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**TortSource: Summer 2018**

**Contents**

Lessons from *Heinz*: The Harsh Reality of Rescission of an Insurance Contract  
*By Jennifer L. Meeker*  
3

*ExxonMobil Corp.*: How Indemnity Obligations May Limit Contractual Insurance Requirements  
*By Seth D. Lamden*  
6

Does Counterclaim Litigation Exhaust a SIR? The *Visionaid* Effect  
*By Eric Hermanson*  
9

Securing Insurance for Social Engineering Exploits  
*By Roberta Anderson*  
12

TIPS Leadership Academy: 12 Years and 10 Classes Later  
*By Matthew J. Evans*  
14

“When I Was a New Lawyer“: Roy Cohen  
*TortSource Interview with Incoming TIPS Chair Roy Cohen*  
15

Tax Consequences of NDAs for Sexual Harassment Settlements under the 2017 Tax Cuts and Jobs Act  
*By Kati Sanford Goodner*  
18

*How to Succeed as a Trial Lawyer, Second Edition,* by Stewart Edelstein  
*Reviewed by Molly E. Meacham*  
20

Meeting Round-Up: TIPS Section Conference in Los Angeles  
*By Christopher Kenney*  
22

“My Amelia Island“: TIPS Fall Leadership Meeting  
*By Madeline Meacham*  
23

Copyright  
24

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2
Imagine the following: You are a new risk management professional at your company tasked with procuring insurance. You answer each question on the application in good faith and faithfully pay the premiums. Eventually, the company suffers a loss. You tender the claim and discover that the insurer seeks to rescind the policy for misrepresentations made on the application. The court agrees with the insurer, and finds that you are not insured after all.


**What is Rescission?**

Rescission of an insurance contract for misrepresentations made on an application for insurance allows the insurer to declare that the policy was never in effect, the result being that coverage for a claim, when tendered by an insured to an insurer, is not covered. International Risk Management Institute, Inc., Glossary, Rescission. www.irmi.com/term/insurance-definitions/rescission.

Thus, as the U.S. Court of Appeals for the Third Circuit affirmed in *H.J. Heinz*, when the insurer discovers a misrepresentation after the policyholder suffers a loss, rescission permits the insurer to void the contract that would otherwise provide coverage for the insured’s loss.

**Background: Heinz’s Application for Insurance**

H.J. Heinz Company (Heinz) makes and sells food products worldwide. In May 2014, Heinz submitted insurance applications for contaminated product insurance to Starr Surplus Lines Insurance Co. (Starr). Starr’s application asked the following questions:

- Has the Applicant, its premises, products, or processes been the subject of recommendations or complaints made by any regulatory body, or internal or third-party audit over the past 12 months, or have any fines or penalties been assessed against the Applicant by any food or similar regulatory body over the last three years?
- In the last 10 years, has the Applicant experienced a withdrawal, recall, or stock recovery of any products, or has the Applicant been responsible for the costs incurred by a third party in recalling or withdrawing any products, whether insured or insurable under an accidental and malicious contamination policy?

Heinz’s new global insurance director was responsible for filling out and certifying the answers on the application—and he alleged that he did so in good faith. He responded to the first question in the negative, and attached a spreadsheet detailing the company’s loss history from 1998 to 2013 in response...
to the second question. The spreadsheet disclosed only one loss over 10 years that was greater than the $5 million self-insured retention (SIR) that Heinz requested.

Two Starr underwriters determined that the requested $5 million SIR was appropriate. The policy became effective on July 1, 2014.

**Heinz’s Claim and Lawsuit**

Two weeks after the effective date of the policy, China’s food control agency informed Heinz that baby food Heinz manufactured in China was contaminated with lead. Heinz recalled the product. Heinz tendered the claim to Starr. During its investigation, Starr found an undisclosed loss by Heinz exceeding $10 million after discovery of excessive levels of nitrite in baby food also manufactured in China that pre-dated the policy.

When Starr informed Heinz that it was reserving its right to limit or withhold coverage under the policy, Heinz filed suit against Starr for breach of contract and bad faith, and sought a declaration that Starr must indemnify Heinz for the loss. In its answer, Starr countersued for rescission, alleging that Heinz failed to disclose previous contamination incidents on its insurance application, thereby rendering the policy null.

The parties agreed to litigate Starr’s counterclaim for rescission first. Heinz claimed the incorrect information communicated was an inadvertent error made by its new global insurance director. A Pennsylvania federal jury, acting in an advisory capacity, found that Heinz made material misrepresentations and omissions, but agreed that those errors were inadvertent. The jury also found that Starr waived its rescission claim.

The district court, however, found that it was not bound by the advisory jury's finding of waiver, and held that there was insufficient evidence that the insurer had knowledge of Heinz’s misrepresentations when it issued the policy. The district court entered judgment in Starr’s favor after concluding that Heinz’s material misrepresentations were sufficient to void the contract.

Heinz appealed, asserting that the district court erred because (1) Pennsylvania law, not New York law, applies to Starr’s counterclaim; (2) it applied the incorrect burden of proof; and (3) Starr waived its right to rescind.

**Affirmation of Rescission for Material Misrepresentation**

On appeal, the Third Circuit affirmed that a policy can be rescinded based on a material—albeit inadvertent—misrepresentation on an application for insurance.

The court first upheld the application of New York law after finding that the policy’s service-of-suit endorsement governed jurisdiction and did not supersede the unambiguous choice-of-law provision. The court also determined that the choice-of-law provision provided that the “validity” of the policy would be governed by New York law.

Next, the court held that it did not need to determine if New York law required rescission to be proved by a preponderance of the evidence, rather than the more demanding clear and convincing evidence standard, because the court found that Starr’s evidence met the clear and convincing evidence standard.
The Court found as follows:

The materiality of Heinz’s misrepresentation is self-evident. For the 10-year period identified in the application, Heinz disclosed only one loss in excess of a $5 million [self-insured retention]. In reality, however, Heinz experienced three losses exceeding a $5 million SIR, totaling more than $20 million . . . Heinz’s misrepresentations were of such magnitude that they deprived Starr of “its freedom of choice in determining whether to accept or reject the risk.”


The panel also found compelling Starr’s evidence that it would not have issued the same policy if the correct information had been disclosed on the application.

**Argument to Waive Rescission Claim Rejected**

Lastly, the appellate court rejected Heinz’s argument that Starr issued the policy despite sufficient knowledge of the misrepresentations and thus waived its rescission claim. As evidence, Heinz referred to emails indicating that one of Starr’s underwriters read an article about one Heinz loss and also was aware of another loss because it was disclosed in a prior application for a different kind of insurance policy. The district court found that “[t]hese items, without more, would not trigger a reasonably prudent insurer to follow-up further.” _H.J. Heinz Co. v. Starr Surplus Lines Ins. Co._, 2016 WL 374307, at *7 (W.D. Pa. Feb. 1, 2016). The appellate court held that the district court made no error, legal or factual, and also rejected Heinz’s argument that Starr failed to promptly assert rescission after a reasonable period of investigation. The five-month gap between when investigators knew of the previous losses to when Starr asserted rescission was “wholly unobjectionable.” _H.J. Heinz_, 2017 WL 108006, at *130.

The _Heinz_ decision is an important reminder to policyholders of the harsh reality of rescission. Applications for insurance matter, and misrepresentations made on them—even unintentional ones—are not tolerated. Policyholders should give the same care and attention to applications for insurance as they do in other important aspects of their business.
Most service contracts contain separate indemnity provisions and insurance procurement requirements, the latter of which often include an obligation that the contractor name its client as an additional insured on the contractor’s CGL policy. As the U.S. Court of Appeals for the Fifth Circuit’s decision in ExxonMobil Corp. v. Electric Reliability Services, 868 F.3d 408 (5th Cir. 2017), explains, in some instances a party’s contractual obligation to procure insurance—including payment of deductibles—may be limited to claims that fall within the scope of the indemnity agreement. This is an important consideration.

**Contractual Provisions and Additional Insured Endorsements Can Limit Scope of Additional Insured Coverage**

Named insureds, such as contractors, may want to protect their policy limits (and not have to pay additional deductibles) by not providing additional insured coverage that is broader than the scope of indemnity required by the contract. And putative additional insureds, such as project owners, will want the broadest scope of additional insured coverage possible to protect and supplement their own insurance program policy limits, especially if the contract only provides limited indemnity. Along these lines, they will want to try to get the fullest benefit of additional insured coverage by having the named insured pay the full amounts of any deductibles in their own program as well as in the additional insured’s program, regardless of whether the claim falls within the scope of indemnity.

The ExxonMobil decision outlines how contracting parties may attempt to accomplish both goals, albeit not in the same contract. Whether they will succeed will depend not only on the contract language, but also on the applicable law and the language of the specific additional insured endorsement at issue. Nevertheless, the starting point in attempting to limit the insurance requirements to the scope of indemnity—or ensuring that they are not so limited—will always be the insurance-related provisions in the contract.

**Additional Insured Coverage May Not Be Limited to Contractual Indemnification Provisions**

The dispute in ExxonMobil arose out of an underlying jobsite injury. ExxonMobil hired Electric Reliability Services (ERS) to perform electrical work at one of its chemical refineries. ERS’s work was governed by a contract that required ERS to procure additional insured CGL coverage for ExxonMobil and pay deductibles underlying that insurance. The contract contained a separate, mutual indemnity provision that required ERS and ExxonMobil to indemnify each other for injuries “resulting from the [other’s] negligence.”
When an injured employee of ERS’s subcontractor sued ExxonMobil, ExxonMobil sought additional insured coverage from ERS’ CGL insurer and asked ERS to pay the policy’s $3 million deductible. ERS conceded that the insurance requirements, standing alone, required ERS to pay the deductible on ExxonMobil’s behalf. However, ERS contended that it was not required to pay the deductible because the worker’s injuries had been caused by ExxonMobil’s sole negligence and the indemnity provision relieved ERS of any obligation to pay the deductible for claims that arose solely from ExxonMobil’s negligence. In other words, ERS argued that its obligations to provide insurance, including payment of any deductibles, were no broader than its indemnity obligations. According to ERS, since its indemnity obligations would not have been triggered if ExxonMobil had brought a claim for indemnity, ERS’s insurance obligations were not triggered.

In making this argument, ERS relied on the Texas Supreme Court’s decision in In re Deepwater Horizon, 470 S.W.3d 452 (Tex. 2015), in which the court found that BP was not entitled to additional insured coverage under liability policies procured by Transocean, BP’s contractor, for liability arising out of the 2010 sinking of the offshore drilling platform Deepwater Horizon and based on language in the BP-Transocean contract requiring Transocean to provide additional insured coverage to BP “for liability assumed by Transocean under the terms of this contract.” In the contract, BP agreed to indemnify Transocean for subsurface pollution and Transocean agreed to indemnify BP for above-surface pollution. Because the additional insured endorsement at issue only provided coverage “where required,” the Deepwater Horizon court held that BP was not entitled to additional insured coverage for subsurface pollution because Transocean had not agreed to assume liability for subsurface pollution.

The Fifth Circuit in ExxonMobil held that Deepwater Horizon did not support ERS’s position because, unlike the insurance requirement in the BP-Transocean contract, which was limited to additional insured coverage “for liability assumed by Transocean,” the contractual obligation to procure additional insured insurance (including payment of the deductible) in the ERS-ExxonMobil contract had contained no language indicating that the parties intended the scope of the indemnity provision to govern the scope of the insurance provision. In explaining why ERS’s argument was incorrect, the ExxonMobil court observed that contractual insurance requirements and contractual indemnification provisions impose separately enforceable, independent obligations—unless the contract contains language linking the two obligations and specifying that the scope of the indemnity obligation explicitly limits the scope of the duty to provide additional insured coverage.

The Fifth Circuit noted that the contract provided that ERS “shall” provide insurance coverage and “shall” pay the applicable deductible without reference to the scope of liability under the indemnity provision. Because there was no limiting language in the contract at issue in ExxonMobil, the court found ERS liable to pay the deductible.

**Endorsements Limit Additional Insured Coverage to Contractually Required Coverage**

While the ExxonMobil decision focused on ERS’s liability to pay a deductible, the Deepwater Horizon decision had denied Transocean’s CGL insurer’s liability to provide additional insured coverage. Similar to the additional insured endorsement at issue in Deepwater Horizon, the additional insured endorsements issued in April 2013 by the Insurance Services Office (ISO) now specify that “[i]f coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.”

Although whether the Deepwater Horizon court correctly determined the scope of additional insured
coverage available to BP is subject to debate, policyholders should expect that insurers will continue to make arguments similar to those made by Transocean’s insurer in coverage disputes arising out of the interpretation of ISO’s April 2013 and later additional insured endorsements, as will contracting parties in disputes over the responsibility for paying deductibles.
An insured—say, an excavation contractor—arranges an excess policy with a cost-erosive self-insured retention (SIR) of, say, $1M per occurrence. Problems develop on a job. The owner says the contractor’s poor work has damaged a neighbor’s property. The owner sues the contractor. It also holds back payment under its contract, to offset the cost of resolving the neighbor’s claim and redoing other poor work it says the contractor performed.

The contractor denies liability. It notifies its insurer and hires counsel to defend the suit. It also files a counterclaim to recover the money the owner is withholding. Sometime later, the contractor finds it has paid its lawyers just over $1 million. Because the SIR is cost-erosive—i.e., it is reduced dollar-for-dollar by costs incurred in “defending” in the underlying proceeding—the contractor asks the carrier to take over its representation.

The carrier declines. It points out that the $1 million in claimed “defense” expenditures also includes amounts spent litigating the counterclaim—in other words, amounts spent to recover amounts due under the contract. It says these costs don’t qualify as costs of “defending” covered claims. It invites the contractor to break down the invoices—i.e., to allocate between the defense of the owner’s claim and the costs of litigating the counterclaim. But the contractor’s counsel says there’s no practical way to do so. The two claims are intertwined. They involve the same operative facts, and many of the same litigation activities.

Is the SIR exhausted? In the past, some courts have suggested it could be. These courts acknowledge—as they must—that satisfaction of a SIR is a condition precedent to the insurer’s defense obligation. They acknowledge it is the insured’s burden to show the SIR has been exhausted through “defense” payments. But these courts find the term “defense” to be ambiguous. In addition to the costs of defending the owner’s claims, they say, “defense” can encompass prosecution of compulsory counterclaims, or “affirmative claims which, if successful, have the effect of reducing or eliminating the insured’s liability.” Great West Cas. Co. v. Marathon Oil Co., 315 F. Supp. 2d 879 (N.D. Ill. 2003).

Other courts have agreed but on different grounds. They point to the insurer’s duty to defend both covered and noncovered claims, sometimes called the “in-for-one, in-for-all” rule. Where a counterclaim is “inextricably intertwined” with a plaintiff’s claim against the insured, Safeguard Scientifics, Inc. v. Liberty Mutual Ins. Co., 766 F. Supp. 324 (E.D. Pa. 1991), such that “defense costs [cannot] be separated by distinct legal theories,” see In re Feature Realty Litig., 634 F. Supp. 2d 1163 (E.D. Wash. 2007), these courts find it “only logical” that “where a dollar of loss is incurred as a result of both a covered claim and a non-covered claim, the dollar is covered —regardless of the dollar’s tangential benefit of settling, or defending against, the non-covered claim.” Id.
Last year, in *Mount Vernon Fire Ins. Co. v. Visionaid, Inc.*, 477 Mass. 343 (2017), Massachusetts’ highest court suggested an alternative position: one that may support the insurer’s position on SIR exhaustion. Although *Visionaid* was not a SIR case, it held that an insurer with a contractual duty to defend an insured was not required—under either the contractual language or the “in for one, in for all” rule—to pay the costs of pursuing an affirmative counterclaim on the insured’s behalf.

As to the meaning of the term “defense,” the court held:

> In common usage, to “defend” means to “deny or oppose the right of a plaintiff in . . . a suit or wrong charged.” . . . Accordingly, . . . the essence of what it means to defend is to work to defeat a claim that could create liability against the individual being defended . . . . [T]he duty to “defend” requires an insurer to work to defeat a claim brought against the insured, but not to prosecute an affirmative claim against the plaintiff in the underlying suit, no matter how advantageous that claim would be to the insured.

*Id.* at 348–49.

As to the “in-for-one, in-for-all” rule, the court held:

> Expanding the “in for one, in for all” rule . . . misaligns the interests of the party who stands to benefit from the counterclaim (the insured) and the party who bears the cost of prosecuting the counterclaim (the insurer). As a result, allowance of such a rule would increase the total number of counterclaims brought by insured parties . . . . If insurers were obligated to prosecute affirmative counterclaims on behalf of insured parties, “an insured would have every incentive—and little disincentive—to file suit, knowing that it could reap the benefits of success—however unlikely—while transferring the costs of an otherwise predictably unsuccessful suit onto its insurer.”

*Id.* at 352.

How will this holding apply in practice? The dissent in *Visionaid* offers one grim prediction. It says the insured may need two counsel—“one attorney appointed by the insurer [to] defend against some [claims] and an attorney retained by the insured [to] defend against others.” *Id.* at 356–57. It points to the possibility of conflict, inefficiency and waste.

But conflict is not inevitable. In some cases, the two attorneys may be able to amicably coordinate their activities. In other cases—where a claim is likely to be covered, and an insurer thinks a counterclaim would strengthen the insured’s negotiating position—the insurer may agree to prosecute the insured’s counterclaims (on a voluntary basis) despite the absence of any contractual obligation to do so. In still other cases, the insurer and the insured may agree to hire a single counsel, dividing the costs to reflect the benefits to each.

What *Visionaid* will require is timely cooperation between the insurer and the insured: specifically, an up-front discussion of case strategy, and what legal activities are (or are not) related to the “defense” of the claim, followed by good-faith negotiations as to how these activities are to be handled and paid for.

The same suggestion can be made for cost-erosive SIRs. If an insured wants to litigate affirmative counterclaims at the same time (and in the same proceeding) where its insurer is defending the claims of a third party, the insured should advise the insurer promptly of that fact. It should offer to discuss the need for the counterclaims, and the strategic benefit of pursuing them. At that point, the parties
can decide whether separate counsel make sense, or whether to reach some other solution: perhaps a negotiated agreement that allocates part of the counsel's fees to “defense,” and part to counterclaims, for purposes of SIR exhaustion.

The result need not be conflict and inefficiency. Quite the contrary: it may be clearer, more timely communication, a collaborative focus on litigation strategy—and an honest recognition of the parties’ divergent interests, with appropriate arms-length negotiation to reconcile and align those interests, to the benefit of all involved.
Social engineering exploits are maddeningly simple and often successful. The goal is typically to trick people into divulging sensitive information, transferring funds, downloading malicious code, or otherwise unwittingly circumventing security.

Social engineering is the current reality of risk—it’s pervasive seriousness punctuated by the fact that a phishing email precipitated Target’s massive data breach. Such exploits have exploded over the past few years and have cost U.S. companies billions of dollars. Yet many organizations remain uninsured, or underinsured, for this dangerous risk. Many organizations incorrectly assume that they are covered under their “cyber” insurance, or commercial crime insurance, the latter of which typically includes insuring agreements dedicated to protecting against “computer crime” and “funds transfer fraud.” But, absent a specific social engineering endorsement, many such exploits, including those involving transfers of funds, do not trigger the typical cyber insurance insuring agreements, and losses from such escapades also may be expressly excluded from coverage under cyber policies. For example, one popular off-the-shelf form excludes loss relating to claims for “the transfer or loss of money or securities from or to an Insured’s accounts or accounts under an Insured’s control, including customer accounts . . .”.

Resistance from Commercial Crime Insurers

Likewise, as to commercial crime insurance, insurers point to the “direct loss” and “directly resulting” verbiage present in many commercial crime insuring agreements and typically argue that social engineering exploits do not trigger coverage. They contend, among other reasons, that social engineering does not present a sufficiently “direct” loss because the victim acts of his or her unwitting volition—in contrast to a purposeful “hack” into the computer system. A typical insuring agreement may state, for example, that the insurer will pay for “loss of . . . money . . . resulting directly from the use of any computer to fraudulently cause a transfer . . .”.

Exclusions in crime policies also can be problematic, as illustrated by the recent decision in Aqua Star (USA) Corp. v. Travelers Casualty & Surety Co. of America, No. 2:14-cv-01368 (9th Cir. Apr. 17, 2018), an unpublished decision in which the Ninth Circuit affirmed summary judgment for the insurer, holding that a commercial crime policy exclusion (for “loss or damages resulting directly or indirectly from the input of Electronic Data by a natural person having the authority to enter the Insured’s Computer System”) barred coverage for a social engineering scheme in which the insured’s employees were tricked into authorizing several international electronic fund transfers to an overseas fraudster.

Email Phishing Schemes

Three other cases currently pending before the Second, Sixth, and Eleventh Circuits, each to address

DID YOU KNOW?

Securing Insurance for Social Engineering Exploits

By Roberta Anderson

Roberta Anderson practiced for 20 years with K&L Gates LLP before forming RAS Enterprise Risk Management Services LLC, of which she is owner and principal, in the Pittsburgh, Pennsylvania, area. In addition to helping clients successfully pursue contested insurance claims and recover insurance assets, she counsels clients proactively on complex underwriting and risk management issues. She may be reached at roberta@cyberenterpriseriskmanagement.com.
whether email “phishing” schemes trigger coverage under commercial crime coverage, will further develop the legal landscape on these issues. The cases are Medidata Solutions, Inc. v. Federal Insurance Co., No. 17-2492, 2018 WL 3339245 (2d Cir., July 6, 2018) (involving potential coverage for loss resulting from an email spoofing scam under a commercial crime policy that covers “direct loss of money, securities or property”); American Tooling Center, Inc. v. Travelers Casualty and Surety Co. of America, No. 17-2014, 2018 WL 3404708 (6th Cir. July 13, 2018) (involving potential coverage for a phishing loss also resulting from fraudulent spoofed emails under a commercial crime policy that covers the “direct loss” of funds “directly caused by computer fraud”); and Principle Solutions Group LLC v. Ironshore Indemnity Inc., No. 17-11703 (11th Cir. 2018) (involving potential coverage for loss resulting from a fraudulent email under a commercial crime policy that covers “computer and funds transfer fraud” losses).

In the meantime, the time to consider insurance is proactively, before a loss. Social engineering exploits present relatively new exposures that do not tend to fit neatly into traditional forms of coverage.

**Tips to Secure Coverage**

Here are three tips for securing coverage for social engineering exploits:

1. Identify the insurance policies the organization already has in place that may respond to social engineering exploits, which may include commercial crime, cyber, fidelity, and errors and omissions coverages, among others.

2. Consider purchasing additional, specialized social engineering coverage, which is frequently offered by endorsement to the above-mentioned coverages, but be careful to consider the scope of coverage, policy conditions, and exclusions, to ensure that the coverage reasonably meets the reality of risk, and does not present unreasonable hurdles to securing coverage.

3. Pay attention to sublimits, which are often applicable to social engineering coverage, to ensure that they are commercially reasonable.

Insurance is a valuable asset. Before an incident, companies are advised to carefully evaluate and address their risk profile, potential exposure, risk tolerance, the sufficiency of their existing insurance coverage, and the role of specialized coverage. Following an incident, companies are advised to carefully consider the best strategy for pursuing coverage in a manner that will most effectively and efficiently maximize the potentially available coverage across the insured’s entire insurance portfolio.
In the fall of 2006, after much planning, TIPS introduced the first Leadership Academy class in Pine Hurst, North Carolina. With the guidance of TIPS leaders like Peter Neeson, Peter Bennett, Ginger Busby, Janice Brown, and John Tarpley, the Leadership Academy met at the four TIPS meetings that year and has continued through the present. Twelve years later, the tenth class of the Leadership Academy for 2018–2019 is set to meet on Amelia Island in October.

The purpose of the Leadership Academy is to identify new, diverse young leaders and incorporate their skill sets into TIPS. Through the two Section meetings in the fall and spring, along with the ABA Midyear and Annual meetings, each themed meeting for the new Academy class will focus on topics ranging from personal development and service to the community to leadership in the profession. Equally important, each class brings together a group of 25 young lawyers who create life-long friendships and bonds through the experience. These classes have shared every aspect of life together ranging from professional successes to births of children.

A dozen years after the Academy’s inception, its graduates—now numbering in the hundreds—are found actively participating in almost every TIPS committee and task force, and many are contributing to the Section in leadership roles. The initial goals of the Leadership Academy were to bring new lawyers into TIPS and find places for them to use their professional skills. Those goals have been met, and the Section has benefitted significantly.

TortSource looks forward to welcoming the Leadership Academy of 2018–2019 to TIPS as the new class convenes for their first meeting at Amelia Island this fall. Board members anticipate working with them and TIPS in the years to come. More importantly, we look forward to participating in and sharing their future successes.
“When I Was a New Lawyer”: Roy Cohen

TortSource Interview with Incoming TIPS Chair Roy Cohen

Roy Cohen is a principal of Porzio, Bromberg & Newman, P.C., in Morristown, New Jersey. He is a senior trial lawyer with experience litigating and trying a wide variety of products liability, toxic tort, construction, environmental contamination, professional liability, premises liability, automotive and trucking, class action, and business litigation matters. He may be reached at racohen@pbnlaw.com.

TS: What inspired you to become a lawyer? And what did you do prior to becoming a lawyer?

Cohen: In college, I was looking for a path that would allow me to apply a passion for history, science, and technology, an innate curiosity about people and how things work, some inherent problem-solving skills, a love of words, and the need to serve in some counseling capacity. And so, it came to be that a career in the law seemed at the time to be a logical career path. More than four decades later, I can say it was a pretty darn good decision for a 20-year-old at Franklin & Marshall College in Lancaster, Pennsylvania.

TS: How did you become involved with the ABA and TIPS?

Cohen: During law school, one of my buddies was the rising chair of the ABA’s Law Student Division. He asked if I would serve as the Law Student Division representative on the Council of the Section of Legal Education and Admissions to the Bar. It was there that I got my first taste for bar association life. I liked the experience and the other Council members, who were legal lights like Bob McKay, Bob Kutak, and Sandy D’Alemberte. During my earlier years, I was active in the New Jersey State Bar Association and, in fact, founded its Product Liability and Toxic Tort Committee in 1986. Although I joined the ABA in 1983, it was not until 1988 that I was looking for a more national platform. Given my law school experience, the ABA—and more specifically, TIPS—seemed to offer the best home with a number of relevant opportunities. I called a lawyer in New Jersey who was serving as the chair of TIPS’s Self Insurers and Risk Managers Committee and asked how to get involved. He put me to work with a vice-chair appointment, and so began my path in TIPS that led to today.

TS: What is the benefit of a new lawyer becoming active with TIPS?

Cohen: TIPS offers new and young lawyers many opportunities, far more than any other organization I have been involved with over the years. The greatest benefit the Section offers to younger lawyers is its culture, one that offers an open and welcoming environment and provides every chance for development as a lawyer as well as a leader in the organization and beyond. Career enhancement, business development, résumé-building and credentialing, mentoring, leadership, education, fellowship, camaraderie, travel, and fun are all an integral part of this culture.

TS: What early career practices led to your success?

Cohen: Three things come to mind. First, my approach to important decisions has always been methodical (some describe it differently), but I have always thought that almost any problem can be solved or at least managed effectively by weighing the relevant options and reaching a considered
conclusion. And, once the decision is made, never look back. Second, I am inherently curious and so
have always asked a lot of questions—a trait that has served me well in virtually all aspects of being a
lawyer. Third, I knew litigation, and specifically trial work, was my calling as a lawyer, so I volunteered
to take on any case that the partners in my firm wanted to jettison. Because many of them were crappy
cases, I got to try most of them in my early years. The first such case was representing the plaintiff in a
rear-end car accident where the claim was that he could no longer play the classical harmonica after he
retired. The jury liked him, and I guess they also liked me, because we got a big verdict. The partners
were so impressed with the result that the cases kept coming. Be careful what you wish for—but,
fortunately, the cases kept getting better and bigger for me. Lastly, as a result of various experiences—
some controlled and some not—I have tried a significant number of cases for both plaintiffs and
defendants. Both make you a better a trial lawyer.

TS: What is your advice for a new lawyer seeking to acquire, retain, and nurture client
relationships?

Cohen: Although lawyer-client relationships can be complicated, the formula for success is pretty
simple. Core competence and credentialing is the first step: learn your craft and your business, and
then learn your client’s business, as well as what drives them. Know their expectations, and then exceed
them and key in on their needs as well. They want predictability (a/k/a no surprises) and expect loyalty
to them and their company. Clients also need to be confident in your advice and value fairness in the
relationship, including your billing practices. In the end, these long-term relationships are built on a
mutual respect and trust that pretty much will transcend everything else. If you can accomplish these
things, you will have many clients and friends for life.

TS: What gives you the most satisfaction?

Cohen: Many things qualify among those that give me great satisfaction as a lawyer. Some have
resonated with me for a long time, and I have come to value others over time. Helping clients resolve
their problems and being treated as a trusted advisor and part of the client team is probably at the top
of my list. Strategizing a case at the beginning and seeing it through to the exact anticipated conclusion
comes next. Mentoring friends and younger lawyers is something more recent for me, but that creates
equal satisfaction. And then there has been the lead-up to chairing the TIPS organization, which has
been a much more fulfilling experience for me than I anticipated. Talk to me in a year, but I am fairly
sure you will hear the same thing at the conclusion of my tenure.

TS: What would you most like to accomplish as TIPS chair?

Cohen: There is a lot to accomplish as we begin implementing the strategic plan I helped create two
years ago:

• Reshaping TIPS for the future, as the Section evolves as an organization. This is central to TIPS’s
  success.
• Planning the TIPS meetings over the next year. These include our Fall Leadership Meeting (Ame-
  lia Island, October 10–14) and the Section Conference in the spring (New York City, May 1–5,
  2019), which has become the Section’s main meeting of the year.
• Adding to our brilliant list of stand-alone, subject-matter-specific meetings, which are among the
  best in the industry.
• Expanding our already strong leadership team, from committee vice-chairs to TIPS officers.
• Staying focused on emerging issues, and helping our new and existing committees find ever better
  ways to serve members. One example is our new Cannabis Law and Policy Task Force.

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electronic database or retrieval system without the express written consent of the American Bar Association.
• Bringing another new concept to fruition: Our new Insurance Institute will take place in New York City on April 30, 2019.
• Initiating new groups to help implement our strategic plan goals: The Law Practice and Legal Department Management Task Force, Business Development and Networking Task Force, and Strategic Communications Task Force will all develop initiatives to help us provide and communicate member value in more meaningful and direct ways.

TS: What themes will you focus on for 2018–2019?

Cohen: The theme for TIPS over the next year will be “Raising the Bar” across the board in the areas of thought leadership, content quality and delivery, mentoring, messaging and communication, practice enhancement, and creating more member value. TIPS is still the only place where all the constituent groups come together for dialogue and continuing legal education on an ongoing basis. This dynamic brings all members of the Section to the same table, and I think that dialogue and interaction make the difference.

Roy Cohen’s Advice for New Lawyers:
• Credentialize yourself in your chosen area(s) of practice.
• Invest the time to hone your skills as a lawyer, whatever it is you want to do.
• Make friends inside and outside the legal profession, and pay attention to your family. These relationships will sustain you throughout your career and your life.
• Don’t be afraid to ask for help and advice from those around you; you will be surprised at how receptive everyone is when asked to provide guidance.
• Join TIPS, and then reach out to someone in leadership, including the chair; ask how to get active, and then do it.
Non-disclosure agreements (NDAs) are common practice in the world of litigation. Lawsuits are filed, a certain amount of discovery ensues, and the parties often reach a settlement agreement, which is almost always confidential. As attorneys, we make these settlements confidential, in theory, to protect all parties. In reality, NDAs are most often drafted to protect defendants who likely have been accused of all manner of horrible things, some of which may be true, some not.

While the threat of damages resulting from the breach of an NDA historically has prevented parties from breaching the confidentiality terms, in the era of the #MeToo movement, NDAs related to sexual abuse and harassment claims recently have become much less secure. Recognizing that many sexual abuse and harassment victims are coerced into signing such agreements under pressure from heavily lawyered and deep-pocketed employers, the validity of these NDAs has come under a much higher level of scrutiny, particularly as more victims of sexual abuse and harassment come forward to expose high-profile defendants and their employers.

NDAs and Tax Advice

Although litigators are typically comfortable drafting and negotiating NDAs, most litigators (except those of us who practice in the tax controversy realm) cringe at the thought of having to advise clients on anything remotely related to taxes. NDAs and taxes previously have not overlapped much, if at all, and attorneys defending and settling sexual abuse and harassment claims generally have been able to avoid having to consider how such a settlement might affect their clients from a tax perspective and could refer the occasional tax questions to a tax attorney or CPA. While tax issues are still best addressed by a tax professional, attorneys representing businesses facing sexual abuse or harassment claims need to be aware of the recent change in how settlements for such claims are treated for tax purposes from the standpoint of employers and defendants settling such suits.

Classification Changes under the 2017 Tax Cuts and Jobs Act

Historically, expenses directly connected with a taxpayer’s business—including litigation expenses, attorney fees, and settlements—were deductible under section 162(a) of the Internal Revenue Code. These section 162 expenses for ordinary and necessary expenses paid or incurred during the taxable year cover expenses ranging from salaries to rent payments to supplies and advertising and help reduce the taxpayer’s taxable income. Among the many changes ushered in by the 2017 Tax Cuts and Jobs Act (the Act), however, is a change to the classification of attorney fees, settlements, and payments resulting
from sexual abuse and harassment suits. Specifically, the Senate amendment to the Act establishes a
new subsection 162(q), which eliminates a business's ability to deduct settlements or payments and
eliminates attorney fees related to such settlements or payments when the settlement or payment stems
from a sexual harassment or sexual abuse claim and is subject to an NDA.

For businesses settling sexual abuse or harassment claims, the addition of subsection (q) and the
elimination of the ability to deduct the expense of sexual abuse or harassment settlements and attorney
fees in situations involving an NDA requires attorneys handling such claims to help their clients
navigate the decision-making process for how to structure release and settlement agreements. Clients
now must balance the desire for confidentiality and management of potential public relations issues
with the additional financial costs of no longer being able to deduct the settlement-related expenses
as ordinary and necessary business expenses. For small settlements, the client may determine that
the protection of confidentiality offered by an NDA outweighs the additional tax burden. For larger
settlements and hefty attorney fees, however, the additional taxes owed may cause the client to think
twice about whether or not confidentiality is worth the extra costs.
TIPS

BOOK REVIEW

How to Succeed as a Trial Lawyer, Second Edition,
By Stewart Edelstein

Reviewed by Molly E. Meacham

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The second edition of How to Succeed as a Trial Lawyer by seasoned trial counsel Stewart Edelstein is aimed at law students or litigators in the early stages of their career who are seeking practical advice on both the written and unwritten rules of trial practice. In this book, Edelstein harnesses his considerable trial experience gained over 40 years of practice, combining that with his decades of teaching civil litigation skills at Yale Law School and presenting CLE seminars. The result is a text that delivers on the title’s lofty promise. Any less-experienced attorney craving a reliable and readable reference manual should consume this cover-to-cover and keep it close at hand for later reference. Edelstein has created a crisp and practical guide that seeks to help attorneys become the mythological gryphon, assembling the best qualities of different animals (an eagle eye, dogged determination, ferreting out the truth) into a successful trial lawyer.

Readers who devoured the first edition, published in 2013, should consider updating to this second edition. As the author notes, the new edition is “updated, reorganized, and expanded” to address the recent significant revisions to the Federal Rules of Civil Procedure and the American Arbitration Association Rules for Commercial Disputes. In addition, Edelstein has added new sections or expanded existing sections on e-discovery, negotiation techniques, persuasive communications, work efficiency, and managing stress.

The author condenses trial practice into seven chapters, and then divides each chapter into intuitive subtopics, answering the most common questions new attorneys have for each. Client relationships are covered in detail in the first chapter, “Dealing with Clients,” as the author takes his readers from initial contact with a prospective client through formalizing and beginning the representation, and finally through strategies for delivering bad news or dealing with difficult clients. Chapter two walks through the unwritten rules of “Dealing with Others in Your Professional Life,” demystifying how to work and communicate with colleagues, witnesses, opposing counsel, judges, and others.

“Writing” in chapter three provides suggestions both technical and stylistic, such as writing to your audience, managing emails, and drafting pleadings and appellate briefs. Questions and strategies regarding “Discovery” are addressed by chapter four, including a must-read section for any new attorney preparing to take or defend their first deposition. Chapter five covers “Alternative Dispute Resolution” and its relationship to trial strategy, as well as negotiating techniques. For those needing a reference on “Court Appearances,” chapter six explains the mechanics of how to prepare for an appearance in addition to proposing big-picture strategies to implement for presenting an effective case.

Although chapter seven, “Succeeding in Your Practice and in Your Life,” is the least technical, it
covers what may be the most vital aspects of establishing and maintaining a career as a trial attorney. Edelstein summarizes the lessons on ethics, marketing, networking, and cultivating relationships he has learned through personal experience and decades of observing other trial attorneys. In addition, the final section of this chapter on “Coping with Stress” frankly addresses the physical, mental, and emotional harms that can result from the stress inherent in trial practice. The author zeroes in on strategies to achieve “holistic success,” meaning achieving professional goals while also balancing other aspects of life. He provides practical techniques applicable to attorneys in any phase of their career on self-care, creating a personal and professional support system, and working smarter.

Beyond its clear value to early-career trial attorneys, How to Succeed as a Trial Lawyer, Second Edition also offers experienced attorneys a quick reference to improve their existing practices. This reference is an enjoyable and fast read that balances practice and procedure with the author’s insights, and offers fresh perspectives and strategies of value to every trial attorney.


Regular price: $149.95; TIPS Member price: $119.95.
WHAT’S NEW AT TIPS

Meeting Round-Up

TIPS Section Conference in Los Angeles, California

By Christopher Kenney

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TIPS held its fourth annual Section Conference in California on May 2–5, 2018, based at the Loews Hotel Hollywood in Los Angeles. The conference was extra special as TIPS members and guests celebrated the Section’s 85th anniversary.

Consistent with our Hollywood setting, the conference was replete with blockbuster CLE programs featuring the best of TIPS faculty on a diverse array of practical topics of interest to our members. Among the star-studded continuing legal education (CLE) offerings were general interest programs on “Creating Your Rock Star Brand and Building a Career You Love,” “Reel Ethics: A Morning at the Movies—How Hollywood Films Demonstrate Legal Ethical Dilemmas,” and “The Corporate Counsel Survival Guide: Tips from the Insiders.”

As always, TIPS also featured pragmatic “how-to” CLE programs to enhance members’ careers and practices. These included “Hey, That Tweet Helps My Case: Presenting Social Media, Electronic, and Demonstrative Evidence at Trial,” “Advanced Mediation Advocacy,” and “Preserving Coverage Defenses: Key Considerations for Insurers and Their Attorneys When Evaluating the Duty to Defend.”

In addition to the CLE, TIPS committees and task forces met throughout the conference to advance their respective programs and publications. The conference also featured several programs designed to advance the careers of women in the court room. These included “Women Lawyers on Trial Teams: How In-House Counsel Are Making a Difference,” “Moving Women into Positions of Power: Men as Allies and Champions,” and a women’s networking lunch to bring the panelists and participants together.

On the social front, attendees gathered on Wednesday for the Welcome Reception at Loews Hotel Hollywood. This red carpet affair was the perfect kick-off to a memorable meeting. The social highlight of the conference was the TIPS 85th Anniversary Gala at Paramount Studios. Members enjoyed cocktails and a gourmet buffet in a lush terrace setting on the grounds of the historic studio, along with the opportunity to be escorted on trams around the studio lot for a guided tour of movie sets recognizable from hit movies and TV shows.

As always, TIPS is grateful to its talented staff members, Section sponsors, and the Section Conference sponsors for helping make our 85th anniversary a resounding success.
How can I, a Yankee, write an article about “My Amelia Island”? I like to think I was a pirate in a previous life. I love the island and its rich history of occupation by Indians; French, Spanish, and English missionaries; colonists; raiders; soldiers; and enslaved African Americans, as well as privateers. The island is part of a chain of barrier islands, the southernmost of the Sea Islands. There’s a low-key vibe compared to other resorts in Florida. And the beaches are spectacular.

First things first: Rent a car. Mind you, you can happily remain on the grounds of the Ritz-Carlton for your visit. The pool area is gorgeous. Hotel guests have direct beach access. It is the site of the Golf Club of Amelia Island and oceanside tennis. My favorite eatery at the hotel is Salt, a farm-to-table restaurant with a sophisticated menu. It was my first experience with black salt.

But there is so much more to explore. Check out Big Talbot Island State Park for hiking, bird watching, or exploring Boneyard Beach, which is famous for skeletons of oak and cedar trees. If you want to kayak, you need to make reservations. Amelia Island State Park has beautiful beaches, salt marshes, and maritime forests, and allows horseback riding on the beach. The George Crady Bridge Fishing Pier is a state park that offers access to one of the best fishing areas in Florida. And four other state parks nearby are also worth a visit.

I can’t resist sharing just a little of the history of Amelia Island. Originally, the island was occupied by the Timucua people. It has been claimed by eight countries at various times. The first recorded European to visit the island was a French Huguenot explorer in 1565. In the early 1700s, it was named Amelia Island in honor of the daughter of George II of Great Britain. The island was held by British loyalists during the Revolutionary War. After their evacuation, Mary Mattair, her children, and one African American worker were the sole occupants left on the Island. The Spanish regained control of Florida and granted Mattair 150 acres, the site of today’s Old Town Fernandina.

Amelia Island was held by a French-born pirate, Louis Michel Aury, on behalf of the revolutionary Republic of Mexico in the early 1800s. Spain finally ceded the island to the United States in 1821. During the Civil War, the island was held briefly by the Confederacy, but Union forces gained control in 1862. The island attracted hundreds of enslaved African Americans, and by 1863, there were 1200 freedmen and their children living on the island with 200 white people. Visit Fernandina Old Town, the Amelia Island Museum of History, and Fort Clinch. I hope you will take some time to explore the natural coastal habitats and history of the island.

Local food is wonderful. Fernandina Beach has many options, including Gilbert’s Underground Kitchen, Timoti’s Seafood Shak, or Lulu’s at the Thompson House. If you prefer something really casual, try Tasty’s Fresh Burgers and Fries, Pi Infinite Combinations, or the Patio Place. DeNucci’s Soft Serve is classic. Try the pineapple soft serve.

So, welcome to Amelia Island! Argh, Matey!!