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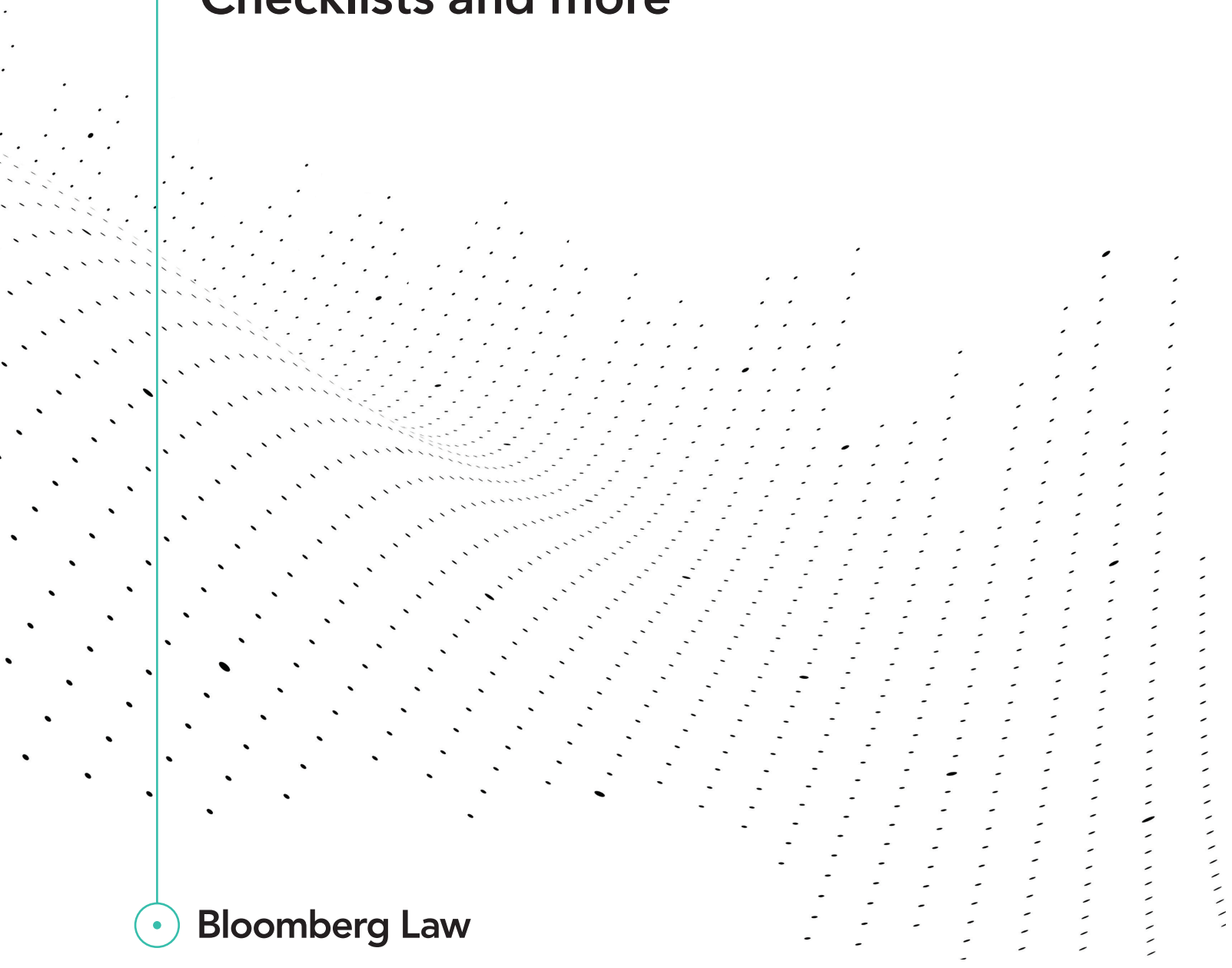

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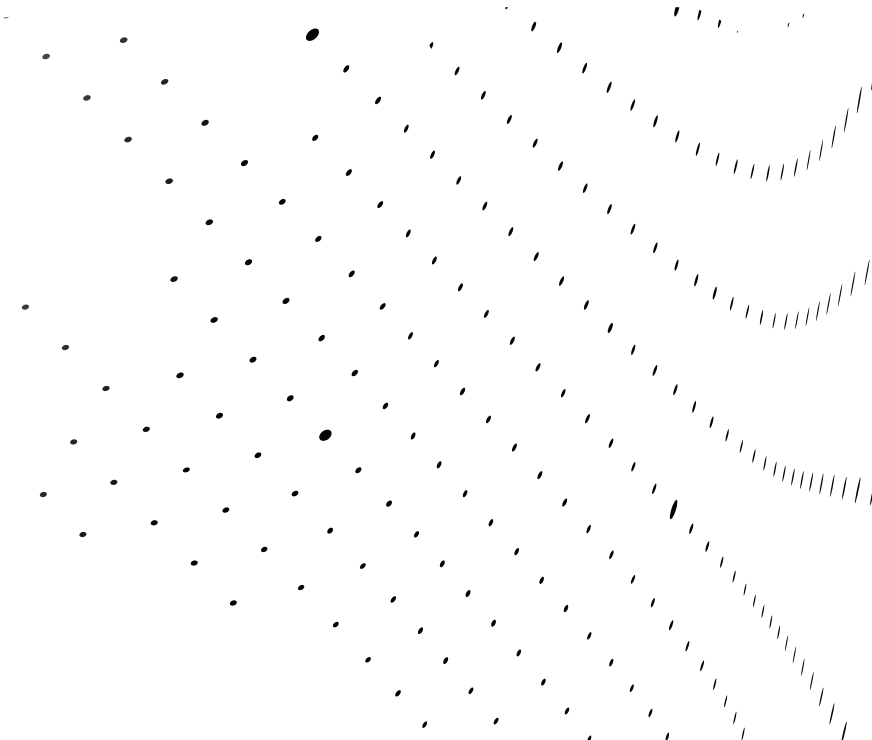


Introduction

Perhaps the only *certain* aspect of law firm practice in 2022 is *uncertainty*. From dramatic shifts in staffing and the changing definition of workplaces and work hours, to the relentless, time-sensitive client inquiries requiring fast, accurate responses in real time, the law firm landscape has been undergoing profound change.

While on the surface, law firms large and small have emerged seemingly unscathed from the turmoil of the last few years, the new normal of law firm practice is to get more done in less time.

That's why practice tools, such as the Practical Guidance contained in this report, have never been of greater importance. Developed by practitioners, for practitioners, Bloomberg Law Practical Guidance anticipates your practice needs with an intelligent combination of practice area expertise, how-to procedural guidance, and essential forms – so you will be certain to have easily accessible, step-by-step answers to address complex questions.

The report includes just a sampling of our 6,000 Practical Guidance documents including broad, topical coverage such as Defamation, Compensatory Damages, Comparative Negligence, Covid-19, M&A, Social Media, and more. Complete Bloomberg Law Practical Guidance coverage includes Bankruptcy, Benefits & Executive Compensation, Commercial Transactions, Corporate Practice, Corporate Transactions, Labor & Employment, Litigation, Health Care, Intellectual Property, Tax, Privacy & Data Security, and Tech & Telecom.

Complementing the Practical Guidance in this report, we have also included Bloomberg Law Analysis, our data-based news coverage providing nuance and insight into the issues changing the legal landscape. Learn more about the uptick in federal court filings referencing the 'major questions doctrine' or the blockbuster growth of SPACs (which outnumbered traditional IPOs for the first time last year).

See why thousands of attorneys rely on Bloomberg Law for answers to their most critical questions. Plus, our 24/7 JD-staffed Help Desk can help you pinpoint the exact content and tools you need to differentiate your firm and communicate your competitive advantage. **Request your demo**.

ANALYSIS

Major Questions Doctrine Filings Are Up in a Major Way

Erin Webb
Legal Analyst, Bloomberg Law
Feb. 1, 2022

A surge in federal court filings in 2021 referencing the "major questions doctrine"—and the increased use of the doctrine by certain U.S. Supreme Court justices recently—indicate that limits to federal agency power may become a more frequently argued topic in the near future.

In a Jan. 13 concurrence with the high court's **decision** staying OSHA's **shot-or-test rule**, Justice Neil Gorsuch—joined by Justices Samuel Alito and Clarence Thomas—referred to the doctrine, which bypasses the court's usual agency deference on issues it deems important.

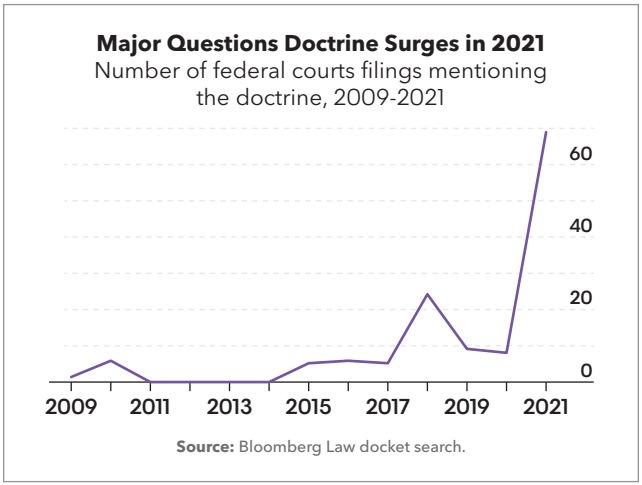
What Is the Major Questions Doctrine?

The major questions doctrine states that agencies may not regulate in areas of high national importance without very specifically granted statutory authority. It carries the name "major questions" because the court has historically only applied it in areas of "economic or political significance." Essentially, the court will reconsider an agency's action with more scrutiny if the action involves a "major question."

The major questions doctrine developed from earlier cases dealing with tobacco and environmental litigation, as discussed in a **recent Bloomberg Law interview** with New York University School of Law professor **Richard Revesz**. Professor Revesz noted Justice Stephen Breyer's repeated dissents in cases applying the major questions doctrine and the potential impact of his recently announced retirement.

How Often Is the Major Questions Doctrine Argued?

The major questions doctrine was rarely argued in federal courts by name before 2018, according to **federal docket filings** available to Bloomberg Law. A few appearances here and there occurred over the years, and then the phrase appeared a record 69 times in federal filings in 2021. The chart below shows the progression over time.



What Does the OSHA Ruling Mean for the Doctrine?

If applied to the OSHA case, ***National Federation of Independent Business v. Department of Labor***, the doctrine would dictate that absent a specific reference to regulating or requiring employee vaccination in OSHA's enabling statute, the agency can't regulate in that area if the court deems workplace vaccines to be "major" enough to require that specific power from Congress.

It's important to note that decision was per curiam on a motion to stay, and wasn't a full review of OSHA's authority to enact the rule. Gorsuch simply **referred to the doctrine** in his concurrence with the court's decision, which granted a motion to stay OSHA's shot-or-test-rule. But, given that one of the factors in granting a stay is likelihood of success on the merits, the analysis that the court provided in the per curiam decision is important. Though it did not reference the "major questions doctrine" by name, the court's per curiam opinion referred to agency powers on issues of "vast economic and political significance," which is an analysis that formed the roots of the major questions doctrine.

The high court's decision has correctly been taken as a strong portent that it would, in fact, find that OSHA lacked statutory authority from Congress for the rule. (OSHA **withdrew the rule** in the Federal Register on January 26.) The court's ruling did more than hint at this when it flatly held that Covid-19 was not an "occupational" risk.

No *Chevron* Deference for OSHA

Courts usually give deference to whatever action has been taken by an agency. That's commonly referred to as ***Chevron*** deference, after the leading case on this point.

Federal agencies are deemed to construe the statutes they administer in a reasonable way when they make regulations or take other actions, the Supreme Court said in its 1984 ruling in the case. If a statute is silent or ambiguous about whether an agency is empowered to take a certain action, *Chevron* states that only an agency's "impermissible" interpretation of a relevant statute can be overturned by a court. (While there are exceptions for when an agency took action by less formal means, here the OSHA rule was published in the Federal Register after notice and comment, so *Chevron* arguably would apply.)

Though there wasn't a specific analysis of ambiguity or of the Chevron doctrine by name in the OSHA case, the court found that the agency's action went beyond the "occupational" purposes described in the statute, **leading to a conclusion** that the court would find the statute at least ambiguous, if it were to hear the full case rather than a request for stay (**which it won't now**, given OSHA's withdrawal of the rule).

"The question, then, is whether the [Occupational Safety and Health] Act plainly authorizes the Secretary's mandate. It does not. The Act empowers the Secretary to set workplace safety standards, not broad public health measures," the court said.

Which approach the court would have taken on a full review of OSHA's action that went beyond the stay request isn't entirely clear from the decision, but Gorsuch's concurrence is a heavy hint that the major questions doctrine would have been involved. What is clear, however, is the court's belief that OSHA's action was outside the authority of OSHA's enabling statute and the "shot-or-test" rule would not be upheld.

What Does the Future Hold for the Doctrine?

Gorsuch's concurrence demonstrates why federal filings are raising the major questions doctrine more frequently: The current Supreme Court is receptive to it. In the last three years, **Gorsuch** and **Thomas** both have cited with approval to the doctrine by name in dissents they wrote.

The court invoked the idea behind the doctrine in another **per curiam opinion** earlier this year (while not labeling it the "major questions doctrine"), when it held that the CDC's pandemic eviction moratorium exceeded its authority.

Alito, too, referenced the doctrine favorably in his dissent in 2020 in a Clean Water Act case, though without using the "major questions" moniker.

Litigants in front of the court, and in the federal court cases that are the on-ramps for parties hopeful to get before the Supreme Court, see the major questions doctrine as an effective way to persuade the court that certain federal agency actions are impermissible. This could have further impact on cases before the court this term that have to do with the scope of federal agency action. So far this term, the major questions doctrine has been:

- argued in a **petition for certiorari** involving the construction of statutes applicable to **veterans' benefit claims**;
- **referenced during** oral argument in a **case about** the Department of Health and Human Services' actions concerning Medicare drug reimbursement rates; and
- **briefed** and expected to be argued in a consolidated group of cases concerning the EPA's Clean Power Plan, set for argument **next month**.

It's a fair prediction that the major questions doctrine will be a major consideration, if not a driving factor, behind the court's upcoming rulings.

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Overview – Defamation

> **Editor's Note:** This Overview provides an introduction to the tort of defamation, focused on how it is analyzed under the common law. Note that this tort may also implicate constitutional and statutory issues, so be sure to analyze all relevant laws prior to bringing or defending against this tort.

The tort of defamation involves the publication of a statement that negatively affects the plaintiff's reputation. Written statements are known as libel, while oral statements are known as slander. Some defamatory statements are actionable per se, while others require proof of special harm. Due to the First Amendment, additional fault rules apply when the defamatory statement involves a public official or public figure and relates to a matter of public concern.

PRACTICE TIP: Defamation is not just a cause of action for individuals - under certain circumstances corporations, partnerships, associations, and even industries can bring claims for defamation too. However, there is no cause of action for defamation of a deceased person. **Restatement (2d) of Torts, §§ 560-562**.

Elements of the Claim

The exact elements of a defamation claim can vary across jurisdictions. However, the general elements of a defamation claim are:

1. a false and defamatory statement about the plaintiff;
2. an unprivileged publication to a third party;
3. fault amounting at least to negligence on the part of the defendant; and
4. actionability as a matter of law or special harm caused by the publication. **Restatement (2d) of Torts, § 558**; **Court Opinions**; **Point of Law** (POL).

PRACTICE TIP: Many states have their own anti-defamation statutes, some of which are criminal in nature. To figure out whether a state has such a statute, run a **State Statutes Search**.

False and Defamatory Statement

A statement is defamatory if it is false and if it tends to harm the plaintiff's reputation by lowering them in the eyes of the community or by deterring third parties from associating or dealing with them. **Restatement (2d) of Torts, § 559**; **Court Opinions**. Defamatory statements tend to expose the plaintiff to hatred, ridicule, or contempt and may reflect negatively upon their morality or integrity, or they may discredit their financial standing in the community. **Court Opinions**.

PRACTICE TIP: As covered more below in Defenses, truth is an absolute bar to a defamation claim. **Restatement (2d) of Torts, § 581A**; **Court Opinions**. A statement must be false in order to be defamatory.

A statement does not have to damage the plaintiff's reputation in the eyes of everyone in the community; if the statement would tend to damage the plaintiff in the eyes of a substantial and respectable minority of the community, that may be sufficient. **Restatement (2d) of Torts, § 559**; **Court Opinions**. Different standards may apply depending on the characteristics of the community members at issue, so jurisdiction specific research is required.

The recipient of the communication must also be considered. For example, the recipient of the communication must have reasonably understood the communication to be defamatory. **Restatement (2d) of Torts, § 563**; **Court Opinions**. The recipient must have also understood that the communication was "of and concerning" the plaintiff, meaning it was intended to refer to the plaintiff. **Restatement (2d) of Torts, § 564**; **Court Opinions**. The plaintiff does not have to be described by name, as long as the recipient reasonably understood that the communication was about the plaintiff. **Restatement (2d) of Torts, § 564**.

PRACTICE TIP: Some statements are only defamatory when they are considered in light of extrinsic facts. As a result, the plaintiff may need to plead additional facts in their complaint to state a claim, often called inducement, colloquium, or innuendo at common law. Modern pleading requirements vary by local practice, so be sure to verify the requirements before filing a complaint. For help, try running a **Court Opinions Search** and filtering by relevant jurisdiction.

Generally, only statements of fact can be defamatory. Statements of opinion generally cannot be the basis of a defamation action, unless they imply that there is an undisclosed, defamatory fact underlying the opinion. **Restatement (2d) of Torts, §§ 565-566**; **Court Opinions**. Often, the test for whether a statement consists of a defamatory fact is whether the statement can be proved false. **Court Opinions**. States vary in how they assess whether statements are pure opinions, or whether they are protected by privileges like the fair comment privilege discussed below, so jurisdiction specific research is required.

Libel vs. Slander

If a defamatory statement is written, it is known as libel. If a defamatory statement is oral, it is known as slander. **Restatement (2d) of Torts, § 568**; **Court Opinions**. The precise contours of whether a statement constitutes libel or slander are nuanced and vary by jurisdiction. The difference matters because in general, plaintiffs alleging libel get a presumption of harm, while plaintiffs alleging slander may or may not, depending on the topic. See the section on Harm below for more details.

Unprivileged Publication

Unprivileged

A statement cannot be defamatory if it is privileged. For more information, see the section on Privilege below.

Publication

A defamatory statement must be shared, either intentionally or negligently, with a third party other than the plaintiff. **Restatement (2d) of Torts, § 577**; **Court Opinions**. The term "publication" does not necessarily mean publication in the traditional sense; defamatory statements can include spoken words or gestures, in addition to written or printed words. **Restatement (2d) of Torts, § 577**; **Court Opinions**.

In general, there is a new publication every time the defamatory statement is communicated to a third party. However, under the "single publication rule," which has been adopted by most states, if a defamatory statement is heard by more than one person at the same time, or is published in a single issue of a newspaper or magazine or in an internet article, that counts as one publication. **Court Opinions**. There is a distinct cause of action for every publication or republication, but once there has been a judgment on the merits, the plaintiff cannot bring another case against the defendant in another jurisdiction, even if the publication crossed state lines. **Restatement (2d) of Torts, § 577A**.

PRACTICE TIP: Questions of republication can be tricky in cases involving the internet where text is easily changed and shared, such as by hyperlinks or tweets, so be sure to look for case law with analogous facts from the relevant jurisdiction.

Fault

Under the Supreme Court's interpretation of the First Amendment in the seminal case of **New York Times Co. v. Sullivan** and its progeny, fault is a necessary element of a defamation claim. The degree of fault required depends on whether the plaintiff is a private person or a public official or public figure and whether the statement is about a matter of public concern.

Public Official or Public Figure

In general, if the plaintiff is a public official or a public figure and the statement relates to their conduct, fitness, or role in their public capacity (i.e., a matter of public concern), the plaintiff must meet a high bar - proving that the defendant acted with "actual malice." This means that the defendant knew the statement was false or acted in reckless disregard of whether the statement was true or false. **Restatement (2d) of Torts, § 580A**; **Court Opinions**. Courts commonly refer to this as the "constitutional privilege." **Court Opinions**.

Public figures are divided into two categories - all-purpose public figures and limited-purpose public figures. In general, for all-purpose public figures, the actual malice standard applies; for limited-purpose public figures, the actual malice standard applies to the public aspect of their lives. **Court Opinions**.

PRACTICE TIP: Be sure to research the case law in the relevant jurisdiction to determine how courts have defined who is a public figure. Given the different fault standards at play, how the plaintiff and matter of concern are classified can make or break the likelihood of success in a defamation case.

Private Person

In general, if the plaintiff is a private person, the plaintiff must meet a lower bar - proving that the defendant was at least negligent with regard to the truth. **Restatement (2d) of Torts, § 580B**; **Court Opinions**.

Harm

Some types of defamation are actionable per se, meaning they are actionable without any proof of special harm, while other types require proof of special harm.

Libel and Slander Per Se

Due to its more permanent nature, libel is generally considered actionable per se (**Court Opinions**), although some courts hold that libel is only actionable per se if the defamatory meaning is clear from the face of the statement and without reference to extrinsic facts. **Court Opinions**. Slander may be actionable per se if the statement relates to certain topics - for example, saying that the plaintiff has committed a crime that is punishable by imprisonment or that the plaintiff has a loathsome disease. **Restatement (2d) of Torts, §§ 569-570**; **Court Opinions**.

PRACTICE TIP: When researching libel per se, be on the lookout for the term "per quod," which means extrinsic facts are required. Different courts have developed different standards, so be sure to research the case law in the relevant jurisdiction.

Special Harm

If a statement is not defamatory per se, the defendant can still be liable if the plaintiff has suffered special (i.e., economic or pecuniary) harm. **Restatement (2d) of Torts, § 575**; **Court Opinions**. For example, if Person A says to Person B, a business owner who is considering employing Person C, that Person C has questionable moral character, and that statement induces Person B to stop employment negotiations with Person C, then Person A may be subject to liability to Person C. **Restatement (2d) of Torts, § 575** Illustration 2.

Defenses

There are three main categories of defenses to a defamation claim: truth, consent, and privilege. In addition, statutory defenses may exist in some states under certain circumstances.

PRACTICE TIP: The best defense to a defamation suit is to never be on the receiving end of one. If you or your client publishes anything, orally or in writing, about an identifiable person, take extra measures to ensure the facts are correct. If your client habitually publishes material on paper or online, conduct regular trainings for all content producers and editors about defamation, best practices, and how to handle complaints.

Truth

In order to be defamatory, the statement must be false. If the statement is true, the plaintiff cannot recover, regardless of whether the defendant believed the statement to be true or false, and even if the defendant made the statement for the sole purpose of harming the plaintiff's reputation. Truth is an absolute bar to a defamation claim. **Restatement (2d) of Torts, § 581A**; **Court Opinions**.

Consent

If the plaintiff consents to the publication of a defamatory statement, they cannot later bring a claim for defamation. **Court Opinions**. The scope of consent depends on the surrounding circumstances - for example, consent may be limited to publication at a particular time or to a particular person. **Restatement (2d) of Torts, § 583**.

Privilege

There are two types of privileges that may protect defendants from liability: absolute privileges and conditional privileges.

PRACTICE TIP: Absolute privileges are sometimes called "immunities," and conditional privileges are sometimes called "qualified privileges," so consider including these keyword variations in your searches.

Absolute privileges

An absolute privilege protects certain categories of individuals from liability, including judges or other officials performing judicial functions, attorneys, witnesses, jurors, and executive and legislative officials, as long as the defamatory statement is made in the context of performing their work. **Restatement (2d) of Torts, Introductory Note**; **Court Opinions**. Communications between spouses are also absolutely privileged. **Restatement (2d) of Torts, § 592**.

PRACTICE TIP: The precise contours of whether someone is performing a judicial function have been developed by common law and statute over the years. Quasi-judicial bodies, such as public utilities commissions or legislative or executive bodies, may exercise a judicial function, so be sure to research the law in the relevant jurisdiction to determine whether this absolute privilege, or any others, may apply.

Conditional privileges

To have a conditional privilege, specific factors must exist - the defendant and the third party recipient must have a common interest in the shared information, and the defendant must not abuse the privilege (by, for example, knowing the statement was false or publishing the statement for an improper or excessive purpose). **Restatement (2d) of Torts, § 593**; **Court Opinions**. For example, someone may be conditionally privileged to tell another person that they believe the plaintiff is about to commit a serious crime in order to try to prevent that crime (**Restatement (2d) of Torts, § 598**), and co-owners of land can discuss a defamatory matter that concerns their common interest. **Restatement (2d) of Torts, § 596**.

Some conditional privileges may be particularly relevant for media defendants, including the fair comment privilege (which applies to a reasonable expression of opinion on a matter of public concern) and the fair report privilege (which applies to fair and accurate summaries of statements made in the course of official government proceedings). **Court Opinions**; **Court Opinions**.

PRACTICE TIP: As explained above in the section on Fault, courts also refer to a "constitutional privilege" to describe the First Amendment's limit on a cause of action for defamation that involves a public official or public figure. Unlike the absolute or conditional privileges, the constitutional privilege is not a defense to a claim for defamation. Rather, the constitutional privilege places the burden of proof on the public official or public figure plaintiff. A traditional privilege puts an extra tool in the defendant's arsenal, but it is theirs to prove as part of their defense.

Similar Torts

There are a number of other torts that involve false and/or disparaging statements. For more information on other similar torts, see **Overview – Injurious Falsehood, Disparagement, Slander of Title & Trade Libel**, **Overview – Public Disclosure of Private Facts or Publicity Given to Private Life**, and **Overview – False Light**.

Burdens of Proof

In general, the plaintiff bears the burden of proving that the statement is defamatory, that it was published, that it applies to the plaintiff, that the third party understood the statement to be defamatory and about the plaintiff, special harm (if required), fault, abuse of any conditional privilege asserted by the defendant, and falsity in matters of public concern. **Restatement (2d) of Torts, § 613**; **Court Opinions**. Otherwise, the defendant bears the burden of proving truth and the existence of a privilege. **Restatement (2d) of Torts, § 613**; **Court Opinions**; **Court Opinions**. Be sure to research the required burdens, particularly regarding truth and falsity, in the relevant jurisdiction. For more on burdens of proof generally, see **Overview – Burdens of Proof**.

Statute of Limitations

The statute of limitations for bringing a claim of defamation will vary by state. Some states may have a statute of limitation directly on point, while others may not.

For assistance finding applicable state statutes of limitations, use the Statutes of Limitations search box on the **Litigation Resources** page, or see **Comparison Table – State Statutes of Limitations**. You can also filter this **Court Opinions Search** to see how courts have analyzed the statute of limitation for defamation in your jurisdictions.

PRACTICE TIP: Be sure to research how the single publication and republication rules affect the statute of limitations, if applicable based on the facts.

For more on time limits generally, see **Overview – Time Limits**.

Damages

Defamation damages may include nominal damages, compensatory damages, and even punitive damages, depending on the facts of the case. **Court Opinions**. Be sure to conduct jurisdiction specific case law research to determine what types of damages are available, and what is required to prove them, in a particular case.

For more information on damages generally, see **Overview – Tort Remedies**.

Standard of Review

Standards of review will vary based on the type of appeal at issue and the jurisdiction. Factual questions tend to receive a more deferential standard of review, while questions of law are reviewed de novo. For more on standards of review generally, see **Overview – Standards of Review on Appeal**.

Overview – Truth: Tort Defense

Editor's Note: This Overview covers the defense of truth to claims of defamation and injurious falsehood/disparagement/slander of title/trade libel in tort law. For more comprehensive resources on tort defenses, see **Tort Defenses**. For more on torts generally, see **Tort Actions** and **Tort Damages and Relief**. For more on affirmative defenses generally, see **Overview – Affirmative Defenses**.

Basic Doctrine

This Overview provides basic background information on the defense of truth in tort law as it applies to the torts of **Defamation** and **Injurious Falsehood, Disparagement, Slander of Title & Trade Libel**. For information about truth in the context of **Tortious Interference with a Contract** and **Tortious Interference with a Prospective Economic Advantage**, see **Overview – Justification and Privileges – Tortious Interference**. Jurisdiction-specific research is always required.

Truth is an absolute bar to defamation and injurious falsehood claims, meaning the plaintiff cannot prevail if the statement at issue is true, regardless of how offensive or damaging the statement may be.

Defamation

To make out a claim for defamation, the statement at issue must be false. Therefore, if the statement is true, the plaintiff cannot recover. In other words, truth is an absolute bar to a defamation claim. **Restatement (2d) of Torts, § 581A**; **Court Opinions**; see also, e.g., **Point of Law** (POL); **POL**. Because truth acts as a complete defense, it generally bars the claim regardless of whether the defendant believed the statement to be true, and even if the defendant made the statement for the sole purpose of harming the plaintiff's reputation. **Restatement (2d) of Torts, § 581A**; **Court Opinions**; see also, e.g., **POL**.

PRACTICE TIP: In a few jurisdictions, courts may consider whether improper motives or malice prevent truth from being a complete defense in private defamation cases, meaning cases that do not involve public officials/public figures or matters of public concern. See, e.g., **POL**. Jurisdiction-specific research is always required.

Substantial Truth Doctrine

Many jurisdictions have adopted the substantial truth doctrine. **Court Opinions**. Under this doctrine, a defendant is protected from defamation liability even if the statements at issue are not 100%, literally true. The court will overlook minor inaccuracies as long as the "imputation," "substance," "gist," or "sting" is substantially true. **Court Opinions**; see also **POL Search**. Courts will consider whether an entirely true statement would have had a different effect on the average reader than the substantially true statement. For example, a statement that the plaintiff tested positive for one illegal drug when they actually tested positive for another illegal drug has been found to be substantially true. The truth or substantial truth of a statement is determined as of the time the statement was made. **Restatement (2d) of Torts, § 581A**; **Court Opinions**.

Injurious Falsehood

Truth is also a complete defense to a claim for injurious falsehood, and the analysis is similar to that in the defamation context. **Restatement (2d) of Torts, § 634**; **Court Opinions**. As in cases for defamation, substantial truth is also a defense. See, e.g., **Court Opinions**.

PRACTICE TIP: There is not as much case law on the defense of truth in the context of injurious falsehood, as opposed to defamation, so you may need to review defamation case law for guidance. Jury instructions may also be instructive. To find jury instructions in the relevant jurisdiction, see the links to jury instructions on the **Litigation Resources Page**.

When to Raise the Defense

In defamation and injurious falsehood cases, courts may determine truth or substantial truth as a matter of law. See, e.g., **POL**; **Court Opinions**; **Court Opinions**. Therefore, it should be raised at the earliest possible time in the defendant's responsive pleadings, as the defendant may be entitled to summary judgment. See, e.g., **POL**.

In the defamation context in particular, be aware that the question of whether the plaintiff bears the burden of proving falsity, or the defendant bears

the burden of proving truth, can be complicated and unclear, depending on whether the plaintiff is a private person or a public official/public figure, whether the case involves a matter of public concern, and the status of the defendant. Public officials/public figure plaintiffs must prove falsity in matters of public concern. See generally **BCite Analysis**. Also, a private plaintiff must prove falsity if the defendant is a media defendant and the statement is a matter of public concern. **BCite Analysis**. Jurisdiction-specific research is always required to determine the relevant burdens in your case. See generally **Overview – Defamation**. Whether falsity is an element of a defamation claim, or truth is a defense, the outcome is that if the defamatory statement is not false, there can be no claim for defamation.

By comparison, in injurious falsehood cases, the burden is on the plaintiff to prove that the statement is false as part of their claim. See generally **Overview – Injurious Falsehood, Disparagement, Slander of Title & Trade Libel**.

PRACTICE TIP: Note that courts sometimes describe truth as an affirmative defense in defamation cases. **POL Search**; **Court Opinions**. Affirmative defenses must be pled by the defendant and should be raised at the first opportunity to avoid the risk of waiver. E.g., **POL**. In federal court, an affirmative defense is generally required to be pled in a responsive pleading. See **Fed. R. Civ. P. 8(c)**.

Many states have similar provisions to the federal rules and therefore also require early pleading of affirmative defenses. See, e.g., **Court Opinions**.

Also, consider the pleading standards in your jurisdiction for affirmative defenses. Courts can vary on the standards for pleading an affirmative defense. Filter this **Court Opinions Search** to review the pleading standard for affirmative defenses in your jurisdiction.

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*For more on affirmative defenses generally, see **Overview – Affirmative Defenses**.*

Overview — Compensatory (Actual) Damages

Tort law seeks to put the victim back in the position they were in before the tort occurred. Thus, "compensatory damages," also called "actual damages," are the primary relief awarded in a successful tort action. Compensatory damages are money awarded to a plaintiff to compensate for the harm, injury, or other losses the plaintiff suffers that are directly caused by the tortious conduct of another party. **Court Opinions**.

The permissibility and amount of compensatory damages may be governed by both the common law and by statutes. In addition to case law research, always search the relevant statutes to determine if the state places any limitations on the type or quantity of compensatory damages available. See **State Statutory Search**.

PRACTICE TIP: States vary in how they define remedies. In principle, compensatory damages are different than consequential damages. Consequential damages are typically "indirect" damages (or damages that were reasonably foreseeable but were not the immediate result of the tort), while compensatory damages cover injuries that immediately and directly resulted from the tortious conduct. However, how each court defines compensatory and consequential damages in tort actions can vary widely, so jurisdiction specific research is always required. For more, see **Overview – Consequential Damages**.

Types of Compensatory Damages

There are two primary types of compensatory damages – economic and non-economic.

Economic Damages

Economic damages, also called "special damages," are compensatory damages that repay monetary losses to the plaintiff suffered as a direct result of the tort. The category typically includes things like loss of earnings (past and/or future), property damage, medical expenses (past and/or future), or funeral and burial expenses if a person died as a result of the tort. **Court Opinions**.

These damages are considered objective and provable with receipts, through witness testimony, or by expert actuarial testimony. See **Proving & Attacking Damages**, below. In fact, some courts refer to economic damages as "objective" or "objectively verifiable" because they are based on quantifiable expenses incurred. **Court Opinions**.

PRACTICE TIP: Note that the term "economic" can take on different meanings when discussing damages. When discussing types of compensatory damages, "economic" typically has a different meaning than when discussing "pure economic damages" in terms of the **economic loss rule**. As discussed below, when analyzing damages to determine applicability of the economic loss rule, "pure economic damages" are more like commercial damages – damages to a person or property are not considered "pure economic loss."

Non-Economic Damages

Non-economic damages, also called "general damages," include intangible, non-monetary injuries that represent a real loss to the plaintiff as compared to their life before the tort occurred. The primary injuries that these damages seek to cover are things like physical and/or emotional pain and suffering, inconvenience, emotional distress, loss of consortium, and impairment of quality of life. **Court Opinions**. In contrast to the objectively verifiable economic damages, non-economic damages are often described as subjective and non-monetary. **Court Opinions**.

Non-economic damages may be capped by statute. Some states legislate non-economic damages more broadly (**Court Opinions**; **State Statutory Search**), while others may only limit or regulate such damages in certain contexts. For example, many states impose statutory limits on non-economic damages in medical malpractice claims. See **State Statutory Search**. Such caps may be in place to contain jury awards resulting from bias against the defendant or emotional sympathy for the plaintiff.

PRACTICE TIP: Be on the lookout for damages caps in all professional negligence cases. For example, statutes may express concern that juries award disproportionate pain and suffering damages in medical malpractice cases and state a public policy to keep malpractice insurance rates – and ultimately health care costs – down. Regardless of legislative intent, be aware that medical and other professional malpractice actions are often treated differently in many jurisdictions as compared to traditional **negligence** actions against other defendants. Enter keywords in the **GO Bar** to search across state statutes and regulations for any damage caps.

The Economic Loss Rule

The economic loss rule generally prevents recovery in tort of damages for purely economic loss. **Court Opinions**. The primary purpose of the economic loss rule is to prevent a party to a contract from seeking greater recovery in tort than would otherwise be available under the contract. **Court Opinions**. Notably, as mentioned above, "purely economic loss" does not mean the same thing as "economic damages."

PRACTICE TIP: Remember, the goal of tort recoveries is to put the plaintiff in the position they would have been in had the tort not occurred. The goal of contract remedies is to give the plaintiff the full benefit of their agreed bargain. The difference in outcome can be stark.

"Purely Economic"

By "purely economic," courts typically mean that no injury to the plaintiff's person or property occurred. **Court Opinions**. For example, suppose that a factory buys an upgrade to the software running its assembly line. The software upgrade fails, and the factory is shut down for a day while the software vendor gets it back online. The contract between the vendor and the factory specifies that the vendor is only liable for liquidated damages of $100 a day in the event of business stoppage, to a maximum of the cost of the software; the loss of production to the factory is tens of thousands of dollars. The resulting loss isn't recoverable in negligence, even if the vendor was negligent, because the loss is "purely economic." The assembly line didn't catch fire, no one was hurt, and the factory's computers still function at the end of the day. Under the economic loss rule, the factory can't avoid the liquidated damages provision in the software contract by bringing a tort claim instead of a contract claim.

PRACTICE TIP: If the case involves a quasi-contract claim, like **unjust enrichment** or **quantum meruit**, research whether the economic loss rule applies. Some jurisdictions hold that because those claims are equitable in nature, the economic loss rule does not apply, while others may apply it in such cases. Jurisdiction specific research is required. E.g., **Court Opinions**.

Application & Exceptions

The rule has been adopted in most jurisdictions, but the contours are slightly different in each. As with most judge-made rules, courts vary in the exceptions they allow and the circumstances in which they enforce the rule. The outcome is highly dependent on the specific facts at issue, the nature of the parties' relationship, disparities between the parties, the terms of the contract, and other factors.

PRACTICE TIP: Application of and exceptions to the economic loss rule become particularly muddied in construction cases. In situations involving contractors and subcontractors who may or may not be in privity, careful research specific to the industry is required.

Some frequent exceptions to the application of the rule include:

- **Contracts for Services**. Many jurisdictions apply the economic loss rule to contracts for goods, but not contracts for services. **Court Opinions**.
- **The Integrated Product Rule**. In most states, if a defective product damages other property, the economic loss rule does not apply. For example, if a defective tractor catches fire and burns down a warehouse, the rule may not bar tort recovery for the cost to rebuild the warehouse. **Court Opinions**. If, however, the defective part or product at issue is an integrated component in a larger product or system, then damage to the whole may not constitute "other property" for purposes of the rule. **Court Opinions**. In other words, if the defective part causes damage to a larger integrated product or system, that likely is purely economic damage subject to the economic loss rule (and thus recoverable only under a contractual theory of recovery).
- **"Sudden and Calamitous" Failure**. In some jurisdictions, if the product is damaged as a result of a sudden and calamitous event of the kind that creates an unreasonable danger, the economic loss doctrine doesn't apply. **Court Opinions**. This exception may also be called the "sudden and dangerous" exception. **Court Opinions**. For example, if a battery in a delivery truck fails and harms the truck by burning out a circuit or relay, that is likely to be an "integrated product" situation and bar recovery under a tort theory of liability. But if the truck battery suddenly explodes, utterly destroying the truck, that might constitute a "sudden and calamitous" failure and open the door to liability under a tort claim.

- **The Independent Duty Rule**. The Independent Duty Rule is an exception to the economic loss rule that allows a plaintiff to recover economic loss damages in tort when the defendant owed the plaintiff a duty traceable to a source other than the parties' contract. **Court Opinions**. If a truly independent tort duty exists, the plaintiff's economic damages are recoverable in tort. For example, even where the parties have a contract regarding delivery of a product, the plaintiff may bring a **fraud** claim against its counterparty for conduct collateral to the contract, because there is an independent duty in tort not to commit fraud. **Court Opinions**. Some jurisdictions have replaced the term "economic loss rule" with "independent duty rule" to take this principle into account E.g., **Court Opinions**.

PRACTICE TIP: Note that contracting parties can still explicitly (or implicitly) displace tort duties and remedies in their contract, rendering the independent duty rule inapplicable. Always read the contract first and be prepared to argue for or against the language used foreclosing a tort action.

Proving & Attacking Damages

Proving Damages

Compensatory damages usually must be proven by a preponderance of the evidence, although courts may apply other burdens of proof such as reasonable certainty or substantial evidence depending on the case. **Court Opinions**. See **Overview – Burdens of Proof**. This typically requires presenting documentation such as receipts, testimony from the plaintiff or other witnesses about the impact of the tort on the plaintiff's life, and, in some cases, expert testimony.

Whether an expert is necessary depends on the facts and circumstances of the case. For example, if a plaintiff is currently suffering from physical pain as a result of the tort, the plaintiff can more easily prove this themselves through showing evidence of doctor's visits, bills, and testifying about their current suffering. In this situation, expert testimony may not be required.

However, in other cases, it can be helpful, or even necessary, to employ an expert to explain to the jury what a plaintiff can typically expect from certain injuries. For example, future pain and suffering is harder to prove through documentation or the plaintiff's testimony, so it more often requires an expert to explain what the plaintiff will experience in the future. **Court Opinions**. When determining whether a case would benefit from an expert, consider the facts of the case, the nature of the injury, and the damages claimed. E.g., **Court Opinions**. For example verdicts and settlements involving experts, filter this **ALM Verdict Search Report**.

In addition to experts, courts may also utilize different rules surrounding proving damages. For example, when future pain and suffering is at issue, some courts consider whether the nature of the injury is objective, which makes it "plainly evident" that pain and suffering will continue in the future. See, e.g., **Court Opinions**.

Attacking Damages

Defendants attack evidence of damages like they attack other elements of the plaintiff's case: by filing motions in limine to exclude evidence of damages (**Dockets Search**), moving to exclude or disqualify an expert (sometimes called a Daubert motion) or filing a motion in limine to limit an expert's testimony (**Dockets Search**), cross examining witnesses, and introducing contradictory evidence and expert testimony about the existence and/or amount of damage the plaintiff has suffered. Filter this **Docket Search** for example filings surrounding the use and exclusion of experts with respect to damages issues.

Calculating Damages

When calculating the plaintiff's damages – or attacking the other side's calculation – it is important to keep damages principles, claim valuation methods, and jury instructions in mind.

Damage Calculation Principles

The Collateral Source Rule

The collateral source rule states that benefits an injured person receives from sources that have nothing to do with the tortfeasor may not be used to reduce the tortfeasor's liability to the injured person. **Court Opinions**. The obvious source for such collateral payments to the plaintiff is from insurance. **Court Opinions**. In practice, the collateral source rule operates to bar the introduction of evidence of payments to the plaintiff from collateral sources, as such payments are immaterial to the plaintiff's compensatory damages and should not generally reduce its damages. **Court Opinions**; **POL Search**.

As with most rules, always ensure that an exception does not apply. For example, some jurisdictions don't apply the collateral source rule to fees written off by a medical provider or payor. **Court Opinions**. There is a lot of disagreement among jurisdictions about how to handle the difference between what a plaintiff may have been billed for medical care and the amount actually paid. Be prepared to document payments and charges whenever seeking medical expenses on a client's behalf.

PRACTICE TIP: When insurance is involved, subrogation is likely to be an issue, as the insurance company may try to recover payments it made to the plaintiff from the tortfeasor. Subrogation is the substitute of one person in the shoes of another person to assume their legal rights, claims, and obligations. See **Court Opinions**. For more information, see **Overview – Subrogation**.

Mitigation

The doctrine of mitigation of damages, which may also be referred to as the doctrine of avoidable consequences, holds that an injured plaintiff has a duty to take reasonable steps to minimize its damages and will not be able to recover for any losses which could have reasonably been avoided. **Court Opinions**; **POL Search**. Where a plaintiff failed to mitigate, damages may be reduced by an amount that could have been avoided through the plaintiff's reasonable efforts to limit damage or avoid injury. **Court Opinions**; **Court Opinions**. A plaintiff who does successfully mitigate damages may be able to recover costs or expenses incurred in mitigation along with their remaining damages. **Court Opinions**.

Comparative & Contributory Negligence

The affirmative defenses of comparative negligence and contributory negligence can greatly impact the plaintiff's damages in negligence cases.

Most states follow some version of the doctrine of comparative negligence. Comparative negligence generally apportions fault in tort cases according to the proportionate fault of the parties, including the plaintiff, and can reduce a plaintiff's damages. See **Overview – Comparative Negligence**. A few states still use the rule of contributory negligence instead, which denies a plaintiff any recovery if the plaintiff is in any way at fault (that is, if they "contributed" to their own harm). See **Overview – Contributory Negligence**.

For a summary of each state's approach to comparative or contributory negligence, see **Comparison Table – Apportionment of Fault Rules**.

Claim Valuation Methods

Attorneys must assess damages and value claims for many reasons. For example, plaintiffs' attorneys must frequently value claims when performing an initial intake assessment. Additionally, all attorneys must value claims when determining the amount in controversy for purposes of determining federal court **diversity jurisdiction**, or when evaluating settlement offers.

Adding up economic damages like medical bills and lost wages is relatively straightforward. However, valuing intangibles like reduced capacity, loss of quality of life, and emotional distress is more complex. There are two primary mathematical methods for calculating pain and suffering and other non-economic (general) damages.

The multiplier method

Begin with the amount of the plaintiff's economic (special) damages and multiply them by a number between 1.5 and 5. Which multiplier is used will depend on a number of factors that a jury would consider in calculating pain and suffering, such as the seriousness and duration of injury, clear fault of the opposing party, and long-term impacts of the injury like degeneration, disfigurement, or disability. E.g., **Court Opinions**.

The multiplier method often comes up in insurance discussions and in determining the amount in controversy for purposes of determining federal court diversity jurisdiction. E.g., **Court Opinions**. It is also used for valuing claims for purposes of settlement.

PRACTICE TIP: Just like choosing a discount rate for calculating the net present value of a claim, choosing a multiplier for non-economic (general) damages is a complex decision based on many factors. For planning purposes with both calculations, try the math using a variety of discount rates and multipliers to ascertain whether the likely proceeds of the claim will be sufficient under enough different scenarios. If the claim is only worth enough to cover the costs of litigation with a high multiplier and/or low discount rate, that is important information when performing an initial intake assessment.

The per diem method

Some courts permit a calculation based on how many days an injury caused pain and suffering with a standard amount charged for each day. However, others forbid the method. **Court Opinions**. When it's permitted, some courts use the daily salary of a person as a measure.

PRACTICE TIP: Remember, calculating damages is just one facet of valuing a claim. Valuing a claim is a bit of an art. Consider learning in depth how lawyers value claims and what tools and methods are currently best practices. Being able to counsel the client on the full range of damages available and how they should be valued today given the time and risk involved in litigation is a critical skill.

Jury Instructions

Finally, always read the jury charge that will be given to the jury on all aspects of the client's claims. Instructions on evidence, burdens, and assessing and calculating damages are critically important. It is best practice to pull together all aspects of the jury charge at the beginning of the case, as doing so informs the complaint (or response) and helps frame strategic efforts. Publicly available jury instructions are available on the **Litigation Resources** page.

With respect to calculating damages specifically, the jury instructions may provide instructions on calculating economic and non-economic damages. However, for non-economic (general) damages like "pain and suffering," juries are sometimes told to assess damages that are "fair and reasonable," without much more guidance. **Court Opinions**. In this situation, make sure to come in prepared to argue why the proposed damages are "fair and reasonable."

PRACTICE TIP: Jurisdictions have different rules about what jury arguments are impermissibly prejudicial, and they frequently touch on damages arguments. For example, some courts forbid mention of the per diem method of calculation to a jury, while others forbid inflammatory contrasts between the defendant's "deep pockets" and the plaintiff's poverty. Mention of these improper arguments by counsel can undermine the verdict. Always conduct research into what methods of elucidating the plaintiff's damages are off-limits in a specific court because these practices can vary widely and have drastic consequences. Look specifically for overturned verdicts and examine carefully what prompted that outcome.

Note that some statements or arguments to the jury about damages will elicit a very negative reaction from the court, even if they might not step entirely over the line. If seeking intel on a court's practices from a practitioner experienced before that judge, remember to ask about any taboo arguments or practices that will anger the judge or prompt an instruction.

Overview — Comparative Negligence

The doctrine of comparative negligence generally apportions fault in tort cases according to the proportionate fault of the parties, including the plaintiff. Although most states have adopted some version of comparative negligence, either through a common law rule or codified in statute, the states vary in their approach to comparative negligence. Additionally, a few states still use the rule of contributory negligence instead, which denies a plaintiff any recovery if the plaintiff is in any way at fault (that is, if they "contributed" to their own harm). See **Overview – Contributory Negligence**.

Diversity among states in apportioning fault makes this a difficult topic to research, particularly combined with divergent approaches to the related concept of joint and several liability. See **Overview – Allocating Liability Among Joint Tortfeasors**.

For a summary of each state's approach to comparative or contributory negligence, see **Comparison Table – Apportionment of Fault Rules**.

PRACTICE TIP: Any time state law provides the rule of decision you will find federal and state cases on the topic. State supreme court decisions are the most authoritative in both federal and state court, while federal cases are merely persuasive in state court. Remember to keep the authorities in mind to build the strongest argument.

Basics of Comparative Negligence

Although there are many variants, there are two main schools of comparative negligence:

1. "pure" comparative negligence, which apportions the plaintiff's damages in direct proportion to the fault attributable to the plaintiff, and the plaintiff is not barred from recovering even when the plaintiff is mostly at fault, and
2. "modified" comparative negligence, which won't permit a plaintiff to recover at all if the plaintiff is found equally at fault, or in some states more at fault, than the defendant(s). In these states, if the plaintiff is found less than 50 or 51 percent at fault (threshold depends on the state), the plaintiff's damages are reduced in proportion to the percent of plaintiff's fault.

PRACTICE TIP: Although most states fall into one of these two categories, the precise rules of each state vary. There can also be outliers. For example, South Dakota has a comparative negligence rule that permits recovery so long as the plaintiff's negligence is only "slight" compared to that of the defendants. See **Smart Code®**; **Comparison Table – Apportionment of Fault Rules**.

Third Party Fault

Additionally, some states explicitly require that, in apportioning fault to a plaintiff, the fault of absent parties to the lawsuit must be included in the calculation. See, e.g., Point of Law (**POL**). Simply put, in those jurisdictions, if three cars are involved in a wreck but the plaintiff sues only one other driver, the role of the nonparty driver must be included in deciding who is at fault and by how much. In other states, fault can be allocated to nonparties, but only under certain circumstances. However, some states prohibit such assignment of fault, while still others give little to no guidance on allocating fault to nonparties. Since the rules on this issue vary widely by state, state specific research is required. See **Comparison Table – Apportionment of Fault Rules** for state guidance on allocating fault to third parties.

PRACTICE TIP: The "choice of law" decision as to which state's comparative negligence rule to apply to a case can be critical. See **Overview – Choice of Law.** Some states hold that it is against their public policy to apply a different state's comparative negligence rule to a dispute. E.g., **POL**; **Court Opinions Search**. Where the relevant states' legal rules differ, and there is an argument that the law of either can apply, the choice of law question can be vital. Research the rule in all possibly applicable bodies of law and argue that the most favorable is the right rule under the forum's choice of law analysis.

Pure Comparative Negligence

Some states follow a rule of "pure" comparative negligence. **Comparison Table – Apportionment of Fault Rules**; e.g., **BCite Analysis**. In pure comparative negligence states, if the plaintiff was found to be 75 percent at fault, and the defendant was found to be 25 percent at fault, the plaintiff can recover 25 percent of its damages from the

defendant(s). Each party involved in an accident is responsible strictly for that party's part of the blame. E.g., **POL**; **POL**; **Court Opinions Search**. In short, even if the plaintiff is more to blame for an accident than the defendant(s), the plaintiff's blame merely reduces the plaintiff's damages rather than preventing recovery altogether.

The states that follow this rule tend to reason that it is the only system which truly apportions damages according to the relative fault of the parties and, thus, achieves total justice.
See, e.g., **POL**; **Court Opinions Search**.

Modified Comparative Negligence

Modified comparative negligence states don't permit plaintiffs to recover if they contributed half, or in some states more than half, of the fault to the accident. The principal argument advanced in its favor is a moral one: that it is not morally right to permit a party more at fault in an accident to recover from one less at fault. But there is also an argument based in proximate *cause* that a defendant didn't really cause damages if the plaintiff was more responsible than the defendant. See, e.g., **POL**; **BCite Analysis**.

There are two basic approaches to modified comparative negligence. The first refuses recovery to plaintiffs that are at least 50 percent at fault. See, e.g., **POL**; **Court Opinions Search**. Other states permit a plaintiff to recover until the plaintiff is more than half at fault. Once the plaintiff's fault reaches 51 percent, there is no right of recovery. See, e.g., **POL**; **BCite Analysis**; **Court Opinions Search**. In both approaches, the plaintiff's recovery is generally reduced in proportion to the amount of fault allocated to the plaintiff. **Court Opinions Search**. To see how each state addresses comparative fault, see **Comparison Table – Apportionment of Fault Rules**.

Another issue in modified comparative negligence states is who to compare the plaintiff's fault to—the combined fault of all defendants, each individual defendant, nonparties, etc. This issue must be researched individually by state as the states vary in their approach. See **Comparison Table – Apportionment of Fault Rules**.

PRACTICE TIP: Typically, apportioning fault among the parties is the province of the trier of fact. See, e.g., **Court Opinions Search**; **POL**. Each state's jury instruction on its comparative/contributory negligence rules is a great place to start. Courts are relying on this formulation of the law in real trial circumstances, and the case law and/or statutory authority for the instruction is at the bottom of the printed page on the model instruction (and on the proffered proposed instructions from parties in a lawsuit). To find jury instructions in the relevant jurisdiction, see the links to jury instructions on the **Litigation Resources Page**. Or, filter a **Dockets Search** to find jury instructions in the relevant jurisdiction as they were given in similar, recent cases.

Procedural Considerations

Comparative negligence is an affirmative defense. E.g., **Smart Code**; **Court Opinions Search**. See **Overview – Affirmative Defenses**. The defendant must come forward with enough evidence of fault on behalf of another to warrant putting the issue to the jury. **POL**; **POL**; **Court Opinions Search**.

Because comparative negligence decisions are typically made by the jury as finder of fact, they are entitled to deference on appeal. See, e.g., **POL**; **POL**; **POL**; **Court Opinions Search**.

PRACTICE TIP: Some federal legal frameworks, like maritime law, also use comparative negligence to apportion fault. But because the federal rules of decision on negligence (or product liability) typically come from state law, state law is also important in these contexts.

Overview – Choice of Law

> **Editor's Note:** For a comparison of each jurisdiction's choice of law rules in contract matters, tort matters, and when there is an express choice of law clause in an agreement, see the **Comparison Table – Choice of Law Rules**.

Bringing suit in a specific forum does not dictate which law will apply. A "conflict of laws" or "choice of law" issue arises when the laws of different jurisdictions might apply to a claim or legal issue, and which body of law the court chooses to apply will make a difference in the outcome of the case. See Point of Law (**POL**).

If the laws of the possible jurisdictions agree on the outcome of an issue, the court can refer to both sets of laws interchangeably. See **POL**. But if the laws conflict, a more complicated analysis ensues.

For example, two Texas citizens traveling to California have an accident in Arizona when a wheel comes off a rental car they picked up in Texas. What law controls for the tort action the Texans file against the rental car company: Texas or Arizona law? What if the rental agreement says that disputes arising from the contract should be decided under New York law?

Assuming Texas, Arizona, and New York would treat the plaintiffs differently, the forum court (the court hearing the case) will have to decide which law to apply.

Briefly, the analysis will be broken into four parts:

1.) The forum court decides whether it has jurisdiction;

2.) The court decides whether different bodies of law might be applicable to the claims and whether they conflict;

3.) The court characterizes each claim or issue, and figures out which choice of law rules to apply to each; and

4.) The court conducts an analysis under the chosen choice of law rule and applies one jurisdiction's law, as dictated by that analysis, to each claim/issue.

Threshold Issues

The Necessity of an Actual Conflict

There is no conflict if the potentially applicable bodies of law agree on how to handle an issue. See **POL**; **POL**. If there is no conflict, **POL**, the court will generally apply the law of the forum where the lawsuit is pending (lex fori). See, e.g., **POL**; **POL**; **POL**. And some states have a strong preference for their own law. E.g., **POL**.

Procedural vs. Substantive Questions

Choice of law rules generally call for different laws to be applied to procedural versus substantive questions. Procedural questions are governed by the law of the forum (lex fori); substantive legal questions are governed by the law chosen under the choice of law rule, which may be foreign to the forum (and could be federal law, state law, or the law of a foreign country). **Court Opinions Search**; **POL**.

PRACTICE TIP: A litigant arguing that the law of a foreign country should apply to the case must prove what the foreign law is. Attach to pleadings or motions all statutes, case law, and anything else necessary to prove what the foreign jurisdiction's law is. The court is never obligated to find citations to foreign law or research the law itself. **POL**; **Court Opinions Search**.

Whether an issue is substantive or procedural is a creature of the law of each state. Whether a statute of limitations, for example, is a procedural rule or a substantive one can be different in each state or even different for different claims. See, e.g., **POL**; **POL**; **POL**. When states would disagree on whether an issue is procedural, that in and of itself can constitute a conflict that would determine the outcome of the case.

This question becomes particularly acute when a rule limits timing for a claim, or standing to bring it, and one state would treat such a limitation as substantive and the other (the forum) would treat it as procedural. If the forum would normally apply its own procedural rules, but the state supplying the substantive law would disagree and apply its own rule, the question of "procedural" or "substantive" is then itself the outcome determinative choice.

Be aware that many states also have "borrowing statutes" that seek to discourage forum shopping by barring any suit in the forum if it would be barred in a different jurisdiction where the action arose. See, e.g., **Smart Code®**.

In the specific case of statutes of limitations, these borrowing statutes can override a common law examination of which statute should apply. For example, if the Texas drivers above sued the rental car company in California, and the suit would be time-barred in Arizona where the claim "arose," a California borrowing statute might bar the California court from hearing the case even if it would be timely under California's statute of limitations. The California court won't bother to decide which statute of limitations should apply, because the statute has supplanted that analysis and dictated that the law of Arizona will apply.

Federal vs. State Choice of Law Rules

After determining that a divergence of substantive law requires the court to conduct a choice of law analysis, the first step for a federal court is to determine what set of choice of law rules it should apply. Depending on the situation, a federal court may follow the forum state's choice of law rule or a federal choice of law rule.

A federal court will apply the forum state's choice of law rule when it is:

(1) Sitting in diversity, **POL**, **POL**, or

(2) Adjudicating pendant or supplemental state-law claims in federal question cases (with federal law applying to the federal questions). **POL**.

PRACTICE TIP: In some contexts, including bankruptcy cases, courts will apply the choice of law rules of the forum state when adjudicating supplemental state law claims unless an overwhelming federal policy requires the court to formulate a choice of law rule as a matter of independent federal judgment. **Court Opinions Search**; **POL**; **POL**.

Accordingly, state law supplies the rule of decision on choice of law problems much of the time.

In contrast, a federal court will follow federal choice of law rules when it is adjudicating federal claims or when jurisdiction is premised on a federal statute. See, e.g., **POL**.

Having determined which choice of law rules to apply, the court's next task is to apply those rules to select the right body of law to govern the dispute.

Choice Of Law Rules

Federal Choice of Law Rules

Federal choice of law rules derive from federal common law, and must be researched in each circuit for each specific claim. Many federal courts follow the Restatement (Second) of Conflict of Laws. **POL**. The conflict of laws determination can turn on whether the issue involves a right or a remedy, whether the issue is substantive or procedural, and whether a uniform result nationwide is highly desirable. These issues become entwined in the analysis in some courts. See **Court Opinions Search**. For instance, a federal district court generally will apply the law of the circuit in which it sits to nonpatent issues and the law of the Federal Circuit to issues of substantive patent law. **POL**.

Traditional State Rules

All 50 states in the U.S. previously followed the "traditional approach" to analyze choice of law conflicts. Those rules used the law of the place where an agreement was made to decide contract disputes (*lex loci contractus*), and the law of the place where the tort occurred for tort claims (lex loci delicti). States differed on whether they would allow parties to choose which law would apply to their dispute through a "choice of law clause" in contracts.

Beginning in the 1960s, states revisited their conflicts jurisprudence and some decided to update their approach. The great majority now follow one of several "modern" rules for deciding conflicts. Federal and state courts also now presumptively honor contractual choice of law clauses unless they violate public policy (or there are other similarly unusual circumstances). These clauses can be determinative in contract cases. **POL**.

PRACTICE TIP: Because of this shift, watch out for older cases. Not all states have overturned their prior law, and the old rule can mistakenly turn up in newer cases. Some states have evolved through stages using different rules, or continue to evolve. Overall, the case law on conflicts may be underdeveloped in some states.

When that is the case, the best approach is usually to walk the court through the development of its own law in briefing to prevent confusion on behalf of the court (or law clerk). If the brief can paint a coherent picture of the state's law and policy on conflicts of law, the court may find it persuasive and latch onto it.

Modern State Rules

If a conflict exists, these are the most important modern rules of decision courts consider in conducting a choice of law analysis:

1. The Restatement (Second) of Conflict of Laws

The Restatement's test is also called the "most significant relationship" test. For each claim, the court asks where the most significant actions underlying the claim occurred and about the public policies of the implicated states.

This is currently the prevalent method of analyzing conflicts of law. About 20 states and the federal courts use this method for tort and contract claims. **POL**.

2. Governmental Interest Analysis

This test asks which jurisdiction has the greatest interest in applying its laws to the conflict, i.e., which state's interests are most impaired if its law is not applied. This analysis takes into account many of the same factors as the Restatement test, but is more focused on the interests of the underlying authorities than on those of the parties. **Court Opinions Search**.

3. Leflar's Choice Influencing Factors (Better Law Method)

Professor Robert A. Leflar proposed this approach, which is also called the "better law" method. The court asks which state's law, when applied to the conflict, will better promote (1) predictability of result, (2) preservation of interstate order, (3) simplification of the judicial decision, (4) advancement of the forum's interests, and (5) application of the better law.

The same considerations are largely subsumed in the Restatement (Second) approach, but several states explicitly use Leflar's method. **Court Opinions Search**; see, e.g., **POL**, **POL**. Others use his factors as an element of their analysis. E.g., **POL**.

4. Lex Loci

A number of states still use the "traditional" rules from the Restatement (First) of Conflict of Laws. Specifically, torts are decided according to the law of the place where the tort occurred (*lex loci delicti*), **POL**, and contracts by the law of the place where the contract was made (*lex loci contractus*), **POL**. See, e.g., **POL**; **POL**.

5. Statutory Rules

In some states, statutes provide the rule of decision for certain claims. See **Smart Code**; **Smart Code**. Generally these codify a prior common law rule.

PRACTICE TIP: While the main modern methods are laid out above, there are permutations of these methods at work in some states, so state- and claim-specific research is required. However, understanding what "bucket" a state falls into in analyzing claims helps in interpreting the research and in picking persuasive law from other states when law on a topic important to the case may be underdeveloped.

Special Issues

Constitutional Limits

States are not entirely free to decide to apply their own law to a legal dispute. It is unconstitutional to apply a state's substantive law to a matter unless the state has a significant contact or significant aggregation of contacts to the dispute, creating state interests, such that the choice of its law is neither arbitrary nor fundamentally unfair. **POL**.

Depecage

Depecage is a doctrine that "breaks up" a suit and applies different laws to different issues or parts of the claim, or to different claims within a lawsuit. **POL**. Depecage is routine. In deciding what law to apply, it is common for courts to analyze cases on an issue-by-issue basis. **POL**. This type of analysis generally produces a better idea of whether and where actual conflicts will occur. It is also common for courts to apply the law of one state to one set of issues and that of another state to a different set of issues. A court in State A may decide that the forum's (State A's) statute of limitations for negligence should apply, but the amount of damages available to the plaintiffs for negligence should be decided under the law of State B. E.g., **POL**.

For example, in the case of the Texans above, the court might apply New York law to the Texans' claim that the rental car company breached its contractual obligation to provide a sound vehicle, based on the contract's choice of law clause. A negligence claim, which is tort-based, might result in the application of Arizona law (the state where the crash occurred). And even then, what constitutes a sound vehicle might be a matter on which the law of Texas, where the car was leased, should have the most say.

The practical outcome of depecage is that the decision of which law to apply isn't always made just once in a case. Each claim, and each issue related to that claim, might permit the application of a different set of laws. In practice, the broad outlines that delineate issues (substantive or procedural, tort or contract, remedy or right) will be used to sort out which claims and issues will be treated separately and which will be lumped together.

Renvoi

Renvoi, French for "to return" or "send back," is a choice of law rule whereby the forum state applies the choice of law rules of a foreign jurisdiction as part of its conflict of laws analysis. This can result in a scenario not unlike touchbacks in a game of tag: a forum court in State A conducts a conflicts analysis that looks to the substantive law of another state, State B, including State B's choice of law rules. The forum court decides that State B's choice of law analysis would decline to apply State B's law to the dispute, and instead would favor the application of State A's law. In effect, this bounces the control of the conflict back to State A and gives the legal analysis a round-trip between the two states. **POL**. State A's law looks to State B for the choice of law rule, and State B's choice of law principles point back to State A to provide the substantive rule of decision.

In cases involving choice of law clauses, the first basic question the forum court sometimes asks is whether the reference to a foreign jurisdiction's law in the clause is only to the substantive law of that jurisdiction, or to its "whole" law, including choice of law rules. This is typically done by applying traditional tools of statutory/contractual interpretation. If the latter, then what would the foreign jurisdiction's choice of law rules require? If the foreign jurisdiction would decide the dispute under its own law, the analysis stops there. If, however, the foreign jurisdiction's choice of law rule would apply the law of forum state to the conflict under its choice of law rules, "remission" occurs. E.g., **POL**.

PRACTICE TIP: This rule can lead to a court in Arizona deciding how a court in New Jersey would approach a choice of law analysis under New Jersey law, for example. The Arizona court might or might not get it right, as far as a New Jersey court would be concerned, so take such case law with a grain of salt in citing precedent to New Jersey courts.

Sometimes the choice of law rules of the foreign jurisdiction would dictate that the law of a *different* foreign jurisdiction supply the substantive rule of decision ("transmission" of the conflict). If the choice of law rules of *that* jurisdiction would apply the choice of law rules of *yet another* jurisdiction, this can theoretically result in a morass. It is also theoretically possible (but practically highly improbable) to get locked in a spiral of remissions where two states would endlessly pass control of the dispute back and forth like a hot potato.

PRACTICE TIP: In practice, remission loops and endless chains of renvoi aren't a practical concern. But if they could theoretically occur, that supports an argument that applying the doctrine of renvoi is inappropriate in a particular case because it would lead to an absurd, unpredictable, or unfair result. Following the transmissions and remissions to their illogical conclusions can be a valuable point to make, if that helps the client get the law they prefer applied to the case.

Procedural Considerations

The party seeking a choice of law analysis from the court bears the burden of demonstrating that a true conflict of laws would impact the outcome of the case. **Court Opinions Search**; **POL**. The party moving to apply foreign law must prove its substance to a reasonable certainty. **POL**; **POL**.

When both parties have failed to prove the foreign law, the forum may say that the parties have acquiesced in the application of the local law of the forum. **POL**.

PRACTICE TIP: Procedurally, choice of law issues come up in a wide variety of motions before the court, and as arguments in briefing on a variety of issues. **Dockets Search**. The question should be raised as early as possible to alert the court to the issue and avoid wasting the court's time looking into the wrong authority.

Choice of law determinations by the district court are reviewed de novo on appeal. **POL**; **POL**.

ANALYSIS

Crypto Drafting Trends Are Emerging in M&A Agreements

Grace Maral Burnett
Legal Analyst, Bloomberg Law
Feb. 17, 2022

The week following "**crypto bowl**" Sunday is a good time to check in on a drafting trend I've **had my eye on** for a while: the appearance of "crypto" in mergers and acquisitions agreements.

And it's no coincidence that in the year leading up to the Super Bowl crypto ad debuts last weekend, the number of publicly available agreements containing references to cryptocurrencies and crypto-assets, such as "Bitcoin" and "digital assets," reached its highest level ever.

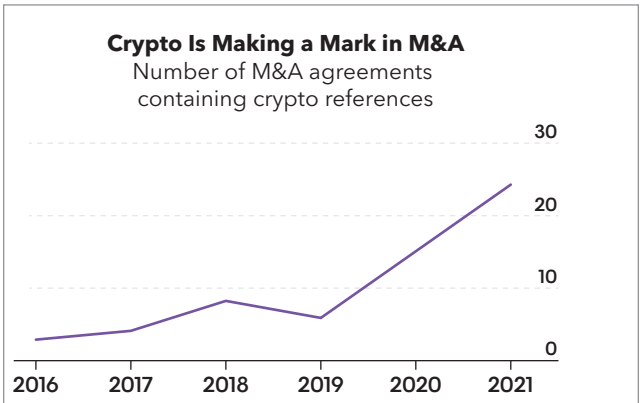
Beyond their increased appearance in these agreements, the emerging provisions we're now seeing may serve as the blueprint for how deal lawyers address crypto in future deals, as the need to do so potentially increases with growing crypto adoption.

As Hannah Miller of Bloomberg News **wrote** earlier this week, "There's no more grandiose way for a business to declare it's entered the mainstream than buying Super Bowl ads." Applying this line of thought to M&A pari passu: There's no more prosaic way for deal lawyers to know it's time to pay attention to crypto than when it starts getting its own reps and MAE carve-outs in publicly filed deal agreements.

Agreements Containing Crypto References

A Bloomberg Law advanced precedent search of publicly available M&A agreements using the Boolean keyword string "crypto" OR "*Bitcoin*" OR "*Ethereum*" OR "*stablecoin*" OR "*digital asset*" OR "*digital currency*" yielded 24 unique M&A agreement results signed in 2021 that contain one or more of the quoted terms. (Access precedent search results **here**.)

While it may seem like a small number of agreements, in the grand scheme, last year's total is the highest ever for deals involving crypto references—and appears to be new territory for crypto's presence in the realm of M&A agreements.



Source: Bloomberg Law as of Feb. 16, 2022. The tally is of publicly available mergers and acquisitions precedents dated between Jan. 1, 2016 and Dec. 31 2021 containing one or more of the following terms: "crypto", "Bitcoin", "Ethereum", "stablecoin", "digital asset", or "digital currency". Duplicate agreements were not counted.

Last year was a record year for **M&A** overall and especially for investment involving entities with a **nexus to crypto**. The search results—which mostly include transactions involving these entities—illustrate this point.

Among the deals captured by our search were a number of **de-SPAC transactions** (see below for examples) and some large deals including the $1.2 billion **BitGo Holdings Inc-Galaxy Digital Holdings Ltd.** merger signed in May and completed in December of last year.

Emerging Crypto Provisions

My review of recent M&A agreements found using the crypto search described above shows the emergence of certain drafting trends. These include some common provisions where crypto references repeatedly appear, as well as a few brand new provisions and carve-outs completely focused on crypto-related matters.

The following are some of the provisions containing crypto references in 2021 deal agreements:

- "Ownership of Digital Assets" standalone representation and warranty
- Crypto-focused representation and warranty paragraph added to end of "International Trade; Anti-Corruption" representation and warranty

- Crypto-specific Material Adverse Effect (MAE) carve-out
- "Material Contracts" representation and warranty
- Interim operating covenants exception to allow certain crypto-related transactions
- Definition of "Cash"
- Definition of "Indebtedness"
- Inclusion in description and formula for: calculation of assets at closing, closing consideration, closing working capital
- Termination provisions
- Closing statement specifications

Below are some examples of certain provisions listed above that are present in multiple deal agreements reviewed, excerpted from the agreements:

Crypto-Specific MAE Carve-Out, Example 1:

[. . .] *(xi) any change in the price or relative value of any digital currency or cryptocurrency, or any other blockchain-based tokens or assets, including Bitcoin or EOS; (xii) any change in existence or legality of any digital currency or cryptocurrency, or any other blockchain-based token or asset, or any halt or suspension in trading of any such digital currency or cryptocurrency on any exchange, in each case including Bitcoin or EOS (except that this clause (xii) shall not exclude any changes in existence, public availability, legality, or trading volume of any digital currency or cryptocurrency, or any other blockchain-based token or asset, or any halt or suspension in trading of any such digital currency or cryptocurrency on any exchange, in each case including Bitcoin or EOS, which, reasonably foreseeably result from actions taken by the Target Companies)* [. . .] (SAITECH Ltd.–TradeUP Global Corp. **Business Combination Agreement** dated Sept. 27, 2021 (governing law: Delaware, Cayman Islands))

Crypto-Specific MAE Carve-Out, Example 2:

[. . .] (c) *any change in the price or relative value of any digital currency or cryptocurrency, including but not limited to Bitcoin, (d) any change in trading volume of any digitalcurrency or cryptocurrency, or any halt or suspension in trading of any such digital currency or cryptocurrency on any digital currency exchange, in each case including but not limited to Bitcoin* [. . .] (Griid Holdco LLC–Adit EdTech Acquisition Corp. **Agreement and Plan of Merger** dated Nov. 29, 2021 (governing law: Delaware))

Ownership of Digital Assets Rep:

Ownership of Digital Assets. As of the date of this Agreement, the Target Companies own and have the exclusive ability to control, including by use of "private keys" or other equivalent means or through custody arrangements or other equivalent means, all of the crypto-currencies, blockchain-based tokens, and other blockchain asset equivalents (collectively, **"Digital Assets"***) set forth on Schedule 4.17(i) of the Company Disclosure Schedules, free and clear of all Liens except for Permitted Liens; provided, however, that such ownership and exclusive ability to control Digital Assets is subject to the continued existence, validity, legality, governance and public availability of the relevant blockchains. Except as set forth on Schedule 4.17(ii) of the Company Disclosure Schedules, the Target Companies and their Predecessors have taken no actions where any of them owns a substantial portion of all outstanding tokens in the then existing issued and circulating supply of such tokens on a blockchain to effectuate change through the governance process of that relevant blockchain that could reasonably foreseeably disrupt the continued existence, validity, legality, governance or public availability of the relevant blockchains.* (Bullish Global–Far Peak Acquisition Corp. **Business Combination Agreement** dated July 8, 2021 (governing law: Delaware, Cayman Islands))

Crypto-Specific Rep Included Under "International Trade; Anti-Corruption":

In the past five years, no Company Group Member has purchased or sold Bitcoin, or any other digital asset, in a transaction involving a counter-party whose identity was not verified in accordance with the Company's sanctions compliance policy and any applicable know your customer/anti-money laundering laws or regulations. (Core Scientific Holding Co.–Power & Digital Infrastructure Acquisition Corp. **Agreement and Plan of Merger and Reorganization** dated July 20, 2021 (governing law: Delaware))

...And You've Got to See These as Well

Below are two provisions that I believe are worth noting, despite the fact that they each appeared only in a single agreement during 2021. One is a provision allowing for termination of the agreement if the price of Bitcoin falls below a certain threshold, and the other is a post-closing covenant stipulating that certain compensation payments be converted into Bitcoin.

Termination:

Termination. This Agreement may be terminated at any time prior to the Effective Time (with respect to Sections 8.01(b) through 8.01(k), by written notice by the terminating party to the other party), whether before or, subject to the terms hereof, after approval of the Merger Partner Voting Proposal by the Shareholders of Merger Partner or approval of the Public Company Voting Proposals by the Shareholders of Public Company:

[. . .]

by Public Company, at any time prior to the Effective Time, if the seven day moving average price of Bitcoin, as reported on Binance as "MA(7)", falls below $15,000. (Gryphon Digital Mining Inc.–Sphere 3D Corp. **Agreement and Plan of Merger** dated June 3, 2021 (governing law: Delaware))

Post-Closing Employee Compensation:

Post-Closing Covenants of the Buyer Parties. On the Closing Date, Buyer shall hire the employees, or engage the independent contractors, of Seller set forth in Schedule 6.04. The parties agree that budget for the compensation for the Persons set forth in Schedule 6.04 shall be One Million Three Hundred Four Thousand Dollars ($1,304,000.00) for the twelve (12) month period commencing on the Closing Date. The compensation paid under this Section 6.04 shall be in United States Dollars, but, subject to compliance with Law, converted to bitcoin at the time of payment through the use of a cryptocurrency payment service provider reasonably mutually agreed by Seller and Troika, such as BitPay Send or BitWage. (Redeeem LLC–Troika Media Group Inc. **Asset Purchase Agreement** dated May 21, 2021 (governing law: New York))

In addition to the examples above, M&A lawyers interested in looking at emerging crypto-related deal provisions might consider reviewing the Delaware-governed BitGo Holdings Inc.–Galaxy Digital Holdings Ltd. **Agreement and Plan of Merger**, which contains a variety of crypto-specific definitions and terms. For example, it contains a robust definition of "Virtual Currency" and embeds crypto into financial terms like the definition of "Cash" and other consideration-related provisions.

The Future

Looking at how deal parties have begun to address crypto in otherwise standard M&A provisions gives us a sense of how crypto might be included in non-crypto-industry deals in the future.

If the crypto industry continues to grow, more crypto-industry deals will require a sophisticated approach to incorporating crypto holdings in their terms. Assuming the trend toward increasing crypto investment at the corporate level continues, there will likely also be more non-crypto-industry deals in which crypto is among the assets being acquired, creating the need to address the digital currency in their contract terms.

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*Bloomberg Law subscribers can find related content on our **M&A Deal Analytics** resource.*

ANALYSIS

SPACs—And the Next Trendy Innovation Going Mainstream

Preston Brewer
Legal Analyst, Bloomberg Law
Jan. 24, 2022

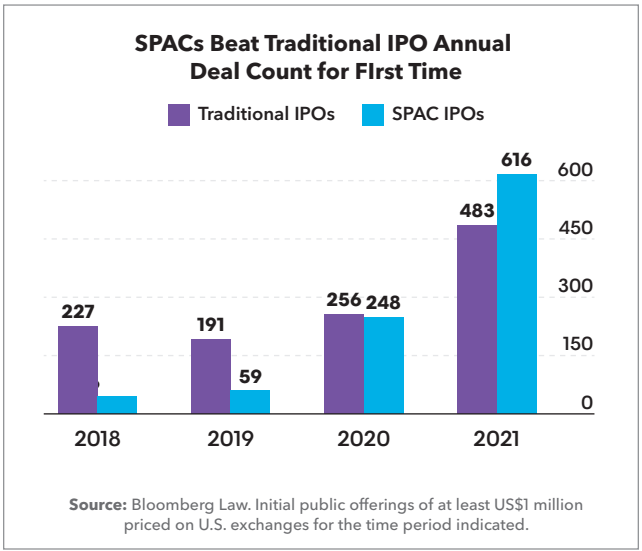
Upstart SPAC IPOs finished a record-breaking year that saw them outnumber traditional IPOs for the first time ever. This astonishing accomplishment was **propelled** by the pandemic and **sustained**, at least in part, by the regulatory arbitrage of how SPACs operate. That structure confers advantages, particularly at the M&A stage.

What might be the next big thing in finance? Building on blockchain and cryptocurrencies, decentralized finance (DeFi) is looking to have its moment. But investors in DeFi could benefit from some regulatory oversight in the future—just as SPAC founders are now reaping the rewards of regulation initiated years ago to address the worst abuses associated with such blank check companies, with potentially more to come **sooner** rather than later.

SPACs Reach the Top of the IPO Mountain

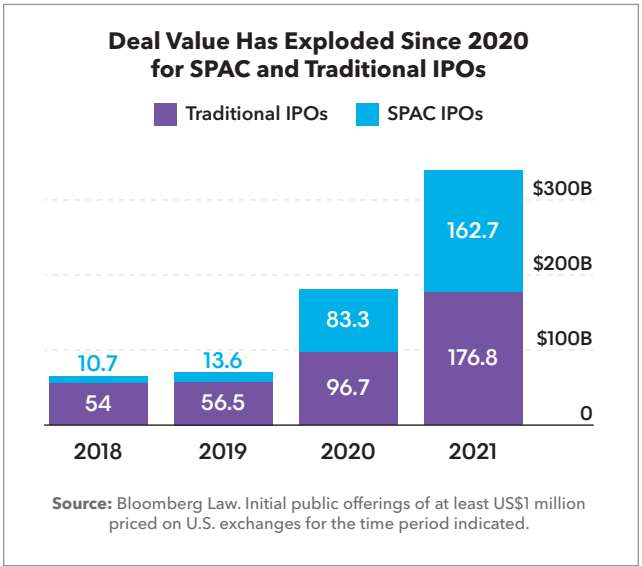
SPACs were once on the fringes of finance. Remember back in the early 1990s, when SPACs **were** merely blank check companies without trust accounts to protect investor funds? Fraud was rife, and there was a strong stigma attached to the practice. Companies seeking financing generally avoided them unless they were out of better finance options.

Since the start of the Covid-19 pandemic, SPAC IPOs have become accepted by many retail and institutional investors as legitimate investment vehicles, much like a music genre that was once considered alternative and novel before becoming part of the pop culture mainstream.



Source: Bloomberg Law. Initial public offerings of at least US$1 million priced on U.S. exchanges for the time period indicated.

As a percentage of annual IPOs on U.S. exchanges, SPACs have enjoyed enormous growth. In 2018, SPAC IPOs represented 16.8% of all IPOs. That figure rose to 23.6% in 2019, then to 49.2%, achieving near-parity with traditional IPOs in 2020. In 2021, SPAC IPOs were 56% of all initial public offerings, the first time traditional IPOs have not reigned supreme.



Source: Bloomberg Law. Initial public offerings of at least US$1 million priced on U.S. exchanges for the time period indicated.

The money raised by SPAC IPOs has been nearly as impressive. SPACs raised nearly $163 billion in 2021, or about 48% of all IPO capital raised. In 2018, SPACs raised a far more modest $10.7 billion, or about 16% of all IPO capital raised.

Grab and Go Down? Deal Falls 21% Amid SPAC Boom

Grab, Southeast Asia's largest ride-hailing and delivery company, went public in November via a reverse merger with public SPAC **Altimeter Growth Corp.**, **completing** a $40 billion special purpose acquisition company deal, the largest in history.

Although hardly any investors redeemed their shares to opt out of the merger deal—a sign of very strong support—shares in the combined company fell 21% in its debut. The company isn't yet profitable and the pandemic has suppressed ride-hailing activity, with the highly transmissible omicron variant adding to investor concerns. Nevertheless, this SPAC deal represents a significant milestone for the once-disfavored financial product.

DeFi: The Next Regulatory Frontier?

The next step in the evolution of finance appears to be a part of the digital asset revolution.

Like SPACs in their early, tumultuous years, which have since benefited enormously from the escrow or trust account requirement of **Securities Act Rule 419**, appropriate regulation needs to follow digital asset innovation for the good of both investors and for the industry's future. Blank check companies virtually disappeared for years after their name got dragged through the mud underneath terrible headlines.

Revamped as special purpose acquisition companies, they still present some issues for investors and regulators. But the improvements made to SPACs and their investor protections paved the way for their current success.

Digital assets, whether cryptocurrencies or non-fungible tokens, and technologies that make use of blockchain and digital assets, such as DeFi and the **metaverse**, would likely put their long-term health on a more secure footing if there were more regulation and oversight to protect investors and encourage future investment.

The financial crisis of 2008 was the **impetus** for the creation of Bitcoin in 2009, the world's first cryptocurrency that rose up independently of any country or central bank. Since then, cryptocurrencies have proliferated as digital assets have increasingly become accepted and adopted. However, so have **frauds** and outright **thefts**.

Crypto and DeFi cheerleaders claim they seek to **democratize** finance by opening up opportunities for ordinary investors not available in the current financial system. Those opportunities are made possible by removing middlemen from transactions, including big banks. That decentralization and removal of traditional financial institutions reduces costs and improves offerings for investors. Crypto lenders tend to offer APY in the double digits, unlike bank savings accounts, which pay nearly nothing at all.

Customers can use the crypto assets they've transferred to their DeFi account as collateral to very quickly secure a loan via their phone's dapp (or decentralized app)—all without wrangling with a bank loan application. **Crypto lending** has obvious appeal.

At present, public digital ledgers, also known as blockchains, provide transparency in transactions. But there is no transparency mandated for parties to DeFi transactions. Customers don't know the reputations of their counterparty lender, and the smart contracts (programs that automatically execute when certain pre-established conditions are met) that effect these transactions cannot anticipate every eventuality, potentially leaving customers without recourse if things go bad.

There is also no regulation of the DeFi industry (save for the SEC and some state attorneys general sending firms cease-and-desist letters or letters **inquiring** into possible unregistered securities violations); no oversight of its actors, like there are for banks and securities broker-dealers; no insurance for deposits (which get stolen by hackers with some regularity) or other **customer protections**; and no adequate requirements for **disclosure** of risks to investors. Some DeFi firms—like crypto exchange BitMart, after hackers stole $150 million in customer cryptocurrencies—**pledge** to make investors whole with their own funds after security breaches, but those promises may take time or go unfulfilled.

SEC Chair Gary Gensler would like crypto investors to enjoy protections similar to those afforded investors who trade stocks or other assets. Crypto exchanges, which are the focus of an effort by Gensler to **regulate** cryptocurrencies, have already begun going public in the U.S.

Coinbase was the first major crypto exchange to go public in the U.S., **providing** significant validation to burgeoning digital assets. Gensler **wants** these exchanges to register with the SEC. To date, DeFi companies have steered clear of becoming publicly registered in the U.S. The lone exception appears to be Canadian firm **DeFi Technologies**, which has registered as a foreign issuer. The company focuses on serving Canadian customers.

DeFi companies have grown in the past two years at rates that put SPACs to shame. From relative obscurity in early 2020, the value of assets used in decentralized finance grew to $100 billion in October 2021. In November, industry tracker CoinGecko **put** the overall DeFi market value at more than $170 billion, up from $22 billion in January.

Regulators have taken notice and are beginning to push the industry to register its products, disclose the risks, and better protect customers. Indeed, the Biden Administration **announced on Friday** that it expects to release an initial government-wide strategy for digital assets as soon as next month.

As Gensler **noted** in a speech in August, it is only after bringing innovations inside the appropriate regulatory regimes, consistent with public policy goals, that new technologies have a chance at broader adoption.

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*Bloomberg Law subscribers can find related content on our **Equity Offerings Deal Analytics** resource and on our **Securities Practice Center** resource.*

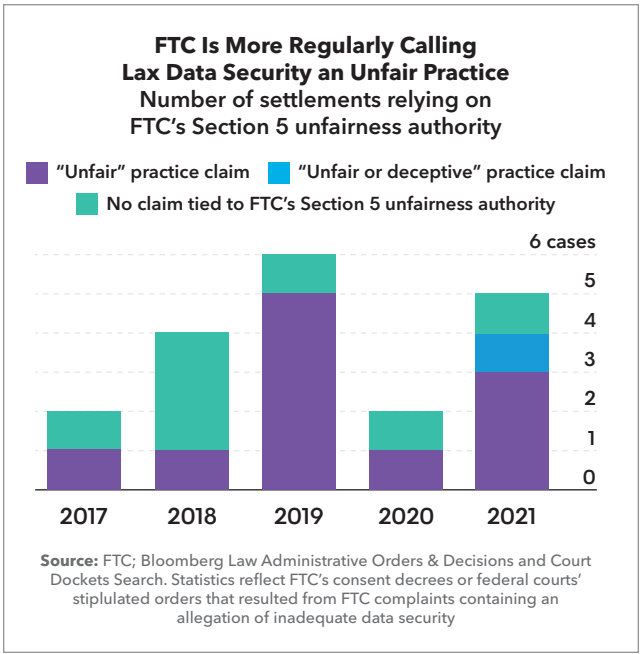
ANALYSIS

The FTC's Gotten Bolder About 'Unfair' Data Security

Peter Karalis
Legal Analyst, Bloomberg Law
Jan. 13, 2022

An analysis of the last five years of the Federal Trade Commission's data security settlements shows that the regulator has generally become less hesitant to label inadequate data security measures as an unfair business practice. This string of precedents may embolden the agency's efforts to draft consumer data protection rules in 2022—a change that could affect both compliance and transactional attorneys alike.

The chart below depicts the last five years of FTC-issued consent decrees and their court-issued equivalents—known as stipulated orders—that resulted from a business's alleged failure to implement adequate data security measures.



These statistics highlight the FTC's increasingly consistent reliance on its general authority to prohibit unfair practices under **Section 5** of the FTC Act. Twelve of the agency's 19 settled data security cases stem from this authority. But in the last three years alone, that ratio has improved to 10 out of 13 cases.

To limit the chart to purely data security matters, I chose to exclude cases in which the FTC identified a deceptive practice (e.g., misrepresenting a privacy certification, falsely reporting malware infections to promote computer repair services, etc.) without also alleging that the level of data security actually provided was unreasonable. Similarly, I opted to exclude matters relating solely to the collection and commercial use of personal data, as opposed to the prevention and mitigation of unauthorized access to such data.

A casual observer of consumer protection cases may ask why it matters how the FTC chooses to describe questionable business practices, so long as it is taking some form of enforcement action to discourage lax consumer data safeguards.

But, in a year when the agency is expected to issue regulations that, in the words of **FTC Chair Lina Khan**, would "protect Americans from unfair or deceptive practices online," the difference between "unfair" and "deceptive" could be more significant than ever.

Why 'Unfairness' Matters

As I summarized in **November**, a practice is "**deceptive**" when a material misrepresentation or omission would likely mislead a reasonable consumer, and "**unfair**" when it is likely to cause a substantial injury that cannot be reasonably avoided and is not outweighed by consumer or competitive benefits. Although a single practice may be deemed both deceptive *and* unfair, if a company has not made a misleading statement or violated an FTC-enforced privacy law, the agency is left to rely on its Section 5 unfairness authority alone to support claims of unreasonable data security measures.

This authority happened to be the subject of a lone dissent to the FTC's final decision of 2021. In her Dec. 22 **dissenting statement** to ***In re Ascension Data & Analytics, LLC***, Commissioner Rebecca Kelly Slaughter argued that an unfair practice claim should have been raised against a mortgage analytics firm that allegedly failed to **appropriately safeguard** customer data. Instead, the FTC's

complaint only accused the firm of violating the Gramm-Leach-Bliley Act **Safeguards Rule**, which governs the data security practices of businesses engaged in financial activities.

Slaughter's concern was that, by failing to leverage its unfairness authority whenever the facts support doing so, the FTC could "miss important opportunities to establish the scope of behavior that is covered" by Section 5 via the agency's publicly available consent decrees.

These consent decrees, which are essentially settlement agreements containing prescribed remedial measures, serve as **fair notice** to other companies as to which types of actions (or inactions) could constitute deceptive or unfair practices. In the realm of privacy and data security enforcement, the FTC's cases are almost always settled rather than litigated. Consent decrees can thus serve to strengthen the FTC's backlog of legal precedents in the event of a challenge to the agency's authority.

Moreover, and especially relevant to this year, the **FTC Act** grants the agency the power to pass "rules which define with specificity acts or practices which are unfair or deceptive." A solid track record of consent decrees requiring companies to remedy a variety of unreasonable data security practices could therefore bolster the FTC's legal grounds for promulgating **consumer data protection regulations** in 2022.

Learning from *LabMD*

Commissioner Slaughter's concern regarding the agency's less-than-perfect record of consistently leveraging its unfairness authority in data security cases is not unfounded. As the chart above illustrates, the FTC has in fact faced serious challenges to the scope of its authority to label data security practices as unfair, and—in 2017 and 2018, at least—mostly held back from pleading unfair practice claims.

This reticence was likely due in no small part to the agency **cautiously awaiting** the outcome of a challenge to its unfairness authority filed by LabMD Inc., a now-defunct health care company that was accused in 2013 of failing to implement reasonable network security. The matter was finally resolved in June 2018, when an Eleventh Circuit **decision** essentially sidestepped LabMD's challenge to the scope of the FTC's Section 5 authority but nonetheless held that the FTC's **2016 remedial order** against LabMD was unenforceable due to the vagueness of what a "reasonably designed" data security program would entail.

Contrary to some experts' predictions, this noteworthy defeat did not **mark the end** of the FTC's reliance on unfairness in data security cases altogether. If anything, the FTC has demonstrated a somewhat **tougher stance**, along with a willingness to learn from its past missteps. At the start of 2020, the agency **posted an update** that boasted of "significant improvements to its data security orders" issued throughout 2019. These orders generally required more specific data safeguards, greater accountability of third-party security assessors, and—where applicable—the presentation of data security program details to a **board of directors**.

Exceptions to the Trend

As noted in the chart, the FTC settled only three data security cases in 2019–2021 without relying on its Section 5 unfairness authority. The most recent of the three exceptions was *Ascension Data & Analytics*, previously discussed.

In the second most recent exception, 2020's ***In re Tapplock, Inc.***, although certain "smart lock" vulnerabilities were **discovered by researchers**, the FTC did not allege that any bad actors accessed consumer data, which may explain why only deceptive practices were alleged.

The third exception involved **Unixiz, Inc.**, a children's website operator that allegedly failed to take **reasonable steps** to secure personal data. Much like in *Ascension Data & Analytics*, the FTC opted to plead a single count under an agency-enforced privacy law—in this case, the Children's Online Privacy Protection Act.

Compliance Includes Contracts, Too

The FTC's **informal guidance** on taking reasonable steps to protect personal data covers technical measures ranging from secure passwords and authentication procedures to network firewalls and data encryption methods. But one of the agency's 10 practical tips addresses a much more traditional safeguard: contracts.

The FTC recommends that service provider contracts contain "appropriate security standards" to help ensure that vendors "adopt reasonable

security precautions" for handling a company's customer data. The agency also suggests that companies provide adequate oversight of service providers to make sure that they operate in accordance with applicable privacy policies and contract requirements.

The past five years of consent decrees and stipulated orders further underscore the significance of contract provisions in data security matters: All but two of the FTC's 19 data security settlements required companies to contractually ensure that service providers implement and maintain appropriate data safeguards.

This prevalence of contract-related requirements could signal that, in addition to preparing for new **state consumer privacy laws**, transactional attorneys may also have to deal with the effects of new FTC data protection regulations that incorporate the types of contracting requirements outlined in recent settlements.

Bloomberg Law subscribers can find practical guidance on drafting security incident reporting clauses, audit rights provisions, and other data security-related contract language in the Data Management module of our ***Practical Guidance: Information Technology Agreements*** *page.*

Pandemic M&A Due Diligence Checklist

Editor's Note: Due diligence requests pertaining specifically to pandemic-related matters may be added to the below-identified relevant sections of a classic due diligence request list to be sent to a seller or target company in an M&A transaction. While many portions of a typical **due diligence request list** may technically cover some of this information, it may be useful, for the avoidance of doubt, to also separately and explicitly request pandemic-related information.

MATERIAL CONTRACTS

Requested Item	Provided [or Public Filing Identified]	N/A	Comments
1. For all Company or subsidiary contracts, a schedule of all contract amendments made or proposed as a result of or in connection with the Covid-19 pandemic, including copies of such and a description of the reason for the amendments. Such amendments or proposed amendments may include, but are not limited to, the grant of time extensions, the acceptance of substitions or modified performance in light of supply-chain disruptions, and the waiver of obligations.	☐	☐	
2. A schedule of all Company contracts that are currently, or, since Jan. 1, 2020, have been, the subject of dispute by a party, whether directly or indirectly as a result of the Covid-19 pandemic, including a description of the dispute and disputed agreement terms, and, if resolved, a description of the resolution reached.	☐	☐	
3. With respect to Company or subsidiary material contracts, copies of all communications sent or received regarding the possibility of non-performance of the target/seller, a contract party, or an upstream party or supply chain member because of force majeure or any other information describing possible non-performance of contractual obligations, whether or not they resulted in an amendement or termination.	☐	☐	

OPERATIONAL MATTERS

Requested Item	Provided [or Public Filing Identified]	N/A	Comments
1. A description of all operational changes, including but not limited to those covered in the items listed below, made by the Company or its subsidiaries in response to the Covid-19 pandemic including but not limited to any quarantine, "shelter in place," "stay-at-home," workforce reduction, social distancing, shut down, closure, sequester, safety or similar law, directive, guidelines or recommendations promulgated by any industry group or any governmental authority, including the Centers for Disease Control and Prevention and the World Health Organization (together, "Covid-19 Measures").	☐	☐	

Requested Item	Provided [or Public Filing Identified]	N/A	Comments
2. A description of any Covid-19 social distancing measures implemented by the Company or its subsidiaries, including the dates of the initial implementation of the measures and subsequent changes thereto.	☐	☐	
3. A description of any Covid-19 testing measures and/or requirements implemented by the Company or its subsidiaries, including the dates of the initial implementation of the measures and subsequent changes thereto.	☐	☐	
4. A description of any Covid-19 masking requirements implemented by the Company or its subsidiaries, including the dates of the initial implementation of the measures and subsequent changes thereto.	☐	☐	
5. A description of any Covid-19 vaccination policy implemented by the Company or its subsidiaries, including the dates of the initial policy implementation and subsequent changes thereto. Please also include whether third doses or boosters have been addressed in such policies.	☐	☐	
6. A description of any Covid-19-specific cleaning, sanitation, maintenance measures, including the dates of the initial implementation of the measures and subsequent changes thereto.	☐	☐	
7. A description of any modifications to work spaces, such as changes to air filtration and/or ventilation systems, seating arrangements, meal arrangements, implemented by the Company or its subsidiaries in response to Covid-19 including the dates of the initial implementation and subsequent changes thereto.	☐	☐	
8. A description of any health or wellness services or measures provided to employees since March 12, 2020, whether or not involving health insurance, including the dates of the initial implementation of the measures and subsequent changes thereto.	☐	☐	

LITIGATION

Requested Item	Provided [or Public Filing Identified]	N/A	Comments
1. A list and description of all pending or threatened litigation or governmental investigations (domestic or foreign) involving the Company or its subsidiaries related to the Covid-19 pandemic or compliance with Covid-19 measures.	☐	☐	
2. A list and description of all orders, writs, decrees, injunctions, judgments or rulings by any court or agency that may bind the Company or its subsidiaries related to the Covid-19 pandemic or compliance with Covid-19 measures.	☐	☐	

LOANS & OBLIGATIONS

Requested Item	Provided [or Public Filing Identified]	N/A	Comments
1. A list all loans, directly or indirectly incurred, pursuant to the Paycheck Protection Program, established by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, as amended or supplemented from time to time by interim rules, policy statements, FAQs or otherwise, or any other lending program authorized by the CARES Act and administered by the Small Business Administration.	☐	☐	

CORPORATE MATTERS

Requested Item	Provided [or Public Filing Identified]	N/A	Comments
1. Copies of all board of directors' communications and meeting minutes regarding the pandemic or its impacts.	☐	☐	
2. A list and description of any board committees established or authorized to address the pandemic or any of its impacts, along with copies of all communications and meeting minutes of such committees.	☐	☐	

REGULATORY MATTERS

Requested Item	Provided [or Public Filing Identified]	N/A	Comments
1. Copies of all regulatory filings, reports, licenses, permits, certificates of authority, consents and regulatory approvals made or obtained by Company and its subsidiaries in relation to Covid-19 Measures.	☐	☐	
2. Copies of all filings by the Company and its subsidiaries with the U.S. Securities and Exchange Commission and U.S. or non-U.S. market regulatory bodies in which pandemic-related disclosures are included.	☐	☐	
3. Copies of all communications or disclosures to shareholders providing pandemic-related information or updates.	☐	☐	
4. A list and description of all violations and alleged violations of governmental laws or regulations pertaining to Covid-19 Measures by the Company or its subsidiaries.	☐	☐	
5. Copies of all correspondence with federal, state, local or foreign regulatory bodies regarding Covid-19 Measures, including any notices of violations from such regulatory bodies.	☐	☐	
6. Copies of minutes or other transcripts of any and all meetings held with, and copies of any correspondence with, any federal, state, local or foreign regulatory agency regarding Covid-19 Measures.	☐	☐	

EMPLOYMENT AND COMPENSATION MATTERS

Requested Item	Provided [or Public Filing Identified]	N/A	Comments
1. Copies of all employee and personnel handbooks, policies, procedures, and manuals maintained by the Company and its subsidiaries, including descriptions of all policies and procedures concerning Covid-19, and each amendment thereto.	☐	☐	
2. A description of any Company and subsidiary Covid-19 "remote work" or "work from home" policies, including the dates of the initial policy implementation and subsequent changes thereto.	☐	☐	
3. A description of Company and subsidiary policies and protocols applicable to employees that test positive for Covid-19, including the dates of the initial policy implementation and subsequent changes thereto.	☐	☐	

Requested Item	Provided [or Public Filing Identified]	N/A	Comments
4. A description of whether and how the Company and its subsidiaries collect information regarding employee Covid-19 vaccination status.	☐	☐	
5. To the extent known, state the percentage of Company employees that are currently fully vaccinated against Covid-19 and the basis for that calculation.	☐	☐	
6. To the extent known, state the percentage of Company employees that currently have received third doses of Covid-19 vaccines or Covid-19 booster shots and the basis for that calculation.	☐	☐	
7. To the extent known, state the monthly number of Covid-19 positive tests among Company and subsidiary employees and the basis for that information.	☐	☐	
8. A description of all pending or threatened employment claims, union organizing activity, strikes, slowdowns, work stoppages or other labor disputes at any facility of the Company or its subsidiaries, since Jan. 1, 2020, and copies of all correspondence and documents related thereto.	☐	☐	
9. The following, as directly pertaining to or related to the Covid-19 pandemic, maintained by the Company or its subsidiaries: • communications [generally broadcast] to employees; • communications with unions and/or any collective bargaining unit; • a summary of employees who have taken sick leave or disability benefits because of Covid-19; • a summary of the number of employees who have resigned since March 12, 2020, including, where known, cited reasons for resignation based on exit interviews or correspondence; • a summary of compensation reviews undertaken since March 12, 2020, whether internal or external; • a list of raises and bonuses granted to existing and new employees since March 12, 2020; • copies of any employee survey fielded since March 12, 2020, and any report(s) created therefrom.	☐	☐	

INSURANCE

Requested Item	Provided [or Public Filing Identified]	N/A	Comments
1. An assessment of excess health insurance costs incurred by the Company and/or its subsidiaries since March 12, 2020.	☐	☐	
2. Copies of additional policies, and summaries of other additional insurance costs incurred since March 12, 2020.	☐	☐	
3. Copies of correspondence with any insurer regarding any loss or claim by the Company or its subsidiaries relating to or arising from the Covid-19 pandemic.	☐	☐	

FINANCE

Requested Item	Provided [or Public Filing Identified]	N/A	Comments
1. A summary of all overall operational costs increases/decreases as a result of the Covid-19 pandemic, including all reports, calculations, and sources of information.	☐	☐	

Sample Clause – Force Majeure as Cause beyond a Party's Control (Annotated)

Editor's Note: This clause may be adapted for use in sale of goods, services and license agreements to document the parties' agreement to provide relief in the event a party's performance is prevented or delayed by a cause outside its control.

*Access our Transactional Precedent Database for **Force Majeure Clauses**, and Force Majeure Clauses Covering **Riot/Riots**, and **Unrest** in publicly filed agreements.*

Sample Language

[Section x] FORCE MAJEURE.

(a) Neither party shall be liable to the other for any delay or failure in performing its obligations under this Agreement (other than the payment of money hereunder) to the extent that such delay or failure is caused by an event or circumstance, whether or not foreseeable, that is beyond the reasonable control of that party (each an "**Event of Force Majeure**"); provided, that in no event will an Event of Force Majeure include economic hardship, changes in market pricing or conditions or insufficiency of funds.

(b) Upon occurrence of an Event of Force Majeure, the affected party (the "**Nonperforming Party**") shall promptly notify the other party of the event's occurrence, its effect on performance, and how long the Nonperforming Party expects it to last. Thereafter, the Nonperforming Party shall continue to update that information as reasonably necessary on a [daily/weekly] basis.

(c) During the pendency of an Event of Force Majeure, the Nonperforming Party shall use [good faith/reasonable] efforts to minimize the duration of the Event of Force Majeure and to resume its performance under this Agreement. When the Nonperforming Party is able to resume performance of its obligations under this Agreement, it shall immediately give the other party written notice to that effect and shall resume performance under this Agreement no later than [number] working days after the notice is delivered.

(d) At the option of the non-affected party, (i) the term of this Agreement shall be extended for a period equal to the period within which the Nonperforming Party's performance was prevented or delayed by the Event of Force Majeure; and (ii) if the period of nonperformance extends for more than [30] days, this Agreement may be terminated upon [three] days' written notice to the Nonperforming Party.

[Optional]

(e) By way of illustration and not of limitation, an Event of Force Majeure shall include any requisition by or of any government authority, act of war, terrorist attack, strike, boycott, lockout, picketing, riot, sabotage, civil commotion, insurrection, protests, civil or political unrest, epidemic, pandemic, disease, act of God, fire, flood, accident, explosion, earthquake, storm, failure of public utilities, infrastructure or common carriers, mechanical failure, embargo, or order or prohibition imposed by any governmental body or agency having authority over the party, including shutdowns, curfews, and stay-at-home directives.

Comment: Force Majeure is a risk-allocating provision in a contract – if certain events occur rendering a party's agreed performance impossible, the parties agree that the affected party is entitled to certain relief. The language used by the parties, particularly the definition of the types of occurrences that qualify as an Event of Force Majeure, is critical. In this sample, the force majeure definition is descriptive (any cause outside the reasonable control of a party) rather than specific. Some practitioners prefer the descriptive approach because it eliminates the need for a "laundry list" of possible catastrophic events and the possibility that that list fails to include the specific event that happens to be the cause of nonperformance in their particular case. Optional subparagraph (e) illustrates the types of events that would qualify under the parties' descriptive definition. Note that this subparagraph expands upon the parties' understanding and expressly states that it is not a limitation of the events that qualify as Events of Force Majeure. Note also that the illustrative list includes occurrences (epidemic, pandemic, disease, directive of a government authority, shutdown and stay-at-home orders) that would be triggering events in the Covid-19 environment, as well as riot, protests, civil or political unrest, and curfews.

Example Clause Search: Access our Transactional Precedent Database for **Force Majeure Clauses Covering General Causes Outside a Party's Control** in publicly filed agreements.

Value/Risk Analysis: A force majeure clause is a risk-allocating provision, typically found in the "boilerplate"

or miscellaneous sections at the end of a written agreement. Inclusion of a force majeure provision protects both parties by allowing for excused, delayed, or suspended performance or even termination of the agreement when their performance is prevented by events that are beyond the control of the parties. Parties who fail to include a force majeure provision in their contract run the risk that their inability to perform under the agreement due to causes beyond their control will nonetheless constitute a breach and give rise to damages and/or termination of the agreement.

Affected Clauses: Other clauses in an agreement that are potentially affected by the inclusion of a force majeure provision include but are not limited to:

- Term and Termination
- Remedies
- Compliance with Law
- Governing Law

Sample Clause – Export Controls on Data Sharing with Foreign Nationals (Annotated)

Editor's Note: The following clause may be adapted for use in service or supply agreements where disclosed software or technology, including information and technical data, is subject to control or regulation for U.S. export purposes. A "deemed export" occurs when controlled technology or source code is released in the United States to foreign persons, which includes U.S.-based representatives and employees of a party receiving information under the agreement. See, generally, **Overview – Export/Import Issues in Software Licensing & Cloud Computing**.

Sample Language

SECTION X. EXPORT CONTROL COMPLIANCE FOR FOREIGN PERSONS

The subject technology of this Agreement (together including data, software, services, and goods provided hereunder) may be controlled for export purposes under the International Traffic in Arms Regulations ("ITAR") controlled by the U.S. Department of State – **22 C.F.R. Parts 120 to 130** – or the Export Administration Regulations ("EAR") controlled by the U.S. Department of Commerce – **15 C.F.R. Parts 730 to 774**. ITAR controlled technology may not be exported without prior written authorization and certain EAR technology requires a prior license depending upon its categorization, destination, end-user and end-use. Exports or re-exports of any U.S. technology to any destination under U.S. sanction or embargo are forbidden.

Access to certain technology (Controlled Technology) by Foreign Persons (working legally in the U.S.), as defined below, may require an export license if the Controlled Technology would require a license prior to delivery to the Foreign Persons' country of origin. SELLER is bound by U.S. export statutes and regulations and shall comply with all U.S. export laws. SELLER shall have full responsibility for obtaining any export licenses or authorization required to fulfill its obligations under this Agreement.

SELLER hereby certifies that all SELLER employees who have access to the Controlled Technology are U.S. citizens, have permanent U.S. residency or have been granted political asylum or refugee status in accordance with **8 U.S.C. 1324b(a)(3)**. Any non-citizens who do not meet one of these criteria are "Foreign Persons" within the meaning of this clause, but have been authorized under export licenses to perform their work hereunder.

Comment: Under U.S. export control regulations, exports take place when property is actually shipped or transmitted out of the United States by any means. For intangible property such as technology or software source code, an export is deemed to occur when it is disclosed or released in the United States to foreign persons. "Any release in the United States of 'technology' or source code to a foreign person is a deemed export to the foreign person's most recent country of citizenship or permanent residency." **15 C.F.R. § 734.13(b)**.

Where data or technology that is subject to export control or restriction under applicable law is or may be the subject of the parties' agreement, the parties typically provide that they will cooperate to ensure export control compliance. Further, they specifically agree that neither party will permit exports (including deemed exports) (i) to any country or region with respect to which the United States has imposed comprehensive sanctions (e.g., Cuba, Iran, Syria, Iraq, North Korea, and the Crimea region; see **31 C.F.R. Part 746**); (ii) to any individual who is a citizen or permanent resident of any such country; or (iii) to anyone on the **U.S. Treasury Department's** List of Specially Designated Nationals, List of Specially Designated Terrorists or List of Specially Designated Narcotics Traffickers, or the **U.S. Commerce Department's** Denied Persons List.

An alternative short form of this covenant is as follows: Each of the parties shall comply fully with all relevant export laws and regulations of the United States to ensure that no software, information or technical data provided pursuant to this Agreement is exported or re-exported directly or indirectly by such party in violation of applicable law.

Example Clause Search: Access our Transactional Precedent Database for **Export Control Compliance** clauses in publicly filed data and technology agreements.

Value/Risk Analysis: Parties that are not familiar with export-control regulations may not realize that their disclosure or receipt of certain data or technology may be subject to export control. This is particularly true where the agreement is between U.S.-based parties and the locus of the parties' transaction is wholly within the geographic United States. When technology or software source code whose export is controlled is released to foreign persons in the United States – for instance, to employees of the receiving party – an export of that technology or source code is deemed to have occurred for compliance purposes. Clarity on each party's responsibility for monitoring and complying with these

requirements is the value for including this clause in the agreement. Not including this clause may inadvertently cause the parties not to be in compliance with these regulations, which may result in significant civil or criminal penalties.

Affected Clauses: Clauses potentially affected by the inclusion of this provision in a technology or services agreement include:

Representations and Warranties – One or both parties may represent and warrant that their conduct under the agreement is in compliance with applicable laws, or a specific representation regarding export control compliance may be required of the party receiving a disclosure of controlled information.

Governing Law – The law governing regulatory matters under the agreement may not be the same law that applies to the agreement's formation and interpretation. For instance, the parties may agree that the law of one of the European countries applies to the interpretation of their rights and responsibilities under the agreement; however, if the agreement provides for the disclosure or release of information that is owned or controlled by a U.S. person, U.S. law would apply to that aspect of the transaction notwithstanding the governing law choice.

Compliance with Law – This provision draws attention to the importance of export control compliance in addition to a general compliance with law clause.

Breach and Termination – A breach of the export control clause may trigger a termination provision in the agreement or give rise to other remedies.

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