The Real Estate Finance Journal Vol. 40 No. 4 Spring 2025

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A THOMSON REUTERS PUBLICATION

Spring 2025

FROM THE EDITOR

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Mat #43266855

EDITOR

Robert G. Koen
Carter Ledyard & Milburn LLP

MANAGING EDITOR

Erbayne W. Jarvis
Thomson Reuters

SUBMISSIONS EDITOR

Steven A. Meyerowitz
Meyerowitz Communications Inc.
All editorial correspondence, manuscripts, etc., should be sent to:
Steven A. Meyerowitz, Esq.
President/Meyerowitz Communications Inc.
26910 Grand Central Parkway, # 18R
Floral Park, NY 11005
631.291.5541
smeyerowitz@meyerowitzcommunications.com

THE REAL ESTATE FINANCE JOURNAL
(ISSN 0898-0209) is published quarterly by Thomson Reuters, 610 Opperman Drive, Eagan, MN 55123-1396.

Editorial Offices: Thomson Reuters, 50 Broad Street East, Rochester, NY 14694. All editorial correspondence, manuscripts, etc., should be sent to this address. Although the utmost care will be given material submitted, we cannot accept responsibility for unsolicited manuscripts.

Subscription: For subscription information or for customer service, call 1-800-328-4880. Periodicals postage paid at St. Paul, MN.

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CONTRIBUTING EDITORS

Ronald B. Bruder
President
The Brookhill Group

Stevens A. Carey
Partner
Holland & Knight LLP

Jonathan L. Kempner
Fellow, Advanced Leadership Initiative
Harvard University

Youguo Liang, Ph.D.
Head, Global Research and Public Markets
Abu Dhabi Investment Authority (ADIA)

Stephen Rushmore
President and CEO
HVS

Stuart M. Saft
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Holland & Knight LLP

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Partner
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Real Estate Access Industries

Andrew N. Stark
Principal
Timberline Real Estate Ventures

From the Editor

Robert G. Koen*

An Abundance of Topics

This issue of *The Real Estate Finance Journal* contains articles on a wider variety of subjects than is typical, and we believe you will find them all of interest!

REITS

We begin with an article titled, "Internal Revenue Service Issues Private Ruling That Entity With Zero Gross Income or Assets Can Qualify as a Real Estate Investment Trust."

Here, Mark A. Melton, Ross Tuminello and Bryce Alan Klein discuss a private letter ruling issued recently by the Internal Revenue Service concluding that a real estate investment trust having no income or assets during the year of its formation did not fail the gross income or asset tests for that year.

LIMITED LIABILITY COMPANIES

Then, in the article titled, "Drawing the Line: When Operating Agreements Govern the Relationships Between New York Limited Liability Companies and Their Members," Lori S. Smith and Jeremy M. Miller discuss a recent New York court decision holding that a limited liability company organized under New York law that has not executed its own operating agreement is not a party to, and therefore cannot be bound by, that operating agreement.

CORPORATE SEPARATENESS

In the piece titled, "U.S. Supreme Court Case May Have Significant Implications for the Doctrine of 'Corporate Separateness,' " David R. Fertig, J'Naia L. Boyd and Xitlaly Estrada discuss a case pending before the U.S. Supreme Court that could have broad implications for the doctrine of "corporate separateness" - the idea that corporations generally will not be liable for the acts or obligations of their affiliates - even beyond the field of trademark law, as a number of other statutes also have remedial schemes that, like the Lanham Act, confer upon the courts broad "equitable discretion" to fashion appropriate remedies.

THE OUTLOOK

James "Chip" Stuart is the author of the piece titled, "U.S. Real Estate Outlook: Navigating Change, Capitalizing on Opportunity."

Robert G. Koen, Esq., the editor of *The Real Estate Finance Journal,* is a partner in the New York Real Estate Finance practice of Carter Ledyard & Milburn LLP, where he focuses on commercial real estate acquisitions, complex financing and restructurings for both lender and borrower entities.

*Robert G. Koen, Esq., the editor of *The Real Estate Finance Journal*, is a partner in the New York Real Estate Finance practice of Carter Ledyard & Milburn LLP, where he focuses on commercial real estate acquisitions, complex financing and restructurings. Mr. Koen represents lenders and borrowers in the negotiation, structuring, and documentation of acquisitions, dispositions, and co-investment transactions; the structuring of real estate joint ventures and partnerships; commercial lending; construction lending; preferred equity investments and mezzanine financings; hotel

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Here, he examines the outlook for U.S. real estate for the rest of this year.

TAX RISK

Jens Hafemann, Maureen E. Linch, Richard Sultman, Benjamin Boisanté, Gianluca Russo and Peter North submitted their piece, titled, "The Current Tax Risk Environment and Best Practices for Managing It."

In this article, the authors identify some key topical areas of tax risk that multinational groups are commonly encountering, and offer some best practices for addressing them.

CFIUS

The next article, titled, "Committee on Foreign Investment in the United States Has Expanded Its Real Estate Jurisdiction," is by Stephenie Gosnell Handler, David A. Wolber, Michelle A. Weinbaum, Roxana Akbari, Mason Gauch and Chris R. Mullen.

Here, the authors explain that the final rules of the Committee on Foreign Investment in the United States expanding jurisdiction over real estate substantially expanded the scope of covered real estate transactions subject to national security review.

SECTION 45V

In the article titled, "U.S. Department of Treasury and Internal Revenue Service Issue Final Regulations on the Credit for Production of Clean Hydrogen Under Section 45V of the Internal Revenue Code," Don Lonczak, Megan L. Jones, Elina Teplinsky, Sheila McCafferty Harvey, David McCullough and Baylee Beeman discuss regulations proposed by the Internal Revenue Service providing guidance on the clean hydrogen production credit granted under I.R.C.§ 45V, which was enacted as part of the Inflation Reduction Act of 2022.

MEGAPROJECTS

Meagan T. Bachman, David Chung and Edmund Northcott next examine the impacts of fast-tracking infrastructure megaprojects. The title of their work: "Fast-Tracking Megaprojects: Balancing Speed, Feasibility and Dispute Risks."

CONTRA PROFERENTEM

In their article, titled, "Contra Proferentem: Can Insureds Be Forced to Waive Its Protection?," Matthew M. Brady and Lauren N. Smith discuss whether insureds may be forced to waive the protection of the legal principle that mandates that any ambiguities in insurance policies are construed against insurers and in favor of insureds.

CONTRACTOR REGISTRATION

The article that follows, titled, "New York State Now Requires Contractor Registration for Contractors and Subcontractors Working on Public Projects and Certain Private Projects," is by Kathy Tuznik. Here, the author reviews a new registration requirement in New York for contractors and subcontractors working on covered projects.

CLIMATE SUPERFUND

Then, in the article titled, "States Introduce 'Climate Superfund' Laws Amid Growing National Trend and Legal Challenges," Jillian

acquisition, financings, and development; commercial project development; and real estate loan and investment workouts and restructurings. He may be contacted at koen@clm.com.

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Marullo, Amanda G. Halter, Ashleigh K. Myers and Kelsey Parker explain that, in a "paradigm shift in environmental liability," some states are seeking to legislate financial responsibility on large coal and oil and gas companies for the public costs associated with strengthening infrastructure against climate change-related weather events.

CITY OF YES

Kenneth K. Lowenstein and Barak Wrobel are next, with their piece, titled, "Affordable Housing Development After Adoption of New York's City of Yes Zoning."

In this article, the authors describe the changes to New York City's affordable housing provisions stemming from comprehensive changes to the city's zoning resolution.

CALIFORNIA

Brian D. Huben and Nahal Zarnighian, authors of the article titled, "Two New Laws Affect California Commercial Landlords," discuss two new California laws that impact how commercial landlords manage their properties, as well as the timeline for unlawful detainer (eviction) cases.

TAX RELIEF

Douglas W. Schwartz, author of the article titled, "Internal Revenue Service and California Provide Tax Relief for Los Angeles County Residents and Businesses," discusses the tax relief granted by the Internal Revenue Service and California Governor Gavin Newsom to Los Angeles County residents and businesses affected by the January fires.

HAWAII

In the article titled, "Hawaii Supreme Court Addresses Insurance and Climate Change Litigation: 'Occurrence' Requirement Met, But Pollution Exclusion Applies to Greenhouse Gases," Valerie E. Lott and William Hunter Craven explore a decision by the Supreme Court of Hawaii holding that although climate change litigation satisfied the "occurrence" requirement under a commercial general liability insurance policy, greenhouse gases are "pollutants" and the pollution exclusion precluded coverage.

AN AGENCY STRATEGY

Andrew M. Grossman follows with his piece, titled, "To Help the New Administration Help Your Industry, You Need an Agency Strategy." In this article, the author explains that seeking to take advantage of upcoming regulatory reforms requires creativity, domain expertise, and legal acumen in crafting policy solutions, especially ones that go beyond the typical administration-to-administration policy shifts.

Enjoy the issue!

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Internal Revenue Service Issues Private Ruling That Entity With Zero Gross Income or Assets Can Qualify as a Real Estate Investment Trust

*Mark A. Melton, Ross Tuminello and Bryce Alan Klein**

In this article, the authors discuss a private letter ruling issued recently by the Internal Revenue Service concluding that a real estate investment trust having no income or assets during the year of its formation did not fail the gross income or asset tests for that year.

In Priv. Ltr. Rul.202440007, the taxpayer (Taxpayer REIT) elected to be treated as a real estate investment trust (REIT) for its initial tax year. The Taxpayer REIT was formed as a vehicle to invest indirectly through various partnerships in multifamily properties.

The parent company of the Taxpayer REIT raised the capital needed for the Taxpayer REIT to make its acquisition but was unable to contribute that capital to the Taxpayer REIT during its first year of existence for lack of investor and regulatory approvals. Consequently, the Taxpayer REIT had no income or assets during its first year and was unable to make its planned acquisition until after the conclusion of its first year of existence.

OVERVIEW OF REIT INCOME AND ASSET TESTS

At the close of each quarter of its taxable year, a REIT must satisfy a number of tests relating to the nature of its assets and gross income. Among other restrictions, at least 75 percent of the value of total assets must be represented by interests in real property, interests in mortgages on real property, shares in other REITs, cash, cash items, government securities and qualified temporary investments. A certain percentage of a REIT's gross income must also be qualifying income.

A lingering question among practitioners has been whether a REIT with no income and no assets can technically satisfy the income and asset tests. The consequences of failing to meet either test are severe. In addition to suffering penalties, a REIT that fails to properly navigate the REIT rules may have its REIT election terminated and is restricted from making a subsequent REIT election for a five-year period. Though relief for noncompliance may be available in limited circumstances, REIT

*The authors, attorneys with Holland & Knight LLP, may be contacted at mark.melton@hklaw.com, ross.tuminello@hklaw.com and bryce.klein@hklaw.com, respectively.

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compliance is a delicate and ever-present concern.

THE RULING

The IRS ruled that having $0 in assets and $0 of income technically satisfied the gross income and asset tests applicable to REITs.

With respect to the gross income test, the IRS observed that Congress and the U.S. Department of the Treasury were concerned with the source of REIT income, not "whether the REIT has gross income in the first instance." The IRS looked to Treas. Reg. § 1.856-2(c)(1), noting that it did not prevent qualification as a REIT on account of having $0 of gross income.

Turning to the asset test next, the IRS similarly relied on legislative history in its claim that "Congress was concerned with the nature of a REIT's assets and not whether the REIT had assets in the first instance." The IRS reasoned that treating the asset test as met in the absence of any assets is consistent with this history.

Ultimately, the IRS concluded that the Taxpayer REIT's election in its initial year was unaffected by having no income or assets during such year. Given its potential for providing much-needed comfort to taxpayers involved in the formation and initial operations stages of REIT structures, the release of Priv. Ltr. Rul. 202440007 should be a welcome addition to existing REIT guidance.

IN SUMMARY

- The IRS recently issued a private letter ruling concluding that a REIT having no income or assets during the year of its formation did not fail the gross income or asset tests for that year.
- The taxpayer, a REIT, was unable to complete an acquisition of real property assets during its first tax year, which gave rise to concerns that it would not satisfy the REIT gross income and asset tests.
- The IRS used legislative history to support a technical application of Section 856(c) in concluding that the taxpayer satisfied the gross income and asset tests for its first year despite having no gross income or assets.

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Drawing the Line: When Operating Agreements Govern the Relationships Between New York Limited Liability Companies and Their Members

*Lori S. Smith and Jeremy M. Miller**

In this article, the authors discuss a recent New York court decision holding that a limited liability company organized under New York law that has not executed its own operating agreement is not a party to, and therefore cannot be bound by, that operating agreement.

Whether a New York limited liability company is a party to and bound by its own operating agreement has been examined in a recent decision by the New York Supreme Court, Appellate Division, First Judicial Department. The opinion distinguished New York's Limited Liability Company Act from the Revised Uniform Limited Liability Company Act (RULLCA), ultimately delineating a bright-line rule: An LLC organized under the laws of the State of New York that has not executed its own operating agreement is not a party to, and therefore cannot be bound by, such operating agreement.

BACKGROUND

In *Wythe Berry v. Goldman*,[1] a dispute arose between two real estate entrepreneurs, Yoel Goldman and Zelig Weiss, relating to the development of a hotel in New York. Pursuant to Section 11 of the Fifth Amendment to the operating agreement of the developers' primary operating company, Wythe Berry LLC, Goldman and Weiss agreed that any dispute arising under the operating agreement would be determined by the American Arbitration Association.

Significantly, the Fifth Amendment only refers to the members - including Goldman and Weiss, in their individual capacities as members - as parties to the agreement. Accordingly, the signature block of the Fifth Amendment made no reference to Wythe Berry.

When a dispute later arose in connection with financing the hotel development, Goldman commenced arbitration against Weiss and several of Weiss and Goldman's entities, including Wythe Berry, pursuant to the arbitration clause in the Fifth Amendment. In re-

*The authors, attorneys with Stradley Ronon Stevens & Young, LLP, may be contacted at lsmith@stradley.com and jmiller@stradley.com, respectively.

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sponse, the petitioner entities, including Wythe Berry, filed a petition to stay the arbitration pursuant to N.Y. Civ. Prac. Law & Rules 7503(b), which allows courts to stay arbitration proceedings on the basis that a valid agreement does not exist.

In opposing the petition, Goldman presented a contract referred to as the "Side Agreement," wherein Weiss and Goldman agreed that the Fifth Amendment would be the governing agreement should any dispute arise between Goldman and Weiss in connection with the hotel development. Specifically, Goldman cited a provision in the Side Agreement that he argued expressed an intent to bind Weiss and Goldman, as well as certain entities registered under their names, such as Wythe Berry, to the Side Agreement.

As translated from Hebrew to English, the relevant provision in the side agreement provided that "Goldman and Weiss 'hereby acknowledge, both on our own behalf and on that of all the corporations registered under our names, whether in whole or in part, and that have any relevance or connection to the [hotel] land and building, without exception - fully acknowledge . . . everything that is written' in the Side Agreement. The Side Agreement further provide[d] that the 'main and principal agreement that shall be determinative and dispositive between us in any case of doubt, dispute, or . . . conflict that may perhaps arise between us . . . shall be . . . [the] [Fifth Amendment], which was signed by us on the said date.' "[2] Like the Fifth Amendment, however, the Side Agreement was not executed by Wythe Berry.

The lower court held that Wythe Berry had agreed to arbitrate, reasoning that the Side Agreement incorporated the Fifth Amendment's arbitration clause and that Weiss and Goldman had acted on behalf of Wythe Berry when they signed the Side Agreement.

LEGAL ANALYSIS ON APPEAL

The Appellate Division relied on a comparative analysis to illustrate how the New York LLC Act diverges from the RULLCA on the issue at hand. The appellate court explained that under the RULLCA, an LLC would be bound by its operating agreement, even if the LLC had not itself manifested assent to said agreement. Under Delaware law, for example, Section 18-101(9) of the Delaware Limited Liability Company Act explicitly provides that a "limited liability company . . . is bound by its limited liability company agreement whether or not the limited liability company . . . executes the limited liability company agreement." In sharp contrast to Delaware's law and the RULLCA, the court explained that under the New York LLC Act, an "operating agreement" is defined as a written agreement among the members of an LLC that concerns the business of the LLC and the conduct of its affairs.[3]

Moreover, because the LLC and its members exist as separate legal entities pursuant to N.Y. Ltd. Liab. Co. Law § 203(d), an LLC that does not execute its own operating agreement is not a party to such agreement. The court further explained that the New York LLC Act does not otherwise provide that operating agreements necessarily govern the relationship between an LLC and its members. Therefore, unlike Delaware and other states that have adopted the RULLCA, the operating agreement of an LLC organized under the New York LLC Act (1) can be exclusively among the members of the LLC, and (2) a

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nonsignatory LLC is a nonparty to any such operating agreement among members.[4]

The Appellate Division rejected the lower court's determination that Wythe Berry's acknowledgment of the Side Agreement manifested an intent for Wythe Berry company to be bound by the Fifth Amendment's arbitration clause. Rather, the appellate court determined that the more consistent interpretation of the Side Agreement is that Wythe Berry merely acknowledged that the Fifth Amendment would be the governing agreement between Goldman and Weiss, the signatories to the Side Agreement.

Because Wythe Berry did not sign the Fifth Amendment and because its mere acknowledgment of the side agreement did not constitute "a clear and unequivocal manifestation of an intent to arbitrate"[5] by Wythe Berry, the court determined that Wythe Berry was not bound by the arbitration provision under the Fifth Amendment.

A BRIGHT-LINE RULE EMERGES

In *Wythe Berry*, the Appellate Division made one thing very clear: Under the New York LLC Act, an LLC shall not be bound by its operating agreement unless it signs the agreement separately from the members themselves. Therefore, if it is the intent of the parties that an LLC formed in New York be bound by the same contractual rights and duties as the members under the operating agreement, then it is imperative that the LLC be a signatory to its operating agreement.

NOTES:

[1] https://www.nycourts.gov/courts/ad1/calendar/List_Word/2024/09_Sep/26/PDF/Wythe%20Berry%20%20v%20%20Goldman%20(2023-06011).pdf.

[2] Wythe Berry LLC v. Goldman, 230 A.D.3d 1081, 220 N.Y.S.3d 7 (1st Dep't 2024).

[3] N.Y. Ltd. Liab. Co. Law § 102(u).

[4] Wythe Berry LLC v. Goldman, 230 A.D.3d 1081, 220 N.Y.S.3d 7 (1st Dep't 2024).

[5] Wythe Berry LLC v. Goldman, 230 A.D.3d 1081, 220 N.Y.S.3d 7 (1st Dep't 2024).

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U.S. Supreme Court Case May Have Significant Implications for the Doctrine of "Corporate Separateness"

*David R. Fertig, J'Naia L. Boyd and Xitlaly Estrada**

In this article, the authors discuss a case pending before the U.S. Supreme Court that could have broad implications for the doctrine of "corporate separateness" - the idea that corporations generally will not be liable for the acts or obligations of their affiliates - even beyond the field of trademark law, as a number of other statutes also have remedial schemes that, like the Lanham Act, confer upon the courts broad "equitable discretion" to fashion appropriate remedies.

The principle of "corporate separateness" - the idea that corporations are separate juridical entities and that stock ownership generally "will not create liability beyond the assets of the [corporation]" - is "deeply 'ingrained in our economic and legal systems.' "[1] Now, the U.S. Supreme Court is poised to weigh in on the boundaries and potential flexibility of this bedrock principle of law. Indeed, in *Dewberry Group, Inc. v. Dewberry Engineers Inc.*,[2] the high court will review whether a corporate defendant may be held liable to pay trademark infringement damages based on profits attributable to infringing activity that were earned not by the defendant itself but only by its nonparty corporate affiliates. Commercial actors - and particularly businesses whose operations are conducted through holding companies or affiliated entities - will thus want to pay close attention to the Supreme Court's upcoming ruling in *Dewberry*, which could have significant implications well beyond the landscape of intellectual property law.

BACKGROUND FACTS

The *Dewberry* case involves a long-running trademark dispute between two commercial real estate companies - petitioner Dewberry Group Inc. (DGI) and respondent Dewberry Engineers Inc. (DEI). DGI, which was founded by former professional football player John Dewberry, did not own or lease any commercial properties itself. Rather, it supported around 30 affiliated operating companies through the provision of certain services, including accounting, human resources and selected legal services. DGI's affiliates - which were under Mr. Dewberry's common ownership but were established and maintained as legally distinct entities that possessed their

*The authors, attorneys with Baker & Hostetler LLP, may be contacted at dfertig@bakerlaw.com, jlboyd@bakerlaw.com and xestrada@bakerlaw.com, respectively.

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own bank accounts and accounting records and filed their own, separate tax returns - owned and leased commercial property to tenants and received all revenues from such leasing activities. Indeed, DGI's revenues consisted solely of contractual fees that it received from its affiliates in exchange for the services it provided to them.

DEI, another company engaged in the provision of real estate development services, asserted that DGI's use of the "Dewberry" mark - for which DEI owned a federal trademark registration - infringed DEI's rights, leading to a settlement between the parties, pursuant to which DGI (then known as Dewberry Capital Corp.) agreed to refrain from using the "Dewberry" mark, and to instead use the mark "DCC" in connection with services it provided in Virginia. After rebranding itself as Dewberry Group Inc., however, DGI produced marketing materials featuring the "Dewberry Group" mark, which, in turn, were used by DGI's affiliates to market commercial properties to tenants. DEI therefore sued DGI for trademark infringement under the Lanham Act.

THE DISTRICT COURT'S DECISION

By order entered August 11, 2021, the U.S. District Court for the Eastern District of Virginia granted summary judgment in favor of DEI.[3] And following a three-day bench trial, the court issued an order requiring DGI to disgorge nearly $43 million in profits.[4] As the court acknowledged, however, DEI presented no evidence that DGI itself - as opposed to its affiliates, which had not been named as defendants and were not parties to the case - had earned any profits from the infringement. In fact, the proof submitted at trial - including DGI's tax returns - showed that DGI had actually suffered losses during the years in question.[5] Nevertheless, the court reasoned that an award directing DGI to disgorge $43 million was appropriate and justified given the "economic reality of how [DGI's] business actually operate[d]."[6]

Among other things, the district court noted that: DGI and its corporate affiliates were all commonly owned by Dewberry, who had "contributed at least $23 million to cover [DGI's] massive losses"; "but-for the revenue generated by [its affiliates], [DGI] as a single-tax entity would not exist"; DGI's affiliates, which were "managed and serviced by [DGI]," earned approximately $43 million in profits attributable to revenue from commercial leases that had been promoted, managed and operated using the infringing marks; and DGI's business had effectively been "structured so that [DGI] and its employees promoted, managed and operated all of the properties owned by [the affiliates]."[7] The court thus reasoned that it was appropriate for DGI and its affiliates to be "treated as a single corporate entity when calculating the revenues and profits generated by [DGI's] use of the Infringing Marks."[8]

Significantly, in reaching this decision, the court acknowledged that DEI had neither named any of DGI's affiliates as defendants nor alleged contributory infringement, nor had DEI alleged or proven any theory of "alter ego" liability.[9] Nevertheless, the court opined that this was "of no moment," because the Lanham Act vests courts with discretion to fashion an appropriate award based on "equitable considerations."[10]

Specifically, 15 U.S.C.A. § 1117(a), the Lanham Act's remedial provision, permits a

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court to order the disgorgement of a defendant's illicit profits and expressly provides that "[i]f the court shall find that the amount of recovery based on profits is either inadequate or excessive, the court may, in its discretion, enter judgment for such sum as the court shall find to be just, according to the circumstances of the case."[11] Concluding that "[DGI's] tax returns, standing alone, do not tell the whole economic story,"[12] the court reasoned that, under "principles of equity," it was appropriate to require DGI to disgorge the infringement-related profits realized by DGI's corporate affiliates because "[t]o hold otherwise would not only ignore the economic reality of how [DGI's] business operate[d], but also undermine the equitable purposes of the Lanham Act's disgorgement remedy by enabling the entire Dewberry Group enterprise to evade the financial consequences of its willful, bad faith infringement."[13]

THE FOURTH CIRCUIT'S OPINION

On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court's decision, holding that the district court had not abused its discretion, either in finding disgorgement appropriate or in calculating the amount to be disgorged by DGI.[14] Critically, the Fourth Circuit acknowledged that the district court had not "pierce[d] the corporate veil" between DGI and its affiliates but nevertheless had "treated [DGI] and its affiliates as a single corporate entity for the purpose of calculating revenues generated by [DGI's] use of infringing marks."[15] The court held, however, that the district court had not improperly failed to respect the corporate distinctions between DGI and its affiliates because, "while [DGI] did not receive the revenues from its infringing behavior directly," it "operate[d] as a corporate shared-services entity under common, exclusive ownership with its affiliates" and thus "still benefited from its infringing relationship with its affiliates[,]" which, "in turn, generate[d] profits" through the use of DGI's infringing conduct.[16] Under these circumstances, the court reasoned, it was not an error for the district court, in the exercise of its "equitable discretion," to "consider[ ] the revenues of entities under common ownership with [DGI] in calculating [DGI's] true financial gain from its infringing activities."[17] Indeed, to do otherwise, the Fourth Circuit opined, would risk "handing" bad actors a "blueprint for using corporate formalities to insulate their [misconduct] from financial consequences."[18]

POTENTIAL SIGNIFICANCE OF THE SUPREME COURT'S IMMINENT DECISION

The doctrine of "corporate separateness" is fundamental to the way in which many businesses structure their operations. Indeed, in reliance on the historically "well-settled rule" that corporations are not liable for the acts or obligations of their affiliates unless the "corporate veil may be pierced,"[19] companies often deliberately choose to create, and to operate through, holding companies and/or one or more affiliated - but carefully "siloed" - corporate entities in order to mitigate risk and protect particular assets from the reach of potential judgment creditors. Any encroachment on the doctrine of corporate separateness could thus have significant implications for many commercial actors.

It remains to be seen whether *Dewberry* marks a significant turning point in the application and observance of the corporate separateness doctrine, or whether the Supreme Court

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will overturn - or perhaps clarify and limit the scope of - the lower courts' decisions in *Dewberry*. On the one hand, it is possible that the Supreme Court intends to confirm the breadth and flexibility of the courts' equitable powers, particularly in the face of statutory mandates like the one present in the Lanham Act, which give the courts wide berth in fashioning relief so as to prevent manifest injustice.

On the other hand, it is conceivable that the conservative-leaning high court agreed to hear the *Dewberry* case based on an inclination to overturn the lower courts' rulings and thereby reinforce the bedrock principle of corporate separateness.

Regardless of how the high court ultimately rules, the business community surely will want to pay close attention to the outcome of the *Dewberry* case - particularly since the decision could have implications far beyond trademark law. Indeed, like the Lanham Act, a variety of other statutes also include express remedial provisions that confer upon courts broad "equitable" discretion to fashion such remedies as they deem just according to the facts and circumstances of the case, including the Copyright Act,[20] the Patent Act,[21] the Securities Exchange Act of 1934,[22] the Federal Defend Trade Secrets Act[23] and the Employee Retirement Income Security Act.[24]

NOTES:

[1]U.S. v. Bestfoods, 524 U.S. 51, 61, 118 S. Ct. 1876, 141 L. Ed. 2d 43, 46 Env't. Rep. Cas. (BNA) 1673, 28 Envtl. L. Rep. 21225, 157 A.L.R. Fed. 735 (1998).

[2]Dewberry Engineers, Inc. v. Dewberry Group, Inc., 2021 WL 5217016, *1 (E.D. Va. 2021), aff'd, 77 F.4th 265 (4th Cir. 2023), cert. granted, 144 S. Ct. 2681, 219 L. Ed. 2d 1297 (2024).

[3]Dewberry Engineers, Inc. v. Dewberry Group, Inc., 2021 WL 5217016, *1 (E.D. Va. 2021), aff'd, 77 F.4th 265 (4th Cir. 2023), cert. granted, 144 S. Ct. 2681, 219 L. Ed. 2d 1297 (2024).

[4]Dewberry Engineers, Inc. v. Dewberry Group, Inc., 2022 WL 1439826, *1 (E.D. Va. 2022), aff'd, 77 F.4th 265 (4th Cir. 2023), cert. granted, 144 S. Ct. 2681, 219 L. Ed. 2d 1297 (2024).

[5]Dewberry Engineers, Inc. v. Dewberry Group, Inc., 2022 WL 1439826, *9 (E.D. Va. 2022), aff'd, 77 F.4th 265 (4th Cir. 2023), cert. granted, 144 S. Ct. 2681, 219 L. Ed. 2d 1297 (2024).

[6]Dewberry Engineers, Inc. v. Dewberry Group, Inc., 2022 WL 1439826, *9 (E.D. Va. 2022), aff'd, 77 F.4th 265 (4th Cir. 2023), cert. granted, 144 S. Ct. 2681, 219 L. Ed. 2d 1297 (2024).

[7]Dewberry Engineers, Inc. v. Dewberry Group, Inc., 2022 WL 1439826, *9 (E.D. Va. 2022), aff'd, 77 F.4th 265 (4th Cir. 2023), cert. granted, 144 S. Ct. 2681, 219 L. Ed. 2d 1297 (2024).

[8]Dewberry Engineers, Inc. v. Dewberry Group, Inc., 2022 WL 1439826, *10 (E.D. Va. 2022), aff'd, 77 F.4th 265 (4th Cir. 2023), cert. granted, 144 S. Ct. 2681, 219 L. Ed. 2d 1297 (2024).

[9]Dewberry Engineers, Inc. v. Dewberry Group, Inc., 2022 WL 1439826, *10 (E.D. Va. 2022), aff'd, 77 F.4th 265 (4th Cir. 2023), cert. granted, 144 S. Ct. 2681, 219 L. Ed. 2d 1297 (2024).

[10]Dewberry Engineers, Inc. v. Dewberry Group, Inc., 2022 WL 1439826, *10–11 (E.D. Va. 2022), aff'd, 77 F.4th 265 (4th Cir. 2023), cert. granted, 144 S. Ct. 2681, 219 L. Ed. 2d 1297 (2024) (noting that "profits disgorgement under the Lanham Act is a remedy sounding in equity, allowing the courts to adjust an award up or down as circumstances demand").

[11]Dewberry Engineers, Inc. v. Dewberry Group, Inc., 2022 WL 1439826, *11 (E.D. Va. 2022), aff'd, 77 F.4th 265 (4th Cir. 2023), cert. granted, 144 S. Ct. 2681, 219 L. Ed. 2d 1297 (2024).

[12]Dewberry Engineers, Inc. v. Dewberry Group, Inc., 2022 WL 1439826, *10 (E.D. Va. 2022), aff'd, 77 F.4th 265 (4th Cir. 2023), cert. granted, 144 S. Ct. 2681, 219 L. Ed. 2d 1297 (2024).

[13]Dewberry Engineers, Inc. v. Dewberry Group, Inc., 2022 WL 1439826, *10, 13 (E.D. Va. 2022), aff'd, 77 F.4th 265 (4th Cir. 2023), cert. granted, 144 S. Ct. 2681, 219 L. Ed. 2d 1297 (2024).

[14]Dewberry Engineers Inc. v. Dewberry Group, Inc., 77 F.4th 265, 293 (4th Cir. 2023), cert. granted, 144 S. Ct. 2681, 219 L. Ed. 2d 1297 (2024).

[15]Dewberry Engineers Inc. v. Dewberry Group, Inc., 77 F.4th 265, 290–92 (4th Cir. 2023), cert. granted, 144 S. Ct. 2681, 219 L. Ed. 2d 1297 (2024).

[16]Dewberry Engineers Inc. v. Dewberry Group, Inc., 77 F.4th 265, 290, 293 (4th Cir. 2023), cert. granted, 144

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S. Ct. 2681, 219 L. Ed. 2d 1297 (2024).

[17]Dewberry Engineers Inc. v. Dewberry Group, Inc., 77 F.4th 265, 292 (4th Cir. 2023), cert. granted, 144 S. Ct. 2681, 219 L. Ed. 2d 1297 (2024).

[18]Dewberry Engineers Inc. v. Dewberry Group, Inc., 77 F.4th 265, 293 (4th Cir. 2023), cert. granted, 144 S. Ct. 2681, 219 L. Ed. 2d 1297 (2024).

[19]*U.S. v. Bestfoods*, 524 U.S. 51, 61–62, 118 S. Ct. 1876, 141 L. Ed. 2d 43, 46 Env't. Rep. Cas. (BNA) 1673, 28 Envtl. L. Rep. 21225, 157 A.L.R. Fed. 735 (1998).

[20]17 U.S.C.A. § 504(b).

[21]35 U.S.C.A. § 289.

[22]15 U.S.C.A. § 78u(d)(5).

[23]18 U.S.C.A. § 1836(b)(3)(B).

[24]29 U.S.C.A. § 1109(a).

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U.S. Real Estate Outlook: Navigating Change, Capitalizing on Opportunity

*James "Chip" Stuart**

In this article, the author examines the outlook for U.S. real estate for the rest of this year.

The U.S. real estate sector now stands at a pivotal crossroads, with the year promising a mix of opportunities and challenges. While recent years have brought turbulence, from rising insurance costs to fluctuating interest rates and persistent labor challenges, the rest of 2025 offers glimmers of hope alongside continuing complexities.

Interest rate adjustments and stabilizing insurance premiums provide reasons for optimism. At the same time, natural disasters, labor shortages and evolving litigation trends demand vigilance. Real estate owners and operators must adopt robust strategies that integrate risk management, employee engagement and financial planning to stay ahead. By preparing for shifting market dynamics and addressing key challenges, those within the sector can position themselves for resilience and profitability.

RETAINING AND ATTRACTING TALENT AMID PERSISTENT LABOR SHORTAGES

The tight labor market continues to challenge the real estate industry, impacting property management, construction and tenant operations. High turnover rates among maintenance staff, security personnel and cleaners create operational vulnerabilities, including increased property risks and insurance costs.

For tenants, the issue is equally pressing. Businesses in hospitality, retail and food services face staffing shortages[1] that hinder their ability to meet lease obligations and operate safely. Property owners must invest in recruitment and retention strategies, while also creating environments that attract tenants' employees back to the workplace.

Enhancing workforce engagement requires a multifaceted approach that addresses both employee needs and operational challenges. Offering personalized benefits through data-driven strategies can significantly improve employee satisfaction and retention, creating a more stable and motivated workforce.

Additionally, investing in property enhancements, such as upgraded amenities and improved safety features, not only makes

*James "Chip" Stuart is the corporate chief sales officer and practice leader for global insurance brokerage Hub International's real estate specialty in North America.

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workspaces more appealing but also fosters tenant satisfaction.

To address construction labor gaps, collaborating with contractors and workforce development programs is essential for ensuring that projects are completed efficiently and on schedule.

PROFITABILITY IN A COMPLEX LANDSCAPE: BALANCING RISING COSTS AND NEW OPPORTUNITIES

Profitability in real estate remains under pressure, with operating expenses such as construction, insurance and labor costs rising steadily. Additionally, the industry grapples with high borrowing costs and increased vacancy rates, particularly in the office and industrial sectors. Office vacancies surpassed 20%[2] in 2024, a stark indicator of ongoing challenges. Close to $1 trillion[3] in commercial real estate mortgages are also slated to mature by the end of the new year, creating additional refinancing pressures.

Yet, the rest of 2025 could mark a turning point. The Federal Reserve's recent interest rate cuts of 50 basis points,[4] combined with expectations for further reductions, are likely to lower borrowing costs, spurring new demand and alleviating refinancing pressures. Investors and operators could also see relief in stabilizing insurance premiums, particularly for properties with strong risk management programs.

Real estate owners looking to improve profitability this year can employ several key strategies. First, evaluate exposures by collaborating with a broker to assess risks and uncover opportunities for securing comprehensive yet affordable insurance coverage.

Next, leverage rate stability in the insurance market by refining your risk management practices, making your properties more attractive to insurers and securing favorable terms.

Finally, adapting to shifting demand is crucial; targeting investments in high-growth sectors such as multifamily housing and logistics properties can help capitalize on emerging opportunities and drive profitability.

PREPAREDNESS FOR EMERGING RISKS AND ADAPTING TO NEW THREATS

The real estate industry must prepare for an evolving risk landscape this year. Climate change continues to intensify natural disasters, while litigation risks, including ADA compliance lawsuits[5] and cybersecurity threats, are on the rise.

Third-party litigation financing is a growing concern, as it enables lawsuits that target real estate operators for perceived regulatory noncompliance. Cyberattacks also pose significant risks, with potential for both financial losses and reputational harm.

Effective risk preparedness this year hinges on adopting best practices that address evolving threats and regulatory demands. Developing a robust enterprise risk management (ERM) framework is essential for identifying and mitigating risks across all aspects of operations.

Staying ahead of compliance requirements, such as those outlined in the Americans with Disabilities Act, can help real estate owners and operators avoid costly litigation.

Additionally, strengthening cybersecurity through investments in advanced technology

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and employee training is critical for protecting against data breaches and other digital threats, ensuring both operational continuity and reputation management.

BUILDING RESILIENCE THROUGH RATE STABILIZATION

After years of sharp increases, this year is set to bring relief to property insurance costs. Stabilization in the market is expected as insurers restore profitability and competition increases. Properties with strong risk management programs could even see premium reductions.

However, challenges remain for properties in disaster-prone areas. Events like convective storms and wildfires drove $42 billion in insured losses[6] in the first half of 2024, highlighting the importance of proactive risk management.

Building resilience this year requires a proactive approach to property management and risk mitigation. Maintaining properties in top condition, particularly by ensuring they are built or upgraded to withstand natural disasters, is a key factor in attracting favorable insurance terms.

Accurate property valuations are equally important, as they help avoid disputes with insurers and ensure fair premium assessments. Additionally, implementing targeted mitigation plans, such as addressing vulnerabilities like water damage risks, can significantly enhance a property's insurability and overall resilience to potential threats.

PRACTICAL STEPS FOR SUCCESS

Navigating this year's complexities will require a thoughtful approach to risk management, workforce vitality and financial planning. By partnering with industry experts, real estate owners and operators can safeguard their assets, support their employees and seize new growth opportunities.

Five key considerations for the rest of this year include:

1. *Safety First*: Emphasize safety training and regulatory compliance to reduce exposure to nuclear verdicts.
2. *Monitor Loss Trends*: Use analytics to address root causes of claims and present a strong case to insurers.
3. *Risk Management*: Adopt proactive strategies, including higher deductibles and alternative risk transfer vehicles, to manage rising costs.
4. *Enhance Workforce Benefits*: Personalized benefits can foster a more engaged and productive workforce.
5. *Communicate With Brokers*: Maintain transparency about operational changes to secure optimal insurance terms.

THRIVING AMID UNCERTAINTY

By staying informed and adaptable, real estate stakeholders can turn challenges into opportunities this year. From stabilizing costs to fostering resilience, the new year offers pathways to sustained growth and success.

NOTES:

[1] https://www.uschamber.com/workforce/understanding-americas-labor-shortage-the-most-impacted-industries.

[2] https://www.moodyscre.com/insights/cre-trends/q2-2024-preliminary-trend-announcement/.

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[3] https://www.spglobal.com/market-intelligence/en/news-insights/research/commercial-real-estate-maturity-wall-950b-in-2024-peaks-in-2027.

[4] https://apnews.com/article/interest-rates-inflation-prices-federal-reserve-economy-0283bc6f92e9f9920094b78d821df227.

[5] https://narfocus.com/publication-issue/view/2024-07-15-commercial-americans-with-disabilities-act-ada-lawsuit-reform#:˜:text=These%20suits%20often%20target%20easily,on%20state%20and%20local%20inspections.

[6] https://narfocus.com/publication-issue/view/2024-07-15-commercial-americans-with-disabilities-act-ada-lawsuit-reform#:˜:text=These%20suits%20often%20target%20easily,on%20state%20and%20local%20inspections.

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The Current Tax Risk Environment and Best Practices for Managing It

*Jens Hafemann, Maureen E. Linch, Richard Sultman, Benjamin Boisanté, Gianluca Russo and Peter North**

In this article, the authors identify some key topical areas of tax risk that multinational groups are commonly encountering, and offer some best practices for addressing them.

This year began with a continuation of the major tax trends emerging in the post-COVID-19 era:

- More aggressive audits by tax authorities in search of additional revenue;
- Increased international cooperation between tax authorities;
- The end of transitional concessions to assist businesses through the pandemic; and
- A developing role for tax in shaping ESG policies and behaviors.

These trends have emerged in an increasingly complex technical tax environment characterized by an accumulation of new rules and the layering of international tax regimes (such as the Organisation for Economic Co-operation and Development's global minimum taxation rules) on top of domestic tax regimes. At the same time, regulators are demanding enhanced transparency, tax authorities are mining data with smarter and faster AI tools and governments are getting more efficient at sharing information across borders. Against this background, the management of modern tax risks has become a cornerstone of sound corporate responsibility.

Set out below are some key topical areas of tax risk that multinational groups are commonly encountering, and some best practices for addressing them.

INTERNAL TAX RISK MANAGEMENT: TAX STRATEGIES AND POLICIES

Establishing and maintaining robust internal procedures for identifying, comprehending and mitigating tax risks can lower compliance costs in the long term while allowing more nimble decision making and facilitating a positive relationship with taxing authorities. An effective framework requires involvement and collaboration at every level of an organization, from the board, to senior management, to the audit and risk committees, to the members of each department.

*The authors, attorneys with Cleary Gottlieb Steen & Hamilton LLP, may be contacted at jhafemann@cgsh.com, mlinch@cgsh.com, rsultman@cgsh.com, bboisante@cgsh.com, grusso@cgsh.com and pnorth@cgsh.com, respectively.

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Best practices include a clear and documented tax risk management strategy set by the board and audit committee, accountability protocols adopted by the tax, finance, human resources and legal departments, and ongoing review and monitoring by business, accounting and tax teams. Members of the tax and accounting teams should be in regular communication with each other and with business teams and should review all business decisions above a certain materiality threshold. Tax risks should be addressed in a consistent manner as other business risks. Achieving an effective system requires top-down engagement and transparency throughout.

The adoption of a formal (and public) tax strategy is a legal requirement for large companies in some countries. The UK, for example, requires large groups with UK members to publish an annual online strategy document covering the group's attitude to UK tax planning, the level of UK tax risk the business is prepared to accept and how the business works with the UK tax authorities. Large corporate groups might consider something similar even if not formally required.

TAX AUTHORITY RISK MANAGEMENT: COOPERATIVE COMPLIANCE

Cooperative compliance initiatives are being increasingly adopted by tax authorities around Europe. Originally these initiatives were available only to large companies, but many countries are now considering reducing the relevant thresholds (which are generally based on annual turnover), to expand their reach to mid-sized companies as well as to high-net-worth individuals.

The main goal of a cooperative compliance approach is to ensure tax compliance through an enhanced relationship with the taxpayer. The benefits to the taxpayer - in the form of reduced risk of tax authority challenge and assessments - can be material. Eligible taxpayers who have a history of compliance, who commit to exchange information with the tax authorities on an ongoing basis and who implement other controls to measure, manage and control tax risks can generally expect favorable administrative procedures, such as expedited access to tax authorities as well as enhanced engagement from tax authorities in formal and informal discussions on uncertain tax issues. Timely and comprehensive disclosures under a cooperation agreement can also result in reduced penalties if assessments nonetheless occur.

ORGANIZATIONAL TAX RISK MANAGEMENT: RISKS OF MODERN WORKING PRACTICES

The post-pandemic shift to mobile and remote working practices has exposed organizations to increased risks of establishing an unintended taxable presence in countries or states where they did not previously report or file returns. This can trigger unplanned corporate income taxes, sales taxes and value added taxes, as well as payroll reporting and withholding obligations. Tax authorities are becoming less accommodating on these matters.

From a corporate income tax perspective, companies generally become subject to tax and filing obligations in jurisdictions where they are considered to be tax resident or in which they are considered to maintain a permanent establishment (PE). Tax residence can often arise in a jurisdiction if management functions are exercised there - some jurisdictions look

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to the location of board level management and control, whereas others look more at the place of effective day to day management. A PE can arise (even if tax residence does not) if a company has a fixed place of business in a jurisdiction or if it has a dependent agent doing business there on its behalf. Tax residence typically entitles the jurisdiction of residence to impose taxation on the company's worldwide profits, whereas the presence of a PE generally entitles the relevant jurisdiction to impose tax on profits of the company attributable to the PE. Similar considerations are also relevant for other taxes (such as VAT and other trade taxes).

Many tax authorities relaxed their enforcement of rules for determining tax residence or the existence of PEs during the pandemic. However, under renewed pressure to increase tax revenues, and with the benefit of recent extensions to international treaty-based rules for when PEs are deemed to exist, those authorities are clamping back down. Consequences can be severe - in some European jurisdictions, for example, an undisclosed PE can result in significant penalties and potential criminal exposures.

Considering these risks, groups with internationally mobile directors, senior management and other employees, or personnel who work remotely in a different jurisdiction to their employing company, should ensure they have an accurate picture of the applicable rules that apply wherever the relevant individuals regularly perform their duties. Any remote working policies put in place during the pandemic should be revisited with additional safeguards being put in place, where necessary. The same is true for permissions that may have been given for directors to attend board meetings by telephone or video conference. Care should be taken to monitor who does what and from where, with contemporaneous evidence - like board meeting minutes, time sheets and travel records being obtained and retained. In some cases, it may be advisable to prohibit remote working practices or locations in the absence of a clear benefit to the business; in other cases it may make sense to embrace a taxable presence in a new place and to set up a local entity to house relevant individuals. Targeted solutions may be available for certain risks, like engaging local professional employer organizations (PEOs) to take on the legal, tax and compliance burdens associated with payroll obligations for remote workers.

TRANSACTIONAL TAX RISK MANAGEMENT: THE USE OF INSURANCE POLICIES

Transactional tax risks are traditionally managed either through contractual arrangements that allocate the risks between the parties (for example in the tax warranties or tax indemnity provisions of a share purchase agreement) or, if available, advance tax rulings issued by the competent tax authority. However, both approaches have limitations:

- Trying to manage tax risks through contractual arrangements remains subject to negotiation power and ultimately counterparty/solvency risk. Also, classic tax indemnities do not typically provide for a "clean break." Due to customary international tax audit cycles, tax risks often take some years to surface, so parties to a tax indemnity will often only know years after a transaction has closed whether a tax risk could materialize, and they could then remain entangled with

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each other for subsequent years based on applicable statutes of limitations and tax assessment and appeal processes.

- Tax rulings, if available, often take too long to be obtained to be a practical tool to address risks arising on deals. They also can trigger significant statutory administrative fees and/or the materialization of tax risks. Furthermore, tax rulings are in many jurisdictions limited to future, yet unimplemented fact patterns and so are not able to address scenarios relating to past transactions.

Many varieties of tax insurance policies have been (and are continuing to be) developed to provide solutions to these concerns:

- Warranty and indemnity (W&I) insurance policies regularly cover tax risks that have not been identified in tax due diligence. Typically, the buyer is required to take out a W&I policy, and the seller's liability under the purchase agreement is either excluded or limited to a symbolic one Euro/Dollar - all subject to satisfactory customary tax due diligence and customary exclusions (such as transfer pricing and fraud). In such cases, the W&I policy covers liability scenarios in which the seller would otherwise be liable under the purchase agreement's tax warranty and indemnity provisions.

- An evolving trend in tax W&I policies is for cover to not strictly be linked to the provisions of the purchase agreement: so-called synthetic/virtual insurance policies are, if available, able to cover fact patterns that are not covered under the indemnity provisions in a typical purchase agreement, including extending the statute of limitations beyond the survival provisions or "scraping" knowledge qualifiers in warranties.

- Tax insurance policies may also be available in relation to certain known tax risks identified in tax due diligence. This so-called special tax liability insurance is often promoted on the basis that it is obtainable faster than a tax ruling, it can cover known but not yet materialized tax risks resulting from past events, and it can bridge risk allocation gaps between the seller and the buyer.

Although tax insurance coverage can often provide solutions on M&A transactions, it can come with drawbacks too. Obtaining the insurance adds another work stream that will require a certain level of tax due diligence, the negotiation of the insurance policy and additional fees, premiums and potentially insurance premium taxes. Other than for the most standard W&I policy (and certainly not in the case of a special tax liability policy) insurance is not a one-size fits all solution and will require tailoring to each deal. In some cases, the timing and cost required to put insurance in place, or the exclusions and other burdensome terms of the policy may outweigh accepting the risk.

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Committee on Foreign Investment in the United States Has Expanded Its Real Estate Jurisdiction

*Stephenie Gosnell Handler, David A. Wolber, Michelle A. Weinbaum, Roxana Akbari, Mason Gauch and Chris R. Mullen**

In this article, the authors explain that the final rules of the Committee on Foreign Investment in the United States expanding jurisdiction over real estate substantially expanded the scope of covered real estate transactions subject to national security review.

The Committee on Foreign Investment in the United States (CFIUS) has begun enforcing its final rule[1] (published in the Federal Register on November 7, 2024) which expands its jurisdiction over real estate transactions involving foreign persons. Of note the list of expanded locations remained unchanged between the proposed and final rule.

BACKGROUND: CFIUS'S JURISDICTION OVER REAL ESTATE TRANSACTIONS

CFIUS's "Part 802"[2] real estate rules permit CFIUS to review acquisitions involving a foreign person purchasing, leasing, or gaining certain other land rights in property close to military installations and other sensitive areas. The rules enumerate those sensitive areas subject to review using four categories of locations in an Appendix to the rules (Appendix A):

- Part 1 lists locations for which a property may be subject to review based on its "close proximity" to a listed military installation (i.e., within one mile).
- Part 2 lists locations for which a property may be subject to review based on being within the "extended range" of a listed military installation (i.e., up to 99 miles).
- Part 3 lists counties or other geographic areas for which a property, if located within one of these areas, may subject to CFIUS review.
- Part 4 lists offshore training areas for which a property, if located within one of these areas, may be subject to CFIUS review.

*The authors, attorneys with Gibson, Dunn & Crutcher LLP, may be contacted at shandler@gibsondunn.com, dwolber@gibsondunn.com, mweinbaum@gibsondunn.com, rakbari@gibsondunn.com, mgauch@gibsondunn.com, and cmullen@gibsondunn.com, respectively.

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AMENDMENTS TO THE LISTS OF SENSITIVE U.S. MILITARY INSTALLATIONS

The Final Rule made the following updates:

- Expanded CFIUS's jurisdiction over real estate transactions to include 40 new military installations (bringing the total to 162) in Part 1;
- Expanded CFIUS's jurisdiction over real estate transactions to include 19 new military installations (bringing the total to 65) in Part 2;
- Moved eight military installations from Part 1 to Part 2;
- Removed one installation from Part 1 and two installations from Part 2 due to their being located within other listed locations;
- Revised the definition of the term "military installation" to bring it in line with existing terms and the locations covered; and
- Updated the names of 14 installations and the location of seven others.

TAKEAWAYS FOR TRANSACTION PARTIES

Transaction parties should take note of the following:

- *Use the Updated Location List for Diligence*. Parties must consult the most recent version of the list of sensitive areas which can be found at 31 C.F.R. Pt. 802, Appendix A.[3]
- *The List of Locations Is Likely to be Expanded on an Annual Basis*. Each year, the U.S. Department of Defense and CFIUS review the list of installations in Appendix Part A and consider updates to Part 802 jurisdiction.
- *Be Mindful of Other Applicable Laws*. Even when real property plays a central role in a transaction, many transactions that involve real estate also implicate CFIUS's "Part 800" jurisdiction over controlling and non-controlling transactions. Additionally, transactions involving real estate may implicate the growing body of state and local restrictions on foreign investment, as well as other federal requirements such as the Agricultural Foreign Investment Disclosure Act (AFIDA).[4]

NOTES:

[1] https://www.federalregister.gov/documents/2024/11/07/2024-25773/definition-of-military-installation-and-the-list-of-military-installations-in-the-regulations.

[2] https://home.treasury.gov/system/files/206/Part-802-Final-Rule-Jan-17-2020.pdf.

[3] https://www.ecfr.gov/current/title-31/subtitle-B/chapter-VIII/part-802/appendix-Appendix%20A%20to%20Part%20802.

[4] https://www.fsa.usda.gov/programs-and-services/economic-and-policy-analysis/afida.

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U.S. Department of Treasury and Internal Revenue Service Issue Final Regulations on the Credit for Production of Clean Hydrogen Under Section 45V of the Internal Revenue Code

Don Lonczak, Megan L. Jones, Elina Teplinsky, Sheila McCafferty Harvey, David McCullough and Baylee Beeman[*]

In this article, the authors discuss regulations proposed by the Internal Revenue Service providing guidance on the clean hydrogen production credit granted under Section 45V of the Internal Revenue Code, which was enacted as part of the Inflation Reduction Act of 2022.

I.R.C.§ 45V (IRC), enacted as part of the Inflation Reduction Act of 2022, grants a clean hydrogen production credit (CHPC) for each kilogram of clean hydrogen produced by a taxpayer at a qualified clean hydrogen production facility (CHPF). The credit amount available to taxpayers under I.R.C. § 45V varies based on the life cycle greenhouse gas (GHG) emissions generated from the CHPF. Additionally, taxpayers can qualify for a higher credit amount when applicable prevailing wage and apprenticeship requirements are met.

On December 22, 2023, the Internal Revenue Service (IRS) published proposed regulations (Prior Regulations)[1] in the Federal Register providing guidance on the CHPC. Significantly, the Prior Regulations introduced requirements closely tied to the three pillars of "incrementality" (or "additionality"), temporal matching and deliverability, which were met with opposition from many industry members. On January 3, 2025, the U.S. Department of the Treasury (Treasury) and the IRS released final regulations (Final Regulations),[2] after reviewing approximately 30,000 comments on the Prior Regulations and consulting with the Department of Energy (DOE) and the U.S. Environmental Protection Agency (EPA). The Final Regulations retain the general framework of the Prior Regulations but make some help-

[*]The authors, attorneys with Pillsbury Winthrop Shaw Pittman LLP, may be contacted at don.lonczak@pillsburylaw.com, megan.jones@pillsburylaw.com, elina.teplinsky@pillsburylaw.com, sheila.harvey@pillsburylaw.com, david.mccullough@pillsburylaw.com and baylee.beeman@pillsburylaw.com, respectively.

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ful modifications in response to submitted comments.

THREE PILLARS/ENERGY ATTRIBUTE CERTIFICATES

The Prior Regulations provided for the use of energy attribute certificates (EACs) as the means of documenting where taxpayers purchased electricity inputs and the emissions impacts of the use of such electricity in hydrogen production. Under this approach, taxpayers would be required to acquire and retire EACs that meet the three pillar requirements of incrementality, temporal matching and deliverability. Despite considerable pushback from industry members, Treasury and the IRS felt the use of EACs, along with the associated three pillar requirements, were needed to (i) avoid double counting of environmental attributes, and (ii) mitigate risk of significant indirect emissions in connection with the production of clean hydrogen. Thus, the acquisition and retirement of EACs continue as a critical aspect of the Final Regulations, although with some flexibility added for taxpayers seeking to comply with the three pillar requirements, as further described below.

INCREMENTALITY

The incrementality pillar is the requirement that the clean electricity used to produce hydrogen must come from sources that are additive to existing sources, which have been commercially operated for more than 36 months. The Final Regulations adopt three additional pathways to comply with the incrementality requirement; specifically, electricity that is produced by:

- Qualifying nuclear reactors;
- An electricity generating facility that has placed in service carbon capture and sequestration technology (within certain time constraints) (CCS Retrofit Rule); and
- An electricity generation facility in a qualifying state.

Qualifying Nuclear Reactor

Up to 200 megawatt hours (MWh) of electricity per operating hour sourced from a “qualifying nuclear reactor” will be considered incremental, regardless of the operating age of that reactor. A “qualifying nuclear reactor” is a plant located in an unregulated market or a single-unit plant that (a) has met the Section 45U credit financial test for any two years between 2017–2021, as determined with respect to any one owner of the reactor, and (b) either (i) has a behind-the-meter hydrogen production facility, or (ii) has a 10-year written binding offtake contract. A written binding contract is one that is enforceable under state law against the taxpayer or a predecessor and does not limit damages to a specified amount (for example, by use of a liquidated damages provision).

The CCS Retrofit Rule

The CCS Retrofit Rule treats electricity sourced from a facility that has been operational for more than 36 months as incremental so long as such facility has carbon capture and sequestration equipment that qualifies under Section 45Q (i.e., carbon is captured and disposed of in secure geological storage and utilized in a manner described in Section 45Q(f) and/or implementing regulations) that has been placed in service within the 36-month period.

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Qualifying States

Taxpayers can treat electricity sourced from facilities in a qualifying state as incremental. A qualifying state is one that has a qualifying electricity decarbonization standard and a qualifying GHG cap program. A qualifying electricity decarbonization standard is defined as a standard that (i) contains a 100% clean retail electricity or equivalent GHG emissions target by 2050 that applies to the large majority of eligible electricity supplied to the state, and (ii) includes policies or a requirement that would achieve that target, such as a renewable portfolio or clean energy standard. A qualifying GHG cap program is a legally binding program with annual obligations with a cap that declines over time and which applies to the large majority of in-state power sector sources of emissions above 25,000 metric tons of CO2e and to emissions associated with those imports and ensures that (a) the prices of allowances sold in a state-run auction cannot fall below $25 per metric ton of CO2e, and (b) the cap on GHG emissions cannot be exceeded for less than $90 per metric ton of CO2e (both amounts as adjusted for inflation). Currently, only California and the State of Washington meet these requirements.

TEMPORAL MATCHING

The temporal matching pillar is the requirement that taxpayers match the clean hydrogen power being produced as the CHPF with clean power generation. The Prior Regulations adopted an hourly matching requirement, with a transition rule based on annual matching until 2028. Here, Treasury and the IRS acknowledged that hourly tracking currently is not widely available and, as such, extended the transition period from the Prior Regulations to 2030. Additionally, recognizing that energy storage technology is growing, the Final Regulations allow a taxpayer to make use of energy storage to shift its temporal profile if (i) the electricity represented by an EAC is discharged from a storage system in the same hour that the taxpayer's CHPF facility uses electricity to produce hydrogen, and (ii) the storage system is located in the same region as both the CHPF and the facility generating the stored electricity.

DELIVERABILITY

Under the deliverability pillar a taxpayer must source its clean electricity generation from a power producer in the same region as the CHPF. The Prior Regulations defined region as a region contained in the DOE's October 30, 2023, National Transmission Needs Study (DOE Needs Study). The Final Regulations retain the DOE Needs Study and add a table of balancing authorities and their corresponding regions, which is intended to be the definitive source for identifying regions. As such, under the Final Regulations, an electricity generating source and CHPF are located in the same region if both are electrically interconnected to a balancing authority (or balancing authorities) located in the same region, as identified in the table. Treasury and the IRS anticipate that the table would be periodically updated, but no more frequently than annually, through administration guidance published in the Internal Revenue Bulletin. The Final Regulations also adopt a special rule for cross-region deliveries under which an eligible EAC will meet the deliverability requirement when the deliverability can be tracked and verified, subject to additional requirements.

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METHANE AND OTHER RENEWABLE NATURAL GAS PROJECTS

The Prior Regulations did not provide for draft regulations for the tracking of methane or renewable nature gas (RNG) used in the production of clean hydrogen; instead, Treasury and the IRS promised future guidance that would be "logically consistent with, but not identical to" the three pillar requirements for tracking electricity. To that end, the Final Regulations introduce the "gas EAC," which is defined as a tradeable contractual instrument, issued through and retired within a qualified gas EAC registry or accounting system, that represents the attributes of a specific unit of RNG or coal mine methane. To establish that RNG was used in the production of clean hydrogen, a taxpayer would acquire and retire qualifying gas EACs for each unit of gas that the taxpayer claims from a methane or RNG source, with the acquisition and retirement being recorded in the relevant registry or accounting system and subject to verification requirements. In this regard, Treasury and the IRS acknowledged that a book and claim system would be an acceptable mechanism for the acquisition and retirement of gas EACs, but did not expect to recognize suitable registries until 2027, at the earliest, due to the need to put safeguards in place that meet the requirements of the Final Regulations.

The Final Regulations adopt monthly matching of use of methane or RNG in hydrogen production to injection of methane or RNG in a pipeline for purposes of the temporal matching requirement and treat the contiguous United States as a single region (with Hawaii, Alaska and each U.S. territory as separate regions) for purposes of the deliverability requirement. Despite being previewed in the preamble to the Prior Regulations, the Final Regulations do not include a "first productive use" requirement as an attempt at addressing incrementality. Under the proposal for first productive use, RNG produced from any source of methane, where the methane had been productively used in a taxable year prior to the taxable year in which the relevant CHPF was placed in service, would not obtain an emission value consistent with biogas-based RNG, and would be deemed to have a value consistent with fossil natural gas. In lieu of a first productive use requirement, the Final Regulations contemplate that other productive uses would be considered an alternative fate in determining the life cycle GHG emissions rate for the relevant gas.

OTHER NOTABLE HIGHLIGHTS

- For purposes of IRC Section 45V, life cycle GHG emissions are determined using the most recent Greenhouse Gases, Regulated Emissions and Energy use in Transportation model (the GREET Model), but the Final Regulations provide a safe harbor allowing a taxpayer to elect to rely on the version of the GREET Model in effect when construction of the CHPF begins to provide greater certainty as to CHPC eligibility. The DOE will soon be releasing an updated version of the 45VH2-GREET model that producers can use to calculate their Section 45V tax credit.

- Despite some requests from commenters, the Final Regulations do not contain any Foreign Entity of Concern restrictions given the absence of a statutory prohibition.

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- For facilities being modified to allow for clean hydrogen production, Treasury and the IRS clarified that there is no monetary threshold for capital expenditures relating to the modifications in order to qualify for the CHPC.

- For purposes of the incrementality requirement, a decommissioned facility that restarts operations can obtain a base of zero in determining increased capacity if the facility was shut down for at least a year during which it was not authorized to operate by a federal regulatory authority.

- The Final Regulations allow taxpayers to use EACs for non-zero emitting facilities due to a change in definition to require accurate reflection of emissions.

- The Final Regulations also include an anti-abuse rule under which the Section 45V credit will not be allowed if the primary purpose of the sale or use of qualified clean hydrogen is to obtain the benefit of the Section 45V credit in a wasteful manner.

FINAL POINTS

While the Final Regulations did not abandon the use of EACs and the three pillars requirements as many industry members had hoped, the modifications provided by the Final Regulations can be viewed as improvements from the Prior Regulations. The Final Regulations are intended to be effective upon publication in the Federal Register and apply to taxable years beginning after December 26, 2023. Taxpayers nevertheless may rely upon Final Regulations for earlier taxable years provided that the Final Regulations are applied in their entirety and in a consistent manner.

IN SUMMARY

- The final regulations retain the general framework of the proposed regulations, with some important modifications based upon comments from industry members.

- The acquisition and retirement of energy attribute certificates will remain the method to establish emissions associated with hydrogen production, but the final regulations provide additional flexibility with respect to at least two of the associated "three-pillar" requirements - incrementality and temporal matching.

- The final regulations contain never-seen-before guidance with respect to the use of methane and renewable natural gas (RNG) products.

NOTES:

[1]REG-117631-23.

[2]RIN 1545-BQ97.

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Fast-Tracking Megaprojects: Balancing Speed, Feasibility and Dispute Risks

*Meagan T. Bachman, David Chung and Edmund Northcott**

In this article, the authors examine the impacts of fast-tracking infrastructure megaprojects.

Even before he took office for the second time, President Donald Trump proposed to expedite federal approvals and permits for any investments worth more than $1 billion.[1] To date, details of Trump's current proposed fast-tracking initiative have not been articulated. If put into action, however, infrastructure megaprojects will certainly be among the investments covered by any such initiative, with such fast-tracking potentially enhancing dispute risks before projects commence and throughout the lifecycle of the project.

WORLD BANK REPORT

In late 2024, the World Bank published a report setting out its findings on drivers of delay in the planning and execution of infrastructure projects. It found that across all regions and regardless of the value of the contract, the majority of delays to infrastructure projects were attributable to the buyer or implementing entity, as opposed to external stakeholders responsible for issuing environmental or other approvals.[2] Among its findings was that delay in approval of permits arising from external stakeholders delayed 6% of all of the infrastructure contracts studied and 13% of contracts for projects worth over $100 million.[3] However, the same report found that for projects worth over $100 million, the most significant percentage of delays arose from low quality of feasibility reports, followed by weak procurement capacity of the implementing entity.[4]

Indeed, among the infrastructure projects studied, the World Bank found that in respect of delays arising out of project preparation, design issues (including changes or inaccurate/incomplete designs) and lack of feasibility and preparatory studies drove more delays than dilatory approvals and site clearances.[5]

In other words, while delays arising out of the permitting process are a concern, according to the World Bank study, other pre-project execution deficiencies drive a higher percentage of delays to infrastructure projects and the effects of such deficiencies are felt throughout the project cycle.[6]

Acceleration of any process in the develop-

*The authors, attorneys with Crowell & Moring LLP, may be contacted at mbachman@crowell.com, dchung@crowell.com and enorthcott@crowell.com, respectively.

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ment and construction of infrastructure - be it the permitting process or otherwise - can result in oversights and gaps leading to problems arising during construction of the project and sometimes significant litigation - both during the planning and permitting phase and during project execution. Even projects that undergo lengthy, comprehensive permitting processes in the ordinary course - processes than can span a decade or longer - result in litigation and thus, further delay. In the case of fast-tracking permitting, however, there may be an even higher risk of disputes arising from failures to properly engage with stakeholders about potential social and environmental impacts, among other things, that may delay commencement of the project or manifest in delays during project execution as gaps and oversights are discovered and challenged.

Equally important, state governments have in the past succeeded in blocking infrastructure megaprojects by withholding requisite approvals. Unless and until Congress decides to change relevant environmental statutes[7] and states and the federal government engage in additional meaningful, coordinated process reform, accelerated issuance of federal permits may have little effect in reducing delays associated with the permitting process and, indeed, could increase them. At their essence, approval and permitting processes are designed to ensure viability and success of megaprojects. Those involved in megaprojects should pay particular attention to these steps, even if the permitting process is accelerated and therefore, possibly, less rigorous to mitigate the possibility of future disputes.

TAKEAWAYS

- *Key Takeaway #1*

  Fast-Tracking Risks: Accelerated permitting processes may lead to disputes due to insufficient stakeholder engagement, design oversights, and environmental impact issues.

- *Key Takeaway #2*

  Findings From the World Bank Report: Delays are more commonly driven by poor feasibility studies, weak procurement practices, and design flaws than by permitting issues alone.

- *Key Takeaway #3*

  Lifecycle Implications: Gaps in early project phases can result in significant litigation during execution, even for non-expedited projects.

- *Key Takeaway #4*

  Dispute Mitigation: Careful project planning, robust design processes, and proactive stakeholder engagement remain critical to minimizing disputes.

NOTES:

[1]Donald J. Trump (2024) Truth Social, December 2024. Available at https://truthsocial.com/@realDonaldTrump/posts/113630131209113398 (last visited 13 January 2025).

[2]World Bank. Drivers of Delays in Procurement of Infrastructure Projects (English), Washington, D.C.: World Bank Group (31 October 2024), at p.29, http://documents.worldbank.org/curated/en/099062824153516589/P173110138cdf70ef18cd21fb78946336ef (last visited 13 Jan. 2025).

[3]World Bank. Drivers of Delays in Procurement of Infrastructure Projects (English), Washington, D.C.: World Bank Group (31 October 2024), at Table 5.3 at p. 29, http://documents.worldbank.org/curated/en/099062824153516589/P173110138cdf70ef18cd21fb78946336ef (last visited 13 Jan. 2025).

[4]World Bank. Drivers of Delays in Procurement of Infrastructure Projects (English), Washington, D.C.: World Bank Group (31 October 2024), at p.27, http://documents.worldbank.org/curated/en/

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099062824153516589/P173110138cdf70ef18cd21fb78946336ef (last visited 13 Jan. 2025).

[5]World Bank. Drivers of Delays in Procurement of Infrastructure Projects (English), Washington, D.C.: World Bank Group (31 October 2024), at Table 5.12 at p. 33, http://documents.worldbank.org/curated/en/099062824153516589/P173110138cdf70ef18cd21fb78946336ef (last visited 13 Jan. 2025).

[6]World Bank. Drivers of Delays in Procurement of Infrastructure Projects (English), Washington, D.C.: World Bank Group (31 October 2024), at pp. 38–39, http://documents.worldbank.org/curated/en/099062824153516589/P173110138cdf70ef18cd21fb78946336ef (last visited 13 Jan. 25 2025).

[7]Needless to say, Congress' amendment of federal environmental and land use laws may not impact states' ability to delay or withhold the issuance of permits and approvals needed for infrastructure projects under state laws.

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Contra Proferentem: Can Insureds Be Forced to Waive Its Protection?

*Matthew M. Brady and Lauren N. Smith**

In this article, the authors discuss whether insureds may be forced to waive the protection of the legal principle that mandates that any ambiguities in insurance policies are construed against insurers and in favor of insureds.

"Contra proferentem" is a foundational legal principle with particular importance in insurance law. It mandates that any ambiguities in an insurance policy are construed against the insurer and in favor of the insured. The doctrine recognizes that insurance policies generally are contracts of adhesion, in which the insurer wields the "power of the pen," and the insured is invited to accept the terms of the pre-written agreement with little to no alteration. Contra proferentem mitigates the inherent inequality of an arrangement where insurers generally have sole drafting authority and insureds, often with limited bargaining power, must accept the insurers' terms as written. By resolving ambiguities in those terms against the insurer, courts are able to counterbalance some of this inequity and find coverage for policyholders.

POWERFUL TOOL FOR POLICYHOLDERS

Contra proferentem is a powerful tool for policyholders looking to establish coverage. Where an insurer has denied coverage under an ambiguous provision - i.e., one capable of more than one reasonable interpretation - the doctrine directs courts to adopt the interpretation that favors coverage. That is, if the insured offers a reasonable interpretation of a disputed policy provision that would provide coverage, the court must find in their favor even if the insurer's interpretation is arguably the more "accurate reflection of the parties' intent."[1] There are hundreds of court decisions across the country to this effect.

Exceptions to Contra Proferentum

It is no surprise that insurers clamor for exceptions to contra proferentem, and with some success. For example, in *ECB USA, Inc. v. Chubb Ins. Co. of N.J.*,[2] the U.S. Court of Appeals for the Eleventh Circuit, applying New Jersey law, declined to apply contra proferentem to interpret an insurance policy in favor of a "sophisticated" insured, holding, "the rules tending to favor an insured that has entered into a contract of adhesion are inapplicable where, as here, both parties are sophisticated

*The authors, attorneys with Pillsbury Winthrop Shaw Pittman LLP, may be contacted at matt.brady@pillsburylaw.com and lauren.smith@pillsburylaw.com, respectively.

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commercial entities with equal bargaining power."

Courts in other jurisdictions have articulated similar exceptions, with varying explanations as to what qualifies as a sufficient level of "sophistication." For example, in *AIU Ins. Co. v. Superior Ct.*,[3] the Supreme Court of California, applying its own law, held that "where the policyholder does not suffer from lack of legal sophistication or a relative lack of bargaining power, and where it is clear that an insurance policy was actually negotiated and jointly drafted, we need not go so far in protecting the insured from ambiguous or highly technical drafting."

Similarly, in *Six Flags, Inc. v. Westchester Surplus Lines Ins. Co.,*[4] the U.S. Court of Appeals for the Fifth Circuit, applying Louisiana law, held that "the presumption does not apply where the insured is a sophisticated commercial entity that itself drafts or utilizes its agent to secure desired policy provisions."

And, in *Eagle Leasing Corp. v. Hartford Fire Ins. Co.*,[5] the Fifth Circuit, applying Missouri law, declined to apply contra proferentem "in the commercial insurance field when the insured is not an innocent but a corporation of immense size, carrying insurance with annual premiums in six figures, managed by sophisticated business men, and represented by counsel on the same professional level as the counsel for insurers."

Protection of Contra Proferentum

To be sure, other courts have recognized the danger of setting precedents about the interpretation of standard policy clauses based on the supposed "sophistication" of a corporate insured when the same terms will be applied later against a broader class of insurance consumers. As the Washington Supreme Court wrote in *Boeing Co. v. Aetna Casualty & Surety Co.*:[6]

> The critical fact remains that the policy in question is a standard form policy prepared by the company's experts, with language selected by the insurer. The specific language in question was not negotiated, therefore, it is irrelevant that some corporations have company counsel. Additionally, this standard form policy has been issued to big and small businesses throughout the state. Therefore it would be incongruous for the court to apply different rules of construction based on the policyholder because once the court construes the standard form coverage clause as a matter of law, the court's construction will bind policyholders throughout the state regardless of the size of their business.

Insurers Attempts to Waive Contra Proferentem

More concerning, however, are attempts by insurers to avoid the application of contra proferentem by explicitly contracting out of it. In some policies, insurers add provisions specifically repealing any policy interpretation presumption in favor of either party. Below is an example:

> The provisions, stipulations, exclusions and conditions of the Policy are to be construed in an evenhanded fashion between the Insureds and us. Where the language of this Policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant provisions, stipulations, exclusions and conditions without regard to authorship of the language and without any presumption or arbitrary interpretation or construction in favor of either the Insureds or us.

While it is a basic tenet of contract law that parties can contract out of almost any default rule, in the context of insurance policies, the contractual waiver of contra proferentem is particularly troubling. Contra proferentem combats the adhesive nature of insurance

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contracts by protecting insureds from the harmful outcomes of unclear language which they had no hand in drafting. The reader may note the inherent unfairness of allowing insurers to easily avoid its application by foisting a contractual waiver on its insured - buried somewhere in the small print of a lengthy policy - the same adhesive contract against which the doctrine is meant to protect.

Whether courts will enforce such waivers in an insurance contract remains to be broadly tested, though there is some case law to suggest that certain courts may uphold such contractual waivers in certain contexts.

For example, in *Hudson Spec. Ins. Co. v. N.J. Transit Corp.*,[7] while ultimately determining that the supposed ambiguity could be resolved simply by reading two purportedly conflicting provisions in tandem, the U.S. District Court for the Southern District of New York appears to accept the validity of the policy's express waiver of contra proferentem with respect to its arbitration clause. "To begin with," the court wrote, "the arbitration clause states in no uncertain terms that 'where the language of this Policy is deemed to be ambiguous or otherwise unclear, policy construction or interpretation will not be presumed to favor any party; no liability or burden will be assigned or assumed by the drafting of this Policy.' "

Conclusion

Although negotiating power may be limited, policyholders should work diligently with their brokers and legal counsel during underwriting to identify and remove any clauses attempting to waive contra proferentem or otherwise limit the insured's interpretative protections, or at least limit the waiver to any terms that are actually negotiated. Where this is not possible, brokers and policyholder-side legal counsel can also help document the insurer's positions on the applicability of key provisions during the underwriting process, providing crucial evidence in the event of a disputed claim.

NOTES:

[1]AIU Ins. Co. v. Superior Court, 51 Cal. 3d 807, 274 Cal. Rptr. 820, 799 P.2d 1253, 32 Env't. Rep. Cas. (BNA) 1257, 21 Envtl. L. Rep. 20315 (1990).

[2]ECB USA, Inc. v. Chubb Insurance Company of New Jersey, 113 F.4th 1312 (11th Cir. 2024).

[3]AIU Ins. Co. v. Superior Court, 51 Cal. 3d 807, 274 Cal. Rptr. 820, 799 P.2d 1253, 32 Env't. Rep. Cas. (BNA) 1257, 21 Envtl. L. Rep. 20315 (1990).

[4]Six Flags, Inc. v. Westchester Surplus Lines Ins. Co., 565 F.3d 948 (5th Cir. 2009).

[5]Eagle Leasing Corp. v. Hartford Fire Ins. Co., 540 F.2d 1257, 1978 A.M.C. 604 (5th Cir. 1976).

[6]Boeing Co. v. Aetna Cas. and Sur. Co., 113 Wash. 2d 869, 784 P.2d 507, 30 Env't. Rep. Cas. (BNA) 2001, 20 Envtl. L. Rep. 20362, 87 A.L.R.4th 405 (1990).

[7]Hudson Specialty Ins. Co. v. New Jersey Transit Corp., 2015 WL 3542548 (S.D. N.Y. 2015).

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New York State Now Requires Contractor Registration for Contractors and Subcontractors Working on Public Projects and Certain Private Projects

*Kathy Tuznik**

In this article, the author reviews a new registration requirement in New York for contractors and subcontractors working on covered projects.

Contractors and subcontractors who perform work on public projects and certain private projects in New York State must have registered with the New York State Department of Labor (DOL) by December 30, 2024, as required by N.Y. Lab. Law § 220-i signed into law on December 30, 2022[1] and amended on March 3, 2023.[2]

The stated purpose of this requirement is to allow DOL to better enforce existing labor laws and regulations, and to ensure that contractors and subcontractors that perform work on public projects and covered private projects do not have previous labor law violations and will abide by New York labor law and regulations, including prevailing wage requirements.[3]

DOL will also establish and maintain a public online system where registration and disclosure information will be available.[4] It is important to keep in mind that Section 220-i registration requirements are in addition to, and do not replace, any other state or local vendor requirements.

The information below provides a high-level summary of the registration requirement.

WHO MUST REGISTER?

Any contractor submitting a bid on a covered project on or after December 30, 2024, as well as any contractor or subcontractor commencing any work on a covered project on or after December 30, 2024, must register.[5] Section 220-i defines contractor as any entity that enters into a contract to perform "construction, demolition, reconstruction, excavation, rehabilitation, repair, installation, renovation, alteration or custom fabrication" on covered projects.[6] Subcontractor is defined as any entity that subcontracts with a contractor to perform any of the above-specified types of work.[7]

*The author, an attorney in the New York office of Faegre Drinker Biddle & Reath LLP, may be contacted at kathy.tuznik@faegredrinker.com.

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WHAT PROJECTS ARE COVERED?

Section 220-i applies to public work projects, as well as private projects subject to N.Y. Lab. Law § 8, which include:[8]

a. N.Y. Lab. Law § 224-a (public subsidy funded projects);

b. N.Y. Lab. Law § 224-d (renewable energy systems);

c. N.Y. Lab. Law § 224-e (broadband projects); and

d. N.Y. Lab. Law § 224-f (climate risk-related and energy transition projects, and roadway excavations).

HOW TO REGISTER?

Contractors and subcontractors must complete an online application on DOL's website[9] and provide information[10] about their business, insurance coverage and any previous labor law violations. The application must be accompanied by a $200 nonrefundable fee.[11] If a contractor or subcontractor is a New York State Certified Minority or Woman-Owned Business Enterprise, the nonrefundable fee is $100.[12] Upon successful registration and payment of the fee, DOL will issue a certificate of registration, which will be valid for two years.[13]

WHAT ARE THE PENALTIES FOR FAILURE TO REGISTER?

The penalties apply to both the unregistered entity that is performing the work, as well as the entity that hired the unregistered contractor or subcontractor. A contractor that bids on a contract for public work or begins work on a covered project knowing that it is not registered with DOL will be subject to a fine up to $1,000, and a stop-work order may be issued.[14] A subcontractor that begins work on a covered project knowing that it is not registered with DOL will face the same fine.[15]

Additionally, contractors that allow a subcontractor to start work on a covered project where they know, or should have known, that the subcontractor is not registered, as well as owners or developers on private covered projects who commence work with a contractor or subcontractor that they know or should have known is not registered, will also be subject to a fine up to $1,000.[16]

A notice and a hearing are required before any fines can be assessed.

CAN A CERTIFICATE OF REGISTRATION BE DENIED OR REVOKED?

Yes. DOL will not issue a certificate of registration, or will revoke an already issued certificate of registration, for any contractor or subcontractor that it finds "unfit" to be registered.[17] DOL will find a subcontractor or contractor is unfit if (a) the contractor or the subcontractor is currently debarred or ineligible pursuant to N.Y. Lab. Law § 220-b(3) or N.Y. Work. Comp. Law § 141-b, or (b) the contractor or subcontractor is currently subject to a final administrative or court order for violation of state or federal prevailing wage law which has not been fully satisfied.[18]

There are procedural protections for registration applicants and before DOL can find a contractor or subcontractor "unfit," which include a requirement that DOL provides reasons for the proposed "unfit" determination and provides an opportunity to cure or be heard prior to the determination.[19]

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TIME IS OF THE ESSENCE

DOL estimates that it may take approximately three to four weeks to review a registration application and issue a certificate of registration.[20] As such, contractors and subcontractors who perform work on the covered projects and have not yet commenced the registration process should do so expeditiously.

IN SUMMARY

- Any contractor submitting a bid on a covered project on or after December 30, 2024, as well as any contractor or subcontractor commencing any work on a covered project on or after December 30, 2024, must register.
- Section 220-i applies to public work projects, as well as private projects subject to N.Y. Lab. Law § 8.
- Penalties apply to both an unregistered entity performing work as well as to an entity that hired the unregistered contractor or subcontractor.

NOTES:

[1]N.Y. State Senate Bill 2021-S5994C, available at https://www.nysenate.gov/legislation/bills/2021/S5994; N.Y. State Assembly Bill 2021-A1338C, available at https://www.nysenate.gov/legislation/bills/2021/A1338.

[2]N.Y. State Senate Bill 2023-S838, available at https://www.nysenate.gov/legislation/bills/2023/S838; N.Y. State Assembly Bill 2023-A984, available at https://www.nysenate.gov/legislation/bills/2023/A984 (amending Section 220-i to clarify and change some of the registration requirements).

[3]N.Y. State Senate Bill 2021-S5994C, available at https://www.nysenate.gov/legislation/bills/2021/S5994 (Purpose or General Idea of Bill).

[4]N.Y. Lab. Law § 220-i(2)(b).

[5]N.Y. Lab. Law § 220-i(6).

[6]N.Y. Lab. Law § 220-i(1)(a).

[7]N.Y. Lab. Law § 220-i(1)(b).

[8]N.Y. Lab. Law § 220-i(1)(c); Frequently Asked Questions for NYSDOL Contractor Registry | Department of Labor, available at https://dol.ny.gov/frequently-asked-questions-nysdol-contractor-registry.

[9] https://dol.ny.gov/how-register-contractor-and-subcontractor-registry.

[10] https://dol.ny.gov/what-you-need-register-contractor-and-subcontractor-registry.

[11]N.Y. Lab. Law § 220-i(3).

[12]N.Y. Comp. Codes R. & Regs. tit. 12, § 223.2(b).

[13]N.Y. Lab. Law § 220-i(4).

[14]N.Y. Lab. Law § 220-i(8); Frequently Asked Questions for NYSDOL Contractor Registry | Department of Labor, available at https://dol.ny.gov/frequently-asked-questions-nysdol-contractor-registry.

[15]N.Y. Lab. Law § 220-i(8).

[16]N.Y. Lab. Law § 220-i(8).

[17]N.Y. Lab. Law § 220-i(4).

[18]N.Y. Comp. Codes R. & Regs. tit. 12, § 223.3.

[19]N.Y. Lab. Law § 220-i(4).

[20]How to Register for the Contractor and Subcontractor Registry | Department of Labor, available at https://dol.ny.gov/how-register-contractor-and-subcontractor-registry.

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States Introduce "Climate Superfund" Laws Amid Growing National Trend and Legal Challenges

*Jillian Marullo, Amanda G. Halter, Ashleigh K. Myers and Kelsey Parker**

In this article, the authors explain that, in a "paradigm shift in environmental liability," some states are seeking to legislate financial responsibility on large coal and oil and gas companies for the public costs associated with strengthening infrastructure against climate change-related weather events.

State infrastructure budgets have become increasingly burdened by the costs associated with recovery from and adaptation to extreme weather events. For example, the Great Vermont Flood of July 2023 resulted in over $1 billion in flood damage from a single rain event. Just after the one-year anniversary of the storms, Vermont was again hit by torrential rains and flooding from the remnants of Hurricane Beryl—one of the many devastating and costly storms of the 2024 hurricane season. To address the growing financial burdens of extreme weather, lawmakers from twelve states have sponsored so-called "Climate Superfund" bills in hopes of boosting their states' budgets to repair and better prepare infrastructure. Among these states, Vermont and New York have successfully enacted such legislation—though both laws are already facing legal challenges. 10 V.S.A. ch. 24A; N.Y. Envtl. Conserv. Law § 76.

States legislators are not alone in their belief that greenhouse gas (GHG) emitters should bear the financial burden for climate-related damages. In September 2024, Sen. Van Hollen (D-MD) and Rep. Nadler (D-NY-12) introduced federal bills, the "Polluters Pay Fund," aiming to establish a national framework for climate liability and unify state efforts under a federal umbrella (S.B. 5054 and H.R. 9573). Although the bills did not advance out of committee, the House version has been reintroduced in the current legislative session as H.R. 1135.

While each proposed Climate Superfund bill and the laws in New York and Vermont have unique nuances, they share a common goal and approach: allocating the financial responsibility for infrastructure repairs and resilience measures to energy companies by generally following the famously stringent "polluter pays," strict-liability framework of the federal

*The authors, attorneys with Pillsbury Winthrop Shaw Pittman LLP, may be contacted at jillian.marullo@pillsburylaw.com, amanda.halter@pillsburylaw.com, ashleigh.myers@pillsburylaw.com and kelsey.parker@pillsburylaw.com, respectively.

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Superfund law. Under this framework, the energy sector may be required to pay into a "fund" to cover the public repair and resilience costs that otherwise are borne by governments, ostensibly in proportion to their shares of legacy GHG emissions. While most states restrict recoverability to the states, three states have bills pending that would allow private individuals to sue for climate-related damages.

Not all states have opted for an immediate liability approach. Some have chosen a more measured approach, introducing bills that would direct studies on the extent and costs of climate-related damages and potential funding mechanisms.

STATE CLIMATE BILL HISTORY & STATUS

In 2023, New York was the first state to introduce the concept of a Climate Superfund, but this initial bill died in Assembly. The day after the close of the 2024 legislative session, the New York Senate and Assembly passed new versions of the bill (A.3351B and S.2129B). After six months in legislative limbo, Governor Hochul signed the bill into law on December 26, 2024, just five days before it would have expired. Although just enacted, the New York statute was amended on February 28; key amendments are noted throughout this article.

Vermont beat New York to successful bill passage with its Climate Superfund Act (S. 259), which passed with overwhelming support. The bill became law on May 30, 2024 without the governor's signature, taking effect July 1, 2024—just days before Hurricane Beryl brought tremendous flooding to the state.

Similar Climate Superfund bills have been proposed at the federal level and in nine other states[1]: California, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, Rhode Island, Tennessee, and Virginia. As of March 20, 2025, New York and Vermont are the only states to have successfully enacted such legislation. Meanwhile, the federal bill and those in New Jersey, Hawaii, California, Connecticut, Tennessee, and Massachusetts remain pending, while Virginia's and Rhode Island's bills failed to progress out of committee and Maryland's has been substantially revised to remove all "Superfund" liability provisions.

In addition to Climate Superfund bills creating liability to state governments, some states are considering expanding liability to private parties. Bills in California, Illinois, and New York propose creating a private right of action, allowing individuals to sue for damages caused by climate-related events. All three bills remain pending.

Finally, rather than imposing liability, Maryland and New Jersey have introduced legislation that mandates state-led cost assessments of past and projected climate-related damages before determining liability or other cost recovery mechanisms. While Maryland's bill remains pending, New Hampshire's legislation failed to progress out of committee.

A summary chart of the enacted and proposed Climate Superfund and related legislation follows:

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State Bill or Act	Status	Coverage	Liability
New York: N.Y. Envtl. Conserv. Law § 76.	Enacted Dec. 26, 2024; amended Feb. 28, 2025.	Emissions attributable to extraction or refining by responsible party.Responsible parties must have emitted at least 1 billion metric tons from 2000 to 2024.Location of emissions: worldwide.	Strict liability; joint & several liability for affiliates only.Cost recovery cap: $75 billion.Responsible party must have sufficient jurisdictional connections to state.
Vermont: 10 V.S.A. ch. 24A	Enacted May 30, 2024.	Emissions generated from "use" of fossil fuels extracted or refined by responsible party.Responsible parties must have emitted at least 1 billion metric tons from 1994 to 2024.Location of emissions: unspecified.	Strict liability; joint & several liability for affiliates only.Cost recovery cap: TBD.
Federal: H.R. 1135	Introduced Feb. 7, 2025; referred to Ways and Means, Transportation and Infrastructure, and Energy and Commerce Committees.	Emissions attributable to extraction or refining by responsible party.Responsible parties must have emitted at least 1 billion metric tons from 2000 to 2023.Location of emissions: unspecified.	Joint & several liability for all responsible parties. Cost recovery cap: $1 trillion. Responsible party must be engaged in business in the U.S. in 2025.
California: A.B. 1243, S.B. 684	Assembly bill reintroduced Feb. 21, 2025; referred to Environmental Quality and Judicial Committees.Senate bill introduced Feb. 21, 2025; referred to Environmental Quality and Judiciary Committees; set for hearing April 2, 2025.	Emissions at any point in the supply chain.Responsible parties must have emitted at least 1 billion metric tons from 1990 to 2024.Location of emissions: global.	Strict liability; joint & several liability for affiliates only.Cost recovery cap: TBD.Responsible party must have sufficient jurisdictional connections to state.

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State Bill or Act	Status	Coverage	Liability
Connecticut: S.B. 1199, H.B. 6280	Senate Bill introduced Jan. 30, 2025; House Bill introduced Feb. 21, 2025; public hearing held on March 3, 2025.	Emissions generated from "use" of fossil fuels extracted or refined by responsible party.Responsible parties must have emitted at least 1 billion metric tons from 1995 to 2025.Location of emissions: unspecified.	Strict liability; joint & several liability for affiliates only.Cost recovery cap TBD.Responsible party must have sufficient jurisdictional connections to state.
Hawaii: S.B. 1652	Introduced Jan. 23, 2025; referred to Senate Water and Land Committee Jan. 27, 2025	Emissions at any point in the supply chain.Responsible parties must have emitted at least 1 billion metric tons from 2000 to 2018.Location of emissions: unspecified.	Strict liability; joint & several liability for affiliates only.Cost recovery cap: $10 billion.
Massachusetts: S. 588, H. 1014	House bill reintroduced Feb. 27, 2025; referred to Committee on Environment and Natural Resources Feb. 27, 2025.Senate bill reintroduced Feb. 27, 2025; referred to Committee on Environment and Natural Resources Feb. 27, 2025.	Emissions generated from "use" of fossil fuels extracted by responsible party.Responsible parties must have emitted at least 1 billion metric tons from 1995 to 2024.Location of emissions: unspecified.	Strict liability; joint & several liability for affiliates only.Cost recovery cap: TBD.Responsible party must have sufficient jurisdictional connections to state.

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State Bill or Act	Status	Coverage	Liability
New Jersey: S. 3545, A. 4696	Senate bill introduced and referred to Environment and Energy Committee on Sept. 12, 2024; reported out of first committee Sept. 12, 2025 and referred to Senate Budget and Appropriations Committee.Assembly bill introduced and referred to Assembly Environment, Natural Resources, and Solid Waste Committee Sept. 12, 2024; reported out of committee March 10, 2025 and referred to Assembly Commerce, Economic Development & Agriculture Committee.	Emissions generated from "use" of fossil fuels extracted or refined by responsible party.Responsible parties must have emitted at least 1 billion metric tons from 1995 to 2024.Location of emissions: unspecified.	Strict liability; joint & several liability for affiliates only.Cost recovery cap: TBD.Responsible party must pay sales tax within state.
Rhode Island: H. 5424, S.B. 326	Failed	Point in supply chain in which emissions are generated: unspecified.Responsible parties must have emitted at least 1 billion metric tons from 1990 to 2024.Location of emissions: unspecified.	Strict liability; joint & several liability for affiliates only.Cost recovery cap: TBD.
Tennessee: S.B. 702, H.B. 716	House bill introduced Feb. 3, 2025; failed Feb. 26, 2025 for lack of motion in Agriculture & Natural Resources Subcommittee. Senate bill introduced Feb. 3, 2025; passed on Second Consideration; referred to Senate Energy, Agriculture, and Natural Resources Committee Feb. 12, 2025.	Emissions generated from "use" of fossil fuels extracted or refined by responsible party.Responsible parties must have emitted at least 1 billion metric tons from 1995 to 2025.Location of emissions: unspecified.	Strict liability; joint & several liability for affiliates only.Cost recovery cap: TBD.Responsible party must have sufficient jurisdictional connections to state.

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State Bill or Act	Status	Coverage	Liability
Virginia: S.B. 1123, H.B. 2233	Failed	Emissions generated from "use" of fossil fuels extracted or refined by responsible party.Responsible parties must have emitted at least 1 billion metric tons from 1995 to 2024.Location of emissions: unspecified.	Strict liability; joint & several liability for affiliates only.Cost recovery cap: TBD.Responsible party must have sufficient jurisdictional connections to state.
Maryland: S.B. 149, H.B. 128	House bill reintroduced Jan. 8, 2025; referred March 17, 2025 to Education, Energy & Environment Finance Committee. Senate bill reintroduced Jan. 8, 2025; referred March 17, 2025 to Economic Matters Environment & Transportation Committee.	N/A – converted to Study Bill only	
New Hampshire: H.B. 106	Failed	N/A – Study Bill only	
Private Right of Action Bills			
New York: S. 4799, A. 72	Assembly bill introduced Jan. 8, 2025; referred to Environmental Conservation Committee.Senate bill introduced Feb. 12, 2025; referred to Consumer Protection Committee.	Responsible parties must have emitted 1 billion+ metric tons from 1989 to effective date.Limitations period: not specified.	Damages: not specified.
California: S.B. 222	Introduced Jan. 27, 2025; referred to Judiciary Committee on Feb. 5, 2025.	Plaintiffs must have incurred at least $10k in damages.Actionable conduct: misleading or deceptive practices regarding connection between products, climate change, and extreme weather.Statute of limitations: 3 years.	Damages: noneconomic; compensatory (property damage and personal injury, including emotional distress); and punitive. Joint and several and strict liability.

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State Bill or Act	Status	Coverage	Liability
Illinois: S.B. 1790, H.B. 3594	Introduced Feb. 6 and Feb. 7; referred to House Rules Committee.	Plaintiffs must have incurred at least $10k in damages.Responsible parties must have emitted 1 billion+ metric tons from 1965 to effective date.Statute of limitations: 3 years.	Damages: noneconomic; compensatory (property damage and personal injury, including emotional distress); and punitive. Joint and several and strict liability.

RESPONSIBLE PARTIES & COVERED EMISSIONS

The "polluter pays" principle is a foundational concept of the federal Superfund Program. Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or "Superfund" law, entities are required to conduct removal and remedial actions at their own cost due to releases or threatened releases of hazardous substances into the environment; otherwise, the government may step in and use the Superfund to do so and then seek reimbursement from statutory responsible parties. While the state and federal bills follow this "polluter pays" approach, only a subset of those that have contributed to GHG emissions would be required to pay into the "funds"—those with over 1 billion metric tons of GHG emissions over a given period.

The coverage periods for the states differ, and it is unclear how the specific dates were determined. For instance, New York's amended law, along with the federal and two state proposals, begins tracking GHG emissions from the year 2000. Vermont's law, along with proposed legislation in several other states, sets an earlier state date of 1995, while California and Rhode Island extend even further, to 1990. Similarly, the cutoff dates for emissions differ, ranging from 2018 to 2024.

None of the Climate Superfund laws or bills require the emissions to originate in or reach the legislating state. Notably, New York's law and California's bill explicitly apply to "worldwide" and "global" emissions, respectively, expressly broadening the scope of covered emissions beyond state borders. The New York and Vermont laws, as well as the federal bill, narrow the definition of covered emissions to include only those generated during fossil fuel extraction and refining, excluding those generated throughout the broader supply chain, such as from transportation or end-use combustion. In contrast, the Hawaii and California bills expressly include emissions generated throughout the supply chain, while the rest cover emissions from the "use" of fossil fuels extracted or refined by the responsible party.

New York's amendment introduced a key jurisdictional limitation, restricting liability to companies with sufficient connections to the state to "satisfy the due process clause of the United States Constitution"—a provision aimed at preempting potential personal jurisdiction challenges. Similarly, the California, Connecticut, Massachusetts, Tennessee, and Virginia bills include comparable jurisdictional lan-

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guage, while the New Jersey bill limits its application to entities required to pay sales tax within the state.

STRICT AND JOINT-AND-SEVERAL LIABILITY

The New York and Vermont Climate Superfund laws, along with each of the proposed state bills, adopt CERCLA's strict and joint-and-several liability frameworks. Strict liability means that after the state implementing agency sends notice of an administrative cost recovery demand, the liable parties will be required to pay into the "funds" regardless of whether their emissions violated any law or permit. In contrast, the federal bill does not include a strict liability provision.

Under joint and several liability, entities can be held responsible for 100% of the costs assessed, even if their individual emissions contributed only a fraction of the total. However, the scope of joint and several liability differs between state and federal approaches. At the state level, only affiliated entities—such as parent companies and subsidiaries—can be held jointly and severally liable. In contrast, the federal bill allows any emitters, regardless of affiliation, to be held jointly and severally liable.

The legislation of most states permits the overseeing agency to adjust the cost recovery demand, generally if the responsible entity provides evidence that the emissions were attributable to another responsible party or were previously accounted for.

FUND ALLOCATION

Borrowing from the federal Superfund Program, each state seeks to create a state-managed fund, but rather than using the fund to perform or reimburse governments for environmental remediation, the funds may be used both proactively to finance projects focused on preventing and mitigating the damage associated with extreme weather events and to retroactively respond, repair, or recover from the same events. While some of the proposed legislation would limit use of the funds to infrastructure projects, in New York, the funds can be used for "climate change adaptive or mitigation infrastructure projects," with a portion of the expenditures dedicated to projects in vulnerable communities. This includes both preparing for and recovering from hurricanes, flooding, and other extreme weather events, as well as providing medical care to treat illness or injury caused by the effects of climate change. Similarly, the proposed bills in Massachusetts, Virginia, and Tennessee incorporate environmental justice considerations. Both Massachusetts and Virginia mandate that a significant percentage of funds be allocated to projects in environmental justice communities, with Massachusetts requiring at least 40% and Virginia at least 50% of expenditures be directed toward these communities.

Similarly, Vermont's law and several of the other states' bills do not limit the use of funds to infrastructure-related projects and would permit the fund to be allocated to any project designed to avoid, mitigate, repair, adapt, or respond to climate change impacts, including medical care programs. Other potential fund uses include projects such as seawall construction and other coastal armoring to protect coastline communities, wetland restoration, transportation infrastructure resilience and modernization, and upgrading, relocating,

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retrofitting, or elevating sewage systems to better manage increasing rainfall. Interestingly, Vermont's law and the legislation proposed in Connecticut, New Jersey, and Tennessee allow the states to use funds for home buyouts but are silent on whether this could be used for mandatory relocations or strictly for the construction of infrastructure projects. Conversely, some states propose the adoption of so-called "Master Plans" to be developed and administered by the relevant state agency to address how the state will utilize the funds.

To allocate responsibility, the Climate Superfund laws seek to utilize advancements in "climate attribution science"—a growing field that aims to determine the extent to which specific weather events or long-term climate trends can be attributed to human-induced climate change. Specifically, they task agencies with utilizing attribution models to allocate the historical emissions of individual fossil fuel companies and apportion monetary responsibility for the damages associated with their share of emissions. Unsurprisingly, attribution models are not without controversy from both policy and technical standpoints. The strict liability scheme and the creation of funds are where the similarities between the federal Superfund and state Climate Superfunds end, making the legislations' titles misnomers.

FUNDING THE FUND

The ceilings for the funds, the contribution amounts required from each responsible party, and the methods for calculating these contributions differ across the state and federal bills. Most of the states delegate authority to their respective state agencies to set the funds' ceilings rather than setting a legislative cap. These states require either their state environmental agency or treasurer to calculate the total costs of climate change to the state. Once these cost evaluations are completed, the states will use the Environmental Protection Agency's Emissions Factors for Greenhouse Gas Inventories or other publicly available GHG data to determine the emissions attributable to each responsible entity. The state agencies will then seek cost recovery from each party in proportion to its share of the total covered emissions though an official administrative cost recovery demand. For example, if the state has ascertained climate change losses to be $10 billion and a party is responsible for 5% of the total covered emissions, the demand on that party would be $500 million. Once the responsible state agency issues a cost recovery demand, the responsible party is required to make payment into the fund in accordance with the act or future regulations as established by agency rulemaking process.

In contrast, New York and Hawaii set specific funding targets in the legislation: $75 billion for New York and $10 billion for Hawaii. The states would determine the cost share of each responsible party by applying a proportional formula based on the total fund amount set by their respective legislation. Specifically, a party's share of the covered GHG emissions would correspond to the same percentage of the total fund amount—$75 billion or $10 billion as that party's share of covered emissions is to the total emissions of all responsible parties.

Similarly, the federal bill sets a specific target for its fund—an astounding $1 trillion—to be collected in annual installments. As with New York and Hawaii, the federal bill establishes responsible parties' liability for the

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$1 trillion fund in proportion to their share of covered emissions. Across the board, each bill or law varies slightly in the mechanics of the cost recovery demands, but once fully funded, the states have granted themselves broad authority to allocate the funds as they see fit.

APPEALS

The state acts and bills establish mechanisms for responsible parties to challenge cost recovery demands through an administrative process. In addition, each provides for judicial review following the issuance of a final order. Notably, the failed Rhode Island bill would have imposed an exceptionally short 20-day deadline from the receipt of a final decision to file suit. The federal bill does not specify any appeal procedures, but responsible parties would be able to challenge the decisions according to the process provided in the Administrative Procedures Act, which governs judicial review of federal agency actions.

PRIVATE RIGHTS OF ACTION

The enacted and proposed Climate Superfund legislation does not establish a private right of action, limiting cost recovery enforcement to state governments. However, in 2025, lawmakers in New York (S. 4799), California (S.B. 222), and Illinois (S.B. 1790 and H.B. 3594) introduced bills that would allow private parties to sue responsible parties for climate-related losses—including punitive and emotional distress damages.

New York's bill would allow any person, government entity, or entity to file suit for damages that were caused or contributed to, either directly or indirectly, by the conduct of an entity that emitted at least one billion metric tons of GHG between 1989 and the effective date of the amendment. The bill provides a partial defense to liability, which may be reduced if the defendant has implemented policies aimed at preventing pollution, such as the release of GHG, and preventing deceptive acts and practices, including those related to environmental commitment, performance, or sustainability. The proposal does not establish a minimum damages threshold, define the types of damages recoverable, set a limitations period, or clarify whether damages would be imposed on a joint and several or strict liability basis.

In contrast, the proposed California and Illinois bills provide clearer parameters, allowing individuals who suffer $10,000 or more in personal injury or property damages due to climate-related events to recover noneconomic, compensatory, and punitive damages. Compensatory damages expressly include (1) the fair market value of recovering, recouping, rebuilding, or remediating the value of lost, damaged, or destroyed property and (2) the cost of personal injuries, including medical care, mental and behavioral health care, past and present pain and suffering, and emotional distress.

California's bill would limit liability to entities that have engaged in misleading or deceptive practices regarding the connection between their fossil fuel products, climate change, and extreme weather events. Unlike the Climate Superfund framework, California's proposal does not impose a minimum emissions threshold for liability. Conversely, like New York, Illinois—which has not yet introduced its own Climate Superfund legislation—would allow suits against any entity that has emitted at least one billion metric tons of GHG between 1965 and the law's effective date, aligning

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more closely with the definitions of "responsible party" in the Climate Superfund legislation introduced in other states. Both the California and Illinois bills establish a three-year statute of limitations for filing claims and would impose joint and several and strict liability on responsible parties.

CLIMATE STUDY BILLS

Rather than immediately imposing liability on GHG emitters through Climate Superfund legislation, New Hampshire and Maryland opted first to assess the financial impact of emissions through state-directed studies.

The Maryland bills (HB 128 and SB 149) were initially introduced as Climate Superfund measures, similar to those discussed above. However, both bills were significantly amended to eliminate liability provisions. Instead, they now would direct the Comptroller and the Departments of Environment and Commerce to conduct a study on the financial burden of GHG emissions. The study would evaluate the impacts on public health, natural resources, biodiversity, agriculture, economic development, flood preparedness and safety, and housing, and calculate both incurred and projected costs for each category. In addition, the bill would require an economic analysis to determine whether costs should be passed on to fossil fuel companies that have emitted more than one billion metric tons of GHG globally between 1995 and 2024. Both bills were passed on March 17 and are now moving to the opposite chamber. If enacted, Maryland's report would be due by December 1, 2026.

Similarly, New Hampshire's bill (HB 106), which failed to progress out of committee, proposed the creation of a commission to study the monetary costs of climate damage and explore methods to recoup these costs. The commission would have consisted of six members of the House and Senate, as well as representatives from the business and industry community, a nonprofit environmental organization, and the Departments of Business and Economic Affairs and Environmental Services. Its mandate would have included assessing the scope and financial costs of climate-related damages over the next 20 and 50 years, including effects on individuals, cities and towns, rural areas, natural resources, infrastructure, industry, agriculture, and tourism. Additionally, the commission would have evaluated adaptation measures to mitigate these damages and assess potential funding mechanisms, including municipal bonding, insurance claims, legal action, and fees.

REACTIONS AND LEGAL UNCERTAINTY

Proponents laud the legislation as a revenue raiser that shifts the burden from taxpayers to significant GHG emitters. Many also predict these bills, especially after the passage of New York's bill, will spur other states to adopt similar legislation in the coming year. That prediction appears to be materializing, with six new states introducing comparable bills within weeks of New York's law being signed into law.

Opponents argue that the laws impose a retroactive tax in an area that states have no authority to regulate. Specifically, they oppose the states' ability to determine the amount of money they allegedly owe—both in the statutory text and in the agency process. Moreover, there is uncertainty as to whether these laws will be amended to extend coverage periods.

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It is worth noting, however, that legal challenges to retroactive liability under CERCLA generally failed.

Industry has also questioned the constitutionality of these laws, in part because it is unclear whether the targeted companies, some of which do not operate within the regulating state or even the United States, have sufficient jurisdictional "contacts" within the state as required by the Due Process Clause. As a result, any foreign-owned producer sent a cost recovery demand will likely claim sovereign immunity. As we have seen, some states have attempted to preempt this argument by including jurisdictional requirements in their bills. Another issue is whether multiple jurisdictions can levy cost demands against entities for the same emissions. Lastly, some opponents—and litigants—argue that the Clean Air Act (CAA) federally preempts this legislation, making the laws unenforceable. Because the Climate Superfund laws are written to operate more like a tax, rather than regulate the emissions, they may not be preempted by the CAA. Answers to these questions may emerge soon, as three lawsuits filed by industry groups and a coalition of Republican-led states challenging the Vermont and New York laws are already pending. *Chamber of Commerce v. Moore*, No. 2:24-cv-01513 (D. Vt.); *West Virginia v. James*, No. 25-cv-00168 (N.D.N.Y.); *Chamber of Commerce v. James*, No. 25-cv-01738 (S.D.N.Y.).

LEGAL CHALLENGES

The newly enacted Climate Superfund laws in Vermont and New York are already facing legal challenges. On December 30, 2024, the American Petroleum Institute (API) and the U.S. Chamber of Commerce filed a lawsuit against Vermont, marking the first-ever legal challenge to a Climate Superfund law. In *Chamber of Commerce v. Moore*, 2:24-cv-01513 (D. Vt. Dec. 30, 2024), the plaintiffs assert that Vermont's law is unconstitutional and preempted by federal law. Specifically, they set forth the following constitutional challenges:

- **Cooperative Federalism and State Sovereignty:** The complaint alleges that the Vermont law is unconstitutional because federal law, not state law, applies to interstate pollution to ensure uniform regulation. The plaintiffs also contend that states cannot legislate beyond their borders because the Constitution grants equal sovereignty to all states.

- **Federal Preemption Under the Supremacy Clause:** The lawsuit contends that the federal CAA governs GHG emissions, thereby preempting state-level regulations seeking to impose additional liabilities.

- **Due Process Clause of the Fourteenth Amendment:** The plaintiffs argue that the law imposes overly harsh, retroactive penalties for decades-old, lawful emissions, relies on an unfair calculation method to signal a handful of energy producers, and imposes a vague penalty, with the amount subject to the agency discretion.

- **Commerce Clause:** The lawsuit asserts that the law unlawfully burdens interstate and foreign commerce by penalizing out-of-state companies for activities occurring outside Vermont.

- **Excessive Fines Clause of the Eighth**

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Amendment: The complaint asserts that the penalties imposed under the law constitute excessive fines that are grossly disproportionate to the alleged harm caused, violating constitutional protections against punitive sanctions.

- **Takings Clause of the Fifth Amendment:** Plaintiffs claim that the law's financial penalties constitute an unlawful taking of private property without just compensation.

Vermont has yet to file any responsive pleadings. However, on March 19, 2025, the court entered the parties' stipulated briefing schedule, giving Vermont until May 19 to file an answer or a motion to dismiss, with briefing on any such motion to be completed by early September oral argument in October or November.

New York is defending two lawsuits challenging its Climate Superfund law. On February 6, 2025, a coalition of industry groups and 22 states, led by West Virginia, filed suit in the Northern District of New York. *West Virginia v. James*, No. 25-cv-00168 (N.D.N.Y). The allegations and causes of action in the complaint largely mirror those made in the Vermont lawsuit, with the plaintiffs asserting that the law is preempted by federal law and violates the U.S. Constitution. In addition, the plaintiffs allege violations of the New York Constitution's due process clause. A status conference is scheduled for May 7.

Then, on February 28, 2025, the same day New York's amendments to its Climate Superfund law were enacted, API, the U.S. Chamber, the National Mining Association, and the Business Council of New York State, Inc. filed a separate lawsuit challenging the amended version of the law in a different federal district court. *Chamber of Commerce v. James*, No. 25-cv-01738 (S.D.N.Y.). Their complaint reiterates the constitutional and preemption arguments raised in the Vermont and Northern District of New York lawsuits.

On March 17, New York filed its answer in *West Virginia v. James*, asserting several defenses, including lack of standing, ripeness, mootness, failure to state a claim, and lack of final agency action, and denying that the law is preempted or unconstitutional. That same day, the New York Attorney General's Office submitted a letter to the court seeking a 60-day extension (until May 23) to answer the complaint in *Chamber of Commerce v. James* and requesting a pre-motion conference to seek a venue transfer of the case to the Northern District of New York, where *West Virginia v. James* is pending. On March 21, the court granted the state leave to file a motion to transfer venue and set the following briefing schedule: the motion is due April 11, 2025, oppositions are due April 25, and the state's reply is due May 2. The court also extended the deadline for New York's answer to 30 days following the court's decision on the motion to transfer. API and the U.S. Chamber have indicated they will oppose the venue transfer.

IN SUMMARY

- New York has followed Vermont as the second state to enact a Climate Superfund law, which was signed into law by Governor Hochul on December 26, 2024 and amended February 28, 2025, with funds due in 2026.
- Seven states have Climate Superfund bills pending, three have private right of

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action bills pending, and one has cost study bills pending.

- The plaintiffs argue that the law imposes overly harsh, retroactive penalties for decades-old, lawful emissions, relies on an unfair calculation method to signal a handful of energy producers, and imposes a vague penalty, with the amount subject to the agency discretion.

- The Climate Superfund bills are meant to be modeled after CERCLA or the "Superfund" law, but this may be a misnomer, as they are more akin to a tax than liability for environmental harm.

- The energy industry is expected to—and has already begun to—challenge these laws on multiple fronts, including constitutional issues such as jurisdiction and retroactive liability.

CONCLUSION

The Climate Superfund laws represent a marked—and controversial—shift in how liability for public costs associated with extreme weather events may be approached. Until now, those costs have been borne by the general public via government coffers. These laws extend beyond traditional regulatory frameworks to impose direct financial responsibility on the fossil fuel industry for their (including permitted) emissions. While proponents see this as a necessary step to relieve taxpayers of the financial burdens of extreme weather events attributed to climate change, critics argue the laws raise significant legal concerns and will substantially increase regulated entities' operating expenses and therefore energy consumers' costs, and they question the reliability of rapidly evolving attribution science. As states and now federal lawmakers continue to advance these legislative efforts, businesses must closely monitor developments and assess their exposure to these potentially expanded liabilities.[2]

NOTES:

[1]By early January 2025, only the federal government and four states had introduced Climate Superfund bills similar to those enacted in Vermont and New York.

[2]This is a rapidly evolving area of law. This article reflects legislative and case developments as of March 21, 2025.

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Affordable Housing Development After Adoption of New York's City of Yes Zoning

*Kenneth K. Lowenstein and Barak Wrobel**

In this article, the authors describes the changes to New York City's affordable housing provisions stemming from comprehensive changes to the city's zoning resolution.

New York City Mayor Eric Adams announced in June 2022 the City of Yes zoning initiative, intended to modernize and update the city's zoning resolution (Zoning Resolution) by promoting environmental sustainability, easing restrictions on small businesses and creating affordable housing. The first two components - Carbon Neutrality and Economic Opportunity - were enacted in December 2023 and June 2024, respectively, without significant controversy. The New York City Council on December 5, 2024, approved the third and final proposal of the zoning initiative, the City of Yes for Housing Opportunity (COY HO).[1]

COY HO is a comprehensive set of changes to the Zoning Resolution designed to stimulate the production of housing generally and particularly affordable housing. These changes include the easing of parking requirements, allowing more density in the form of affordable housing, permitting accessory dwelling units and facilitating conversion of office buildings to residential uses. While the New York City Council modified some of the original proposal, the enacted text constitutes the broadest and most significant revisions to the Zoning Resolution since the adoption of the 1961 resolution. This article describes the changes to the affordable housing provisions in the Zoning Resolution.

VOLUNTARY INCLUSIONARY HOUSING PROGRAM

Prior to the adoption of COY HO, the Zoning Resolution's principal tool to incentive the production of affordable housing was the Voluntary Inclusionary Housing Program (VIH). VIH was a bonus program under which eligible sites could increase the permitted floor area ratio (FAR)[2] if affordable housing was provided. VIH applied to sites located in R10 districts (and their commercial equivalent), in an Inclusionary Housing Designated Area (IHDA) and in many Special Purpose Districts. All affordable housing under VIH was permanently affordable, and the maximum income for the affordable housing was 80 percent of the Area

*The authors, attorneys with Holland & Knight LLP, may be contacted at kenneth.lowenstein@hklaw.com and barak.wrobel@hklaw.com, respectively.

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Median Income (AMI), adjusted for household size.[3]

- In R10 districts (and their commercial equivalent), where the base maximum FAR is 10, for each square foot of affordable housing, depending on the building's location and type of work, a building received between 1.25 to 3.5 square feet of bonus floor area up to a maximum FAR of 12.
- In R6 to R9 districts in IHDAs, a building could receive a 33 percent bonus above the base FAR by providing 20 percent of the floor area as affordable housing. For example, a 10,000-square-foot site in an IHDA in an R8 district could construct a 54,000-square-foot residential building with no affordable housing at a maximum base FAR of 5.4.[4] The FAR could be increased to 7.2, allowing 72,000 square feet of floor area if 20 percent of the floor area in the building (or 14,400 square feet) was provided as affordable housing.

Under VIH, the affordable housing could be located in the same building receiving the bonus (referred to as the "compensated development") or off-site, provided that the off-site building (referred to as the "generating site") and the compensated development were located in the same community district or in an adjacent community district and within one-half mile of each other. By allowing generating sites to sell their VIH development rights, the city created a very active market for the buying and selling of off-site VIH development rights.

Buildings using VIH were required to distribute the affordable units on at least 65 percent of the floors, provide a proportionate unit mix for the affordable and market-rate units and meet minimum size specifications. Developers seeking to use VIH needed the approval of the city's Department of Housing Preservation and Development (HPD) and executed a regulatory agreement with HPD.

UNIFORM AFFORDABILITY PREFERENCE PROGRAM

COY HO replaces the VIH Program with a new program known as the Uniform Affordability Preference Program (UAP). In contrast to VIH, which was available only in a relatively limited number of areas, UAP is available in any R6 to R10 district (and commercial equivalents) and in most Special Purpose Districts, except for sites located in Mandatory Inclusionary Housing (MIH) Areas.

UAP is not a bonus program - rather, for each square foot of affordable housing provided, the maximum floor area permitted is increased by an equal amount up to the maximum permitted in that zoning district. For example, a 10,000-square-foot site located in an R8 district now has a base FAR of 7.2[5] when located within 100 feet of a wide street, which can be increased to a maximum FAR of 8.64, provided that all floor area above the maximum base amount (14,400 square feet) is affordable housing. In addition to the floor area increase, buildings providing affordable housing under UAP are permitted to be taller - for example, in an R8 district, for buildings within 100 feet of a wide street, the maximum height is increased from 135 feet to 175 feet.

Affordable housing units under UAP must still be permanently affordable, but the maximum income for all affordable units cannot

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exceed a weighted average of 60 percent of AMI (adjusted for household size). In addition, no more than three income bands are permitted, and the maximum income of any income band is 100 percent AMI (adjusted for household size). Finally, for buildings with 10,000 square feet or more of affordable housing, at least 20 percent of the affordable housing must be affordable to households with incomes not exceeding 40 percent AMI (adjusted for household size).[6]

Most of the other requirements under VIH - such as distribution of affordable units, bedroom mix and unit size - remain the same or similar under UAP. Like for buildings in R10 districts (and their commercial equivalent), IHDAs and certain Special Purpose Districts, UAP also allows the affordable housing to be located off-site within the same geographical limitations as VIH (same community district or in an adjacent community district and within one-half mile). Developers seeking to use UAP will continue to be required to receive approval from HPD.

Table 1 highlights the major components of VIH and UAP.

Table 1

	UAP	VIH	
Availability	R6 - R10 (and commercial equivalents)*	R10 (and commercial equivalent), some Special Purpose Districts and IHDAs*	
Bonus Ratio	One foot increase for each one foot of affordable housing	1.25 - 3.5	
Affordability	Maximum 60 percent AMI average/5 percent at 40 percent AMI/ maximum 100 percent AMI/3 income tiers	80 percent AMI	
Additional Height	Yes	Sometimes	
Available Off-Site	Yes with limitations	Yes with limitations	
Distribution	65 percent of floors	Same	
Bedroom Mix	Proportionate	Same	
Unit Size	For any bedroom type, average size of affordable must be equal to average size of market or meet minimum size	Minimum size requirements apply	

* Not available in MIH Areas

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The broader availability of UAP will provide increased opportunities for the development of affordable housing in areas of the city where it has not been previously permitted. However, the requirement that 100 percent of the additional floor area be affordable housing could lead developers to elect to build 100 percent market-rate and forgo the additional floor area.

AFFORDABLE HOUSING OPTIONS POST-COY HO

Despite the adoption of UAP, the VIH Program will continue to be available in many areas due to the inclusion of grandfathering provisions that allows developers to utilize the bonuses available under VIH.

- Developers with buildings in R10 districts (and their commercial equivalent), IHDAs and many Special Purpose Districts are allowed to purchase VIH development rights at the same bonus ratio (1.25 to 3.5 for R10 districts and 1.25 for IHDAs) as existed prior to the adoption of COY HO.
- Any generating site that has a regulatory agreement with HPD as of Dec. 5, 2024, retains the right to sell the inclusionary housing development rights using the VIH bonus ratios.
- Generating sites for new construction where an application is pending with the city's Department of Buildings (DOB) as of Dec. 5, 2024, are also grandfathered and able to sell their VIH development rights using the VIH bonus ratios if 1) DOB approves an application for a foundation, new building or alteration permit within one year of adoption and 2) HPD signs a regulatory agreement within two years of adoption.[7]
- Buildings utilizing VIH development rights receive the same additional height and increased FAR as a building developed under UAP.

Returning to the R8 site example, assuming the 10,000-square-foot site is located in an IHDA, the floor area can be increased from 72,000 square feet at a maximum base FAR of 7.2 to 86,400 square feet at a maximum FAR of 8.64 by either providing 14,400 square feet of affordable housing under UAP or 11,520 square feet by purchasing VIH development rights (14,400/1.25).

For a 10,000-square-foot site located in an R10 district where the ratio is 3.5:1, only 5,715 square feet of VIH development rights are needed, compared to 20,000 square feet under UAP. In addition, the buildings qualify for the additional height, regardless of whether they use UAP or purchase VIH development rights.

VIH will be most advantageous to condominium developers who are not eligible for the Affordable Neighborhoods for New Yorkers Program (also known as 485-x) and prefer not to have affordable housing in their buildings. Rental developers who need to use 485-x are required under that program to provide 20 percent to 25 percent of the units as affordable in the building and will have no incentive to purchase VIH development rights. For that reason, rental developers will likely be the major uses of UAP.

IN SUMMARY

- The New York City Council on December

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5, 2024, approved the third and final proposal of Mayor Eric Adams' City of Yes zoning initiative, the City of Yes for Housing Opportunity (COY HO). COY HO is a comprehensive set of changes to the Zoning Resolution designed to stimulate the production of housing generally - and particularly affordable housing. These changes include the easing of parking requirements, allowing more density, permitting accessory dwelling units and facilitating conversion of office buildings to residential uses.

- Through its new UAP, COY HO seeks to incentivize increased development of housing throughout the majority of the city where affordable housing programs have not previously been applied under the Zoning Resolution. However, the requirement that 100 percent of the additional floor area that is permitted under UAP be provided as affordable housing could lead developers to elect to build 100 percent market-rate and forgo the increase in floor area permitted under UAP.
- The old VIH will continue to be available in many areas due to the inclusion of grandfathering provisions allowing developers to utilize the bonuses available under VIH.
- VIH will be most valuable to condominium developers who are not eligible for the Affordable Neighborhoods for New Yorkers Program (also known as 485-x) and prefer not to have affordable housing in their buildings. Rental developers who need to use 485-x are required under that program to provide 20 percent to 25 percent of the units as affordable in the building and will have no incentive to purchase VIH development rights. For that reason, rental developers will be the most likely to utilize UAP.

NOTES:

[1] https://www.nyc.gov/site/planning/plans/city-of-yes/city-of-yes-overview.page.

[2] Floor area ratio (FAR) is the ratio of total building floor area to the area of its zoning lot.

[3] There was and continues to be a separate program known as Mandatory Inclusionary Housing (MIH). For sites located in a MIH Area listed in Appendix F, no residential development is permitted unless it includes a minimum amount of affordable housing (ranging from 20 percent to 30 percent of floor area). This program is unchanged and for that reason is not discussed in this article.

[4] In most Inclusionary Housing Designated Areas (IHDAs), the base FAR was lower than comparable districts not in IHDAs. For example, in non-IHDAs in R8 districts, the maximum FAR was 6.02, allowing a maximum floor area of 62,000 square feet.

[5] Compared to 5.4 in an IHDA or 6.02 in a non-IHDA that previously applied.

[6] Using the example from the previous paragraph, 2,400 square feet of the 12,000 square feet of affordable housing must be occupied by households with a maximum income of 40 percent Area Median Income (AMI) (as adjusted for household size).

[7] Generating sites that are preserving existing affordable housing have one year to sign the regulatory agreement with the city's Department of Housing Preservation and Development (HPD).

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Two New Laws Affect California Commercial Landlords

*Brian D. Huben and Nahal Zarnighian**

In this article, the authors discuss two new California laws that impact how commercial landlords manage their properties, as well as the timeline for unlawful detainer (eviction) cases.

Two new laws that went into effect on January 1, 2025, impact how commercial landlords manage their properties, as well as the timeline for unlawful detainer (eviction) cases.

In late September 2024, California Governor Gavin Newsom signed Assembly Bill No. 2347 (AB 2347)[1] and Senate Bill No. 1103 (SB 1103)[2] into law.

- AB 2347 increases the time a tenant has to respond to an unlawful detainer complaint from five to 10 days.
- SB 1103 provides "qualified commercial tenants" with expanded protections and imposes new obligations on commercial landlords regarding rent increases, lease terminations, and the recovery of property operating costs.

AB 2347

Time to Respond to Unlawful Detainer Complaint - Doubled

Previously, tenants served with an unlawful detainer summons and complaint had five days, excluding Saturdays, Sundays, and judicial (i.e., court) holidays to respond to the complaint. Cal. Civ. Proc. Code § 1167 has been amended to provide a tenant with 10 days (excluding Saturdays, Sundays, and judicial holidays) to respond to an unlawful detainer complaint.[3]

Hearing Date on a Demurrer or Motion to Strike - Finally, a Hard Deadline, Sort Of

Previously, Cal. Civ. Proc. Code § 1167 allowed a tenant to respond to an unlawful detainer complaint only by an answer or demurrer (i.e., a motion to dismiss the entire complaint). If a demurrer was filed, there was no date by which the demurrer had to be heard.

Now, Cal. Civ. Proc. Code § 1170 allows a tenant to respond by filing an answer, a demurrer, or a motion to strike. If the tenant responds by filing a demurrer or a motion to strike, there must be a hearing not less than

*The authors, attorneys with Ballard Spahr LLP, may be contacted at hubenb@ballardspahr.com and zarnighiann@ballardspahr.com, respectively.

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five court days and not more than seven court days thereafter. The court, however, upon a showing of "good cause," may order the hearing on the demurrer or motion to strike be held at a later date.[4]

The Takeaway on AB 2347

The hearing date element of AB 2347 is a step in the right direction, but still allows for some mischief. Getting a firm date for a hearing on a demurrer or motion to strike is a decent trade for giving a tenant 10 days to respond to an unlawful detainer complaint. However, for many years, both before and after the COVID-19 pandemic, tenants would often file a demurrer with a hearing date 60, 90, or 120 days in the future, and thus significantly delay getting the case to trial. The addition of Cal. Civ. Code § 1170(b)(1) should curb that abuse, but only time will tell what courts will consider to be "good cause" to order a later hearing date.

SB 1103

What Is a "Qualified Commercial Tenant" and Why You Should Care

Three California Civil Code statutes (i.e., Sections 827, 1632, and 1946.1) have been amended, and a new statute was created - Cal. Civ. Code § 1950.9 - by SB 1103. Common to all the changes brought by SB 1103 is the new concept of a "qualified commercial tenant."

A qualified commercial tenant is a tenant meeting both of the following criteria:

1. The tenant is a microenterprise, a restaurant with fewer than 10 employees, or a nonprofit organization with fewer than 20 employees; and,
2. The tenant has provided the landlord with: (a) written notice of its qualified commercial tenant status, and, (b) a self-attestation regarding the number of employees.

When, and how frequently, the written notice and self-attestation must be provided is a function of the length of the tenancy. Unless it is a short-term tenancy (i.e., week-to-week, month-to-month, or other period less than one month), the notice and self-attestation must be given either before or upon execution of the lease, and annually thereafter.

A "microenterprise" is already defined by the California Business and Professions Code as a sole proprietorship, partnership, limited liability company (LLC), or corporation that has five or fewer employees, including the owner (who may be part-time or full-time), and generally lacks sufficient access to loans, equity, or other financial capital.[5]

Two of the Elements of SB 1103 Relate to Short-Term Leases or Leases With No Specified Term

- *New Notice Required for Rent Increases in Short-Term Tenancies*

  Landlords dealing with short-term tenancies (i.e., week-to-week, month-to-month, or other period less than a month in duration) must provide written notice to a qualified commercial tenant of a rent increase. If the increase is 10 percent or less, written notice must be given at least 30 days before the effective date of the increase. If the rent increase exceeds 10

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percent, written notice must be given at least 90 days before the effective date.[6]

- *Navigating Lease Termination Notices*

  For leases with an unspecified term, or when a tenant holds over following the natural expiration of the lease (creating a de facto month-to-month tenancy), a landlord must provide written notice of the termination to the qualified commercial tenant. If the qualified commercial tenant has occupied the property for less than one year, the landlord must provide written notice at least 30 days prior to the effective date of the termination. In all other instances (i.e., the tenant has occupied for more than one year), the landlord must provide written notice to the qualified commercial tenant at least 60 days prior to the effective date of the termination.[7]

Significant Changes for Recovering Traditional Triple-Net Expenses

SB 1103 adds a new Cal. Civ. Code § 1950.9, and limits a landlord's ability to charge and recover "building operating costs" from a qualified commercial tenant. However, Section 1950.9 only applies to:

(a) Leases executed or tenancies commenced or renewed on or after January 1, 2025;

(b) A "short-term" tenancy (discussed above); and

(c) Leases executed or tenancies commenced before January 1, 2025, that do not contain a provision regarding building operating costs.

New Cal. Civ. Code § 1950.9(h)(1) defines building operating costs as "costs that are incurred on behalf of a tenant for the operation, maintenance, or repair of the commercial real property, including, but not limited to, maintenance of common areas, utilities that are not separately metered, and taxes or assessments charged to the landlord pursuant to property ownership."

- *New Record-Keeping and Notice Requirements*

  SB 1103 also imposes a "supporting documentation" requirement for a landlord with a qualified commercial tenant. Supporting documentation means a dated and itemized quote, contract, receipt, or invoice from a provider that includes, but is not limited to both: (i) a tabulation showing how the building operating costs are allocated, and (ii) a signed and dated attestation by the landlord that the documentation and costs are true and correct.[8]

  In order to recover a building operating cost from a qualified commercial tenant, not only must a landlord provide a qualified commercial tenant with supporting documentation, but a landlord must be able to demonstrate all of the following:

  1. The building operating costs are allocated proportionately per tenant, by square footage, or another method as substantiated through supporting documentation;
  2. The building operating costs were incurred within the last 18 months, or reasonably expected to be incurred within the next 12 months (based on reasonable estimates);
  3. Before the lease is executed, the landlord provided notice that supporting documentation for the building operating costs (incurred or expect to be incurred) may be inspected within 30 days of a request from a qualified commercial tenant;

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4. The building operating costs do not include expenses paid directly by the tenant to a third party (e.g., water, trash, or electricity); and,
5. The building operating costs do not include expenses for which a third party, tenant, or insurance company reimbursed the landlord.

- *Changes to the Building Operating Costs Allocation Method or Formula*

  During the term of the lease, a landlord may not alter the method or formula to allocate the building operating costs which results in an increase to a qualified commercial tenant's share of those costs without providing the qualified commercial tenant with written notice and supporting documentation.[9]

- *Qualified Commercial Tenant Defenses and Landlord Liabilities*

  The waiver of any right granted to a qualified commercial tenant under Section 1950.9 is void as a matter of public policy.[10] In an unlawful detainer, a qualified commercial tenant may raise a landlord's violation of Section 1950.9 as an affirmative defense.[11] A landlord violating Section 1950.9 may also be liable to the qualified commercial tenant in a separate civil action for actual damages and attorney fees and costs. A willful violation by a landlord exposes the landlord to treble and punitive damages.[12]

New Lease Translation Requirements

If you primarily negotiate leases in Spanish, Chinese, Tagalog, Vietnamese, or Korean, as of January 1, 2025, you must provide the qualified commercial tenant with a translation of the lease into the applicable language before the lease is executed.[13]

The Takeaway on SB 1103

The new notice and record-keeping requirements of SB 1103 are extensive, and unfortunately will increase the cost of doing business for landlords with qualified commercial tenants.

NOTES:

[1] https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB2347#:~:text=AB%202347%2C%20Kalra.,is%20served%20on%20the%20defendant.

[2] https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB1103.

[3] See Cal. Civ. Code § 1167(a).

[4] See Cal. Civ. Proc. Code § 1170(b)(1).

[5] See Cal. Bus. & Prof. Code § 18000(a).

[6] See Cal. Civ. Code § 827(b)(2), (3).

[7] See Cal. Civ. Code § 1946.1(a), (b), (c).

[8] See Cal. Civ. Code § 1950.9(h)(6).

[9] See Cal. Civ. Code § 1950.9(c).

[10] See Cal. Civ. Code § 1950.9(g).

[11] See Cal. Civ. Code § 1950.9(d).

[12] See Cal. Civ. Code § 1950.9(e).

[13] See Cal. Civ. Code § 1632(b).

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Internal Revenue Service and California Provide Tax Relief for Los Angeles County Residents and Businesses

*Douglas W. Schwartz**

In this article, the author discusses the tax relief granted by the Internal Revenue Service and California Governor Gavin Newsom to Los Angeles County residents and businesses affected by the January fires.

The Internal Revenue Service (IRS) on Friday, January 10, 2025, extended tax payment and filing deadlines[1] to October 15, 2025, for Los Angeles County individuals and businesses because of the recent fires. The California governor's office followed suit on Saturday, January 11, 2025.[2]

WHO AND WHAT IS COVERED

The IRS relied on its authority to extend tax deadlines upon a FEMA disaster declaration under Treasury Regulation Section 301.7508A-1[3] and IRS Revenue Procedure 2018-58.[4] "Affected" taxpayers with an address in LA County (not just fire or evac zones) automatically qualify for relief. Under the IRS rules, "affected" taxpayers with an address outside LA County whose records are in the county (for example, those with CPAs in Los Angeles County) also qualify for relief but need to contact the IRS disaster hotline at 866.562.5227 to obtain that relief.

The IRS extensions cover most tax returns and payments normally due (initially or with extension) from Tuesday, January 7, 2025, (Day One of the county-wide windstorm which breathed the fires) to Wednesday, October 15, 2025, including:

- 2024 quarterly estimated income tax payments due January 15, 2025, and 2025 quarterly estimated tax payments normally due April 15, June 16, and September 15, 2025;
- Individual income tax returns and payments due April 15, 2025;
- Calendar-year partnership, LLC and S corporation returns due March 17, 2025;
- Calendar-year C corporation and fiduciary returns and payments due April 15, 2025, or fiscal-year returns due (originally or as extended) between January 7, 2025 and October 15, 2025; and

*The author, a partner in the Los Angeles office of Nossaman LLP, may be contacted at dschwartz@nossaman.com.

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- Calendar-year exempt organization returns due May 15, 2025, or fiscal-year returns due (originally or as extended) between January 7, 2025 and October 15, 2025.

The California tax relief tracks the treatment above for comparable individual and business income and franchise tax returns. California probably will conform to the federal extension in the case where the IRS hotline agrees to extend a due date (though the governor's announcement does not expressly say that).

ADDITIONAL PROPERTY TAX RELIEF

On January 16, the California governor extended, to April 10, 2026, property tax payment deadlines[5] for the following zip codes in LA County: 90019, 90041, 90049, 90066, 90265, 90272, 90290, 90402, 91001, 91040, 91104, 91106, 91107, 93535, and 93536. These zip codes are for areas destroyed by or evacuated because of the Palisades fire (Pacific Palisades, Brentwood, Malibu, Santa Monica) and Eaton fire (Altadena and Pasadena).

SECTION 1031 DEFERRED EXCHANGES

In relying on IRS Revenue Procedure 2018-58,[6] the IRS also extended deadlines for performing certain acts other than tax return filing and payment. These acts include the twin deadlines for a deferred Section 1031 exchange[7] - i.e., identifying a replacement property (45 days after sale of the relinquished property), and closing on it (180 days after sale of the relinquished property). Under Section 6 of Revenue Procedure 2018-58 (which applies to "affected" taxpayers only) these deadlines are extended to October 15 if they would have otherwise fallen between January 7 and October 15. As an alternative, Section 17 of Revenue Procedure 2018-58 provides that the last day of the 45- or 180-day period that otherwise falls on or after the date of the FEMA-declared disaster (here, January 8) is postponed by 120 days or to October 15 (whichever is later), but in no event beyond the due date (including extensions) of the taxpayer's tax return for the year of the transfer or one year, if:

- The taxpayer transferred the relinquished property on or before the date of the FEMA-declared disaster (here, January 8); and
- Either the taxpayer is an "affected" taxpayer or, if not, the taxpayer is having difficulty meeting the 45- or 180-day deadline as a result of the disaster (for example, the relinquished, identified, or replacement property is located in the disaster area; a party to the exchange, accommodator, attorney, or other key person is located in the disaster area or otherwise severally affected by the disaster; or a lender or title insurer pulls out because of the disaster).

An "affected" taxpayer can choose between Section 6 and Section 17 depending on which produces a better result. Any other taxpayer must rely on and qualify under Section 17.

NOTES:

[1] https://www.irs.gov/newsroom/irs-announces-tax-relief-for-taxpayers-impacted-by-wildfires-in-california-various-deadlines-postponed-to-oct-15#:~:text=Affected%20taxpayers%20that%20have%20an,before%20Oct.%2015%2C%202025.

[2] https://www.gov.ca.gov/2025/01/11/california-provi

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des-tax-relief-for-those-affected-by-los-angeles-wildfires/.

[3] https://www.law.cornell.edu/cfr/text/26/301.7508A-1.

[4] https://www.irs.gov/irb/2018-50_IRB#RP-2018-58.

[5] https://www.gov.ca.gov/2025/01/16/governor-newsom-extends-state-property-tax-deadlines-for-la-firestorm-communities-until-april-2026/.

[6] https://www.irs.gov/irb/2018-50_IRB#RP-2018-58.

[7] https://www.law.cornell.edu/cfr/text/26/1.1031(k)-1.

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Hawaii Supreme Court Addresses Insurance and Climate Change Litigation: "Occurrence" Requirement Met, But Pollution Exclusion Applies to Greenhouse Gases

*Valerie E. Lott and William Hunter Craven**

In this article, the authors discuss a decision by the Supreme Court of Hawaii holding that although climate change litigation satisfied the "occurrence" requirement under a commercial general liability insurance policy, greenhouse gases are "pollutants" and the pollution exclusion precluded coverage.

In *Aloha Petroleum Ltd. v. National Union Fire Insurance Company of Pittsburgh* (*Aloha*),[1] the Supreme Court of Hawaii held that, while the climate change litigation satisfied the "occurrence" requirement, greenhouse gases (GHG) are "pollutants" under a commercial general liability (CGL) policy, and the pollution exclusion precluded coverage.

BACKGROUND

The city and county of Honolulu and the county of Maui (the Counties) filed lawsuits against major oil and gas companies, alleging the fossil fuel industry did not warn of the risk of climate change. The Counties allege the companies knew about these risks beginning in the 1960s but concealed their knowledge and increased production of fossil fuels, which led to climate change.

One of the defendant companies, Aloha Petroleum Ltd. (Aloha), had CGL insurance with National Union Fire Insurance Company of Pittsburgh, PA and others (National). The insurers issued consecutive CGL policies to Aloha beginning in 1978 and ending in 2010.

Aloha tendered defense and indemnity for the litigation and filed a declaratory judgment in Hawaii federal court. There, National argued that climate change was the foreseeable result of intentional emission of GHGs and could not be an "accident." National also argued coverage was excluded under the pollution exclusion because GHGs are "pollutants."

*The authors, attorneys with Akerman LLP, may be contacted at valerie.lott@akerman.com and william.craven@akerman.com, respectively.

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CERTIFIED QUESTIONS

The U.S. District Court for the District of Hawaii certified two questions to the Supreme Court of Hawaii in *Aloha*.[2] The district court asked whether an "accident" includes an insured's reckless conduct, to which the Hawaii Supreme Court answered "yes." The second question certified was whether GHGs are "pollutants" under the policies. The court also answered this affirmatively, but not before a lengthy analysis of the history and treatment of pollution exclusions.

RECKLESSNESS AS AN ACCIDENT

The relevant policies have different definitions for the term "occurrence."[3] However, the court used the following post-1986 definition: "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policies do not define the term "accident."

The court found that under the facts of this litigation, recklessness constitutes an "occurrence" because it "honors the principle of fortuity."[4] Hawaii courts define "accident" as "not intended or practically certain from the insured's standpoint." The court distinguished risks from intentional or planned losses and noted that "[f]or the purposes of insurance, recklessness is more like negligence than intent." Therefore, in this context, the court ruled that Aloha's alleged reckless conduct constitutes an "occurrence."

The court also noted that a recent Virginia case, *AES Corp. v. Steadfast Insurance Company*, had a different outcome.[5] In *AES Corp.*, the Virginia Supreme Court found that climate change was not an accident because it "was the 'natural or probable consequence' of [the] emissions." Virginia courts define "accident" as "unexpected from the viewpoint of the insured." The Hawaii Supreme Court attributes the differing outcomes to the states' different interpretations of the word "accident."

TREATMENT OF POLLUTION EXCLUSIONS

Until now, Hawaii had not adopted an interpretation of pollution exclusions in CGL policies. There is a split in states' treatment of pollution exclusions.[6] Many states have adopted a "literal reading" approach to pollution exclusions. This approach is broader and applies the pollution exclusion's terms literally because those terms are clear and unambiguous. Specifically, this approach "maintains that the clause applies equally to negligence involving toxic substances and traditional environmental pollution, and that the clause is as unambiguous in excluding the former as the latter."[7]

The second main approach is a "traditional environmental pollution" application.[8] Courts that take this approach either interpret the pollution exclusion to be ambiguous or find the exclusion contradicts an insured's reasonable expectations. Notably, the contradiction of an insured's reasonable expectation is often traced to the initial, historical development of the pollution exclusion which was arguably limited only to instances in which the environment itself was harmed. The "traditional environmental pollution" approach limits the application of the exclusion to "contaminants" that cause damage due to their presence in the environment.

In adopting a "traditional environmental pollution" application, the Hawaii Supreme Court

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noted the exclusion was not ambiguous in the policy because under both a traditional and plain language reading of the pollution exclusion, GHGs that cause climate change are considered "pollution." The court "believe[s] the 'traditional environmental pollution' reading is the superior approach" and holds that "what makes a substance a 'contaminant' - and thus a 'pollutant' - is whether it causes damage due to its presence in the environment."

According to the court, "[b]y plain language, GHGs are 'gaseous,' 'contaminants' that are 'released' causing 'property damage.' " The court also provided three key features of the "traditional environmental" approach: "(1) the release of a damaging substance, (2) into the environment, (3) that causes harm because of its presence in the environment."[9]

CONCLUSION

In *Aloha*, the Hawaii Supreme Court expressed its view that even under a "traditional" environmental pollution approach, GHGs constitute a "pollutant" as defined in modern CGL policies.[10] Further, while *Aloha* concludes the "occurrence" requirement is met, the court emphasizes the importance of state law defining "occurrence" and expressly attributes its differing conclusion from a prior Virginia decision on that basis.[11]

Climate change litigation is not limited to particular companies or industries and may also target municipalities, counties, or entire countries. Investors, stakeholders, and regulators require increasing disclosure of these risks. In a changing and uncertain political landscape, monitoring these risks becomes even more important.

Insurance coverage for climate change litigation will likely continue to turn on state-specific insurance laws, including the "occurrence" definition, the "pollutant" definition, and the approach (if any) adopted for interpreting pollution exclusions. In the meantime, carriers may consider adding policy language expressly addressing climate change litigation.

NOTES:

[1]Aloha Petroleum, Ltd. v. National Union Fire Insurance Company of Pittsburgh, 155 Haw. 108, 557 P.3d 837 (2024).

[2]Aloha Petroleum, Ltd. v. National Union Fire Insurance Company of Pittsburgh, PA, 690 F. Supp. 3d 1168 (D. Haw. 2023), certified question answered, 155 Haw. 108, 557 P.3d 837 (2024).

[3]The court notes that generally policies before 1986 define occurrence as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Aloha Petroleum, Ltd. v. National Union Fire Insurance Company of Pittsburgh, 155 Haw. 108, 557 P.3d 837, 2024 WL 4431797, *7 (2024). After 1986, policies changed to "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Id.

[4]Aloha Petroleum, Ltd. v. National Union Fire Insurance Company of Pittsburgh, 155 Haw. 108, 557 P.3d 837, 2024 WL 4431797, *1 (2024).

[5]AES Corp. v. Steadfast Ins. Co., 283 Va. 609, 725 S.E.2d 532 (2012).

[6]Apana v. TIG Ins. Co., 574 F.3d 679, 682 (9th Cir. 2009).

[7]MacKinnon v. Truck Ins. Exchange, 31 Cal. 4th 635, 3 Cal. Rptr. 3d 228, 73 P.3d 1205, 1209 (2003), as modified on denial of reh'g, (Sept. 17, 2003).

[8]Apana v. TIG Ins. Co., 574 F.3d 679, 682–83 (9th Cir. 2009).

[9]Apana v. TIG Ins. Co., 574 F.3d 679, 682–83 (9th Cir. 2009).

[10]The Hawaii Supreme Court sent the case back to the district court to assess coverage under policy years that did not contain relevant pollution exclusions.

[11]We note there is a lengthy concurring opinion issued by J. Ginoza on the first issue certified to the Court. Ginoza's concurrence provides a thorough comparison of this case with prior Supreme Court of Hawaii opinions discussing the definition of "occurrence" in insurance policies.

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To Help the New Administration Help Your Industry, You Need an Agency Strategy

*Andrew M. Grossman**

In this article, the author explains that seeking to take advantage of upcoming regulatory reforms requires creativity, domain expertise, and legal acumen in crafting policy solutions, especially ones that go beyond the typical administration-to-administration policy shifts.

The Trump administration brings what may be an unprecedented opportunity to ease regulatory burdens. While much attention has focused on the new Department of Government Efficiency, or DOGE, headed up by Elon Musk, the real action in the early months will be in the agencies themselves. The Trump transition effort issued a barrage of "day one" orders that ultimately have to be executed by the agencies, and those will be followed by a stream of agency actions to reverse the policy decisions of the Biden administration and carry out the new administration's agenda. Central planks of that agenda are deregulation, reducing the burden of government and empowering domestic business. This is a massive opportunity to improve the business environment for practically every industry.

AN AGENCY STRATEGY

To take full advantage of that opportunity, you need an agency strategy. The key elements are identifying prospects for reform that further the new administration's priorities and mapping out how to get from here to there - in other words, what to do and how to do it. Getting those things right is essential.

The "what" involves questions of policy and law. Agency nominees and prospective nominees are looking for high-impact reforms that can be carried out through administrative action - that is, without the need for legislation. In previous changeovers, new agency leaders often concerned themselves with relatively incremental shifts, such as reversing some of the recent actions of their predecessors. This time around, they're thinking bigger. That includes reconsidering long-standing regulatory requirements or interpretations that don't fit current needs or that impose disproportionate costs. It also includes cleaning the slate of regulations and guidance that may exceed agency power.

*The author, a partner based in the Washington, D.C., office of Baker & Hostetler LLP, may be contacted at agrossman@bakerlaw.com.

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On that last point, the Supreme Court's recent *Loper Bright* decision, which eliminated most deference agencies receive for their statutory interpretations, i.e., *Chevron* deference, may aid the new administration's efforts. To be sure, that decision cuts down on agency interpretative power and so may impair some deregulatory efforts. But it also casts doubt on a potentially large swath of existing regulations that rely on aggressive interpretations of agency authority. For at least the time being, *Loper Bright* will do more to facilitate than hinder regulatory reform.

With agency heads thinking big, small-ball pitches may fall by the wayside. But for many regulatory domains, there is no list of ready-to-go big-picture reforms, because big changes long seemed beyond the realm of political possibility.

Identifying new prospects, especially big ones, is not easy. The place to start is with the statutory law, bringing to bear all the standard tools of statutory interpretation. This sort of statutory work is best done by subject matter experts working in collaboration with generalists such as appellate attorneys who excel with interpretative issues. The experts know the industry and what reforms will pay off. What the appellate team brings to the table is the ability to give statutes a rigorous reading in the same way that judges do, without the preconceptions and parochialism that can color the views of those in the field and sometimes cause them to overlook opportunities. The experts tend to know how the law in their field works today, not how it could work tomorrow. The difference between the two is often significant, with so many major statutes passed in the years before the courts took their textualist turn.

ACHIEVING POLICY TARGETS

A policy target is not enough on its own. The agency also needs to know how to achieve it. That is where administrative law wizardry comes into play. Discussions about regulatory reform often assume that the agency will undertake notice-and-comment rulemaking. But that is time-consuming, burdensome and hard to do in the early days when there may be limited capacity to carry out the new leadership's policies. It may also be unnecessary. Guidance can usually be revoked without much in the way of procedure. Interpretative rules, among other kinds, can be published without going through notice and comment. A proposal is more likely to win approval if the agency can do it quickly and easily. Can a reform that involves a legislative rule be reworked or pursued in some alternative way that dispenses with the need for notice and comment?

BIG IMPACTS

New agency heads are also looking to make a big impact fast. (In fact, that's among the considerations going into nominee selection.) Even where a reform might take time to get out the door, an agency might be able to wield its power to make a difference much sooner. A rule that hasn't gone into effect can be administratively stayed or have its compliance deadlines pushed back through an interim final rule. Rules subject to litigation can be judicially stayed. Even long-standing rules that an agency intends to rescind may be susceptible to the exercise of enforcement discretion in the meantime. Not everything can be done on day one, but a lot can be if the agency is well informed about how to exercise its power.

A whole separate set of considerations ap-

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plies to rules (mostly from the Biden administration) that are subject to ongoing litigation. In addition to judicial stays, there may be prospects for settlements (or surrenders) that result in vacatur or at least remand and reconsideration. Sometimes litigation may help an agency achieve goals such as undoing prior actions with a minimum of fuss - even in circumstances where the agency might otherwise be unable to act.

Getting the "how" right can be the difference between a proposal that goes places and one that's disregarded as infeasible or not worth the effort. It can also be the difference between an action that works and one that gets tied up in litigation or even rejected by a court. Yet agencies often lack the expertise in administrative law necessary to understand their options and wield them effectively. Even many top law firms aren't up to date in this area, which has moved quickly in recent years. A skilled practitioner ought to be able to reel off the potential pathways for any given objective along with the respective benefits and risks of each. Very few have that capability.

CONCLUSION

While lobbying is important, right now the new administration is looking to those in the trenches for ideas on how best to achieve its agenda of cutting regulatory burdens, strengthening domestic business and improving the functioning of government. To help the administration achieve those things, you need an agency strategy.

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