

In-House Counsel

FALL 2022

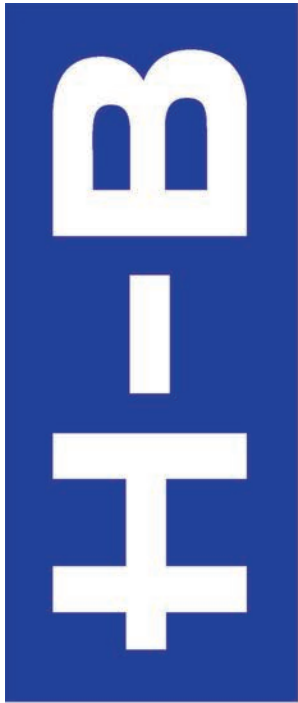
THE SOCIAL RESPONSIBILITY

HOW SOCIAL MEDIA HAS CHANGED THE
LEGAL PLAYING FIELD

MAJOR OPINIONS

APPELLATE COURTS SEE 'DIP' IN CASELOADS
FROM THE PANDEMIC



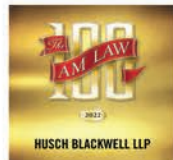


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CORPORATE COUNSEL IN THE NEWS

PALMER-EASON JOINS HEARTLAND COCA-COLA

Ramona G. Palmer-Eason has joined Heartland Coca-Cola Bottling as general counsel.

Palmer-Eason, previously of Armstrong Teasdale, brings over 20 years of legal experience, which includes legal counsel in

private practice, government practice and corporate practice. She will serve as the primary legal counsel for Heartland and as an advisor to the company's senior executives.

She earned her law degree from Drake University in 1996.

FINANCE COMPANY PREVAILS IN DISPUTE OVER CAR'S TITLE

By David Baugher

Special to Missouri Lawyers Media

A dispute over a car sale gone sour resulted in arbitration and an eventual judgment for the finance company.

According to attorney Phillip Raine of Knight Nicaastro McKay, much of the case revolved around the issuance of title for the vehicle, a decade-old Lexus purchased in Blue Springs in 2015. Raine's client, Westlake Services, ultimately repossessed the car and filed suit against buyer Danielle Williams in 2020.

Williams counterclaimed that she had not received proper title in a timely fashion and that Westlake "knowingly threatens and otherwise forces consumers who it knows did not receive titles to pay on the void installment sale contracts by falsely

informing the consumers that they are still obligated to pay on the contracts," according to her filing with the arbitrator.

In arbitration, the parties were reversed and Williams became the plaintiff.

Raine said that Williams signed a piece of paper indicating she'd received title.

"During discovery, we found out that she actually had a copy of the title but she was saying that she couldn't ever register it because the DMV was telling her there was some issue with the lienholder on it," he said. "Nobody could ever quite figure out what the issue was."

Williams alleged violations of Missouri merchandising practices laws and proposed a class action in the matter, requesting compensatory and punitive damages exceeding \$1.1 million.

Arbitrator Arlander Keys found in favor

of Westlake, noting that "the Claimant's testimony suffers from serious questions" and saying that Williams frequently answered "I don't remember" on various points. The arbitrator outlined a number of areas where he felt testimony was inconsistent or lacking and indicated evidence that Williams had received a wide array of documentation.

"It is implausible that the dealer would give all the other documents necessary to complete the transaction to Claimant and forward them to Respondent but fail to give her the Title," he wrote.

Keys also awarded \$8,460.39 to Westlake reflecting the amount still due under the contract.

Scott Waddell of Waddell Law Firm, an attorney for Williams, did not return a request for comment.

ARBITRATOR AWARDS DAMAGES FOR FAULTY FARM BUILDINGS

By David Baugher

Special to Missouri Lawyers Media

A Newton County farmer has been awarded more than \$600,000 in damages through arbitration in a dispute over the construction of several houses for the raising of chickens.

"Almost from the start, he started experiencing problems not only with the equipment but with the buildings themselves," said Russ Schenewerk of Schenewerk & Williams.

Due to a contract clause, arbitration was eventually ordered in the case filed by Brandon Keeling against Preferred Poultry Supply which built six semi-automated structures to house his birds under a contract worth more than \$2 million.

But Keeling's petition alleged a wide variety of difficulties with the finished

product including incorrect exhaust fans and improperly installed wiring, pumps, doors and feeding equipment.

Schenewerk also said that the buildings were leaning and attempts by the company's representatives failed to correct the ongoing issues.

He said the defense claimed that problems related to site preparation were the responsibility of the client and that the claimant's use of the buildings constituted acceptance of the work.

"The trouble is that you can't tell that the house is in a good working order until you have birds in there," Schenewerk said. "The arbitrator, I think, understood that."

Arbitrator James Lawson agreed with Preferred Poultry that site compaction and soil creep, two of the three factors making the buildings out of plumb were

the claimant's responsibility but that a third factor — improper post imbedding — fell under the respondent's purview. He granted a third of the claimed damages on that point.

However, most of the total award came in regard to the electrical issues. Lawson rejected the respondent's argument that any award would be speculative because it was only based on the potential for damages that might arise later.

However, the arbitrator did reject Keeling's attempt to recover on a series of invoices and repair orders which related to attempts to correct problems. He also turned away claims for negligence, negligent misrepresentation and breach of express warranty.

Schenewerk said that he is now engaged in post-judgment collection activity to enforce the award.

DON'T STOP AT PATENTS! - CONSIDER THE ENTIRE IP TOOLBOX TO BEST PROTECT YOUR COMPANY'S INTELLECTUAL CROWN JEWELS

When many companies consider protecting a new product line (or a newly acquired one), they automatically start (and stop) thinking of intellectual property (IP) protection by thinking "get a patent". And patents should almost always be a major tool to consider in a company's IP Toolbox as it is quite literally the most powerful economic tool in the free world. A well-written U.S. patent can be an absolute government-sanctioned monopoly allowing small and medium-sized companies to stand up toe to toe with the big boys of commerce in their field for up to twenty years.

Also, if fully calculated in terms of economic power, the cost of obtaining a U.S. patent (especially compared to elsewhere around the globe) is a substantial bargain, a real winner of a "bang for your buck" - again, if it's description and claims are crafted to give meaningful protection for your products or processes.

Moreover, once patent protection is established (to a certain extent, even applied for), there is no need to worry about keeping your innovation secret. In fact, your patent will be published to the world and in most instances, you are required to mark your covered products, either literally or virtually, to provide notice to the world that you have obtained patent protection.

But, given their obvious attraction, why stop your IP deliberations at the patent waterline? Many economically valuable innovations simply can't be patented. For example, there are growing numbers of areas that the Supreme Court and other federal courts have carved out as exceptions to patent protection. Prime examples are many areas of process innovation; business methods and even diagnostic techniques. Even the field of computer and digital software must be looked at to see if patent claims can be crafted in such a way as to pass muster at the USPTO.

Additionally, while "up to twenty years" of patent protection may seem quite long, it is nonetheless time-limited, and the public disclosure of the patent may make your innovation a prime target for competition. Competitors can use the public disclosure as a road map for designing around your issued patent claims and to evade enforcement of your monopoly.

Moreover, many innovations, such as a company's insider information on making a competitively better product or service, may simply be more valuable as company secrets than splashed across the USPTO's Patent Gazette for all to see.

Thus, your company should always look at trade secret IP protection as a possible alternative to, or better yet, an add on IP to strictly relying just on patents alone. To make a finer point, where appropriate, the most significant advantage of trade secrets is that they need never die. Just ask the folks at Coca-Cola® who recently celebrated the 130th anniversary - or the equivalent of at least 6 and ½ patent lives and ticking on - of their "secret formula" for making their highly valuable coke.

Of course, to be amenable to trade secret protection, your company must meet certain requirements. The principal requirements are: (1) the information to be deemed a trade secret is actually secret; (2) the information confers a competitive advantage, and (3) the information is subject to reasonable efforts to keep it secret. While the first two are somewhat no-brainers, number (3) can be slippery, and, in our opinion, should be a well-designed program entered into with the assistance of an experienced IP attorney. Unfortunately, once gone, trade secret protection can often not be recaptured. Thus, programs for their protection must be safeguarded, sometimes both

physically, but also with appropriate paperwork to prevent their walking out the door, e.g., with a former employee.

Trade secret protection also has limitations. If the trade secret can be reverse engineered by a competitor, for example based on your publicly available product, then the competitor is free to use the subject of the trade secret. In other words, trade secret protection protects against corporate espionage, not fair competition, and independent development. In contrast, a patent protects against competitors' infringing products even when such products are developed independently and/or without knowledge of your patent.

Another important tool in the IP tool chest to keep in mind, e.g., particularly where software innovation may be the key value proposition, is copyright



Harley Blosser



Clayton Zak

protection, or copyright coupled with either or both patent and trade secret protection. A major benefit of copyright protection is that it lasts so long - many decades at a minimum. Copyright protection is the most basic protection for software and will typically prevent a competitor from copying code for its own software. Copyright has limitations though in that it does not protect an underlying idea or information. Rather copyright just protects the expression of that underlying idea or information. A competitor who develops software that provides the same functions as your product with code that is not similar to yours (e.g., in another programming language, with different structure and/or syntax, etc.), does not infringe your copyright even though it accomplishes the same functions.

In order to get the most protection for a software related innovation, a combination of IP protection should be considered. This can also serve as a good example of how the different types of IP protection can be layered together. Taking software as an example, a copyright registration can be used to protect the expression of the code. This can be useful in protecting against direct copying. A patent can be

layered on to protect the functionality of the software innovation beyond the exact expression of the code found in the copyright. The patent can therefore provide protection for features coded for in a different manner by a competitor. The copyright registration still provides value though because in a direct copying situation a copyright registration is often simpler to enforce and a copyright registration provides additional value and tools (e.g., statutory damages which patents do not provide for).

Trade secret protection can also be used for software innovations in combination with other forms of IP protection. Typically, trade secret protection is not used in combination with copyright registration because the secret must, well, be kept secret, and copyright registration requires providing a copy of the code to the copyright office (with a somewhat complicated exception). However, an application for a patent essentially only requires a description that allows a person of skill in the art to make and use the invention. Depending on the type of software innovation, some related information may be held as a trade secret. For example, if the innovation is in providing a new type of functionality or process and later development is used to determine optimum values for the innovation (e.g., optimized coefficients for an algorithmic process), then a patent application can be filed for the overall process while the optimization (e.g., the values of the coefficients) is held as a trade secret. This allows for trade secret protection beyond the term of the patent while also providing the expanded protection of the patent during its lifetime.

As demonstrated by this example, the whole IP toolbox should always be considered when protecting an innovation. The different tools each have strengths and weaknesses and offer different, but often overlapping, protection. Getting the most effective protection for your innovation is a big job; one that more often than not requires more than one tool.

Beyond what we have mentioned in some detail here, there are other forms of IP that may be usefully employed in a "full-protection" package in order to maximize your company's competitive advantage. For example, you can also seek to protect your products' aesthetic (non-functional) features, and possibly some eye-catching product packaging features as well, through the use of our U.S. design patent system. Similarly, you will likely want to consider trademark and trade dress protection to protect your company's branding and developed good will in selling and marketing your key products and services. These latter IP protections are essentially unlimited in time, subject to simple renewal and/or continuous use requirements and can propel your products' primacy in the marketplace as the trusted originator well past the typical life of a U.S. patent.

Our bottom line take away for you from this article: consider all of your IP tools when deciding how to best protect your company's products and services, and your new innovations as to them as you move forward. It is rare that any two situations line up precisely the same. Therefore, fashioning your optimum IP set of solutions will just as likely vary in the tools employed as well.

SOCIAL RESPONSIBILITY: HOW SOCIAL MEDIA HAS CHANGED THE LEGAL PLAYING FIELD

By David Baugher

Landon Miller of the Faber Law Firm recalls a matter in which a client accused in an assault case found that there was video of the incident from a third party.

The videographer was the client's own girlfriend who shared the material on her social media.

"The prosecutor sends me screen captures of this girl's Snapchat story that was public and 500 people could see so somebody reported it and sent it to the prosecutor's office," said the Columbia lawyer.

It's becoming a common story. The rise of social media has created a dramatic expansion of the playing field for both the collection of evidence and its presentation to jurors as well as new issues for judges to grapple with regarding admissibility of a growing sea of personal information flowing freely across the Internet. In both the civil and criminal worlds, self-inflicted wounds by clients are becoming commonplace with a single critical post that can make or break a million-dollar matter or decide if someone goes home or to a jail cell.

Even after the incident, there can be problems with a party's public statements and how they might affect the outcome in a courtroom. With people addicted to constant sharing of every thought and feeling, can attorneys keep clients from musing online about the case?

"You can try," Miller chuckles. "You can sure try."

'It is out there'

Alan S. Mandel, a former president of the Missouri Association of Trial Attorneys puts it directly.

"In the proper circumstance, Facebook or social media posts could be devastating to a case," said the partner at St. Louis's Mandel, Mandel, Marsh,



Landon Miller

Sudekum, Sanger.

He noted that he always cautions clients to avoid posts about the matter and he is also careful to ensure that staff surf through social media messages to look for anything that might create a problematic surprise. In civil cases involving personal injury or workers compensation matters, Mandel said it can be devastating to show an allegedly injured person in engaged in strenuous recreational activities or simply leading an active, happy lifestyle.

Still, he feels it can also have the opposite effect. In one recent personal injury matter, he recalled the defense introducing photos from his client's wife's social media page and then watching as jurors shook their head disapprovingly.

"It totally backfired," he said. "I think if you are going to use social media posts to try to impeach a witness...it better work. It better be good because

juries don't like the invasion of privacy."

But when it is effective, it can make a big difference. Mandel compares social media material to a "cheap form of surveillance", a sort of digital outgrowth of the kind of research that insurance companies have long employed private investigators to conduct.

"But now, you don't really have to pay for it," he said. "It is out there."

Vet but don't tamper

Richard Schnake of Neale & Newman in Springfield handles intellectual property cases and appeals. He noted that unauthorized copying and use of logos can be an issue in IP with social media's growing prevalence. Even song lyrics or a poem could infringe someone's copyright though he notes that such matters probably mostly go unenforced.

"The damages aren't going to be enough to justify filing a copyright lawsuit so you don't see that very much," he said.

But the types of matters that could be affected by social media are limitless. Indiscreet photos could change the course of a divorce or certain messages might impact a contract case. Even leaving reviews for a business online could prompt a defamation action.

"If they are not true, you can go file a lawsuit and I've seen those things happen," he said.

And there can be a lot of material to go through. Back in Columbia, Miller notes that the issue is becoming such a wealth of opportunities and pitfalls for legal cases that it can be difficult just to find the time to digest it all – especially when clients may have multiple accounts under multiple usernames.

"You could probably create a position in a law firm just for vetting your clients' social media," he said.

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Social responsibility, continued from page 6

But be careful to warn clients against the temptation to vet themselves as some may attempt to rewrite history by expunging posts relevant to the case. Tampering with or destroying evidence is a serious matter.

“You let them know that, ‘Sorry, I know you probably want to go delete this now but you can’t,’” Miller said.

Still, social media can give one advantage to a defense attorney – especially a public defender who may be working with indigent clients whose only link to the electronic world may be a free Internet connection at the local library.

“If they have Facebook I can message with them that way,” he said. “Actually, I have quite a few clients that don’t have the ability to maintain a phone number and Facebook Messenger is the only way I have to get a hold of them.”

Immediacy and permanence

Mikah Thompson, a law professor and associate dean of diversity, equity and inclusion at the University of Missouri-Kansas City School of Law, said that the issue is coming increasingly before the courts.

“Because social media is so huge and everybody’s using it, I think there is more law being made I’d say in that area than we’ve seen in the past,” she said.

The main problems to introduction of social media evidence relate to matters of hearsay and difficulties with authentication.

“How do you actually know that it’s mine?” she said. “How do you know that I wrote it? Like any other piece of evidence used at trial, it would have to be authenticated before it can be shown to the jury.”

Basically, the rules apply just as they might to any other material, such as a written letter.

“The same evidentiary issues that we might deal with with any piece of evidence also might come into play for social media posts or text messages,” she said. “There is nothing that would



Mikah Thompson

generally bar them from coming in if all the other hurdles can be cleared.”

But what’s different, Thompson notes, is that letters don’t have the same audience or permanence. A generation ago, a letter might be sent only to one person who may then lose or destroy it. But the Internet means our thoughts can easily live forever among a mass audience of contacts and acquaintances armed with screenshots and backed by the power of cloud-based information.

“Now, it is out there for everybody to see immediately and it doesn’t actually go away,” she said.

Even privacy settings may not save someone from themselves since messages and posts, even to a limited audience, can be potentially discoverable if deemed relevant.

Thompson, who practiced employment law, said that it is standard practice for each side to sift through electronic messages in such matters to look for evidence from either the company or the plaintiff, but that process is no longer just limited to email. It applies to more informal messaging for-

mats between mobile devices as well.

“Everybody understands that that is going to happen in litigation and I think the same is now true for text messages,” she said. “It is just becoming run-of-the-mill.”

Even online personas can be problematic — particularly in criminal cases where violent rap lyrics and imagery of accused defendants are increasingly coming to the fore in high-profile matters. Even if meant as entertainment or a metaphor, such material on a social media page can be used by prosecutors in some cases.

“That is now potentially admissible evidence to show something about who you are, something about your character,” Thompson said.

Meanwhile, other defendants might find themselves in trouble based off of their own communications which pinpoint them in certain locations or engaged in certain activity. While it is not a criminal proceeding, the Jan. 6 committee hearings have often found a starring role for text messages.

“It is so casual,” Thompson said. “People are more likely to make an admission about what they are doing and where they are by way of text more so than by way of email because it is a casual way of conversing.”

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APPELLATE COURTS SEE ‘DIP’ IN CASELOADS FROM PANDEMIC

By Scott Lauck

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Missouri’s appellate courts are mostly back to their pre-pandemic operations, but the state’s long drought of trials has left them with fewer cases to be argued and decided.

The total number of appellate decisions, including those from the Supreme Court and the three districts of the Court of Appeals, has dropped by about 24 percent in 2022, compared to comparable six-month periods prior to the pandemic.

Obviously, those courts can only decide the cases that are sent their way. While official statistics for the 2022 fiscal year, which ended June 30, won’t be available until later this year, a review of records on Case.net indicates the number of cases filed in those four branches of the court fell to a low of roughly 1,200 in the latter half of 2020. Approximately 1,375 cases have been filed so far this year. The average in the four six-month periods preceding the pandemic was 1,760.

At a panel discussion of the Kansas City Metropolitan Bar Association’s annual David Prager Appellate Institute on June 24, (which the author of this article moderated), appellate judges said they’re now seeing their lowest case counts since pandemic began.

“We’re really seeing the full effect of decreases in activity in the circuit courts,” said Judge Alok Ahuja of the Court of Appeals Western District. But, he noted, notices of appeal are now returning to pre-pandemic levels, though it will probably be another eight to 10 months before those cases are argued and decided. “We see that this dip, this trough, that we’re in is ending.”

Judge Sarah E. Warner of the Kansas Court of Appeals, who also took part in the panel, said she’s facing the same issues on her side of the state line. Warner said that before the pandemic, a three-judge panel of her court would typically hear 24 cases in a month. Her July docket, in contrast, was just 12 cases.

In an email, Laura Roy, the clerk of the Missouri Court of Appeals Eastern District, said she is starting to see

increased numbers of notices of appeal come in, and she expects that to continue.

“This pandemic has taught me to take one day at a time,” she said.

None of which is to say that Missouri’s courts haven’t been issuing important rulings. Missouri Lawyers Media’s semiannual Major Opinions section reviews cases from the prior six months from the Missouri Supreme Court, the Missouri Court of Appeals and the 8th U.S. Circuit Court of Appeals that raised significant issues in a variety of practice areas. For prior sections, please see molawyersmedia.com/major-opinions online.

State government

Missouri’s Sunshine Law saw plenty of court action in the first half of the year.

The Western District ruled in June that the state’s open records law couldn’t be used to compel the disclosure of messages that former Gov. Eric Greitens’ administration sent using the phone application Confide, which automatically destroys messages after the communication is sent or received. The case is *Sansone v. Governor of Missouri et al.*, WD84426.

The ruling built on that court’s March ruling that a state agency didn’t violate the Sunshine Law when it refused to provide information to a free-market think tank that it already had provided to a public-sector union. The case is *Show-Me Institute v. Office of Administration*, WD84561.

In another Greitens-related case, the Eastern District in January declined to disturb a default judgment ordering the St. Louis Circuit Attorney’s Office to provide records of its communications relating to the two dismissed cases against the former governor. The case is *Solomon v. St. Louis Circuit Attorney*, ED109396.

Medical marijuana also was a big topic. The Missouri Supreme Court said in February that the data of applicants for marijuana growing licenses could be disclosed as part of discovery in a competitor’s underlying lawsuit, despite the privacy protections in the state constitutional provision that legalized marijuana for medicinal purposes. The case is *State ex rel. Missouri Department of Health and Senior Services v. Slusher*,

SC99205.

In May, the Western District ruled that regulations that restricted the total number of medical marijuana licenses to the minimum required by the state constitution were not irrational, arbitrary or capricious. The case is *Sarcoxi Nursery Cultivation Center LLC et al. v. Williams*, WD84492.

The Supreme Court in February struck down a state law that said proponents wanting to circulate a referendum petition must wait until the Secretary of State’s Office has certified its official ballot title, as it can leave too little time to collect signatures. The case is *No Bans on Choice et al. v. Ashcroft*, SC98879.

And, not to leave out the third branch of government, the Western District ruled in May that administrative orders from the Supreme Court gave circuit courts authority to give their presiding judges supervisory authority over deputy clerks. The case stems from an ongoing dispute between the Lincoln County Circuit Court’s presiding judge and its elected clerk. The case is *Allsberry v. Ohmer et al.*, WD84992.

Court procedure

Many court cases hinge on technicalities, and the same can be said of appellate briefs. In March, the Supreme Court took the unusual step of fully dismissing the appeal of a workers’ compensation case after hearing oral arguments because the plaintiff’s briefs didn’t comply with the court’s formatting rules. Although appellate courts routinely call out such errors, they often will exercise their discretion and rule on the merits of the case. But with such a clear warning from the high court, appellants could see less leniency in the future. The case is *Lexow v. Boeing Co.*, SC99199.

The Supreme Court has cracked down on the use of video hearings for criminal and juvenile defendants. In three cases issued in January, the court said safety concerns with in-person hearings during the pandemic don’t override an individual’s constitutional right to confront witnesses. The cases are *State v. Smith*, SC99086; *C.A.R.A. v. Jackson County Juvenile Office*, SC99231; and *J.A.T. v. Jackson County Juvenile Office*,

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Mitigating the Risks of Workplace Violence

By Erik Eisenmann

Workplace violence has become a topic of increasing concern among corporate leaders. The trend is well-documented and is especially felt by the healthcare industry, which continues to experience the fall-out of the Covid-19 pandemic. In 2018, 73% of all nonfatal workplace violence incidents involved healthcare workers. A late 2020 survey reported that 20% of nurses reported they began facing an increase in workplace violence after the pandemic commenced.

The issue of workplace violence is not purely an issue of employee morale, but also carries significant legal consequences. In January, the Occupational Health and Safety Administration (OSHA) hit Montefiore Medical Center in New York City with over \$13,000 in fines for failing to protect employees from workplace violence from patients, which resulted in broken bones and bite injuries. OSHA determined that Montefiore's workplace violence prevention program was inadequate and lacked sufficient employee training. Further, while the healthcare industry has seen the highest incidence of violence, other industries are not immune. In late July, OSHA proposed more than \$330,000 in fines against Family Dollar Stores Inc. for failure to implement effective workplace violence prevention programs, after one incident left an employee dead.

The first step in mitigating workplace violence is developing an effective policy. An effective workplace violence prevention program should have clear goals, be suitable for the size and complexity of the employer's operations, and adaptable to specific situations. The first step in developing such a program is identifying risks through records review, hazard analysis of job tasks, employee surveys, and customer surveys. The second step is to implement appropriate controls based on the identified risks. Some common controls in the hospital setting are providing two exits to every room, adding accessible silent panic buttons, ensuring workers are not alone with patients prone

to violence, and periodically surveying and moving unneeded items out of reach of patients. Lastly, the program should be constantly reassessed and adjusted (preferably after every incident or near-miss) to ensure it is best-tailored to meet the program's goals.

Of course, simply developing a policy is not enough. An employer must ensure that their workers are well-trained on the policy and their role in its implementation. Workplace violence can happen to anyone, and the sources of it are poorly understood. Therefore, it is imperative that *all* workers, including contract workers, supervisors, and managers, are trained on the policy. While training should include general instruction on developing a respectful workplace culture as a form of violence prevention, there should also be individualized training on job-specific hazards and the appropriate responses that have been developed for various positions. For example, third-shift employees should be informed that nighttime has been identified as a particularly high-risk time for violence and in turn workers should be accompanied by or in the line of sight of another individual whenever possible. After this initial training, workers should be given periodic refresher trainings on program expectations.

Merely ignoring the rising trend of workplace violence and thinking "*it won't happen to my company*" is not an option for employers. The key to mitigating workplace violence is effective policy and training guided by experienced professionals in the labor and employment field.



Erik Eisenmann is a Milwaukee-based partner with Husch Blackwell and leads the firm's Labor & Employment group.

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SC99251.

The Supreme Court ruled in April that a constitutional challenge isn't final for purposes of appeal until the trial judge has ruled on all the ways the law allegedly is unconstitutional. The 5-2 ruling sent a sales tax dispute back for further proceedings, which the dissent argued was unnecessary and "will have unwanted effects in other areas of law." The case is *Jefferson County 9-1-1 Dispatch v. Plaggenberg*, SC98904.

The Eastern District in April declined to set aside default judgment against a business despite its arguments that the pandemic had hampered its response. The case is *Dorsey v. JPAM Consulting Inc.*, ED109723.

The Eastern District in April overruled one of its own decisions from 1985 that had allowed arbitration provisions in contracts so long as the parties had "actual notice" of that provision. The court now says parties must include mandatory language set out in state law if arbitration is to be enforced. The case is *Wind v. McClure*, ED109818.

In April, the Eastern District said a woman allegedly injured by a malfunctioning hospital bed doesn't have to produce confidential settlement documents and related communications from a separate car accident that may have exacerbated her injuries. The court said producing them at this stage would have a "chilling effect." The case is *Hill v. Wallach*, ED110232.

Employment

The Western District in March said the Missouri Human Rights Commission must allow plaintiffs to proceed with their lawsuits if it hadn't finished investigating the claim by the statutory deadline. The agency had said it needed more time to determine if the claims were barred by a new provision of law that exempts religious organizations from the Missouri Human Rights Act — an issue that remains unresolved. The case is *Najib v. Missouri Commission on Human Rights et al.*, WD84344.

The Western District ruled in April that the state's Human Rights Act still provides individual liability for discrimination in public accommodations, pre-empting common law claims against those defendants. The case is *Loomis v. Bowers*, WD84424.

In January, the Missouri Supreme Court upheld a school district's firing of a teacher who tried to download the school drive to her personal email, marking the first Missouri case to interpret the Family Educational Rights and Privacy Act. The case is *Ferry v. The*

Board of Education of the Jefferson City Public School District, SC98959.

Both the Eastern and Western Districts have said the state owes unemployment benefits to workers whose normal employment conditions were upended by the pandemic. They include a fast-food worker whose hours were eliminated but was never formally terminated (*Koenen v. BRG Liberty LLC*, ED110045); a Walmart worker deemed to have quit when he caught COVID-19 (*Chavis v. Wal-Mart Associates Inc.*, ED110016) and a call-center employee who began working remotely from New York state (*Ekres v. Division of Employment Security*, WD84496).

The Western District in February said a whistleblower lawsuit against the city of Kansas City may be able to continue, as it's unclear when a one-year statute of limitations kicked in under the facts of the case. The case is *Richest v. City of Kansas City*, WD84464.

Workers' Compensation

Both the Eastern and Western Districts have applied a high bar that the Supreme Court has set for lawsuits against co-workers who cause on-the-job injuries. The Eastern District in February affirmed the dismissal of a wrongful death suit by the family of a man who was fatally knocked from the back of a trash truck (*Miller v. Bucy*, ED107055), and the Western District ruled in March that a man injured in the collapse of a utility trench cannot hold his employer personally responsible. (*Bestgen v. Haile*, WD83865).

The Eastern District in February reinstated a permanent partial disability award for a man injured in the workplace nearly a decade ago. It was the third time in three years that the court considered the "legal odyssey." The case is *Krysl v. Treasurer of Missouri*, ED109568.

In May, the full Southern District split in determining whether a nurse who twisted her knee at work was owed workers' compensation. The court disagreed whether her actions were truly connected to the workplace or if she could have been subjected to such an injury in her normal life. The case is *Durr v. Clark's Mountain Nursing Center et al.*, SD37212.

Tort claims

The Missouri Supreme Court in April affirmed the post-trial reduction of a \$6 million jury verdict in a business dispute case. The ruling upheld Missouri's cap on punitive damages, leaving the judgment at about \$3.1 million. The case is *All Star Awards & Ad Specialties Inc. v. HALO Branded Solutions Inc.*, SC99007.

It wasn't the only high-dollar case to go through the appeals courts. The 8th Circuit in June denied an objector's challenge to a \$39.55 million class action settlement with Monsanto (*Jones et al. v. St. John*, 21-2292). In January, it held that a defendant in a massive verdict against a bankrupt business remains on the hook for \$24.4 million (*Olsen v. Kraus et al.*, 20-2771) and affirmed a \$5.88 million verdict in favor of a farm supply store in a dispute with a lawnmower maker (*S&H Farm Supply Inc. v. Bad Boy Inc.*, 21-1121).

The Eastern District, meanwhile, ruled in January that the state of Missouri is not responsible for most of its share of a \$13.825 million settlement reached in 2018 with family of a man freed after 30 years of wrongful incarceration. The case is *State ex rel. Schmitt v. City of St. Louis*, ED108130.

The Eastern District also ruled in January that the two-year statute of limitations for medical malpractice claims applies to a woman who was injured when she fell out of bed at a rehabilitation hospital. She'd argued that her injuries were caused by ordinary negligence rather than medical negligence. The case is *Payne v. Rehabilitation Institute of St. Louis LLC*, ED109560.

A separate protection for med mal defendants tripped up another plaintiff when the Supreme Court said in June that he had filed his expert affidavits 18 days too late. The case is *Giudicy v. Mercy Hospitals East Communities*, SC99249.

The 8th Circuit said in January that two cases alleging pollution from leftover Manhattan Project nuclear waste belong in federal court because they deal with a nuclear waste event under the federal Price-Anderson Act. The cases are *Banks et al. v. Cotter Corporation*, 21-1165; and *In Re: Cotter Corporation*, 21-1160.

Insurance

The Missouri Court of Appeals Western District ruled in May that an insurer is on the hook for part of a \$4.5 million judgment despite its allegations that the policy misrepresented her father's use of the car before he got into an accident. The case is *Wright v. Nash and Key Insurance Company*, WD84602.

The 8th Circuit has on several occasions upheld insurers' denial of claims made during the COVID-19 pandemic. In February, the court threw out a challenge by a flower shop that claimed it overpaid for insurance during

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stay-at-home orders in 2020 and found an “epidemic” exclusion in a travel insurance policy meant there was no coverage for the airfare of a round-trip flight. The cases are *Alissa’s Flowers Inc. v. State Farm Fire & Casualty Company*, 20-3340, and *Bauer v. AGA Service Company*, 20-3711.

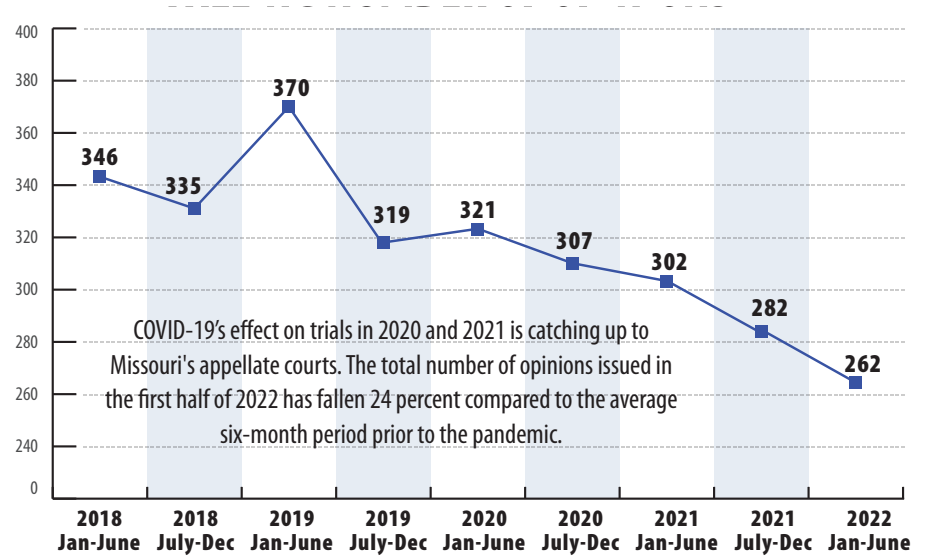
The Western District in June said an insurer could not prevent a circuit court from affirming a \$5.2 million arbitration award, though it can still contest coverage in separate litigation. The facts of the case rocketed around social media, as it stemmed from a claim that the insurer’s policyholder had infected the plaintiff with HPV during sexual encounters in the car covered by the policy. The case is *M.O. v. GEICO*, WD84722.

The case was one of several recent decisions involving to Section 537.065, a Missouri statute that allows defendants who face a denial of coverage to allow the plaintiff to obtain a judgment against them so long as the plaintiff seeks to collect that award only from the defendant’s insurance policy. Recent revisions to the law allow insurers to intervene before a judgment can be rendered, but examples of insurers doing so successfully are few and far between, as shown in recent cases such as *Reddick v. Spring Lake Estates Homeowner’s Association et. al.*, ED109672, and *Yuncker and Gutierrez v. Dodds Logistics et. al.*, WD84645.

However, ‘065 agreements carry risk as well, as an 8th Circuit ruling in February demonstrated. The court found that there was no insurance coverage for a pair of arbitration awards for two employees who faced egregious discrimination at work. The combined \$20 million awards had ranked as the third largest judgment of 2020, as tracked by Missouri Lawyers Media. The case is *AMCO Insurance Company v. Columbia Maintenance Company*, 21-1822.

Criminal law

The Eastern and Western Districts split on whether low-level sex offenders must still register for life. Amendments in 2018 to Missouri’s Sex Offender Registry Act allow some offenders to petition for removal after a certain period. The Eastern District in June ruled in favor of two offenders who had sought removal. But the Western District in May reiterated prior holdings that federal law requires lifetime registration. The dispute could end up in the Supreme Court. The Eastern District cases are



Source: Missouri courts, Missouri Lawyers Media

Brock Smith v. St. Louis County Police et al., ED109734, and *Gary Nelson Ford v. Col. Jon Belmar, chief of police as chief law enforcement officer of St. Louis County, et al.*, ED109958. The Western District case is *MacColl v. Missouri State Highway Patrol*, WD84739.

The Eastern District in March said a man allegedly caught with drugs when reporting the overdose death of an acquaintance prove Missouri’s recently passed “Good Samaritan” law applies to him. It was the first case to examine the law since its passage in 2017. The case is *State v. Gill*, ED109852.

Several defendants won new trials so that jurors could decide if they’d acted in self-defense. The Supreme Court in January said a man who fatally shot his stepdaughter’s husband should be able to argue he was defending himself from a potential act of arson (*State v. Whitaker*, SC98856). In April, the high court said woman may be able to invoke the state’s “castle doctrine” after she shot another woman who reached into her car window to hit her (*State v. Straughter*, SC99170). And the Eastern District said a landlord could bring in evidence of racist death threats he faced before wounding the son of his tenant (*State v. Townsend*, ED109061).

In June, the Supreme Court aired its worries about the use of a state constitutional provision allowing use of prior convictions or alleged crimes as evidence cases involving sex crimes children. Although the court affirmed the man’s convictions for molesting his daughter, a concurrence warned judges “not take the proverbial rabbit hole” of using unproven allegations against defendants. The case is *State v. Minor*, SC99469.

Constitutional

One of the Missouri Supreme Court’s more unusual cases involved the effect of its own reinterpretation of the state constitution. In 2017, the court had struck down a law that set a cap on the amount of revenue that St. Louis County could raise from fines and fees for minor traffic violations. But two years later the court overturned the case when it drastically revised its approach to such “special laws.” Nonetheless, the court said in April that the special St. Louis County revenue cap remains unenforceable. The case is *City of Normandy v. Parson*, SC98998.

In April, the Supreme Court gave a nondefinitive answer to several municipalities that are challenging the constitutionality of a state law that bars enforcement of federal gun laws. The court said the challenge could continue in state court but declined to weigh in on the constitutionality of the Second Amendment Preservation Act. The case is *City of St. Louis et al. v. State of Missouri et al.*, SC99290.

In February, the Supreme Court upheld a state law that bars city officials from using taxpayer money to advocate for ballot measures or political candidates, finding unanimously that the law doesn’t chill free speech. The case is *City of Maryland Heights et al. v. State of Missouri*, SC99098.

But in March, the court said a law that sought to require defense attorneys to give counseling information to victims of sexual assault violates the First Amendment, as it would interfere with their ability to zealously defend their clients. The case is *Fox et al. v. State of Missouri*, SC98909.

ARBITRATION DENIED ON CLAIM OF ASSAULT AT WORK CONFERENCE

By Scott Lauck

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A split panel of the 8th U.S. Circuit Court of Appeals ruled Aug. 30 that a woman's claims against a man alleged to have sexually assaulted her at a work conference are not subject to arbitration.

The 8th Circuit's majority, relying on precedents from several other federal appellate courts, held that the alleged assailant couldn't rely on the employer's arbitration agreements, despite their broad language covering "any dispute arising under or related in any way" to the agreement.

But a dissenting judge called the ruling an example of the old adage "bad facts make bad law."

The plaintiff, Katherine Anderson, was a Colorado-based independent contractor for the American Family Life Insurance Company of Columbus, better known as Aflac. In a lawsuit filed in federal court in 2020, she alleged that, while attending a work conference in St. Louis, another attendee, Jeffrey Hansen, drugged her at a bar and later forcibly entered her hotel room and raped her.

Hansen has denied the claims, arguing in court documents that the relationship was consensual and that the local prosecutor declined to file charges. He has brought counterclaims against Anderson and her husband, Jason, alleging they pursued the suit for financial reasons. According to

court records, the Andersons reached a confidential settlement with Aflac prior to the filing of the lawsuit.

As part of his defense, Hansen argued he was a third-party beneficiary of the arbitration agreement Anderson had agreed to as part of her employment with Aflac. Last year, Judge John A. Ross declined to enforce arbitration for most of the claims.

The 8th Circuit's majority affirmed, basing its ruling on *Jones v. Halliburton Co.*, a 2009 case from the 5th Circuit, and *Doe v. Princess Cruise Lines Ltd.*, from the 11th Circuit in 2011. Both cases involved allegations of sexual assault against co-workers in which the defendants unsuccessfully sought to apply broadly worded arbitration agreements related to employment.

Chief Judge Lavenski R. Smith, writing for the 8th Circuit panel, agreed with those rulings, saying the allegations against Hansen had no "direct relationship" with the arbitration agreements. He noted similar rulings in the 9th Circuit in 2017 and in the 2nd Circuit last year.

"All of the Andersons' tort claims involve factual allegations about Hansen drugging Katherine Anderson at a bar and forcibly raping her in a hotel room," he wrote. "Nothing about those allegations arose under or related in any way to the Andersons' Associate's Agreements."

Senior Judge Roger Wollman concurred. But Judge L. Steven Grasz argued that the ruling ignored prior 8th Circuit cases

that had enforced arbitration where the disputes "simply touch" matters covered by the arbitration agreement.

"It may be that, as a matter of public policy, the court should deviate from our established standard," Grasz wrote, pointing to the recent passage of the federal Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 but noting that it is not retroactive. "So, while I sympathize with desire to allow the Andersons to litigate in court, I do not believe this is what the law today allows."

The Andersons were represented locally by Amy Collignon Gunn of The Simon Law Firm in St. Louis and Justin M. Plaskov in Jester Gibson & Moore in Denver. In an interview, Plaskov said he was pleased that the court continued a line of precedents that prevents such cases from being forced into arbitration.

"It feels like it would be an injustice to require somebody who's been sexually assaulted by a co-worker go to a private judge and not be judged by a jury of their peers," he said. "Something feels just wrong about that."

Given the passage of the recent federal law, Plaskov said he doubted the full 8th Circuit or the U.S. Supreme Court would be interested in accepting the case for further review.

Liz Carver of Dowd Bennett in St. Louis, an attorney for Hansen, didn't immediately respond to a request for comment.

The case is *Anderson v. Hansen*, 21-2719.

CY PRES ARGUMENTS FAIL TO OVERTURN CLASS SETTLEMENT

By Scott Lauck

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The 8th U.S. Circuit Court of Appeals on June 29 affirmed a \$39.55 million class action settlement with Monsanto in Missouri federal court. But an attorney for an objector said he would seek further review.

The settlement was approved in the U.S. District Court for the Western District of Missouri in May 2021. In a lawsuit filed in 2019, three plaintiffs representing a nationwide class alleged that labels on Monsanto's Roundup weed and grass killer products were misleading.

They alleged the label falsely stated that glyphosate, the active ingredient in Roundup, "targets an enzyme found in plants but not in people or pets," when in fact that enzyme is used by helpful bacteria in the digestive system of humans and animals. The case is one of several filed around the country making similar claims.

Following litigation and mediation, the parties reached a settlement that won preliminary approval in May 2020. But they continued to iron out some details. In the end, the agreement provided payments to claimants of up to 50 percent of the value of the products they purchased, a 25

percent award of attorneys' fees totaling \$9.89 million, an administrator's fee of \$1.8 million, and \$2,500 incentive payments for each of the three lead plaintiffs.

That left approximately \$14 million to \$16 million to be distributed under a cy pres clause in the revised settlement. Cy pres awards — derived from the Norman French expression cy pres comme possible, or "as near as possible" — are intended to benefit the "next best" recipient of unclaimed settlement funds. The potential recipients were the National Consumer Law Center, the National Advertising Division of the

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Better Business Bureau and the Berkeley Center for Consumer Law & Economic Justice.

But an objector named Anna St. John challenged several of the cy pres conditions, arguing among other things that the award to outside parties was a form of compelled speech that violated her First Amendment rights.

The U.S. Supreme Court has held that forcing someone to subsidize the speech of other private speakers raises First Amendment concerns — most notably in *Janus v. AFSCME, Council 31*, a 2018 case that said non-union workers couldn't be required to pay union fees as a condition of employment.

But the 8th Circuit said the cases weren't analogous. The residual funds could only be distributed after class members who filed claims had been compensated, the

court said, and potential class members who didn't participate could have either filed claims or opted out.

"Cy pres distribution of residual funds pursuant to the settlement agreement neither constitutes speech by any individual class member nor infringes on their First Amendment rights," Judge Jane Kelly wrote. Chief Judge Lavenski R. Smith and Judge Duane Benton concurred.

St. John also argued that the class members should have been paid 100 percent of the value of the Roundup they bought rather than distribute the money to outside groups. She pointed to *In re BankAmerica Corp. Securities Litigation*, an 8th Circuit case from 2015 that had required the lower court to determine the measure of class members' damages and whether they had been fully compensated before making a cy pres distribution.

But Kelly said the Western District of Missouri did make such a determination in

the Roundup case.

"The district court reasoned that even if class members claimed they would not have purchased Roundup if it had not borne the allegedly misleading label, their damages would still have to be reduced from 100% to account for the value they received from using Roundup," she wrote.

Ted Frank, director of the Hamilton Lincoln Law Institute in of Washington, D.C., who represented St. John, said in an email that he would seek en banc review.

"The ruling contradicts existing Eighth Circuit precedent, the BankAmerica Securities case I also argued, and we'll be asking the full court to look at the decision to divert millions of dollars of the class's money to Berkeley Law School," he said.

The plaintiffs were represented by attorneys from the Richman Law Group in New York and locally by Bell Law in Kansas City.

The case is *Jones. St. John*, 21-2292.

SUPREME COURT OKS ARBITRATION FOR CLAIMS AGAINST LOAN SERVICER

By Scott Lauck

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The Missouri Supreme Court ruled on July 12 that a group of former car owners remain bound by an agreement to arbitrate their claims against a loan servicer even as they are being sued in court for what they still owe on their cars.

In a unanimous opinion encompassing two nearly identical cases, the court overruled cases by the Court of Appeals that had read sales agreements and the arbitration agreements they included as separate contracts, with each required to offer separate consideration to the parties. That approach, Judge W. Brent Powell wrote, "would contravene the often-repeated mandate that agreements to arbitrate must be governed by the same rules as apply generally in contract law."

"Specifically, such a holding would violate the black letter law that a court cannot go line by line ensuring each promise is counterbalanced," he wrote.

The cases at issue involved two cars that were repossessed after the owners — Kelly Donaldson and Robert Haulcy in one case, and Christopher Jones in the other — allegedly failed to make multiple payments.

Bridgecrest Acceptance Corporation, which was assigned the cars' contracts after the sales, sued the buyers in St. Louis County Circuit Court to collect the remaining value of the vehicles after they were resold. When the defendants filed

class-action counterclaims that Bridgecrest had violated consumer-protection laws, the company sought to compel arbitration.

The circuit court declined to enforce the agreements and the Court of Appeals Eastern District affirmed. In amicus briefs filed in the Supreme Court, the U.S. and Missouri Chambers of Commerce and several other business and lending groups said the Eastern District opinion, though unpublished, had created "significant uncertainty."

The Supreme Court reached the opposite conclusion as the Eastern District did in its earlier opinion, which was wiped out when the high court accepted the case on transfer. Although the Supreme Court has said in prior cases that arbitration agreements can be enforceable even if the contract to which it relates is not, Powell said that rule is "irrelevant when a party challenges the embedded arbitration agreement itself, rather than the viability of the larger contract."

Because the overall contract and the arbitration agreement are part of the same transaction, "if the consideration given in exchange for the installment contract was adequate, it likewise supported the arbitration agreement," Powell wrote.

In a footnote, he also said a 2020 Eastern District case, *Caldwell v. UniFirst Corp.*, "appears to contradict this rule" and should no longer be followed. According to court records, the Eastern District originally ruled on the case in 2018, but the Supreme

Court ordered it to be reconsidered in light of a different precedent. On rehearing, the case was heard by a three-judge panel that included Judge Robin Ransom, who has since been appointed to the Missouri Supreme Court and joined the opinion that overturned her earlier case. The Supreme Court had been asked to review the second *Caldwell* case, but the court declined the request without comment.

In *Caldwell*, the appellate court had held that there wasn't adequate consideration to support the arbitration clause because the agreement allowed the company to sue the plaintiff in court while forcing Caldwell to arbitrate his claims. The Supreme Court has previously struck down other arbitration agreements on similar grounds. But the cases against Bridgecrest were different, Powell said, because the consumers retained the right to seek injunctive relief and were not "wholly constrained" to contesting the company via arbitration.

"Bridgecrest cannot litigate any claim while forcing Consumers to respond to such claims in arbitration," he wrote.

David Helms of GM Law, an attorney for Bridgecrest, didn't immediately return a message seeking comment. Jesse Rochman of OnderLaw, an attorney for the consumers, couldn't be reached.

The cases are *Bridgecrest Acceptance Corporation v. Donaldson*, SC99269, and *Bridgecrest Acceptance Corporation v. Jones*, SC99270.