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Point of Law

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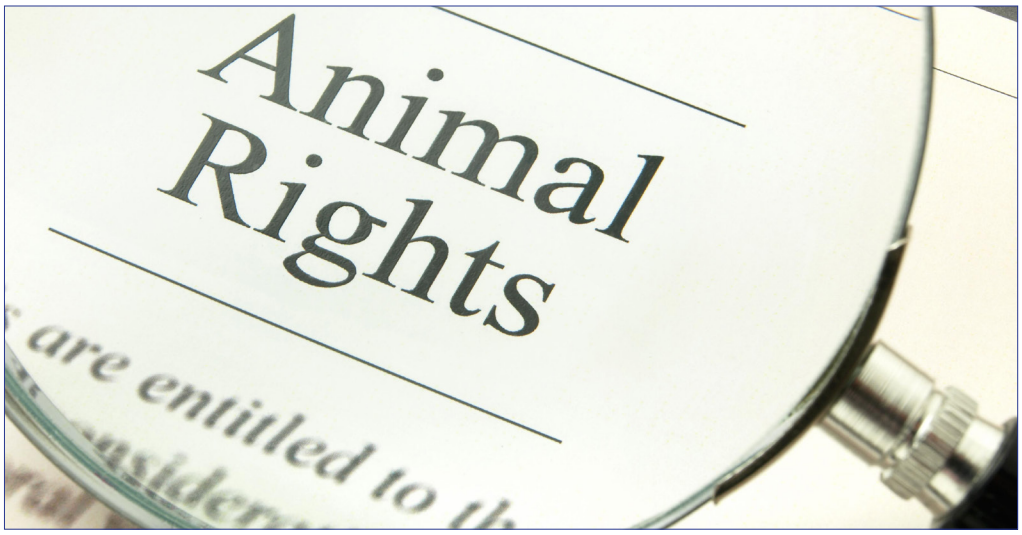
What is Animal Law?

By Rachel Sekine-Tenny

When I say I studied animal law in law school, I usually get the same question: "What is animal law?" As a broad answer, animal law involves all laws that deal with animals, such as criminal laws imposing sentences for cruelty to animals and animal fighting, environmental laws regulating wildlife and the protection of endangered species, estate laws providing for the care of pets through wills and trusts, and many more.

Animal laws are implemented on a federal, state, and local level. At the federal level, the only animal-specific laws are the Animal Welfare Act ("AWA"), the Endangered Species Act ("ESA"), the Humane Methods of Slaughter Act (HMSA), and the "28 Hour Law." The AWA regulates the treatment of certain animals in research, exhibition, transport, and by dealers and requires a minimum standard of care for certain animals.



7 U.S.C. § 2131 *et seq.* The AWA grants protections for dogs, cats, non-human primates, guinea pigs, hamsters, and rabbits but excludes protections for birds, rats, mice, farm animals, and all cold-blooded animals. 7 U.S.C. § 2132(g). In addition, the AWA prohibits dog fighting and cockfighting if the activity crosses state lines. 7 U.S.C. § 2156.

The ESA protects fish, mammals, and birds listed as threatened or endangered. 16 U.S.C. § 1531 *et seq.* A species is endangered if it is in "danger of extinction throughout all or a significant portion of its range," and a species is threatened if it is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(6); 16 U.S.C. § 1532(20). The ESA makes it unlawful to import, export, take, possess, sell, or transport any threatened or endangered species. 16 U.S.C. § 1538(a). The ESA also provides civil and criminal penalties for violations, which may result in imprisonment and a fine of up to $50,000. 16 U.S.C. § 1540.

Continued on page 4

Table of Contents

Page 1....What is Animal Law?
Page 2....Fake News: ... Continuing Lifeguard Education
Page 3....The Basics of Filing a Lawsuit for Copyright Infringement
Page 5....Peeping Drones: Uncertainty in the UAV World After Act 78
Page 6....Forming an LLC and Drafting the Operating Agreement Under ...
Page 7....Does a Mother Hubbard Clause Operate to Include Additional Acreage ...
Page 9....GDPR Compliance: The Practical Effects on the way Companies do Business
Page 11....One Layman's Folly is Another Layman's Fallacy

Fake News:
Lawyer Attends Wrong "CLE," Gets Crash Course in Continuing Lifeguard Education

By James Thornburg

Local lawyer Bob Jenkins recently attended the wrong "CLE" by mistake and found himself submerged in the wonders of continuing lifeguard education. Jenkins told his story for the first time in an exclusive interview with *Point of Law.*

"I had just signed up a big copyright infringement case, but I didn't know much about copyright law," Jenkins said. "So I registered for an all-day intensive seminar: Basic Principles of Copyright Law."

On the appointed day, Jenkins arrived at the conference area of a local hotel, followed signs marked "CLE," and came to a room filled not with lawyers but with lifeguards.

"Turns out I had gone to the wrong hotel," Jenkins said. "This isn't that big of a city. I don't understand why we have like fifteen Marriotts."

Despite his mistake, Jenkins decided to stay. "It looked interesting," he said. Sources familiar with the matter say the instructor was an attractive blonde wearing a red, *Baywatch*-style swimsuit, but Jenkins denied noticing whether the instructor was attractive. "I just wanted to learn CPR," he claimed. *Point of Law* obtained a copy of the lifeguarding course's syllabus, which, in addition to CPR and other lifesaving techniques, included seminars on running in slow motion and applying suntan lotion to the instructor's body.

His possible prurient interest aside, Jenkins did indeed learn the essential skills of a lifeguard, as he would soon demonstrate in spectacular fashion.

"At the oral argument on the motion to dismiss in my copyright case," Jenkins related, "the defense attorney was hammering away at the deficiencies in my complaint when the judge started gasping for air and clutching his chest."

As the judge lost consciousness and went into cardiac arrest, Jenkins leapt into action and performed CPR until paramedics arrived with a defibrillator. The judge made a full recovery, but paramedics say he would have died in the courtroom if not for Jenkins's efforts.

"It feels good to know I was able to help someone," Jenkins said.

But how did the case turn out?

"The judge said that since I had saved his life, he couldn't possibly rule against me. So he recused himself."

The new judge granted the motion to dismiss in a scathing opinion that took Jenkins to task for his ignorance of basic principles of copyright law.

At press time, Jenkins said he was considering closing his law office and applying for a job at a local swimming pool. ■

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The Basics of Filing a Lawsuit for Copyright Infringement

By Lou Kroeck

When you are ready to file your first lawsuit for copyright infringement there are a few practical considerations that will add immense value to your services. Your initial inclination may be to send a cease and desist letter to opposing counsel. Avoid the urge.

Start by making sure that your client has properly registered their work with the United States Copyright Office. Although any copyrightable work is technically protected the minute it is expressed in a tangible form, you must register your work with the Copyright Office prior to initiating litigation. The typical fee to register a copyright is $55, for expedited service you will pay a fee of $550. Failure to register will be detrimental to your potential suit. The registration process can be daunting. It can take up to a year to get a certificate of registration from the United States government. Practice tip: once you have determined that the original was registered, ask the client if there have been any changes to the work that would qualify it as a derivative work. This may result in the need for a supplemental registration.

There has been a myth circulating for many years regarding the "poor man's registration." Many clients mistakenly believe that mailing a copy of their work to themselves provides some level of protection. This measure does nothing more than firmly establish a date of creation. It provides no other protection whatsoever. We now live in the digital age – metadata, emails and photographs will contain the necessary information needed to properly date the work.

In 2019, the Supreme Court held that registration of a copyright is a

requirement per-requisite to filing an infringement action. They also held that once the work is registered the owner may make a retroactive recovery for infringement. Prior to the decision some jurisdictions were allowing plaintiffs to bring suit after initiating registration but prior to achieving registration. *See* generally, Estate Public Benefit Corp. v. Wall-Street.com, LLC, *https://www.jurist.org/news/2019/03/supreme-court-rules-registration-of-copyright-claim-occurs-when-copyright-office-grants-registration/.*

Once you've properly registered the work you must document the infringement. As a young lawyer I made the mistake of sending a cease and desist letter demanding an accounting of sales for a photograph that was being sold by an unlicensed third party via their website. The third party responded that there were no sales whatsoever of the photograph. The infringing material was removed from the website. I had no proof of damages. The case ended. I'd failed my client.

As a more experienced lawyer, I would ask my client to purchase a copy of their photograph from the third party prior to sending my letter. If the third party then claimed that there were no sales of the photo we would be looking at some serious damages for willful infringement and concealment.

Draft a cease and desist letter to the third party. Providing them notice of infringement is essential to your suit. Moreover, if they continue infringement after your letter has been sent, you can make a case for willful infringement. In your letter provide proof of registration and the date of creation. If you can get a legitimate accounting of sales or you have a standard licensing fee for your content, you may be able to extract the necessary funds without bringing suit.

There is a three-year statute of limitations on copyright infringement. Don't blow it. Even if you haven't perfected registration, make sure to get your case filed prior to the running of the statute. You ought to be able to get through expedited registration prior to 12(b)(6) motions.

Provide the court with proof of registration, a theory on damages and proof of infringement. Remember, copyright infringement is a federal cause of action. There are times when the infringement is ancillary to other causes of action and state court is appropriate, but those times are few and far between. The rest of the process is a cakewalk. Be sure to ask for your statutorily guaranteed attorneys' fees in your complaint. ■

Lou Kroeck is a solo practitioner who focuses his practice on civil litigation, intellectual property and civil rights. When Lou isn't running around in between the various court houses within the Commonwealth he hosts a weekly happy hour for young professionals.

What is Animal Law?

Continued from page 1

The HMSA provides regulations regarding how certain animals are slaughtered. 7 U.S.C. § 1901 *et seq.* Specifically, the HMSA requires that cattle, calves, horses, mules, sheep, swine, and other livestock be rendered insensible to pain before slaughter. 7 U.S.C. § 1902. Poultry animals are excluded from the HMSA. *Id.* Along with the HMSA, the "28 Hour Law" requires that vehicles transporting cattle, sheep, and swine may not confine animals for more than 28 consecutive hours without unloading the animals for feeding, water, and rest. 49 U.S.C. § 80502. However, this law does not apply if the vehicle contains access to food, water, space, and an opportunity for rest. 49 U.S.C. § 80502(c).

While the federal laws cover some animal protection issues, many animal laws are enacted and enforced at the state level. Pennsylvania has many state animal laws that range from prohibiting engaging in any form of sexual intercourse with an animal (18 Pa.C.S. § 3129) to allowing for the creation of pet trusts to provide funds and care instructions for pets after their owners pass away (20 Pa.C.S. § 7738). Notably, Pennsylvania's animal cruelty laws received a major overhaul two years ago.

On June 29, 2017, Pennsylvania legislators passed Act 10, or Libre's Law, named after a dog who was found on a farm in Lancaster in a severe emaciated and dehydrated state with mange, skin infections, and open wounds. Libre made a miraculous recovery, but lawmakers and the public were appalled to discover that Pennsylvania was one of only a handful of states that did not have a felony penalty for animal cruelty outside of animal fighting or killing of an endangered species.

With the passage of Libre's Law, Pennsylvania's animal cruelty laws were strengthened in five major ways. First, animal abusers may receive a felony in the third degree if their actions rise to the level of aggravated cruelty. 18 Pa.C.S. § 5534(b). Second, any person convicted of a felony violation must forfeit or surrender the abused or neglected animal to a shelter. 18 Pa.C.S. § 5554(b). Third, penalties for cruelty to horses are treated at the same level as cruelty to dogs and cats, as previous violations to horses were graded as only summary offenses. 18 Pa.C.S. § 5531. Fourth, dogs cannot be tethered outside for more than nine hours in a 24-hour period and cannot be left outside for more than 30 minutes in weather above 90 degrees or below 32 degrees. 18 Pa.C.S. § 5536. Fifth, a licensed veterinarian or a certified veterinary technician or assistant who reports suspected violations of animal cruelty cannot be held liable for civil damages as a result of the reporting. 18 Pa.C.S. § 5556(a).

On the local level, Pittsburgh has passed laws that expand state laws, such as making it unlawful for dogs to be left outside for more than 30 minutes in weather above 90 degrees or below 32 degrees even if they are untethered (Pittsburgh, Pennsylvania, Municipal Code § 633.23), and other laws that go beyond any state law. For example, in December of 2015, Pittsburgh passed the first Puppy Mill Ordinance in the state that makes it unlawful to sell commercially bred dogs, cats, and rabbits within city limits. Pittsburgh, Pennsylvania, Municipal Code § 638 *et seq.* Additionally, in December of 2017, Pittsburgh City Council voted to ban the use of bullhooks, electric prods, shocking devices, hacksaws, and other instruments capable of inflicting pain, intimidating, or threating pain for the purpose of training or controlling wild or exotic animals, including elephants, lions, tigers, bears, monkeys, and camels, within city limits. Pittsburgh, Pennsylvania, Municipal Code § 637 *et seq.*

I would need the space to write a much longer article if I were to include all the state and local laws in place in our area, let alone in our country. However, I hope I was able to shed a bit of light on the vast complexities of the field of animal law with this selection of some important federal, state, and local laws. ■

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Submit an article for Point of Law, the YLD's ABA award-winning newsletter

YLD members are encouraged to write about the practice of law or any substantive legal issue of interest. Additionally, writers are encouraged to write responses to any article appearing in this issue. Featured authors will have their article – up to 1,000 words long – published along with a brief bio. Articles and inquiries may be submitted to *YLDCommunications@gmail.com.*

Peeping Drones: Uncertainty in the UAV World After Act 78

By Corey A. Bauer

Before January 12th, 2019, the Federal Aviation Administration (FAA) was the primary entity capable of policing any and all aircraft in the sky above Pennsylvania – including unmanned aerial vehicles (UAV's), more commonly referred to as "drones." Even as municipalities scrambled with their solicitors to enact ordinances regulating drone flights, the FAA simply shook their finger disapprovingly and said, "you can't do that, that's our job." *FAA Press Release – FAA Statement – Federal vs. Local Drone Authority,* July 20, 2018.

The regulation of aircraft (manned and unmanned) and the airspace they roam fall squarely into the field of aviation safety, which the FAA has declared sole jurisdiction over, and state laws that encroach upon this area of federal regulation are susceptible to being preempted, whether or not those state laws are in conflict with federal regulation. *Arizona v. U.S.,* 567 U.S. 387, 132 S.Ct. 2492, 2501, 183 L.Ed.2d 351 (2012) ("Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.") (citing *Silkwood v. KerrMcGee Corp.,* 464 U.S. 238, 249, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984)).

However, states reserve the ability to enforce their "historic police powers" unless they are ***clearly*** preempted by congress. Typically, these include regulations and municipal ordinances that impact law enforcement and emergency response operations, as well as those that touch upon land use and zoning, privacy, and trespass. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). Regulation in areas such as these allow for states to enact laws affecting drone use without being immediately challenged on the basis of preemption.

Pennsylvania is attempting to do just that with Act 78, which was codified as 18 Pa.C.S. § 3505 and went into effect on January 12th, 2019. With this statute, the Commonwealth of Pennsylvania has criminalized the use of drones to (a) conduct surveillance upon people in a private place, (b) operate so as to place another in reasonable fear of bodily harm, or (c) deliver, provide, transmit or furnish contraband to convicts in prison or inmates in a mental hospital.

For the purposes of this article, focus will be placed upon the summary offense codified in 18 Pa.C.S. § 3505(a)(1) and the practical implications that I believe will befall upon municipal courts across the Commonwealth as drones become more prevalent as a recreational hobby. This specific subsection makes it a summary offense to use a drone to "conduct surveillance of another in a private place." Further, the statute includes the following definitions:

Surveillance: "observe, record or invade the privacy of another"

Private Place: "where a person has a reasonable expectation of privacy"

The term "observe" is undeniably vague. As is the notion of a "reasonable expectation of privacy" when it comes to drones. A "reasonable expectation of privacy" is something that has been constantly forged and sharpened within the American judicial system for over a century and is well established. Yet, none of this well-settled case law takes into account the existence of a pilotless aircraft that can be launched almost effortlessly by any average citizen. This creates some interesting concerns regarding what a reasonable expectation of privacy actually is regarding this statute – and these concerns will be addressed at the Magisterial Court level.

Continued on page 8

Forming an LLC and Drafting the Operating Agreement Under Pennsylvania's Business Corporation Law

By Lauren Mathews

No matter what area of law you practice, it is likely you've encountered at least one client seeking advice and guidance on how to form a limited liability company. With Pennsylvania's recent adoption of the Business Corporation Law ("BCL"), 15 Pa. Con. Stat. § 101, *et seq.,* the formation of an LLC has become a creature of contract and this newly adopted statute. Importantly, the BCL provides for a number of gap-filler provisions that will be implicitly read into an operating agreement that is otherwise silent, and includes limitations on what can be varied by the operating agreement.

The BCL's provisions guide the process for the formation of an LLC. First and foremost, the organizer or organizers of the LLC must deliver to the Bureau of Corporations and Charitable Organizations of the Pennsylvania Department of State a Certificate of Organization. 15 Pa. Con. Stat. §8821(a). Oftentimes an attorney will act as the organizer on behalf of their client. For clients who have LLCs outside of Pennsylvania, this may seem out of the ordinary, as other states may require Articles of Organization in the alternative.

While preparing the Certificate of Organization, you will need to know the name of the LLC, and the address for the company. 15 Pa. Con. Stat. §8821(b). The Certificate of Organization may contain statements other than what is required under subsection (b), and any provisions of the Certificate of Organization are also deemed provisions of the LLC's operating agreement. 15 Pa. Con. Stat. §8821(c), (d). The organizer(s) may decide that the Certificate of Organization will go into effect, and thus formation of the LLC will occur, on a date in the future, however, the organizer(s) may not select a retroactive date. Be sure to confirm the cost for filing the Certificate of Organization and, once it is filed, ensure receipt by the Pennsylvania Department of State.

In addition to preparing the Certificate of Organization, your client will want to consider ordering an official Corporate Minute Book and seal from the Pennsylvania Department of State. The client may also want to apply for a federal EIN number for the new company, and have initial formation resolutions prepared. Depending on whether the LLC is going to be member-managed or manager-managed, a manger and/or officers will also need to be appointed. It is important to keep in mind the provisions of the BCL that specifically govern member-managed versus manager-managed LLCs. An LLC is considered to be member-managed, unless the operating agreement states otherwise.

The provisions of the operating agreement are vital to any LLC. The operating agreement not only lays out the relations among members and between members and the LLC, but also provides for the rights and duties of members/managers, describes the activities and affairs of the LLC, and provides for the manner in which the operating agreement can be amended, among other things. 15 Pa. Con. Stat. §8815(a). Where an operating agreement is otherwise silent regarding the provisions described in subsection (a), the LLC is governed by the statutory provisions of the BCL. 15 Pa. Con. Stat. §8815(b).

It is important that the operating agreement includes a list of definitions; the powers and purposes of the entity (including a statement of what the LLC does); the identity of the general manager or other managing persons; the members and classes of membership interests; businesses in which the entity is authorized to engage; references to any associated agreements; provisions governing contributions, future financing, and tax matters; management and voting provisions; distribution and allocation provisions;

Continued on page 8

Does a Mother Hubbard Clause Operate to Include Additional Acreage other than the Acreage stated in an Oil and Gas Lease?

By Molleigh Thomas

In the most basic terms, an oil and gas lease is an agreement between two parties wherein Party A, the lessor, allows Party B, the lessee, access to Party A's oil and gas estate underlying the property. As is the nature of an oil and gas lease, the operator intends to secure the greatest amount of land possible, and will include a number of provisions that specifically detail the who, what, when and where aspects of the lease, including a Mother Hubbard clause. This clause, also known as the "cover-all" clause, acts as an insurance policy to include those tracts of land that are adjacent or contiguous, but are mistakenly omitted. This definition led me to question what role a properly drafted Mother Hubbard clause plays when an oil and gas lease operates to include additional acreage other than the acreage stated on the lease, causing a dispute between the lessor and lessee.

According to Williams & Meyers Manual of Oil and Gas Terms by Howard R. William and Charles J. Meyers, a Mother Hubbard clause is "a clause commonly included in contemporary leases to meet the problem of adequately describing strips of land owned by a lessor contiguous to the land specifically described by the lease and intended to be covered by the lease." A typical Mother Hubbard clause will "follow the specific description of the land leased" and has multiple variations of the language used in the clause. The main purpose of the clause is to protect against the loss of certain parcels adjacent or contiguous to certain specifically described tracts of land that are unintentionally omitted from the property description. At its core, the Mother Hubbard clause is an insurance policy.

Pennsylvania does not actually have any case law regarding Mother Hubbard clauses in oil and gas leases disputes. Accordingly, it is important to look to Pennsylvania's Appalachian Basin sister states, Ohio and West Virginia, and beyond that to the mega oil producing state of Texas. As with Pennsylvania, no case law exists in West Virginia interpreting oil and gas leases that include Mother Hubbard clauses. However, a trial court order granted in Ohio, *Eric Petroleum Corp., et al. v. New Rocky Valley Farms, Inc.,* although not specifically focused on the issue of a Mother Hubbard clause, is factually helpful to lend insight as to Ohio courts' mindsets. 2014 WL 12521045 (Ohio Com.Pl.) (Trial Order) 2014. In *Eric Petroleum,* the lessee executed a lease specifically including four of the six parcels owned by the lessee, and included a Mother Hubbard clause which stated, "this lease also covers and includes, in addition to that above described, all land, if any, contiguous or adjacent to or adjoining the land above described…." The trial court issued an order finding that one of the two parcels not specifically included in the lease, being 0.875 acre, was not covered by the lease because it was not adjoined, contiguous or adjacent to the acreage described in the lease, but the second tract, containing 74.375 acres, was covered by the lease since that tract was contiguous with, adjacent to, and adjoined the four described parcels. *Id.* Thus, the Ohio trial court employed a 'literal' approach to construing the Mother Hubbard clause and gave effect to the plain meaning of the words.

According to Texas case law, there are two approaches to interpretation of Mother Hubbard clauses: (1) the literal approach, or (2) the narrow approach. The literal approach to interpretation of Mother Hubbard clauses first began with three cases: (i) *Sun Oil Co. v. Burns, et al.,* 125 Tex. 549 (1935); (ii) *Gulf Production Co., et al. v. Spear, et al.,* 125 Tex. 530 (1935); (iii) and *Sun Oil Co. v. Bennett, et al.,* 125 Tex. 540 (1935). The *Burns* Court emphasized the importance of ascertaining the parties' intentions and giving an unambiguous clause its plain meaning. The *Bennett* court raised the lack of scienter requirement, although considered dictum. The *Spears* court took into account surrounding circumstances, including testimony evidence from the lessor himself. These three cases gave more weight to the express language of the clause rather than the size of the acreage in question and enforced the clause as it was written, unless there was proven fraud, mutual mistake or duress. In opposition to the literal approach, the court in *Smith v. Allison* adopted a much narrower interpretation of Mother Hubbard clauses. 157 Tex. 220 (1956). Although

Continued on page 10

Peeping Drones: Uncertainty in the UAV World After Act 78

Continued from page 5

For example, if your neighbor puts up a fence, she undeniably has a reasonable expectation that you will not place a step ladder to that fence and spy on her swimming in her pool. Yet, what exactly does that fence mean for a drone being flown by the neighbor four houses down? What if that drone was 399 feet above the ground and could "observe" half of the block at once? Is it reasonable for your neighbor to expect privacy in that situation? Is that even an "observation" at 399 feet (given that people are almost indiscernible to the pilot as he views the live feed from his phone)?

What about when your neighbor puts up umbrellas, but the pilot can still see the neighbor from his own backyard's airspace and has no intent to observe? Further, what if the observation is only for 1 second as the pilot soars through the airspace above at 20 mph?

These questions remain unanswered. All that can be done by lawyers at this juncture is to give an educated guess to clients as to their legal parameters in recreational drone use. If a lawyer is confronted with a client already charged, they should be sure to apprise themselves of privacy law and understand that they have the chance to create precedent. Drones are a relatively new technology that most do not understand. Fear of the unknown is primal, and drones can feed into it. We often do not know who is piloting a drone, where the drone came from, or what the intent of the pilot is – people are understandably in fear for their privacy. Drone use has long gone unregulated by states, yet the proverbial pendulum must not swing too far in the other direction.

Thus, until we have greater clarity in the law, lawyers should encourage drone pilots to err on the side of caution – and assume that almost ***any*** observing or recording by a drone in flight could be an infringement of another's reasonable expectation of privacy. This may place an unfair burden on drone pilots, but it is up to said pilots to inform their neighbors of their use and let them know their intentions. If drone pilots inform the community in which they fly of their intentions, perhaps it will avoid unnecessary court dates. ■

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Forming an LLC and Drafting the Operating Agreement Under ...

Continued from page 6

transfer restrictions; dissolution provisions; and provisions governing dispute resolution.

Where there is no operating agreement, the parties involved in the formation and operation of the LLC lose the valuable opportunity of having control and order over their relationship with one another and with the LLC. For example, while no one wants to believe a conflict or dispute will arise during the life and operation of the LLC, the operating agreement can provide the parties with predetermined resolutions to address these situations. In addition, the absence of an operating agreement may cause the LLC to be subject not only to the default provisions of the BCL, but also the default provisions of the Pennsylvania Business Associations Code.

Although the terms of the operating agreement guide the management and function of the LLC, the operating agreement is limited by a number of BCL provisions. 15 Pa. Con. Stat. §8815(c). Importantly, the operating agreement cannot vary, for example, the general provisions of the BCL, the applicability of Pennsylvania law as governing the LLC, or the characteristics of a limited liability company. *Id.* Further, the operating agreement generally cannot eliminate the duty of loyalty or duty of care of a member or manager, nor can it vary the contractual obligation of good faith and fair dealing. 15 Pa. Con. Stat. §8821(c)(11), (12), (13).

With these provisions of the BCL in mind, you can properly determine how to move forward with formation of an LLC and preparation of the operating agreement in a manner that best fits the needs of your client and their company. ■

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GDPR Compliance:
The Practical Effects on the way Companies do Business

By Derrick L. Maultsby Jr. and Jason L. Ott

On May 25, 2018, the European Union (the "EU") Parliament implemented the General Data Protection Regulation (the "GDPR"). The GDPR replaces the prior Data Protection Directive 95/46/EC, in an effort to create uniform data protection laws across the EU member countries. The GDPR was created in the spirit of transparency. The articles of the GDPR protect and empower the citizens of the EU by affording them more control over their personal data. The GDPR already has impacted how companies conduct business in the EU, specifically with respect to data collection and use. Additionally, the GDPR potentially may affect companies that collect and/or utilize data concerning an EU citizen, regardless of whether that citizen is located in the EU at the time of the data collection/use.

The GDPR dramatically increases the scope of EU data protection regulations. Prior to the GDPR becoming effective, companies that maintained their company data processing outside the EU were not subjected to EU-specific data protection regulations. However under the GDPR, any organization that monitors the behavior of EU data subjects, or processes and holds the personal data of residents in the EU, is subject to the regulations, regardless of physical location. Companies will want to ensure compliance as penalties under the GDPR can be up to four percent (4%) of a company's annual global turnover or $23.4 million U.S. (depending on which is higher).

The first major shift in how companies conduct business with EU residents will be the new regulations regarding consent. Under the GDPR, a request for consent must be given in an understandable way, absent of vague or complicated terms or conditions consisting of mystifying legalese. Further, the consent form must state explicitly both: (i) the purpose for the data being requested; and (ii) everywhere such personal data will be stored. Beyond that, the form of the consent document must be independent of all other forms (i.e., terms of use, privacy policy, terms of service, etc.).

The second major shift will be the duty of companies to hire or appoint a Data Protection Officer (the "DPO"). The DPO is responsible for the internal record keeping requirements of the GDPR. The DPO also is responsible for mapping out the personal data in a company's possession to ensure that it is easily identifiable. That mapping and organization will be vital, at a minimum, based on: (i) the rights of EU citizens under the GDPR to request that their data be sent to them or erased at any time; and (ii) the duty of the DPO to notify any individual whose data may have been compromised immediately following a breach. The DPO also will be the direct correspondent to the Data Protection Authorities, which have an office in every EU member country. Finally, the DPO can be externally or internally appointed but must not perform any other tasks within the company that possibly could impede his or her position as the DPO.

The GDPR has been a topic of controversy due to the ambiguity surrounding its scope and whether the EU will be able to exercise extraterritorial jurisdiction based on the obligations outlined in the GDPR applying to personal information of all EU residents, notwithstanding where those EU residents might be located at any given time. While there is significant validity to that argument that the EU does not have the power to burden companies in non-member countries located on the other side of the globe, that does not reduce the necessity for companies across the world to take note and to address GDPR compliance in the near term. That is especially the case because the GDPR, while wide reaching itself under its express provisions, has sparked the introduction and passage of many laws around the globe concerning data privacy regulation. The resemblance of these policies to the GDPR displays that the GDPR has set the standard for what data privacy regulation and compliance will be moving forward.

One example of the GDPR's influence in the United States is the California Consumer Privacy Act (the "CCPA"). The CCPA was passed in June of 2018 and is tentatively set to take effect in January of 2020. Similar to the GDPR, the CCPA is intended to require significantly increased transparency between consumers and the companies that receive, maintain, and use their data. The CCPA creates similar rights for consumers such as the right to access and the right to be forgotten. The CCPA also places

Continued on page 10

Does a Mother Hubbard Clause Operate to Include Additional ...

Continued from page 7

Smith involved a deed conveyance and not an oil and gas lease, it is important to note that the court interpreted a very detailed Mother Hubbard clause as ambiguous and in opposition to other clauses within the deed. Justice McCall's concurring opinion in *Smith* rendered a balance between the two approaches, giving weight to the plain meaning of the clause while limiting it to areas particularly described. Justice McCall stated that Mother Hubbard clauses should be "considered as supplemental to the specific description of the particular tract which is the primary subject of the conveyance" unless the intention is clearly opposed.

Based on these Texas cases, it appears that most courts will analyze whether the Mother Hubbard clause is ambiguous or unambiguous and ultimately find the language, if properly written, unambiguous. Additionally, the wording within the clause itself will significantly matter. Most clauses use the words "adjacent," "contiguous," and/or "adjoining." By its definition, "adjoining" would be a more restrictive word use than "adjacent" or "contiguous." Also, the use of "or" or "and" when connecting those descriptors will determine whether the land supposedly covered by the clause need satisfy ***all*** descriptors ***or*** just one. Second, after determining the possible ambiguity of the clause, the question will then turn on whether the court will take a literal approach or a narrow approach. According to recent case law, it appears that Pennsylvania courts will try to implement a balance between the two approaches, similar to Justice McCall's concurring opinion in *Smith,* in that a Pennsylvania court may enforce the Mother Hubbard clause but it will be strictly construed. Although there is no case law specifically on Mother Hubbard clause interpretations in Pennsylvania, *Yuscavage v. Hamlin* potentially sheds light on where Pennsylvania courts might fall on the approach spectrum. 137 A.3d 242 (Pa. 1958). In *Yuscavage,* the grantors, owners of the mineral and surface states, conveyed "all the surface and right of soil" to the grantees including a habendum clause with a general reference to the conveyance of "all the estate, right, title and interest... of [the grantor]." The grantors claimed that the oil and gas interest had not been conveyed by the deed; however, the Court disagreed and relied upon the broad language of the habendum clause. Thus, per the Court's holding in *Yuscavage,* it appears that the Pennsylvania Supreme Court has shown its willingness to give effect to all the terms of a deed, including ***general*** terms over specific terms, in order to carry out the parties' intent.

Although Pennsylvania courts have yet to hear a case on the application of a Mother Hubbard clause to an oil and gas lease, the conclusions drawn from the Ohio trial court and ample Texas case law lead one to believe that Pennsylvania courts would employ a hybrid approach of the literal and narrow approaches, with a heavy emphasis on the actual wording of the clause. ■

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GDPR Compliance: The Practical Effects on the Way ...

Continued from page 9

similar burdens upon data-collecting companies, such as providing reasonable security procedures, obtaining consent for the collection and use of personal information, and providing policies in plain English. The fines under the CCPA are also similarly large, which will encourage companies to comply.

The trend of stricter data privacy regulation is only beginning. Over the next few years, data privacy bills almost certainly will continue to proliferate around the world. The legislation that has been introduced following the GDPR derives key concepts and elements from the GDPR, and that is a trend that is likely to continue as well. While companies may feel that the GDPR does not apply to them right now or that the EU lacks jurisdiction to enforce the law against them as presently situated, it is wise for all companies to consider becoming GDPR compliant, if only for the purpose of positioning themselves to comply with future data privacy regulations or to participate in our increasingly global economy. ■

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One Layman's Folly is Another Layman's Fallacy

By James Baker

"Every man is presumed to know the law," *Carpenter's Case,* 14 Pa. 486, 488 (Pa. 1850), just like all jurors "are presumed to follow the court's instructions," *Commonwealth v. Aikens,* 168 A.3d 137, 143 (Pa. 2017). These statements are the foundational principles of trial by jury. They reduce the workings of our justice system to one important point: that jurors must apply the facts and the law to come to a reasoned decision. However, this presumption must be taken with caution lest we forget the simple, unavoidable reality that jurors are, in fact, human.

I was privileged to be selected last fall to serve on an Allegheny County civil jury. I was surprised, to say the least, that I was selected given my legal and educational background, but I had an opportunity to see our courts from a different perspective that too few lawyers get. Before I go further, I want to thank the courts for everything that was done for myself and my fellow jurors, from directions and discounts for local restaurants to handling many of the motions and objections before we entered the courtroom. In particular, the court liaison did a remarkable job of distracting us during sidebars and keeping us informed and comfortable as we waited to get into the courtroom.

One of the first things I noticed as the trial began was just how much the jury could see. If I wanted to, I could watch every adrenaline-fueled tremor, every nod, and every time the plaintiff gave a pleading look towards the jury during another witness's testimony. I would catch changes in an attorney's tone of voice as they emphasized one point or another and moments of hesitation before witnesses responded to questions.

No one moment was going to change the outcome in my mind, but I appreciated little ways that a case could be made. The trial was not just about who had a more comprehensive and believable narrative or a stronger oration. Rather, my understanding of the facts developed throughout the trial, from beginning to end, and I realized that advocates can make their case in many ways, from the way they phrase objections to which inconsistencies they point out and how that builds into their case.

What surprised me the most was what happened when we went back to deliberate. Despite having seen the same arguments and the same testimony, from the get go it was clear that every single juror had a different take on what happened. The trial, which spanned two days, had been a relatively simple Lemon Law and breach of warranty case, but even so, each juror saw the facts differently. There was a lot of confusion as to when certain events happened and what the law meant. Facts that one juror had forgotten or that seemed inconsequential formed the basis for other jurors' votes, and nearly every fact mattered in some way. No matter how simple or short the trial, it hit home the need for attorneys to provide a clear visual to the jury of what happened and when, as well as giving various reasons why that means your client should emerge victorious.

It was not as if the lawyers or the court had been unclear. In fact, they knew their case, and they knew the law, and they explained everything quite well, but when it came down to it, we did not have a clear consensus of what had happened or how the law fit in. What we did have was a plurality who saw the case in a certain light, a few who felt both sides had good points but were undecided, and a few dissenters. While some of us tried to let everyone get their point across, there were also some who felt strongly about their point of view and pushed hard for the dissenters to see it their way. It was easy to see how a particularly strong-willed dissenting voice or voices could bring deliberations to a standstill. Fortunately, our jury was able to come to what we felt was the right decision even if some of the jurors had understandable reservations about the all-or-nothing verdict.

At the end of the day, a jury is made up of human beings. We see it reflected in appellate decisions all the time that juries can and will misunderstand facts and misapply laws in reaching their decisions, even in "simpler" cases. Jurors will always be susceptible to imperfect memories and the non-legal common sense of laypeople. Perhaps it is too much to presume that jurors fully understand the facts and law of a case, but this experience showed me that juries serve the purpose for which they are needed – to render a community judgment between two difficult, but equally valid, points of view. ■

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