Fall 2021

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# LEGAL UPDATE

Colorado • Utah • Wyoming • Texas

## IN BRIEF

### COLORADO

- U.S. District Court, Colorado, determined financial losses incurred during the COVID-19 shutdowns imposed by local government do not constitute physical loss because the word physical relates to tangible things.

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### UTAH

- The Utah Supreme Court declares on-site operators have a duty to exercise reasonable care to prevent take-home exposure of asbestos to employee's co-habitants because of the foreseeability of injury and the superior position of the on-site operators to prevent the injury.

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### WYOMING

- The U.S. District Court, Wyoming, determined that an expert's position as a Wyoming Legislator was not relevant to the issues at hand and would not bias the jury.

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### TEXAS

- The Texas Supreme Court declined to assert liability to Facebook for failure to warn users of the dangers of sex-trafficking while using its website and found the CDA barred Plaintiff's negligence and strict liability claims.

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## COLORADO

### COURT GRANTS DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FINDING BUSINESS LOSSES FROM COVID-19 SHUTDOWNS DID NOT CAUSE "PHYSICAL LOSS" TO PLAINTIFF AND NO CIVIL AUTHORITY COVERAGE APPLIES.

*U.S. District Court, Colorado:* Plaintiff Sagome (Sagome), a restaurant in Aspen, Colorado filed a property claim with their insurance, Defendant Cincinnati Insurance Company (Cincinnati Insurance). Sagome sought coverage for financial losses incurred during the COVID-19 pandemic shutdowns imposed by the Colorado state government. Sagome argued the virus constituted physical damage to the property because COVID-19 could contaminate surfaces in the restaurant. Sagome noted Cincinnati Insurance's policy did not exclude viral contamination from covered losses. Sagome also noted the policy failed to define "physical loss" and "physical damage." Sagome argued the "ordinary meaning of the word 'physical' is not limited to permanent or structural impact on property."

The Court, taking the definition from Black's Law Dictionary, concluded the word "physical" relates to "material things" and therefore a "tangible alteration to the structure of the property at issue" must have taken place to trigger coverage under the policy. The Court held that any injury incurred by Sagome was not physical and was not covered under the physical loss provision.

Sagome also argued Cincinnati Insurance's policy's civil authority provision provides coverage for COVID-19 related business losses. This provision provided coverage "where civil authority orders: (1) prohibit access to the 'premises' due to (2) direct physical 'loss' to property, other than at the 'premises' caused by or resulting from any Covered Cause of Loss."

The Court also found this provision failed to cover the types of losses incurred from COVID-19 shutdowns because "no neighboring properties suffered physical loss triggering coverage under the Policy." Based on Sagome's failure to establish Cincinnati Insurance owed policy benefits, Cincinnati Insurance's motion for summary judgment was granted and Sagome's complaint was dismissed with prejudice.

*Sagome, Inc. v. Cincinnati Insurance Company, 2021 WL 4291016 (September 21, 2021, not yet released for publication in the permanent law reports).*

## IN THIS ISSUE

## LACK OF IMPARTIALITY OF APPRAISER INVALIDATES ANY AWARD GIVEN AND STANDARD FOR IMPARTIALITY SHOULD BE BASED ON THE POLICY LANGUAGE.

*Colorado Court of Appeals:* A forty-nine-unit condominium sustained significant storm damage. The owners of the condominiums (Dakota) filed two claims with Owners Insurance Company. The parties were unable to agree on the amount of damage. Dakota then made a written demand for an appraisal in accordance with the appraisal provision in the insurance policy. The relevant provision stated that when a written demand is made "each party will select a competent and impartial appraiser" who will "select an umpire." The provision then provides that "[t]he appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding." The policy also "require[ed] the appraiser to be unbiased, disinterested, without prejudice, and unswayed by personal interest" and to "not favor one side more than the other."

Dakota hired Scott Benglen as a public adjuster to handle the claims. Benglen was working on a contingency basis. The adjuster retained Laura Haber as Dakota's appraiser. Haber's "contract included a fee cap provision that would limit her fees to 5% of the total replacement cost of value." Lines for initials included with this provision were left unmarked. Each party's appraisers submitted their estimates. The umpire used four contested categories in Owner's appraiser's estimates and Haber's estimates in the other two. One of Haber's estimates the umpire used was the largest contested category, about $3 million for roof repair. Haber and the umpire signed for the award and Owners paid it. Owners filed a motion to vacate the award under section C.R.S. 13-22-223, based partly on the claim that Haber was not an impartial appraiser.

The trial court denied the motion, based upon the determination "that appraisers aren't subject to the same impartiality requirements as umpires or arbiters but, instead are expected to base their decisions on their experience and investigation (much like expert witnesses)." The appeals court affirmed with a split decision. The Colorado Supreme Court reversed "concluding" the appeals court "had employed the wrong standard of impartiality" and "established the applicable standard for appraiser impartiality" should be based on the policy language. The Colorado Supreme Court remanded the case back to the trial court.

The trial court "issued new findings and conclusions finding that Haber wasn't impartial" based on Haber's "bias and advocating for Dakota," Haber's including later losses in her appraisal, and Haber's close association with Benglen (Dakota's adjuster) along with the fee cap agreement. The appeals court affirmed.

*Owners Insurance Company v. Dakota Station II Condominium Association, Inc., 2021 WL 377866 (August 26, 2021, not yet released for publication in permanent law reports).*

## JURY FINDS UBER DRIVER IS AN AGENT AND NOT AN EMPLOYEE OR INDEPENDENT CONTRACTOR.

*District Court, Denver County:* Plaintiff Dispenza was injured when Defendant Bushaalah's car ran over his leg. Dispenza was getting into the car with a group of friends when Bushaalah, an Uber driver, started to drive forward and the car rolled over Dispenza's lower right leg. Dispenza then entered the vehicle and went to dinner with his friends and did not seek medical attention until the next day.

Dispenza later sued Bushaalah for negligence and Defendant Raiser, d/b/a/ Uber under theories of respondeat superior and agency. Dispenza alleged he sustained knee and hip injuries and would require future surgery. Dispenza also alleged he would need knee surgery at a cost of between $68,000 to $100,000 and future hip replacement at a cost of approximately $500,000. Defendant Raiser denied Bushaalah was acting as an employee or agent at the time of the incident.

The jury found that Bushaalah was not an employee of Raiser, but was acting as an agent within the scope of his agency at the time of the incident. The court entered judgment for the plaintiff and against the defendants jointly and severally totaling $911,734.79 ($674,000 plus prejudgment interest of $237,734.79).

*Dispenza v. Bushaalah, and Raisser, LLC d/b/a Uber (2020 CV 33792).*

# Utah

## ON-SITE OPERATORS HAVE A DUTY TO EXERCISE REASONABLE CARE TO PREVENT TAKE-HOME EXPOSURE TO ASBESTOS OF EMPLOYEE'S CO-HABITANTS.

*Supreme Court of the State of Utah:* During the 1960s and 1970s Plaintiff Larry Boynton worked at numerous job sites where he was exposed to asbestos. Larry was employed as a laborer for Kennecott Utah Copper, LLC ("Kennecott") from 1961 to 1964. From 1976 to 1978, Larry was employed by Phillips66/ConocoPhillips's ("Conoco") oil refinery.

During his time at Kennecott, Larry's "duties included cleaning up discarded pipe insulation that may have contained asbestos." He also worked near Kennecott employees that "scraped, sawed, and swept asbestos insulation and mixed asbestos cement." These activities "released asbestos dust into the air" where Larry was working. At Conoco "employees allegedly removed asbestos pipe insulation and let it fall to the ground." Later employees would "sweep the discarded insulation during cleanup." Each activity "generated asbestos dust" in the area where Larry worked. Neither Kennecott nor Conoco "warned Larry about the dangers of asbestos."

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After work Larry would drive home in the family car, "enter the home wearing his work clothes, spreading asbestos dust" and exposing the dust to Barbara Boynton, Larry's wife. Barbara would then launder his clothes, shaking the dust off before washing. On February 4, 2016, Barbara, Larry's wife of almost fifty-four years, was diagnosed with malignant mesothelioma and died from the condition on February 27, 2016. Larry sued three job site operators, including Kennecott and Conoco, asserting strict liability and direct-liability negligence for exposing his wife to asbestos dust. Kennecott and Conoco moved for summary judgment arguing that it had no legal duty to Barbara.

The Supreme Court of the State of Utah found that during the time Larry worked at the subject job sites, the dangers of asbestos were becoming well known. The Court further found that the site operators knew about the toxicity of asbestos and therefore could foresee the risks of take-home exposure of such. The Court also found that Kennecott and Conoco were in the best position to prevent the loss. The Court held this knowledge, foreseeability, and "superior position" created a duty for the job site operators to prevent injury from take-home exposure.

*Boynton v. Kennecott Utah Copper, LLC, 2021 WL 3418401 (August 5, 2021, not yet released for publication in the permanent law reports).*

## STANDARD FOR MANUFACTURER WARNINGS MODIFIED: WARNING MUST INCLUDE A LEVEL OF SPECIFICITY JUSTIFIED BY THE MAGNITUDE OF THE RISK.

*Supreme Court of the State of Utah:* During a fishing trip at a reservoir in Morgan County, Utah, Craig Feasel, a passenger on a bass fishing boat, was severely injured "when repeatedly struck by a boat propeller after he . . . [was] ejected into the water." Monty Martinez, who was operating the boat, was also ejected into the water. Martinez was not wearing the stop switch lanyard provided by the manufacturer at the time of the incident. The unmanned boat's engine continued to run, causing the boat to run in circles through the water, trapping and striking Feasel repeatedly.

Feasel sued Tracker Marine LLC ("Tracker"), the boat manufacturer, and Brunswick Corporation ("Brunswick"), the engine manufacturer, alleging they failed to adequately warn the driver of the dangers of not wearing the lanyard. Feasel also claimed Defendants failed their duty to warn boat passengers of the danger. Defendants "argued that the warnings they provided were standard in the industry" and thus they were not liable for Feasel's injuries.

Tracker's warnings consisted of "notices placed in the boat as well as in each company's owner's manual." The warning in Tracker's manual "contained a description of the lanyard and a warning label indicating that the lanyard should be tested, used, and replaced if not functioning" though it "did not expressly state what harm may arise." Another section of the manual did indicate that "failure to abide by the warning may result in serious bodily injury or death." Tracker also included "[s]everal checklists" to follow before operating the boat that mentioned the lanyard. "But the lanyard was not mentioned in the passenger-safety discussion, the emergency procedures section, or the person overboard subsection." Nor did the manual "include any information concerning" the "circle of death." The Court found that this "circle of death" phenomenon, where an unmanned boat turns sharply to the right potentially trapping "the ejected driver or passenger in its circle, causing the propeller to repeatedly strike and cause serious injury or death" was known in the industry.

Brunswick's "manual explained that the purpose of the stop switch lanyard was to stop the engine if the driver fell overboard or moved too far away." The manual did state "that ejection was more common in some boats (like bass boasts)" and "noted that when the stop switch was activated, the boat" would "coast for some distance" but would "not complete a full circle." The manual "further stated that 'while the boat is coasting, it can cause injury to anyone in the boat's path.'" However, Brunswick's manual failed to include any information concerning the "circle of death" phenomenon.

The boat itself had only one notice regarding the lanyard, "a checklist of things the driver should do before starting the engine." This checklist advised the driver to ensure the lanyard switch was "operational and securely fastened."

The district court granted summary judgment on behalf of Tracker and Brunswick, finding that there already were numerous warnings Martinez was aware of and failed to heed. The court of appeals reversed concluding the warnings were not adequate under the *House* standard found in *House v. Armour*, (929 P.2d 340 Utah 1996). The Supreme Court of the State of Utah modified the third prong of the House standard, adding the warning must be of an intensity and at a level of specificity justified by the magnitude of risk, and remanded the case back to the district court.

*Feasel v. Tracker Marine LLC, 2021 WL 3557633 2021 UT 4 (Utah, August 12, 2021).*

# Wyoming

## EXPERT'S POSITION AS A WYOMING LEGISLATOR IS NOT RELEVANT TO THE CASE AND THEREFORE DOES NOT EXCLUDE HIM FROM TESTIFYING; EXPERT'S EXPERIENCE AND KNOWLEDGE QUALIFY HIM AS AN EXPERT WITNESS.

*U. S. District Court, Wyoming:* While staying at a cabin at Jenny Lake Lodge, Plaintiffs Dian Hartley, Patrick Crofoot, Taylor Hartley, and Drew Wamser were awoken by bats flying about their cabin. Crofoot was bitten by a bat while attempting to shoo it out of the cabin. All four Plaintiffs were subsequently treated for rabies. None of the four contracted rabies.

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Plaintiffs sued Jenny Lake Lodge and Grand Teton Lodge Company for negligence, negligent misrepresentation, negligent infliction of emotional distress and promissory estoppel. Plaintiffs designated Patrick Sweeny as their liability expert in hospitality and hotel management. Jenny Lake Lodge and Grand Teton Lodge Company moved the court to exclude Sweeney's testimony, arguing his testimony and opinion were not relevant and could bias the jury.

Defendants asserted Sweeney had no experience regarding operating a resort in a national park and pointed to Sweeney's testimony that his only experience in pest mitigation is removing pigeons from an urban hotel. Defendants further argued Sweeny could not give his opinion because of the specialized knowledge and experience required to operate a resort, such as at Jenny Lake Lodge. Lastly Defendants argued that Sweeney's position as an elected Wyoming official could potentially bias the jury.

Plaintiffs argued Sweeney's experience in hotel management for over 40 years qualified him to give expert opinion and testimony on the standard of care owed to hotel guests. Plaintiffs further noted Sweeney has had experience as a general manager of several hotels, as well as positions on the Wyoming Travel and Tourism board and the Wyoming Lodging and Restaurant Association. Plaintiffs contended that Sweeney's position as an elected official would not bias the jury and furthermore argued it was not proper for the court to consider bias and prejudice when deciding if an expert should be stricken.

The Court found that Sweeney's years of experience, education and, training in the standard of care owed to guests qualified him as an expert, noting the liberal standard Wyoming courts have used to determine if experts are qualified. The Court also determined that Sweeney was a reliable witness based on his sound methodologies. The Court noted that Defendants could attempt to sway the jury otherwise during trial.

The Court further found Sweeney's position as a Wyoming Legislator was not relevant in the present case and therefore did not exclude him from testifying. The Court also found his testimony would assist the jury since his experience and knowledge is not within a juror's common knowledge. The Court held that while Sweeney could testify "regarding industry standards and practices and discuss Defendants' actual conduct" he was excluded from "concluding Defendants' conduct caused the accident, violated the law, were negligent, or offer any other improper legal conclusions" as prohibited under Rule 702.

*Hartley v. Jenny Lake Lodge, Inc., 2021 WL 3914263 (June 18, 2021).*

## Texas

### CDA MAY NOT BE USED AS A WAY TO IMPOSE LIABILITY TO INTERACTIVE WEBSITE PROVIDERS FOR FAILING TO WARN USERS OR IMPLEMENT SAFEGUARDS.

*Supreme Court of Texas:* Three Plaintiffs brought suits against Facebook alleging Facebook was liable for the injuries they incurred when they became victims of sex trafficking after becoming "entangled with their abusers through Facebook." The Plaintiffs brought claims of negligence, gross-negligence, negligent-undertaking, and products-liability claims against Facebook. Plaintiffs also brought "claims under a Texas statute creating a civil cause of action against those who intentionally or knowingly benefit from participation in a sex-trafficking venture."

Facebook moved to dismiss all claims, contending they were "barred by . . . the federal "Communications Decency Act" ("CDA"). The CDA prohibits treating interactive website providers "as the publisher or speaker of any information provided by another information content provider" and thus shields the interactive website providers from liability for the actions of its users.

Plaintiffs contend that because they "were users of Facebook . . . the company owed them a duty to warn them or otherwise protect them against recruitment into sex trafficking by other users." Plaintiffs argued that because they did not allege Facebook was liable as a "publisher" or "speaker", but instead liable for its failure to "implement any safeguards to prevent" the sex trafficking or "warn of the dangers," their claims were not barred by the CDA.

The Court agreed with Facebook stating that the CDA does not hold "internet platforms accountable for the words or actions of their users." The Court did note that while "Congress recently amended [the CDA] to indicate that civil liability may be imposed on websites that violate state and federal human-trafficking law" this amendment applied to "internet companies whose own actions – as opposed to those of their users – amount to knowing or intentional participation in human trafficking." The Court declined using the CDA as a way to impose liability to interactive website providers for failing to warn users or implement safeguards.

*In re Facebook, 625 S.W.3d 80 (Tex. 2021).*

### UNDER THE TEXAS PRODUCTS LIABILITY ACT, "SELLERS" APPLIES ONLY TO PERSONS OR ENTITIES THAT HOLD OR RELINQUISH TITLE WHEN ENGAGED IN DISTRIBUTING OR PLACING PRODUCTS IN THE STREAM OF COMMERCE.

*Supreme Court of Texas:* The McMillans bought a remote control on Amazon.com that was sold by a third-party retailer. Close to a year later the McMillan's nineteen-month-old daughter was somehow able to open the remote's battery compartment and swallowed the "button battery" included with the remote. Doctors were able to surgically remove the battery, but the "battery fluid caused permanent damage to the child's esophagus." The McMillan's informed Amazon about the incident. Amazon suspended the third-party merchant's account and "removed the remote from its website." Morgan McMillan subsequently sued Amazon and the

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third-party retailer alleging "strict liability for design and marketing defects" among others. Amazon "moved for summary judgment on the ground that it was not a seller of the remote and therefore could not be held strictly liable."

McMillan argued that Amazon "was a non-manufacturing seller" and therefore liable under the Texas Products Liability Act. While the Act does not generally apply to non-manufacturing sellers, "an exception applies when the manufacturer is not subject to the jurisdiction of the court." Because Mcmillan "had alleged that [the third-party retailer] was the manufacturer, and [the third-party retailer] did not make an appearance, the federal district court concluded that McMillan had . . . trigger[ed] the exception."

The district court thus denied Amazon's motion for summary judgment concluding that: "(1) Amazon's role as a service provider did not preclude it from also being a seller . . . (2) Amazon's possession and control of the remote was evidence that it engaged in the business of placing the product in the stream of commerce . . . (3) Amazon's lack of title did not preclude it from being a seller . . . and (4) Amazon's relationship to the manufacturer aligned with the policy justifications for strict liability." The Fifth Circuit then certified the question of whether Amazon is a "seller" under the Texas Products Liability Act to the Supreme Court of Texas, finding there was no controlling Supreme Court precedent.

The Supreme Court of Texas confirmed, that under the Texas Products Liability Act (Chapter 82), a non-manufacturing seller is not liable unless one of the exceptions applies. The Court found that "Chapter 82 is a liability-restricting statute" and "does not expand the pool of potentially liability non-manufacturing sellers." The Court, disagreeing with the federal district court, held that "when a product-related injury arises from a transaction involving a sale, sellers are those who have relinquished title to the allegedly defective product at some point in the chain of distribution." The Court thus held that "[b]ecause McMillan obtained the remote through a transfer of title for a price, and Amazon did not hold or relinquish title at any point in the remote's distribution chain, Amazon was not 'engaged in the business of distributing or otherwise placing the remote into the stream of commerce [and] . . . therefore, Amazon is not a chapter 82 seller under Texas law."

*Amazon v. McMillan, 625 S.W.3d 1010 (Tex. 2021).*

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