



2020 Annual Legal Update

LIVE Zoom Webinar

Wednesday,
December 9, 2020

www.kmklaw.com



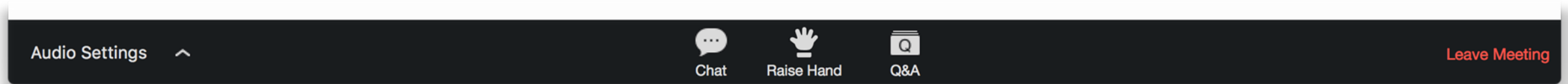
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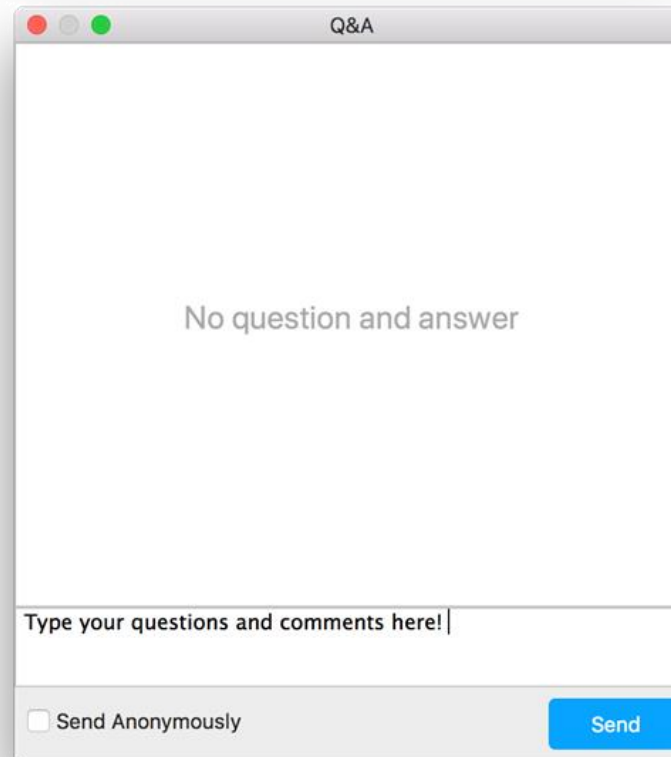


Introduction

Zoom Webinar Controls



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- Q&A / Chat



Seminar Materials

YOUR TRUSTED LEGAL ADVISORS

The KMK Law multi-disciplinary Coronavirus (COVID-19) Response Team is dedicated to providing a comprehensive and coordinated response to issues that our clients are facing now and may face in the near future. Click this image to find our most recent insights and analysis under the News & Resources and Blogs tabs on our team page.



LIVE Webinar

2020 KMK Law Legal Update



Latest Insights

IRS Clarifies Position on Deductibility of Expenses Covered by PPP Loans



KMK Law D&I Newsletter

Volume 2 | Issue 2

Zoom Webinar Technical Assistance

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Recently viewed
articles

Frequently asked questions

The following are answers to some of the most common questions or problems users come across.

Read common questions about:

- [Getting started with Zoom](#)
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- [Joining a meeting](#)
- [Zoom webinars](#)

CLE Test Prompt



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10 Cases Every In-House
Counsel Should Know

1. *Ford Motor Co. v. Mont. Eighth Jud. Dist.*, and *Ford Motor Co. v. Bandemer*, Cons. Dkt. Nos. 19-368 & 19-369 (Oral Argument Oct. 7, 2020).

- Personal jurisdiction (general and specific personal jurisdiction).
- “Whether the ‘arise out of or relate to’ requirement for a state court to exercise specific personal jurisdiction over a nonresident defendant under *Burger King v. Rudzewicz* is met when none of the defendant’s forum contacts caused the plaintiff’s claims, such that the plaintiff’s claims would be the same even if defendant had no forum contacts.”
- In *Montana*, the Gullett Estate brought product liability claims in Montana state court. The 1996 Ford Explorer involved in her 2015 accident was assembled in Kentucky; sold to a dealership in Washington; and originally sold to a consumer in Oregon. The Ford Explorer was bought and sold numerous times before being purchased by Gullett.
- In *Bandemer*, Mr. Bandemer brought product liability claims in Minnesota state court. The 1994 Ford Crown Victoria involved in his 2015 accident was designed in Michigan; assembled in Canada; and sold to a dealership in North Dakota. Mr. Bandemer was the fifth owner of the vehicle.

1. *Ford Motor Co. v. Mont. Eighth Jud. Dist.*, and *Ford Motor Co. v. Bandemer*, Cons. Dkt. Nos. 19-368 & 19-369 (Oral Argument Oct. 7, 2020).

- The Due Process Clause requires that a Defendant have “certain minimum contacts” with the forum state “such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).
- General jurisdiction: where is the Defendant “at home.” *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017) (overturning Montana Supreme Court’s narrow interpretation of *Daimler*).
- Specific personal jurisdiction: (1) Defendant must have minimum contacts with the state; (2) the claims must “arise out of or relate to” the contacts; and (3) it must not be unreasonable or unduly burdensome to require the defendant to litigate in the state.
- Does “arise out of or relate to” = suit-related conduct/contacts? *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1781 (2017) (“affiliation between the forum and the underlying controversy”); *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (“suit-related conduct”); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 584 U.S. 915, 923 (2011) (“activity gave rise to the episode-in-suit”).

1. *Ford Motor Co. v. Mont. Eighth Jud. Dist.*, and *Ford Motor Co. v. Bandemer*, Cons. Dkt. Nos. 19-368 & 19-369 (Oral Argument Oct. 7, 2020).

- United States as Amicus Curiae – Opposes Ford’s proximate cause test and advocates a test based on “where the defendant makes or sells a product” that would allow a business to “take more precautions or reduce the volume of sales in states with less desirable litigation environments.”
- Chamber of Commerce, NAM, and ATRA as Amicus Curiae – “To satisfy the ‘substantial connection’ requirement, there must be (1) a causal connection between the defendant’s forum activity and the asserted claim that (2) is substantially related to other States’ connections to the controversy.”
- 37 States as Amicus Curiae – Purposeful availment and relatedness are distinct inquiries; the relatedness inquiry accounts for a State’s interest in providing a forum for its citizens injured within its borders.
- Multiple Briefs of Civil Procedure Professors as Amicus Curiae – All for Respondents.

2. ***Henry Schein v. Archer and White Sales, Inc.*, Dkt. No. 19-963 (Oral Argument Dec. 8, 2020).**

- Class action arbitration and arbitration provisions.
- Whether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator.
- *Henry Schein v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 529-30 (2019) (*Schein I*) (Court unanimously vacated opinion of the Fifth Circuit; “when the parties’ contract delegates the arbitrability question to an arbitrator, a court may not override the contract, even if “the court thinks that the argument that the arbitration provision applies to a particular dispute is wholly groundless.”).
- The Court remanded to the Fifth Circuit to address the issue of whether the contract at issue in fact delegated the arbitrability issue to the arbitrator. *Id.* at 531.

2. ***Henry Schein v. Archer and White Sales, Inc.***, Dkt. No. 19-963 (Oral Argument Dec. 8, 2020).

- On remand, the Fifth Circuit refused to enforce the arbitration agreement.
 - 2007 boilerplate provision: “Any dispute arising under or related to this Agreement (*except for actions seeking injunctive relief* and disputes relating to trademarks, trade secrets or other intellectual property of Pelton & Crane) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association.”
 - Unless the parties clearly provide otherwise, the question of arbitrability is decided by the court, not the arbitrator.
 - However, a mere reference to the AAA rules presents clear and unmistakable evidence that the parties agree to arbitrate arbitrability.
 - The plain language of the provision incorporates the AAA rules for all disputes except those under the carve out; given the carve out, the parties did not show a clear and unmistakable intent to delegate arbitrability. Therefore the Fifth Circuit decided the issue and decided that the parties did not intend to arbitrate the underlying action (Sherman Act claims that included claims for injunctive relief).

2. ***Henry Schein v. Archer and White Sales, Inc.*, Dkt. No. 19-963 (Oral Argument Dec. 8, 2020).**

- Petition to address the issue was granted; a conditional cross petition to address two additional issues (does the incorporation of AAA rules, in and of themselves, indicate that the parties intend for the arbitrator to determine arbitrability issues, and whether a court must decide whether a non-signatory to an arbitration agreement can enforce the agreement under the doctrine of equitable estoppel) was denied.
- *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (FAA reflects “both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract”).
- *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (“courts are required to rigorously enforce arbitration agreements according to their terms”).
- *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (employment contracts can legally bar employees from collective action).
- Friendly advice – review your arbitration provisions....

3. *In re Capacitors Antitrust Litig. No. III*, 2020 U.S. Dist. LEXIS 206508 (N.D. Cal. Nov. 3, 2020).

- Antitrust; Direct Purchaser Plaintiffs (DPP) v. Indirect Purchaser Plaintiffs (IPP) and standing.
- MDL is 6+ years old; DOJ investigation resulted in guilty pleas by 8 companies and fines totaling over \$150 million.
- DPP trial ended in mistrial in the spring due to COVID-19; rescheduled for 2021.
- Multiple national settlements to date; millions in settlement recoveries.
- IPPs sought certification of a class against two defendants who refused to settle (Shinyei Capacitor Co., Ltd. And Taitso Corporation).

3. *In re Capacitors Antitrust Litig. No. III*, 2020 U.S. Dist. LEXIS 206508 (N.D. Cal. Nov. 3, 2020).

- Despite millions in IPP class settlements, class certification was denied.
 - Request for nationwide class under California law denied.
 - Request to certify subclasses under the antitrust and consumer protection laws of California and 31 other states because they did not have a named plaintiff with standing for every state.
 - Request to certify state subclasses for the 6 states with proposed class representatives because the Plaintiffs presented no substantive discussion of the state laws that they rely upon for 6 separate state class actions.
 - The requests failed under Rule 23(b)(3) (predominance) but would also fail for lack of a record under Rule 23(a) (specifically numerosity and commonality) and Rule 23(b)(2) (injunctive class).
- *Apple, Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (5-4 decision) (putative class of iPhone owners could bring antitrust claims directly against Apple for injury allegedly caused by the 30% commission levied against Apple app developers).

4. ***In re Restasis Antitrust Litig.*, 335 F.R.D. 1 (E.D.N.Y. May 5, 2020).**

- Uninjured class members in a putative class; the *de minimis* exception to class certification.
- Predominance under Rule 23(b)(3): common questions will predominate over individual questions in proving liability. Antitrust class plaintiffs generally must show that all (or nearly all) putative class members suffered common impact, such that common proof will establish that all (or nearly all class) class members suffered antitrust injury.
- In *Restasis*:
 - End-Payor Plaintiffs (EPPs) alleged that Defendant Allergan maintained a monopoly through anticompetitive conduct to block generic drug competition.
 - EPPs moved to certify a class of indirect purchasers in 32 states.
 - EPPs' expert purported to show that 94.3% of 1M class members were injured by conduct, but also conceded that up to 5.7% of the class would likely purchase the brand drug even if a cheaper generic alternative had been available.

4. *In re Restasis Antitrust Litig.*, 335 F.R.D. 1 (E.D.N.Y. May 5, 2020).

- The District Court certified the class.
 - The District Court rejected Allergan's argument that a class may not contain uninjured members as inconsistent with *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016).
 - The District Court concluded that potentially 55,000 uninjured class members was still the outer limits of de minimis (5.7%), *citing In re. Rail Freight Fuel Surcharge Antitrust Litig.* 934 F.3d 619 (D.C. Cir. 2019) (affirming denial of class certification where uninjured members constituted 12.7% of the putative class; observing in dicta that "5% to 6% constitutes the outer limits of a *de minimis* number).
- Rule 23(f) appeal was denied by the Second Circuit on August 27, 2020.

4. *In re Restasis Antitrust Litig.*, 335 F.R.D. 1 (E.D.N.Y. May 5, 2020).

- *But see Tyson*, 136 S. Ct. at 1053 (Roberts, C.J., concurring) (“Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.”).
- *But see In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184 (3d Cir. April 22, 2020) (certification vacated and remanded; *Tyson* is limited to FLSA cases; Plaintiffs’ allegations of establishing damages through averages was not rigorously analyzed by the district court at the class certification stage; “averages may be acceptable where they do not mask individualized injury,” but the record was insufficient to make that determination).
- *But see In re Aluminum Warehousing Antitrust Litig.*, 2020 WL 4218329 (S.D.N.Y. July 23, 2020) (class certification denied; Plaintiffs’ expert presented statistical models purporting to show classwide impact and causation; the District Court, citing *Comcast*, rigorously examined the models; “courts have disdained models that have found classwide price impact by means of averaging impact across a class period”).

5. *In the Matter of Zoom Video Communications, Inc.*, F.T.C. File No. 192 3167 (Nov. 10, 2020).

- Cybersecurity and data privacy.
- Number of issues: lack of security features; Zoombombing; automatic sharing of data with Facebook; storage of unencrypted recordings; representation of end to end encryption when it was not available across all platforms.
- FTC settlement and consent order:
 - Designate a qualified employee or employees to be responsible for the new privacy and security programs.
 - Security review of all policies and procedures.
 - Implement a vulnerability management program.
 - Five year monitoring by independent cybersecurity firm.
 - Restrictions on representations.

5. *In the Matter of Zoom Video Communications, Inc.*, F.T.C. File No. 192 3167 (Nov. 10, 2020).

- FTC consent orders – provide specificity and guidance
 - *In the Matter of Tapplock Inc.*, Dkt. No. 4718 (FTC) (May 20, 2020) (consent agreement over allegations that Tapplock’s “smart locks” were not secure).
 - *In the Matter of NTT Global Data Centers Americas, Inc. (RagingWire Data Centers)*, Dkt. No. 9386 (FTC)(June 30, 2020) (consent agreement over allegations that RagingWire misled customers about its participation in the EU-US Privacy Shield framework and failed to adhere to the program’s requirements).
- *In re: Zoom Video Communications, Inc. Privacy Litig.*, Case No. 20-02155-LHK (N.D. Cal.).
 - CCPA.
 - Question of adequacy of notice.
 - Sharing of personal data and information.
 - Roll out of new version around March 27, 2020.

5. *In the Matter of Zoom Video Communications, Inc.*, F.T.C. File No. 192 3167 (Nov. 10, 2020).

- *Blahaous v. Sarrell Reg'l Dental Ctr. For Pub. Health, Inc.*, 2020 U.S. Dist. Lexis 125394 (M.D. Ala. July 16, 2020) (data breach lawsuit dismissed due to lack of standing; allegations based on potential misuse of information that may have been stolen were too speculative to establish standing).
 - Four theories of harm: (1) increased risk of identity being stolen; (2) Plaintiffs incurred costs to mitigate data risk, including credit monitoring; (3) they overpaid for dental services because implicit promise that their data was secure was part of the service; and (4) the value of their PII was reduced because of potential exposure to hackers.
 - Still a split among the circuits in interpreting standing under *Spokeo* in data breach litigation; Sixth, Seventh, Ninth, and DC generally hold that the increased risk of future identify theft establishes standing at the motion to dismiss stage.
- *Yes, People Are Still Using '123456' and 'password' as their password*, <https://www.cnn.com/2020/11/19/tech/common-passwords-2020-trnd/index.html> (Nov. 19, 2020) (listing top 10 most common passwords still used today).

6. ***Salzberg v. Sciabacucchi (Blue Apron), 227 A.3d 102 (Del. Sup. Ct. Mar. 18, 2020).***

- Delaware Supreme Court upholds validity of designating federal courts as exclusive forum for actions arising under the Securities Act of 1993.
- By-product of *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061 (2018) and state court filings of Securities Act claims.
- Corporate solution = include a Federal Forum Provision (“FFP”) in your charter.

6. ***Salzberg v. Sciabacucchi (Blue Apron), 227 A.3d 102 (Del. Sup. Ct. Mar. 18, 2020).***

- FFPs fall within the management of business and affairs and relationship with stockholders.
- FFPs enhance flexibility and achieve judicial economy.
- FFPs do not violate any state or federal laws or policies.
- Significant ruling for securities litigation, for now.
 - *Facially* valid vs. *as applied* basis.
 - “Perhaps the most difficult aspect of this dispute is not with the facial validity of FFPs, but rather, with the ‘down the road’ question of whether they will be respected and enforced by our sister states.”

7. *Stiner v. Amazon.com, Inc.*, No. 2019-0488, 2020 Ohio LEXIS 2205 (Oct. 1, 2020).

- Is Amazon a “supplier” under the Ohio Products Liability Act?
 - R.C. 2307.71(A)(15): a person who “sells, distributes, leases, prepares, blends, packages, labels, or otherwise participates in the placing of a product in the stream of commerce.”
- Third-party vendor required to:
 - “Source, sell, fulfill, ship, and deliver” products.
 - Ensure proper packaging and compliance with applicable laws.
 - Provide product description on Amazon marketplace.
 - Set the price.
 - Responsible for any non-conformity, defect, or recall.
- Compare to “Fulfillment by Amazon”: Amazon stores product and then packages and ships to buyer.

7. ***Stiner v. Amazon.com, Inc.*, No. 2019-0488, 2020 Ohio LEXIS 2205 (Oct. 1, 2020).**

- Catchall terms only embrace things of similar character: “supplier” requires some level of control over the product or preparation of product for use or consumption.
- R.C. 2307.71(A)(15)(b)(iv): a supplier does not include a person who acts only in a financial capacity with respect to the sale of a product.
 - Compare to strict liability of commercial lessor vs. finance lessor.
- Degree of control over vendors \neq control over product
 - *See Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, D.N.J. No. 17-2738, 2018 U.S. Dist. LEXIS 123081 (July 24, 2018) and *Fox v. Amazon.com, Inc.*, 930 F.3d 415 (6th Cir. 2019).
- Ohio Products Liability Act replaced public policy decisions regarding protection of public from accidents.

7. *Stiner v. Amazon.com, Inc.*, No. 2019-0488, 2020 Ohio LEXIS 2205 (Oct. 1, 2020).

- Does Amazon's retail dominance put it in the best position to compensate injured consumers and allocate those costs to itself and third-party vendors?
- Justice Donnelly: We remain in the Stone Age.
- Incentivize Amazon to use reputable merchants with safe products.
- "Closing the obligation gap in the Ohio Products Liability Act for actors like Amazon would ensure the utmost protection that Ohio consumers deserve. But as the majority says, such policy concerns are for the General Assembly, not this court, to address."

8. and 9. E-Discovery (*EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc.*, No. 19-5836/5838, 2020 U.S. App. LEXIS 12158 (6th Cir. Apr. 15, 2020), and *Alsadi v. Intel Corp.*, No. CV-16-03738, 2020 U.S. Dist. LEXIS 126153 (D. Ariz. July 17, 2020)).

- Yes, we've been here before.
- Under “new” Federal Rule of Civil Procedure 37(e), courts still have broad discretion to issue e-discovery sanctions.
- Higher courts (i.e., the Sixth Circuit) continue to give deference to lower courts when issuing adverse inference instructions.

8. and 9. E-Discovery (*EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc.*, No. 19-5836/5838, 2020 U.S. App. LEXIS 12158 (6th Cir. Apr. 15, 2020), and *Alsadi v. Intel Corp.*, No. CV-16-03738, 2020 U.S. Dist. LEXIS 126153 (D. Ariz. July 17, 2020)).

- ESI broadly construed.
- FRCP 37(e) trumps inherent authority—provides “uniformity to an area of the law that had been badly splintered by various courts’ reliance on inherent authority.”
- Mandatory adverse inference instructions require an intent to deprive.
- Do you have defensible preservation practices and are they being followed?

10. ???



Justice R. Patrick DeWine
The Supreme Court of Ohio



Technology, Legal
Professionalism and Our
Evolving Court System

Objectives

- Discuss how technological innovations developed during the pandemic may change the way our courts operate
- Review how the Ohio Supreme Court is reacting
 - Improving Court Operations Using Remote Technology (iCourt) Task Force
- Provide best practices on how attorneys should maintain professionalism during different scenarios while working in a virtual environment

***“Never let a
good crisis go
to waste”***



iCOURT TASK FORCE

The task force shall review Ohio courts' use of technology to ensure the continued and effective operation of the judicial system during the COVID-19 pandemic and make recommendations regarding the use of such technology in the future.

Specific duties

1. Examine precisely how courts have used technology;
2. Identify courts' various experiences with remote appearances and trials;
3. Survey judges and attorneys regarding their experiences and opinions with remote appearances and trials;
4. Identify best practices and technologies for local courts;
5. Identify barriers and challenges to the effective use of technology, such as limited internet access, wireless difficulties, costs, and equipment;

Specific duties (cont.)

6. Identify next steps;
7. Identify practices to safeguard procedural due process and access to justice when technology is used;
8. Identify rules that may need to be updated and modernized;
9. Address how to conduct remote criminal jury trials; and
10. Identify uses of technology that can be implemented to improve court efficiency and access to justice.

Timeline

November 2, 2020	• Survey sent to respondents
November 23, 2020	• Survey responses due
December 14, 2020	• December Task Force Meeting
January 8, 2021	• January Task Force Meeting
March 19, 2021	• March Task Force Meeting
•April 1, 2021	• Initial draft of report due to Task Force
•May 7, 2021	• Final draft of report due to Task Force
•May 14, 2021	• May Task Force Meeting
•June 1, 2021	• Report given to SCO's Public Information Office
•June 30, 2021	• Report due to Chief Justice O'Connor

iCOURT SURVEY

Dear Attorney,

Over the last several months, Ohio courts have been responsive to the COVID-19 pandemic by implementing innovative technological strategies to safeguard against the unnecessary delay of the administration of justice. As courts continue to navigate these unprecedented times, the Supreme Court of Ohio established the *Task Force on Improving Court Operations Using Remote Technology* (iCOURT) to review courts' use of technology to ensure the continued and effective operation of the judicial system and make recommendations regarding the use of technology in the future.

Specifically, the iCOURT Task Force was asked to survey justice system participants regarding their experiences and opinions with remote appearances and proceedings to help inform the task force's recommendations. The input of the stakeholders in our justice system will be essential to the work of the task force. Please complete this 8-minute [SURVEY](#). This survey is anonymous, and you are not required to provide your name or contact information.

In order to garner the experiences of litigants, we are also asking that you send your clients who have participated in a remote proceeding a separate survey ([CLIENT SURVEY](#)). Their feedback is essential to capturing everyone's perspectives. Again, this survey is anonymous. You can view the represented party survey [HERE](#).

The deadline to respond is Monday November 23rd. Please contact iCOURTSurvey@sc.ohio.gov if you have any questions.

Thank you for your time in this matter,

Hon. Rocky A. Coss, Highland County Common Pleas Court
iCOURT Task Force Chair

Courts' use of technology

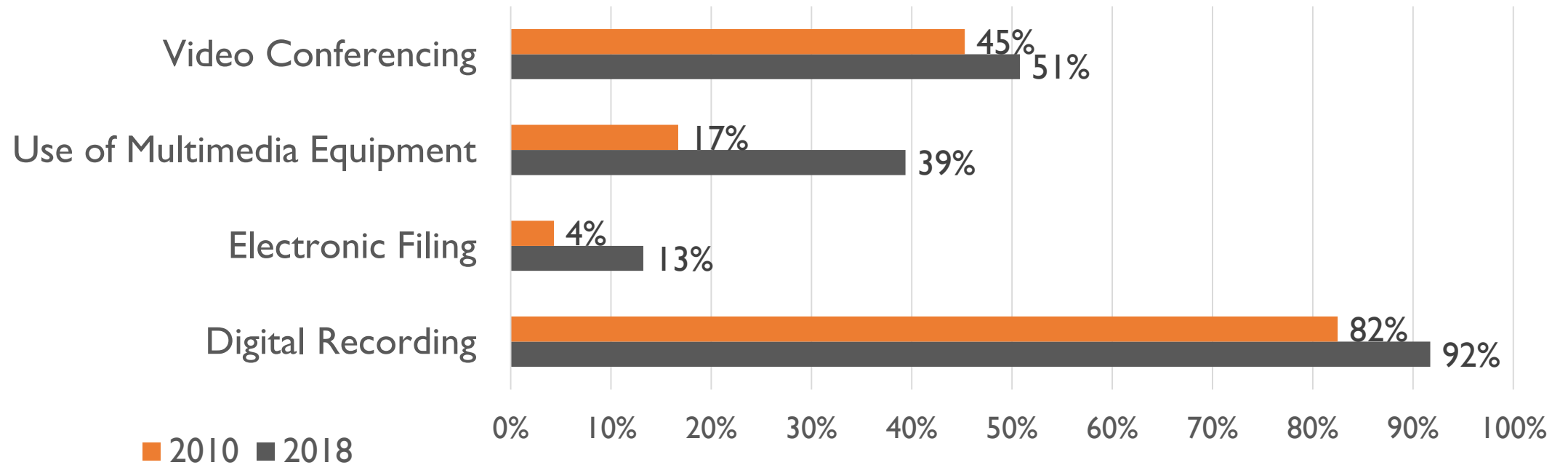
A look at where we are today





Use of technology over time

Inventory on Technology & the Courts Survey



Use of remote hearings: July 2020

Supreme Court Survey Findings:

86% of the 202
respondents were
conducting remote
hearings.

Court Type	Yes		No		Total
	Count	% Total	Count	% Total	
Appellate	8	72.7%	3	27.3%	11
Common Pleas	121	93.1%	9	6.9%	130
General only	30	93.8%	2	6.3%	32
General, DR	26	92.9%	2	7.1%	28
General, Prob	-	-	-	-	-
No Divisions	2	100.0%	-	0.0%	2
General, DR, Probate	-	0.0%	1	100.0%	1
DR only	13	100.0%	-	0.0%	13
DR and Juvenile	7	100.0%	-	0.0%	7
Juvenile only	8	100.0%	-	0.0%	8
Probate only	6	100.0%	-	0.0%	6
Probate, Juvenile	27	87.1%	4	12.9%	31
DR, Probate, Juvenile	2	100.0%	-	0.0%	2
Municipal/County	46	75.4%	15	24.6%	61
Municipal	40	76.9%	12	23.1%	52
County	6	66.7%	3	33.3%	9
Total	175	86.6%	27	13.4%	202

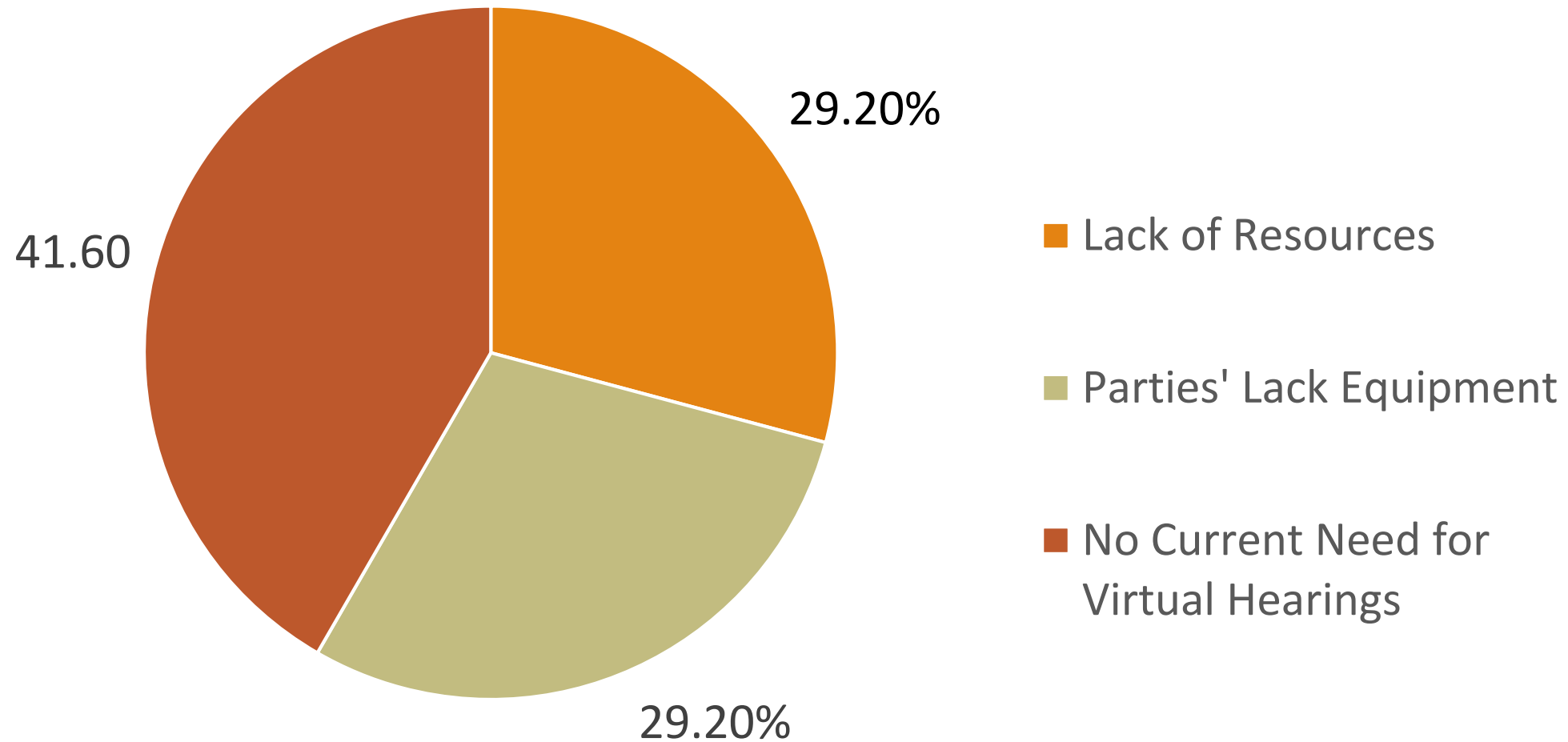
Remote hearing platforms

Supreme Court Survey Findings:

42.6% of the 202 respondents were using **ZOOM**. **11.4%** were using **WebEx**.

Virtual Hearing Platform	Responders	% of Total	Other Platforms
Zoom Meeting	86	42.6%	Cisco Telepresence
WebEx	23	11.4%	Direct link with jail (3 responders)
Skype	7	3.5%	Google Meet
GoTo Meeting	6	3.0%	IP address calling
LifeSize	6	3.0%	JAVS (2 responders)
Polycom	6	3.0%	RingCentral
BlueJeans	4	2.0%	Skype for Business
Microsoft Teams	4	2.0%	Spontania
Whereby	2	1.0%	Telephonic (4 responders)
Zoom Meeting; Polycom	2	1.0%	XProtect
CourtCall	1	0.5%	
GoToMeeting; Polycom	1	0.5%	
Zoom Meeting; CourtCall; Polycom	1	0.5%	
Zoom Meeting; GoTo Meeting	1	0.5%	
Zoom Meeting; GoTo Meeting; Skype	1	0.5%	
Zoom Meeting; Polycom; WebEx	1	0.5%	
Zoom Meeting; Skype	1	0.5%	
Zoom Meeting; WebEx	1	0.5%	
Other (please specify)	16	7.9%	
Total Responders	202	100.0%	

Why remote hearings were not held



Professionalism and Remote Hearings

- Strong Brief is still the foundation of good oral argument
- Make sure right technology/test it out beforehand
- Watch other remote hearings
- Take advantage of court practice sessions
- Think about your background
- Moot oral argument
- Have an IT person handy

Oral Argument Day

- Sit or stand
- Wear professional clothing
- Unmute/mute
- Address the court as normal
- Please answer the questions
- Try not to get distracted (or to be distracting)
- Remember, this is a conversation





zoom

Zooming

total host-visible participants: 14

Court Timer 14:28

Judge Pierre Bergeron

Justice Fischer

Justice Donnelly

Chief Justice O'Connor

Justice Stewart

Justice Kennedy

Justice DeWine

Stephen Hardwick

Mike Mendonshot

STEPHEN P. HARDWICK
REPRESENTING HARMON LINGLE AND MARK GROSSER

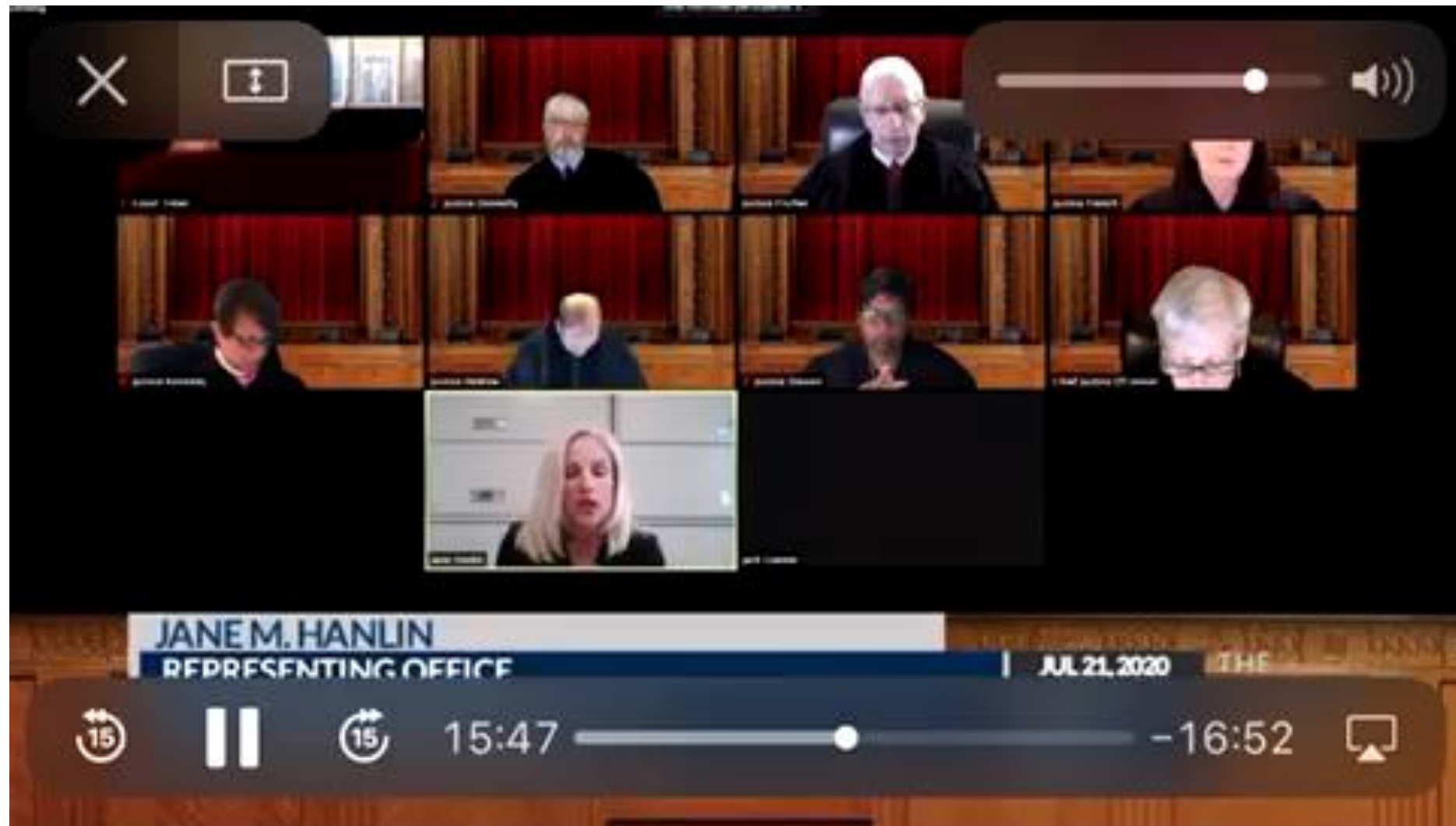
JUL 8, 2020
SUPREME COURT OF OHIO

THE OHIO CHANNEL 2957

01:00 / 32:39

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Chief Justice McCormack

2020-11-12 10:05:42



Courtroom Clerk



Judge Fisher



Judge Washington



Judge Thompson



Horace Bradshaw

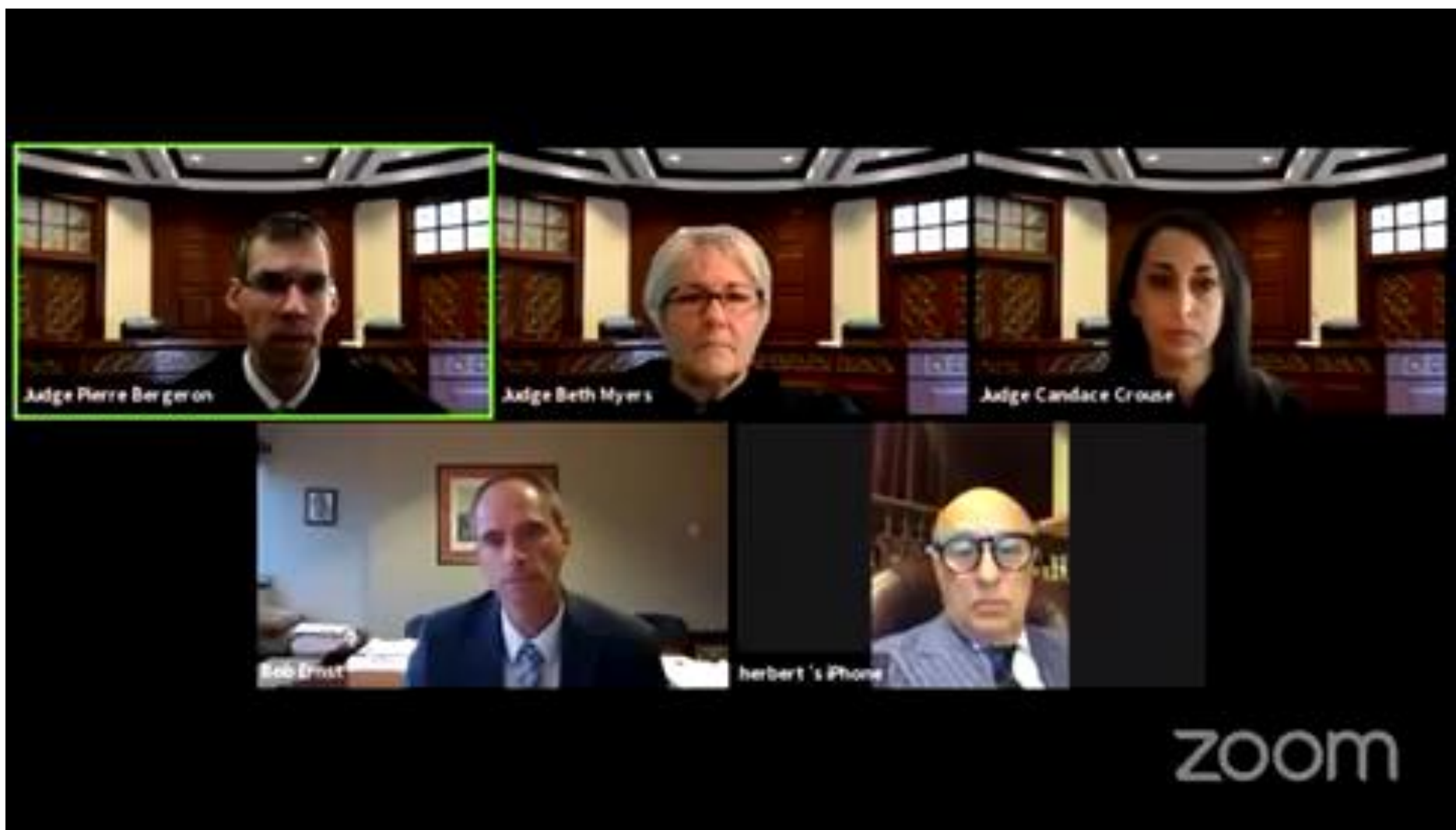


Anthony Costi



Geoffrey Simpson

zoom







Contact Information

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2020 Legal Update Seminar

10-Minute Break

Program Resumes
at 2:00 PM



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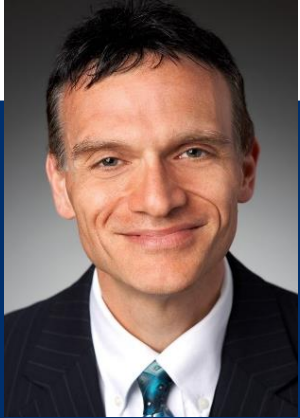


Stressed and Distressed:
Continuing to Manage the Financial
Disruptions of the COVID-19 Economy

Objectives

Session One:

- Examine mortgage loan default scenarios from lender and borrower perspectives under both a CMBS/REMIC type loan and a traditional commercial bank loan program
- Discuss regulatory matters that may constrain a lender's ability to restructure a loan
- Delve into federal tax issues arising from cancellation of indebtedness as a result of a restructuring



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Background

Impact of COVID-19 on Commercial Lending

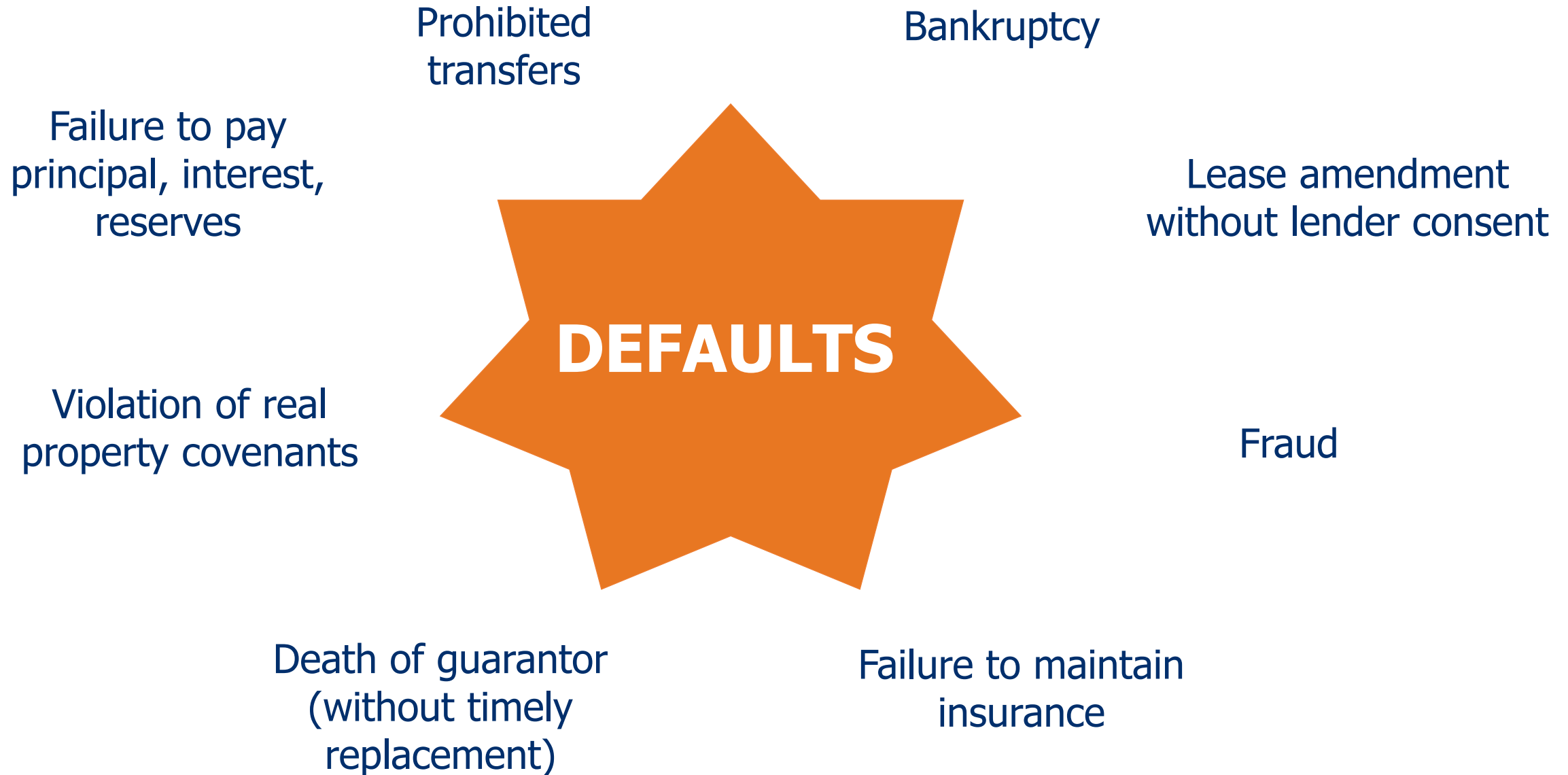
Borrower

- Cessation or significant decline in operations
- Short-term liquidity needs
- Going concern risks



Lender

- Increase in requests for loan modifications
- Increase in defaults
- Banking Innovation



Lender Response



- Cash Management / Sweep Event
- Receivership
- Foreclosure

Impact on Guaranteed Obligations

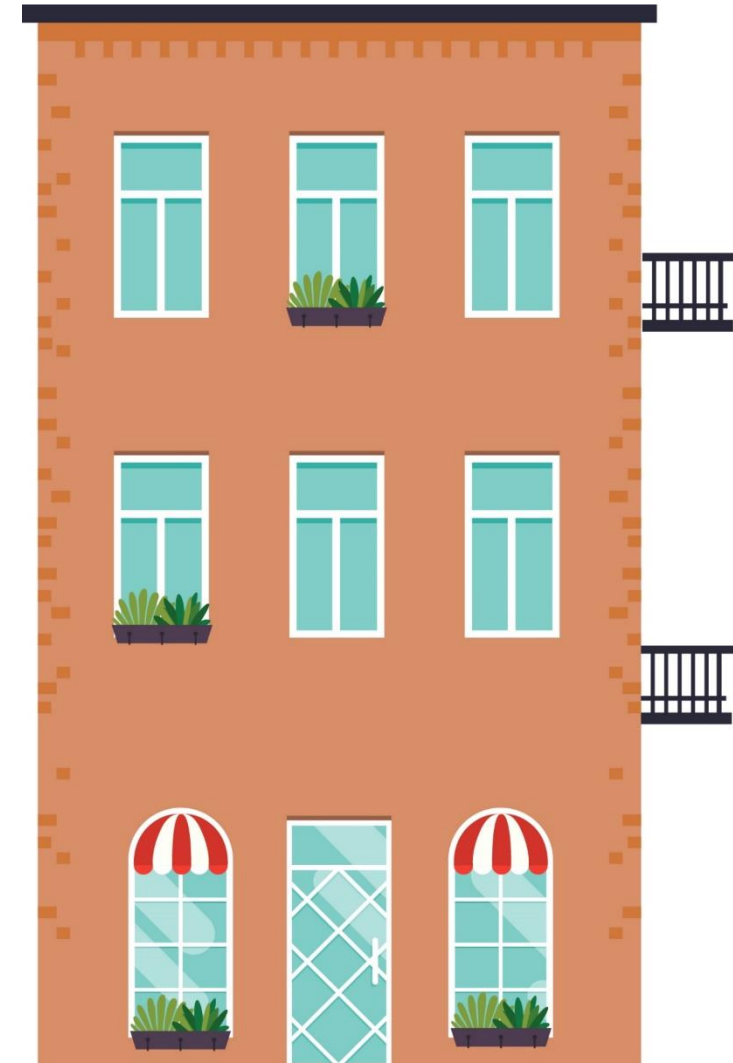
Nonrecourse Carveouts

Liability for Lender Losses

- Breach of reps
- Waste of property
- Misapplication of property revenues
- Failure to pay taxes, insurance
- Failure to provide financials
- Lease amendments without lender consent

Acceleration of Debt

- Bankruptcy, receivership
- Prohibited transfers
- Violation of SPE provisions
- Fraud, willful misconduct



Remedies

Lender and Borrower Constraints

Lender

- Troubled Debt Restructuring
- Other Regulatory Constraints

Borrower

- Lender consent
- Terms of loan agreement and guaranty
- Cancellation of indebtedness income

Objectives

Session Two:

- Provide advice on managing anticipated credit risks with respect to customers and vendors
- Strategies for dealing with customer defaults
- Provide an overview of bankruptcy issues and potential litigation that businesses may face as a result of customer/vendor bankruptcy filings



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Stressed and Distressed:
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Managing Credit Risk Related to Your Customers and Suppliers

- Analyzing Credit Risks
- Use Your Credit Application Effectively
- Credit Enhancements



UCC Remedies When You Discover Your Customer or Supplier is Insolvent

- Adequate Assurance
- Reclamation
- Remedies for Repudiation or Breach

Bankruptcy Filings: Immediate Concerns

- Automatic Stay
- Doing Business with a Debtor-in-Possession
- Administrative Claims
- Reclamation
- Critical Vendors
- Proof of Claim

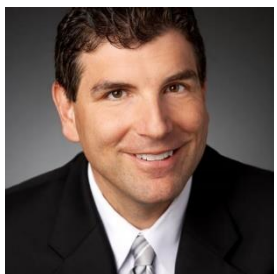
Bankruptcy Filings: Executory Contracts

- Assumption
- Assignment
- Rejection

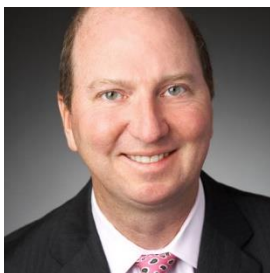
Bankruptcy Filings: Avoidance Actions

- Fraudulent Transfers
- Preference Action under Section 547
- Statutory Defenses

KMK Law Distressed Assets Task Force



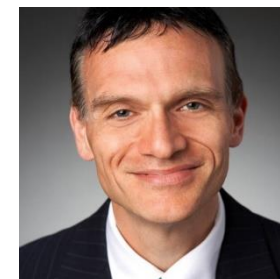
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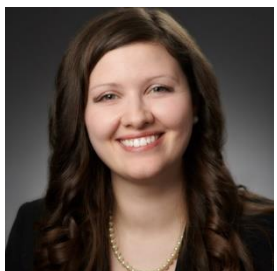
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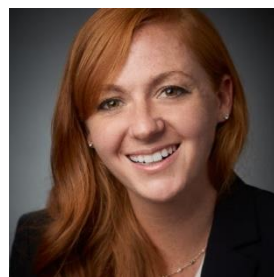
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2020 Legal Update Seminar

10-Minute Break

Program Resumes
at 3:10 PM



Justice Patrick F. Fischer
The Supreme Court of Ohio



Ethics Decisions of the Supreme Court 2020

Objectives

- Review lawyer disciplinary cases from 2020
- Identify considerations for practicing lawyers based on those cases
- Discuss possible upcoming changes in the grievance process



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COVID-19 Guidance
for Employers:
Adjusting to the “New Normal”

Topics

- Workplace Safety
- Employee Leave Issues
- COVID Immunity Laws
- Litigation Avoidance

Workplace Safety

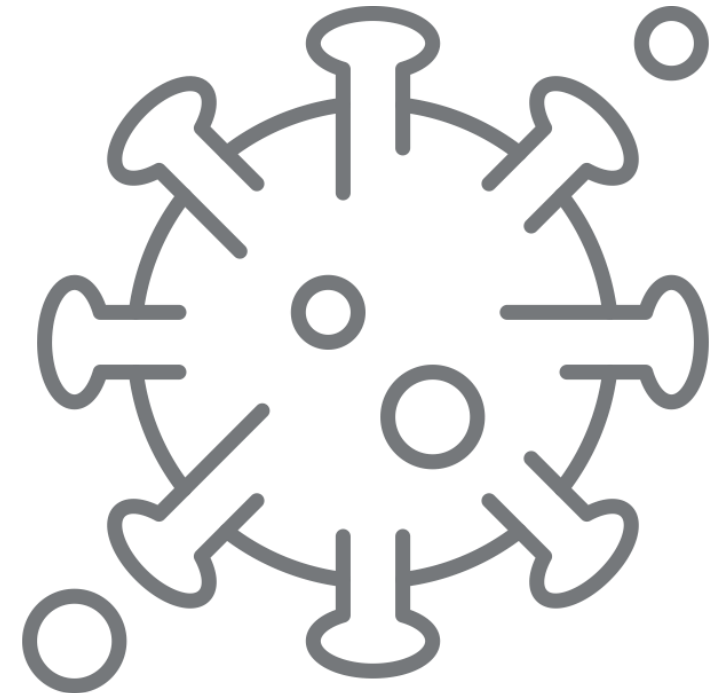
- Maintaining the Status Quo
 - Committees
 - Rules / Procedures
 - State / CDC Guidance

Workplace Safety

- When an Employee Tests Positive for COVID-19
 - Response Plan:
 - Contact Tracing Process
 - Notifications
 - Reporting
 - Protective Steps
 - Return to Work
 - Dealing with Health Departments

Workplace Safety

- Issues for Employers to Consider:
 - COVID-19 and Holiday Travel
 - COVID-19 Vaccine



Leave Issues

Families First Coronavirus Response Act (FFCRA)

Covers:

- Private employers with fewer than 500 employees
- Small businesses with fewer than 50 employees may qualify for exemption
- Leaves from April 1, 2020 – December 31, 2020

Leave Issues

Families First Coronavirus Response Act (FFCRA)

Provides:

- Two weeks (up to 80 hours) of paid sick leave at the employee's regular rate of pay where the employee is unable to work because the employee is quarantined and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- Two weeks (up to 80 hours) of paid sick leave at two-thirds the employee's regular rate of pay because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine), or care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19
- Up to an additional 10 weeks of paid expanded family and medical leave at two-thirds the employee's regular rate of pay where an employee is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

Leave Issues

Families First Coronavirus Response Act (FFCRA)

Prohibits:

- Retaliation - Employers may not discharge, discipline, or otherwise discriminate against any employee who takes paid sick leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.

Leave Issues

- Additional Leave Issues
 - Family Medical Leave Act (FMLA)
 - American with Disabilities Act (ADA)
- Employees Refusals to Work

Immunity Laws

- Proposed Federal Law:
 - SAFE TO WORK Act (S.4317)
 - [Safeguarding America's Frontline Employees To Offer Work Opportunities Required to Kickstart the Economy]
- State Laws – Ohio, Kentucky, and many others

Immunity Laws

- Typical Components
 1. Immunity for claims based on exposure, transmission, or contraction of COVID-19 in a place of business;
 2. Exception for conduct that is intentional, willful, reckless, gross negligence, etc.
- Case Study
 - Fernandez v. Tyson Foods, Inc.
 - Gross Negligence and Fraud
 - OSHA
- Limitation of Immunity Laws – Employers Beware

Litigation Avoidance

- COVID-19 Litigation Explosion
- Employer Actions:
 - Terminations and RIFs
 - Compensation Changes
 - Reassignment of Duties
 - Reorganization and restructuring
 - Leaves of Absence
 - Accommodation Requests
 - Separation of Employees Refusing to Return to Work

Litigation Avoidance

- COVID-19 Litigation Explosion

Litigation Exposure

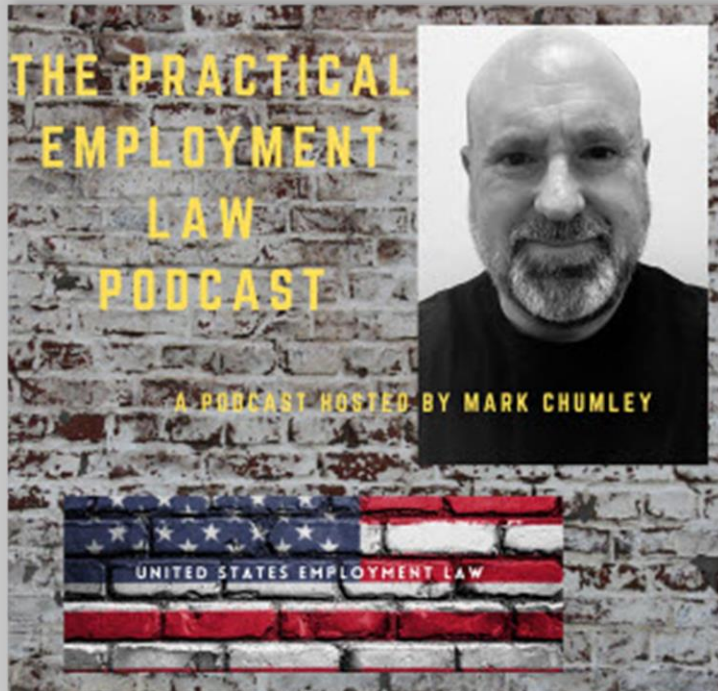
- Retaliation
 - FFCRA
 - FMLA
 - OSHA
 - ADA
 - Whistleblower Laws
- Discrimination
 - Title VII (race, color, religion, sex, or national origin)
 - ADEA (age)
 - ADA (disability)
- Statutory Claims
 - Wage and Hour
 - WARN

Litigation Avoidance

- Best Practices
 - Train Managers
 - Document Decisions
 - Anticipate Issues



The Practical Employment Law Podcast



- New podcast for managers, business owners, human resources professionals, attorneys, and others interested in learning about the employment law challenges facing businesses today.



More

Retirement Plan Considerations

- SECURE ACT
- CARES Act
- Fiduciary Rules
- Proposed legislation
 - HEROES Act
 - Securing A Strong Retirement Act of 2020

Health and Welfare Plan Considerations

- ACA Reporting
- Price Transparency
- CARES ACT
- Update of Outbreak Period
- Update on Flexible Spending Accounts
- Wellness Rules
- HEROES Act

SECURE Act – Distributions

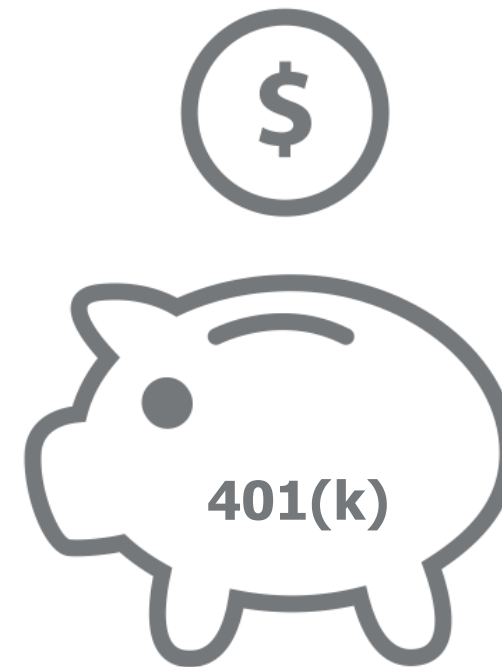
- RMD age increased from 70-½ to 72
- RMD for designated beneficiaries – 10 year limit
- Qualified Birth or Adoption
- Qualified Disaster Relief
- 401(k) Loans

SECURE Act – Safe Harbor Plans

- Auto enrollment increases to 15%
- Nonelective Safe Harbor Plans
 - Notices not required
 - May be adopted midyear
 - May be adopted after year end

SECURE Act – 401(k) Eligibility

- Begin counting service for long-term, part-time employees beginning on January 1, 2021
- Participation by January 1, 2024
- Special rule for vesting service



SECURE Act – Lifetime Income and Annuities

- Annual lifetime income disclosure
- Fiduciary safe harbor when selecting an annuity provider

SECURE Act – Penalties

- Late Form 5500
 - Increased from \$25 per day to \$250 per day
 - Maximum increased from \$15,000 to \$150,000
- Late Form 8955-SSA
 - Increased from \$1 per day to \$10 per day
 - Maximum increased from \$5,000 to \$10,000

EXPIRING PROVISIONS

- CARES Act
 - CRD loans expired September 23, 2020
 - CRD distributions expire December 30, 2020
 - Suspended loans must restart January 1, 2021
 - Minimum funding payments must be made January 1, 2021 (extended to January 4, 2021 by Notice 2020-82)



EBSA Notice 2020-01

- Plan loans and distributions
- Late employer contributions
- Blackout notices
- General fiduciary compliance

DOL Final Rule – Fiduciary Investment Selection

- Finalized October 30, 2020
- Plan fiduciaries must choose investment options based on financial considerations
- Plan fiduciaries should not choose investment options based on social or political considerations

HEROES Act – Retirement Plans

- Health and Economic Recovery Omnibus Emergency Solutions Act
- Pension funding relief
- Multiemployer pension reforms
- CARES Act relief extended to 2019 RMDs

Securing a Strong Retirement Act of 2020

- Requires automatic enrollment and automatic escalation
- Some significant exceptions including small employers and existing plans
- Allows self-correction of auto enrollment and escalation failures

Securing a Strong Retirement Act of 2020, cont.

- Increases RMD age from 72 to 75
- Provides an exemption from RMD rules for participants with balances below \$100,000
- Expands deferral of tax rules for sale to an ESOP to S corporations
- Increases catch-up amount at age 60
- Allows matching contribution to be used for student loan repayments

Securing a Strong Retirement Act of 2020, cont.

- Expands Section 403(b) plans
- Adds special eligibility credit for military spouses for small employers
- Increases tax credit for small employers adopting plans
- Allows eligibility of long-term, part-time employees after two years (change from SECURE Act eligibility after three years)

Securing a Strong Retirement Act of 2020, cont.

- Establishes an Office of the Retirement Savings Lost and Found
- Expands EPCRS and ability to self-correct
- Adds requirement to provide a paper statement

Update on ACA Reporting

- 2020 individual statement deadline relief
- No future deadlines will be extended
- No future good faith relief
- Caution - reporting may be more complicated because of COVID leaves

Final Price Transparency Rule

- Requires disclosure of cost-sharing information
- Employers have duty to monitor
- Plans subject to enforcement and civil penalties
- Effective January 1, 2022

CARES Act

- Group health plans required to cover COVID-19 preventive expenses without cost-sharing
- Telehealth allowed for HDHP
- OTC drugs permitted to be reimbursed for HSA, HRA and FSA

COVID-19 Testing and Vaccines

- Departments of Treasury, Labor and HHS issued interim final regulations
- Requires group health plans to cover COVID-19 testing and vaccines
- Coverage must be provided 15 days after recommendation

Outbreak Period

- Guidance applies from March 1, 2020 until 60 days after the end of the COVID-19 National Emergency
- No deadlines = less compliance?
- Creates administrative complexities

Health and Dependent Care FSA and HRA

- Mid-year changes
- Extension for 2020 claims
- Increase carryover limit
- Reimbursement of individual insurance

Dependent Care Assistance

- IRS Information letter addressed unused amounts in a DCAP
- IRS Notice 2020-29 allows flexibility to make mid-year changes
- Does not change rule requiring forfeiture of unused contributions and prohibiting retroactive changes

Wellness Programs

- EEOC is expected to propose new rules
- Would only allow “de minimis” incentive
- Allow ADA insurance safe harbor as an exception to the “de minimis” rule



HEROES Act – Health Plans

- Adds a one-time, eight-week special enrollment period to allow uninsured to enroll in an ACA Exchange plan
- Requires coverage of medically necessary COVID-19 related treatment with no cost sharing
- Amends COBRA notice rules to require plan administrators to provide information about ACA Exchanges



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Conclusion



Thank You

LIVE Zoom Webinar

Wednesday,
December 9, 2020

www.kmklaw.com