

# Litigation Trends in Florida

*ACC South Florida's 13th Annual CLE Conference*

*Presented by*

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# Tort Reform

George G. Mahfood

# Recent Trends In Florida Litigation 2023

## Tort Reform

- Statute Of Limitations For Negligence Reduced To 2 Years
- Comparative Fault Revised To Bar Claims Where Plaintiff Is Found To Be More Than 50% At Fault Except In Medical Negligence Cases
- Insurance Bad Faith Cases – Negligence Alone Is Not Enough
- Insurance Bad Faith Cases - Increases Safe Harbor Period To 90 Days from Notice To Tender Lessor Of Policy Limits Or Amount Demanded

# Recent Trends In Florida Litigation 2023

## Tort Reform

- If Two Or More Claimants Have Claims Arising From A Single Occurrence Allows Insurer To File Interpleader And Pay Policy Limits Into Court Registry
- Attorneys' Fees – Plaintiffs' Lawyers Fees Provision Does Not Now Apply To Underinsured Motorist Coverage And Property Insurance Claims
- Evidence Of Medical Expenses – Proof Of Actual Amount Paid, Not Amount Billed Is Required For Admissibility

# Recent Trends In Florida Litigation 2023

## Tort Reform

- Letters Of Protection Are Now Required To Be Offered Plus Itemization Of Bill For All Med Expenses And Identity Of Any Factoring Company Involved
- Premises Liability – Fault Of Criminal Wrongdoer Must Now Be Factored Into Property Owners Share Of Liability
- Contingency Based Fees Will Generally Not Be Subject To Multipliers Of Attorney Lodestar Time



# Non-Compete Agreements

George G. Mahfood

# Recent Trends In Florida Litigation 2023

## Non-Compete Agreements

- FTC Proposed Rule Making Would Make Non-compete Agreements Unenforceable
- Non-compete Agreements Are Unfair Method Of Competition
- Existing Non-compete Agreements Would Have To be Rescinded When Rule Compliance Date Occurs (180 Days After Publication Of Final Rule)

# Recent Trends In Florida Litigation 2023

## Non-Compete Agreements

- Notice Of Rescission Must Be Given To Worker
- Exception To Rule For Seller All Or Substantially All Of Business Assets
- Rule Would Supercede State Laws
- FTC Vote Has Apparently Been Put Off Until April 2024



# Recent Trends In Florida Litigation 2023

## Non-Compete Agreements

- Florida Courts Are Enforcing Non-compete Agreements Using Standards Developed Under Fla. Stat. 542.335
- *Bahia Bowls Franchising LLC v. DJS LLC*, 2023 WL 2303048 (MD Fla. Mar. 1, 2023)
  - Court enforced restrictive covenant for operating competing business for two years within 25 miles to protect trademarks, trade secrets, trade dress, goodwill, and confidential information.
  - *Lincare, Inc. v. Markovic*, 2022 WL 18927111, (MD Fla. Nov. 17, 2022)
    - Court enforced restrictive covenant for working for a competitor. The agreement had no time frame, so the court imposed a one-year time period pursuant to Fla. Stat. 542.335(1)(c).

# Recent Trends In Florida Litigation 2023

## Non-Compete Agreements

- Florida Courts Are Closely Scrutinizing The Legitimate Business Interests Component Of The Statute And In Some Instances Declining To Enforce The Non-compete Agreement
- *Blue-Grace Logistics LLC v. Fahey*, 2023 WL 424285 (MD Fla. Jan. 26, 2023)
  - Restrictive covenants unenforceable for lack of legitimate business interests – information stored by employer from a third party was not confidential, historical records and notes stored by employer were out of date or freely available
- *Vessels v. Dr. Terrazzo of Florida, LLC*, 352 So.3d 946 (Fla. 5<sup>th</sup> DCA Dec. 22, 2022)
  - Employer did not provide extraordinary or specialized training in terrazzo restoration, as required to prove a legitimate business interest.



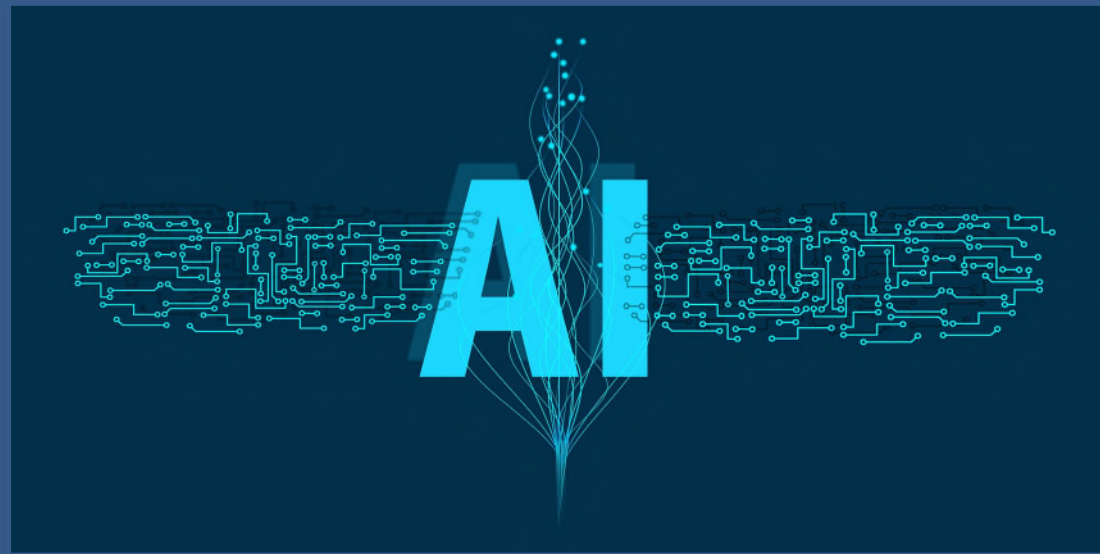
# Artificial Intelligence

Christina Lehm

# What is AI?

In the National Artificial Intelligence Initiative Act of 2020, Congress defined “AI” to mean:

“a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.”



Source: <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>

# How AI is Used in the Employment Process

Employers rely on software with algorithmic decision-making at several stages of the employment process.

Examples include:

- resume scanners that prioritize applications using certain keywords;
- employee monitoring software that rates employees on their keystrokes or other factors;
- “virtual assistants” or “chatbots” that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements.



Source: <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>

# Artificial Intelligence and Algorithmic Fairness Initiative

EEOC considers the use of AI and automated systems to be

“a new civil rights frontier.”



Source: <https://www.eeoc.gov/ai>

<https://www.eeoc.gov/laws/guidance/select-issues-assessing-adverse-impact-software-algorithms-and-artificial>

# Violations:

The employer relies on an algorithmic decision-making tool that intentionally or unintentionally “screens out” an individual with a disability, even though that individual is able to do the job with a reasonable accommodation.

**Example:** If a particular applicant had a gap in employment, and if the gap had been caused by a disability (for example, if the individual needed to stop working to undergo treatment), then the chatbot may function to screen out that person because of the disability.

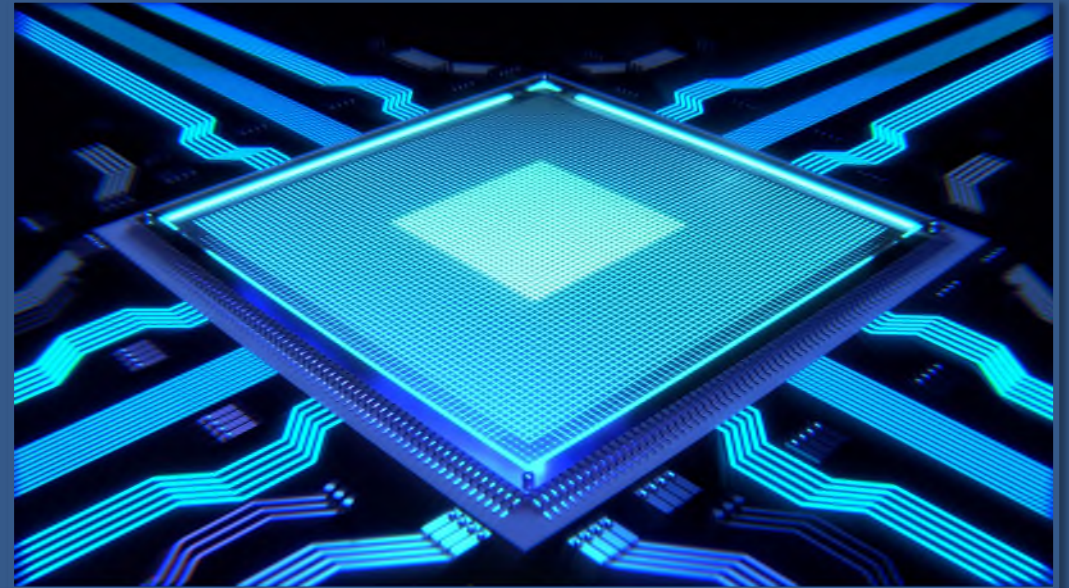


Source: <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>

# Liability for Vendors' Use of Algorithmic Decision-Making Tools

If an employer administers a pre-employment test, it may be responsible for ADA discrimination if the test discriminates against individuals with disabilities, even if the test was developed by an outside vendor.

In addition, employers may be held responsible for the actions of their agents, which may include entities such as software vendors, if the employer has given them authority to act on the employer's behalf.



Source: <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>



# EEOC Settlement:

Tutoring company settles with the EEOC over allegations that it programmed its AI-based recruitment software to be biased:

The software allegedly automatically rejected applicants who were:

- women over 55, and
- men over 60

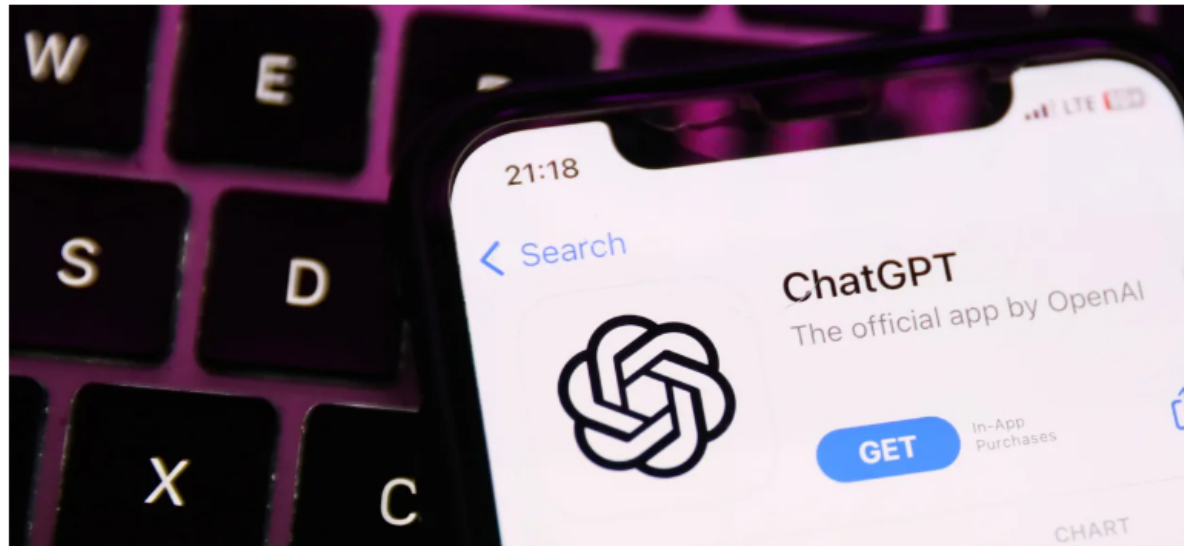


Source: EEOC v. iTutorGroup Inc., No. 22-cv-02565, E.D.N.Y.

# Hallucinations:

## AI tools make things up a lot, and that's a huge problem

By Catherine Thorbecke, CNN  
Published 2:35 PM EDT, Tue August 29, 2023



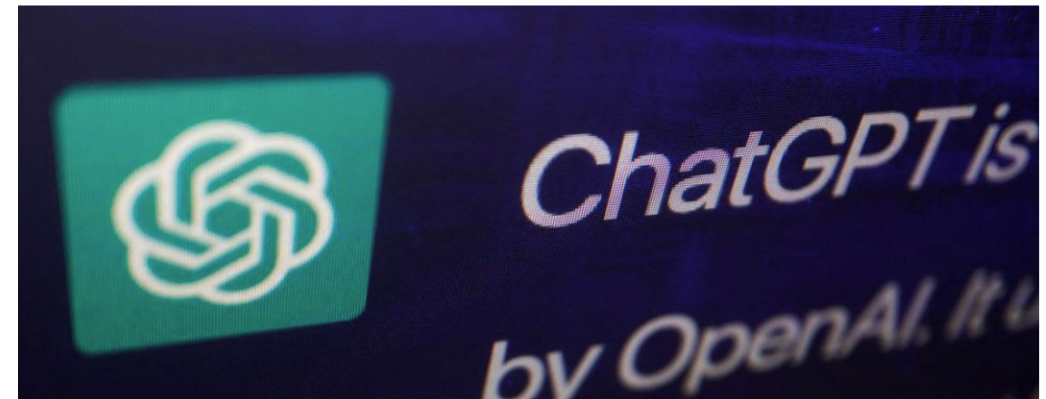
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Disrupted

## New York lawyers sanctioned for using fake ChatGPT cases in legal brief

By Sara Merken

June 26, 2023 4:28 AM EDT · Updated 3 months ago



# Questions to Ask Outside Counsel and Vendors:

- What guard rails are in place to avoid hallucinations?
- Is the AI model being trained on the company's data and what data security measures are used to protect the data?
- Intellectual property ownership of materials created by the use of AI
- Bias/fairness: Is a software vendor's algorithmic decision-making tool developed with individuals with disabilities in mind?



# Crypto Currencies / Private Litigation and Enforcement

Dan Newman

# Recent trends in Florida litigation: Crypto currencies / Private litigation and enforcement

- Today, there are 18,142 cryptocurrencies, 460 crypto-exchanges and the market cap of cryptocurrencies amounts to \$1.7 trillion. Every 24 hours, \$91 billion worth of cryptos are traded, most of them Bitcoin or Ethereum.
- The SEC has remained aggressive in bringing enforcement actions –
  - **In 2022, SEC filed 30 crypto-related enforcement actions**
    - 14 of them were related to initial coin offerings and 57% of those included fraud allegations
    - 73% of the actions alleged unregistered securities offerings in violation of Sec. 5(a) and 5(c)
    - 70% alleged fraud under Section 17(a) of the Securities Act, or Section 10(b) and Rule 10b-5 of the Exchange Act
    - 50% alleged both unregistered securities offerings and fraud.

# SEC v. Ripple

- **SDNY Granted Summary Judgment Finding Institutional Sales of XRP Were Unregistered Securities Sales**
  - “Even if XRP exhibits certain characteristics of a commodity or a currency, it may nonetheless have been offered or sold as an investment contract.”
    - Sales to Institutional buyers were sales of investment contracts under Section 5 because the purchase involved (1) a payment of money, (2) into a common enterprise with horizontal commonality, (3) the economic reality surrounding the sales led buyers to have a reasonable expectation of profits to be derived from the entrepreneurial/managerial efforts of others (Ripple’s communications, marketing efforts, and details of the transaction led to this belief).
    - Sales of XRP on digital asset exchanges amounted to sales to a secondary market purchaser (blind bid/ask transactions) and not investment contracts under Section 5.
      - Distributions of XRP to employees as compensation and third parties through funding initiatives also not investment contracts under Section 5 because no “investment of money”
    - Individual officers’ offers and sales of XRP were programmatic sales on digital asset exchanges and therefore no reasonable expectation of profits being derived could be established.

# SEC v. Coinbase

- SEC charged Coinbase “**with operating its crypto asset trading platform as an unregistered national securities exchange, broker, and clearing agency,**”
  - Coinbase has made billions of dollars facilitating the buying and selling of crypto assets as part of investment contracts.
  - The SEC alleged, Coinbase serves as an unregistered exchange, broker, and clearing agency
    - **An unregistered broker**, including by soliciting potential investors, handling customer funds and assets, and charging transaction-based fees;
    - **An unregistered exchange**, including by providing a marketplace that, among other things, brings together orders of multiple buyers and sellers of crypto assets and matches and executes those orders;
    - **An unregistered clearing agency**, including by holding its customers’ assets in Coinbase-controlled wallets and settling its customers’ transactions by debiting and crediting the relevant accounts.
    - **Unregistered Offer and Sale of Securities** in Connection with Staking-as-a-Service Program

# SEC v. Binance

- The SEC alleged Defendants **unlawfully solicited U.S. investors to buy, sell, and trade crypto asset securities through unregistered trading platforms available online at Binance.com and Binance.US.**
  - Binance and BAM Trading have **unlawfully engaged in unregistered offers and sales of crypto asset securities, including Binance’s own crypto assets called “BNB” and “BUSD,” as well as Binance’s profit-generating programs called “BNB Vault” and “Simple Earn,” and a so-called “staking” investment scheme available on the Binance.US Platform.**
- Defendants **failed to restrict U.S. investors from accessing Binance.com**
  - “The complaint alleges that...behind the scenes, Zhao directed Binance to allow and conceal many high-value U.S. customers’ continued access to Binance.com. In one instance, the Binance chief compliance officer messaged a colleague that, ‘[w]e are operating as a fking unlicensed securities exchange in the USA bro.’”



# Florida Regulation

- HB 273 (effective 1/1/2023) imposes a license requirement on transmitters transacting business involving virtual currency
  - Virtual currency is defined as “a medium of exchange in electronic or digital format that is not currency”
  - This law also requires the transmitter to hold virtual currency of the same type and in the same amount until transmission is complete.
- Florida Governor Ron DeSantis signed SB 7054 into law to prohibit the use of a federally adopted Central bank digital currency (CBDC) by excluding it from the definition of money within Florida’s UCC.

# ESG Policy for Public Companies

- In Florida, Governor Ron DeSantis signed into law a bill designed to block the consideration of ESG factors in investment decisions.
  - In requiring that investment decisions (and proxy voting decisions) for state pension assets be made on the basis of “pecuniary factors” only.
  - A pecuniary factor does not include “the consideration of the furtherance of any social, political, or ideological interests.”
- SEC adopted a new rule aimed at preventing investment companies from using misleading names to market their funds to investors. - Prevent use of deceptive names (Greenwashing)
- SEC Enforcement action related to ESG Issues against Goldman Sachs Asset Management in Nov. 2022.
  - Failure to have policies and procedures for ESG research and failure to follow once established

# SEC Regulation of Earnings Management

- Recent SEC Enforcement Activity Reaffirms Focus on Improper Earnings Management.
- The SEC initiative, launched a few years ago, reviews earnings per share for the majority of U.S. public companies to spot questionable reported figures. The team working on this is part of the SEC's enforcement division and uses analytics and has built a database to try to pinpoint potential manipulators of EPS, the commonly used measure of a company's financial performance.
- Atlanta-Based Pest Control Company and Former CFO Charged with Improper Earnings Management by engaging in improper accounting practices in order to boost the company's publicly reported quarterly earnings per share ("EPS") to meet research analysts' consensus estimates.
- Companies should
  - pay close attention to the data and metrics used
  - document their accounting judgments; and
  - ensure compliance with their disclosure controls and procedures.

# Private Litigation

- In the first nine months of 2022, more than half of suits filed against crypto companies were class actions.
  - Most of which arose out of alleged violations of securities regulations and consumer protection statutes.
- Although New York and California are the hubs for crypto-related litigation (representing 70% of the cases filed through September 2022), Florida follows in No. 3 of number of crypto-related actions by state.
- In 2022, the number of cases arising under securities laws decreased, while the number of cases arising under tort, contract, and consumer protection claims increased.
- What the “Ripple” approach may mean for class actions
  - Though the question of whether there was an investment contract, and therefore a transaction involving a security, is fact-specific, Judge Torres’ approach in Ripple suggests that federal securities laws do not attach to retail investor purchases of tokens from unknown sellers on crypto exchanges (as opposed to the institutional investor with reasonable expectations).
    - This could make it harder for plaintiffs to get a class certified under federal securities laws claims.



# White Collar Crime Investigations and Litigation

Dan Newman

# Recent trends in Florida litigation: White collar crime investigations and litigation

- DOJ leadership has made explicit its intent to prioritize the investigation and prosecution of financial and corporate malfeasance. Overall, the DOJ's memorandums on corporate criminal enforcement signal towards more robust regulation and enforcement, with greater incentives for corporate cooperation.
  - In a 2021 Memorandum, the DOJ announced four major revisions
    - Creation of a Corporate Crime Advisory Group tasked with reviewing the department's approach to prosecuting criminal conduct by corporations and their executives, management, and employees.
    - Prosecutors must consider the entirety of a corporation's record of past misconduct as indicative of whether a company lacks the appropriate internal controls and whether remediation or compliance programs would succeed if implemented.
    - To qualify for cooperation credit, a corporation must provide the Department all the relevant facts related to an individual's conduct – meaning all nonprivileged relevant information. Companies may not limit their disclosure to those individuals they believe to be substantially involved.
    - Streamlined guidance for imposition of a monitor as part of resolution of a corporate matter. Monitors should be imposed where there is a demonstrated need for, and clear benefit to be derived from, a monitorship.

# Then, in 2022, the DOJ issued a new memorandum with additional revisions – (2022 Memo)

- To qualify for cooperation credit, disclosure of all relevant facts must be produced in a timely fashion – any undue or intentional delay will result in reduced or eliminated credit.
- Prosecutors should consider several factors when deciding whether to delay prosecution in their jurisdiction due to ongoing prosecution in a foreign jurisdiction.
- All components of the DOJ that prosecute corporate crime will create a policy that incentivizes voluntarily self-disclose of misconduct by corporations.
- Prosecutors should evaluate a corporation’s compliance program holistically, not just based on the compliance department. This should include whether the corporation employs compensation structures that promote compliance and their policies regarding the use of personal devices and third-party applications.
- Department offices must establish (if it does not already have one) a process for selecting a monitor.
- Agreements to resolve corporate criminal liability should include an agreed-upon statement of facts outlining the relevant criminal conduct, and a statement of relevant considerations that explains the department’s reasons for entering into the agreement.

# Recent trends in Florida litigation: White collar crime investigations and litigation

- The DOJ has focused its hiring and requests for additional resources on targeting financial and anti-corruption efforts, including specific initiatives such as Covid fraud, kleptocracy, cryptocurrency, and cyber-fraud enforcement.
- Some recent charges and convictions filed by the U.S. Attorney's Office for the Southern District of Florida
  - Former Company CEO Charged in Alleged MJ Capital Funding, LLC Ponzi Scheme totaling approximately \$190.7 million
  - Local Man Charged with Fraudulently Obtaining More Than \$500,000 in COVID-19 Relief Funds
  - Former Lawyer Pleads Guilty to Wire Fraud in West Palm Beach Federal Court involving the defrauding of clients and friends to the tune of approximately \$7 million.
  - Former Chairman of 1 Global Indicted for Running \$250 Million Securities Fraud Scheme.
  - Coral Springs Man Charged with Operating \$100 Million Ponzi Scheme Through His Trucking Company.
  - Forty-One year old been sentenced in federal district court to 24 months in prison followed by five years of supervised release for bank and wire fraud as part of a scheme to defraud the Paycheck Protection Program (PPP) out of loan proceeds.



# Presenters



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