Inside 4Q2021

ACC Association of Corporate Counsel

BALTIMORE

FOCUS

President's Message

Dan Smith

I'm writing this to you from what I thought would be my temporary home office in our unfinished basement, but it has now become a more permanent fixture in our house. If there is one thing that COVID has taught us, it is that we need to be, as we said in the Air Force, "rigidly flexible". From the hope of vaccines to the scourge of Delta (and now Omicron), we have all needed to flex to the continually changing landscape. Your Chapter has done all that it could to react and adjust as well. We have hosted both virtual and in-person events, as the circumstances would allow us to do so. We will continue to take this approach, working with our fantastic sponsors and following the guidance of health professionals to do all that we can to continue to engage with each one of you in as safe and healthy a manner as possible.

This will be my final note to you as my term as your President is coming to an end. Since this is my last newsletter note as President, I want to thank everyone for an amazing, mostly virtual, year. I am so grateful to the Members, the Sponsors, the Board and the best ACC Chapter Administrator we could ask for, Lynne Durbin, for their continued support of our Chapter and attendance at our events. Also, I would like to give a special shout out to Raissa Kirk for all her help with the Newsletter this year and to Andy Lapayowker for his work on the Chapter webpage - in light of the pandemic, these are two increasingly important ways for us to connect.

It goes without saying, that this has certainly been a challenging year with difficult decisions being made. However, we were able to continue to provide outstanding programming from our Sponsors in a virtual manner, host a couple of in-person social events and to figure out a way to get people together for our Annual Golf/Spa event (which was modified to Golf/Wine Tasting) and allow us a chance to connect in-person. To be honest, one of the important insights this introvert has gained from COVID is that I do miss in-person events. It is fantastic when there is an opportunity to connect face-to-face with colleagues and friends (even masked up). I've also learned that hosting virtual events is another avenue through which we can connect with our membership and expand opportunities for our members to participate in the activities of the Chapter (the virtual chocolate tasting sponsored by Womble was fantastic!) as it is easier for members outside of Baltimore to attend virtual events. Yet another unintended consequence of COVID.

What will 2022 look like? Well … I've pretty much given up on trying to predict what the future will hold and have just adjusted to the fact that we need to be "rigidly flexible" (that term once again). I hope you are in a position where you can do the same. We are positioned well for an exciting 2022. Our Sponsors have committed to the Chapter with their support and programming. The Board of the Chapter and our Chapter Administrator are working with our Sponsors to set an exciting year of programming and social activities – in-person and virtual. At the end of the day, pandemic or not, your ACC Chapter will continue to provide you with access to helpful and interesting programming and fun social activities (chocolate tasting, part deux?) one way or another.

It has been a pleasure serving this Chapter and I hope to see all of you in-person in 2022! I'm confident that our new President, Kimberly Neal, will take us to new heights.

Stay Safe!

Bringing the Human Voice to Legal Language

By Chaman Sidhu, Xero, Chief Legal Officer

If we could agree on one action to transform the image of the legal profession, increase its value, and introduce innovation to our practice, what would that be?

Technology has transformed the way we deliver legal services, from AI-driven smart contracts to sophisticated client and process management systems. But we shouldn't think of innovation as being the sole domain of expensive tech investment. Perhaps remarkably, one of the answers is available to us at virtually no cost and it is guaranteed to help us create greater trust and importantly, greater understanding in an increasingly complex world where corporate speak and buzzwords reign supreme.

The path to these possibilities, and others, lies in language — the words we use and how we use them. Language that is intuitive, stripped down, conversational, real, welcoming, and yes, even friendly.

Let's call it "human language."

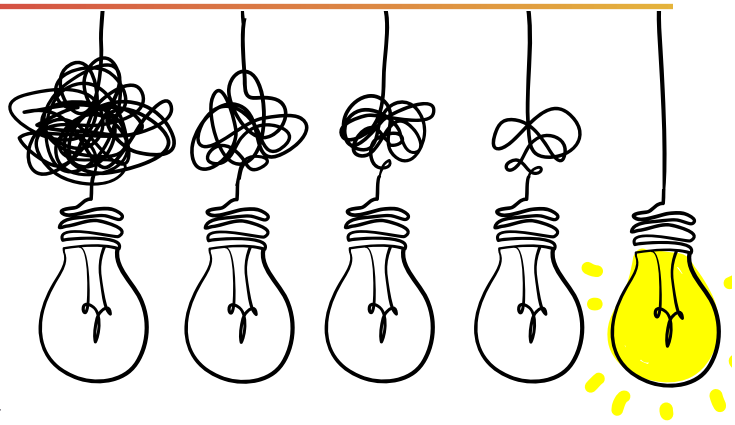
> At its best, it is distinctly easy to hear, read, and understand.

What I'm describing is the next natural step beyond plain language — an approach to legal communication that seeks clarity and understanding via simplicity. At its best, it is distinctly easy to hear, read, and understand.

This evolution does more than demystify contract terms and legal advice. It makes the value of our profession more obvious and accessible to everyone, from the board of directors to shareholders to the C-suite and to the general public. As in-house counsel, if we're striving to get a coveted "Seat at the Table," then we need to speak in a more accessible way to change perception and break through these communication barriers.

Humanizing legalese

Legal language has created a barrier at many levels — even in-house. It's no surprise that people can often find the wording of contracts and other legal communications about as accessible as double encrypted state secrets.



So, first let's think in terms of what the audience wants to know, and what we want them to consume.

Let's use language that's engaging to read, not formal, frustrating, or intimidating. It is possible to use language that is still rigorous and legally effective, but also feels like we are facilitating conversation between equals.

When we take this step beyond plain language and take on a more human voice in our communications, we do more than simplify. We become translators. We generate inclusion. We close gaps between individuals and institutions.

Ultimately, we deliver a new level of value for people dealing with a world that's becoming faster and relentlessly more complex. We shouldn't strive to add to this complexity, but instead to help make better sense of it.

This escalating complexity alone means we must be serious about demonstrating the value of effective human language in things like end-user contracts, non-disclosure agreements, employment offers, training documents, shareholder communications — virtually anything we produce for regular people, not other lawyers.

> We become translators. We generate inclusion. We close gaps between individuals and institutions.

I'm not suggesting this will be easy; only that it needs to be done.

Mark Twain once wrote, "I didn't have time to write you a short letter, so I wrote you a long one." Sometimes taking the complex and making it easy is often the hardest part.

We represent a profession with a proud history, one that has undergone rigorous training, and upholds traditions that draw on precedence. We are trained to deal with new situations by consulting the past. We tend to default to formality and jargon — albeit artful jargon — as indicators of our expertise and unique value. Instead, we should demonstrate our value by departing from the archaic formalities inherent in language structures from the past.

Retraining our hard wired and learned mindsets and tendencies will be challenging. Communicating in a human voice can, ironically, feel quite unnatural for us. And this shift doesn't fit every situation, so it also requires judgment and a level of adaptability. Recognizing the difference between contracts for a multi-billion dollar toll road project and explaining terms of use for a consumer is one example.

But once we take this on as a new commitment, the benefits for our profession in perception and reputation will certainly justify the effort required to change.

Where to begin?

At Xero, we're already using "human language" legal communication, and I invite anyone to check out how this approach is taking shape — our terms of use is a good example.

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I thought it would be helpful to include some simple steps on how you can apply human language to your company's legal communications.

Place yourself in the target audience's shoes

Start with what the consumer of our language needs to know and understand, and in what order. Your company's challenges, protections, and risk considerations matter, of course, but they can come later.

"Say it out loud" — and listen carefully

Imagine explaining this agreement to a friend, over a family dinner, or at a local community event. Go back to the words you would have used before you were qualified as a lawyer and trained to use formal legal drafting.

Start fresh

Don't reuse or edit an existing legal draft that wasn't working before. In this case, it's essential to start new and draft something in original human language.

Simplify, simplify, simplify

It takes time, and some bravery, to let go of some of our professional ego. Simplification is not second nature for most of us.

It requires us to challenge our training, think about what really matters today, not what mattered 10 or 20 years ago, and write with an audience of non-lawyers in mind. Using complicated language is not a telling representation of your level of intelligence, however drawing on your soft skills and showing ability to adapt and communicate effectively to any audience is.

Re-examine the rationale for everything you do

Human language does not diminish or compromise our mission to protect the interests of a client or our organization. Our profession can do both, and do it in ways that are much more balanced than the language often used today.

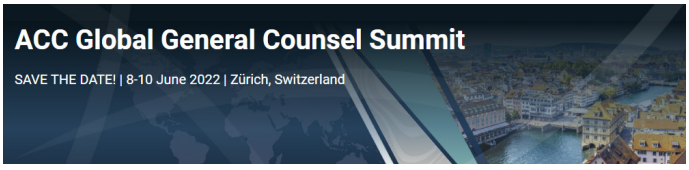
ACC News

2022 Virtual Cybersecurity Summit: March 8-10

Registration is now open for the 2022 Virtual Cybersecurity Summit. These program offers three days of live educational sessions and networking opportunities, designed to engage and educate professionals about today's most pressing cybersecurity concerns.

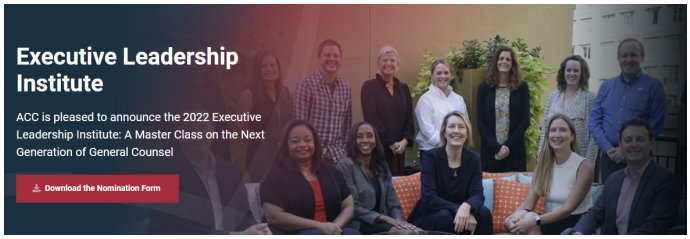
2022 ACC Global General Counsel Summit: June 8–10 Zurich Switzerland

Save the date for the 2022 Global General Counsel Summit, 8-10 June 2022, in Zürich, Switzerland, to collaborate and share ideas on critical trends and challenges facing general counsel with your global chief legal officers in a small, highly interactive setting. Seats are limited. Questions? Want to reserve your seat? Contact Ramsey Saleeby.



ACC Executive Leadership Institute: July 26–29 2022 Chicago, IL

Invest in your high-performers and put your succession plan in place. Nominate your rising stars to gain the professional development they need to one day lead your department at the 2022 Executive Leadership Institute. Seats are limited



DEI Maturity Model

The DEI Maturity Model is designed for legal departments to benchmark their diversity, equity, and inclusion efforts across a wide range of functional areas. Download the model.

Renew Your ACC Membership

Don't forget to renew your ACC membership!

Opportunity Economy: Biden Administration Prioritizes Corporate Criminal Enforcement

By Joe Whitley, Luke Cass, Mark P. Henriques, Womble Bond Dickinson

Takeaways

- In recent remarks, top DOJ officials stated that DOJ will "surge resources" and "redouble efforts" for corporate enforcement.
- Areas of particular concern include Foreign Corrupt Practices Act, government contracting fraud, financial fraud, tax issues, and energy pricing benchmark manipulation.
- Strong compliance programs must be top-down, with C-suite executives enforcing the importance of compliance. Should problems occur, the first call always should be to legal counsel.

In this Opportunity Economy conversation, two Department of Justice alumni—Womble Bond Dickinson attorneys Luke Cass and Joe Whitley—discuss enforcement trends in corporate crime with Womble Bond Dickinson attorney Mark Henriques. The discussion took place on an episode of the "In-house Roundhouse" podcast, and the article below is based on that conversation. Cass spent 11 years at DOJ, serving as an Assistant U.S. Attorney and Senior Trial Attorney with the Criminal Division's Public Integrity Section. In those roles, he handled financial fraud and public corruption investigations and prosecutions of public officials. Whitley served as Acting Associate Attorney General, the third-ranking position at Main Justice during the Ronald Reagan and George H.W. Bush administrations. He was also appointed by Presidents Reagan and Bush, respectively, to serve as the U.S. Attorney in the Middle (Macon) and Northern (Atlanta) Districts of Georgia and appointed to be the first General Counsel for the United States Department of Homeland Security by President George W. Bush.

Nothing keeps corporate executives up at night quite like the threat of white-collar criminal charges. While other forms of wrongdoing or mistakes can cost the company money, white-collar charges can result in actual jail time for company leaders. DOJ has renewed its focus on prosecuting individuals for corporate crimes.

Federal white-collar enforcement priorities typically change when there is a new administration in Washington, and that certainly is the case in 2021, with the Biden Administration implementing its own set of compliance priorities and enforcement emphases.

New Sheriff in Town: What to Expect from the Biden Administration DOJ

"The last administration was focused on immigration and violent crimes, primarily. Under the Biden Administration, you've seen a renewed focus on white-collar enforcement. There's a lot of tough talk and they're getting ready for task forces and investigations in a number of areas," Cass said.

The first such task force addresses Foreign Corrupt Practices Act (FCPA) violations, with an eye on Latin America. Of the DOJ's four FCPA actions in 2020, three involved parties based in Latin America.

"Apart from FCPA, I think you'll see financial fraud continue to be a priority," Cass said. "When you flood the system with capital, like with the PPP and CARES Act funds, fraud will follow. I think you'll see those prosecutions for years to come." He said the amount of money on the table in the proposed infrastructure bill could also lead to more opportunities for bad actors to commit fraud—which, in turn, could lead to an increase in investigations related to government contracts.

Whitley said he also expects to see more tax prosecutions of high-wealth individuals and corporations, as well as more antitrust enforcement and more environmental enforcement regarding pollution.

Ransomware is another topic on the minds of corporate executives, particularly given the recent high-profile attacks on Colonial Pipeline and Sinclair Broadcast Group. But paying certain parties could actually be illegal under federal law.

"It's an unknown path ahead. Sometimes, the bad actors are foreign governments," Whitley said, noting that companies must take a cooperative approach with the federal government.

"The compliance programs have to be broad enough to cover all of these areas, but specific enough to handle any challenges that come up," Cass said. "That's difficult to manage, but that is the challenge corporate compliance programs are facing."

Return to Normal Means Renewed Focus on White-Collar Crime

Whitley said he expects the Biden Administration's approach to white-collar enforcement to be more in line with administrations before Trump—both Democratic and Republican.

"What I think we'll see a return to is more international cooperation," Whitley said. "(Former U.S. Attorney General) Jeff Sessions focused more on immigration and street crime enforcement, but many of us who worked in the DOJ feel that is more of a state and local area of enforcement. When I was in the Reagan and first Bush administrations, we were focused on what was going on in the boardroom, and I think we will see a return to that."

For example, Whitley said price-fixing in commodities is one area he expects to see increased enforcement.

"I believe the business community wants to see this happen. It's an unfair disadvantage to see your competitor engaging in fraudulent activity when you are trying to do the right thing," Whitley said.

While specific areas of emphasis continue to evolve, the Biden DOJ already has shown an interest in investigating alleged pricing benchmark fraud in the energy industry.

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"It comes from a Reuters report and according to the report, investigators are focused on alleged wrongdoing surrounding Platts reports supplied by traders to calculate oil and energy benchmarks. The allegedly fraudulent information then influences the price of these benchmarks" Cass said. "If the allegations are true, and the fraud is as widespread as the report seems to indicate, it could be a massive case similar to Libor."

Henriques said that with energy costs rising and supply chains stretched, it makes sense that energy pricing benchmarks will remain under federal scrutiny.

Setting the Tone for Compliance

Not everything is changing, however. In some situations, the new administration is building on work started in the previous administration.

In June 2020, the DOJ issued a memo on corporate compliance meant to be a guide as to what is expected in a company's compliance program, and Cass and Whitley said that memo still serves as a good primer. The memo asks three key compliance questions:

1. Is your compliance program well designed?
2. Is it applied in good faith?
3. Does it actually work in practice?

Cass said some compliance departments were downsized in the pandemic, which is something the DOJ frowns upon.

And Whitley said the responsibility for compliance can't just fall on a company's compliance committee or the GC's office.

"The tone at the top is so critical. CEOs have a different mission today, and part of that is to set a moral tone at the top of the organization. I think it's important that companies redouble their compliance efforts and make sure this is priority one. The compliance officer should have a direct line to the auditor committee, the CEO and/or the GC. There has to be some value in the compliance officer – that he or she matters in the organization," he said.

Following the taping of this podcast, at the American Bar Association's 36th National Institute on White Collar Crime, Deputy Attorney General Lisa Monaco announced several priorities and Department of Justice policies for corporate criminal enforcement. A copy of Deputy Attorney General Monaco's address may be accessed here.

Deputy Attorney General Monaco's speech can be summarized as follows:

- Companies need to actively review their compliance programs to ensure they adequately monitor for and remediate misconduct — or else it's going to cost them down the line.
- For clients facing investigations, as of today, the department will review their whole criminal, civil and regulatory record — not just a sliver of that record.
- For clients cooperating with the government, they need to identify all individuals involved in the misconduct — not just those substantially involved — and produce all non-privileged information about those individuals' involvement.
- For clients negotiating resolutions, there is no default presumption against corporate monitors. That decision about a monitor will be made by the facts and circumstances of each case.

Deputy Attorney General Monaco stated, "Looking to the future, this is a start — and not the end — of this administration's actions to better combat corporate crime."

What to do if You Are Subpoenaed?

Obviously, compliance programs are intended to keep a company out of trouble. But no prevention system is infallible, and even well-run companies can make mistakes. So what happens when the feds knock at the door?

"This is where lawyers get frustrated. Often, the first call is not made to outside counsel or general counsel. Having a plan in place to deal with the government in an enforcement capacity is critical," Whitley said. "So much can happen in a matter of just a few minutes during the first stage of the investigation."

He said the point isn't to hide information from the government, but make sure that information is correct and accurate. Sometimes, investigators get bad information that puts the company at a disadvantage. "We might spend hours trying to correct that impression," Whitley said.

Cass said such prior planning is particularly important in an environment where many employees may be working remotely, adding that legal counsel should be involved from the very beginning of all government investigations.

"You need someone who has been through the process before to serve as a guide," Henriques said.

Authors:

Luke Cass defends corporations and individuals in connection with a variety of federal criminal allegations, including health care fraud, conspiracy, mail and wire fraud, embezzlement, bank fraud, and money laundering. He also conducts proactive, internal investigations related to bribery, misbranding, and the Foreign Corrupt Practices Act (FCPA). Luke served as a federal prosecutor for over a decade and has significant experience with white collar investigations and has litigated federal appellate and district court cases throughout the United States.

Joe Whitley represents clients nationally and internationally in a variety of white collar matters including corporate internal investigations, regulatory enforcement, Foreign Corrupt Practices Act (FCPA) and export controls compliance, corporate compliance, health care fraud and FDA-related matters, securities fraud, criminal antitrust, financial institution fraud, public corruption and campaign finance, and commercial bribery.

Mark Henriques understands the needs of today's in-house counsel and regularly discusses them on his podcast, In-house Roundhouse Podcast. Mark quickly focuses on key issues and objectives and then works with clients to develop a comprehensive strategy to win the case. Through his organized, engaging presentation, he explains even the most complex or technical factual patterns to mediators, arbitrators, judges or juries. Mark helps his clients solve the "better, faster, cheaper" challenge through innovative approaches to dispute resolution and fee arrangements. Mark currently chairs the Firm's Editorial Board and COVID-19 Task Force.

The Case for Limiting Employee Drug Tests for Cannabis

By Erik Pramschufer and Ruth Rauls, Saul Ewing Arnstein & Lehr LLP

By now most employers are aware of the legal changes surrounding adult-use (also referred to as "recreational") and medicinal cannabis but may be reluctant to change their policies absent a formal governmental requirement. Cannabis is only approved in Maryland for medicinal purposes; however, earlier this year State House Speaker Adrienne Jones (D) pledged that the House will soon pass legislation allowing for Marylanders to vote on the legality of adult-use cannabis on the November 2022 ballot. Expecting that voters will support legalization, Annapolis lawmakers have already discussed establishing a regulated adult-use cannabis marketplace by as early as 2023.[1]

To make matters more complicated for many Maryland employers, Virginia recently authorized the cultivation, use and possession of cannabis in that state. While Virginians are without a legal mechanism to buy adult-use cannabis until its regulated marketplace is formalized, individuals are allowed under the present law to consume cannabis that they grow themselves, or that was freely shared with them.

The current state of cannabis legislation in Maryland (and throughout the country) presents several legal and practical concerns for employers that utilize drug tests at any stage of the employee life cycle. Virtually all of these concerns stem from the physiological aspect that cannabis breaks down slowly in the human body, and a person will test positive for cannabis well after they last consumed it. This process becomes even more elongated following consistent repeated use.

What are the risks of conducting cannabis drug tests under a medical-only legislative scheme?

Unlike some states, Maryland's medical cannabis law does not contain an explicit provision that employers cannot take action against employees because they use medical cannabis. Rather, the law only provides that qualifying patients (i.e., people lawfully prescribed medical cannabis) may not be "denied any right or privilege." MD Code, Health – General § 13-3313(a)(1). While most practitioners conservatively believe this establishes an anti-discrimination protection for medical cannabis users, the provision has not been tested in any reported caselaw. Even absent a direct anti-discrimination requirement, however, employers who drug test for cannabis must do so in a way that does not violate state and local laws prohibiting disability discrimination, such as the Maryland Fair Employment Practices Act (MFEPA).[2]

Employers undoubtedly have the right to prevent employees from using or possessing cannabis during working hours and on their premises, regardless of whether they are certified to use medical cannabis. However, under the MFEPA employers have an obligation to reasonably accommodate employees' disabilities so long as the accommodation does not present an undue hardship. Such an accommodation could include the ability to use medical cannabis while off duty and outside of the worksite, inevitably causing an employee to test positive anytime he or she is tested for cannabis. Additionally, many employees who are prescribed medical cannabis may not even disclose this fact to their employer, so following a positive drug test may become the first time the conversation even happens.

Drug tests are typically performed in two separate contexts: (i) pre-employment, or (ii) following a workplace accident. Caselaw from other jurisdictions provides that in both of these contexts employers must recognize if the applicant/employee utilizes medical cannabis, and if so, not take any adverse action against them exclusively because of a failed drug test.

An example of courts scrutinizing post-accident drug testing can be found in the New Jersey Supreme Court decision *Wild v. Carriage Funeral Holdings, Inc.*, 241 N.J. 285 (2020). *Wild* concerned a motion to dismiss, and the plaintiff, a driver for the defendant funeral home, alleged that he utilized medical cannabis as part of his cancer treatment. While working a funeral the plaintiff's vehicle was struck by another vehicle that ran a stop sign. The plaintiff was taken by ambulance to the hospital, and the plaintiff informed the treating physician that he had a license to possess medical cannabis. The plaintiff alleged that the treating physician informed him that it was clear that he was not under the influence of cannabis, and therefore the physician did not believe a drug test was necessary. However, the funeral home advised the plaintiff that a blood test was required before the plaintiff could return to work. The plaintiff in-turn advised the funeral home that he used medical cannabis for his disability, and that he would undoubtedly test positive despite not being impaired at the time of the accident.

Several days later, the plaintiff was informed that the funeral home was unable to "handle" his cannabis use and that his employment was being terminated because they found drugs in his system. The plaintiff received a letter stating that he had been terminated because he failed to disclose his use of medication which might adversely affect his ability to perform his job duties. See also *Wild v. Carriage Funeral Holdings, Inc.*, 458 N.J. Super. 416 (App. Div. 2019) (intermediate appellate decision with additional factual background).

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[1]House Cannabis Referendum and Legalization Workgroup streaming session for Wednesday, September 8, 2021, available at https://www.youtube.com/watch?v=26cX-phcqpU&feature=emb_imp_woyt

[2]Under the Americans with Disabilities Act, current illegal drug users, which include drugs that are unlawful under the Controlled Substances Act, are not "individuals with disabilities." Because marijuana remains illegal under the federal Controlled Substances Act, anyone using marijuana, medical or otherwise, is a "current" illegal drug user that is not entitled to a reasonable accommodation under the ADA. 42 U.S.C. §12114(a)

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The funeral home moved to dismiss the plaintiff's discrimination claim arguing that the state anti-discrimination statute (the N.J. Law Against Discrimination) does not require an employer to accommodate an employee's medical cannabis use because the separate medical cannabis law did not contain an anti-discrimination provision at the time. The New Jersey Supreme Court soundly rejected this and recognized that a plaintiff's authorized use of medical cannabis outside the workplace is "harmonized with the law governing [state] disability discrimination claims." Wild, 241 N.J. at 288. Accordingly, the court found that the plaintiff's discrimination claim could proceed despite the fact the medical cannabis law itself did not contain an anti-discrimination provision.[3]

In the pre-employment context, the District of Connecticut's decision in *Noffsinger v. SSC Niantic Operating Co.*, 338 F. Supp. 3d 78 (D. Conn. 2018) is instructive. There, the plaintiff alleged that a nursing and rehabilitation center, which operates as a federal contractor, reneged on its decision to hire her because she acknowledged using medical cannabis and tested positive for cannabis in a pre-employment drug test. The plaintiff filed a complaint against the center alleging, among other things, a violation of Connecticut's Palliative Use of Cannabis Act ("PUMA"). The center countered by arguing that it was exempt from PUMA's anti-discrimination provision because the statute allows for an exception if discrimination "is required by federal law or required to obtain federal funding." To this point, the center contended that the federal Drug Free Workplace Act (DFWA) barred it from hiring the plaintiff. The court rejected the center's argument, stating that the DFWA does not require drug testing, "[n]or does the DFWA prohibit federal contractors from employing someone who uses illegal drugs outside of the workplace, much less an employee who uses medical cannabis outside the workplace in accordance with a program approved by state law." Finally, the court also declined the center's argument that PUMA only prohibits discrimination on the basis of one's status as an approved medical cannabis patient, but not on account of one's *use* of medical cannabis, finding that the purpose of the statute is to protect employees from discrimination based on their use of medical cannabis pursuant to their qualifying status under PUMA.

What's up next if adult-use cannabis is legalized?

Employers trying to predict what the employment landscape may look like once cannabis becomes legalized can look at recent activity in New York, which (similar to Virginia) authorized the possession and use of cannabis, but has not yet set up a regulated marketplace. Coupled with this authorization, New York amended its Labor Law to make it clear that employers may not discriminate or retaliate against employees or job applicants because they consume cannabis recreationally (or for medical purposes).

Recent guidance published by the New York State Department of Labor (NYSDOL) addresses how this amendment relates to drug testing, and states that employers are not allowed to test employees or applicants for cannabis unless (1) it is required to do so by federal or state law; (2) failure to do so would result in a violation of federal law or result in the loss of a federal contractor of federal funding; or (3) the employee manifests specific articulable symptoms of impairment. Accordingly, drug testing for cannabis has effectively become illegal in that state outside of those narrow circumstances.

The trend in New York is notably continuing in other jurisdictions, including that in Philadelphia the city passed an ordinance effective January 1, 2022, prohibiting employers from conducting pre-hire cannabis testing. While it is unclear how exactly Maryland will implement any adult-use cannabis authorization, the trends from other jurisdictions suggests that employers will be forced to accommodate employees' rights to consume cannabis outside of working hours away from company property.

What actions can employers take now?

Employers can protect themselves from anti-discrimination claims under the current model by first recognizing what cannabis drug testing can tell you, and what it cannot. Employers who utilize pre-employment drug testing should understand that applicants who test positive for cannabis may be certified medical cannabis patients, who may be able to raise a claim under either the Maryland medical cannabis law or the MFEPA if they are denied employment solely because of a failed drug test. Further, employers should be cautious about exclusively relying on cannabis drug testing in the post-accident context. Managers should be trained to identify any potential signs of impairment and contemporaneously document them. This documentation, *together with a failed drug test*, may support a disciplinary action. Relying on a drug test alone could be deemed insufficient and may expose the company to liability.

For government contractors, the legal predicaments are further heightened by competing obligations under the DFWA and relevant contracts, which was highlighted by the *Noffsinger* decision. These employers and their counsel should closely scrutinize their drug testing obligations and revisit past practices to avoid legal problems in the future.

Authors:

Ruth Rauls and **Erik Pramschufer** represent management in all areas of employment litigation. They also counsel businesses and their owners regarding compliance with federal, state and local employment laws, including crafting employee policies regarding medicinal and adult-use cannabis in the workplace.

Ruth Rauls

Erik Pramschufer

[1]After the New Jersey Supreme Court granted certification to review the decision in *Wild*, the legislature amended its medical statute and enacted adult use legislation, both of which impact an employer's ability to conduct drug testing for cannabis.

Federal Antitrust Agencies Focus on Non-Compete Clauses, Exclusive Dealing Contracts

By Jon B. Jacobs and Caroline Gizem Tunca, Perkins Coie LLP

Over the past decade, federal antitrust agencies have significantly increased their examination of employment and business contract terms as wage and labor suppression issues have been brought to the forefront by the media and the public. The Biden administration will continue to carry that activist torch, as seen through its most recent appointments. On June 15, 2021, Lina Khan was sworn in as the new chair of the Federal Trade Commission (FTC). Khan has been critical of the FTC's passive approach to rulemaking, and she vows to use the "full breadth" of the agency's authority to combat anticompetitive behavior. On July 20, President Biden nominated Jonathan Kanter to lead the Antitrust Division of the United States Department of Justice (DOJ). Kanter has been a leading critic of large tech platforms and of how antitrust law has dealt with monopolization and excessive market power. And in July, the President himself issued an Executive Order on Promoting Competition in the American Economy, which urges all federal agencies and departments to combat excessive market concentration, wage suppression tactics, and unfair competition.

Corporate counsel should therefore be watchful for new enforcement initiatives coming from the DOJ and FTC regarding employment and business contract terms. Two areas already under scrutiny are non-compete clauses and exclusive dealing arrangements, both of which are widespread in the U.S. economy. In this article, we summarize the recent activity by the federal antitrust enforcement agencies in these two areas.

Non-Compete Clauses

On August 4, 2021, the FTC invited public comment on various contract terms that may harm fair competition and "create power asymmetries that disadvantage small businesses, workers, and/or consumers." Among those listed as examples were non-compete clauses preventing workers from seeking employment with other firms. This solicitation most likely was instigated by the President's Executive Order, which specifically urged the FTC to curtail the "unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."

Certain states have already taken such action. Three states—California, North Dakota, and Oklahoma—have largely banned non-compete agreements. Several others—including Maryland, Illinois, Oregon, Nevada, and Virginia—have restricted their use with lower-wage workers.

But apart from those states, the use of non-compete agreements *between employers* and their employees is a fairly common device to protect an employer's investment in training as well as its trade secrets. Courts generally uphold such clauses as long as they are reasonable in their geographic and temporal scope.

The FTC's solicitation may have been prompted by not only the Executive Order but also a petition filed by the Open Markets Institute on July 20, 2021. That petition requested the FTC to prohibit non-compete clauses because they reduce worker mobility and impair product market competition. It argued that because most private-sector workers do not belong to a labor union, the "threat of leaving for another job is often the only source of leverage for many workers." Non-compete clauses take away this power and force workers to stay in possibly "discriminatory, hostile, or unsafe work" environments. Additionally, in a highly concentrated market, monopolists might use such clauses to deprive rivals of essential workers, thereby impeding those rivals' ability to compete.

Meanwhile, the DOJ has continued to actively prosecute non-compete agreements of a different sort. The FTC's solicitation is focused on agreements between employers and their employees. The DOJ's recent enforcement efforts have focused on agreements between employers. These include agreements to limit wages to a certain level or not to "poach" employees from each other. Prior to October 2016, the DOJ attacked such agreements in a series of civil actions and obtained injunctions prohibiting companies from continuing to enter into such agreements.

In October 2016, the DOJ and FTC jointly issued their "Antitrust Guidance for Human Resource Professionals." In it, they made clear that from that date forward, wage-fixing and no-poach agreements between employers would be considered per se unlawful and subject to criminal prosecution.

The DOJ has been true to its word. To date, three individuals and three companies have been indicted for entering into such agreements that continued past October 2016. Some of the indictments quote from alleged company emails referring to "gentlemen's agreements" among companies not to recruit each other's employees. Others include alleged statements made to potential job candidates, saying that they could not be hired because the company could not actively recruit from the competitor, and references to ways that the companies allegedly agreed to address violations of their no-poach agreement.

Not all such agreements among independent companies are subject to criminal prosecution. If companies are part of a legitimate joint venture, then certain agreements prohibiting the recruitment of employees who are a part of that venture may pass legal muster. And agreements among franchisors and franchisees may also fall into a different category. The DOJ has been actively seeking to participate in certain cases involving those agreements, largely to argue that they should not be considered per se unlawful because of the presence of the franchise agreement.

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Exclusive Dealing Contracts

The FTC's August 4 notice also solicited comments about "exclusivity provisions that require small businesses to limit their trade to a single company." An exclusive dealing contract is one in which a buyer promises to limit its purchases of certain products to a particular seller. Exclusive dealing contracts are used frequently by businesses and are upheld against antitrust attack unless they foreclose competitors from a substantial share of the market and lack a legitimate business justification.

The FTC's concern about exclusive dealing may have been prompted by a different petition from the Open Markets Institute filed on July 20. That petition urged the FTC to prohibit any exclusive dealing arrangement causing substantial foreclosure without regard to its actual effects on competition or any proffered business justifications. The petition argued that the FTC should define "substantial foreclosure" and establish that "it can be shown through firm dominance, quantitative foreclosure, or qualitative foreclosure." It also cast doubt on the various defenses raised to justify exclusive dealing, including the need to achieve economies of scale.

It is unclear what changes, if any, the FTC will make in its approach to exclusive dealing. The law's primary concern with the practice has been foreclosure—i.e., that smaller businesses that do not have such contracts may be foreclosed from selling to (or buying from) a substantial part of the market and may therefore find it more difficult to compete effectively. The FTC's solicitation, however, seemed more focused on small businesses that do have such contracts. Its concern may be less focused on substantial foreclosure and blocking new entrants and more focused on ensuring that small businesses have choices with regards to their supply chain management.

Key Takeaways

The DOJ and FTC will jointly host a virtual public workshop on December 6 and 7, 2021, to discuss labor markers and worker mobility in the antitrust context. The deadline for submitting public comments is December 20, 2021. Comments can be submitted electronically at https://www.regulations.gov/docket/FTC-2021-0057.

Corporate counsel should also keep abreast of this rapidly changing area of antitrust law. Counsel should be wary of potential agreements with other companies relating to employees and should ensure that human resources personnel are included in their company's antitrust compliance programs. A review of the company's agreements relating to employee contract terms, as well as any contracts involving exclusive dealing terms, would also be worthwhile as we await additional guidance and possible enforcement by the federal antitrust agencies.

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Not What They Bargained For: Labor Implications of Recent Developments Surrounding the Classification of 'Student-Athletes'

By Katherine E. Rodriguez and Courtney Woods, Jackson Lewis, P.C.

The debate over whether college athletes are "employees" and, thus, covered by the protections of the National Labor Relations Act ("NLRA" or the "Act") has resurfaced. On September 29, National Labor Relations Board ("NLRB") General Counsel Jennifer Abruzzo issued a memorandum declaring that college athletes at private colleges and universities are employees under the NLRA, the federal law which governs private employers' and employees' rights to take collective action, organize unions, and engage in collective bargaining. The National Collegiate Athletic Association ("NCAA") has made clear its position that these athletes are not employees, and that they do not have the right to organize. Private colleges and universities should take notice that this issue is a Board priority and prepare for the possible implications.

Overview of Student-Athlete Unionization Efforts at the NLRB

This is not the NLRB's first dance with the "student-athlete" classification issue. In August of 2015, the Board declined jurisdiction to decide whether a group of Northwestern University football players could unionize. These efforts began in 2014, when the players filed a petition with the NLRB to be represented by the College Athletes Players Association (CAPA) in negotiations with their educational institutions. In response to a petition for representation, the Regional Director held that the players were "employees" under the NLRA and directed an election. However, on appeal, the Board declined to assert jurisdiction and dismissed the petition without ruling on the core issue of whether the "student-athletes" were employees and, thus, dashed the athletes' hopes of being represented by a union.

In February 2017, former NLRB General Counsel Richard Griffin signaled his support for the inclusion of "student-athletes" by issuing a memo stating that "scholarship football players in Division I Football Bowl Subdivision private-sector colleges and universities are employees" under the NLRA. Griffin opined that scholarship football players fell under the Section 2(3) definition of employee and that the *Northwestern* decision did not preclude such a classification. Griffin's memo was later rescinded by President Trump-appointed General Counsel Peter Robb.

The Abruzzo Memo

In her September 29 memo, GC Abruzzo aggressively expands upon the 2017 memo and takes the position that nothing from the Northwestern University decision discussed above precludes the finding that athletes at private colleges and universities are employees under the NLRA. Abruzzo opines that college athletes fit the Board's definition of "employee" under common law agency rules, because athletes: 1) perform services, 2) are subject to their school's and the NCAA's control regarding the terms, conditions, and manner of their services, and 3) are provided with compensation in the form of athletic scholarships.

The memo, on its own, does not convert college athletes to employees covered by the Act. However, it provides a roadmap for the NLRB's priorities during President Biden's administration. Abruzzo has the power within her role as General Counsel to oversee charge investigations and elections, issue complaints, and ultimately influence matters that the Agency prosecutes before the Board. Abruzzo further intends to pursue independent violations of the Act on the basis that players are misclassified as "student-athletes." Abruzzo argues that such misclassifications have a chilling effect on Section 7 rights because it leads players to believe that they are not entitled to NLRA protections, which include protections against retaliation for engaging in protected concerted activity.

Abruzzo thinks that as courts continue to undermine restrictions on compensation untethered to education, there will be an even stronger argument that student athletes can be considered employees under law.

The Supreme Court's Take: *NCAA v. Alston*

In her memo, Abruzzo relied on *NCAA v. Alston*, decided June 21, 2021, to support her contentions. In *Alston*, the Supreme Court weighed in on issues surrounding the rights and limitations of student-athletes. SCOTUS ruled unanimously that the NCAA violated anti-trust laws by limiting education-related benefits that colleges and universities can offer student-athletes. Notably, in Justice Kavanaugh's concurring opinion, he proposes that schools and athletes "could potentially engage in collective bargaining to provide student athletes a fairer share of the revenues that they generate for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues."

Moving Forward

Like any good athlete, private colleges and universities should prepare for the upcoming season of the NLRB games under the Biden administration. Private colleges and universities should anticipate:

- Increased protected concerted activity among student-athletes, including collective complaints or demands to negotiate regarding their terms and conditions such as pay, stipends for expenses, training equipment and facilities, uniforms, health benefits, travel and more;
- Increased organizing efforts among student-athletes and unions, including public campaigns against the school or university, sit-ins or marches on the administration's office, petitions filed with the NLRB, and more;

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- Unfair labor practice charges filed against private colleges and schools for "misclassifying" student-athletes, for taking adverse actions against student-athletes for alleged protected concerted activity, and for refusals to bargain with unions attempting to represent student-athletes; and
- The NLRB, which now constitutes a majority appointed by President Biden, to issue a decision classifying student-athletes as employees under the NLRA.

Other implications may include:

- Increased time and resources needed to develop the institution's position and communications on the issue for student-athletes, larger student body, community and other stakeholders;
- A financial impact and administrative burden due to student-athletes' potential ability to collectively bargain over wages, hours, and working conditions; and
- An impact on recruiting efforts due to an additional factor in competition with public colleges and universities which are not subject to the NLRA.

Private colleges and universities should be proactive in considering how they would respond to these potential changes in Board law. These institutions should take a close look at current approaches to student-athlete relations in order to make changes in advance of any Board decisions to come. Institutions should be mindful to refrain from taking adverse actions against athletes engaging in protected concerted activity such as collective efforts to speak out regarding working conditions or compensation. Private colleges and universities should consider consulting with an attorney regarding these developments and the changing landscape.

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GETTIN' OUTTA DODGE: Avenues for Escaping Plaintiffs' Selected Forums

By Craig Brodsky, and Kamil Ismail, Goodell, Devries, Leech & Dann, LLP

The uncertainty of litigation causes consternation among C-suite personnel for many reasons. Although impossible to eliminate this uncertainty, there are a number of ways that companies can reduce their risk. In this article, we explore strategies available that help mitigate risk by controlling the forum for litigation.

Removal

As a corporate defendant, a company has little control over the court in which a suit, once initiated, may proceed, if filed in a state court. One time-honored tradition, borne out of a concern for fairness and to avoid "home cooking" that might be present for a local plaintiff, is removal to federal court. The prevailing thought processes, in general, are that judges are more receptive to complex legal arguments and that companies are more likely to get a fair shake in federal court. Other concepts that have been cited as benefits to removal are the stricter expert disclosures and reports requirements, assignment of the case to one particular judge, stricter pleading requirements, broader subpoena power, and stronger enforcement of scheduling order deadlines. Federal jury pools – drawing from larger districts – may also be more neutral than localized state court jury pools. The ability to remove a case to federal court depends on both the nature of the case and the parties to the suit.

Removal: The Nature of the Case

A case can be removed from state court to federal court if it involves a question of federal law. Federal question jurisdiction exists if a plaintiff's claims "aris[e] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. For a federal question to be present on the face of a well-pleaded complaint, either federal law must create the cause of action, or the plaintiff's right to relief must necessarily depend on the resolution of a substantial question of federal law. *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830 (2002). *See also Empire Healthchoice Assurance*

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Inc. v. McVeigh, 547 U.S. 677, 689-90 (2006). There are times, however, when a complaint may present a federal question without specifically pleading a federal cause of action. *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 311 (2005) (plaintiff claimed good title to land based on 26 U.S.C. § 6335(a)); *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 807 (4th Cir.1996) (plaintiff claimed entitlement to "emissions allowances" based on 42 U.S.C. § 7651g(i)). While a clever plaintiff can try to avoid pleading a claim to omit a federal question, "If a court concludes that a plaintiff has 'artfully pleaded' claims to omit federal questions, 'it may uphold removal even though no federal question appears on the face of the plaintiff's complaint.'" *Adkins v. Wells Fargo Home Mortg.*, WDQ-12-3333 (D. Md. July 9, 2013) (quoting *Rivet v. Regions Bank of La.*, 522 U.S. 470, 476 (1998)).

One potential issue is whether a company can create a federal question by filing a counterclaim. This arises when a dispute involves claims that are asserted by both parties but initiated by a party who wants to be in state court and/or avoid a federal question. Unfortunately for the defendant, defenses and counterclaims do not create a federal question unless there is a statutory exception or complete preemption, even when the counterclaim is compulsory. *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002) ("[A] counterclaim—which appears as part of the defendant's answer, not as part of the plaintiff's complaint—cannot serve as the basis for 'arising under' jurisdiction."). Indeed, the Supreme Court has reiterated on a number of cases that "[T]he mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808, 813 (1986). The takeaway here is that there may be some incentive to be the first to the courthouse in a dispute where both parties have claims against each other.

The federal doctrine of preemption can sometimes create a basis for removal. While asserting preemption, in general, as a defense has been determined inadequate to create federal jurisdiction, *Burrell v. Bayer Corp.*, 918 F.3d 372 (4th Cir. 2019) (holding that preemption defense was inadequate to confer federal jurisdiction), under the "Complete Preemption Doctrine," removal can be appropriate. *Lontz v. Tharp*, 413 F.3d 435, 439–40 (4th Cir.2005); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23–24 (1983); *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 424–25 (4th Cir.2003)). The complete preemption doctrine "provides that if the subject matter of a putative state law claim has been totally subsumed by federal law – such that state law cannot even treat on the subject matter – then removal is appropriate." *Id.* at 439. Although completely preempted claims are rare, they are held to satisfy the well-pleaded complaint rule. *Id.* at 440. Nonetheless, there is a presumption against finding complete preemption, id., and complete preemption, i.e., where federal law has entirely displaced state law, has only been found in three contexts: the National Bank Act, the Labor Management Relations Act, and ERISA. *Barbour v. Int'l Union,* 594 F.3d 315 (4th Cir. 2010).

Removal: The Parties to the Suit

A second basis for removal is the well-known concept of diversity jurisdiction under 28 U.S.C. § 1332(a). That section provides that the federal courts have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different states.

For the purposes of diversity jurisdiction, corporations are considered citizens of the state of incorporation or principal place of business. 28 U.S.C. § 1332. For individuals, citizenship for purposes of diversity jurisdiction depends not on residence, but on national citizenship and domicile. *E.g., Newman–Green, Inc. v. Alfonzo–Larrain*, 490 U.S. 826, 828 (1989). The rules for other entities, such as LLCs and partnerships, are more detailed and can require investigation into multiple layers of ownership. For example, for diversity purposes, the citizenship of a limited liability company is determined by the citizenship of its members. *See Gen. Tech. Applications, Inc. v. Exro Ltda*, 388 F.3d 114, 121 (4th Cir. 2004); *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187-88 (1990) (holding that a limited partnership is not "corporation," and in determining its citizenship, the court must look to the citizenship of ALL (not just some) of the partnership's partners (limited and general) to determine whether there is complete diversity); *NY State Teacher's Retirement System v. Kalkus*, 764 F.2d 1015, 1017 (4th Cir. 1985) (court must look to the citizenship of both limited and general partners when determining the citizenship of a limited partnership); *Nat'l Ass'n of State Farm Agents, Inc. v. State Farm Mut. Auto. Ins. Co.*, 201 F. Supp. 2d 525, 528 (D. Md. 2002) (when not-for-profit corporation is suing solely as a representative of real parties in interest and not to assert its own rights, diversity jurisdiction must be based on the citizenship of the real parties, not on the citizenship of the corporation).

The potential for removal has created myriad efforts by creative lawyers to avoid it. One strategy employed by attorneys is fraudulently joining defendants who should not be in the suit simply to defeat removal on diversity basis. However, where no viable cause of action has been stated against a non-diverse defendant, that defendant is fraudulently joined, and its presence in the lawsuit is ignored for purposes of determining the propriety of removal. *See AIDS Counseling & Testing Ctrs. v. Group W Television, Inc.*, 903 F.2d 1000, 1003 (4th Cir. 1990) (fraudulent joinder occurs where there is "no colorable ground" for seeking judgment against non-diverse defen-

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dant) *Sherman v. Litton Loan Servicing*, 796 F. Supp. 2d 753, 760 (E.D. Va. 2011) (denying plaintiff's motion to remand because trustee was fraudulently joined); *Weidman v. Exxon Mobil Corp.*, 776 F.3d 214 (4th Cir. 2015) (upholding removal under fraudulent joinder doctrine.) When fraudulent joinder is in play, the party seeking removal must show "that either (1) there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or (2) there has been outright fraud in the plaintiff's pleading of jurisdictional facts." *Riverdale Baptist Church v. Certainteed Corp.*, 349 F. Supp. 2d 943, 947 (D. Md. 2004) (citing *Mays v. Rapoport*, 198 F.3d 457, 464 (4th Cir. 1999)) (internal citation omitted).

Another strategy employed by creative lawyers is naming a "nominal party" to a suit to defeat diversity. A nominal party for removal purposes is a "party who has some immaterial interest in the subject matter of a lawsuit and who will not be affected by any judgment." *Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co.*, 736 F.3d 255, 260 (4th Cir. 2013); *Correll v. Bank of America, N.A.*, 2012 WL 348594, at *6 (E.D. Va. Feb. 2, 2012) (finding that substitute trustee's citizenship was not a factor in diversity analysis because substitute trustee was nominal defendant and borrower had no plausible cause of action under deed of trust). Put simply, a named party who doesn't really have in interest in the litigation should not prevent removal based on diversity.

While most cases are removed at the outset of the case, mostly because removal must occur within 30 days of service, there are times when diversity jurisdiction can be created after a case is already at issue. For example, if a non-diverse defendant is dismissed by a plaintiff less than one year since the date of filing, then a case can be removed. *King v. Kayak Mfg. Corp.*, 688 F. Supp. 227, 229-30 (N.D.W. Va. 1988) (holding that voluntary settlement between plaintiff and non-diverse defendant rendered action removable). But, if diversity is created by a court order dismissing a non-diverse defendant, defendants may not remove because diversity is temporary in that the plaintiff may choose to appeal the dismissal. *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1166 (4th Cir. 1988). See also *Phillips v. BJ's Wholesale Club, Inc.*, 591 F. Supp. 2d 822, 824 (E.D. Va. 2008).

One limitation to removal based on diversity is if one of the defendants is a citizen of the state in which the action is brought, even if there is diversity. 28 U.S.C. § 1441(b) (A case is "removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."). "The majority of courts that have interpreted Section 1441(b) apply the plain language of the statute to allow removal when none of the forum defendants have been served." *Robertson v. Iuliano*, 2011 U.S. Dist. LEXIS 11123, 2011 WL453618 (D. Md. Feb. 4, 2011). *See also Blankenship v. Napolitano*, 2019 U.S. Dist. LEXIS 118731, 2019 WL 3226909 (S.D. W.Va. Jul. 17, 2019) (permitting snap removal). *But cf. Campbell v. Hampton Roads Bank Shares, Inc.*, 925 F. Supp. 800 (E.D. Va. 2013) (holding that unserved forum defendant itself could not remove).

To counter this, some defendants have employed a strategy of "snap removal" in which a case is removed before the forum defendant has been served. *See Teamsters Local 677 Health Serv. & Ins. Plan v. Friedman*, 2019 U.S. Dist. LEXIS 184186, 2019 WL 5423727 (D. Md. Oct. 23, 2019) ("Federal courts are divided on whether the forum defendant rule prohibits pre-service removal . . . . The nationwide divide over pre-service removal is also reflected in this District . . . . Mindful of its responsibility to 'resolve all doubts about the proprietary of removal in favor of retained state court jurisdiction,' . . . , the court concludes that where, as here, a defendant files a notice of removal before the plaintiff has a reasonable opportunity to effectuate service of process, and the forum defendants were not added to prevent removal, the forum defendant rule precludes removal to federal court.").

Removal: Amount in Controversy

Removal on Diversity of Citizenship also requires a threshold of the amount in controversy which is designed to prevent smaller matters from ending up in federal court. "Ordinarily the jurisdictional amount is determined by the amount of the plaintiff's original claim, provided that the claim is made in good faith." *Wiggins v. N. Am. Equitable Life Assur. Co.*, 644 F.2d 1014, 1016 (4th Cir.1981). However, "if it appears to a legal certainty that the plaintiff cannot recover the jurisdictional amount, the case will be dismissed for want of jurisdiction." *Id.* (quoting *McDonald v. Patton*, 240 F.2d 424, 426 (4th Cir.1957)). *Bennett v. 3M Co.*, No. 3:14-CV-198, 2014 WL 1493188, at *2 (E.D. Va. Apr. 15, 2014). The amount in controversy is "measured by the value of the object of the litigation." *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977); *see also Liberty Mut. Fire Ins. Co. v. Hayes*, 122 F.3d 1061 (4th Cir. 1997). That value may be determined from either party's viewpoint. *Dixon v. Edwards*, 290 F.3d 699, 710 (4th Cir.2002). However, "[a]fter removal a plaintiff may not force a remand by reducing the amount of the prayer below the diversity requirement…." *Lang v. Manufacturers & Traders Trust Company*, 274 F.R.D. 175, 182 (D. Md. 2011). Further, "Courts 'may condition a voluntary dismissal without prejudice on the payment of the non-moving party's attorney's fees and costs in the litigation.'" See *Hailstock v. Home Depot USA, Inc.*, 2011 W.L. 324040484, * 3(D. Md. 2011) citing *Lang*, 274 F.R.D. at 185 quoting *Best Industries, Inc. v. CIS DIO International*, 1998 W.L. 39383, * 2 (4th Cir. 1998).

Removal: Some Specific Situations

Some types of cases deserve specific discussion. For example, many cases, such as those involving improper use of intellectual property, may seek declaratory or injunctive relief. In those actions, seeking declaratory or injunctive relief, it is well established that the amount in

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controversy is measured by the value of the object of the litigation." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977). Similarly, class action suits come with their own set of removal rules; see, 28 U.S.C. § 1332(d), including the requirements of "minimal diversity" and that aggregated claims must total more than $5,000,000. That said, there is no diversity jurisdiction over a class action in which greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the state in which the action was originally filed. Moreover, district courts may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction over a class action matter in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the state in which the action was originally filed based on an evaluation of the factors set forth in 28 U.S.C. § 1332(d)(3).

Two other types of removal that have been recognized as proper are "Federal Enclave" jurisdiction and "Federal Officer Removal." Federal Enclave jurisdiction is proper when the claim is based on events occurring in a federal enclave where state law has been federalized because in that instance, the suit necessarily arises under federal law and implicates federal question jurisdiction under Section 1331. *Jones v. John Crane-Houdaille, Inc.*, 2012 U.S. Dist. LEXIS 48931 (D. Md. Apr. 6, 2012); *see also JAAAT Tech. Serv., LLC v. Tetra Tech. Tesoro, Inc.*, 2016 U.S. Dist. LEXIS 41946 (E.D. Va. Mar. 29, 2016) (applying Federal Enclave jurisdiction). Federal Officer removal, based on 28 U.S.C. § 1442(a)(1)), comes into play when the defendant is a federal officer or someone working under a federal officer. In these circumstances, federal court jurisdiction is proper. *County Bd. of Arlington Cnty. v. Express Scripts Pharm., Inc.*, 996 F.3d 243 (4th Cir. 2021) (upholding removal under federal officer removal statute); *Ripley v. Foster Wheeler LLC*, 841 F.3d 207 (4th Cir. 2016) (government contractor defense may provide basis for removal under federal officer removal statute, i.e., where defender is a federal officer or a person acting under that officer, asserting a colorable federal defense, and the suit is for an act under color of office).

Removal: Procedural and Other Miscellaneous Issues

Procedurally, a defendant must file notice of removal within 30 days of formal service of both the summons and complaint. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48 (1999) (sending courtesy copy of complaint by fax does not sufficiently provide notice of removability so as to start running of 30-day period for filing notice of removal). See also, *Barbour v. Int'l Union*, 594 F.3d 315 (4th Cir. 2010) (last-served defendant has 30 days to remove). That said, removal based on diversity cannot occur more than one year after the date of filing, unless removal was obstructed by the plaintiff's bad faith.

Removal also generally requires consent from all properly joined and served defendants. Each party need not file a paper indicating consent. Rather, the party filing the removal paperwork may state in the Notice of Removal that all properly joined and served defendants consent is sufficient. "We can see no policy reason why removal in a multiple-defendant case cannot be accomplished by the filing of one paper signed by at least one attorney, representing that all defendants have consented to the removal." *Mayo v. Bd. of Educ.*, Nos. 11-1816, 11-2037 (4th Cir. Apr. 11, 2013); Hartford Fire, 736 F.3d at 259 ("the consent of a nominal or formal party is not required to properly remove a case."). Importantly, not all circuits follow this approach, and some may require consent in writing from other defendants. Moreover, consent of fraudulently joined parties is not necessary. *Richardson v. Phillip Morris, Inc.*, 950 F. Supp. 700, 701 n.1 (D. Md. 1997).

Removal: Remand

A plaintiff who contends that removal is improper may seek to have the matter remanded to state court. If the challenge to removal is procedural, the defect must be raised within a 30-day window. *Cooke-Bates v. Bayer Corp.*, 2010 WL 3984830 (E.D. Va. 2010) (on motion for reconsideration, court held that failure of all defendants to consent to remove is a procedural defect, which cannot be the basis of a trial court's sua sponte remand order). If the defect to removal is based on the subject matter jurisdiction, the 30-day time limit does not come into play. "Subject-matter jurisdiction cannot be conferred by the parties, nor can a defect in subject-matter jurisdiction be waived by the parties. Accordingly, questions of subject-matter jurisdiction may be raised at any point during the proceedings and may (or, more precisely, must) be raised sua sponte by the court." *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 390 (4th Cir.2004) (en banc) (citation omitted). In fact, a motion to remand on the basis of lack of subject matter jurisdiction can be granted anytime, even sua sponte by a court of appeals (but trial court cannot sua sponte raise motion to remand for procedural defect). *See Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 198 (4th Cir. 2008).

While removal and remand can sometimes be hotly litigated at the trial court level, under 28 U.S.C. § 1447 (d), an order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the state court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise. This concept is, however, not absolute. *See BP, PLC v. Mayor of Baltimore*, 141 S. Ct. 1532 (2021) ("Since at least 1949, federal appellate courts have generally lacked the power to review a district court order remanding a case to state court. . . . But like most rules, this one has accrued exceptions with time. . . In the Civil Rights Act of 1964, Congress created an exception allowing appellate review for cases "'removed pursuant to'" 28 U. S. C. §1443, a provision that

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guarantees a federal forum for certain federal civil rights claims. . . . In 2011, Congress added a similar exception for suits against federal officers or agencies removed pursuant to 28 U. S. C. §1442. . . . The Fourth Circuit erred in holding that it was powerless to consider all of the defendants' grounds for removal under §1447(d).").

Generally as well, the right to remove a case is not waived if filed within the proper time frame. *Haak Motors LLC v. Arangio*, 670 F. Supp. 2d 430, 433 (D. Md. 2009) (filing general denial and affirmative defenses is not waiver, nor is reserving the right to amend answer). *Mansfield v. Anesthesia Associates, Ltd.*, 1:07CV941 (JCC), 2007 WL 4531948, at *3 (E.D. Va. Dec. 18, 2007) (filing demurrer in state court is not a waiver of right to remove). *Abraham v. Cracker Barrel Old Country Store, Inc.*, 3:11CV182-HEH, 2011 WL 1790168, at *5 (E.D. Va. May 9, 2011) (filing a motion to dismiss for improper venue and/or its objections to venue, answer, and grounds of defense, and prayer for jury trial in state court eight days before filing notice of removal is not waiver of right to remove). That said, a defendant, under extreme situations, can be found to have waived the right to remove by taking "substantial defensive action in state court before petitioning for removal" if the defensive action must demonstrate Defendant's "clear and unequivocal" intent to remain in state court. *Aqualon Co. v. Mac Equip., Inc.*, 149 F.3d 262, 264 (4th Cir. 1998); *Bryfogle v. Carvel Corp.*, 666 F. Supp. 730, 733 (E.D. Pa. 1987) (same).

Transfer of Venue (Federal and State)

For cases that were originally filed in federal court, but filed in an improper state or federal district, defendants also have the more limited remedy of seeking to transfer venue to a more appropriate district. Likewise, for defendants sued in state court, but in an improper county, a similar remedy exists.

For federal court individual cases, general transfer of venue is governed by 28 U.S.C. § 1404 entitled Change of Venue. Under that section, a district court may transfer any civil action to any other district or division where it might have been brought for the convenience of parties and witnesses, in the interest of justice, or to any district or division to which all parties have consented. Similarly, in multidistrict litigation under 28 U.S.C. § 1407(a), "when civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."

These same standards apply to most state court litigation as well. In *Maryland, Md. Rule 2-327(c):* Convenience of the Parties and Witnesses provides, "On motion of any party, the court may transfer any action to any other circuit court where the action might have been brought if the transfer is for the convenience of the parties and witnesses and serves the interests of justice." Similarly, in Washington, DC, D.C. Code § 13–425, entitled Inconvenient Forum, provides, "When any District of Columbia court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss such civil action in whole or in part on any conditions that may be just." Likewise, in Virginia, Va. Code § 8.01-265 permits a court to dismiss an action brought by a person who is not a resident of the Commonwealth without prejudice under such conditions as the court deems appropriate if the cause of action arose outside of the Commonwealth and if the court determines that a more convenient forum which has jurisdiction over all parties is available in a jurisdiction other than the Commonwealth or transfer the action to any fair and convenient forum having jurisdiction within the Commonwealth.

Given the disparity in jury pools and judges, venue remains highly contested in many cases. As a result, there is a wealth of recent local case law which provides a road map for successful motions to transfer venue. *See Univ. of Md. Med. Sys. Corp. v. Kerrigan*, 456 Md. 393, 174 A.3d 351 (2017); *Walker v. Seton Med. Grp., Inc.*, No. 0620, 2021 Md. App. LEXIS 556 (App. July 7, 2021); *Rosenthal v. Rosenthal*, No. 2312, 2021 Md. App. LEXIS 495 (App. June 11, 2021); *Loeffler v. Loeffler*, No. 491, 2021 Md. App. LEXIS 493 (App. June 10, 2021); *Garcia v. AA Roofing Co., LLC*, 125 A.3d 1111, 1114 (D.C. 2015) ("The purpose of the doctrine of forum non conveniens . . . is to avoid litigation in a seriously inconvenient forum, rather than to ensure litigation in the most convenient forum." *Hechinger Co. v. Johnson*, 761 A.2d 15, 20 (D.C. 2000) (emphasis in original) (internal quotation marks omitted)); *Mills v. Aetna Fire Underwriters Ins. Co.*, 511 A.2d 8, 10 (D.C. 1986); *Future View, Inc. v. CritiCom, Inc.*, 755 A.2d 431, 433 (D.C. 2000)). *Medlantic Long Term Care Corp. v. Smith*, 791 A.2d 25, 32 (D.C. 2002); *Animal Outlook v. Cooke Aquaculture, Inc.*, 2021 D.C. Super. LEXIS 12; *TRG Customer Sols., Inc. v. Smith*, 226 A.3d 751 (D.C. 2020); *RMBS Recovery Holdings, I, LLC v. HSBC Bank USA, N.A.*, 297 Va. 327, 827 S.E.2d 762 (2019); *HSBC Bank USA, N.A. v. RMBS Recovery Holdings I, LLC*, No. 180557, 2018 Va. LEXIS 145 (Oct. 18, 2018); *Dinwiddie Dep't of Soc. Servs. v. Nunnally*, 288 Va. 214, 764 S.E.2d 526 (2014).

A key takeway from recent case law is that a successful Motion to Transfer Venue is based on a significant presentation of the facts to the trial court. Successful motions contain a detailed identification and description of the parties and witnesses via a comprehensive submission of affidavits. Additionally, supporting documentation should include data that also addresses public policy and other public interest factors which support transfer. This data can include but should not be limited to the burden on the court system.

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Pre-Litigation Options: Forum Selection Clauses and Arbitration

Given the inherent challenges to defendants that exist simply because the plaintiff is the party initiating litigation, it is important to consider the potential for litigation when transacting business and negotiating contracts and business relationships. Two avenues that should be considered in every transaction are forum selection clauses and arbitration provisions.

At a basic level, a forum selection clause is a contractual clause that requires suit to be filed in a particular court or federal district. Historically, forum selection clauses were not favored by American courts; however, this changed beginning with *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 32 L. Ed. 2d 513, 92 S. Ct. 1907 (1972). After *The Bremen*, states, too, have concluded that forum selection clauses can be enforceable. *Gilman v. Wheat, First Sec., Inc.*, 345 Md. 361, 378-79, 692 A.2d 454 (1997); *Peterson v. Evapco, Inc.*, 238 Md. App. 1, 188 A.3d 210 (2018); *Forrest v. Verizon Communs., Inc.*, 805 A.2d 1007, 1009-10 (D.C. 2002) (adopting The Bremen and RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1988); *Paul Bus. Sys., Inc. v. Canon U.S.A., Inc.*, 240 Va. 337, 397 S.E.2d 804 (1990) (relying upon *The Bremen*).

A review of the various jurisdictions' case law shows that (1) forum-selection clauses are presumptively valid and enforceable and the party resisting it has the burden of demonstrating that it is unreasonable; (2) a court may deny enforcement of such a clause upon a clear showing that, in the particular circumstance, enforcement would be unreasonable; and (3) the clause may be found to be unreasonable if (i) it was induced by fraud or overreaching, (ii) the contractually- selected forum is so unfair and inconvenient as, for all practical purposes, to deprive the plaintiff of a remedy or of its day in court, or (iii) enforcement would contravene a strong public policy of the state where the action is filed. *Peterson, supra*. Further, one who challenges a forum-selection clause must show (1) that consent was obtained through fraud; (2) that requiring the challenger to defend the action in the chosen forum would be so unfair as to deprive him of a remedy or deprive him of his day in court; or (3) that enforcement of the forum selection clause would violate a strong public policy of the state where the action was filed. *Parker v. K&L Gates, LLP*, 76 A.3d 859, 866 (D.C. 2013).

A business may determine that it prefers arbitration to litigation in court. There has been much written about both the benefits and drawbacks to arbitration, and this article is not intended to provide a comprehensive analysis of these issues. What is important for this article, however, is that if your businesses wishes to arbitrate a potential dispute, in most cases, an arbitration clause will be enforced. For example, in Maryland, arbitration is a matter of contract. Maryland uses contract principles to determine whether an agreement to arbitrate exists. *Ford v. Antwerpen Motorcars Ltd.*, 443 Md. 470, 477, 117 A.3d 21 (2015) (citations omitted). When a contract's language is unambiguous, Maryland courts give effect to its plain meaning without considering what the parties intended. *Rourke v. Amchem Prods., Inc.*, 384 Md. 329, 354, 863 A.2d 926 (2004) (citation omitted). Therefore, only "the intention of the parties as expressed in the language of the contract controls the analysis." *Antwerpen*, 443 Md. at 477.

Both the District of Columbia and Virginia view arbitration clauses in a substantially similar fashion. In the District of Columbia, there is a strong presumption in favor of enforcing arbitration agreements under both federal and DC law. Indeed, courts in the District of Columbia are statutorily required to "summarily...decide the issue [of arbitrability] and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate." D.C. Code Ann. § 16-4407; *Masurovsky v. Green*, 687 A.2d 198, 205 (DC 1996); Adamovic v. METME Corp., 961 F.2d 652, 654 (7th Cir. 1992)). *TM Delmarva Power v. NCP of Virginia*, 263 Va. 116, 557 S.E.2d 199 (2002); *Doyle & Runell, Inc. v. Roanoke Hospital Association*, 213 Va. 489, 494, 193 S.E.2d 662 (1973); *see also* Va. Code § 8.01-581.01.

Arbitration is not without its limits. There are times when a dispute is either not covered by an arbitration clause or there may be an issue of whether public policy prevents arbitration. For example, the question of whether arbitration clauses can be enforced in the health care context, the employment law context, or a fee dispute between a client and a lawyer are the types of matters in which there may be a public policy issue. Similarly, there may be a question of whether the particular cause of action is covered by the arbitration clause. These are fact-specific inquiries for a particular case. Finally, while a contract may contain an arbitration provision, a party who fails to assert the arbitration clause at the outset of a dispute can waive its right to compel arbitration. *Cain v. Midland Funding*, 452 Md. 141, 155, 156 A.3d 807, 815 (2017).

In the event your company is faced with litigation over a dispute where the contract contains an arbitration provision, the proper responsive pleading is a Motion to Dismiss or to Compel Arbitration because the remedy is a dismissal for lack of subject matter jurisdiction. *Jahanbein v. The Ndidi Condo. Unit Owners Ass'n, Inc.*, 85 A.3d 824, 831 (D.C. 2014) (upholding trial court's dismissal for lack of subject matter jurisdiction). As with Motions to Transfer Venue, the determination of whether arbitration should be compelled is a fact-based inquiry into the plain language of the contract, the intent of the parties, and the circumstances surrounding the execution of the contract. We have found that presenting evidence in addition to legal argument significantly increases the likelihood of a successful Motion to Dismiss or to Compel Arbitration.

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Conclusion

While it is impossible to remove the uncertainty of litigation, businesses have tools available to limit risk and uncertainty. These tools include forum selection clauses and arbitration clauses. In addition, businesses can move quickly at the outset of litigation to counter forum shopping by opposing parties. We urge our clients to be forward thinking and consider all options available as the best outcomes in cases come from overall strategic evaluation of all potential case issues, not just those that are based on the actual facts of the dispute.

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