

**The Kentucky Bar Association
Corporate House Counsel Section presents:**

**2025 Issues for Corporate House
Counsel CLE Seminar**



**This program has been approved in
Kentucky for 4 CLE credits.**

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The Kentucky Bar Association
Office of Continuing Legal Education for
Kentucky Bar Association Corporate House Counsel Section**

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2025 Issues for Corporate House Counsel CLE Seminar

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2025 Issues for Corporate House Counsel CLE Seminar
March 27, 2025
University of Kentucky J. David Rosenberg College of Law
Lexington, Kentucky

AGENDA

- | | |
|------------------|--|
| 9:00 a.m. | Registration |
| 9:25 a.m. | Welcome
Gary McCollum
<i>KBA Corporate House Counsel Section Chair</i> |
| 9:30-10:30 a.m. | ADA and FMLA Bootcamp for In-House Attorneys
(1 CLE credit)
Elizabeth S. Muyskens
<i>Stoll Keenon Ogden PLLC</i> |
| 10:35-11:35 a.m. | Administrative Law at the Supreme Court and Its Impact on Corporate Legal Departments
(1 CLE credit)
R. Clay Larkin
<i>Dentons Bingham Greenebaum</i> |
| 11:45-12:45 p.m. | Lunch (provided) & Annual Section Meeting |
| 12:45-1:45 p.m. | Evolution of the Plaintiffs' Bar: How to Respect It but Combat It
(1 CLE credit)
Lynsie Gaddis Rust
<i>Wilson Elser Moskowitz Edelman & Dicker LLP</i> |
| 1:50-2:50 p.m. | Commercial Real Estate Leases for In-House Counsel
(1 CLE credit)
G. Brian Wells
<i>Wyatt, Tarrant & Combs LLP</i> |

PRESENTER BIOGRAPHIES

R. Clay Larkin
Dentons Bingham Greenebaum
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Clay Larkin is a partner in the Dentons Lexington office. Recognized in the fields of environmental and energy & natural resources law by Chambers and *Super Lawyers*® magazines, Mr. Larkin has devoted a significant amount of his practice to the representation of energy and mining companies with an emphasis on the coal, oil and gas, and electricity generation industries. He received his B.A. from Western Kentucky University and his J.D., *Order of the Coif*, from the University of Kentucky J. David Rosenberg College of Law. Mr. Larkin is a member of the Kentucky Bar Association, Kentucky Coal Association, Federalist Society, and the Energy & Mineral Law Foundation, serving as its president in 2022-23.

Elizabeth S. Muyskens
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Lexington, KY

Elizabeth Muyskens is a member of Stoll Keenon Ogden's Lexington office and has been with the firm since 2008. She is co-practice leader of the Labor, Employment & Employee Benefits practice group. Ms. Muyskens is relied upon by clients as a trusted and responsive advisor. She counsels clients on workplace law issues, represents employers in administrative proceedings, and litigates matters when conflicts arise. She specializes in employee leave laws including the Family and Medical Leave Act; wage and hour matters; and personnel issues. She received her B.S., *summa cum laude*, from the University of Kentucky and her J.D., *summa cum laude*, from the University of Kentucky J. David Rosenberg College of Law. Ms. Muyskens is a member of the American, Kentucky, and Fayette County Bar Associations.

Lynsie Gaddis Rust
Wilson Elser Moskowitz Edelman & Dicker LLP
Louisville, KY

Lynsie Gaddis Rust is a partner in Wilson Elser's Louisville office, where she focuses her litigation practice in general civil defense, with an emphasis on trucking and transportation defense, general tort defense, commercial disputes and trial advocacy. She has been part of the Claims Litigation Management Alliance's faculty for its Claims College School of Transportation since 2020. Ms. Rust was selected for inclusion in *The Best Lawyers in America*® (2023-2025) and *Kentucky Super Lawyers Rising Stars* (2013-2022). She received her B.A. from the University of Kentucky and her J.D. from the University of Kentucky J. David Rosenberg College of Law. Ms. Rust is a member of the Tennessee, Kentucky, and Louisville Bar Associations. She completed the LBA Leadership Academy in 2011 and is currently a member of its Public Service Committee.

G. Brian Wells
Wyatt, Tarrant & Combs LLP
Lexington, KY

Brian Wells is a partner with Wyatt, Tarrant & Combs, LLP in the firm's Lexington office. He concentrates his practice in the area of general business law, mergers and acquisitions, real estate lending transactions, commercial leasing, and contract drafting and negotiation. Mr. Wells is a member of the Corporate and Securities Service Team and is the co-service team leader of

the firm's Natural Resources & Environmental Service Team. He has been included in Woodward/White's *The Best Lawyers in America*[®] since 2013 and has been listed as a Rising Star in Kentucky *Super Lawyers*[®] since 2015. Mr. Wells received his B.A. from the University of Kentucky, his J.D. from the University of Louisville Brandeis School of Law, and his LL.M. from Georgetown University. He serves on the board of directors of the Kentucky Oil and Gas Association and is a member of the Kentucky Bar Association.

I. INTRODUCTION

The Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA) present numerous legal obligations for employers. Employers must develop coordinated and consistent processes for granting and denying leave, actively designating employee leave as FMLA leave, centralizing the system of administering leave, complying with all requirements related to medical information and records, and engaging in the interactive process. This outline highlights only a sampling of the statutory and regulatory framework surrounding the FMLA and ADA that employers must be aware of to successfully comply with these laws.

II. THE FAMILY AND MEDICAL LEAVE ACT

The FMLA was signed into law in 1993 by President Clinton. It was revolutionary for its time and guaranteed up to 12 weeks of unpaid leave per year.

A. Eligibility for Leave

Still today, the FMLA provides eligible employees with up to 12 weeks of unpaid, job-protected leave per year.

1. Eligible employees.

Employees are eligible for leave under the FMLA if the employee has been employed for at least 12 months and has worked at least 1,250 hours for that employer in the previous 12-month period. [29 U.S.C. §2611\(2\)\(A\)](#).

2. Eligible employers.

An employer is subject to the requirements of the FMLA if it employs 50 or more employees in a 75-mile radius. [29 U.S.C. §2611\(2\)\(B\)](#).

B. Qualifying Reasons for Leave

The Act and supporting regulations provide detailed descriptions for the circumstances in which an employee may utilize FMLA leave. Employees may receive a total of 12 workweeks, or in some cases 26 workweeks, of leave during any 12-month period for the following:

- For birth of a son or daughter, and to care for the newborn child;
- For placement with the employee of a son or daughter for adoption or foster care;
- To care for the employee's spouse, son, daughter, or parent with a serious health condition;

- Because of a serious health condition that makes the employee unable to perform the functions of the employee's job;
- Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty (or has been notified of an impending call or order to covered active-duty status); and
- To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember.

[29 U.S.C. §2612\(a\)](#); [29 C.F.R. §825.112](#). While most of the qualifying reasons entitle an employee to 12 workweeks of leave, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the servicemember. [29 U.S.C. §2612\(a\)\(3\)](#).

Eligible employees are entitled to leave for the employee's own "serious health condition" where the employee experiences illness, injury, impairment, or a physical or mental condition that involves inpatient care or continuing treatment by a health care provider. [29 C.F.R. §825.112](#). The regulations provide detailed descriptions of when a serious health condition involves treatment by a health care provider, including for incapacity and treatment; pregnancy or prenatal care; chronic conditions; permanent or long-term conditions; conditions requiring multiple treatments; and even some circumstances in which the employee or the covered family member does not receive treatment during the absence (such as an employee with asthma). [29 C.F.R. §825.115](#).

C. Intermittent Leave

Eligible employees are entitled to take FMLA leave on an intermittent or reduced schedule when the leave is medically necessary due to the employee's own serious health condition or to care for a covered family member or servicemember. [29 C.F.R. §825.203](#).

Eligible employees are also entitled to take leave on an intermittent basis or on a reduced schedule when the leave is taken for a planned medical treatment. *Id.* In these instances, the employee is required to make a "reasonable effort" to schedule the planned medical treatment at a time that does not unduly disrupt the employer's operations. *Id.*

Employers are not required to offer intermittent leave or a reduced schedule, however, to bond with a healthy, newborn child. In this regard, an eligible employee may only use FMLA leave on an intermittent basis or on a reduced schedule *if the employer agrees*. [29 C.F.R. §825.120](#). Agreement by the employer for intermittent leave is not necessary where the leave is required by the serious health condition of the expectant mother or newborn child. *Id.* In instances where spouses are employed by the same covered employer and seek leave to care for the child after birth, for adoption or foster care placement, or to care for the employee's parent

with a serious health condition, available leave is limited to a *combined* total of 12 workweeks during a 12-month period. *Id.*

D. Medical Certification and Re-Certification

Employers are often entitled to receive medical certification that verifies the information provided by the employee. Employers should request that an employee furnish certification issued by the health care provider of the employee or the employee's family member within five business days of the employee's request for leave. [29 C.F.R. §825.305](#). The regulations provide the following additional guidance related to certifications:

1. General.

Employers may require that an employee's leave to care for the employee's covered family member with a serious health condition, or due to the employee's own serious health condition be supported by a certification issued by the health care provider of the employee or the employee's family member. Employers may also require that an employee's leave because of a qualifying exigency or to care for a covered servicemember with a serious injury or illness be supported by a certification. [29 C.F.R. §825.305\(a\)](#).

2. Complete and sufficient certification.

Employees are *required* to provide complete and sufficient certification to employers. Employers shall advise employees when a certification is incomplete or insufficient and must state in writing the additional information necessary to make the certification complete and sufficient. Employers must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. If the deficiencies specified by the employer are not cured in the resubmitted certification, the employer may deny the taking of FMLA leave. [29 C.F.R. §825.305\(c\)](#).

3. Annual certification.

Where an employee's need for leave due to the employee's own serious health condition, or the serious health condition of the employee's covered family member, lasts beyond a single leave year, employers may require the employee to provide a new medical certification in each subsequent leave year. [29 C.F.R. §825.305\(e\)](#).

4. Recertifications.

Employers may request recertification not more than every 30 days. [29 C.F.R. §825.308](#). Employers may request certification in less than 30 days if the employee requests an extension of leave; if the circumstances described by the previous certification have significantly changed; or if the employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. *Id.*

III. THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act and its subsequent legislative amendments provide protections to employees with disabilities. Unlike the FMLA, the ADA does not affirmatively entitle employees to a certain amount of leave; rather, the ADA generally prohibits discrimination against individuals with disabilities in employment, transportation, public accommodations, communications, and access to government programs and services.

A. Eligibility

The ADA provides that employers shall not discriminate against a qualified individual with a disability in regard to any aspect of employment. [42 U.S.C. §12112\(a\)](#).

1. Eligible employers.

An employer is subject to the requirements of the ADA if it employs 15 or more employees. [29 C.F.R. §1630.2\(e\)](#).

2. Eligible employees.

An employee must establish that the employee has a qualifying disability within the meaning of the ADA. [42 U.S.C. §12102\(1\)](#). In general, a “disability” means: a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such impairment. *Id.* The statute explicitly notes that a “disability” should be construed broadly to permit broad coverage under the law. [42 U.S.C. §12102\(4\)](#).

The ADA further defines the types of functions that are considered to be a “major life activity.” In this regard, such activities include, but are not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. [42 U.S.C. §12102\(2\)](#). Additionally, major bodily functions including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions are considered to be major life activities for purposes of determining an employee’s disability. *Id.*

B. Reasonable Accommodations

Under the ADA, it is unlawful for a covered employer to not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee, unless the employer is able to demonstrate that the accommodation would pose an *undue hardship* on the operation of its business. [29 C.F.R. §1630.9\(a\)](#). Courts construe whether or not a requested accommodation is an undue hardship based on the specific facts and circumstances of each case; employers should be cautious not to outright deny a request for an accommodation before first consulting with counsel. Considerations related to undue hardships to an employer may include:

- The nature and net cost of the accommodation needed;
- The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
- The type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; and
- The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

[29 C.F.R. §1630.2\(p\)\(2\).](#)

The regulations provide a number of examples of what may be considered as a reasonable accommodation under the ADA. These include job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. [29 C.F.R. §1630.2\(o\)\(2\).](#)

C. Interactive Process

To determine the appropriate and reasonable accommodation for an employee under the ADA, the employer must engage in an *interactive process* with the employee in need of an accommodation. [29 C.F.R. §1630.2\(o\)\(3\).](#) Throughout this process, employers and employees should work together to identify the precise limitations of the disability and potential reasonable accommodations that could overcome those limitations. *Id.* Such processes should be undertaken with a problem-solving approach, and include the following steps:

- Analyzing the particular job involved and determining its essential functions;
- Consulting with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
- In consultation with the individual to be accommodated, identifying potential accommodations and assessing the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
- Considering the preference of the individual to be accommodated and selecting and implementing the accommodation that is most appropriate for both parties.

[29 C.F.R. pt. 1630 app. §1630.9](#). Remember, there is no “one-size-fits-all” approach to the interactive process and what requested accommodations may ultimately be reasonable to a particular employer.

ADMINISTRATIVE LAW AT THE SUPREME COURT AND ITS IMPACT ON CORPORATE LEGAL DEPARTMENTS

R. Clay Larkin

I. OVERVIEW

This presentation examines four recent (or relatively recent) decisions of the United States Supreme Court concerning issues of federal administrative agency authority. Each decision is addressed, followed by a discussion of how lower courts have applied the decision, and whether the decision has been applied or addressed by Kentucky's courts. The discussion of each case concludes with potential applications of the decisions in scenarios faced by businesses and their legal departments.

II. EXECUTIVE SUMMARY

Recent Supreme Court decisions have made it easier for litigants to challenge the actions of federal administrative agencies. The Court is increasingly skeptical of claims of agency power and expertise. The decisions emphasize that agencies have only those powers which are properly delegated to them by the legislature, that the judiciary must exercise independent judgment, and that the mere longstanding continuation of an agency practice does not assure its validity.

- The Existence of Agency Power: When an administrative agency takes an action that is substantial in scope or addresses a "major" question of national importance, the Court will look for a clear statement in the agency's statute indicating that Congress intended to grant such power to the agency ([West Virginia v. EPA](#)).
- End of Deference to Agency Interpretations: Courts will no longer defer to agency interpretations of ambiguous statutes. The judiciary can decide cases involving agency statutory interpretation using traditional tools of construction to reach the right outcome, without giving the agency an advantage in close cases ([Loper Bright v. Raimondo](#)).
- Older Actions of Agencies Can Sometimes Now Be Challenged: The Court is also making it easier for corporate entities to challenge older agency actions, rejecting a statute of limitations defense. ([Corner Post v. Bd. of Governors](#)).
- In-House Courts under Scrutiny: The Court is reaffirming the Seventh Amendment's right to jury trial for certain agency enforcement actions, although the regulated community's ability to avoid "in-house" agency adjudication remains subject to a case-by-case analysis ([SEC v. Jarkesy](#)).

And, a case currently pending before the Supreme Court may make it easier for corporations to show that they have been harmed by federal agency action, such that they can show the needed standing to challenge that action (*Diamond Alternative Energy v. EPA*).

All of this adds up to perhaps more work for corporate counsel, but better potential outcomes for clients who have a need to push back on government overreach. On the

other hand, some of these cases may result in more challenges to government action that actually benefits corporate clients. Some of these implications are discussed below.

A. [West Virginia v. EPA](#), 597 U.S. 697 (2022)

1. Case summary.

The United States Environmental Protection Agency (“EPA”) is charged with implementing the federal Clean Air Act (“CAA”). One section of the CAA, [42 U.S.C. §7411\(d\)](#) (“Section 111(d)”), allows EPA to regulate air emissions from existing industrial sources of air pollution, such as factories or power plants. Under Section 111(d), EPA can regulate the plants’ air emissions if EPA first establishes “standards of performance” for such plants. The “standards of performance” must represent the “best system of emission reduction” that is “adequately demonstrated” to control pollution at the particular type of facility.

For approximately 50 years, EPA applied Section 111(d)’s “system of emission reduction” requirement by setting emission limits based on the installation and use of pollution control equipment at the facility itself. In other words, under EPA’s historic method for setting these standards, the facility could continue to operate the way it was intended to operate, but new or better pollution controls would be required to be installed to limit or control air pollution. However, in 2015, EPA adopted new regulations under Section 111(d) that were specific to fossil fuel-fired power plants. These new regulations – known as the “Clean Power Plan” – imposed limits that could not be met by new pollution control equipment installed at coal-fired power plants but instead could only be met by operating the plant less often or shutting it down completely and generating the electricity by use of some other fuel, like natural gas, wind, or solar. This was known as “generation shifting” because utilities would have to shift their business from generating electricity with coal to generating it from some other energy source in order to comply.

The question presented to the Court was whether Section 111(d) could fairly be read to grant EPA the authority to require electric generating utilities to generate less of their electricity using coal. Specifically, the Court framed the question as whether “restructuring the Nation’s overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the ‘best system of emission reduction’ within the meaning of Section 111.” According to the Court, EPA’s claim of authority to substantially change the nation’s electricity generation mix was “extraordinary” in terms of “economic and political significance” and as such the Court had a “reason to hesitate before concluding that Congress meant to confer such authority.” When claiming to have such broad authority on questions of such significance, the Court held, an agency must point to “clear congressional authorization” for the claimed power. The Court therefore expressly adopted what is known as the “major questions doctrine” – that is, on questions of major political and economic significance, agencies must point to a clear delegation from Congress of the authority they claim to hold. With respect to the Clean Power Plan, the Court found no such

clear delegation, and in fact found historical evidence that Congress expressly did not want EPA to establish generation shifting as a system of emission reduction, as Congress had previously debated and declined to pass bills that would have imposed similar systems.

2. Key takeaway.

The key takeaway from this case is that in “extraordinary” cases where the agency claims significant powers on matters of national political and economic significance, the agency must show clear congressional authority in the text of the statute it is relying on in order to regulate. Particularly where an agency is using an old statute in an expanded manner, courts will be skeptical that agency power exists.

For businesses impacted by national regulations or regulations that impose major costs or changes in business practices, an examination of the statutory authorization is critical. The court will not accept merely a “plausible” claim to agency power, but in these “major question” cases, the court will look for a “clear statement” in the statute indicating that the agency has the power. This doctrine provides opportunities to push back against new rulemaking or enforcement initiatives, particularly where agencies are attempting to apply older or more settled statutes to new or developing policy or economic areas where it may be harder to establish legislative intent to grant the agency authority.

3. Application in other cases.

Litigants are now frequently invoking the “major questions” doctrine announced in [West Virginia v. EPA](#) to attack agency rulemakings, with some success.

In [Biden v. Nebraska](#), 143 S. Ct. 2355 (2023), a state was successful in challenging then-President Biden’s student debt forgiveness plan. The statutory basis for the authority to cancel or forgive a huge amount – over \$400 billion – in student loans was a 2003 act granting the Secretary of Education the authority to “waive or modify” certain loan requirements contained in the 1965 Higher Education Act. Finding that the case presented a “major question”, the Court held that “waive or modify” as used in the 2003 statute “do[es] not mean ‘completely rewrite’” and that there was no clear statement from Congress in the relevant statute granting the Secretary of Education the authority to “unilaterally alter large sections of the American economy.”

The “major questions” doctrine was also cited by the Fifth Circuit in striking down Securities and Exchange Commission rules imposing corporate board diversity requirements. *Alliance for Fair Bd. Recruitment v. SEC*, 125 F.4th 159 (5th Cir. 2024).

In other instances, courts have rejected the attempted application of the major questions doctrine, by either finding that the power claimed by the agency was not “unheralded” or that there was no “transformative” use of

agency authority. For example, in *State v. Su*, 121 F.4th 1 (9th Cir. 2024), the court rejected a challenge to an executive order and corresponding Department of Labor rule which required federal agencies to include a clause in federal contracts requiring contractors to pay the \$15/hour federal minimum wage. The court held that there was no newfound use of the claimed statutory authority, because two prior presidents had imposed similar requirements. Under the Ninth Circuit’s rationale, the major question analysis applies only if the agency is both undertaking an “unheralded” or “transformative expansion” of its authority under a statute *and* its action would be of “vast economic and political significance.” In other words, some courts are careful to limit the doctrine to only true “major” questions and not apply it to all questions of agency authority.

The specific contours of the major questions doctrine remain to be examined in cases going forward, but it will certainly provide at least some argument against the existence of agency authority in a number of cases, particularly those impacting large or important sectors of the economy, and those involving a claimed authority over new issues under old statutes.

4. Application in Kentucky.

As of this writing, no reported Kentucky appellate court decisions have invoked the “major questions” doctrine. This could be because Kentucky administrative law has long contained a presumption *against* the existence of administrative agency power. See, e.g., *Henry v. Parrish*, 211 S.W.2d 418, 422 (Ky. 1948) (“The scope of [an administrative agency’s] authority is necessarily limited. If there is any fair or reasonable doubt concerning the existence of a particular power here sought to be invoked, it should be resolved against the [agency].”); *United Sign, Ltd. v. Commonwealth*, 44 S.W.3d 794, 798 (Ky. App. 2000) (“Any doubts concerning the existence or extent of an administrative agency’s power should be resolved against the agency.”); *Laurel Mountain Resources, LLC v. Commonwealth, Energy and Environment Cabinet*, 360 S.W.3d 791, 800 (Ky. App. 2012).

B. [*Loper Bright Enters. v. Raimondo*](#), 603 U.S. 369 (2024)

1. Case summary.

[*Loper Bright*](#) overturned a rule of statutory interpretation, applied only in administrative law cases, known as the [*Chevron*](#) deference doctrine, which was adopted by the Court in the case of [*Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*](#), 467 U.S. 837 (1984). Under the [*Chevron*](#) doctrine, when a court was faced with conflicting interpretations of a statute which an administrative agency was charged with administering, the courts were to engage in a two-step process. First, the court was to determine if Congress had “directly spoken to the precise question at issue” – *i.e.*, to determine whether the statute was clear. If the statute was clear, then the case could be decided simply on the basis of the interpretation of clear statutory text. However, if the court deemed the statute “silent” or “ambiguous with respect to the specific issue” the court was to proceed to a second step. Under this second step, the court was *not allowed* to determine the best

interpretation of the statute, but rather, was required to defer to the agency's interpretation as long as that interpretation was "permissible," even if the court would otherwise have adopted a different interpretation. This was based on a theory that silence or ambiguity in a statute was an intentional delegation by Congress to the agency of authority to formulate policy to fill in gaps in the statute. As a practical matter, [Chevron](#) meant that in a close case involving interpretation of an agency's statute, an agency was likely to win. This put challengers to agency action at a significant disadvantage.

In the [Loper Bright](#) case itself, certain Atlantic Ocean fishing companies challenged a rule adopted by the National Marine Fisheries Service (NMS), under the Magnusson-Stevens Fishery Conservation and Management Act. The Act required that fishing companies comply with certain requirements designed to address overfishing of U.S. waters. Particularly, the Act called for the creation of regional fisheries management plans, and provided that such plans could require fishing vessels to carry "one or more observers" on board, to monitor the vessel's compliance with fishing limits. The Act itself established three categories of fishing vessels that were required to pay the cost of these government observers – over \$700 per day. Atlantic fishing vessels were not among those the Act expressly required to pay for observers. However, the NMS adopted an administrative regulation that could require Atlantic fishing vessels to pay for the cost of observers.

The plaintiffs in [Loper Bright](#) challenged the observer rule. The trial court and D.C. Circuit ruled in favor of the agency, invoking the [Chevron](#) doctrine. The courts found that the statute was ambiguous as to whether the agency could require Atlantic vessels to pay for the observers. Judge Walker of the D.C. Circuit dissented, arguing that because the statute did not expressly provide for payment of observers on Atlantic vessels, combined with the fact that three other types of vessels were expressly required by the Act to pay for observers, resulted in a straightforward conclusion that the Act did not require Atlantic vessels to pay for observers. In other words, but for application of [Chevron](#), the plaintiffs would likely prevail. The Supreme Court granted review to resolve whether or not to continue applying [Chevron](#) deference.

The Supreme Court struck down the [Chevron](#) doctrine, finding it inconsistent with the Administrative Procedures Act – which requires courts to exercise independent judgment in reviewing agency action – and with the Constitution's grant of the judicial power to the courts. The Court held that courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and [Chevron](#) deference precludes courts from exercising the judicial power vested in them by Article III to say what the law is. Instead of deferring to agency interpretations, courts are now to find the best interpretation of a statute, using traditional tools of statutory construction, without deferring to the agency.

2. Key takeaway.

Courts will no longer simply “defer” to administrative agency interpretations in close cases. Rather, courts will apply independent judgment and tools of statutory construction in administrative law cases, just as they do in other cases. For corporate counsel, this improves the odds that a corporate client can challenge agency rulemaking or enforcement actions that are contrary to their interests. If there is a legitimate dispute as to an agency’s interpretation of a statute – either when it refuses to issue a permit, writes a violation, or proposes a new regulation – counsel need no longer caution their clients that the government nearly always wins in close cases, as was effectively the rule under [Chevron](#).

However, [Loper Bright](#) may also have unintended consequences for corporate clients whose business interests are *advanced* by agency regulatory interpretations. Although issues of agency power are typically viewed through the lens of agencies inhibiting or hindering business interests, this is not always the case. In many instances, agencies have used their expertise and discretion to craft rules which interpret statutes in a manner that is friendly to industry. Indeed, [Chevron](#) itself was just such a case. In [Chevron](#), the court was reviewing an EPA rule that was being challenged by the Natural Resources Defense Council – an environmental interest group – as being contrary to statute and too friendly to industry. It was an oil company – Chevron – that sought to support EPA’s interpretation of the statute. Thus, [Loper Bright](#) and the demise of [Chevron](#) are not necessarily a boon for all businesses in all cases. To the extent that a business benefits from a particular rulemaking, policy or practice of an administrative agency which might not be in line with that agency’s underlying statute, the business may see challenges to that agency policy from third party interest groups or even adversely impacted competitors. Thus, [Loper Bright](#) is not in every case a “pro-business” ruling.

3. Application in other cases.

[Loper Bright](#) is less than a year old, but as of this writing it has already been cited over 500 times in reported cases. ([Chevron](#) was cited over 20,000 times in its four decades as the prevailing rule of agency deference). [Loper Bright](#) has been invoked in numerous decisions overturning agency actions, including by: the Sixth Circuit to vacate certain “net neutrality” laws adopted by the Federal Communications Commission as inconsistent with the Communications Act of 1934 and Telecommunications Act of 1996 (*In re MCP No. 185*, 124 F.4th 993 (6th Cir. 2025)); by the Fifth Circuit in vacating certain cryptocurrency regulations, *Van Loon v. U.S. Dep’t of Treasury*, 122 F.4th 549 (5th Cir. 2024); and by the D.C. Circuit in overturning EPA regulations under the Clean Air Act, *United States Sugar Corp. v. EPA*, 113 F.4th 984 (D.C. Cir. 2024).

4. Application in Kentucky.

[Loper Bright](#) has, as of this writing, apparently been cited only three times by Kentucky appellate courts.

A footnote in *Pantoja v. Atomic Transp., LLC*, 2024 Ky. App. LEXIS 99, 2024 WL 4714470 (Ky. App. Nov. 8, 2024) cites [Loper Bright](#) for the proposition that “when it comes to federal agency rulings, ‘courts must exercise their independent judgment . . . [and] need not . . . defer to an agency interpretation of the law.’” However, the issue of deference to administrative agency interpretation was not the primary issue in that case.

The dissenting opinion in *Hall v. BPM Lumber LLC*, 2024 Ky. LEXIS 384, 2024 WL 5174554 (Dec. 19, 2024) extensively cited to [Loper Bright](#), primarily to invoke its separation of powers holdings. But the Kentucky Supreme Court has not expressly adopted it.

The only other Kentucky case to discuss [Loper Bright](#) is *Comm’r of Dep’t of Workplace Standards, Education and Labor Cabinet v. Kalkreuth Roofing & Sheet Metal, Inc.*, 2024 Ky. App. LEXIS 92, 2024 WL 4469215 (Ky. App. Oct. 11, 2024). This opinion suggests that [Loper Bright](#) may be of limited impact in cases decided solely by the Kentucky courts applying Kentucky law, because it was never entirely clear whether Kentucky courts fully adopted [Chevron](#) deference to begin with. The court began its opinion by noting, without citation, that “Kentucky has generally adhered to the doctrine of ‘[Chevron](#) deference’ . . .” But then it stated that the [Loper Bright](#) decision “has no real impact” because, among other reasons, “the Kentucky Supreme Court has also recognized that the courts have the ultimate responsibility in matters of statutory construction, and a reviewing court is not bound by an administrative body’s interpretation of a statute” and “[o]n issues of law, courts are authorized to review on a *de novo* basis.”

The author of this paper notes that Kentucky’s application of [Chevron](#) was usually about as inconsistent as the statements in the opinion above. The deference doctrine was frequently cited as being applicable to a case, only to be followed by a citation within the same opinion indicating that Kentucky courts decided issues of law without regard for agency construction. This was confusing before, but perhaps the confusion has been fully resolved by [Loper Bright](#), and that [Chevron](#) is now just as dead in Kentucky as anywhere else, even if it maybe never lived here at all.

It is also possible that Kentucky will fully remove the last vestiges of [Chevron](#) by statute. As of this writing, [Senate Bill 84](#) was being advanced through the Kentucky General Assembly. That bill would amend [KRS Chapter 446](#) to provide that courts “shall not defer” to agency interpretations, and that in the event of ambiguity in a statute, the statute should be interpreted to “resolve any remaining ambiguity against increased agency authority.”

C. [Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.](#), 603 U.S. 799 (2024)

1. Case summary.

Corner Post was a truck stop and convenience store which opened for business in 2018. Like most similar businesses, it accepted debit cards as

payment, and so was required to pay “interchange fees” to the banks that issue the cards.

In the early-to-mid 2000s, there were numerous criticisms of these fees on debit cards, and in response Congress included a provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 which required the Federal Reserve to establish the interchange fee rates based on what was “reasonable and proportional to the cost incurred by the issuer [of the card] with respect to the transaction.” The Federal Reserve adopted a rule, known as Regulation II, to carry out this rate-setting requirement in 2011. Litigation to challenge Rule II was filed in 2011 by a trade association, but that challenge was not successful.

Corner Post did not exist in 2011, but by 2021 it was frustrated with the fees and joined a new lawsuit challenging Rule II. Corner Post’s case was dismissed on statute of limitations grounds by the district court and the circuit court affirmed the dismissal. The lower courts reasoned that a cause of action to challenge a regulation under the federal Administrative Procedures Act is subject to the general six-year statute of limitations applicable to government actions under [28 U.S.C. §2401](#), and that the cause of action accrues for purposes of the limitation period on the date the final rule is published. Corner Post, not being in existence at the time the rule was published or within the six-year period thereafter, could not have challenged the rule under this rationale.

The Supreme Court held that the statute of limitations to challenge agency rulemaking under the APA did not begin to run until the plaintiff was actually injured by the action. In Corner Post’s case, it could not have been injured until it existed and began paying the fees, which was sometime in 2018. Thus, its claim brought in 2021 was timely, because it was brought within six years of the date of its first claimed injury as a result of governmental action. Thus, Corner Post was free to challenge the rule, even though the rule itself was a decade old at the time of suit.

2. Key takeaway.

Corporate entities that are injured by agency rulemakings or policies may still be able to challenge those actions or policies even if the rules or policies have been in place for a long time, if the injured entity is a new entity. Corporations in particular need of the ability to challenge agency rulemaking could consider adopting structures that result in the creation of new entities that may be able to take advantage of the ability to challenge longstanding agency rules.

3. Application in other cases.

[Corner Post](#) is limited in scope and the issue it resolved is presented in fewer cases than the principles articulated in [Loper Bright](#), or even perhaps [West Virginia](#). This is likely because it adopts a fairly straightforward rule, but one that applies only in limited factual circumstances.

4. Application in Kentucky.

Likely because it only applies to the federal APA and the federal statute of limitations, this case has not been addressed by Kentucky's state courts.

D. [SEC v. Jarkesy](#), 603 U.S. 109 (2024)

1. Case summary.

The U.S. Securities and Exchange Commission ("SEC") brought securities fraud charges against Jarkesy and an entity with which he was affiliated. The SEC sought civil penalties for these alleged fraud violations. The SEC's complaint was filed in an administrative forum, with the hearing conducted by an in-house SEC Administrative Law Judge ("ALJ"). The ALJ ultimately imposed a \$300,000 civil penalty against Jarkesy and his limited liability company. Jarkesy appealed, arguing, among other things, that the [Seventh Amendment](#) to the U.S. Constitution gave him a right to a trial by jury with respect to the SEC's civil penalty claims.

The Court framed the question: "whether the [Seventh Amendment](#) entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud." The court analyzed the case by reference to two prior decisions, [Granfinanciera, S.A. v. Norberg](#), 492 U.S. 33 (1989) and [Tull v. United States](#), 481 U.S. 412 (1987). Applying those two cases, the Court found that the SEC's civil penalty remedy for securities fraud was akin to a common law fraud action seeking damages, and therefore the [Seventh Amendment](#) guaranteed the right to a jury trial for such actions, because they were within the meaning of "suits at common law" to which the jury trial right applied.

The court noted, however, that it was not disturbing an existing exception to the jury trial right, known as the "public rights exception." The public rights exception allows administrative agencies to proceed to collect penalties via in-house administrative adjudications if the proceeding involves "a new cause of action, and remedies therefor, unknown to the common law." [SEC v. Jarkesy](#), 603 U.S. 109, 137 citing [Atlas Roofing Co. v. Occupational Safety and Health Review Commission](#), 430 U.S. 442 (1977).

2. Key takeaway.

[Jarkesy](#) makes clear that when agencies are enforcing statutes that effectively mirror common law claims, it must provide the targets of its enforcement actions the right to a jury trial. However, [Jarkesy](#) also declined to overrule cases like [Atlas Roofing](#) which allow in-house adjudication where the violation and civil penalty action relate to statutes creating rights or remedies that were not known at common law when the [Seventh Amendment](#) was ratified. Although administrative defendants will likely continue to invoke [Seventh Amendment](#) defenses to administrative adjudication processes, particularly where there are concerns regarding the neutrality of in-house arbiters, whether [Jarkesy](#) merely reiterates

existing law or significantly expands the rights of defendants remains to be seen.

3. Application in other cases.

Courts have seen a number of challenges to in-house agency adjudications in the wake of [Jarkesy](#). In some instances, they have affirmed the “public rights” exception from [Atlas Roofing](#). See, e.g., *Prewitt v. McDonough*, 2025 U.S. Dist. LEXIS 2957, 2025 WL 42744 (D.C. Cir. Jan. 7, 2025) (Veterans Administration may continue to use administrative adjudication to resolve cases regarding disability benefit payments to veterans). On the other hand, certain agency procedures have already been altered as a result of the [Jarkesy](#) decision. For example, Federal Energy Regulatory Commission (“FERC”), has already suspended certain in-house enforcement proceedings in “market manipulation” cases based on the [Jarkesy](#) decision. See *Total Gas & Power N. Am., Inc.* 188 FERC [para] 61,197 (2024).

4. Application in Kentucky.

[Jarkesy](#) has not been cited by Kentucky’s courts in a reported appellate decision, at least as of this writing. Nor have Kentucky’s courts cited to either [Granfinanciera](#) or [Tull](#), the precedents on which [Jarkesy](#) relied.

Kentucky’s Supreme Court affirmed the “public rights” exception from [Atlas Roofing](#) in *Kentucky Comm’n on Human Rights v. Fraser*, 625 S.W.2d 852 (Ky. 1981). *Fraser* upheld administrative adjudication of civil rights violation claims because such claims did not exist at common law and therefore did not implicate the [Seventh Amendment](#). Whether the publicity surrounding the [Jarkesy](#) decision results in new [Seventh Amendment](#) defenses to administrative enforcement actions in Kentucky remains to be seen.

E. *Diamond Alternative Energy, LLC v. EPA*, Docket No. 24-7

On December 13, 2024, the Supreme Court granted *certiorari* in this case on the question of “whether a party may establish the redressability component of Article III standing by relying on the coercive and predictable effects of regulation on third parties.” If the Court agrees that such third-party effects can provide challengers with standing, this may increase the ability of companies to challenge agency rulemakings or similar actions.

The case itself is a challenge to EPA’s decision to grant the state of California a “waiver” under the Clean Air Act. That Act allows California, but no other state, to establish more stringent standards related to air pollution if it can show that such standards are “needed” due to “extraordinary” conditions in the state. In this instance, California sought a waiver that, effectively, allowed it to impose a zero emission mandate on new automobiles in the state by 2026 – effectively requiring only electric vehicles in the state. California’s decision then had a predictable market effect in increasing the demand for electric cars and decreasing the demand for liquid fuel cars. The petitioners are makers of liquid fuel.

In the case below, the court ruled that the petitioners failed to demonstrate standing because they failed to show that a favorable decision – *i.e.*, a decision that the California waiver should be set aside – would actually cause auto manufacturers to produce fewer electric vehicles and more liquid fuel vehicles. The lower court held that evidence, such as affidavits, from these producers should have been submitted to show that the petitioners' injury would be redressed by a favorable decision, as required to establish standing.

In the Supreme Court, petitioners are arguing that when the effects of an agency action are “predictable,” then direct evidence of the occurrence of those predictable effects is not required to demonstrate standing. Under the petitioner’s theory, it can be safely assumed that if the California waiver is struck down, there will be at least some decline in electric vehicle production and use, and some relative increase in the manufacture and use of liquid fuel vehicles.

If the Court agrees with petitioners in this case, it may make it somewhat easier for business to challenge agency rules or actions. Federal defendants frequently invoke standing as a defense to claims challenging agency action, and federal courts examine standing quite closely. Federal courts in Kentucky have recently dismissed challenges based on very rigid standing analyses and required proof of standing that may be difficult to obtain in advance of litigation. As any corporate counsel who has been charged with obtaining “standing affidavits” in order to support lawsuits against agencies that regulate the company knows, it can often be quite difficult to find an individual willing to share – much less swear to – potentially negative information concerning the impact of agency action on a company. Allowing litigants to use common sense predictions about likely future impacts should increase the ability to demonstrate standing while protecting sensitive information from disclosure.

What we will cover....

- What is the purpose of this presentation?
 - To educate you on the evolution of the Plaintiffs' bar and how sophisticated they have become sharing information on a national level
 - To share with your outside counsel/attorneys
- Am I going to bash Plaintiffs' lawyers? **NO**
 - This is not a slight or meant to be negative towards the opposing counsels you and your companies find yourself in litigation against. They are doing a great job. Imitation is the best form of flattery. We should take a cue from them.

2

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HOW IT USED TO BE...



- The defense bar started the notion of information sharing
- Example: DRI – founded in 1960 (International Association of Insurance Counsel)
 - Database of 65,000 experts
 - Seminars/Conferences/CLEs
 - Membership perks
 - Newsletters
 - Podcasts

Corporate Counsel

[Path to the In-House Counsel Position: Conversation with John Gersch, Toyota](#)

Published: August 27, 2021

Duration: 48 minutes 21 seconds

Have you ever wondered how in-house attorneys become in-house attorneys? This interview explores the different paths that DRI members have traveled in order to find themselves working in corporate legal environment.

DRI Trucking Law Reptile Series: Episode 8

Published: March 5, 2021

Duration: 33 minutes 11 seconds

Pre-trial strategies for addressing reptile theory – Mark Perkins; Maryam Danishwar; Dr. Bill Kanasky.

Recorded October 19, 2020

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What Happened?

- The Plaintiffs' Bar flipped the script – starting in early 2000s
 - Behavior Economics
 - Psychology
- The Defense Bar slowed down on collaborating and the Plaintiffs' Bar sped up
 - Think Tanks
 - War chests – “Building new ones everyday”
 - They are committed to developing the next generation



4

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The Result?

- For our bigger corporate clients, what we are seeing:
 - Boilerplate, lengthy Complaints
 - National trends with discovery disputes
 - Focus on Reptile theories, Corporate Rep depositions
 - They have a playbook. They are sharing and trading ideas.



5

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So, let's unpack their bag of tricks...

- Information sharing, national collaboration in big cases
- Educating each other
- Reptile Theory
- Anchoring
- Advertising



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Educating Themselves and Each Other...

- The Plaintiffs' Bar is more transparent and willing to learn
- They view it as building the next generation
- They view it as being in one big effort together
- The Defense Bar is not making investments
- The Defense Bar typically see themselves as individuals with the "secret sauce"



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What is the Reptile Theory?



- How it started
 - *Reptile: The 2009 Manual of the Plaintiff's Revolution*, authors Don C. Keenan and David Ball
 - They persuade attorneys to appeal to a juror's "reptile brain" – the oldest part of your brain that used to guide people's primitive instincts
 - "[W]hen the reptile sees a survival danger, even a small one, she protects her genes by impelling the juror to protect herself and the community."
- How is this used in civil cases
 - Considered effective in product liability, motor vehicle accidents, medical malpractice and environmental contamination cases
 - The focus is less about how the injury occurred (the incident or accident) and more about the conduct of the company (emphasis on safety)
 - Plaintiff's counsel will suggest to a jury to award damages that will not just "compensate" the plaintiff but will also "punish" the company/defendant because it is a danger to the community

8

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What is Anchoring?

- "Drop an anchor" in *Voir Dire*
 - "Would you be willing to award millions of dollars in damages or is there a maximum amount you think you could go to?"
- Normalizing big figures from the start
- In fact, normalized before the jurors ever step foot in the courtroom
- The higher they go the higher the middle ground



9

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What does all this lead to? Nuclear Verdicts



- Nuclear Verdict
 - A jury award that exceeds \$10M
 - Some in the industry say there are no nuclear verdicts, only runaway verdicts
 - Some happened, something that you underestimated
- Reasons for Nuclear/Runaway Verdicts
 - Failure to admit fault; systematic issues/repeated violations
- “9 figure single event verdicts are not helping. It’s gone too far.”
 - Joe Fried, Trial Lawyer Nation



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What can we do together?

- Turn the tables – educate each other, collaborate
 - We do not have a secret sauce
 - Be vulnerable about what to do better
 - Focus Groups
 - We are not going to lose our competitive advantage for our clients by information sharing
 - Do not just work case by case, think more globally
- Counter-Anchoring
- Tort Reform/Lawsuit Abuse Reform



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I. INTRODUCTION

Many, if not most, businesses lease space from a property owner to conduct their operations. While typical lease agreements continue for a number of years and often contain one or more extension options to prolong the tenancy, their terms are dynamic and often implicate a number of pitfalls that can provide unbudgeted cost increases during the term. The purpose of this presentation is to analyze commercial real estate leases from the tenant's perspective by first examining selected lease provisions and then to discuss recent examples from actual fact patterns which created an unexpected burden on the tenant.

At the outset, it is important to acknowledge that leverage is, of course, one of the most critical components of any negotiation, and lease negotiations are no exception. In recent years, landlords of commercial warehouse locations have enjoyed a prolonged period of low inventory and high occupancy rates, thus those landlords typically have greater leverage than their tenant counterparts. Meanwhile, in the aftermath of the COVID-19 pandemic many would-be tenants have pivoted to remote working flexibility creating more office space inventory. Thus, office tenants may be in a position to demand more attractive lease concessions and tenant improvements in order to incentivize them to execute leases of vacant office space. Other factors involving leverage are the size of leased premises, the location and age of the premises, the credit of the proposed tenant, and the individual vacancy rate of the building. Depending on the specific facts and circumstances concerning both the proposed tenant and the leased premises, it is possible that a tenant may be successful in negotiating for all or none of the provisions referenced below.

II. COMMON COMMERCIAL LEASE STRUCTURES

A. Gross Lease

The tenant in a gross lease pays a fixed amount of rent which is inclusive of all of the landlord's costs to maintain and operate the building. In sum, the gross rent is generally the sole financial consideration owed to the landlord in exchange for the tenant's occupancy of the premises. Note, however, that in many instances gross rent does not include some or all of the tenant's utilities, and most gross leases require tenants to maintain liability and personal property insurance coverages. An important clarification is that a gross lease structure does not automatically mean that the tenant does not have to maintain or repair the interior of the leased premises. Indeed, maintenance and repair responsibilities are often a separately negotiated matter.

For tenants, a gross lease can be appealing because it provides the most financial predictability by avoiding fluctuating costs like operating expenses/common area maintenance ("**CAM**") or property taxes. It's often used for office spaces where the landlord prefers to manage the property or if the space is relatively small.

B. Triple Net Lease

In contrast to a gross lease, the tenant in a triple net lease is responsible for not only an amount of base rent due to the landlord, but also a share of CAM, property insurance, and real property taxes. In most triple net leases, there are certain carveouts for structural repairs to the building and certain other items mentioned below, but most costs incurred by the landlord to own, operate, and maintain the building are passed through to their tenants.

A triple net lease provides the landlord with the least amount of risk since unexpected repair costs and fluctuations in taxes and insurance premiums are passed through to the tenant. Thus, the landlord has a predictable return which facilitates financing opportunities and investment. On the other hand, the tenant can be forced to incur significant year-over-year unbudgeted lease expenses. Thus, from the tenant's perspective it is critical to employ appropriate safeguards to ensure that there are limits on the types of costs that are passed through to the tenant and, in some instances, even the amount of the increase. Triple net leases remain the most common structure that we encounter in our leasing practice.

C. Modified Gross Lease

A modified gross lease is a hybrid between a gross lease and a triple net lease. In a modified gross structure, the tenant pays a fixed base rent amount and also fixed amount of CAM which typically increases year-over-year as the lease term progresses. The concept is to eliminate what can be difficult negotiations concerning the costs which are properly includable in CAM and to provide predictability to the tenant for increases in CAM. A fixed amount of operating expenses also avoids the necessity of CAM reconciliations because the fees are fixed. Note that there are commonly carveouts and exclusions for non-controllable expenses like building repairs required by a change in law, in addition to increases in insurance premiums, landscaping, and snow removal.

D. Leases of Single Tenant Buildings vs. Multi-Tenant Buildings

1. In a **single-tenant building**, the lease is typically simplified because there's only one tenant occupying the entire building. Since the tenant is the sole occupant of the building, the premises is often defined as the entire building, and the tenant typically bears all of the maintenance responsibilities and costs associated with the building that would otherwise be the landlord's responsibility.
2. In a **multi-tenant building**, the landlord usually retains responsibility for the maintenance and repair of the portions of the building that are shared in common with all of the tenants – elevators, building lobbies, parking lots, etc. Generally, tenants are allocated responsibility for a portion of these costs based upon the percentage of the building leased to each tenant. Similar principles apply where the building is part of multi-building project, and often there are separate percentages for cost which are applicable to just one building and costs which are attributable to the entire project.

III. TENANT FAVORABLE LEASE PROVISIONS FOR CONSIDERATION

A. Tenant Improvements

Landlords frequently agree to perform alterations or improvements to fit-up the premises for tenant's desired configuration based upon its particular needs.

B. Free Rent Credit

Landlords, especially in long term leases, are often willing to extend free rent to a prospective tenant as an incentive to enter into a lease. Free rent periods can help to offset moving costs, tenant buildout, and equipment/furniture purchases which could otherwise create a burden on the tenant's cash flow.

C. Extension Options

Most new leases contain at least one tenant option to extend or renew the lease term for a negotiated period of time. Extension terms help to ensure continuity of operations and provide comfort that the lease will be on the same terms and conditions as the initial lease term, often with the only exception being the amount of rent paid during the extended term. Extension options frequently contain provisions which require them to be exercised by a date certain. A tenant favorable adaptation to that general rule is language which provides that the tenant may continue to exercise its option to extend the term until such time as landlord has provided notice to tenant that it has failed to exercise its extension option timely.

D. Termination Options

Leases are notoriously difficult for a tenant to terminate. In fact, many landlord lease forms contain provisions which prohibit a lease termination even in the event of a landlord default. Looking through this lens, tenants can be reluctant to risk entering into a new lease because of the fear of a long-term rent obligation. A termination option is a way to manage the tenant's risk by providing that it may terminate the lease upon the satisfaction of certain conditions – normally that the tenant is not in default at a predetermined date during the lease term and the payment of certain sums to the landlord. Landlords can be receptive to a termination option which requires the tenant to pay a termination fee and which provides a mechanism to allow the landlord to recoup all or some of the tenant incentives that it offered to attract the tenant to lease the premises.

E. Expansion Options

Particularly when a tenant hopes to grow its business and there is additional space in the building, a tenant may want to request a right of first refusal or right of first option to expand into any vacant or soon-to-be vacant space in the building. These options often have a short window in which they can be exercised, but they can provide significant benefits to a tenant who needs additional space.

F. Exclusive Rights

Tenants, particularly in retail environments, are incentivized to manage competition. For example, a startup drugstore doesn't want a Walgreens next door or even in the same shopping center. Likewise, non-retail tenants may be concerned about the unintentional compromise of market intelligence or trade secrets due to its occupancy of premises in close proximity to a competitor. For tenants who are concerned about a direct competitor leasing space nearby, those tenants can consider an exclusive use provision in the lease which would prohibit the landlord from entering into a lease with the tenant's direct competitor for an agreed upon area.

IV. SELECTED FREQUENTLY NEGOTIATED LEASE PROVISIONS

A. CAM

As referenced above, since most commercial leases are structured as triple net leases, the costs which are properly passed through to tenants of the building are typically one of the most negotiated lease provisions. The issues referenced below are common in CAM negotiations:

1. Capital expenditures: who is responsible?

An unbudgeted capital expenditure can have a material impact on the amount of rent paid. For example, if unchecked, it is possible a landlord could pass through the cost of an entire roof replacement to the current tenants of the building. Of course, since the useful life of a roof is often greater than a lease term, that outcome is fundamentally unfair to the building's tenants. Consequently, the most common compromise is that the landlord makes a capital expenditure, but that the tenant reimburses the landlord the portion of the useful life of the capital repairs or replacements that is amortized over the term of the lease. Tenants typically pay such amortized amount through monthly installments of additional rent.

2. Costs to comply with changes in law.

Although these costs typically arise in the form of capital expenditures, landlords and tenants often negotiate the costs to comply with laws by allowing the landlord to pass through costs to comply with new laws, while the landlord retains responsibility for ensuring that the premises comply with applicable legal requirements which exist at the time of lease commencement.

3. Costs which are typically excluded from CAM:

- a. Loan costs.
- b. Political/charitable contributions.
- c. Improvements requested by, or created for, specific tenants.

- d. A profit.
- e. Structural building repairs.
- f. Landlord salaries for everyone who is above the building manager level (landlord overhead).
- g. Landlord's legal fees for lease negotiations and enforcement of leases with other tenants (legal fees incurred by landlords in an effort to reduce CAM commonly negotiated).

4. Tenants' audit rights.

Since negotiations concerning CAM costs are frequently heavily negotiated, tenants are well served to insist on audit rights to ensure that the amount it is charged as additional rent is in compliance with the lease terms. This is especially true where a tenant may have received concessions on includable expenses that diverge from the landlord's standard CAM calculations. Common issues in connection with CAM audits are:

- a. What is the deadline to initiate an audit?
- b. Who pays for the audit?
- c. What records is the tenant entitled to review?
- d. Where must the records be available – is the landlord required to provide electronic copies of the records?
- e. Can the tenant employ an audit firm who is engaged on a contingency fee basis?

B. ADA Provisions and Compliance with Law

The ADA and its state analogues are more prevalent now than ever. Tenants should request that the landlord warrant that the space is compliant with all applicable access and disability laws in existence at the time of lease commencement. The costs of improvements or alterations resulting from new legal requirements are frequently passed through to tenants as CAM.

C. Delivery Date/Delivery Condition

Shortages in materials and labor that were pervasive during the COVID-19 pandemic have lessened, but shortages and delays are still commonplace. Consequently, a prospective tenant should evaluate whether a current tenant is occupying the premises that it wishes to lease and whether those premises are "move-in ready" before signing a lease. Tenants often request a remedy for the landlord's failure to deliver the premises timely, and tenants should consider the ramifications of the landlord's delay in delivery, such as any increased costs

related to tenant's existing lease and impacts on its operations, in determining the appropriateness of such remedy.

D. Landlord Insurance/Waiver of Subrogation

A tenant should request that a landlord maintain property insurance on the building equal to its full replacement value and request a mutual waiver of subrogation to protect the tenant against the landlord's insured losses.

E. Indemnity

Indemnities are typically heavily negotiated. Tenants often want indemnity provisions to contain similar language to achieve mutuality. Landlords tend to push back arguing that the tenant's activities are more active in the building than the landlord's. A "facts and circumstances" approach is necessary in the evaluation of the indemnity but, as a corollary issue, tenants should seek a mechanism to recover their out-of-pocket professional fees to enforce their rights under the lease – otherwise, the costs of enforcement can be a material obstacle to requiring the landlord to perform its lease obligations.

F. Consequential Damages

As with many procurement-like contracts, consequential damages can be significant. Tenants often request blanket waivers of consequential damages. While waivers are commonly agreed to by landlords, sometimes they demand carveouts for diminution in value resulting from environmental damages or lost profits/opportunities resulting from a tenant holdover.

G. Subordination

Most buildings are subject to preexisting mortgages or subject to mortgages arising from refinancing. While most commercial leases contain subordination provisions which subordinate tenant's rights under the lease to the rights of the mortgagee, tenants can typically obtain concessions from the landlord's lender stating that tenant's possession won't be disturbed so long as tenant complies with its obligations under the lease and otherwise attorns to the mortgagee or its designee as the new landlord. In addition, tenants typically request not to be made a party to any foreclosure action except to the extent required by law or to preserve its leasehold interests, and generally landlords accommodate that request.

H. Environmental and Hazardous Substances

Environmental issues are back at the forefront of lease negotiations with emergence of PFAS as a hazardous substance for purposes of environmental laws. Tenants often request a "your watch-my watch" style indemnity, which is receiving much greater attention in more recent times. In recent years, landlords are often willing to acknowledge that the tenant isn't responsible to remediate any environmental damages which aren't caused by the tenant, while at the same time limiting the landlord's express indemnity to only environmental damages which are actively caused by the landlord.

I. Alterations and Improvements

Landlords understandably want some level of approval in any improvements or alterations that the tenant intends to make to the premises, particularly if those alterations impact the structure of the building or if the tenant is not obligated to remove any alterations or improvements that it constructs. On the other hand, tenants don't want to be required to obtain the landlord's consent for minor alterations like installing an office wall or warehouse racking. A common compromise is to permit the tenant to perform non-structural alterations and improvements which cost less than an agreed upon threshold to ensure that the character of such alterations or improvements remains minimal.

V. RECENT DECISIONS

A. *Lincoln Learning Solutions, Inc. v. Cnty. of Beaver*, 312 A.3d 970, 976 (Pa. Commw. Ct. 2024)

1. Issue:

Can a tenant be liable for holdover rent when it is unaware that it occupies premises on an expired lease?

2. Facts.

In this case, a unique situation arose whereby the landlord and tenant entered into a lease which contained a provision that stated upon the occurrence of a certain event (a release of Pennsylvania Finance Authority Bonds), the lease would automatically terminate. A separate provision of the lease permitted the tenant the option to take title to the property at the same time. The tenant, followed by the tenant's successor in interest, rented and upheld the lease from 2005-2022. However, unbeknownst to the tenant, the bonds had been released in 2016. The tenant did not discover that the bonds had been released until 2022, when it then sought reimbursement for rent paid since 2016. The landlord countered that the tenant was not entitled to reimbursement and in fact the tenant owed the landlord additional amounts for holdover rent.

3. Argument.

The landlord argued that by operation of the lease as soon as the bonds were released the lease terminated and because tenant remained in possession of the premises for an additional six years, it had technically been a holdover tenant and, as such, the landlord was entitled to additional damages.

4. Decision.

The court determined that a tenant cannot be responsible for holdover rent when it has no actual knowledge that it is holding over. Unlike typical holdover tenancy cases, this tenant did not knowingly remain in possession of the property after the lease terminated. Although the tenant continued to

pay rent and the landlord continued to accept it after the lease terminated, it was only because the tenant had no knowledge that the lease had, in fact, terminated by its terms. The landlord never notified the tenant that the bonds were no longer outstanding, thereby triggering the lease to terminate and tenant's option to take title.

5. Takeaway.

The general takeaway from the court's holding is twofold: 1) if you are the landlord and you have a tenant that is holding over, provide notice, even if not required, to be safe; and 2) if you are a tenant, particularly a successor-in-interest, be sure to understand the provisions of the underlying lease to avoid missing crucial information.

B. *ROC-Lafayette Assocs., LLC v. Sturm*, 223 N.Y.S.3d 41 (App. Div. 2024)

1. Issue:

When there is conflict between a lease and a guaranty, which will control?

2. Facts.

Landlord and tenant entered into a commercial lease. In connection with the lease the defendants entered into a private guaranty which guaranteed payments through tenant's surrender of the premises. The tenant later surrendered the premises, and the landlord brought an action for unpaid past rent and future rent. The landlord succeeded in obtaining a money judgment against the tenant and then sought to collect from the guarantors. The landlord sought to recover all sums from the guarantors, not just for the amounts due until surrender.

3. Argument.

Under the terms of the lease, the tenant was required to get the landlord's written consent prior to surrendering the premises and it failed to do so. The landlord therefore argued that because the lease was not properly surrendered, the guarantors were still liable.

4. Decision.

The court ruled that the guarantors were not liable. While it acknowledged that the tenant had failed to properly surrender the premises under the terms of the lease, under the terms of the guaranty agreement, which had not expressly incorporated the lease, the court found that surrender for purposes of the guaranty was defined in a less strict manner. The court determined that the guaranty must take precedence over the lease provision.

5. Takeaway.

From a practical perspective this case demonstrates that it is important to understand how lease definitions and guaranty definitions work together. Generally, it is better to draft the lease and guaranty to conform to and incorporate each other but, if for some reason they do not, it is crucial to understand how the differences will affect the parties.

C. *Westminster American Ins. Co. v. Bond*, 307 A.3d 749, 752 (Pa. 2023)

1. Issue:

When a lease does not dictate that a tenant has to obtain casualty insurance, can the tenant be considered a “co-insured” and thus protected from subrogation by the landlord’s fire insurer?

2. Facts.

The landlord had a building with two premises, an upstairs and a ground-floor area. A single tenant rented both areas but given their particular uses, entered into separate leases for each space. The ground level lease required the tenant to obtain fire insurance to protect personal property (but not on the structure itself), whereas the upstairs lease had no such requirement. Additionally, neither lease required the landlord to obtain fire insurance. The tenant began making alterations to an attic space on the property (which was not rented). A fire broke out and destroyed the entire premises. The landlord’s insurance company paid the landlord for the damage and then sought to bring a subrogation claim against tenant for its negligence.

3. Argument.

The tenant argued that because the lease did not require it to maintain fire insurance on the building it was considered “co-insured” under the landlord’s policy and thus could not have a claim of subrogation brought against it. The insurance company argued that while the leases did not require tenant to obtain fire insurance, they explicitly stated that the landlord’s insurance did not cover the tenant, and that landlord did not have to obtain its own fire insurance.

4. Decision.

The court determined that in certain circumstances when a lease is silent as to insurance, a tenant can be considered a co-insured if there is a reasonable expectation that it would be covered by the landlord’s policy. However, since the landlord had no obligation to obtain fire insurance, the tenant could have no reasonable expectation and thus was not considered to be a co-insured.

5. Takeaway.

The case obviously reveals the importance for both the landlord and the tenant to make sure the lease covers all types of insurance and who is responsible for what or, better yet, to include subrogation provisions in the lease itself to ensure that events like this do not transpire.

VI. RECENT DISPUTES INVOLVING LANDLORDS AND TENANTS

A. Sublease Rent Gone Wrong

1. The parties:

- a. Landlord – the landlord under a warehouse lease.
- b. The Client – the tenant under the warehouse lease, and the sublandlord under the sublease.
- c. Subtenant – the subtenant under a sublease of part of the Client’s leased premises.

2. The issue:

The Client was in the unfortunate position of unintentionally negotiating different rates for its lease and a subsequent sublease.

The Client entered into a lease with Landlord with a fixed rent of \$2 per square foot. Pursuant to the lease, if the Client extended the term, the rent would increase by 3 percent. Thereafter, the Client entered into a sublease of part of its premises with Subtenant (who was then an affiliate of Client) using the exact same form as the lease.

Client then desired to expand its footprint in the building, and Client and Landlord amended the lease to address the increase in premises which also included a rent increase. In addition, Landlord used this opportunity to amend other lease provisions, including, increasing the rent during the extension term from the original 3 percent to the then “fair market value” for the leased premises. Unfortunately, Client did not amend the sublease at the same time. In addition, Client and Subtenant separated during the same period and were no longer affiliates.

At the end of the initial term, Client exercised its right to extend the lease. Landlord provided notice that the “fair market” base rent for the Premises was set at \$5.50 psf. Subsequently, Subtenant exercised its option to extend the sublease (it having the same option since the Client utilized the same form as its lease for the sublease), and Subtenant informed Client that its rent could only be increased by 3 percent of \$2.00. Since both options had been exercised, Client was now obligated to subsidize Subtenant’s rent for the remainder of the sublease.

3. Takeaway.

It's very easy to see how this problem occurred. Amendments were made to separate leases years apart from one another. Best practices involve keeping detailed records and lease abstracts summarizing financial and other pertinent terms for real estate leases. It would also be useful to maintain a lease file containing the lease and any other pertinent documents which would have included in this case, the sublease.

B. Costly Surrender Obligations in Long-Term Lease

1. The parties:

- a. Landlord: Successor landlord of long-term lease.
- b. The Client: Successor tenant of long-term lease.

2. The issue:

Landlord demanded that the Client remove costly alterations at the end of a long-term lease.

The initial tenant entered into a lease with the Landlord's predecessor in the 1990s. In the early 2000s, the Client acquired the tenant's assets including the tenant's obligations under the lease. The lease then expired more than 20 years after it commenced.

Under the express terms of the lease, Landlord had the right to require the Client to remove all alterations and improvements installed by the tenant. When the lease was executed, the premises was a shell, and the original tenant received an allowance to build-out the entire premises. The Landlord argued that the lease required the Client to restore the premises back to a white-box state by simply providing notice to the Client at any point during the lease term.

Within six months of the expiration of the term, the Landlord did in fact send notice to the Client, demanding the Client to remove all of the alterations and improvements, including the initial build-out work. Compounding the issue, the Client was required to obtain a building permit to perform the demolition work which necessitated certain facility upgrades (a significant cost) to obtain the permit. Of course, the Client had budgeted nothing for this matter which, as a small company, created a significant impact on its cash flow.

3. Takeaway.

Tenants should be cautious regarding lease surrender provisions. While it is unquestionably common in leases that a landlord must consent to alterations installed or constructed by a tenant, we recommend including protective language in the lease requiring the landlord to advise whether it will require a tenant to remove an alteration or improvement before the

alteration or improvement is installed or constructed. In addition, tenants should be wary of any requirement to remove initial build-out alterations. Note that if the lease doesn't contain protective language, we recommend tenants seek clarification on the landlord's removal or demolition expectations when seeking the landlord's consent for such alterations or improvements. This unfortunate circumstance could have been avoided by including a provision requiring the Landlord to inform the original tenant of whether it would require the tenant to remove these alterations at the time they were installed.