

TB LAW

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ANNOUNCEMENTS

RECOGNITION

T&B Represented in 'Best Lawyers' & 'AZ' 2021 Listings

The Best Lawyers in America is a listing of outstanding attorneys who have attained a high degree of peer recognition and professional achievement. The 2021 listing recognized:

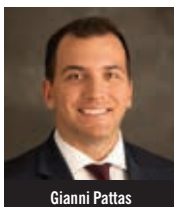
Jodi R. Bohr (Litigation-Labor and Employment); Michael A. Bosco, Jr. (Real Estate Law); Mark S. Bosco (Litigation-Banking and Finance; Mortgage Banking Foreclosure Law); David L. Case (Litigation-Trusts and Estates; Tax Law; Trusts and Estates); Ensen Crowe (Bankruptcy and Credit Debtor Rights/Insolvency and Reorganization Law); James A. Fassold (Litigation-Trusts and Estates); Alisa J. Gray (Litigation-Trusts and States); Richard G. Himelrick (Litigation-Securities); John A. Hink (Real Estate Law); Christopher R. Kaup (Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law; Litigation-Bankruptcy); May Lu (Corporate Law); Leonard J. Mark (Family Law); Robert D. Mitchell (Commercial Litigation; Litigation-Securities); James P. O'Sullivan (Closely Held Companies and Family Businesses Law); Robert A. Royal (Business Organizations (including LLCs and Partnerships)); Anthony R. Smith (Mortgage Banking Foreclosure Law); Michael E. Tiffany (Real Estate Law); and Donald M. Wright (Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law; Litigation-Bankruptcy).

The Best Lawyers in America listed the following attorneys as Ones to Watch in 2021: Zachary R. Cormier (Commercial Litigation); Carl Emmons (Litigation-Banking and Finance); Chelsea A. Hesla (Real Estate Law); and Elizabeth Loefgren (Real Estate Law).

The 2021 edition of *AZ Business Leaders* magazine, a major annual business-to-business publication that combines the who's who of the Arizona business community, recently recognized Mark S. Bosco (Banking), Darren T. Case (Estate Planning & Probate), Alisa J. Gray (ADR), and Nora L. Jones (Elder Law) for their vision, influence, and leadership in their respective practice areas.

MOVING UP

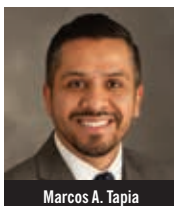
Firm Associates Promoted to Shareholders In January 2021



Gianni Pattas

GIANNI PATTAS focuses his practice on civil and commercial litigation with an emphasis in contract disputes, real estate disputes, and commercial landlord-tenant issues. Gianni assists individual and corporate clients of all sizes. Gianni takes the time to identify the wants and needs of his clients to achieve creative solutions consistent with their goals and objectives in an efficient manner.

GAYA SHANMUGANATHA is a litigator who focuses her practice on business disputes (especially disputes involving contract, intra-company matters, misappropriation, trade secret, embezzlement, negligence, and fiduciary issues). Gaya holds certifications from the Association of Certified E-Discovery Specialists and the Electronic Discovery Institute, has extensive, hands-on experience managing cases with large volumes of data, discovery disputes, and court-appointed special masters, and has obtained sanctions against her opponents for failing to produce or preserve information. Gaya is also a member of Tiffany & Bosco's Automotive Group and regularly represents automobile dealers in navigating state and federal regulations, as well as negotiating, arbitrating, and litigating consumer disputes. In addition to her experience in litigating cases to a verdict, Gaya is also experienced in negotiating resolutions before a lawsuit is filed and resolving disputes in mediations, arbitrations, and settlement conferences.



Marcos A. Tapia

MARCOS A. TAPIA focuses his practice on civil and commercial litigation with an emphasis in contract, real estate, and business disputes. While Marcos assists individual and corporate clients of all sizes, as a native Spanish speaker, Marcos particularly enjoys assisting clients in the Latinx community to achieve their goals and objectives in an efficient manner. Among other things, Marcos is currently the Immediate Past President of Los Abogados, Arizona's Hispanic Bar Association, where he serves as a liaison to the Arizona Hispanic Chamber of Commerce.

NEW FACES

Welcoming Our Newest Associate



Ryan P. Hogan

RYAN P. HOGAN joined the firm in September 2020. Ryan earned his Bachelor of Arts from the University of San Diego in 2015 and his Juris Doctor from the Sandra Day O'Connor College of Law at Arizona State University in 2018. He graduated *magna cum laude* and is a member of the Order of the Coif. During law school, Ryan was a member of the *Arizona State Law Journal* and an editor for a moot court team. Prior to joining the firm, Ryan served as a law clerk to Judge Michael J. Brown of the Arizona Court of Appeals and Judge James A. Teilborg of the United States District Court for the District of Arizona. In his free time, Ryan is either reading a good book or playing tennis.

ANNOUNCEMENTS

PROFESSIONAL AND PERSONAL ACHIEVEMENT

JODI R. BOHR and **ALISA J. GRAY** were selected as Top 100 Lawyers in Arizona by AZ Big Media for 2021.



Ashley L. Case

ASHLEY L. CASE has been elected to serve as Chair of the Estate Planning, Probate, & Trust Section Board of the Maricopa County

Bar Association.

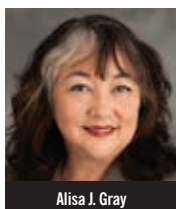
DARREN T. CASE was the guest presenter for the Southern Arizona Estate Planning Council on September 18, 2020 on the topic of “Estate Planning and the 2020 Presidential



Darren T. Case

Election.” Two days later, he presented on the same topic for the Maricopa County Bar Association. The presentation detailed the

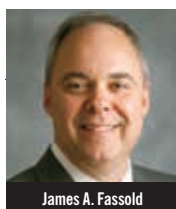
potential tax law changes proposed by the candidates, such as the impact on a potential drop in Estate, Gift, and GST Tax exemptions and modification to Income Tax laws, particularly in the area of Capital Gains. He was also the guest presenter for the Seattle Estate Planning Council’s 65th Annual Estate Planning Seminar for his presentation of “Forget the Cold Winters, I’m Moving Somewhere Warm: Avoiding Ethical Pitfalls When Clients Relocate,” which took place on November 2, 2020. In addition, Darren was part of an estate planning panel discussion for the State Bar of Arizona on December 3, 2020 in regard to “Modern Trusts and Planning for Modern Times.”



Alisa J. Gray

ALISA J. GRAY and **JAMES A. FASSOLD** presented several seminars in the Fall of 2020 for the State Bar of Arizona

and the Bar Leadership Institute on mindfulness in the law, time

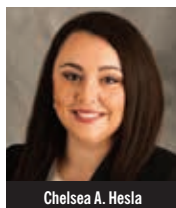


James A. Fassold

management, and work-life balance.

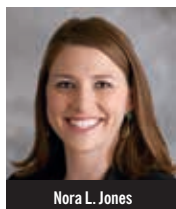
JAMES A. FASSOLD has been elected to the Executive Council of the State Bar’s Probate and Trust Law Section.

CHELSEA A. HESLA was invited to present at the Arizona Fiduciary Association Fall 2020 Conference on the topic, “Top Five Legal Takeaways for 2020: A Conversation About Legal Developments in 2020 Impacting Arizona Fiduciaries and Best Practices.”

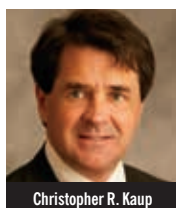


Chelsea A. Hesla

NORA L. JONES has been recognized by the Arizona Board of Legal Specialization as a Certified Specialist in estates and trusts, a distinguished honor reserved for lawyers who have substantial experience, the respect of their peers, and demonstrated special knowledge, skills and proficiency in a specialized area of law. She also has been selected as a Judge Pro Tempore for the Alternative Dispute Resolution Probate Settlement Conference Program’s 2021 Fiscal Year. Nora has served as a Judge Pro Tempore for the Maricopa County Superior Court Probate Division since 2019.



Nora L. Jones



Christopher R. Kaup

CHRISTOPHER R. KAUP received the Meritorious Service Star Award from the Grand Canyon Council for his work on the Executive Committee relating to the Boy Scouts of America Bankruptcy Case pending in Delaware.

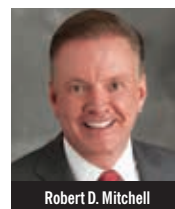


May Lu

MAY LU chaired and moderated the “Fiduciary Duties After the New Arizona LLC Act” seminar on behalf of the Business Law

Section at the State Bar of Arizona’s 2020 Annual Convention in December. May also was recently elected President of the ACLU of Arizona.

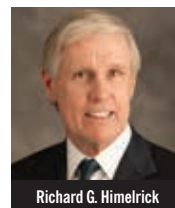
MAY LU and **JAMES P. O’SULLIVAN** co-presented two seminars for the State Bar of Arizona: one on September 17, 2020 regarding business formation and entities at The Solo Practitioner & Small Firm Institute; and the other with Lynda C. Shely and Christopher A. LaVoy titled “Linking Up and Breaking Up Are Hard to Do — Especially for Law Firms” on October 7, 2020.



Robert D. Mitchell

ROBERT D. MITCHELL has joined **RICHARD G. HIMELRICK** in co-authoring the sixth edition of *Arizona Securities Law: Civil Liability, Defenses, and Remedies*. It will be published by the State Bar of Arizona. The target release

date is during the spring of 2021. Prior editions of the book have been recognized by securities-law practitioners as the authority on Arizona securities litigation.



Richard G. Himelrick

GIANNI PATTAS presented a continuing legal education course on Arizona Ethical Rule 1.6 (Confidentiality of Information) with fellow State Bar of Arizona Ethics Advisory Group Members Nancy Greenlee and Pat Sallen on October 6, 2020 through the State Bar of Arizona.

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ANNOUNCEMENTS

GOOD WORKS

T&B Staff's Commitment to Caring



Tiffany & Bosco remains steadfast in its commitment to being a leader in the community and making a positive impact through a wide spectrum of programs and initiatives. During the past few months, despite the continuing effects of COVID-19, the

firm's Staff Committee has been hard at work making a difference for many families in the community.

HOLIDAY ANGELS PROJECT

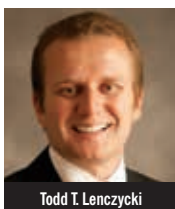
For the last several years, Tiffany & Bosco's Staff Committee has committed to the Holiday Angels

Project. This project is dedicated to supporting the Jaydie Lynn King Foundation by providing holiday gifts to families that have a child in treatment at Phoenix Children's Hospital Center for Cancer & Blood Disorders. In December 2020, the firm came together and donated more than 228 gifts, including everything from household goods to bicycles to an Apple MacBook, as well as over \$1,900 in cash donations.

ST. MARY'S FOOD BANK

Tiffany & Bosco's Staff Committee kicked off the new year with a fundraiser for the St. Mary's Food Bank. Firm employees raised \$1,225 in just two weeks, during which both the Staff Committee and Managing Partner Mark S. Bosco committed to a dollar-for-dollar match, up to \$1,000 each. After everyone's contributions, the firm was able to send a total donation of \$3,225 to St. Mary's. With each dollar providing 7 meals to hungry members of our community, the firm's donations represented a total of 22,575 meals.

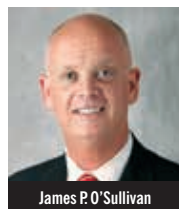
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Todd T. Lenczycki

JAMES P. O'SULLIVAN served as Chair and **TODD T. LENCZYCKI** recently presented as part of a State Bar of Arizona seminar entitled, "Financial Literacy for Lawyers."

JAMES P. O'SULLIVAN was recently asked to present at the State Bar of Arizona's Construction Law Section webinar titled "COVID-19 and Construction Part II: PPP Loans,

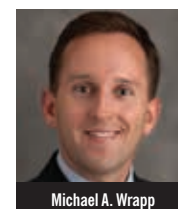


James P. O'Sullivan

Insurance Coverage and Bonding Issues." Jim also recently presented on legal issues in business ownership for transitioning members of the U.S. Armed Forces as part of the U.S. Small Business Administration's "Boots to Business" program.

GAYA SHANMUGANATHA obtained a certification from the Association of E-Discovery Specialists and a Certificate in Discovery Practice

from the Electronic Discovery Institute. Gaya will be presenting on E-Discovery on June 18, 2021 at the State Bar of Arizona's 2021 Annual Convention.



Michael A. Wrapp

MICHAEL A. WRAPP has received an AV Preeminent Peer Review Rating from Martindale-Hubbell, the highest possible rating for professional excellence in legal ability and ethical standards.

GET TO KNOW US



Meet the Pets

Can you match the furry friends to their Tiffany & Bosco owners?

1. **Hobbes** is a purebred English bulldog that has a heart of gold and soothingly snores 12-14 hours a day. When he is actually awake, he likes to fetch a tennis ball, much like an offensive lineman attempting to recover a fumble. Unlike me, instead of getting up at 5:15 a.m., Hobbes would prefer to sleep in until 10 a.m.

2. Meet my kittens, **Sheryl** and **Sebastian**. What makes them awesome is that they enjoy the finer things in life, especially champagne!

3. Coming from Wildrose Kennels in Oxford, MS, **Moses the Lawgiver** was not so sure about man-made bodies of water. Six years older, Texas, of course, always let his best buddy be the one to venture forth (and make all the mistakes). Now, Moses spends his time, including during my Zoom meetings, following thrown balls into the bushes and the pool, and up trees!

4. Don't let the floppy ears fool you, these two bandits can capture a rotisserie chicken from any kitchen counter and make it disappear in five seconds or less.

5. Here's **Johnny**. Although he does not live with me, I adopted Johnny through donations. Yes,

Johnny is a wooly pig.

6. One of the newer additions to the firm, **Jax** enjoys long walks around the block, begging for treats, squeaky toys, and yelling at cats to stay off his lawn.

7. **Riley** is on the top. **Ridley** is on the bottom. These dogs have no concept of personal space!

8. **Chinook** was a stray we found in the White Mountains of Arizona. We scanned her microchip and contacted her prior "owners," but they didn't want her back. So she came to live with us. Chinook is a Chesapeake Bay Retriever. My wife and I were married on the Chesapeake Bay. Chinook was born in November. My wife and I were born in November. Chinook's microchip number is 019769. My Arizona bar number is 019769. Make of that what you will.

9. We adopted **Sherman** from a breeder in Bethesda, Maryland in June 2010. We were visiting my ex-sister-in-law who was living in Virginia at the time. He was a birthday present to me, so I named him Herman after my grandfather. On his way back to Arizona, however, my daughters (10 and 8 at the time) had settled on Sherman. Really, who was I

to disagree?! His nicknames are Shermanator and Sherman the Tank. He is a purebred English Yellow Labrador and weighs in at right around 100 pounds. He really focuses on two things: eating and jumping in the pool. He is the best! He is a very happy and gentle dog.

10. When I am not in court winning cases for my clients, my joy is to be out in the mountains, riding the trails with either **Navajo** or **Champ**. A few years back, one of my clients worried so much that I was out of cell phone coverage with my horses, he bought me a satellite phone and insisted that I take it on all remote trips. My favorite horse quote is from Ronald Reagan: "There's nothing better for the inside of a man than the outside of a horse." I agree. I love the intellectual challenge of communicating with my beloved horses in a way that they understand, and I never fail to appreciate a horse's magnificence and beauty.

11. This is our dog "Gretzky," a.k.a. "The Great One," a.k.a. **Tuna**. He is a Cairn Terrier like Toto (Wizard of Oz), but has a brindle coat and was considered the runt of his litter. He is a pedigree that

could not be sold as a show dog, which is the only reason that we were able to get him when we did a little over five years ago. The Tuna is extremely vocal (loves to gripe), demands attention by punching with both hands, and performs several tricks for treats (when he feels like it). Despite how much he acts like a 100-pound dog in a 20-pound-dog's body, he is happiest cuddling with his favorite person...his Mom.

12. This is **Lucy**, one of two sisters we adopted from a local rescue. Since COVID-19 made working from home a mainstay last year, Lucy watches for her morning cue and rushes past me to "the Office." Lucy enlivens webcasts with her "side eye" cameos, long sighs, and low groans in response to long-winded lawyers — making the case that Zoom fatigue is real!

13. **Sparky**, a.k.a. the Goodest Boy, was rescued from a shelter in Baja, Mexico, when he was approximately 5 months old. He needed surgery for a broken hip and femur. After surgery and a little rehab, Sparky is near full speed. Bonus: he never barks and loves everyone. Negative: he also loves leather shoes.

EMPLOYMENT MATTERS

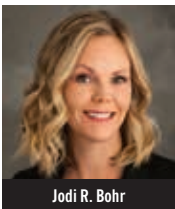


Limiting Limitations

Carefully drafting restrictive covenants is critical to enforceability

BY JODI R. BOHR

Are you considering asking your employees to sign a confidentiality or non-solicitation agreement? If so, have you carefully considered just what you are seeking to protect? Before creating an agreement with post-employment restrictions, an employer must understand just what it is seeking to protect. Such agreements are becoming increasingly difficult for employers to enforce, and an agreement that seeks to protect anything more than a legitimate protectable interest may not survive legal challenges.



Jodi R. Bohr

WHY DO YOU NEED RESTRICTIVE COVENANTS?

Restrictive covenants are needed to protect a company from a former employee taking the training he received, the customer base he fostered, or the confidential information he learned to a competitor. They prevent a competitor from “purchasing” a business by offering an employee an over-market salary to bring the business with him. Unfortunately, however, courts do not generally favor restraints on trade, which means that these covenants must be carefully drafted.

NON-COMPETE AGREEMENTS

Non-compete agreements prohibit employees from working in competing businesses for set periods of time and within specific geographic areas following separation from employment. These agreements are disfavored by courts and should be used sparingly. Limiting non-

competes to employees who present a genuine competitive threat demonstrates the importance and reasonableness of any restrictions, and enhances the likelihood that the agreements will be enforced. Moreover, non-compete agreements are only enforceable to the extent that their restrictions are no greater than necessary to protect the employers’ legitimate business interests and do not impose undue hardships on employees.

ANTI-PIRACY AGREEMENTS

An anti-piracy (a.k.a. non-solicitation) agreement is less restrictive. An anti-piracy agreement permits a former employee to work in a competitive business, but restricts him from interfering with customer relationships. Employers must take care to ensure that the restrictions in such an agreement are not broader than necessary, taking into consideration the relationship the employee had with

the customer. Restrictions cannot encompass all company customers regardless of the relationship. They must also be limited in time to what is no longer than necessary for the employer to put a new employee on the job and to allow that new employee a reasonable opportunity to demonstrate his effectiveness. To determine appropriate duration, employers should consider whether accounts will be reassigned to current employees or whether a new employee will need to be hired and trained.

Additionally, employees may be prohibited from soliciting coworkers. Again, those restrictions must be reasonably tailored in duration and scope. Restrictions that are broader than necessary (i.e., those that restrict solicitation regardless of the employees' knowledge or the extent of their relationship) are likely unenforceable.

CONFIDENTIALITY AGREEMENTS

Confidentiality agreements prohibit an individual from using or disclosing a company's proprietary information. Confidentiality agreements can only protect information that is not generally known to the public. Information that is available through public means, but pieced together at significant time and expense by an employer is not confidential, and therefore should not be restricted. An employer must also take care not to restrict an employee from using general skills and knowledge acquired during employment.

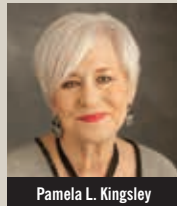
CONCLUSION

Employers should keep in mind that restrictive covenants are only as good as their willingness to seek enforcement. Employees are more likely to take these agreements seriously when employers emphasize they will seek enforcement as a result of any breach. Narrowly-tailored agreements may also be regarded more highly as they do not aim to unduly restrict departing employees. Employers who have specific questions about restrictive covenants are encouraged to contact the attorneys at Tiffany & Bosco.

The Workplace Meets Adult-Use Marijuana

BY PAMELA L. KINGSLEY

It may be a Class I controlled substance under federal law, but last November, Arizona voters passed the "Smart and Safe Arizona Act," allowing adults to grow, possess, and use marijuana and license holders to sell it, even though federal statutes make all four acts illegal. Does that mean



Pamela L. Kingsley

employers have to welcome weed into their workplace? Unquestionably, no. Will they be facing additional challenges in dealing with their adult employees who enjoy "recreational marijuana"? Absolutely, but not because of any new legal constraints resulting from the new law.

Arizona businesses have been down a similar path before. In 1996, the voters of Arizona passed an initiative legalizing the use of medical marijuana for seriously or terminally ill patients, only to have the legislature repeal it. Aimed at preventing future acts of legislative encroachment, two years later, the voters amended Arizona's Constitution to severely restrict the legislature's and the governor's abilities to negate or amend voter enactments, by adding the Voter Protection Act (Ariz. Const. art. IV, Pt. 1 § 1). Although the next attempt to legalize medical cannabis failed, the voters, in 2010, ushered in the Arizona Medical Marijuana Act (AMMA), Title 36, Chapter 28.1 (Arizona Revised Statutes §§ 36-2801 to 36-2821). As a result of the Voter Protection Act, there was little elected officials could do to alter the AMMA, which permits possession of up to 2.5 ounces for a 14-day period and up to 12 plants in certain circumstances.

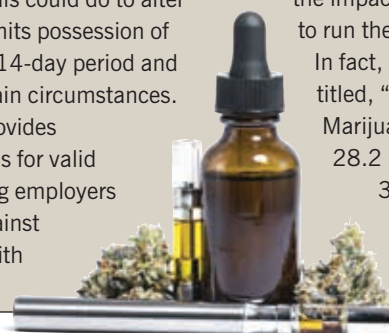
The 2010 AMMA provides employment protections for valid cardholders, prohibiting employers from discriminating against "Qualifying Patients" with

DISCLAIMER: Tiffany & Bosco takes no position and neither endorses nor opposes the Arizona Cannabis Laws as approved by voters and the forthcoming regulations by the State of Arizona. The reader is reminded that federal law prohibits activities involving marijuana.

debilitating medical conditions for positive drug tests for marijuana components or metabolites (presuming they "appear in insufficient concentration to cause impairment"), in hiring, terminating their employment, or imposing terms or conditions of employment on or penalties against them. A.R.S. § 36-2813(B) and § 36-2814(A)(3). An exception is made if the employer would lose a monetary or licensing benefit under federal statutes or regulations. Although the Voter Protection Act precluded it from altering the AMMA itself, six months later, the legislature helped businesses by bolstering Arizona's Drug Testing in Employment Act (DTEA), Title 23, Chapter 14 (A.R.S. §§ 23-493 to 23-493.12, defining "impairment" (A.R.S. § 23-493), and recognizing "safety-sensitive positions" (A.R.S. § 23-493.06(A)(7)), and expanding protections for an employer who acts "based on the employer's good faith belief that [the] employee had an impairment while working while on the employer's premises or during hours of employment." A.R.S. § 23-493.06(A)(6).

Legislators are similarly restricted from modifying the Smart and Safe Arizona Act. Proactively, many of them worked with its proponents and business leaders to include provisions that would minimize the impact on employers attempting to run their businesses effectively.

In fact, the resulting statute, titled, "Responsible Adult Use of Marijuana," Title 36, Chapter 28.2 (A.R.S. §§ 36-2850 to 36-2865), which permits



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COMPLIANCE

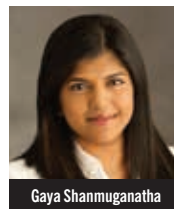
Burden of Discovery

*Electronically
Stored
Information:
Resolving
proportionality
objections
Part III of III*

BY GAYA SHANMUGANATHA

What should you do if you have an uncooperative or overzealous opponent, either before or after a lawsuit has been filed? The Arizona Rules of Civil Procedure provide litigants and litigators with an avenue for dealing with overzealous or non-compliant parties.

At one time or another, most litigants and litigators have received a letter from an opponent demanding preservation or production of every document and byte of data since the beginning of time (or a relevant business). Such overbroad requests, issued without much thought about proportionality, can create a lot of confusion, burden businesses, and increase the cost of preservation and litigation. In addition to the mechanisms identified in my prior articles on Electronically Stored Information (ESI), the 2018 amendments to Arizona's



Gaya Shanmuganatha

Rules introduced other methods for addressing these broad requests.

A party or nonparty challenging the scope of a request must quantify and explain why the request is "overbroad" or "burdensome." Specifically, the objecting party should examine the six factors codified in Rule 26(b)(1) when arguing any proportionality objections: (1) the importance of the issues at stake; (2) the amount in controversy; (3) the parties' relative access to relevant information; (4) the parties' resources; (5) the importance of the discovery in resolving the issues; and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit. Importantly, when an objection concerns ESI, Rule 26(e)(2) requires the objecting party to file an affidavit describing the related burden and estimating the expense that would be

PROPORTIONALITY DISPUTE

Action Pending

After meet & confer, file a dispute per Rule 26(d). The party seeking discovery limits must file an Affidavit describing the burden and estimated expense.

Arizona courts will consider Rules 26(b)(1) (six factors re: proportionality), 26(e)(3) (seven factors re: undue burden or expense), and 26(e)(4) (three factors re: good cause) before limiting discovery or shifting costs.

PROPORTIONALITY DISPUTE

No Action Pending

Per Rule 45.2(c), serve a written objection on the requestor (i.e., no duty to preserve ESI or the request is burdensome or expensive).

Meet and confer with requesting party. If a resolution has not been reached, objector may file a verified petition, per Rule 45.2(e), asking the court to determine the existence or scope of any duty to preserve ESI.

The verified petition must be served per Rule 4 and an in-state defendant must answer within 20 days and an out-of-state defendant must answer within 30 days. Petitioner may file a reply within five days after service of a response.

The court will hold a hearing and consider Rules 26(b)(1) (six factors re: proportionality) and 37(g) (ESI Preservation) before limiting discovery or shifting costs.

incurred. In other words, baldly asserting that compliance would be unduly expensive without identifying precisely why and by how much would not likely result in any orders limiting the scope of discovery.

However, why a request is burdensome and the estimated expense of compliance are not the only factors Arizona courts will consider when hearing an ESI objection. Specifically, courts examine the following seven factors:

1. The estimated expense of the discovery or disclosure;
2. The anticipated disruption to normal business operations if the discovery or disclosure is ordered;
3. Any efforts required to obtain data in the custody of another;
4. The difficulty and expense of any necessary review to separate confidential or privileged material;
5. Whether the difficulty or expense of accessing the information is attributable to the good-faith routine operation of an electronic information system, or the good-faith and consistent application of a document retention policy, before a duty to preserve arose;
6. Whether the difficulty or expense of accessing the requested information is attributable to any violation of the preservation obligation or to other purposeful action by the responding party; and
7. The party or person's interest in the action.

Notably, even if there is a strong showing that a request is burdensome or expensive, a court may order discovery or disclosure for "good cause." Rule 26(e)(4) identifies three factors a court may consider to determine whether "good cause" exists: (1) the likelihood of finding relevant, responsive information that cannot be obtained from other, more accessible sources; (2) the extent to which the request has been narrowly tailored to discover relevant information; and (3) the importance of the

information to a fair resolution on the merits. After analyzing those factors, the court may deny, grant, or place conditions on the initial discovery request, including shifting some or all of the associated costs to the requesting party).

But you do not have to be involved in active litigation to ask a court to determine the propriety of a preservation request. Rule 45.2 introduced in 2018 permits a person who is not a party to litigation to file a verified petition asking a court to determine the existence or scope of any duty to preserve ESI. A person may file a Rule 45.2 petition if and only if the person (1) served a written objection identifying the grounds for their objection (i.e., a lack of duty to preserve ESI or that the requested preservation would impose an undue burden or expense), and (2) met and conferred with the requesting party about their objection and could not reach a resolution. The petition must be served in accordance with Rule 4, and the requesting party has an opportunity to respond. The court will hold a hearing and may issue orders limiting a party or nonparty's preservation obligation based

on the factors set forth in Rule 26(b)(1) and 37(g) and, if appropriate, shifting some or all of the costs of preservation. Moreover, reasonable costs incurred in connection with a Rule 45.2 petition may be awarded by the court, which incentivizes reasonableness in requesting preservation and responding to requests. Importantly, a party or nonparty who complies with a preservation order issued under Rule 45.2 is deemed to have taken reasonable steps to preserve ESI.

ESI DOES IT

Please contact the attorneys at Tiffany & Bosco, P.A. if you require any assistance with creating and implementing a document retention policy, drafting and enforcing a litigation hold letter, overseeing the preservation, collection, review and production of ESI, or with any of your other discovery or litigation needs.



CONSUMER LAW



Floating Down the Amazon

The diminishing reach of strict liability in the world of e-commerce

BY RYAN P. HOGAN

Even before we were all spending more time at home due to COVID-19, online marketplaces like Amazon.com were playing an increasing role in our lives. And there is no doubt that they will continue to do so after the public health situation improves. Not many of us, however, think “what could go wrong” before we add a product to our carts. Yet a simple spark from a defective battery could ignite a severe house fire with the potential to damage your property or worse. If a product purchased from an online marketplace malfunctions and injures your person or property, will you have legal recourse?

Normally, when a product defect causes injury, the law allows for a “strict liability” claim. Strict liability means that a seller of a defective and unreasonably dangerous product will be liable to an injured consumer even if the seller has exercised all possible care. This theory traces its origins all the way back to the Middle Ages to impose penalties on merchants supplying corrupted food

or drink. Today, strict liability is justified as a policy device for allocating the risk of harm from defective products to those who market the products, profit from their sale, and can efficiently take preventative action. While strict liability has long been effective in achieving this desirable policy outcome, it may be starting to show its age.

As a recent rash of cases percolating through state and federal courts shows, your ability to take advantage of a strict liability claim depends on two key factors: (1) what you purchased, and (2) where you purchased it. Retailers like Amazon and Walmart do not actually manufacture every product offered on their online marketplaces; instead, third parties produce many of those products. If such a product is the source of your in-

HELP THAT DELIVERS

If you need assistance with evaluating prosecution or defense of a potential product liability claim, please contact the attorneys at Tiffany & Bosco.

jury, the vast majority of jurisdictions—including Arizona—do not allow a strict liability claim against the online marketplace. With its deep pockets and ability to influence other companies through its market power, you might expect that Amazon would be subject to strict liability as the best cost-spreader and risk-avoider under the circumstances.

Nonetheless, these jurisdictions largely agree that when an online marketplace simply connects consumers to third-party manufacturers, the marketplace does not participate significantly enough in the stream of commerce to subject it to strict liability. They have reached this conclusion even when the manufacturer of the defective product is an effectively judgment-proof foreign company, meaning the online marketplace is the only member of the chain of commerce that is amenable to service and has the resources to make the injured party whole. Only a small minority of jurisdictions, notably including California, has recognized these concerns and imposed strict liability on Amazon, for instance, for selling defective third-party products.

In light of all that, if you are worried about the possibility of suffering harm from a defective product, what can you do? To begin with, you can mitigate potential risk yourself by paying close attention to the information available regarding third-party vendors. Online marketplaces usually identify third-party vendors. If a particular third-party vendor strikes you as unfamiliar, perhaps a different choice would be prudent.

If you have suffered an injury from a third-party product, a clever attorney may still deploy a viable legal theory to hold an online marketplace liable for selling a defective product. Although such claims will likely require evidence of fault on the part of an online marketplace, theories like negligent misrepresentation remain untested in this context. This new legal development emphasizes that, as our world grows increasingly complex, the need for consumers and their attorneys to think strategically when seeking recovery for harm suffered from defective products grows increasingly crucial.

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individuals who are 21 or older to possess up to 1 ounce and 6 plants, is devoid of any workplace protections for recreational users.

Thus, whereas the AMMA prohibited (and still prohibits) discrimination against bona fide medical marijuana cardholders, there is nothing comparable for recreational users. Instead, the law expressly provides protections to employers by declaring (a) they are not restricted from maintaining drug-and-alcohol-free workplaces, (b) their ability to have workplace policies restricting the use of marijuana by employees or prospective employees is not affected, (c) they are not required to allow or accommodate the use, consumption, possession, transfer, display, transportation, sale, or cultivation of marijuana in their places of employment, and (d) their rights to prohibit or regulate conduct otherwise allowed by the statute when the conduct occurs on or in their properties are not restricted. A.R.S. § 36-2851.

Although employers may still have a zero-tolerance drug policy, and may still test in compliance with the law, including having a written policy distributed to all employees, they need to be mindful of several considerations. Even though no appellate court has yet decided the issue, a number of cardholder plaintiffs have presented constitutional challenges to the DTEA'S good faith belief and safety-sensitive exceptions.

At least one lower court has held that a drug test, which proves only recent use, cannot, standing alone, be relied upon to prove a good faith defense of belief of impairment in the workplace. Rather, the presence of "metabolites or components of marijuana" must appear in sufficient concentration to cause impairment. *Whitmire v. Wal-Mart Stores Inc.*, 359 F. Supp. 3d 761 (D. Ariz. 2019).

And relying solely on drug tests can be problematic. The best practice is to have other evidence of impairment coupled with a test that is able to detect recent usage.

This means, currently, to avoid urinalysis or hair tests, as they can show positive for the "inactive metabolite" of THC (THC-COOH), which can stay in the system for days, weeks, or more. Instead, employers should utilize blood or breath tests or saliva swabs, which can reveal "active" THC.

Nothing in the new law prohibits employers from refusing to hire, disciplining, or discharging non-cardholder recreational users. In other words, recreational marijuana use remains an area where businesses can decide the extent to which they wish to regulate their employees' non-work conduct.

Although it appears that Arizona's statutory law as to marijuana usage by employees has been settled for some time, businesses and workers can expect significant changes resulting from court decisions and improved testing procedures. What is certain is that the employment attorneys at Tiffany & Bosco will be ready to answer any questions and assist with any issues.

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