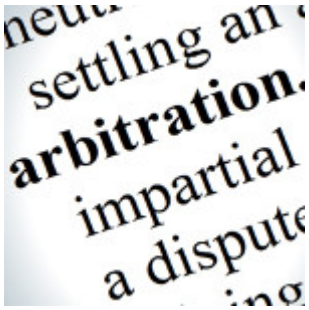
Enforce Arbitration Agreement or Waive Right to Arbitrate Trade Secret Misappropriation Claims



A recent federal court denied an employer's motion to compel arbitration, finding that it waived its right to arbitration by engaging in litigation.

George L. Kanabe, a partner in the San Francisco office of Orrick, Herrington & Sutcliffe LLP, discusses three key lessons the ruling provides for plaintiff-employers.

Kanabe reports that the ruling noted, "[t]here is no other reasonable interpretation of plaintiff's untimely demand for arbitration than as a deliberate tactic to test the judicial waters but then, when those waters did not flow the direction plaintiff intended, to change routes in hopes of finding a different current."

Read the article.

Prominent Trial Lawyer Dead After 'Battle With a Mental Health Issue'

Steve Mostyn, a top Democratic donor and prominent Houston trial lawyer who made his fortune suing insurance companies on behalf of homeowners after hurricanes, has died at 46.

Amber Mostyn, his wife, released a statement saying her husband died after "a sudden onset and battle with a mental health issue." She did not disclose the cause of death," reports ***The Texas Tribune***.

KTRK, the Houston ABC television affiliate, **reports** that Mostyn died at his home Wednesday night, and, according to authorities, he took his own life.

Tribune reporters **Morgan Smith** and **Jay Root** write that Mostyn and his wife, also an attorney, have long been considered the state's most powerful Democratic backers, spending millions on Democratic campaigns in Texas and beyond.

Read the *Texas Tribune* article.

Another Client Close to Firing Boies After Weinstein Revelations

Now even a pro bono client feels compelled to fire David Boies after revelations of the famed litigator's role in attempting to hide Harvey Weinstein's alleged history of sexual harassment and assault.

The *Tampa Bay Times* **reports** that the City of St. Petersburg, Florida, is heading toward ending its relationship with Boies.

Charlie Frago writes that Boies and his firm Boies Schiller Flexner had offered their services to the city in a challenge to *Citizens United v. Federal Elections Commission*, the 2010 U.S. Supreme Court ruling that removed restrictions on how much outside groups can spend on elections.

One city council member reacted to the revelations of Boies' actions: "I find this reprehensible and will absolutely NOT vote to accept Boies' offer to represent the city of St. Petersburg pro bono on the campaign finance issue."

Read the *Tampa Bay Times* article.

Ware, Jackson, Lee, O'Neill, Smith & Barrow on 2018 Best Law Firms List

Ware, Jackson, Lee, O'Neill, Smith & Barrow, LLP has been named in *U.S. News and World Report* and *Best Lawyers* list of "**Best Law Firms** for 2018."

According to *U.S. News and World Report*, "Firms included in the 2018 'Best Law Firms' list are recognized for professional excellence with persistently impressive ratings from clients and peers. Achieving a tiered ranking signals a unique combination of quality law practice and breadth of legal expertise."

The firm received recognition for a variety of litigation areas, including construction, mass torts, commercial, labor and employment, environmental, and trusts and estates.

Read more about the recognition.

Here's How Trump Is Rapidly

Reshaping the Judiciary

The New York Times lays out the plan the Trump team devised to fill the federal appeals courts with young and deeply conservative judges – a strategy that has started to show results.

Reporter **Charlie Savage** describes the plan: "Start by filling vacancies on appeals courts with multiple openings and where Democratic senators up for re-election next year in states won by Mr. Trump – like Indiana, Michigan and Pennsylvania – could be pressured not to block his nominees. And to speed them through confirmation, avoid clogging the Senate with too many nominees for the district courts, where legal philosophy is less crucial."

He predicts that the consequence of the transformation of the judiciary will yield an appellate court system as ideologically split as Congress is today, after the Democrats regain power and use the same playbook.

Read the *NYT* article.

An Overview of Recent

Production Deduction Cases

Courts in several states recently have addressed questions about post-production cost deductions in petroleum production, according to an **on-demand webcast** from Steptoe & Johnson.

In this webcast, Andrew S. Graham reviews the state of the play in the Appalachian Basin, as well as other oil and gas producing states, on the source of the deduction problem and where the states stand on this notoriously thorny issue.

Among the topics for discussion:

- What does the *Leggett* case mean for West Virginia producers in light of *Tawney*?
- Why did the Supreme Court of Ohio decide to not decide a case on post-production deductions?
- Has the marketable product rule reached a high-water mark in Colorado?

Watch the on-demand webinar.

PREX17 Insights on Building a Preservation Game Plan That

is Litigation-Ready

Zapproved has published "**Building Your Preservation Responsive Playbook**," illustrating ways to adopt, monitor and document a preservation process that is litigation-ready.

The guide can be downloaded at no charge.

Providing insights in the publication are:

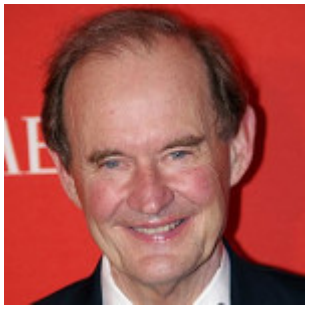
- Cortney Starble, E-Discovery Specialist at CBRE, Inc.
- Leslie Kendrick, Litigation Counsel at Daimler
- Bryan Dearinger, Associate General Counsel at University of Oregon

The guide is intended to provide practical tips aimed at helping legal operations teams preserve relevant data, release legal holds and manage clear preservation workflows.

Download the guide.

Super Lawyer Boies Entangled

in Intrigue Over Weinstein; *Times* Fires His Firm



The sexual-assault scandal that brought Harvey Weinstein's career to an abrupt halt and started a national conversation about the treatment of women has led to scrutiny of tactics used by his former attorney, David Boies, one of America's most-famous litigators, according to **Bloomberg Big Law Business**.

Boies hired private detectives who sought to identify accusers and undermine news coverage of their claims. Reporter **Erik Larson** writes that a primary target was the *New York Times*, which published an article in which the Hollywood producer was accused of raping an actress. At the same time, Boies' firm, Boies Schiller Flexner LLP, was representing the *Times* in various legal matters, raising concerns about conflict of interest.

The newspaper fired the firm, and Boies admitted that he participated in the hiring of private investigators who targeted the *Times*' reporters.

Read the Bloomberg article.

JPMorgan Judge Upends $1.1 Million Whistle-Blower Verdict

A U.S. district judge says she saw prejudice in a jury's verdict Tuesday that would have awarded $1.13 million in damages to a former JPMorgan Chase & Co. employee over her dismissal, according to **Bloomberg**.

The Manhattan jury deliberated for five hours to find the former wealth manager has been fired illegally. The jury awarded her $563,000 in back pay and $563,000 for emotional damage.

Reporter **Bob Van Voris** quoted Judge Denise Cote:

> "The award of emotional damages says to me that the jury was prejudiced against the bank. That undermines the entire verdict."

Read the Bloomberg article.

Jury Hits Hospital With $26M

Med-Mal Verdict in Tragic Birth Case

Jurors took just eight hours to award a Brooklyn couple $26 million – double what they had sought – after overwhelmed medical residents at Maimonides Medical Center allegedly botched the birth of their twins, leaving one dead and the other deaf and mute, reports the ***New York Post***.

Under a "high-low" agreement struck earlier by both sides, the plaintiffs agreed to receive a "high'' of $7.5 million if they won their suit and a "low'' of $1.5 million, even if they lost, according to reporter **Julia Marsh**.

In 2010, the expectant mother went to the hospital twice with cramping and spotting but was sent home by doctors-in-training, according to the lawsuit. When her twins daughters were born later, they weighed about 1.5 pounds each. A month later, one died from an infection, and the other is deaf and suffers from kidney failure.

Read the *Post*'s article.

Defending Breach-of-Contract

Claims in Data-Breach Litigation

A post on the **What's Fair?** blog on the Ellis & Winters LLP website discusses a recent federal appellate decision that shows how data-breach lawsuits premised on overpayment theories – which often assert claims sounding in contract – still face an uphill battle.

Alex Pearce explains that the overpayment theory rests on the premise that the price of a product or service includes a payment for data security measures. He outlines the recent ruling in *Kuhns v. Scottrade*.

"In that decision—a boon for data-breach defendants—the Eighth Circuit employed a demanding test for the pleading of facts that give rise to an overpayment claim," Pearce writes.

Read the article.

Enforcing Nursing Home Arbitration Agreements Post-*Kindred*

Image by [NY Photographic]

Liz Kramer, writing for Stinson Leonard Street's **Arbitration Nation**, writes that a recent ruling for a state supreme court may be indicative of what litigation over nursing home arbitration agreements will look like after the U.S. Supreme Court's ruling in *Kindred Nursing Centers v. Clark*.

Kramer, a partner in the firm, discusses the Wyoming Supreme Court's reversal of a lower court's ruling in an arbitration case. The lower court denied a nursing home's motion to compel arbitration.

But the state's high court reversed, following the U.S. Supreme Court's *Kindred* ruling that another state's rationale for not enforcing an arbitration agreement was preempted by the Federal Arbitration Act.

Read the article.

Federal Financial Resources Essential to Addressing Opioid Crisis

President Trump declared the opioid crisis a public health emergency, stopping short of calling it a national emergency. The announcement expands access to treat the epidemic, but doesn't free new federal funding for cities and states to use.

Dallas attorney **Jeffrey Simon** of **Simon Greenstone Panatier Bartlett**, who represents Texas counties suing drug manufacturers, says more federal funding is needed.

"I commend the president for using his platform to highlight the epidemic of opioid abuse in America," said Simon. "Opioid addiction is a disease rather than a character flaw, and the president's effort to draw this distinction is welcome. But the financial costs of successfully treating opioid addiction are substantial, as are the costs of effective educational programs to stem the epidemic. I remain hopeful that our federal government will devote the financial resources necessary to combat this health crisis, but that remains to be seen.

"I contend that the second essential step to addressing any problem, after acknowledging its existence, is to identify the source of the problem. Our Texas county governments, which pay high costs to combat the opioid abuse epidemic in their communities, are doing this very thing. They are fighting back. Counties we represent, such as Bowie County and Upshur County, have filed lawsuits against drug manufacturers and wholesale distributors for the purpose of holding them financially accountable for their roles in promoting and selling so many of these addictive drugs.

"On behalf of their citizens, these county governments are

confronting the opioid abuse epidemic in their communities. We are proud and privileged to serve Texas counties as legal counsel in this fight."

U.S. States Allege Broad Generic Drug Price-Fixing Collusion

Image by Images Money

A large group of U.S. states accused key players in the generic drug industry of a broad price-fixing conspiracy, **reports Reuters**.

Reporter Karen Freifeld writes: "The states said the drugmakers and executives divided customers for their drugs among themselves, agreeing that each company would have a certain percentage of the market. The companies sometimes agreed on price increases in advance, the states added."

The suit names 18 companies and subsidiaries and named 15

medicines. Mylan NV, Teva Pharmaceuticals USA, Ascend Laboratories and Encure Pharmaceuticals are among the 18 companies named.

The Los Angeles Times also covered Mylan's challenges: "**A price-fixing noose tightens around Mylan, the company that profiteered from the Epipen.**"

Read the Reuters article.

Michael Krauss Joins DLA Piper's Litigation Practice in Minneapolis

DLA Piper announced that Michael Krauss has joined the firm's Litigation practice as partner in the Minneapolis office.

Krauss, a former assistant U.S. attorney in New York, advises trustees, creditors and lenders on complex financial disputes. He has represented leading national banks in corporate trust and structured products matters, such as residential mortgage-backed securities litigation and indenture claims, and has secured over US$150 million in related settlements. Krauss also advises clients on creditor litigations and insolvency.

"Michael is a top-notch litigator with an impressive track record representing clients in the financial services sector," said Loren Brown, co-chair of DLA Piper's global and US Litigation practices. "That background, coupled with his

enforcement experience as an AUSA, makes him an important addition to our representation of some of the world's largest financial institutions."

In a release, the firm said Krauss also has experience working on financial issues and potential liabilities in the highly-regulated field of tribal gaming, and has won judgments and settlements for lenders and developers nationwide.

"Michael is known in the Twin Cities and nationally as an impactful litigator with the ability to efficiently manage the spectrum of financial disputes that a company may face," said Kathleen Smith Ruhland, managing partner of DLA Piper's Minneapolis office. "Those skills will be immediately beneficial to our clients based here and throughout the country."

Krauss is the most recent addition to DLA Piper's Minneapolis office, which welcomed partner Michael Fisco earlier this year. The firm's Litigation practice has also welcomed several partners this year, including Amy Rudd (Austin), Ilana Eisenstein (Philadelphia), Christopher Oprison (Miami), David Sager (New Jersey), John Rah (Washington, DC), Raphael Larson (Washington, DC), Thiru Vignarajah (Baltimore), and Louis Ramos (Washington, DC).

Krauss joins DLA Piper from Faegre Baker Daniels in Minneapolis, where he was the Finance Litigation team leader. He earned his J.D., with distinction, from Stanford Law School and his B.A., with highest distinction and high honors, from the University of Michigan.

Hydraulic Fracture Related Damage Claim: Federal Court Addresses Application of Consent and Release Agreement

A U.S. District Court recently addressed issues associated with a producing vertical well's claim for damages related to another company's subsequent installation of a horizontal well, reports **Walter G. Wright** for **Mitchell, Williams, Selig, Gates & Woodyard**.

Specifically, the court addressed whether various damage claims were waived by the execution of a consent and release agreement.

Wright explains that the defendant cited the second paragraph in the agreement in support of its assertion for the waiver of most damages. In contrast, the plaintiff cited the last sentence of the first paragraph for the proposition that it was not restricted in its ability to "seek relief."

The court found the agreement to be ambiguous because of this inconsistency and contradiction and found that the terms should be construed against the defendant, who drafted the agreement.

Read the article.

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A Lesson from the 3rd Circuit on Arbitration Clauses: Say What You Mean

A recent decision by the United States Court of Appeals for the Third Circuit is a reminder that – for an arbitration clause to apply in certain situations or to certain parties – that intention must be built into the plain terms of the contract.

In **a post** on the Blank Rome website, partners **Stephen M. Orlofsky** and **Deborah Greenspan** discuss *White v. Sunoco, Inc.* The case involved the "Sunoco Awards Program," under which customers who used a Citibank-issued "Sunoco Rewards Card" credit card were supposed to receive a 5-cent per gallon discount on gasoline purchased at Sunoco gas stations.

A dispute over the discount led to arbitration.

In its ruling the appellate court found: "[n]owhere does the agreement provide for a third party, like Sunoco, the ability to elect arbitration or to move to compel arbitration."

Read the article.

Alternative Fee Arrangements With Outside Firms Level Off

The portion of Norton Rose Fulbright's **2017 Litigation Trends Annual Survey** that covers alternative fee arrangements presents a puzzling picture that probably reveals the challenges of bringing about changes in the way external counsel are instructed, the firm reports.

Last year, 37 percent of respondents predicted they were going to increase their use of AFAs.

"Those who have used AFAs over the year are almost universally satisfied with the quality of the work they have received," according to the report. "But, despite this, the use of AFAs (56 percent) and their average spend under an AFA (28 percent) are largely unchanged since last year.

"The inherent unpredictability of many types of dispute could be placing a ceiling on the proportion of matters where both parties feel confident operating under an AFA. However, staged approaches to AFAs can help to overcome this. Predictions for 2018 once again show a rise in AFAs – it will be interesting to see if this materializes or whether inertia persists."

The survey also looks in detail at other major areas of concern, including regulatory investigations; class actions and environmental disputes.

Read the survey report.

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Winston & Strawn Lawyer Collaborates With Judge to Write Jury Trial Reference

Tom Melsheimer

The University of North Texas Press is releasing a lawyers' guide to courtroom preparation and strategy titled "On the Jury Trial: Principles and Practices for Effective Advocacy."

Texas trial lawyer and **Winston & Strawn** Dallas managing partner Tom Melsheimer and Texas judge Craig Smith wrote the book, which covers jury selection, witness preparation, opening statements, jury research, and more.

Judge Craig Smith

“In an age when the jury trial is vanishing, I think a book such as ours is a must-read,” said Melsheimer. “To preserve the jury trial, we must preserve the skills involved in trying a case effectively and efficiently. Judge Smith and I wrote this to add to that effort.”

Trial lawyers whose comments appear on the book’s jacket laud the work for its down-to-earth advice, illustration and commentary.

“Real-world, real-life insights. A book that every lawyer should read,” said Michael E. Tigar, author of “Persuasion: The Litigator’s Art and Examining Witnesses.”

“I will definitely order a copy of this book for every associate in my firm and recommend that others do so too,” said Steve Susman of Susman Godfrey L.L.P.

Before being elected to the 192nd District Court in Dallas County in 2006, Judge Smith was a trial lawyer for more than 25 years. As a judge, he was honored as Trial Judge of the Year by the Dallas Chapter of the American Board of Trial Advocates and was elected president of the Texas Association of District Judges in 2010.

Melsheimer has tried cases for more than 30 years. He is a past “Trial Lawyer of the Year” by the Texas Chapters of the American Board of Trial Advocates and by the Dallas Bar Association. He is a Fellow in the International Academy of Trial Lawyers and an Advocate in the American Board of Trial

Advocates.

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Dismissal of $472 Million Verdict v. J&J is Disaster for Talc Plaintiffs

A ruling that throws out a plaintiff's $417 million jury verdict against John & Johnson will affect many of the nearly 5,000 women who claim they developed ovarian cancer from J&J power containing talc, **reports Reuters**.

"The judge's skepticism about causation will reverberate across the talc litigation in California because she's overseeing all of the more than 800 suits by women who attribute their cancer to J&J powders that contained talc," writes **Alison Frankel**. "Unless their lawyers can come up with better evidence than Echeverria – or unless scientific developments boost causation theories – Judge Nelson's decision is ominous for plaintiffs and a boon for J&J and its subsidiary."

Read the Reuters article.

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