

A Swift Debriefing: Rapid Fire Legal Update

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March 26, 2024



At Ward and Smith's recent In-House Counsel event, four Ward and Smith attorneys shared insights on a variety of legal topics, including updates from the General Assembly, how to navigate insurance policies, a Supreme Court decision with implications for businesses operating

across state lines, and the current state of the commercial real estate market.

The rapid-fire session guidance on a number of issues with potential impacts on the business community, including:

- Tax law changes
- Noteworthy bills that passed and failed
- Guidance on insurance policy disputes
- Strategies for negotiating commercial leases

General Assembly Updates

The event began with an overview of General Assembly (NCGA) activities by Whitney Campbell Christensen, a government relations attorney who serves as president of the North Carolina Professional Lobbyists' Association. The highlight of the GA's year was approval of the largest state budget in North Carolina history, at \$30 billion.

"The new budget had around \$2 billion for local water and sewer projects, and a few of our clients had special requests in regard to that portion, so we were excited to see it go through," said Christensen.

An important factor for the future was the new budget allocated \$500 million to NC Innovation, a nonprofit established to monetize research produced by the UNC system. A pay raise for teachers of seven percent and a Medicaid expansion extending coverage to 600,000 people were also included.

The General Assembly reduced the personal income tax to 4.99 percent as part of its plan to step down the rate to 3.99 percent by 2026. There were no changes to the corporate income tax rate, as there is already a plan in place to completely phase it out by 2030.

"If no states jump in front of us, we'll only be the third state to do that," noted Christensen. "We already have one of the lowest corporate income tax rates nationwide."

Motorsports, senior care facilities, aviation, breast pumps, and fuel for freight boats received an extension of sales tax exemptions; a new excise tax on ridesharing services will take effect in July 2025.

Sports wagering and parimutuel wagering on horse races, professional and amateur sports, are now permissible in North Carolina, either electronically or from a licensed establishment. Although the Lottery Commission has yet to issue licenses for these establishments, we expect the Commission to grant licenses and allow for legal online sports wagering by the statutory deadline of June 14, 2024. Civilian traffic crash investigator programs are also now permissible for municipalities in North Carolina.

The programs, which allow local governments to hire non-sworn officers to investigate traffic incidents, had already experienced successful rollouts in Fayetteville and Wilmington. Implementation showed a faster, more efficient clearing of traffic incidents, so Christensen believes more governments will adopt these programs.

Restrictions on abortions after 12 weeks, with exceptions for rape, incest, fetal abnormalities, and the health of the mother, were also enacted. Other notable developments that passed included the removal of income restrictions in terms of who can apply for private school vouchers and the redistricting of House and Senate maps.

Passing medical marijuana legislation received extensive support in the Senate, but there is apparently a high bar for passing it in the House, as there is a pocket of Republicans who oppose it. Similarly, there was considerable support for allowing commercial non-tribal casinos in the Senate; however, there was not enough for it to pass the House.

"I think this one will come back in 2024, as there are some influential people working on it," advised Christensen.

A bill allowing the sale of liquor from ABC stores starting at 10 am on Sundays also died on the vine. Christensen expects the so-called vice bills to remain important in 2024.

Other topics of interest include the fact that North Carolina has not elected a Republican attorney general since 1897. "The current AG Josh Stein only won his seat by 0.2 percent, so it can't be ruled out," added Christensen. Congressman Dan Bishop has foregone another term in Congress and filed to run for the Republican nomination for Attorney General, the only Republican in that race. Should he succeed in the Primary, Bishop could square off with a familiar face from Congress, Rep. Jeff Jackson, who also filed in the Attorney General race. Jackson faces Durham County District Attorney Satana Deberry in the Democratic primary.

Now-former State Auditor Beth Wood is not running for reelection, as she resigned as a result of an alleged drunk driving incident in which she may or may not have parked her Camry on another Camry. "So, Governor Cooper will get to appoint someone who will then run as an incumbent," Christensen concluded. Last week, Governor Cooper appointed former Wake County Commission Chair Jessica Holmes to the post. Holmes assumed office on December 15 following Wood's resignation and announced that she would be seeking a full four-year term next year.

Editor's note: The latest breakdown and analysis of the outcomes of the North Carolina Primary Elections are available [here](#).

Understanding that insurance is unavoidable, that many business contracts are predicated on having certain types of insurance, and that insurance has an impact on nearly every segment of the industry, the Firm's new Insurance Counseling and Recovery practice features attorneys with a variety of legal experience pertaining to insurance matters.

Allen N. Trask III, an attorney who co-leads the Firm's practice, noted, "Insurance is essential for minimizing risk, but of course, the business should actually be getting what it's paying for," and shed light on how to utilize this necessity of modern business effectively. "Aside from helping companies interpret existing policies, we offer proactive counseling to ensure the policy that the client has purchased is actually aligned with the goals of the business," he said.

The nature of the relationship between the insurer and the insured is inherently adversarial, although it does not necessarily have to be contentious. "The insurance relationship is an arm's length contract, not a fiduciary relationship. It's not that the carriers are bad actors, it's just not in their interest to be your friend because of the nature of the contract," commented Trask. The Firm helps clients to understand and appreciate this nature, which informs everything from the negotiation of the policy pre-purchase to navigating claims once they are made.

The Firm focuses a great deal of its energy on representing clients who have sought the protections of insurance coverage and made claims on their policies, and the Firm has specific expertise in helping clients to manage situations where they have been sued or need to sue their insurance carrier.

The claims process typically begins with the client tendering a claim to the carrier, for example, in response to a demand made by a potential plaintiff or when the client experiences a casualty loss. After receiving the claim, the carrier often issues a reservation of rights letter setting up their coverage position. "At that point, you're technically adverse to the carrier. It doesn't mean you can't work together, but what the letter is essentially saying is that, while we do have some obligations under the policy, we're reserving our right to say we have less than that, or none at all," advised Trask.

Generally, carriers have two main obligations under a liability policy, including:

1. Duty to defend – pay for attorneys to manage defense
2. Duty of indemnity – potential obligation to pay a judgment against the company

"They're almost always going to be reserving their right not to pay that judgment, under some exclusion, exemption of policies or lack of coverage...whatever the case may be," added Trask.

The practice also litigates against carriers, though only as a last resort.

Liability in a State Where an Entity Registers to Do Business

Ellis Boyle, a litigation attorney, offered an overview of a recent Supreme Court decision involving personal jurisdiction. In the case, *Robert Mallory vs. Norfolk Southern Railway*, Mallory sued the Railroad in a Pennsylvania court after he developed cancer. Mallory worked for the railroad as a freight car mechanic in Ohio and Virginia. Mallory argued he got cancer from exposure to asbestos and chemicals he encountered at work. While Mallory had lived in Pennsylvania briefly in the past, he lived in Virginia when he filed the lawsuit in Pennsylvania.

Norfolk Southern is incorporated and headquartered in Virginia. The Railroad registered to do business under Pennsylvania laws that required an out-of-state entity to agree to be sued in any Pennsylvania state court for any reason, regardless of whether the subject of the lawsuit related to any actions taken by the entity in

Pennsylvania.

"The question became whether a Virginia resident can sue a Virginia company in Pennsylvania for conduct that occurred in Ohio and Virginia," noted Boyle. The Pennsylvania Supreme Court decided a company with an out-of-state headquarters could not be sued there for conduct that did not occur in Pennsylvania. The US Supreme Court reversed, holding that a company can be sued anywhere it is registered to do business if the laws of that state require the business to submit to the state's jurisdiction as part of the registration.

Currently, the only states with laws that seem to open up an out-of-state business to unlimited jurisdiction by virtue of registering to do business are Georgia, Minnesota, and Pennsylvania. However, corporate entities should monitor the laws and legislatures of any states where they operate or register to do business. "The obvious focus would be on states with plaintiff-friendly laws passing such laws like Illinois, California, and Louisiana. Of course, it's a no-brainer to bring a complaint where you have a better chance of winning. To find more insights on this, visit JudicialHellHoles.com," laughed Boyle.

Commercial Negotiating Strategies

Drake Brinkley, a commercial real property attorney, provided guidance for navigating the commercial office leasing environment. For anyone following the news, the fact there is a substantial amount of office space available due to work-from-home preferences should come as no surprise.

"We're seeing terms for tenants right now that were not on the radar for a long time," said Brinkley.

Because there is such an abundance of office space available, tenants are now able to negotiate lease terms that were unimaginable in prior years. A common theme is tenants should focus on obtaining the highest possible degree of flexibility.

Asking for a premises reduction provision is a possibility. Tenants should work with their architects early during upfit planning to take into account a possible future reduction of space. In addition, understanding what triggers are in the lease providing an option to potentially reduce space is essential.

"It's vital to formalize a reduction by putting it in writing," advised Brinkley.

Early termination provisions may be easier to obtain in today's market; however, it is important to understand any financial ramifications. "Landlords may try to claw back some costs, including broker commissions and tenant improvement allowances," noted Brinkley.

Renegotiating terms is advisable for anyone with a renewal on the horizon. Reaching out to the landlord a few months before a renewal notice deadline is approaching may allow a tenant to negotiate more beneficial terms.

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