where we did…We made recommendations to our retail brokers as what may be needed by the insured after reviewing the application, or even asked deeper questions in order to determine what else might be needed. In other words, we were interested in providing the Insured financial protection, as opposed to simply selling them some insurance. After all, we were in fact experts in Professional Liability and Specialty lines. We would provide guidance and counsel with respect to 'gotcha's' that existed in the policies whether it be in the definition of 'claim,' insuring agreement issues, the usage of absolute exclusions, or onerous conditions or the lack of liberal 'conditions.' We would give advice and counsel to our insurance customers. The result was that, after 20 years, I can represent that not one insurance broker we did business with ever got sued for professional liability for anything my firm did or failed to do. Why? Because we delivered our expertise…After all, what is better, successfully defending a lawsuit, or not having one at all?" ■

About the **AUTHOR**

Frederick J. Fisher, J.D., CCP is President of *Fisher Consulting Group, Inc.* in El Segunda, CA. He is Vice Chair of the PLDF Insurance Agent/Broker Claims Committee; Member of the Editorial Board for Agents of America; a Faculty Member of the Claims College, School of Professional Lines; a founding member and past president of PLUS; and, a prolific author. He has taught or presented over 100 CE classes and lectures concerning Specialty Lines Insurance Issues and coverage. He is an A.M. Best's recommended expert, and has been testifying as an Expert witness for over 30 years. He may be reached at fjfisher@fishercg.com.

Counterpoint: Why the Wholesale Broker Typically Owes No Duty of Care to the Insured in Procuring Coverage

Peter J. Biging, Esq.

I respectfully disagree with the above argument. In making this statement, I note that I don't disagree with the proposition that wholesale brokers may not necessarily in all instances be properly referred to as a mere "conduit." The role of the wholesale broker in any particular transaction will be fact specific. What I do take issue with—to the extent that is the point of the above argument—is the contention that a wholesale broker typically will owe duties of care to the underlying insured with respect to the procurement of insurance.

The duties any professional may owe to another with regard to the provision of its professional services are typically governed by whether there was, in fact, a professional-client relationship in place. Alternatively, a duty of care may arise

even where there is no direct professional-client relationship in cases where the professional knew or reasonably should have understood that a party was going to be relying on its representations or its services. In the context of a retail broker and the insured/customer, the connective tissue between the broker and its client is fairly simple and straightforward. To the extent the customer has requested that the broker procure insurance coverage, and the broker has agreed to do so, a professional-client relationship arises. The broker, in the capacity of the professional, is thus tasked with at the very least either procuring the requested coverage or advising within a reasonable period of time of the inability to do so. (The temporal requirement of advising of the inability to procure the coverage within a reasonable period of time exists because it is not unreasonable that, having engaged a broker to purchase insurance, a customer will expect and anticipate that the coverage will either be purchased or the customer will be told that the coverage could not be procured. Conversely, it would be unfair to subject customers to the risk that a broker could just never get around to either purchasing the requested coverage or letting the customer know that the coverage hasn't been purchased.)

In a very small number of states (e.g., New Jersey), there may be additional, fiduciary duties to provide advice and guidance with regard to the coverage to purchase. In the vast majority of other states, such a fiduciary duty of care does not automatically attach. In those states, a fiduciary duty of care to provide advice and guidance regarding the coverage to purchase, rather than just a duty to take the order and procure what was requested, can typically be found to arise where there are "special circumstances" or where a "special relationship" has arisen between the broker and its customer. Such special circumstances can arise where, for example, the broker is charging consulting fees in addition to receiving compensation via commissions on the premium charged for the insurance or has entered into a contract with the insured to provide risk management services. Another example of circumstances that may give rise to a duty to advise is where the broker and the customer have had an extended course of dealings such that a reasonable person in the broker's position would understand that the customer is placing special trust and reliance in the broker to provide such advice and guidance. Still another example where special circumstances may give rise to a fiduciary duty of care with regard to the procurement of coverage is where the broker has had an interaction with the insured with regard to a question of coverage, with the insured relying on the broker's expertise.

Assuming there are no "special circumstances," however, the normal retail broker standard of care in regards to the procurement of insurance for a customer is, as noted above, to procure the coverage that has been requested or advise of the inability to do so within a reasonable period of time. How does the wholesale broker fit into this? In many, if not most, instances, the wholesale broker only comes into the picture after the retail broker has been requested to purchase coverage, and the retail broker has determined that it will be unable through its insurer contacts to purchase the requested coverage at all, or at a price point that will be acceptable to the customer. In such instances, the retail broker will then typically seek to "market" the insurance request by reaching out to a wholesale broker with contacts with a broader range of insurers, including non-admitted and surplus lines insurers.

When the retail broker reaches out to the wholesale broker in such instances, the retail broker typically makes no mention of this to its customer. It doesn't advise the customer that it is going to be using a wholesale broker. It doesn't request permission to do so. It isn't given authorization by the customer to do so. The retail broker just goes ahead and seeks the assistance of the wholesaler. Assuming the wholesaler comes up with a viable option, a quote will be provided to the retail broker, who will then pass the quote onto the customer for its approval. Assuming the quote is accepted, the wholesale broker is then advised by the retail broker to bind the coverage. Significantly, the wholesale broker will typically not only be wholly unknown to the customer; the wholesale broker will typically have no contacts of any kind with the customer.

> "I don't disagree with the proposition that wholesale brokers may not necessarily in all instances be properly referred to as a mere 'conduit.'…What I do take issue with …is the contention that a wholesale broker typically will owe duties of care to the underlying insured with respect to the procurement of insurance."

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For this reason, if the coverage isn't procured, or it isn't procured in a timely manner, or the wrong coverage is procured and the customer is left uninsured or underinsured for a loss, if a lawsuit is commenced the wholesale broker will typically take the position that the customer has no standing to pursue claims in either contract or common law negligence against the wholesaler because they owed the customer no duty of care. The reason for the wholesaler taking this position is rooted in the law of agency. If for some reason at the outset of the customer's interactions with a retail broker regarding the purchase of insurance the retail broker were to tell the customer that it intended to utilize a wholesale broker, identify the wholesale broker it intended to use, and obtain the customer's consent to make use of that wholesale broker, the retail broker would effectively have been granted the authority to appoint a sub-agent for the purpose of fulfilling its agreed obligation to procure coverage.

But where the customer has no idea that a wholesale insurance broker is going to be utilized, has not given instructions to use a wholesaler or specifically assented to the use of a wholesaler, and has no interactions of any kind with a wholesaler, the retail broker generally cannot be deemed to have been granted authority to appoint a sub-agent to act on behalf of the principal (i.e., the customer) in regards to the transaction. So while it would certainly be fair to argue that the wholesale broker might owe a duty of some sort to the retail broker, it would not be fair to state that the wholesale broker—in the ordinary course of events—would owe any duty of care to the customer.

The significance of this as it plays out in the context of lawsuits based on alleged failure to procure the correct coverage is that a wholesaler will have a strong basis for arguing that the customer typically should not have standing to pursue a claim against the wholesale broker used in the transaction. Further, even if coverage differing from what was originally requested has been purchased, that is no guarantee that the retail broker can pursue a viable claim for its part against the wholesale broker. If, as is typically the case, the wholesale broker can point to a quote provided to the retail broker matching with the coverage procured, the wholesale broker will have the ability to argue that any failure on its part to purchase what was originally requested was rendered moot by the fact that the retail broker was provided with a coverage option, and, presented with that option, chose to ask the wholesaler to bind the quoted coverage.

Ultimately, therefore, while I don't disagree that a wholesale broker taking the position that it is a mere conduit is not always going to be a viable argument, I disagree with the notion that the wholesaler will owe a duty of care—either contractually or under common law—to the customer except in specific circumstances. Where the wholesale broker cannot be fairly characterized as having been appointed indirectly by the customer, through its duly authorized agent (as that term is used in the context of the law of agency), it should, in my humble opinion, have a strong argument to make that it should bear no liability to the insured for any alleged failure to procure. And in those instances where the insurance that was purchased was preceded by the offering of a written quote, listing all of the policy forms to be included in the offered coverage, which the retail broker had the ability to review and chose to instruct the wholesale broker to bind, the wholesale broker will have a strong argument that it should face no liability to anyone involved in the transaction, including the retail broker.

Conclusion

While there may be no meeting of the minds as between Fred and Peter, they have definitely provided food for thought in the context of this ongoing debate. What do you think? Please provide your comments to Sandra Wulf, at sandra@pldf.org. We will publish some of the responses on the PLDF website and include them in the next *PLD Quarterly*. ■

About the **AUTHOR**

Peter J. Biging is a partner in the law firm *Goldberg Segalla, LLP*, where he serves as Co-Chair of the firm's New York nationwide Management and Professional Liability practice. Mr. Biging is a past Chair of the PLDF Insurance Agent/Broker Claims Committee. Mr. Biging currently serves on the PLDF Board as Secretary. Mr. Biging may be reached at pbiging@goldbergsegalla.com.

Maintaining Company Culture in a Remote World

Andrew P. Carroll | *Clark Hill PLC*

Going into the summer of 2021 there was a great deal of optimism that the warm weather and availability of vaccines would finally signal the end of the pandemic. Instead, we saw a reluctance to get the vaccine, disappointingly high transmission numbers, and now a return to cold weather that is expected to increase spread of the Delta variable. As firms and companies push back office opening dates, how can you onboard new employees and maintain comradery among your team?

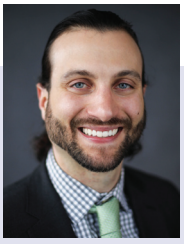
Burnout, isolation and depression have been cited as key recent demotivating forces for American workers. The antidote is to bring back personal interaction by increasing connectivity in a remote world. Most attorneys spend a significant portion of their day behind a computer without any real human interaction. Furthermore, senior attorneys need little oversight while young associates may be concerned about "bothering" other attorneys with basic questions. Employers who have been successful in retaining talent and training new hires have answered these problems by embracing a hybrid model that consistently keeps everyone in touch. For example, senior partners have implemented regular office hours specifically set aside to meet with any attorneys who have questions. By making these office hours regularly available, young attorneys can feel comfortable knowing they are not inconveniencing the partner while maintaining the necessary personal interaction for development and mentorship building.

However, it is also incumbent for leaders to take the initiative to reach out to all others in their office or practice group. Whether the discussion is regarding a specific assignment, larger firm issue, or just to chat, these regular interactions are vital for firm and company culture. Personal connections between employees is what builds morale and keeps the team rowing in one direction, so regular conversations about any topic can be incredibly helpful for the overall health of a firm or company.

Personal connections between employees is what builds morale and keeps the team rowing in one direction, so regular conversations about any topic can be incredibly helpful for the overall health of a firm or company.

These virtual options have allowed more and different people to meet each other across offices, but it should not be lost that in person events are possible and should be made available. Simple happy hours, lunches and the like for small groups can be offered for those who feel comfortable doing so. While some may prefer to avoid such events, many more jump at the opportunity to reconnect with co-workers.

Although these are just a few options, the common thread is the necessity of maintaining a personal connection with all employees. Each of us goes to work everyday for a paycheck, but it is often forgotten that a paycheck is available in a lot of places. Keeping your employees happy and healthy by reminding them of the close relationships with colleagues can mean more than what hits the bank account every other Friday. By implementing different practices like those above, you can train new employees, onboard laterals, and generally build a strong culture that will last through any pandemic. ■



About the AUTHOR

Andrew P. Carroll is a Senior Attorney with *Clark Hill PLC* in Philadelphia. Mr. Carroll is a litigator with a diverse and complementary practice who represents professionals, mortgage lenders and servicers, and construction clients in both civil and disciplinary proceedings. He focuses his professional liability practice on representing attorneys and law firms in a variety of civil and disciplinary proceedings, including claims of legal malpractice, abuse of process, breach of fiduciary duty, violations of debt collection laws, wrongful use of civil proceedings and actions brought by state disciplinary boards. Andrew also represents attorneys in litigation relating to partnership dissolutions, third-party litigation funding and fee splitting disputes. He may be reached at apcarroll@clarkhill.com.

formation, and sparking ideas is at the heart of this organization's mission. The connection between members is PLDF's foundation and I aim to reinforce that by bolstering monthly calls and creating more points of contact during the year. I believe that increased virtual and in-person meetups will make membership more rewarding, improve our collective resources, and reinforce the center of what the organization is about: connecting people.

Inclusion (DEI)

In everything we do, diversity, equity, and inclusion will be a top priority. The Board has already completed two tasks in pursuit of this goal. First, we have made a change to the Diversity Statement (https://www.pldf.org/page/MissionandDiversity) that makes it more proactive in encouraging diverse members to join and participate. Second, to tie our pursuit of improved inclusivity to our Foundation and Support goals, we have appointed a Diversity Officer. This individual will be a resource to all members and committees to enhance collaboration and develop strategies that incorporate and promote DEI.

Support

Finally, we will promote attorney wellness and offer enhanced pandemic support resources. We work in a high-stress profession where burnout is common; one survey (https://bit.ly/3Gt3oNw) found dissatisfied lawyers feel burnout 74% of the time; and even satisfied lawyers experienced it 28% of the time. It is vital we take care of ourselves, not least to give our *clients* the best representation possible. Among other things, we will prepare a 50-state survey examining attorney mental health and COVID-19 resources; we will use this to highlight states or programs doing particularly well or poorly to increase wellness and reduce barriers to support.

I am focused on involving everyone to achieve these goals and want you all to measure our progress during the year. With your help, and that of PLDF's talented Board of Directors and Committee Representatives, I will strive to make this an even more fun, vibrant, inclusive, and supportive professional organization.

Last, but certainly not least, thank you to everyone who helped make the 2021 Nashville Conference such a roaring success! We will build on that momentum, strengthen our connections, and continue exchanging valuable resources throughout the year.

I hope you will join us for new virtual and in-person meetings, building up to the September 14-16, 2022 Annual Conference in Chicago.

Also look out for upcoming opportunities to publish in the PLDQ, submit articles to the Survey of Law, and post to PLDF's 1.1K Member LinkedIn Group (https://www.linkedin.com/groups/2558882/).

I look forward to working with you all to make this year the best one yet. ■

About the **AUTHOR**

Andrew R. Jones is a Partner in the New York City law firm of *Furman Kornfeld & Brennan LLP*. Mr. Jones' practice focusses on professional liability and includes the direct defense of lawyers, insurance brokers and other professionals, as well as giving advice to domestic and international insurers, including insurance program management. Mr. Jones has tried cases in Federal and State Courts and handled international and domestic arbitrations. He has lectured extensively on various professional liability defense matters. Mr. Jones is admitted as an attorney in New York, and is a Solicitor admitted to practice in England & Wales. He may be reached at ajones@fkblaw.com.

New Members

We are thrilled to welcome the following new members to the Association:

Don Engels
Ringler Associates

Laurence C. Harmon
Harmon Law, LLC

Hunter Harper
Marsh & McLennan Companies, Inc.

Samantha Panny
Furman Kornfeld & Brennan, LLP

Timothy J. Ross II
Bush & Augspurger, P.A.

Melissa Sinor
Clark, May, Price, Lawley, Duncan & Paul, LLC

Bruce R. Swicker
EPIC Insurance Brokers & Consultants

Wendy Testa
Wilson Elser Moskowitz Edelman & Dicker

Association News

Message from the President: Attorney Well-Being

I am excited to share that this year PLDF is shining a spotlight on lawyer mental health and well-being. To that end, we are compiling a 50-state survey on lawyer mental health and well-being resources in each state. Specifically, we're aiming to capture the contact information for each state's confidential Lawyer Assistance Program and state bar association well-being committee (if one exists), COVID-19 resources specific to lawyers, and a few bullet points on the services provided by each. This information will be made available in the new well-being section of the PLDF website.

If you are interested in providing information for your state, please contact a member of the newly created PLDF Lawyer Well-Being Task Force:

- **Patty Beck, Esq.**, *Minnesota Lawyers Mutual Insurance Company*, pbeck@mlmins.com
- **Andrew Carroll**, *Clark Hill PLC*, apcarroll@clarkhill.com
- **Andrew Jones, Esq.**, *Furman Kornfeld & Brennan LLP*, ajones@fkblaw.com
- **Samantha Panny, Esq.**, *Furman Kornfeld & Brennan LLP*, spanny@fkblaw.com

Also, please keep an eye out for the new well-being section of the *PLD Quarterly*. If you are interested in contributing to this section (i.e., writing articles, providing resources, tips, etc.), please contact a member of the Task Force.

Thanks, and be well!

Andrew

Andrew R. Jones, Esq.
2021-2022 PLDF President
Furman Kornfeld & Brennan LLP
ajones@fkblaw.com

2021 Survey of Law Call for Submissions

Dear PLDF Members:

It was great seeing many of you in Nashville at the Annual Meeting. I hope that we can carry that energy to achieve even broader participation across PLDF for the *2021 Survey of Law*.

The *Survey* is meant to be a resource for practitioners and claims professionals in identifying important trends in professional liability from across the country. Several of the wonderful presentations at the annual meeting touched on important developments last year—from liability coverage trends to our new PLDF Committee focusing on school leaders' liability claims. These are great examples of the types of cases we look to include in the *Survey*.

So, as the year comes to a close, consider planning to contribute to the *Survey*. The first step is to take note of important cases in your practice area handed down in 2021. Then write a 300-500 word summary for the *Survey*. The author requirements are available here: https://bit.ly/3EDwAQ1. Deadlines for a list of cases and submissions are as follows:

- **January 17, 2022**: List of cases to be summarized sent to Jim Hunter at james.hunter@ceflawyers.com
- **January 31, 2022**: Summaries due

Do not hesitate to reach out to me, or the *Survey's* executive editors **Jacqueline DeLuca** of *Fraser Stryker PC LLO* (Jdeluca@fraserstryker.com, 918-440-4538) and **Jay Salsman** of *Harris Creech Ward Blackerby* (jcs@hcwb.net, 252-638-6666) if you have any questions.

Sincerely,

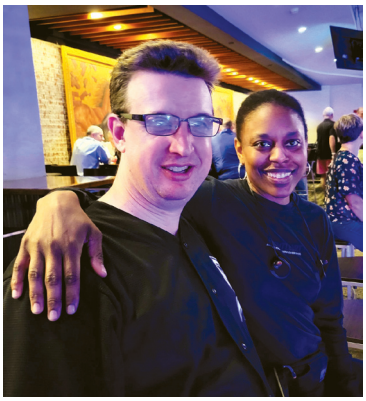
Jim Hunter

Editor in Chief, *Professional Liability Defense Survey of Law*
Collins Einhorn Farrell P.C.
248-663-7716

2021 Annual Meeting – Nashville


NEW MEMBER
SPEAKER


David
NEW MEMBER

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Planning Committee

Our sincere thanks to our 2021 Annual Meeting Planning Committee:

Peter J. Biging
Goldberg Segalla LLP, New York, NY

Andrew Carroll
Clark Hill PLC, Philadelphia, PA

Donald Patrick Eckler, Esq.
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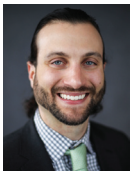

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