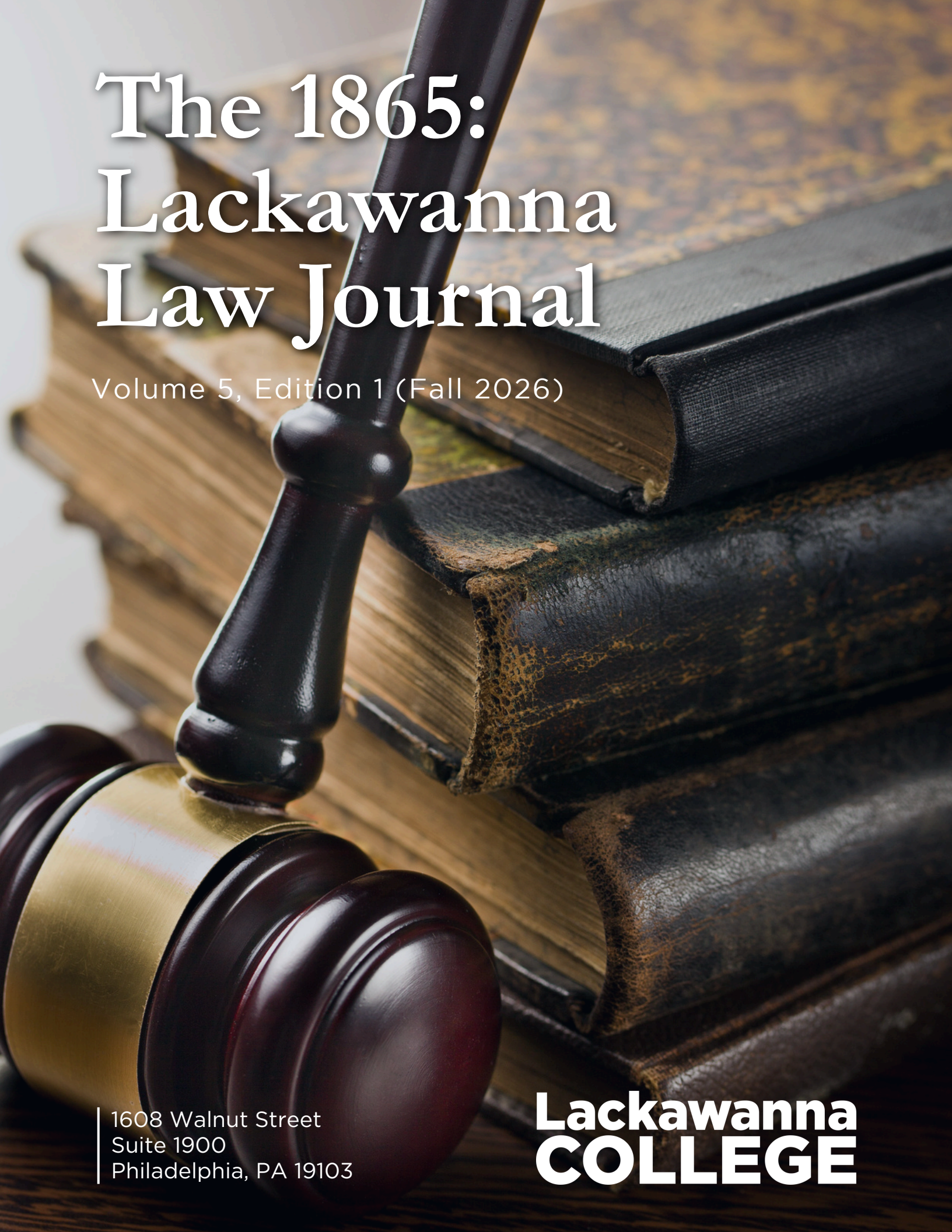


The 1865: Lackawanna Law Journal

Volume 5, Edition 1 (Fall 2026)

1608 Walnut Street
Suite 1900
Philadelphia, PA 19103

Lackawanna COLLEGE



THE 1865

1608 Walnut Street
19th Floor
Philadelphia, PA 19103



THE 1865
LACKAWANNA LAW JOURNAL [1]

Kimberly Moore
Staff Editor

Kimberly Hoxie
Staff Editor

Trisha Hicks-Sampang
Staff Editor

R. Christopher Campbell, J.D.
Advisor

[1] *The 1865: Lackawanna Law Journal* uses outside editors (practicing attorneys) for the Journal's double-blind, peer-review process.



LEGAL STUDIES PROGRAM

Ivy Kempf, J.D.
Program Director

Lauren Guzzo, J.D.
Program Specialist

R. Christopher Campbell, J.D.
Adjunct Professor/Advisor

THE 1865
LACKAWANNA LAW JOURNAL

VOLUME 5 | FALL 2026 | EDITION 1

TABLE OF CONTENTS

HISTORY OF THE LEGAL STUDIES PROGRAM v

ABOUT THE LAW JOURNAL vii

ARTICLES, COMMENTS, & ESSAYS 1

Does Remote Work *Work?—by Doris Hiegl,* B.S. *& Charlene Glenn,* Ed.D.....2

The Involuntary Creditor Paradox: Reforming Priority in Mass Tort Bankruptcies—*by Ryan J. Raynor,* J.D.....29

MEANINGFUL MARITIME CONSENT: Liability Waivers, the Titan Disaster, and Experimental Maritime Ventures —*By Kim Hoxie,* B.S.....47

IS THE COMMONWEALTH PERFORMING ITS FIDUCIARY DUTY WITH THE SPLURGE OF DATA CENTERS?—*By Kimberly A. Moore,* B.S.....68

ACKNOWLEDGMENTS 77

— HISTORY OF THE LEGAL STUDIES PROGRAM —

Lackawanna College traces its origins to 1894, when it was established as Scranton Business College in Scranton, Pennsylvania. Over the ensuing decades, the institution evolved to meet the changing educational and professional needs of its students, expanding its academic offerings while maintaining a commitment to accessible, career-focused education. Today, Lackawanna College offers a broad range of academic programs designed to prepare students for professional success, continued education, and meaningful contributions to their communities.

In 2025, Lackawanna College merged with Peirce College, a Philadelphia institution founded in 1865 as Union Business College. Originally established to provide career-focused education for soldiers returning from the Civil War, Peirce developed a longstanding reputation for practical business education and professional training. In 1985, Peirce established one of the region's first paralegal studies programs, which subsequently received approval from the American Bar Association (ABA).[1]

The merger brought together two institutions with rich histories of career-focused education and a shared commitment to academic excellence and professional development.

Today, Lackawanna College continues to offer an ABA-approved Paralegal Studies Program, providing students with the legal knowledge, analytical abilities, and practical skills necessary to succeed in the legal profession through its associate's and bachelor's degree programs, as well as its certificate program.

In keeping with this commitment to legal education, Lackawanna College proudly continues the publication of *The 1865: Lackawanna Law Journal*. *The 1865* provides a scholarly forum for examining significant legal issues, emerging developments, and matters affecting the legal profession. The Journal welcomes contributions from attorneys, legal scholars, educators, paralegals, and law enforcement professionals.

Equally important, *The 1865* serves an educational mission. As a student-edited publication, the Journal provides students with valuable experience in legal research, legal writing, citation, editing, and scholarly publication.

As *The 1865* continues under Lackawanna College, it honors the traditions upon which it was founded while looking toward the future of legal education and scholarship. Through its commitment to academic inquiry, professional engagement, and student development, *The 1865* seeks to contribute meaningfully to the legal profession and the broader community.

[1] The ABA (the American Bar Association) is the preeminent organization for legal academic programs. *See* https://www.americanbar.org/.

— ABOUT THE LAW JOURNAL —

The 1865: Lackawanna Law Journal is a student-run, double-blind peer-reviewed law journal that provides a forum for original articles written by attorneys, paralegals, legal professionals, legal scholars, alumni, professors, and law enforcement. The Journal publishes once a year, in the fall. The Journal addresses compelling issues, trends, and topics in the legal field as well as specific topics in the paralegal profession.

The Journal staff consists of a faculty advisor, a technical advisor, and a handful of current College students. Each year, the College's Legal Studies Department selects three to five students to run the Journal as staff editors. The students are selected based on their outstanding academic achievements and writing abilities. The staff editors elect an editor-in-chief. Students may also be admitted to the Journal by authoring an article suitable for publication (i.e., "writing on"). For the Journal's double-blind, peer-review process, the Journal uses "outside editors" (practicing attorneys).

SUBMITTING ARTICLES

Articles may be submitted each school year until June 1 for the fall edition. To submit an article, please forward the article as an email attachment to Lawjournal@lackawanna.edu.[2] For the double-blind peer-review process, the author's name, email, credentials, and biographical information should be on a separate page from the article. After an article is submitted, all correspondence with the author will be via email.

JOURNAL GUIDELINES

All submitted articles will be carefully considered. However, articles must comply with College standards and the Journal guidelines. Articles that meet the standards and guidelines will be considered for publication through a double-blind peer-review process to ensure impartiality. All articles must be focused on or linked to a law-related topic. Submitted articles should be double-spaced, with one-inch margins in a word document. Articles should also be no fewer than 1,000 words and no more than 6,000 words. (Articles fewer than 1,000 words or larger than 6,000 words may be considered on a case-by-case basis.) Quotation marks and citations should be used for another author's language, and citations and references should also be used to support the article. For sources and references, please use footnotes rather than endnotes. For editing and citation checking, the Journal uses the *ALWD* citation manual (Associate of Legal Writing Directors). Articles formatted via *The*

[2] Note that articles sent by regular mail will not be accepted.

Bluebook are acceptable. Articles submitted in APA format may be considered if our staff editors can easily convert the citations and references to an *ALWD* format.

REFERENCES

The recommended citations for articles, comments, or essays in *The 1865: Lackawanna Law Journal* is: [Vol.] Lackawanna College L. J. [first page of article] ([semester] [year]).[3]

DISCLAIMER FOR CONTENT OF ARTICLES, COMMENTS, & ESSAYS

The opinions expressed in the articles, comments, and essays in *The 1865: Lackawanna Law Journal* are solely the opinions of the authors. The opinions do not reflect Lackawanna College, *The 1865,* or the staff and outside editors. Although *The 1865* was created as a forum for compelling issues, trends, topics in the legal field, and specific topics in the paralegal profession, *The 1865* was not created to offer legal advice. If seeking legal advice, please contact a legal professional.

LEGAL NOTICES

The authors retain ownership of the copyright of the articles. The authors have granted to *The 1865* a license to publish, reproduce, distribute, reprint, and use their articles in all formats, including the right to publish the articles or an abstract thereof in an issue of *The 1865*, its online component, social media (including X (formally *Twitter*)), Lackawanna College website, or any computerized retrieval system, including Westlaw or Lexis Nexis.

OUTSIDE EDITORS

If interested in reviewing articles as an outside editor for the Journal's double-blind, peer review process, please email Lawjournal@lackawanna.edu. In the email, include a resume and the reasons for your interest.

[3] This citation format applies to Vol. 5 of *The 1865: Lackawanna Law Journal* and all subsequent volumes. Prior volumes (Vols. 1–4) use a different citation format.

ARTICLES, COMMENTS, & ESSAYS

DOES REMOTE WORK *WORK?*

By Doris Hiegl, B.S.* & *Charlene Glenn,* Ed.D.*

I. Introduction

Remote work, also categorized as *telework*, was started as a massive experiment in 2020, largely due to the COVID-19 pandemic. Many organizations found out that many jobs could be done by employees just as efficiently, if not more so, from the comfort of their homes.[1]

Before the pandemic, remote work opportunities in the United States accounted for approximately four percent of all available jobs. In 2025, remote jobs accounted for more than fifteen percent of total job opportunities and were concentrated within five major industries.[2] The five major industries that saw phenomenal increases in remote work from seventeen percent in 2019 to thirty-nine percent in 2021 included: professional, scientific, and technical services; information, finance, and insurance; and management of companies and enterprises per the Bureau of Labor Statistics Productivity (BLS) Program and the American Community Survey (ACS).[3]

As data has emerged in industries where remote work is increasing, additional findings highlight productivity, employee satisfaction, and retention within remote work environments. Total factor productivity ("TFP") is calculated by dividing output by a combination of all inputs used in production and was used to measure productivity gains as remote work increased. Statistical analysis of the data revealed that a rise in remote work and TFP growth are positively correlated.[4] Over the 2019–2022 period, industry-level (TFP) increased by an average of over eleven (11.8) percentage points, while TFP in the private business sector rose by four tenths (0.4) of a

* Doris Hiegl is a graduate of Peirce College with a B.S. in Paralegal Studies and a dedicated paralegal in consumer law.

* Dr. Charlene Glenn received her Ed. D. from Saint Joseph's University. She is the Dean of Graduate Studies at Peirce at Lackawanna College and a Fulbright Scholar recipient with twenty-plus years in higher education as a professor, researcher, and administrator.

[1] Raisa Yogiaman, *11 Surprising Statistics on Remote Work for 2026*, Strong DM, https://www.strongdm.com/blog/remote-work-statistics (last updated Oct. 24, 2025).

[2] *Id.*

[3] Sabrina Wulff Pabilonia & Jill Janocha Redmond, *The Rise in Remote Work Since the Pandemic and Its Impact on Productivity*, U.S. Bureau of Labor Statistics (Oct. 31, 2024), https://www.bls.gov/opub/btn/volume-13/remote-work-productivity.htm.

[4] *Id.*

percent. This suggests that the increase in remote work contributed to productivity growth during the pandemic.[5]

Other research studies have argued that the increase in remote work has negatively impacted productivity due to challenges related to organizational communication, employee well-being, and the preservation of organizational culture. These studies noted that increases in productivity outcomes can only be strengthened with an adequate technological infrastructure, effective leadership, and strong internal communication systems.[6]

Employee satisfaction is another important metric through which remote work is evaluated. Research conducted by Owl Labs and Global Workplace Analytics in 2021 indicated that seventy-four percent of employees feel happier when working remotely, due to factors such as reduced commuting, increased flexibility, and more time with their families.[7] Further, Buffer's 2023 State of Remote Work Report indicated that ninety-eight percent of remote workers would recommend remote work to others, and the same percentage wants to continue working remotely for the remainder of their careers.[8]

Despite favorable findings on the success of remote work, both employees and employers have raised legal concerns regarding this work arrangement. Key issues include where remote workers can bring legal claims against employers, whether remote work qualifies as a reasonable accommodation, and whether adequate wage protections exist for remote workers.

This article defines remote work and explores the types of remote work, growth in remote jobs, the industries in which it is most prevalent, and data on its impact on productivity, employee mental health and well-being, and employee satisfaction and retention. Further, emerging legal concerns are discussed, including cross-jurisdictional employment, workers' rights and protections in remote work environments, and remote work as a reasonable accommodation for pregnant and disabled individuals.

II. Remote Work: Definition and Types

5 U.S.C.S. § 6501 defines telework as "a work flexibility arrangement under which an employee performs the duties and responsibilities of such employee's position, and other authorized activities, from an approved worksite other than the location from

[5] *Id.*

[6] Adina Ioana Saplontai Botiş, *The Impact of the Pandemic on Global Business: the Rise of Remote Working and Its Impact on Productivity and Organizational Culture*, 26 Rev. Int'l Compar. Mgmt. 927, 933 (2025).

[7] Yogiaman, *supra* note 1.

[8] Buffer, 2023 State of Remote Work Report, https://buffer.com/state-of-remote-work/2023 (last visited May 9, 2026).

which the employee would otherwise work."[9] Most often teleworking will be performed at the employee's home.[10]

There are three common types of telework: full-time, recurring (or routine), and situational. Full-time telework refers to employees working remotely on a full-time basis. Recurring or routine telework involves working remotely on a regular but less-than-full-time schedule, such as one or two days per week. Situational telework, by contrast, is temporary and occurs in response to specific circumstances; for example, allowing an employee with a disability to work from home for a defined period while recovering from a medical procedure. This type of telework has a foreseeable end and is inherently infrequent and conditional.[11]

III. Remote Job Growth

The FlexJobs Remote Work Index, which collects data around trends and statistics in the remote work landscape, reported that remote job growth was up by twenty percent in Q1 2026, driven by high-paying roles and shifting worker priorities around flexibility and career mobility.[12]
Some of the key findings include:

- Sixty-five percent of roles sought workers with "established experience."[13]
- Out of all remote jobs, those in sales and business development categories exhibited the most growth.[14]
- In-demand remote jobs paying $100,000 yearly salaries and higher include: Senior Product Managers—$136,000 per year; Data Engineers—$135,000 per year; Senior Software Engineers—$132,000 per year; Project Managers—$105,000 per year; and Product Marketing Managers—$105,000.[15]

[9] Act of Dec. 9, 2010, Pub. L. 111-292, § 2(a), 124 Stat. 3165; *see also* 5 U.S.C.S. § 6501.
[10] Frequently Asked Questions from the Federal Sector about Telework Accommodations for Disabilities, EEOC, https://www.eeoc.gov/FAQ-federal-sector-telework-accommodations-disabilities (last visited May 9, 2026).
[11] *Id.*
[12] Keith Spencer, FlexJobs Remote Work Index (Q1 2026): Remote Job Growth Up 20%, FlexJobs, https://www.flexjobs.com/blog/post/flexjobs-remote-work-economy-index (last updated Apr. 1, 2026).
[13] *Id.*
[14] *Id.*
[15] *Id.*

- Monster's 2025 WorkWatch Report shows that thirty-three percent of workers would refrain from applying for a fully in-person role.[16]

The FlexJobs Remote Work Index further reveals remote work remains strongest in established, high impact functions that support core operations. While sales and business development categories showed the highest growth in remote jobs, account management, marketing, and communications roles expanded by over thirty percent.[17] Medical, health, computer, and information technology ("IT") roles also maintain consistently high levels of remote work availability.[18] These trends highlight that organizations are expanding remote hiring in roles tied to revenue, customer relationships, and business growth.

Top companies hiring in the remote job market in Q1 2026 included: Thermo Fisher Scientific, Centene Corporation, General Electric, Medtronic, Abbott, General Dynamics, Liberty Mutual, Stratacuity, and Elevance Health. These organizations continue to invest in remote hiring as part of a long-term workforce strategy.[19]

IV. Industries with Remote Jobs

According to the BLS and ACS, remote work increased dramatically across all major industries between 2019 and 2021. The removal of social distancing policies reduced remote work slightly; however, it was still higher than the 2019 levels in all industries, except agriculture, forestry, fishing, and hunting, which returned to their 2019 levels.[20] As was previously mentioned, the five major industries that saw increases in remote work from seventeen percent in 2019 to thirty-nine percent in 2021 included: professional, scientific, and technical services; information; finance and insurance; and management of companies and enterprises.[21]

Another twelve industries had between ten percent and twenty-five percent of their workforce working remotely in 2021. These industries included:

- Retail Trade
- Healthcare
- Nondurable manufacturing

[16] Vicki Salemi, Monster's 2025 WorkWatch Report: Workers Explore New Opportunities Amid Change, Monster, https://www.monster.com/career-advice/research/workwatch-report (last updated Dec. 10, 2025).
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] Wulff Pabilonia & Janocha Redmond, *supra* note 3.
[21] *Id.*

- Manufacturing
- Agriculture, forestry, fishing, and hunting
- Durable manufacturing
- Arts, entertainment, and recreation
- Administration and waste management services
- Wholesale trade
- Real estate rental and leasing
- Educational services
- Utilities[22]

V. Remote Work: Impact on Productivity

Positive aspects of remote work enable employees to manage their time more efficiently, reduce commuting demands, and create environments that support concentration and creativity. Yet, remote work also presents challenges, including social isolation, communication difficulties, technological barriers, and blurred work–life boundaries.[23] Consequently, organizational productivity is influenced by the balance between these advantages and drawbacks.

As researchers have evaluated the overall productivity of teams in organizations, some exhibited elevated productivity due to less distractions and "the elimination of stress factors related to the physical work environment."[24] Conversely, there were situations where performance was affected by the lack of direct interaction, blurred work-life boundaries, and communication and employee motivation challenges. Key factors affecting productivity include "the quality of the technological infrastructure, online communication skills, and the level of autonomy granted to each individual."[25]

Another factor to be considered is organizational culture and how it plays a role in employee performance. Organizational culture can foster or hinder productivity.[26] In a 2024 study, twenty percent of remote workers "identified cooperation and communication as their primary challenge."[27] Such challenges are, in part, due to increased schedule flexibility and the newfound ability to hire workers living in different time zones.[28] With that in mind, organizations must consider how to support team cohesion and commitment in the remote work environment. Many employers are attempting to facilitate more efficient communication via online applications such as Slack, Skype, and Microsoft Teams; however, the efficiency of these tools hinges

[22] *Id.*
[23] Saplontai Botiş, *supra* note 6, at 932.
[24] *Id.* at 933.
[25] *Id.*
[26] *Id.*
[27] Dr. D. Mahesh, *Remote Work: Challenges and Strategies for Effective Management*, 11 Int'l J. Mgmt., Jan. 2024, at 145, 146.
[28] *Id.*

on the tech-savviness of the workers using them.[29] Thus, it is crucial that employers adequately train their remote employees to streamline communication and strengthen team relationships.

VI. Remote Work: Impact on Mental Health and Well-being

Research has shown that the quality of working conditions and promotion of self-care in the workplace directly impact worker productivity and overall business success. With regards to telework, researchers have concluded that the mental health of workers may vary depending on the quality of management and work demands.[30] In some instances, remote working, while offering flexibility, has "increased levels of stress, anxiety, and feelings of isolation."[31] Further, remote workers have experienced a diminished sense of belonging and support, compounding feelings of loneliness and, for some, depression.[32] Researchers have also found that "[i]solated and unsupported employees experienced professional detachment and inefficacy, workplace disengagement, escalated job-related demands, employee burnout, and emotional exhaustion."[33] In contrast, researchers also found that social support from management, consistent and constant communication across organizational teams, and efficient time management reduced burnout, increased productivity, and fostered a sense of social belonging among remote workers.[34]

Another well-being factor that has arisen among remote workers since the onset of the COVID-19 pandemic is lower back pain. A 2024 study conducted by researchers in New Delhi, India indicated that working from home has been associated with increased lower back pain in male and female employees during the COVID-19 lockdown due to poor ergonomics.[35] Ergonomics is defined as the science of designing workplaces, products, and systems to fit the user, rather than forcing the user to adapt to them. By applying principles of anatomy and psychology, it reduces injury risks particularly

[29] *Id.*

[30] Elisabeth Figueiredo et al., *Teleworking Effects on Mental Health—A Systematic Review and a Research Agenda*, 3 Int'l J. Env't Rsch. & Pub. Health, Feb. 20, 2024, at 1, 8.

[31] Saplontai Botiş, *supra* note 6, at 938.

[32] *Id.*

[33] Alina Costin, Alina Felicia Roman & Raluca-Stefania Balica, *Remote Work Burnout, Professional Job Stress, and Employee Emotional Exhaustion During the COVID-19 Pandemic*, Frontier Psych., June 1, 2023, at 1.

[34] *Id.* at 2.

[35] Ilma Tareen, Deepika Singla & Sachin Gupta, *Impact of COVID-19 Lockdown on Low Back Pain in Computer Using Working Adults*, 79 Archive Evn't & Occupational Health, 293 (2025).

musculoskeletal disorders and increases productivity.[36] A similar study conducted in 2022 in Gujarat, India also found that over ninety-one percent of the eight hundred and ninety-two remote worker participants experienced lower back pain.[37] These studies have raised awareness among remote workers about adopting proper ergonomics practices while using computers both at home and work to prevent musculoskeletal issues and promote spinal health.

Cyberbullying was also studied as a work stressor for remote workers, partly due to increased accessibility through technological means. In 2024, the Workplace Bullying Institute reported that over thirty-two percent of remote workers and over fifty-one percent of hybrid-remote workers experienced cyberbullying.[38] The Workplace Bullying Institute speculates that cyberbullying worsens for hybrid-remote workers on their remote workdays "as if they are being punished or resented for either daring to work from home (if they had the ability to choose) or being allowed to do so (connoting favoritism perceived by jealous coworkers)."[39] Workplace cyberbullying is "a situation where over time, an individual is repeatedly subjected to perceived negative acts conducted through technology (e.g. phone, email, web sites, social media) which are related to their work context."[40]

Remote work has produced new methods of technology-mediated communication; thus, requiring organizations to develop a shared understanding about what behaviors are appropriate. It is crucial for organizations to provide early primary interventions to educate employees about how cyberbullying manifests as well as its adverse consequences.[41]

VII. Remote Work: Employee Satisfaction and Retention

Research over the last few years has consistently shown that the provision of telework fosters employee satisfaction and retention. As previously mentioned, a 2021 study found that seventy-four percent of employees feel happier when they work remotely.[42] This

[36] Ergonomics, O.S.H. Admin., https://www.osha.gov/ergonomics (last visited May 16, 2026).

[37] Dr. Pranali Shah et al., *Prevalence of Low Back Pain Among Work From Home IT Professionals During COVID-19 Pandemic in Anand City—A Cross-Sectional Study*, 10 Int'l J. Creative Rsch. Thoughts, a283, a286 (2022).

[38] G ary Namie, PhD, 2024 WBI U.S. *Workplace Bullying Survey: The Complete Report*, Workplace Bullying Institute, 2024, at 1, 10.

[39] *Id.* at 9.

[40] Samuel Farley et al., *Design, Development and Validation of a Workplace Cyberbullying Measure,* the WCM, 30 Work & Stress, 293, 295 (2016).

[41] Mallory A. McCord & Gargi Sawhney, *The Effect of Cyberbullying on Stress and Productivity of Remote Employees During COVID-19,* 46 Deviant Behavior, May 30, 2024, at 656.

[42] Yogiaman, *supra* note 1.

same research states that fifty percent of surveyed employees would willingly take a pay cut to continue working remotely.[43] This satisfaction is further supported by Monster's 2025 WorkWatch Report stating that eighty-two percent of remote workers would seek new roles if their current employer required them to return to the office full-time.[44]

Based on these research studies, employees were satisfied with remote work and wanted it to continue due to its flexibility. However, after the COVID-19 pandemic, many employers wanted employees to return to in-person work and change or eliminate remote work arrangements. A study conducted in Sao Paulo, Brazil, using data from thirty-nine federal agencies spanning from 2016 to 2023, examined work from home availability in the context of the psychological contract framework and conservation resource theory.[45] In defining these frameworks, a psychological contract is established when an individual perceives that promises (direct and indirect) have been made by the organization, with a corresponding expectation of contributions (e.g., effort, loyalty, or dedication) in return.

Meanwhile, conservation resource theory posits that stress occurs when individuals' resources (personal, social, or structural) are threatened, lost, or fail to increase after investment.[46] Due to the widespread adoption of telework during the pandemic, this work arrangement was a vital resource for employees, offering flexibility and autonomy. Thus, it became an indispensable part of the psychological contract between employees and their employers. Consequently, with organizations revisiting post-pandemic practices and encouraging a return to in-person work, a significant decline in job satisfaction occurred.[47] This study further argued that a total elimination of telework will adversely affect job satisfaction compared to shifting to a hybrid-remote schedule, as it not only removes the core resource of flexibility but also "disrupts the associated bundle of interrelated resources as described by the conservation resource theory."[48]

Many employers believe that remote work for employees can lead to higher retention and less turnover. A 2021 poll conducted by EDUCAUSE and the College and University Professional Association for Human Resources ("CUPA-HR") gathered data from IT and HR employees in higher education pertaining to "work arrangement preferences, work arrangement realities, and the

[43] *Id.*
[44] Salemi, *supra* note 16.
[45] Gustavo Tavares, Tatiana Iwai & Jefferson Moura, *I Can't Get No Satisfaction! Examining the Impact of Remote Work Removal on Job Satisfaction*, 2025 Acad. Mgmt. Proc. 1.
[46] *Id.*
[47] *Id.*
[48] *Id.*

likelihood of looking for other employment within the next year."[49] Another segment of the poll more closely examined the relationship between the incongruency of preferred and actual work arrangements as well as the likelihood that employees will seek employment elsewhere.[50] Overall, the findings of this poll reported that higher education employees want more flexible work arrangements, especially regarding telework.[51] The data revealed:

> ● Nearly two-thirds (⅔) of employees reported some level of incongruency between their preferred and actual work arrangements, particularly about being able to work remotely on an at least parttime basis.
> ● Nearly half (½) of employees were at least somewhat likely to seek employment elsewhere in the near future.
> ● There was "a clear relationship between the provision of remote work opportunities when employees prefer them and employees' satisfaction in terms of whether they will be seeking other employment."[52]
> ● Improving employee satisfaction and retention would require only a small movement in the direction of offering more flexible job opportunities.[53]

The outcomes of the 2021 EDUCAUSE poll are reinforced by Owl Labs's 2026 State of Hybrid Work Report, which states that forty(40)percent of hybrid workers would seek employment elsewhere and five(5)percent would outright quit if their flexible work schedules were revoked.[54]Further, in 2025, ten(10)percent of in-office workers switched employers while, in contrast, only four(4)percent of remote workers switched roles.[55]

---

[49] Jacqueline Bichsel, Ph.D., *Melissa Fuesting, Ph.D. & Mark McCormack, Providing Remote Work Opportunities Will Aid Your Retention Efforts*, Coll. & U. Pro. Ass'n for Hum. Res., Nov. 2021, at 1, 2.
[50] *Id.*
[51] *Id.* at 10.
[52] *Id.*
[53] *Id.*
[54] State of Hybrid Work, Owl Labs, https://owllabs.com/state-of-hybrid-work/2025?gl=116casscgcl_auMjk0OTYyNzc 1LjE3Nzg0MjgzNjc.#download (last visited May 10, 2026).
[55] *Id.*

VIII. Emerging Legal Concerns

a. Cross-Jurisdictional Employment

The widespread implementation of telework since the onset of the COVID-19 pandemic has raised numerous legal questions that are now being explored in courts throughout the U.S. One such question is: In which state should a remote worker file a lawsuit against an out-of-state employer? In more legal terms, which court has personal jurisdiction over a matter involving an out-of-state defendant?

Personal jurisdiction, or *in personam* jurisdiction, is a court's power over a person (or entity) who is a party to a lawsuit before said court, including the court's power to render judgments that would affect said party's rights. [56]A court's power to adjudicate a matter depends on "the connection between the parties in conflict and the jurisdiction in which the court sits."[57] Per the Supreme Court's interpretation of the Fourteenth Amendment's Due Process Clause, a state court rendering a judgment that affects a nonresident without meaningful connections or ties violates the constitutional rights of that person (or entity) "by depriving the individual of property without due process of law."[58] [59] In other words, personal jurisdiction seeks to prevent a defendant from being unfairly subjected to litigation in a distant or inconvenient forum.[60]

In *Int'l Shoe Co. v. Washington*, the Supreme Court established a two-part test to assess if a state court has personal jurisdiction over the defendant(s) in a matter: (1) a defendant must have established minimum contacts with the forum state "that demonstrate an intent to avail itself of the benefits and protections of state law;" and (2) the forum state must not be unduly burdensome for the defendant.[61] [62] Minimum contacts are the connections an out-of-state defendant has with the forum state.[63] A defendant's minimum contacts can take the form of general personal jurisdiction or specific

[56] Personal Jurisdiction, *Black's Law Dictionary* (10th ed. 2014).
[57] Linda Rose Piccolo, *Remote Work's Complication of Companies' Personal Jurisdiction Standings: Morphing the Historical Analysis to Fit Modern Remote Work Characteristics*, 14 Am. U. Bus. L. Rev. 879, 882 (2025).
[58] *Id.*
[59] Constitution Annotated, Amdt14.S1.7.1.1 Overview of Personal Jurisdiction and Due Process, Libr. Cong., https://constitution.congress.gov/browse/essay/amdt14-S1-7-1-1/ALDE_00000907/ (last visited May 10, 2026).
[60] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).
[61] Constitution Annotated, *supra* note 58.
[62] *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).
[63] Minimum contacts, Wex, https://www.law.cornell.edu/wex/minimum_contacts (last updated Apr. 2022).

personal jurisdiction. General personal jurisdiction covers any claim filed against a defendant, regardless of whether the forum state is related to the cause of injury.[64]

A defendant is automatically subject to general jurisdiction where they are domiciled which, in the case of a corporate defendant, is the state in which it is incorporated or where its principal place of business is located.[65] In contrast, a state has specific personal jurisdiction over a claim because of the extent of the defendant's activities in said state giving rise to or being related to the facts of the claim.[66]

Generally, a plaintiff who wants to file a lawsuit in their home state against an out-of-state defendant must establish specific personal jurisdiction. Establishing specific personal jurisdiction in telework-related cases depends heavily on the reason for which the plaintiff was working remotely.[67] The minimum contacts requirement for specific personal jurisdiction in telework-related cases is typically fulfilled if the defendant employer intentionally recruited out-of-state workers to develop or conduct business in that remote state as it indicates that the defendant employer "purposely availed" itself of said state.[68] However, specific personal jurisdiction would not apply if the plaintiff works remotely for reasons unrelated to their work duties (e.g., personal convenience).[69]

The issue of personal jurisdiction, as well as subject matter jurisdiction, as it pertains to out-of-state defendants in the context of telework was recently explored in *Khartchenko v. Am. Oncologic Hosp., Inc.* In this matter, plaintiff Inna Khartchenko worked remotely from her New Jersey home as the Director of Technology Transfer and New Ventures for the Pennsylvania-based Defendants American Oncologic Hospital, Inc., The Institute for Cancer Research (named in the Original Complaint as "The Fox Chase Cancer Center"), and Temple University Health System, Inc. ("Corporate Defendants"). The Corporate Defendants originally jointly hired Khartchenko in 2007 to work in-person at their corporate headquarters in Philadelphia, Pennsylvania as the Associate Director of Business Development[70]

---

[64] Piccolo, *supra* note 56.

[65] *Id.*

[66] Specific jurisdiction, Wex, https://www.law.cornell.edu/wex/specific_jurisdiction (last updated Dec. 2021).

[67] Cynthia N. Sass & Jennifer D. Zumarraga, *Jurisdictional Questions Raised When Remote Workers Reside in Other States and Countries,* Am. Bar Ass'n (Nov. 19, 2021), https://www.americanbar.org/groups/labor_law/resources/magazine/archive/jurisdictional -questions-remote-workers-other-states-countries/.

[68] *Id.*

[69] *Id.*

[70] Compl. at 5, *Khartchenko v. Am.* Oncologic Hosp., Inc., No. MER-L-001311-23 (N.J. Super. Ct. Law Div. July 11, 2023).

In 2015, Khartchenko was promoted to the Director of Technology Transfer and her responsibilities were expanded to include the New Ventures program in 2018. Throughout her tenure of sixteen years, Khartchenko exceeded expectations in her various roles, which was reflected in her favorable performance reviews.[71]

Starting in 2013, Khartchenko began working on a hybrid-remote schedule that eventually became fully remote, along with those of all other employees in Khartchenko's department, in March 2020 due to the COVID-19 pandemic.[72] In March 2022, Khartchenko and her coworkers completed a telework agreement with Corporate Defendants Fox Chase Cancer Center ("FCCC") and Temple University Health System, Inc. ("TUHS") to extend their telework schedule through June 2023, which was approved.[73]

In August 2022, Corporate Defendants hired Defendant Sangeeta Bardhan Cook as the Chief Innovation Officer for FCCC, the Senior Vice President of Commercialization Strategy and Business Development for TUHS, and Khartchenko's direct supervisor. Starting in October 2022, Cook repeatedly made anti-Semitic and ableist remarks to Khartchenko about their colleagues at FCCC and TUHS during their virtual weekly one-on-one meetings, making Khartchenko (who was of Jewish heritage) uncomfortable. Khartchenko frequently expressed disagreement with Cook's remarks. However, Cook's remarks persisted to the point that Khartchenko found interacting with Cook to be "emotionally taxing."[74]

In November 2022, Khartchenko was hospitalized for an ovarian torsion, "which is when the ovary twists around itself cutting off blood supply."[75] Physicians determined that Khartchenko needed surgery, which was scheduled for January 9, 2023. Khartchenko promptly notified Cook of the surgery. Cook suggested that Khartchenko take unpaid leave under the Family and Medical Leave Act ("FMLA leave") but stated that the decision was ultimately Khartchenko's to make.[76] Given Khartchenko's March 2022 telework agreement with FCCC and TUHS and her enthusiastic dedication to her job, Khartchenko told Cook that she would continue to work remotely and use her sick days as needed through her recovery from a major abdominal surgery.[77]

Between January 12, 2023 and January 27, 2023, Khartchenko worked remotely while using about two sick days per

[71] *Id.* at 6.
[72] *Id.* at 10.
[73] *Id.*
[74] *Id.* at 7–9.
[75] *Id.* at 9.
[76] *Id.*
[77] *Id.* at 11.

week during her difficult recovery.[78] During this time, Cook began heavily scrutinizing Khartchenko's work for seemingly no reason, which created an increasingly stressful work environment for Khartchenko and her team. Khartchenko also noticed that Cook did not once ask Khartchenko how she was feeling post-surgery. Khartchenko suspected that Cook's change in behavior towards her was "directly related to her post-surgery disability and the need for her to use sick time during her recovery from surgery."[79]

On January 23, 2023, Khartchenko reported Cook's pattern of discriminatory behavior to FCCC's Director, Jonathan Chernoff, focusing on Cook's derogatory comments about her colleagues.[80] Khartchenko also explained that Cook's increased scrutiny towards Khartchenko and her team in recent weeks adversely affected her recovery. [81]On January 27, 2023, Cook told Khartchenko that she must retroactively use FMLA leave for her sick days used post-surgery and that she must present a doctor's note to return to work thereby preventing Khartchenko from completing her workday. Khartchenko immediately contacted her doctor to obtain clearance to work.[82]

On January 30, 2023, Cook and Defendant Amber Medlin of Corporate Defendants' Human Resources Department presented Khartchenko with an accommodation form that her doctor must fill out to continue working remotely, despite the March 2022 telework agreement that Khartchenko and her coworkers reached with FCCC and TUHS that did not expire until June 2023. Despite feeling set up by Cook, Khartchenko complied and had her doctor complete the accommodation form, which stated that Khartchenko's disability required her to work from home and that her work duties could be fulfilled from home as evidenced by her performance working remotely fulltime for the past three years.[83]

On February 2, 2023, Khartchenko reported Cook's increasingly discriminatory and retaliatory behavior to Medlin.[84]Human Resources allegedly investigated Khartchenko's claims and interviewed Khartchenko via Zoom on February 15, 2023.[85] After Khartchenko's accommodation request was approved on February 17, 2023 through May 13, 2023, Cook continued to engage in retaliatory behavior towards Khartchenko following the investigation. Cook publicly criticized and micromanaged Khartchenko and her team without merit to make Khartchenko look incompetent in the eyes of her colleagues. Cook even excluded

[78] *Id.*
[79] *Id.*
[80] *Id.* at 11–12.
[81] *Id.* at 12.
[82] *Id.*
[83] *Id.*
[84] *Id.* 12–17.
[85] *Id.* at 17.

Khartchenko from important meetings directly related to her work duties.[86]Cook's hostility towards Khartchenko further intensified after Khartchenko expressed concerns about Corporate Defendants potentially engaging in illegal business with a Russian company in late March 2023 and early April 2023. On April 14, 2023, Cook told Khartchenko that she was to work in-person three days per week starting on May 1, 2023, despite Khartchenko's approved telework accommodation that was not due to expire until May 13, 2023.[87]

On April 19, 2023, Cook and Medlin held a virtual meeting with Khartchenko to issue her a final written warning (despite no prior warnings) for "assuming malicious intent in others," and placed her on a performance improvement plan.[88] On April 20, 2023, Khartchenko's counsel sent Corporate Defendants notice of Khartchenko's intent to file a lawsuit for retaliation.[89] On April 21, 2023, Khartchenko emailed a complaint to Cook and Medlin regarding their retaliatory behavior. Throughout Khartchenko's last two months of employment at Corporate Defendants, Cook continued to heavily scrutinize and humiliate Khartchenko.[90] On June 21, 2023, Corporate Defendants fired Khartchenko.[91]

On July 11, 2023, Khartchenko filed a complaint in the Superior Court of New Jersey, Law Division, Mercer County against American Oncologic Hospital, Inc., The Institute for Cancer Research (named as "The Fox Chase Cancer Center"), Temple University Health System, Inc., Sangeeta Bardhan Cook, John Lasky, Amber Medlin, and Jerome Maddox, alleging that they retaliated against her in violation of the New Jersey Conscientious Employee Protection Act and New Jersey Law Against Discrimination for having "invoked her disability-leave rights and objected to the unlawful and discriminatory activity of her supervisors."[92]

In response, the Defendants filed a Notice of Removal on December 13, 2023 to remove this matter from the Superior Court of New Jersey to the U.S. District Court for the District of New Jersey per 28 U.S.C. §1332(a).[93] The Defendants argued that the U.S. District Court had diversity jurisdiction over this matter due to the parties being domiciled in two different states.[94] Defendants will often remove a case from state court to federal court for a myriad of reasons. In cases involving out-of-state defendants, a defendant may

[86] *Id.*
[87] *Id.* at 17–18.
[88] *Id.*
[89] *Id.*
[90] *Id.* at 26.
[91] *Id.* at 27.
[92] *Id.* at 2.
[93] Defs.' Notice of Removal at 2, *Khartchenko v. Am. Oncologic Hosp., Inc.,* No. 1:23-cv-23043-ESK-EAP (D.N.J. Dec. 13, 2023), ECF No. 1.
[94] Id. at 3.

file a removal to prevent being forced to litigate in an unfamiliar state court as court processes vary state-by-state.[95]

On December 20, 2023, the Defendants filed a Motion to Dismiss for Khartchenko's "failure to state a claim," arguing that Khartchenko could not allege that the Defendants violated New Jersey state laws as her state of employment was Pennsylvania and she was working remotely in New Jersey for non-business reasons.[96] The Court granted the Motion to Dismiss on November 20, 2024, but permitted Khartchenko to file an amended Complaint "curing" her failure to "establish that [D]efendants conducted any business in New Jersey or targeted New Jersey in any purposeful way."[97]

On December 17, 2024, Khartchenko filed her amended Complaint still alleging violations of the New Jersey Conscientious Employee Protection Act and New Jersey Law Against Discrimination while also newly alleging violations of the Americans with Disabilities Act, Civil Rights Act of 1964, Pennsylvania Human Relations Act, and Pennsylvania Whistleblower Law.[98] Because Khartchenko's amended Complaint went "beyond the scope of [the Court's] November 20, 2024 opinion," the Court directed Khartchenko to file a Motion for Leave to amend her amended Complaint.[99] [100] Khartchenko filed her Motion for Leave on March 28, 2025, which was granted in part and denied in part on October 10, 2025.[101] [102] On October 16, 2025, Khartchenko filed her amended Complaint asserting only one count under the Americans with Disabilities Act.[103]

---

[95] Akhil A. Sheth et al., *The What, When, How, and Why of Removing to Federal Court Before a Defendant Is "Properly Joined and Served",* Am. Bar Ass'n (Jan. 19, 2024), https://www.americanbar.org/groups/litigation/resources/newsletters/mass-torts/spring202 4-the-what-when-how-and-why/.

[96] Defs.' Mot. to Dismiss at 5, *Khartchenko v. Am. Oncologic Hosp., Inc.,* No. 1:23-cv-23043-ESK-EAP (D.N.J. Dec. 20, 2023), ECF No. 5-2.

[97] Order Granting Defs.' Mot. to Dismiss at 4, *Khartchenko v. Am. Oncologic Hosp., Inc.,* No. 1:23-cv-23043-ESK-EAP (D.N.J. Nov. 20, 2024), ECF No. 30.

[98] Pl.'s 2d. Am. Compl. at 3, *Khartchenko v. Am. Oncologic Hosp., Inc.*, No. 1:23-cv-23043-ESK-EAP (D.N.J. Dec. 17, 2024), ECF No. 31.

[99] *Khartchenko v. Am. Oncologic Hosp., Inc.,* No. 1:23-cv-23043-ESK-EAP, 2025 U.S. Dist. LEXIS 221061, at 2 (D.N.J. Nov. 10, 2025).

[100] Text Order, *Khartchenko v. Am. Oncologic Hosp., Inc.*, No. 1:23-cv-23043-ESK-EAP (D.N.J. Mar. 1, 2025), ECF No. 41.

[101] Pl.'s Mot. for Leave to File Am. Compl., *Khartchenko v. Am. Oncologic Hosp.,* Inc., No. 1:23-cv-23043-ESK-EAP (D.N.J. Mar. 28, 2025), ECF No. 43-44.

[102] Order Granting in Part & Denying in Part Pl.'s Mot. for Leave to File Am. Compl., *Khartchenko v. Am. Oncologic Hosp., Inc.,* No. 1:23-cv-23043-ESK-EAP (D.N.J. Oct. 10, 2025), ECF No. 50.

[103] Pl.'s 2d. Am. Compl. at 2, *Khartchenko v. Am. Oncologic Hosp., Inc.*, No. 1:23-cv-23043-ESK-EAP (D.N.J. Oct. 16, 2025), ECF No. 51.

On October 22, 2025, Khartchenko filed an appeal of the Court's opinion as to the Motion for Leave.[104]

On October 23, 2025, the Court administratively terminated Khartchenko's appeal and entered an Order to Show Cause as to why the case should not be transferred to the U.S. District Court for the Eastern District of Pennsylvania.[105] On November 10, 2025, the Court ordered that this matter be transferred to the U.S. District Court for the Eastern District of Pennsylvania because: (1) Khartchenko did not assert that the Defendants committed any wrongdoing within the state of New Jersey but, instead, from their corporate headquarters in Philadelphia, Pennsylvania; and, (2) the Corporate Defendants' employment records were all maintained in Pennsylvania.[106] In short, Khartchenko failed to sufficiently establish that the Defendants had minimum contacts in New Jersey.

b. Worker's Rights and Protections in Remote Work

Another area of law in which novel legal questions pertaining to telework are arising is worker's rights. One novel question in particular that was recently explored in *Lott v. Recker Consulting, LLC* is: When does the compensable workday begin for exclusively remote workers who use computers to perform their essential work duties under the Fair Labor Standards Act?[107] Per the U.S. Department of Labor, the Fair Labor Standards Act ("FLSA") "establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments."[108] The FLSA applies to "employees and enterprises engaged in interstate commerce."[109] As *Lott* revolves around remote call center workers, call center workers may be covered under the FLSA in two ways. First, call center workers may be collectively covered as employees of an enterprise if the employing call center's annual dollar volume is $500,000 or more.[110]

---

[104] Pl.'s Mot. for Appeal of Op. & Order Granting in Part, Denying in Part Pl.'s Mot. for Leave to File Am. Compl., *Khartchenko v. Am. Oncologic Hosp., Inc.,* No. 1:23-cv-23043-ESK-EAP (D.N.J. Oct. 22, 2025), ECF No. 53.

[105] Text Order, *Khartchenko v. Am. Oncologic Hosp., Inc.,* No. 1:23-cv-23043-ESK-EAP (D.N.J. Oct. 23, 2025), ECF No. 54.

[106] *Khartchenko v. Am. Oncologic Hosp., Inc.,* No. 23-cv-23043-ESK-EAP, 2025 U.S. Dist. LEXIS 221061, at 8-9 (D.N.J. Nov. 10, 2025).

[107] *Lott v. Recker Consulting, LLC*, No. 1:23-cv-489, 2025 LX 492712 (S.D. Ohio Oct. 7, 2025).

[108] Dep't of Labor, Wages and the Fair Labor Standards Act, https://www.dol.gov/agencies/whd/flsa (last visited May 10, 2026).

[109] Sarah A. Donovan, *The Fair Labor Standards Act (FLSA): An Overview, Libr. Cong.* (Mar. 8, 2023) https://www.congress.gov/crs-product/R42713.

[110] Dep't of Labor, Fact Sheet #64: Call Centers under the Fair Labor Standards Act (FLSA), https://www.dol.gov/agencies/whd/fact-sheets/64-flsa-call-centers (last updated July 2008).

Second, even if a call center worker is not covered as an employee of an enterprise, said worker may be covered under the FLSA as an individual employee if they "individually engage in interstate commerce, the production of goods for interstate commerce, or in an occupation closely related and directly essential to such production."[111]

In *Lott*, Plaintiff Kiara Lott began working remotely from her home in Cincinnati, Ohio on or about September 21, 2020 for Defendant Recker Consulting, LLC d/b/a "Path Forward IT" as an hourly, non-exempt call center representative, commonly referred to as a "customer service representative" ("CSR").[112] Lott and her fellow CSRs typically worked five days per week and up to (and occasionally over) forty hours per week, taking inbound and periodically making outbound phone calls for clients to answer questions using Recker Consulting's "applications and systems to track all events and customer service information."[113] Recker Consulting provided its CSRs with "a computer, one or more computer screens, and a variety of essential and indispensable computer programs, applications, and servers" to perform their daily work duties.[114]

Recker Consulting instructed Lott and her coworkers to be immediately "call ready" at the start of their shifts but prohibited them from clocking in prior to the start of their shifts. To fulfill this obligation, Lott and her coworkers had to be logged into their computers with all essential work-related programs and applications loaded prior to the start of their shifts, which Lott argued constituted off-the-clock work.[115] Recker Consulting monitored the CSRs' clock-in times in relation to the start of their shifts, as well as the time CSRs went into "ready" status, to maintain schedule adherence and attendance metrics.

Recker Consulting evaluated CSRs metrics daily and, at times, punished CSRs based on their metrics via "coaching sessions, team meetings, write-ups and termination."[116] Lott and her coworkers were also forced to perform off-the-clock work when returning from lunch to prepare themselves to be in "ready" status the very moment their breaks ended in compliance with Recker Consulting's attendance policy. Similarly, Lott and her coworkers performed off-the-clock work when shutting down their computers and other equipment after clocking out at the end of their shifts.[117] This pre-, mid-, and post-shift off-the-clock work amounted to about nineteen to twenty-five minutes

[111] *Id.*
[112] Compl. at 1, *Lott v. Recker Consulting, LLC,* No. 1:23-cv-00489-DRC (S.D. Ohio Aug. 1, 2023), ECF No. 1.
[113] *Id.* at 5.
[114] *Id.* at 6.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 7.

of unlawfully uncompensated daily time for Lott and her coworkers. Lott argued that Recker Consulting knowingly and intentionally failed to compensate its CSRs for their off-the-clock work as Recker Consulting had access to information and electronic data indicating when its CSRs turned on and logged into their work computers as well as when they clocked into Recker Consulting's online timekeeping system.[118]

On August 1, 2023, Lott filed a class action lawsuit in the U.S. District Court for the Southern District of Ohio, Western Division against Recker Consulting (and later adding LYP Contact Center, LLC ("LYP") as a Defendant) for failing to properly compensate her and her fellow CSRs for their worked hours in violation of the FLSA as well as the Ohio Minimum Fair Wage Standards Act, Section 34a of Article II of the Ohio Constitution, and common law.[119] Recker Consulting and LYP filed a Motion for Summary Judgment on September 9, 2024, arguing that Lott's case should be dismissed because employers are not legally required to compensate remote workers for "time spent passing through these types of security protocols [to access their computers] before a shift, during an unpaid lunch break, or at the end of a shift." Recker Consulting and LYP further argued that, even if the time workers spent logging onto and off their computers was compensable, it would be "*de minimis*," or so insignificant that Recker Consulting and LYP could disregard it.[120]

On September 4, 2025, the Court granted in part and denied in part Recker Consulting's and LYP's Motion for Summary Judgment. The Motion was granted in part regarding Lott's FLSA claim "to the extent Plaintiffs' claims rely on the preliminary and postliminary activities the Court identified."[121] The Court's rationale was that Lott argued that simply "engaging the computer," or turning it on, triggered the start of the compensable workday, but the Court found that language to be too vague as "engaging the computer" could refer to a plethora of actions that may or may not be related to a worker's duties (e.g. "playing Sudoku online, perusing Reddit, or reading an article on CNN.com before the start of a shift").[122] An activity must be "both integral and indispensable" to be considered compensable under the FLSA.[123]

In its analysis, the Court referenced the definition of "integral and indispensable" that the Supreme Court established in *Integrity*

[118] *Id.* at 8.
[119] *Id.* at 1, 12.
[120] Defs.' Mot. for Summ. J. at 3, *Lott v. Recker Consulting, LLC*, No. 1:23-cv-00489-DRC (S.D. Ohio Sept. 9, 2024), ECF No. 41.
[121] Op. & Order Granting in Part & Denying in Part Defs.' Mot. for Summ. J. at 41, *Lott v. Recker Consulting, LLC,* No. 1:23-cv-00489-DRC (S.D. Ohio Sept. 4, 2025), ECF No.
[122] *Id.* at 35, 39–40.
[123] *Id.* at 39.

Staffing Sols. v. Busk.[124] [125] In *Integrity Staffing Sols.*, "integral" was defined as "belonging to or making up an integral whole; constituent, component; specifically necessary to the completeness or integrity of the whole; forming an intrinsic portion or element, as distinguished from an adjunct or appendage."[126] That Court also defined "indispensable," in the context of describing a duty, as an activity "that cannot be dispensed with, remitted, set aside, disregarded, or neglected."[127] The Court in *Integrity Staffing Sols.*, then established that "an activity is...integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities."[128]

The Court in *Integrity Staffing Sols.*, further established that the assessment of whether a work activity is both integral and indispensable must be "tied to the productive work that the employee is employed to perform" and that an employer requiring an activity does not by default make that activity compensable.[129] For instance, in *Integrity Staffing Sols.*, warehouse workers were required to undergo antitheft screenings before exiting the worksite, which took about twenty-five minutes to complete.

In that case, the Court held that the antitheft screenings were not compensable under the FLSA because they were not directly tied to the productive work that the warehouse workers were employed to perform. The antitheft screenings were deemed non-compensable "postliminary activities" and were, thus, not integral or indispensable to the workers' principal activities of retrieving products from warehouse shelves and/or preparing them for shipment.[130]

In applying the Supreme Court's analysis of *Integrity Staffing Sols.*, to *Lott*, the Court found that, while the remote CSRs' activity of turning on their computers was indispensable to performing their job duties due to their jobs being solely computer-based, it was not an integral activity as computers can be used for numerous non-work-related activities. The computers themselves are integral tools to performing the CSRs' job duties; however, the FLSA focuses on the integrality of an activity, not a tool.[131]

That being said, the Court acknowledged that the CSRs' computers had applications and programs that enabled activities that

[124] *Id.* at 27.
[125] *Integrity Staffing Sols. v. Busk*, 574 U.S. 27 (2014).
[126] *Id.* at 33.
[127] *Id.*
[128] *Id.*
[129] *Id.* at 36.
[130] *Id.* at 30, 35.
[131] Op. & Order Granting in Part & Denying in Part Defs.' Mot. for Summ. J. at 34, *Lott v. Recker Consulting, LLC*, No. 1:23-cv-00489-DRC (S.D. Ohio Sept. 4, 2025), ECF No.

were integral to their job duties.[132] Thus, the Court concluded that the CSRs' activity of turning on their computers to be preliminary under the FLSA and that the activity of "operating a program or application they use as part of the principal work activities they are employed to perform" triggers the compensable workday.[133] The compensable workday concludes "the moment the employee closes out of the last such program or application."[134]

The *Lott* Court also denied in part Recker Consulting's and LYP's Motion for Summary Judgment regarding their claim that, even if the amount of time the CSRs spent logging onto and off their computers was compensable, it would be "*de minimis*" because the Court only just established in this ruling which out-of-work activities were compensable as part of that process. The Court also expressed concerns of "a genuine dispute of material fact." Thus, the Court deemed it premature to effectively analyze this issue.[135] This case has since been appealed and is now being litigated in the U.S. Court of Appeals for the Sixth Circuit.[136]

c. Remote Work as a Reasonable Accommodation for High-Risk Pregnancy

A third area of law in which novel legal questions about telework is being analyzed is pregnancy rights. One particularly unique issue that was recently explored is whether an employer is at fault for denying a pregnant employee's request to work remotely due to a high-risk pregnancy that resulted in the death of the fetus or newborn. In *Larkin v. Total Quality Logistics LLC*, Total Quality Logistics LLC ("TQL") hired Chelsea Walsh as an in-person Claims Associate in its Cincinnati, Ohio office on January 18, 2021. Walsh informed TQL that she was pregnant during the interview process.[137] On or about February 11, 2021, Walsh was hospitalized due to an incompetent cervix, requiring an emergency cerclage, which is "a stitch through the cervix in order to prevent preterm labor."[138] Throughout Walsh's hospital stay, Walsh kept her supervisor and manager at TQL informed as to her status.[139] After a successful operation, Walsh was discharged from the hospital on February 12, 2021 but was ordered to remain on modified bedrest.[140]

---

[132] *Id.* at 35.
[133] *Id.* at 37.
[134] *Id.*
[135] *Id.* at 45, 50.
[136] Pl.'s Notice of Interlocutory Appeal, *Lott v. Recker Consulting, LLC*, No. 1:23-cv-00489-DRC (S.D. Ohio Apr. 7, 2026), ECF No. 81.
[137] Pl.'s Compl. at 2, *Larkin v. Total Quality Logistics LLC*, No. A 2300752 (Ohio Ct. C.P. Feb. 22, 2023).
[138] *Id.*
[139] *Id.* at 3.
[140] *Id.* at 2.

On February 15, 2021, Walsh returned to the TQL office and requested that she be permitted to work from home so that she could remain on modified bedrest while maintaining her much needed income and health insurance.[141] Walsh's supervisor agreed that TQL could grant this reasonable accommodation and informed TQL's human resources department that Walsh required bedrest and requested to work from home. Human Resources had TQL's benefits department email Walsh a leave of absence form for her physician to complete. The email attaching the form indicated that Walsh would not be permitted to work. Walsh's supervisor, who was included on the email, replied informing Human Resources that Walsh requested to work from home, not take a leave of absence. As instructed via email, Walsh had her physician complete the leave of absence form, which notably did not request what workplace accommodations Walsh may need but only the amount of time for which Walsh would be unable to work. On February 16, 2021, Walsh's physician sent the completed leave-of-absence form directly to TQL per the form's instruction, giving Walsh no opportunity to review the completed form, which stated that Walsh needed to take a leave of absence through February 19, 2021.[142] At this point, TQL had not taken any action on Walsh's request to work remotely. Thus, Walsh remained working in-person as she had no permission to leave.[143]

On February 16, 2021, Walsh attempted to enter her time into TQL's timekeeping system at the end of her shift but was unable to do so. Walsh promptly emailed TQL's benefits department about this and was informed that she was on an unpaid leave of absence due to her physician completing the leave of absence form and, therefore, not permitted to work at all. TQL never previously informed Walsh of her unpaid leave of absence.[144]

On Friday, February 19, 2021, Walsh provided TQL with a doctor's note stating that she was cleared to return to work but that she needed to work from home because of pregnancy complications. TQL's benefits department emailed Walsh that they could not accept the doctor's note or process her request for a telework accommodation because "the letter did not contain an end date for the accommodation or the medical reason for the accommodation."[145] TQL's benefits department further stated that Walsh was expected to return to work in-person at the office on Monday, February 22, 2021. Later that day, Walsh submitted to TQL a much more detailed doctor's note stating that Walsh needed to work from home starting on February 19, 2021 through the start of her maternity leave on or

[141] *Id.* at 1, 3.
[142] *Id.* at 3–4.
[143] *Id.* at 4.
[144] *Id.*
[145] *Id.*

about July 9, 2021 "to prevent further complications with her high-risk pregnancy, due to increased activity at the workplace."[146] Upon receipt of the doctor's note, TQL's benefits department emailed Human Resources asking, "Did you want to take it from here? I am guessing we are not approving her [working from home] for this long."[147]

Without further communication with Walsh, TQL denied Walsh's telework accommodation request. Human Resources told Walsh that TQL would never approve an employee to work from home for such an extended period of time because employees must be in the office, despite the fact that Walsh's entire department worked from home for several months during the COVID-19 pandemic with at least one employee at the time of Walsh's request still working from home.[148] Human Resources then offered Walsh two options: (1)remain on an unpaid leave of absence with no health insurance until she was due to give birth in or around July 2021; or, (2)work in the TQL office against her doctor's orders.[149] Walsh told Human Resources that she could not afford to live without income or health insurance, but TQL refused to reconsider its decision to deny Walsh her telework accommodation. Thus, Walsh made the impossible, incredibly dangerous decision to return to work in the TQL office on February 22, 2021.[150]

On or about late February 23, 2021 or early February 24, 2021, TQL's Vice President of Sales, Gary Carr, received a phone call from a colleague who learned of TQL's treatment of Walsh regarding her telework accommodation request, stating that TQL made "a substantial error by denying Walsh permission to work remotely and thought he should be aware."[151] Carr reportedly responded saying, "Thank you. You just saved us a lawsuit."[152]

On the morning of February 24, 2021, Walsh's manager told Walsh that TQL approved her telework accommodation request and sent Walsh home to finish her shift while on modified bedrest, which she did so per her doctor's orders. On the evening of February 24, 2021, Walsh was hospitalized for cramping and bleeding. Walsh's physician removed the cerclage and Walsh gave birth prematurely to her daughter, Magnolia Walsh, who had only been gestating for twenty weeks and six days. Magnolia tragically died in Walsh's arms about one hour and thirty minutes later.[153]

---

[146] *Id.*
[147] *Id.*
[148] *Id.* at 6.
[149] *Id.* at 5.
[150] *Id.* at 6.
[151] *Id.* at 6–7.
[152] *Id.* at 7.
[153] *Id.*

Walsh kept her supervisor abreast throughout her hospital stay and was discharged on February 26, 2021. Despite the horrific loss of her newborn daughter, TQL expected Walsh to return to work in the office on Monday, February 28, 2021, which Walsh did so for the sake of remaining employed.[154] Upon her return, Walsh's supervisors became concerned that Walsh was seeking legal action against TQL for denying her telework accommodation request and told her that, if she could not "move past" TQL denying her telework accommodation request to save her daughter's life, she would "not succeed at TQL."[155] Out of fear of retaliation from TQL, Walsh ultimately resigned from her position.[156]

On February 22, 2023, Walsh's attorneys filed a wrongful death lawsuit against TQL in the Court of Common Pleas in Hamilton County, Ohio, stating that TQL's "refusal to allow Chelsea Walsh to work from home breached its duty to Magnolia Walsh, resulting in Magnolia's premature birth and death."[157] In its answer to Walsh's complaint, TQL asserted that Walsh's "own negligence, carelessness, or actions and/or the negligence carelessness" contributed to or caused Magnolia's death.[158] On March 18, 2026, this matter went to trial before a jury. The jury awarded Magnolia Walsh's estate $25,000,000.00 in compensatory damages, and apportioned fault at ninety percent to TQL and ten percent to Chelsea Walsh. On March 30, 2026, the Court ordered TQL to pay Magnolia Walsh's estate $22,500,000.00.[159]

This case is unique because pregnancy accommodation claims typically focus on "compliance, documentation, or damages tied to lost wages," whereas this case shows that employers may risk much more than a traditional accommodation claim if they opt to deny a pregnant employee a reasonable work-from-home accommodation.[160] To reach its verdict, the jury assessed: (1) whether Walsh's work-from-home request was a reasonable accommodation based on her documented medical restrictions; (2) how the timing of TQL's response to Walsh's accommodation request affected Walsh's condition; and (3) whether TQL's accommodation decision was a "substantial factor" in Magnolia Walsh's premature birth and death.[161]

---

[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.* at 1.
[158] Def.'s Answer at 11, *Larkin v. Total Quality Logistics LLC*, No. A 2300752 (Ohio Ct. C.P. June 20, 2023).
[159] Final J. Entry at 2, *Larkin v. Total Quality Logistics LLC*, No. A 2300752 (Ohio Ct. C.P. Mar. 31, 2026).
[160] Carol Warner, Jury Awards $22.5M Verdict in Pregnancy Accommodation Lawsuit, HRMorning, https://www.hrmorning.com/news/remote-work-denied-pregnancy-accommodation/ (last updated Mar. 26, 2026).
[161] *Id.*

The multimillion-dollar jury award to Magnolia Walsh's estate is particularly rare in pregnancy accommodation claims and reflects how much is at stake when an employer chooses to not reasonably accommodate a pregnant (or disabled) employee. Further, this case demonstrates how mistakes in such employment decisions can lead to major consequences for both the employer and the employee.[162] To avoid similar cases moving forward, employers may want to properly train their management team on the accommodation process as well as the legal requirements. Employers may also wish to maintain detailed records of their legitimate business reasons for denying accommodation requests as well as ensure that they apply their attendance, telework, and accommodation policies consistently and fairly.[163]

Coincidentally, after the filing of this lawsuit, the Pregnant Workers Fairness Act ("PWFA") went into effect on June 27, 2023. The PWFA, which is a federal law, "requires a covered employer to provide a 'reasonable accommodation' to a qualified employee's or applicant's known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an 'undue hardship.'"[164]

Per the National Women's Law Center, a pregnant or postpartum worker does not need to have a disability (or even a complicated pregnancy) to qualify for a reasonable accommodation under the PWFA.[165] Under the PWFA, "known limitations" are "physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions."[166] Per the National Women's Law Center, a pregnant worker who wishes to take legal action against their employer must file a charge of discrimination with the Equal Employment Opportunity Commission, which is the federal agency that enforces federal workplace anti-discrimination and anti-harassment laws.[167] [168] The charge must be filed within one hundred and eighty days after the unlawful act. This deadline may be

[162] H. Devon Collins, *Ohio Jury Verdict Highlights Risks in Denying Pregnancy Accommodations*, Ogletree Deakins (Mar. 30, 2026), https://ogletree.com/insights-resources/blog-posts/ohio-jury-verdict-highlights-risks-in-de nying-pregnancy-accommodations/.

[163] *Id.*

[164] What You Should Know About the Pregnant Workers Fairness Act, EEOC, https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act (last visited May 10, 2026).

[165] Know Your Rights: Pregnant Workers Fairness Act, Nat'l Women's L. Ctr. (Oct. 30, 2024), https://nwlc.org/resource/know-your-rights-pregnant-workers-fairness-act/.

[166] EEOC, *supra* note 163.

[167] Nat'l Women's L. Ctr., *supra* note 164.

[168] About the EEOC, EEOC, https://www.eeoc.gov/youth/about-eeoc-0 (last visited May 10, 2026).

extended up to three hundred days if a state or local anti-discrimination law also applies to the claim.[169]

IX. Final Thoughts

So, does remote work *work*? The authors of this article sought out to investigate this question by defining remote work (also known as *telework*), presenting data on remote job growth and the industries with the most remote jobs, analyzing research studies that discussed the advantages and disadvantages of remote work, and sharing lawsuits and court decisions surrounding remote work arrangements. The COVID-19 pandemic was a major driver in organizations adopting remote work arrangements to maintain business operations. As a result, remote work opportunities increased significantly across multiple industries with sales and business development roles exhibiting some of the highest growth. Between 2019 and 2021, several sectors expanded their remote job offerings, including professional, scientific, and technical services; information; finance and insurance; and management of companies and enterprises.

However, research findings on remote work present two contrasting perspectives. Productivity, employee satisfaction, and retention have been highlighted as positive outcomes of remote work environments. Many organizations reported increased productivity due to fewer workplace distractions and the reduction of stressors associated with traditional office settings. Studies also found that employees experienced greater job satisfaction because of reduced commuting time, increased flexibility, and more opportunities to spend time with their families. Many employees expressed a desire to continue working remotely and indicated they would recommend remote work arrangements to others. Research on employee satisfaction and retention further suggested that some employees would even accept a pay cut to maintain remote work opportunities.

Conversely, some studies argue that the rise in remote work has negatively affected productivity, employee mental health, and overall well-being. Key challenges identified include social isolation, communication difficulties, technological barriers, blurred work-life boundaries, and cyberbullying. Additionally, concerns have been raised regarding the impact of remote work on organizational culture, which can directly influence employee engagement and performance. That being said, it is important to highlight that these studies indicate that efficient and supportive management can mitigate these issues. As organizations continue to evaluate the advantages and disadvantages of remote work, legal questions surrounding the implementation and regulation of these arrangements are also receiving increased attention.

[169] Nat'l Women's L. Ctr., *supra* note 164.

Several lawsuits initiated by remote workers examined the issues of cross-jurisdictional employment, remote workers' rights related to wages under the FLSA, and remote work as a reasonable accommodation for high-risk pregnancy. *In Khartchenko v. Am. Oncologic Hosp., Inc.*, the Court ruled that a remote worker must file a lawsuit against an out-of-state employer in a state where said employer has minimum contacts. In *Khartchenko* specifically, Khartchenko failed to establish that her Pennsylvania-based employers had any sort of business-related presence in her home state of New Jersey from which she worked remotely. Khartchenko's employers simply allowing her to work from her New Jersey home for the purpose of personal convenience was not sufficient to establish minimum contacts because it provided no evidence that the employers sought to avail themselves of the benefits and protections of New Jersey law. Thus, her case was transferred to a Pennsylvania court.

In *Lott v. Recker Consulting, LLC*, the Court established that the compensable workday for remote workers under the FLSA starts when said workers begin "operating a program or application they use as part of the principal work activities they are employed to perform" and the compensable workday ends upon closing the last such program or application.[170]

Lastly, in *Larkin v. Total Quality Logistics LLC*, the Court ordered the employer to pay Magnolia Walsh's estate $22,500,000.00, sending a clear message that employers may risk far more than a traditional accommodation claim if they opt to deny a pregnant employee a reasonable work-from-home accommodation.

The authors conclude that remote work *works* for some employees while, for others, it may not be a preferred work arrangement. Workers with established experience excel in remote environments provided the organization has a strong technological infrastructure, user-friendly online communication tools, and a supportive management team that fosters a sense of social belonging among remote workers.

Further, employers must have a well-defined remote work policy that is human-centric and supports employees to be successful in such an environment to retain employees. Organizations should also collect employee feedback to assess whether the remote work arrangement fits the needs of their workers and their respective roles. Evaluating and fulfilling employee needs can potentially prevent lawsuits similar to those explored herein and prompt employers to revisit remote work policies on an annual basis. The remote work

[170] Op. & Order Granting in Part & Denying in Part Defs.' Mot. for Summ. J. at 37, *Lott v. Recker Consulting, LLC*, No. 1:23-cv-00489-DRC (S.D. Ohio Sept. 4, 2025), ECF No.

policy may meet the needs of current employees but, if the demographics of employees change, revisions may be required.

THE INVOLUNTARY CREDITOR PARADOX: Reforming Priority in Mass Tort Bankruptcies

By Ryan J. Raynor, J.D.*

> *Annual income twenty pounds, annual expenditure nineteen nineteen and six, result happiness. Annual income twenty pounds, annual expenditure twenty pounds ought and six, result misery.*
>
> – Charles Dickens[1]

I. Introduction

"A law to restructure largely commercial, largely voluntary debts is not an obvious home for mass torts."[2] Last year's bipartisan bill[3] targeting the controversial "Texas Two-Step" is evidence that "Houston, we have a problem." A Chapter 11 bankruptcy problem. While the bill focuses on the Texas Two-Step, the title—Ending Corporate Bankruptcy Abuse Act—illustrates a growing concern that corporations are abusing bankruptcy, especially to the detriment of involuntary creditors like tort victims. But the attention given to this perceived exploitation goes well beyond Congress.[4] Many legal scholars, jurists, and journalists have caught on because, at first blush, it sets off all types of injustice alarms.[5]

Bankruptcy, by design, enables debtors to free themselves from certain financial obligations arising from certain pre-petition conduct. But tort claimants are often unsuspecting victims of the debtor and have been hauled into bankruptcy, not of their own volition. Thus, tort claimants are involuntary creditors in bankruptcy—possessing significantly different perspectives and priorities than other creditors. Where a tort claimant pursuing justice against a defendant may favor the liquidation of a company, a secured lender creditor may prefer to finance the company's reorganization in to achieve a more substantial future return on investment. Furthermore, bankruptcy

* Ryan J. Raynor received his Juris Doctor from Rutgers Law School in 2026.

[1] *David Copperfield*, Ch. 12 (1850).

[2] Melissa B. Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 TEX. L.R. 1745, 1746 (2023).

[3] *See* Press Release, U.S. Senators Whitehouse & Hawley, and Representatives Sykes & Gooden, Ending Corporate Bankruptcy Abuse Act (July 23, 2024), https://www.whitehouse.senate.gov/news/release/whitehouse-hawley-sykes- gooden-introduce-bipartisan-legislation-to-deter-texas-two-step-bankruptcy-trick/.

[4] Because there is an abundance of legal scholarship dedicated to this topic, this paper tends to focus on the low-priority and poor bargaining position of tort claimants in bankruptcy.

[5] Namely, due process.

does not incorporate many of the procedural safeguards that tort claimants benefit from in traditional litigation, which serve to shine a light on inappropriate behavior and dissuade future misconduct.

Straight away, it seems absurd that the interests of other "voluntary" creditors are more protected in bankruptcy than involuntary creditors. As the name implies, voluntary creditors enter a financial relationship with the debtor willingly, often through loans, contracts, or credit agreements. These creditors make a conscious decision to extend funds or services to the debtor, expecting repayment according to the agreed terms. Also, voluntary creditors are in a position to bargain with the debtor and can increase interest rates to mitigate the risks of nonpayment and bankruptcy. On the other hand, involuntary creditors have not actively chosen to lend to or engage with the debtor. Yet, they are affected by the debtor's financial distress. This seems to create a paradox: while tort victims are typically the most morally deserving, they receive the least legal protection in bankruptcy proceedings.

The paradox lies in the fact that voluntary creditors—those who choose to deal with and are in a position to bargain with the debtor—almost always get paid before involuntary creditors receive anything. This happens because voluntary creditors typically have a prior contractual relationship with the debtor, and bankruptcy law generally upholds the contractual rights of these creditors. Conversely, involuntary creditors—those who did not knowingly take on the risk associated with the debtor—are subordinated and often get paid with whatever is left over. Nevertheless, bankruptcy law generally emphasizes the predictability and stability of existing contractual relationships between voluntary creditors and debtors, recognizing that these creditors undertook a calculated risk by agreeing to provide loans or services.

Thus, the paradox is that while voluntary creditors took on the risk knowingly, they are placed in a more favorable position compared to involuntary creditors, who are frequently left with fewer options and lower recovery prospects. And in some respects, this makes sense because bankruptcy serves a highly utilitarian purpose in society.[6] But this paradox is exactly what rings the alarm of injustice in so many people. It is fundamentally unsettling to those who possess a strong sense of egalitarian justice. Why should a tort victim relinquish

[6] *See* Ralph Brubaker & Heidi M. Hurd, Maximizing Wealth by Forgiving Debts: A Critique of Utilitarian Theories of Bankruptcy Discharge (July 15, 2019), 15 Revue d'études benthamiennes, pp. 2–5 (2019), http://journals.openedition.org/etudes-benthamiennes/4885 (discussing four traditional utilitarian views on bankruptcy discharge); Anita F. Hill, Bankruptcy, Contracts and Utilitarianism, 56 MO.L.REV. 571, 574 (1991) ("[bankruptcy's] purpose is utilitarian.").

their right to recovery in favor of a party that voluntarily engaged with the debtor?[7]

In "consumer" bankruptcies under Chapters 7 or 13, the voluntary versus involuntary creditor paradox lurks but is easier to swallow. In consumer bankruptcies, the "honest but unfortunate debtor" is simply a person who puts all their assets on the table and whose bankruptcy offers a fresh start. For them, filing for bankruptcy is stigmatizing; not a corporate strategy to manage debt. Even worse, some corporations file for bankruptcy even when not facing financial distress. In Chapter 11 corporate reorganizations, the debtor retains control of its assets and attempts to create a repayment plan, subject to approval by creditors and the court. However, the plan can be "crammed down" over the objections of some creditors, and this can be problematic for dissenting creditors, particularly those whose claims are subordinated or who feel they are not receiving a fair recovery. For example, in Purdue Pharma's plan, opioid victims were to receive between $3,500 and $48,000 per claim,[8] and had the plan not called for "third-party releases" to non-debtors, it would have been approved despite thousands of dissenting votes.[9]

In response, this paper argues that tort victims should be given super-priority claims in some circumstances. This paper also examines certain provisions of the Bankruptcy Code that seemingly evince contradicting purposes with respect to involuntary creditors. For instance, 523(a)(6) excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or the property of another entity."[10] This seems like a good start for tort victims, but most tort creditors in bankruptcy will be victims of reckless or negligent conduct, not willful and malicious. That is why, in 1984, Congress carved out a separate exception for victims of drunk driving

[7] *See Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (The "purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.").

[8] Cici Yongshi Yu, Opioid Victims Struggle With Purdue Pharma Settlement's High Bar, BLOOMBERG LAW (Aug. 8, 2023), https://news.bloomberglaw.com/health-law-and-business/opioid-victims-struggle-with-purdue-pharma- settlements-high-bar.

[9] 2,683 individual personal injury victims opposed the plan. It is accurate that 95% of the victims who voted as part of the Purdue Pharma bankruptcy process ultimately agreed to the settlement. But in the majority opinion, Gorsuch noted that only 20% of Oxcyontin victims cast votes. Also, the remaining 5% objected, contending the bankruptcy court exceeded its authority in allowing the Sacklers to hold on to half their wealth and escape further liability. Brian Mann & Nina Totenberg, Supreme Court Rejects Controversial Purdue Pharma Bankruptcy Deal, NPR (Updated June 27, 20244:12 PM ET), https://www.npr.org/2024/05/30/nx-s1-4986029/purdue-scotus-sackler-bankruptcy-oxycontin.

[10] 11 U.S.C. § 523(a)(6).

that does not require "willful and malicious" conduct.[11] The law was later amended in 1990 to include driving under the influence of other drugs besides alcohol, and in 2005 to encompass other motor vehicles like boats and airplanes. [12]

Also, in 1990, Congress added § 507(a)(10), which gives a priority (tenth in line) to those creditors whose claims also qualify for non-dischargeability under 523(a)(9).[13] Additionally, a much more niche provision of the bankruptcy code—§ 1171(a)—gives victims of "personal injury ... or death" administrative priority against railroad company debtors when the claim "aris[es] out of the operation" of the railroad.[14] But for now, this is the backdrop for the following discussion: Tort victims often enter bankruptcy unwillingly, lose their right to traditional litigation and a determination of accountability, frequently recover very little, and lose their future right to recover forever, all in the utilitarian goal of achieving and efficient, final, and definitive resolution of a large number of claims arising from a single source of harm.

II. Chapter 11 Notoriety

As noted above, Chapter 11 bankruptcies are garnering significant attention and scrutiny due to concerns regarding perceived inequality and unfairness. Chapter 11 provides numerous advantages to struggling businesses, especially those that are genuinely insolvent. But solvent entities are increasingly utilizing Chapter 11 as a strategy to manage mass torts. First, it is important to note that mass torts have their place in bankruptcy. A "race to the courthouse" where every creditor tries to collect ahead of the others has long been disfavored for many reasons, chief among them that the first claimant leaves little for future claimants. But in resolving mass tort claims through bankruptcy, tort victims should not be forced to accept a worse outcome than they might in the tort system or otherwise.

[11] 4 COLLIER ON BANKRUPTCY ¶ 523.12, Discharge Exception for Debts for Willful and Malicious Injury to Another Entity or Property of Another Entity; § 523(a)(6) [1].

[12] *Id.*

[13] 4 COLLIER ON BANKRUPTCY ¶ 507.13, Tenth Priority: Drunk Driving Claims; § 507(a)(10) ("The operative language in section 523(a)(9) is identical to that in section 507(a)(10) with two exceptions. The first is that section 523(a)(9) refers to death or personal injury "caused by" the debtor's operation of the vehicle while section 507(a)(10) refers to death or personal injury "resulting from ... [t]he second difference is that section 523(a)(9) also covers the debtor's operation of an aircraft while section 507(a)(10) does not cover aircraft.").

[14] 11 U.S.C. § 1171(a).

For example, in Purdue Pharma, the debtors[15] and a majority of creditors[16] supported the reorganization plan and condemned the United States Trustee's (UST) objection to the inclusion of nonconsensual third-party releases to the Sackler family because they claimed that without the third-party releases, the deal would evaporate, and most victims would get nothing.[17] The plan would have been confirmed and crammed down over the dissenting votes of over 2,000 tort victims. Luckily, a slim majority of the Supreme Court agreed with the UST, and just nine months later, Purdue Pharma submitted a new plan that allows creditors to opt in or out of the third-party releases and even pays out a billion dollars more than the initial plan the Court vacated.[18]

While this example provides a glimpse of how modern mass torts are treated in Chapter 11, it is essential to revisit the issue from a historical perspective. A common starting point is the Chapter 11 filing of the Johns-Manville Corporation in 1982. Yet, the Hartford Circus Fire case predates the Bankruptcy Code and serves as a valuable reference for the role that bankruptcy should aspire to play in mass torts.[19] On July 6, 1944, a fire destroyed the Ringling Brothers and Barnum & Bailey Circus during an afternoon performance in Hartford, Connecticut, killing 169 people and injuring over 500, including many children.[20] The cause of the fire remains unclear, but it spread quickly due to the highly flammable tent material.[21] In the

[15] Brief for Debtor Respondents at 16, *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024), No. 23-124, 2023 WL 7042400, at *16 ("Trustee here is an interloper who has no standing—and no right—to destroy a plan that the actual victims crafted and overwhelmingly support.").

[16] Brief of Respondent Ad Hoc Committee of Governmental and Other Contingent Litigation Claimants at 3, *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024), No. 23-124, 2023 WL 7042626, at *3 ("[T]here is no alternative that would provide anything close to the benefits, monetary and otherwise, promised by the current plan. Reversal of plan confirmation likely would result in the liquidation of Purdue, with most or all of its value going to satisfy claims of the federal government.").

[17] *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 230 (2024) (Kavanaugh, J. dissenting) ("Without releases, there will be no $5.5 to $6 billion settlement payment to the estate, and "there will be no viable path to any victim recovery.") (quoting oral argument of Respondents).

[18] Fabiana Negrin Ochoa, Purdue Pharma Files New Reorganization Plan With $7.4 Billion for Creditors, THE WALL STREET JOURNAL (March 19, 2025 3:00 am ET), https://www.wsj.com/articles/purdue-pharma-files-new- reorganization-plan-81854427.

[19] THE HARTFORD CIRCUS FIRE ~JULY 6,1944, https://www.circusfire1944.com/ (last visited, May 9, 2025).

[20] Troy A. McKenzie, *The Mass Tort Bankruptcy: A Pre-History*, 5 N.Y.U. J. TORT L. 59, 61 (2012).

[21] *See id.* A major priority of the tent was not to let rain leak through, so the tent was made of "a highly flammable construction of canvas soaked in a paraffin-gasoline waterproofing mixture." *Id.*

aftermath, thousands of lawsuits were filed against the circus, leading to a race to secure legal claims.[22]

However, the circus—with few assets beyond its train and animals—could neither pay the damages nor continue its tour to generate revenue due to fifteen million dollars of legal attachments placed on its property.[23] So, either all the circus's assets would be gobbled up by the first few winners of the "race to the courthouse," or a plan would need to emerge to benefit all creditors.[24]

Fortunately, the plaintiffs' attorneys sought, and the Court appointed an equity receiver who allowed the Circus to continue its operations and begin to generate profits again.[25] "Within months of the fire, counsel for the receiver, plaintiffs' attorneys, and the circus agreed to a comprehensive claims resolution process."[26] And within a span of just six years, the receiver paid out all claims awarded through the claims resolution process, amounting to nearly four million dollars to claimants.[27] Thus, the Hartford Circus fire case paints a good picture of what goals bankruptcy should consider when handling mass torts.

More than forty years later, the Johns-Manville Corporation, once the world's largest producer of asbestos-containing products, played a central role in one of the most significant and precedent-setting corporate bankruptcies in U.S. history. Johns-Manville thrived for decades by manufacturing insulation, roofing, and construction materials that widely used asbestos. By the early 1980s, the company faced over 16,000 asbestos-related lawsuits, with projections suggesting that hundreds of thousands of additional claims were likely in the future.[28] This mounting legal and financial pressure led Johns-Manville to file for Chapter 11 bankruptcy in 1982 in the U.S. Bankruptcy Court for the Southern District of New York.[29] At the time, this was the largest Chapter 11 filing in U.S. history and the first

[22] *Id.*

[23] *Id.* at 61–62.

[24] This was before the Bankruptcy Code's enactment in 1978, so business reorganizations were authorized through either Chapters X or XI of the Chandler Act of 1938. *See* Eugene V. Rostow & Lloyd N. Cutler, *Competing Systems of Corporate Reorganization: Chapters X And XI of the Bankruptcy Act*, 48 YALE L.J. 1334, 1334 (1938-1939).

[25] McKenzie, *supra* note 20, at 67. For more on equity receiverships and mass torts, *see* Aadira. I. Khan, *From Historical to Cutting-Edge: Equity Receiverships as a Tool to Resolve Mass Torts*, 172 U.PA.L.REV. 1667 (2024).

[26] McKenzie, *supra* note 20, at 68.

[27] *Id.*

[28] Steve Korris, A Lesson In History: Founder of Bankrupt Johns Manville Died of Asbestos-Related Illness, MADISON-ST. CLAIR RECORD (Jun 17, 2005), https://madisonrecord.com/stories/510559967-newsinator-a-lesson-in- history-founder-of-bankrupt-johns-manville-died-of-asbestos-related-illness.

[29] Christopher M.E. Painter, Note, *Tort Creditor Priority in the Secured Credit System: Asbestos Times, the Worst of Times*, 36 STAN. L.R. 1045, 1045 (1984).

time a major American company filed for bankruptcy not to restructure its operations but to tackle overwhelming tort liabilities.[30]

The bankruptcy proceedings unfolded over several years and involved multiple layers of the federal judiciary. A crucial turning point came in 1986 when the court approved a reorganization plan that proposed the establishment of a trust fund to handle both present and future asbestos personal injury claims. The plan was approved by Judge Burton R. Lifland, a bankruptcy judge in the Southern District of New York,[31] and subsequently affirmed by the U.S. District Court for the Southern District of New York[32] and the U.S. Court of Appeals for the Second Circuit.[33] These approvals essentially established that bankruptcy courts could use their equitable power to not only discharge current liabilities but also manage future claims that arose from pre-petition conduct—a concept that had not been clearly addressed in the Bankruptcy Code up to that point.[34]

The concept was novel: rather than allow ongoing litigation to threaten the viability of the reorganized company, all current and future personal injury asbestos-related claims would be funneled into a single entity trust.[35] In exchange, Johns-Manville would be shielded from future lawsuits related to its asbestos products.[36] Recognizing this model's significance and potential replicability, Congress responded in 1994 by amending the Bankruptcy Code through legislation that added § 524(g).[37] Section 524(g) essentially codified the legal

[30] *See* Robert Jones, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 HARV. L. REV. 1121, 1122 (1982–1983) ("The most extraordinary aspects of the Manville case are that the majority of Manville's creditors are unknown and that the majority of the debts on which Manville bases its claims of prospective insolvency are contingent and unliquidated. Manville thus appears to be attempting to use the bankruptcy power largely as a tool to limit the aggregate size of its current and future liabilities.").

[31] *In re Johns-Manville Corp.,* 68 B.R. 618 (Bankr. S.D.N.Y. 1986).

[32] *In re Johns-Manville Corp.*, 78 B.R. 407 (S.D.N.Y. 1987).

[33] *Kane v. Johns-Manville Corp.,* 843 F.2d 636 (2d Cir. 1988).

[34] *See id.* at 640 ("The cornerstone of the Plan is the Asbestos Health Trust ... a mechanism designed to satisfy the claims of all asbestos health victims, both present and future.").

[35] *Id.*

[36] *Id.*

[37] Press Release, Department of Justice, Statement of Interest Urging Transparency in the Compensation of Asbestos Claims, December 28, 2020, https://www.justice.gov/archives/opa/pr/justice-department-files-statement-interest-urging-transparency-compensation-asbestos-claims ("Congress enacted 11 U.S.C. § 524(g) to create a comprehensive mechanism for addressing injuries caused by asbestos. Under section 524(g), asbestos-related claims may be channeled to a special trust created under the bankruptcy plan of reorganization, which then assumes responsibility for both the defense and payment of those claims. The trusts are managed by trustees, who often must secure support for major decisions from a "trust advisory committee," whose members are often the same attorneys who represented asbestos claimants during the bankruptcy. Since 1994, more than 60 such trusts have been established by Chapter 11 debtors with asbestos-related liabilities. According to the Government Accountability Office, asbestos bankruptcy

framework pioneered in the Johns-Manville case.[38] It allowed for the creation of asbestos personal injury trusts as part of a debtor's reorganization plan, provided that the plan met certain criteria and was approved by 75% of the affected claimants.[39]

Importantly, § 524(g) also incorporates the concept of a channeling injunction, which permanently enjoins future lawsuits against the debtor and redirects them to the trust for resolution.[40] This legal mechanism was designed to balance the interests of claimants with the need for corporate debtors to achieve finality and operational stability after emerging from bankruptcy. The legacy of the Johns-Manville bankruptcy is profound—it not only helped preserve the company as a "going concern" but also transformed how the legal system handles mass torts in bankruptcy, influencing both court doctrine and statutory law.[41]

Since Johns-Manville, managing mass tort liability in Chapter 11 has continued to evolve, and lately, several concerns have raised suspicion among Congress, jurists, scholars, and others. Countless articles are written about third-party releases,[42] venue and forum shopping,[43] and due process concerns.[44] Most recently, much attention has turned to the Johnson & Johnson ("J&J") talc-based baby powder that contained asbestos and is alleged to have caused mesothelioma and cancer.[45] Controversially, J&J employed the "Texas Two-Step" maneuver, where the company essentially spun off a new subsidiary

trusts paid $17.5 billion from 1988 through 2011, and more recent studies estimate higher amounts.").

[38] 11 U.S.C. § 524(g).

[39] *Id.*

[40] *Id.*

[41] "Going Concern," is an accounting term, which means "a business is financially stable and can operate with the expectation of indefinite existence." *See* Legal Info. Inst., Cornell L. Sch., https://www.law.cornell.edu/wex/going_concern.

[42] Lindsey D. Simon, *Bankruptcy Grifters,* 131 YALE L.J. 1154 (2022).

[43] Adam J. Levitin, Judge Shopping in Chapter 11 Bankruptcy, U. ILL. L.REV. 351 (2023); Jonathan C. Lipson, *Vertical Forum Shopping in Bankruptcy*, TEMPLE 10-Q: TEMPLE'S BUSINESS LAW MAGAZINE (last visited May 9, 2025), https://www2.law.temple.edu/10q/vertical-forum-shopping-in-bankruptcy/; but see Brook E. Gotberg, *The Market for Bankruptcy Courts: A Case for Regulation, Not Obliteration*, 49 BYUL.REV. 647 (2024).

[44] J. Maria Glover, *Due Process Discontents in Mass-Tort Bankruptcy Due Process Discontents in Mass-Tort Bankruptcy*, 72 DEPAUL L.REV. 535, 558 (2023) ("The unique benefit of bankruptcy for mass-tort defendants seeking global peace is, chiefly claimants' mandatory participation by way of channeling injunctions in a trust. But this tends to come at the expense of what would otherwise be claimants' due process rights to opt out of a global deal, to pursue their own "day in court," and to seek to maximize their own individual financial interests.").

[45] *See* Allegra Abramson, *Johnson & Johnson's "Talcum" Two-Step*, TEMPLE 10-Q: TEMPLE'S BUSINESS LAW MAGAZINE (December 12, 2024), https://www2.law.temple.edu/10q/johnson-johnsons-talcum-two-step/; Travis Rodgers, Judge Rejects J&J's $10 Billion Talc Settlement, ASBESTOS.COM (April 9, 2025), https://www.asbestos.com/news/2025/04/09/judge-rejects-jj-settlement/.

and assigned all of its talc-based liabilities to it with the intention of the new subsidiary filing for Chapter 11, allowing J&J to shield its assets.

Currently, J&J has tried and failed three times to use the Texas Two-Step to settle its talc- based liabilities. J&J's first attempt ended with the Third Circuit dismissing its case because LTL was not in "financial distress."[46] Not one to "go down looking," J&J filed refiled just two hours after the court dismissed its first petition[47] only to whiff and have its case dismissed again for not meeting the Third Circuit's requirement of "imminent" or "immediate" financial distress.[48] Stepping out of the batter's box and taking a deep breath, J&J reincorporated in Texas and tried again.[49] This time, filing in the Texas Southern Bankruptcy Court through a newly created subsidiary named Red River Talc LLC. Nevertheless, J&J swung and missed again, striking out with Judge Christopher Lopez, who dismissed the case not due to a single reason but for the totality of the circumstances.[50] But J&J did not head back to the dugout and wait for its next at- bat. It has said it will not appeal the decision and will "return to the tort system to litigate and defeat these meritless talc claims."[51]

Going back to utilitarian vs. egalitarian theories and looking at these cases and the evolution of mass torts in bankruptcy, there appears to be much more skepticism about what bankruptcy courts allow corporate debtors to do in the name of utility maximization. Mass tort claims have gotten bigger and more costly to litigate, never mind prove, and adjudicate. Meanwhile, corporate debtors have continued to push the limits of what is permitted, and the courts do not seem as willing to play ball as they once did. Nevertheless, tort victims will continue to be hauled into bankruptcy and embark on an uphill battle to get justice. Is there a solution?

---

[46] *In re LTL Mgmt., LLC,* 64 F.4th 84, 93 (3d Cir. 2023) ("What counts to access the Bankruptcy Code's safe harbor is to meet its intended purposes. Only a putative debtor in financial distress can do so. LTL was not. Thus we dismiss its petition.").

[47] *In re LTL Mgmt., LLC*, 652 B.R. 433, 439 (Bankr. D.N.J. 2023).

[48] *Id.* at 436 ("Simply put, the Debtor does not meet the more exacting gateway requirement implemented by the Circuit with respect to "good faith" under 11 U.S.C. §1112(b), which would allow LTL to take advantage of the tools available under the Bankruptcy Code to resolve its present and future talc liabilities.").

[49] *In re Red River Talc LLC*, No. 24-90505, 2025 Bankr. LEXIS 863 (Bankr. S.D. Tex. Mar. 31, 2025).

[50] *Id.* at 17 ("In the end, based on the Court's on-the-spot evaluation, the prepetition voting and solicitation issues, the denial of plan confirmation, and the unique nature of this divisional merger case, there is cause to dismiss this case. There is not any one individual factor that requires this result. It is all of them together that require the Court to dismiss this case.").

[51] U.S. Judge Rejects Johnson & Johnson's $10 Billion Baby Powder Settlement, CNBC (March 31, 2025, 11:57 PM EDT), https://www.cnbc.com/2025/04/01/us-judge-rejects-johnson-johnsons-10-billion-baby-powder- settlement.html.

III. Existing Priority and Non-Dischargeability Provisions

Priority and non-dischargeability play a crucial role in bankruptcy. But the current priority and non-dischargeability provisions of the Bankruptcy Code illustrate that Congress has only partially and inconsistently addressed the unique vulnerabilities of tort victims in bankruptcy. Section 507 of the Bankruptcy Code pertains to priority and dictates who receives payment first. It also indirectly determines who gets paid in full when funds are limited because Chapter 11 and 13 plans cannot be confirmed without paying priority claims in full.[52] Admittedly, priority can also be irrelevant. For example, in a Chapter 7 liquidation where the debtor's only assets are fully encumbered by security interests, a priority claim might not make any difference in whether the creditor is paid. And that is okay because it aligns with the overarching goal of bankruptcy: to provide a fresh start to the honest but unfortunate debtor. But in Chapter 11, a debtor cannot even confirm a plan without paying priority claims in full (unless the priority holding creditor agrees).[53]

First, although not mentioned in § 507, it is important to emphasize that secured creditors have a special status in bankruptcy. Secured creditors have a security interest in the collateral of the debtor. While not technically given first priority by statute, secured creditors always receive the full amount of their claim—so long as it is supported by collateral—before any payments are made to unsecured claims.[54] Section 507 establishes a claim hierarchy, which begins with domestic support obligations.[55] This is followed by administrative expenses, unsecured claims from Federal Reserve banks, and wage and employee benefit claims.[56] It also includes claims from specific producers and fishermen, consumer deposit claims, certain tax claims, and claims associated with maintaining capital levels of depository institutions.[57] And lastly, it covers claims arising from the unlawful operation of vehicles or vessels that lead to injury or death because the debtor was intoxicated from using alcohol, a drug, or another substance.[58] Of these priority claims, only the tenth—claims arising from driving under the influence (DUI)—sound in tort.

Under the Code's priority rules, tort victims are not granted any special treatment unless the claimant is the victim of a DUI

[52] Unless the creditor consents to taking less than what they are owed.
[53] *See* 11 U.S.C. § 1129(a)(9).
[54] *See* Lucian Arye Bebchuk & Jesse M. Fried, *Uneasy Case for the Priority of Secured Claims in Bankruptcy: Further Thoughts and a Reply to Critics*, 82 Cornell L. Rev. 1279, 1281(1997)
[55] 11 U.S.C. § 507.
[56] *Id.*
[57] *Id.*
[58] *Id.*

accident. As a result, most tort claims, including those involving catastrophic harm, are relegated to general unsecured status, paid only after secured creditors and other priority classes. The absence of tort creditors from the specified priority classes implies that Congress has either overlooked their plight or deliberately upheld the conventional creditor hierarchy, thereby subordinating involuntary victims to voluntary creditors who contracted with the debtor.

A limited set of non-dischargeability provisions under 11 U.S.C. § 523 and § 727 further illustrates Congress's uneven attention to tort victims. Section 727 takes away the debtor's right to discharge any debt. Whereas § 523 lists certain types of debts not subject to discharge, also known as non-dischargeable claims. These debts survive bankruptcy and remain fully enforceable even after bankruptcy concludes. With some deviation, most of the priority claims found in § 507 are also not dischargeable under § 523. For example, certain tax debts, domestic support obligations, and debts arising from driving under the influence causing injury or death are both priority and non-dischargeable under §§ 507 and 523. While debts obtained through fraud, not properly listed or scheduled by the debtor, and resulting from willful and malicious injury are not priority claims under § 507—but are non-dischargeable under § 523. Of the enumerated non-dischargeable claims in § 523, several sound in tort.

Sections 523(a)(2) and (a)(4) aim to prevent debtors from discharging debts that arise from intentional deceit, theft, or abuse of trust, reinforcing the principle that bankruptcy should benefit the honest individual facing misfortune, rather than those who have engaged in fraudulent behavior. Similarly, § 523(a)(6) renders certain debts non-dischargeable when they stem from a debtor's willful and malicious harm to another individual or their property. This means that if someone causes harm intentionally—not merely through recklessness or negligence—they cannot erase that debt through bankruptcy proceedings.

Consequently, among all tort claims categorized as priority or non-dischargeability, only driving under the influence provisions lack an element of intent.[59] Accordingly, tort victims affected by recklessness or negligence generally receive neither priority nor nondischargeability claims, leaving them as general unsecured creditors in bankruptcy cases. The selective and reactive nature of these reforms suggests a recognition of the issue yet demonstrates insufficient systemic commitment to addressing it. In sum, the existing Bankruptcy Code shows only slight concern for tort victims, offering them inadequate protections. This deficiency in legislation highlights the need for reform proposals.

Nonetheless, a rarely utilized provision in the code gives tort victims a top-level priority for personal injury or wrongful death claims

[59] DUI is a strict liability crime that can also give rise to a negligence tort claim.

without requiring the high burden of proving a debtor's willful and malicious harm to another individual or their property. Section 1171(a) of the Bankruptcy Code provides a rare, though limited, glimpse of Congressional intent to protect tort victims—specifically in the context of railroad bankruptcies. Here, Congress provides a safeguard to individuals who have experienced personal injuries or wrongful deaths caused by railroad operations.[60] In practical terms, this means that railroad workers, passengers, or others injured by the railroad's negligence or wrongdoing must be paid in full in Chapter 11 cases and are paid before almost all other claims.

This exceptional provision represents the only place in the Code where Congress explicitly elevates claims based on negligent torts within the bankruptcy priority structure. By conferring administrative expense status to tort victims in railroad bankruptcies, Congress recognized their unique position as involuntary creditors harmed by the debtor's ordinary operations and sought to safeguard them from being entirely wiped out by sophisticated secured claims. Nevertheless, the applicability of § 1171(a) is limited. It is exclusively pertinent to railroad reorganizations governed by Chapter 11 and does not extend to tort victims in the vast majority of bankruptcy cases. And considering the common carrier status[61] of most railroads, it is unsurprising that Congress opted to ensure that railroads serve the public interest beyond their own business interests. Nonetheless, the existence of this provision demonstrates that Congress can—and has—recognized tort victims as deserving of special priority, at least in industries where the risk of catastrophic public harm is high, and the victims are clearly not voluntary participants in the firm's risk structure.

IV. Super-Priority for Tort Victims

There is no shortage of proposed solutions offered to help bolster tort victims' position in bankruptcy. Some have argued for "super-priority."[62] Others for "super-durability,"[63] for equity

[60] This section first pertained only to railroad employees only but was expanded to any individual. *See* H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1978) p. 424.

[61] Common carrier, CORNELL LAW SCHOOL, LII, WEX (last visited May 9, 2025), https://www.law.cornell.edu/wex/common_carrier; *see also* Issue Spotlight: *Common Carrier Obligations for Rail Carriers*, INTERNATIONAL CENTER FOR LAW & ECONOMICS (March 16, 2023), https://laweconcenter.org/spotlights/issue-spotlight-common-carrier-obligations-for-rail-carriers/.

[62] *See* Painter, *Supra* note 29, at 1045.

[63] Vincent S.J. Buccola & Joshua C. Macey, *Claim Durability and Bankruptcy's Tort Problem*, 38 YALE J.REG. 766 (2021).

receiverships to play a larger role,[64] for more expansive veil-piercing,[65] and surely much more. While all seek to address bankruptcy's tort problem, super-priority offers a superior solution.

In 1984, Christopher M.E. Painter wrote a student note proposing that mass torts might be resolved more equitably if tort claimants were granted a super-priority lien on debtor assets.[66] Painter's super-priority concept proposes altering the traditional distributional hierarchy in bankruptcy to elevate tort victims above all other creditors—even secured.[67] Under current bankruptcy law, secured creditors are paid first to the extent of their collateral, followed by administrative expenses, and then unsecured creditors—including tort victims—on a pro rata basis. Painter's innovation recognizes the asymmetry discussed above: that tort victims differ fundamentally from other creditors, especially secured ones.[68] In consideration of this, Painter contends that tort victims should be given a super-priority status, positioning their claims before secured claims within the bankruptcy distribution scheme.[69]

In practice, this means that when a debtor files for bankruptcy—whether under Chapter 7 liquidation or Chapters 11 or 13 reorganization—the assets will first be used to satisfy tort claims before any payments to unsecured creditors. If the debtor's estate consists of $100 million in assets and $40 million in valid tort claims, these claims will be fully paid off before any distribution to secured lenders, regardless of their collateral rights in those same assets. The logic behind this is not to penalize secured lenders, but rather to shift bankruptcy policy towards a more equitable treatment of involuntary creditors, who might otherwise receive minimal or no recovery within the current framework.

Painter anticipates three main objections to his super-priority proposal and addresses each with well-founded rebuttals. First, he says critics contend that it would increase credit and insurance expenses, particularly for companies producing hazardous products, which might render some goods unaffordable or unavailable.[70] Painter counters by arguing that equity investors are already positioned behind tort victims in recovery,[71] aware of the risks, and that creditors would continue to provide loans, albeit at elevated interest rates.[72] He

[64] Aadira. I. Khan, *From Historical to Cutting-Edge: Equity Receiverships as a Tool to Resolve Mass Torts,* 172 U. PA. L. REV. 1667 (2024).
[65] Christopher W. Peterson, *Piercing the Corporate Veil by Tort Creditors*, 13 J. BUS. & TECH. L. 63 (2017), https://digitalcommons.law.umaryland.edu/jbtl/vol13/iss1/4.
[66] Painter, *Supra* note 29, at 1080–83.
[67] *Id.*
[68] *See* Section I, *supra*, Involuntary Creditor Paradox.
[69] Painter, *Supra* note 29, at 1080–83.
[70] *Id.* at 1082.
[71] Equity is at the bottom of the recovery totem pole.
[72] *Id.*

further contends that a company unable to cover its social costs should not operate unless government subsidies justify its continuing operation.[73]

Second, critics argue that imposing tort liability on creditors is unjust, but Painter responds that the existing system already applies this principle to involuntary creditors and that secured creditors, as voluntary participants, have the means to price for risk and shield themselves, unlike tort victims who lack bargaining power.[74] Therefore, it is not unjust to hold lenders who finance risk-bearing activities partially accountable, particularly when considering the consequences on involuntary creditors. Third, he anticipates critics citing the Takings Clause, suggesting that reducing secured creditors' rights could be unconstitutional.[75]

Painter addresses this by proposing a prospective-only application, which avoids retroactive impairment and resolves any constitutional concerns.[76] To implement the super-priority rule, Painter proposes a coordinated state and federal strategy.[77] He suggests amending the Uniform Commercial Code (UCC) to prioritize tort claims over secured creditors, redefining the rights of tort victims and secured lenders.[78] Each state would then need to adopt this revised UCC provision into its own code.[79] To avoid constitutional challenges under the Fifth Amendment's Takings Clause, the super-priority would apply prospectively, not affecting existing security interests but applying to future loans and agreements.[80] Then, at the federal level, the Bankruptcy Code must be amended to stop debtors and secured creditors from bypassing the super-priority by choosing bankruptcy over state liquidation.[81] This two-tiered strategy—state-led reform via the UCC, backed by federal bankruptcy recognition—would harmonize the judicial treatment of tort victims, close any loopholes, and ensure the reform is constitutionally enforceable.

Overall, Painter's super-priority aims to shift bankruptcy from favoring secured financial institutions to one that fairly considers the losses of those unable to protect themselves. With a super-priority norm, a larger share of corporate tort costs would be borne by voluntary creditors, rather than the current system that places the burden on involuntary creditors. This approach would weave the principles of distributive justice into the foundation of not just

[73] *Id.*
[74] *Id.* (emphasis added)
[75] *Id.*
[76] *Id.* at 1082–83.
[77] *Id.* at 1083–84.
[78] *Id.*
[79] *Id.* at 1084.
[80] *Id.*
[81] *Id.*

bankruptcy law, but law in general, while maintaining the collective and centralized process of bankruptcy resolution.

V. Super-Priority Updates

To update Painter's 1984 super-priority proposal to reflect the realities of contemporary mass torts, it is essential to adapt the framework to address the scale, complexity, and strategic legal maneuvers that currently characterize these cases. First, one improvement would be to narrow the scope of super-priority to clearly defined categories of involuntary tort creditors—such as those suffering personal injury, wrongful death, or environmental harm—while excluding commercial or contract-based torts, including fraud, that could be addressed more effectively through traditional creditor protections. This helps maintain the logic of the rule while avoiding some unintended consequences for commercial credit markets.

Also, the modern rule must explicitly prioritize not only existing tort claims but also future, unmatured, and unknown claims. A significant number of contemporary mass torts involve long-tail liabilities—such as opioid addiction, toxic exposure, or sexual abuse—where injuries may manifest years after the initial harm has occurred. To adequately address this issue, the super-priority rule must guarantee that funding for tort claims, including those channeled through post-confirmation trusts, is secured with priority over secured creditors.

Additionally, Painter's model should be integrated with trust structures that are commonly employed in mass tort bankruptcies, such as those authorized under § 524(g) in asbestos-related cases. The revised rule should grant these trusts a statutory lien or create a specific carve-out from the bankruptcy estate that ensures adequate funding. At the same time, the contemporary framework should jump on Congressional attention to the increasingly prevalent pre-bankruptcy strategies—like the Texas Two Step—which aim to circumvent liability and safeguard against them. These strategies allow companies to isolate liabilities within underfunded entities while simultaneously shielding valuable assets.

In short, a contemporary super-priority rule must be comprehensive, adaptable, and enforceable. It should be customized to the procedural and financial strategies employed by corporations encountering mass liability while concurrently maintaining bankruptcy's fundamental role in resolving complex claims. Implementing such a rule would more effectively safeguard the interests of tort victims and create a more equitable system of law for involuntary creditors.

VI. Modern Super-Priority Concerns

One major concern regarding the implementation of a modern super-priority rule is that such a rule would increase the difficulty of valuing tort claims, especially in cases involving latent injuries or unresolved liability. It is true that some companies file for bankruptcy precisely because their tort and environmental liabilities are vast and uncertain. And adding a super- priority rule could further complicate the valuation process, as courts would be asked to assign potentially large recoveries to claims whose full scope is not yet known. However, this problem is not new to bankruptcy. Courts routinely undertake the intricate estimation of future or unliquidated tort claims,[82] frequently utilizing mechanisms such as post-confirmation trusts or estimation hearings. While implementing super-priority might heighten the stakes, it would not present a fundamentally new challenge. Nor would it be one that bankruptcy courts could not handle.

Another concern is that a super-priority rule might compromise bankruptcy's role as an effective venue for sorting out mass liabilities. While Chapter 11 admittedly offers many procedural tools that help companies centralize and resolve sprawling tort litigation, the process's efficiency should not come at the expense of justice for tort victims. If the cost of smooth reorganization leads to the systematic under-compensation of the involuntarily harmed, then that trade-off warrants reform. The super-priority rule realigns the bankruptcy's mass tort system in favor of fairness, even if it complicates case management or disincentivizes some potential filers.

Finally, perhaps the most significant concern is pragmatic: super-priority, while normatively appealing, might be politically impossible.[83] Simply stated, a super-priority rule is not on the legislative agenda and would likely face powerful opposition from secured lending interests. Yet political difficulty should not inhibit the development of sound normative arguments. Proposals, such as Painter's, contribute to shaping long-term discourse and provide benchmarks for assessing more incremental reforms. In summary, while super-priority has flaws and would necessitate careful design, it likely remains a more favorable option than a status quo wherein tort victims are consistently subordinated to voluntary creditors.

VII. Super-Priority v. Super-Durability

[82] Bankruptcy court judges are authorized to estimate any contingent or unliquidated claim. *See* 11 U.S.C. § 502(c)(1).

[83] *See* Buccola, *supra* note 63, at 783.

Speaking of the *status quo*, why opt for a super-priority rule to fix the involuntary creditor paradox and not another proposed solution like super-durability? Super-durability proponents argue that some tort claims should survive bankruptcy and follow the debtor, even if its assets are transferred to a new entity.[84] If tort victims are not paid in full through Chapter 11, they should be allowed to sue the successor outside bankruptcy.[85] While both super-priority and super-durability attempt to solve the same problem, super-priority offers a superior solution because it preserves the core structural and normative goals of bankruptcy by aggregating claims and binding claimants while enhancing distributional fairness, and encouraging socially responsible behavior by debtors and creditors alike. Whereas super-durability kicks the can down the road, and both debtors and tort creditors are left with uncertainty.

Unlike the durability model proposed by Vincent Buccola and Joshua Macey,[86] which allows tort claims to follow debtors or assets out of bankruptcy, super-priority keeps all claims within the centralized process of collective resolution. This ensures an orderly and definitive distribution of assets, facilitating debtors in achieving the fresh start that is fundamental to bankruptcy policy. The super-durability approach, by contrast, threatens to disrupt going-concern sales and reorganizations by imposing lingering liabilities on successor entities. Such uncertainty may deter investment, diminish estate value, and undermine the efficiency that bankruptcy seeks to protect.

As Buccola and Macey admit, "[Super-priority's] biggest downside is the same as that of unlimited liability: it does not seem to be on the legislative agenda."[87] Thus, the primary advantage of a super-durability rule over super-priority appears to be its potential for judicial implementation without the need for new legislation. But do not go throwing the proverbial baby out with the bathwater. This institutional advantage is overstated. The Courts are unlikely to alter existing norms regarding discharge and successor liability without explicit statutory guidance from Congress. Thus, super-durability carries the same legislative challenges as super-priority, but it lacks many of its benefits.

VIII. Conclusion

[84] *Id.* at 766.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 783.

As it currently stands, bankruptcy law systematically disadvantages the most vulnerable creditors: tort victims haled into bankruptcy as involuntary creditors. These victims, often suffering physical injury, death, or widespread harm, are subordinated to voluntary, financially sophisticated creditors who knowingly assumed risk. While bankruptcy serves important utilitarian purposes like claim centralization and finality, those goals must not come at the cost of basic justice.

The existing Bankruptcy Code offers inconsistent and piecemeal protections for tort victims, mostly ignoring the fundamental difference between voluntary and involuntary creditors. The proposal for super-priority, updated from Painter's original formulation, offers a principled response to this enduring problem. By prioritizing tort claims—even over secured debt—in narrowly defined circumstances involving involuntary harm, bankruptcy law would better reflect egalitarian values and reassert its legitimacy in the face of increasing public skepticism. Importantly, this solution maintains the centralized, collective, and orderly bankruptcy structure while restoring balance to an uneven playing field.

Bankruptcy should not be a refuge for the powerful to shed responsibility while victims are left behind. Adopting a super-priority rule would send a clear message that the legal system will not prioritize wealth and strategic maneuvering over accountability and justice. In an environment where mass torts are progressively increasing in complexity and scale, the time has come to rewrite the rules—not to favor one class of creditors, but to finally bestow upon involuntary creditors the place they deserve at the front of the line.

MEANINGFUL MARITIME CONSENT: Liability Waivers, the Titan Disaster, and Experimental Maritime Ventures

By Kim Hoxie, B.S.*

On June 18, 2023, the privately operated Titan submersible descended into the North Atlantic carrying five people on an expedition to view the wreck of the RMS Titanic.[1] Before the voyage, each participant signed liability waivers acknowledging that the expedition involved significant risks, including the possibility of serious injury or death.[2] When Titan lost communication with its support vessel, a subsequent investigation confirmed that the submersible had suffered a catastrophic implosion, killing all five people aboard.

The disaster sparked extensive discussion about engineering decisions, safety practices, regulatory oversight, and the role of liability waivers in experimental maritime ventures.[3] Titan operated outside customary classification and certification practices, raising questions about whether participants possessed sufficient information to evaluate those risks.[4]

On a larger scale, the tragedy raises an important question for maritime law: when people participate in highly technical and experimental maritime activities, should courts assume that a signed waiver necessarily reflects meaningful informed consent? Maritime law generally respects freedom of contract and frequently enforces agreements that allocate risk, although courts recognize important limits when such agreements undermine safety and accountability. Courts have long upheld forum-selection clauses, indemnity agreements, assumption-of-risk provisions, and liability waivers when participants voluntarily accept known risks and possess sufficient information to make informed decisions.[5]

At the same time, maritime law has never treated contractual freedom as absolute. Admiralty courts have consistently stressed

* B.S. in Paralegal Studies, Peirce College. 2026 inductee into Lambda Epsilon Chi (LEX) National Honor Society for Paralegal Students.

[1] U.S. Coast Guard Marine Board of Investigation, Report of the Marine Board of Investigation Into the Implosion of the Submersible TITAN (CG1788361) in the North Atlantic Ocean Near the Wreck Site of the RMS TITANIC Resulting in the Loss of Five Lives on June 18, 2023 [hereinafter TITAN MBI Report], at v (Aug. 4, 2025); OceanGate, TITAN Submersible Brochure (Apr. 2021).

[2] *Id.*

[3] *Id.*

[4] TITAN MBI Report, at vii; Marine Technology Society, Manned Underwater Vehicles Committee Letter to OceanGate, at 1 (Mar. 27, 2018).

[5] *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–95 (1991); *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 90–91 (1955).

reasonable care, safety, and accountability when evaluating agreements that affect human life and safety.

Emerging maritime ventures can create challenges that traditional waiver principles have not fully addressed. These activities may involve novel technologies, limited operational histories, and risks that participants cannot independently evaluate.[6] Consequently, participants frequently depend upon operator information necessary to assess the risks they are being asked to assume.

Titan illustrated this problem. The relevant question is not whether participants understood that deep-ocean exploration was dangerous, but whether they possessed sufficient information to evaluate the risks associated with the specific vessel and its novel technology. A participant may knowingly accept the danger in the abstract while lacking access to information necessary to assess risks known primarily to the operator.[7]

For this article, meaningful informed consent exists when a participant possesses sufficient information to reasonably understand and evaluate the material risks associated with an activity. This does not require disclosure of every conceivable danger. Instead, it requires access to information that a reasonable participant would consider important when deciding whether to undertake the activity and assume the associated risks.[8]

This article argues that maritime courts should not automatically presume that a signed waiver resolves the question of consent when participants lack a realistic opportunity to independently evaluate material risks arising from experimental maritime ventures. Instead, courts should examine the circumstances surrounding the agreement before determining the degree of deference a liability waiver should receive.[9]

To address this issue, this article proposes the Meaningful Maritime Consent Framework (MMCF). The MMCF does not prohibit liability waivers or diminish maritime law's well-established respect for freedom of contract. Instead, it provides courts with a structured method for evaluating whether a participant's decision to assume maritime risk is supported by adequate information. Courts applying the MMCF would examine factors including access to material safety information, operator control over risk-related information, the technology's experimental nature, the participant's

[6] *Tunkl v. Regents of the Univ. of Cal.*, 60 Cal. 2d 92, 98–101 (1963); *City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747, 777–78 (2007).

[7] *Tunkl*, 60 Cal. 2d at 98–101; W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 68 (5th ed. 1984).

[8] *Tunkl*, *supra*, at 98–101; Prosser & Keeton, *supra* note 5, § 68.

[9] *Tunkl*, *supra*, at 98–101; *Shultz v. Florida Keys Dive Ctr., Inc.*, 224 F.3d 1269, 1272–75 (11th Cir. 2000); *Thompson v. Over the Line VI, LLC*, No. 8:18-cv-01890, 2020 WL 4188126, at *4–6 (M.D. Fla. July 21, 2020).

ability to independently evaluate risk, the severity of potential harm, and the availability of rescue or recovery.

This approach is consistent with the historical development of maritime law. Admiralty courts have repeatedly adopted legal doctrines to address new challenges while retaining fundamental principles of safety, accountability, fairness, and uniformity. The development of maritime wrongful-death remedies following *The Harrisburg* and culminating in *Moragne v. States Marine Lines, Inc.* demonstrates how maritime law has evolved when existing rules proved insufficient to address gaps in accountability.[10] The MMCF follows a similar approach by providing courts with a framework for evaluating consent in circumstances not fully contemplated by traditional maritime waiver doctrine.

This article proceeds in five parts. Part I examines the maritime duty of reasonable care and the limits of liability waivers. Part II explores the historical development of maritime wrongful-death remedies and admiralty law's response to accountability gaps. Part III analyzes modern maritime waiver doctrine and the principles controlling waiver enforcement. Part IV applies those principles to the Titan disaster, focusing on the challenges created when participants rely primarily on operators for technical safety information.

Finally, Part V proposes the Meaningful Maritime Consent Framework as a structured method for evaluating whether meaningful informed consent was realistically possible before enforcing liability waivers in experimental maritime activities.

I. Maritime Duty of Care and the Limits of Liability Waivers

a. Duty of Reasonable Care in Maritime Law

Maritime law recognizes an essential idea that vessel operators owe a duty of reasonable care to individuals lawfully aboard their vessels. *In Kermarec v. Compagnie Générale Transatlantique*, the Supreme Court held that shipowners owe lawful passengers a duty of reasonable care.[11] The Court recognized the importance of a uniform maritime standard rather than differing rules based upon state law. As a result, maritime law imposes a broad legal obligation focused upon safety, accountability, and the protection of those who rely upon marine operators.

Kermarec remains important today because it establishes that vessel operators owe passengers duties of reasonable care imposed by

[10] *The Harrisburg*, 119 U.S. 199 (1886); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 387–409 (1970); *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 818–21 (2001).

[11] *Kermarec v. Compagnie Générale Transatlantique*, 358 U.S. 625, 629–32 (1959).

maritime law.[12] This principle is especially important in maritime settings because vessel operators generally possess greater knowledge about vessel conditions, navigation, equipment, and safety procedures than their passengers. Passengers frequently rely upon that expertise when entering unknown or potentially risky environments.

The importance of this duty grows even more obvious when a voyage involves specialized equipment, advanced technology, or operating conditions beyond the knowledge of ordinary participants. In these circumstances, passengers may possess a very limited ability to independently evaluate risks and must instead rely upon information provided by the operator. The duty recognized in *Kermarec*, therefore, provides an important foundation for evaluating whether consent to risk is genuinely informed.[13]

b. Historical Limits on Liability Waivers

The Supreme Court's decision in *Bisso v. Inland Waterways Corp.* illustrates an early limitation of contractual freedom in maritime law. In *Bisso*, the Court refused to enforce a contractual provision that would have relieved a towing company of liability for its own negligence. The Court explained that such agreements could reduce incentives for safe conduct and allow parties with greater bargaining power to avoid responsibility for their actions.[14]

Bisso demonstrates that maritime law distinguishes between permissible risk allocation and contractual provisions that undermine safety objectives. Although parties may generally allocate risks through agreement, courts may limit enforcement when a provision would weaken incentives for responsible maritime operations.[15]

Congress has likewise imposed limits on liability waivers. The Passenger Vessel Liability Restriction Act, 46 U.S.C. § 30509, generally prohibits operators of passenger vessels from including contractual provisions that limit liability for personal injury or death caused by negligence.[16] This limitation reflects the principle that passenger safety may outweigh private agreements that attempt to eliminate responsibility for negligent conduct.[17]

Although § 30509 does not apply to every maritime activity, it reinforces the broader principle that maritime law limits contractual provisions that conflict with important safety policies.[18] Together, *Bisso* and § 30509 demonstrate that maritime law places important

[12] *Id.*
[13] *Kermarec*, 358 U.S. at 630–32; *Tunkl*, 60 Cal. 2d at 98–101; *Thompson*, 2020 WL 4188126, at *4–6.
[14] *Bisso v. Inland Waterways Corp.,* 349 U.S. 85, 90–91 (1955).
[15] *Id.* at 90–91.
[16] 46 U.S.C. § 30509(a).
[17] *See id.*
[18] *Id.*

limits on the ability of contractual waivers to eliminate responsibility for negligent conduct.[19]

c. Public Policy, Bargaining Power, and Non-Waivable Duties

Maritime law's emphasis on accountability is also reflected in wider public policy principles. *Tunkl v. Regents of the University of California* shifted the analysis from the existence of a waiver to the circumstances surrounding the agreement.[20] The California Supreme Court identified factors that may render a liability waiver unenforceable, including unequal bargaining power, participant dependence, and the degree of control exercised by the party seeking protection from liability.[21]

Although *Tunkl* arose outside the maritime context, its reasoning provides a useful framework when evaluating experimental maritime ventures. Participants in highly specialized activities may lack equal access to information, limited ability to negotiate contractual terms or sufficient knowledge to evaluate the risks they are assuming.[22] Consequently, the presence of a signed agreement alone does not resolve whether consent was meaningfully informed.

Another non-maritime authority illustrating this limitation is *City of Santa Barbara v. Superior Court*, where the California Supreme Court held that liability waivers generally cannot shield a party from claims involving gross negligence.[23] The court recognized that public policy requires a minimum level of accountability when conduct represents an extreme deviation from ordinary standards of care.[24]

Together, these authorities demonstrate that courts have long looked beyond the mere existence of a contractual agreement when evaluating liability waivers. Factors such as public policy concerns, bargaining relationships, and the nature of the transaction may influence the degree of deference a court affords a waiver.[25]

d. Toward a More Careful Examination of Consent

Taken together, *Kermarec, Bisso*, § 30509, *Tunkl,* and *City of Santa Barbara* demonstrate that waiver analysis requires courts to

[19] *Bisso*, 349 U.S. at 90–91; 46 U.S.C. § 30509(a).
[20] *See Tunkl*, *supra*.
[21] *Id.* at 98–101.
[22] *Id.*
[23] *City of Santa Barbara*, 41 Cal. 4th at 777–78.
[24] *Id.*
[25] *Tunkl*, 60 Cal. 2d at 98–101; *City of Santa Barbara,* 41 Cal. 4th at 777–78.

consider both the purpose of the agreement and the circumstances under which risk is allocated.[26]

These principles become increasingly important in modern maritime ventures involving specialized technologies and complex operational risks. In these settings, a signed waiver may establish that an agreement exists, but it does not necessarily determine whether the participant possessed sufficient information to evaluate the risks being assumed.[27]

This approach does not undermine freedom of contract or suggest that liability waivers could be routinely invalidated. Instead, it recognized that contractual consent must be evaluated within the context in which the agreement was formed. When a maritime agreement involves significant information differences, limited participant understanding, or reliance upon operator representations, courts may need to consider whether enforcement of the waiver is appropriate.[28]

The following part examines another recurring theme in maritime law: the development of wrongful-death remedies and admiralty law's response when existing doctrines prove inadequate to address changing maritime realities.

II. Maritime Wrongful-Death Remedies and the Development of Accountability

Part I established that maritime law imposes a duty of reasonable care and recognizes limits on contractual provisions that undermine safety. The development of maritime wrongful-death remedies provides important context for understanding how admiralty law responds when traditional doctrines prove inadequate. This historical evolution provided important context for evaluating whether traditional waiver doctrine requires further refinement when applied to modern experimental maritime ventures.[29]

Historically, maritime law recognized no general cause of action for wrongful death.[30] Following the prevailing common-law rule, personal injury claims generally ended upon the injured person's death, often leaving surviving family members without a remedy.[31] The Supreme Court adopted this approach in *The Harrisburg*, holding that admiralty courts lacked authority to recognize wrongful-

[26] *Kermarec*, 358 U.S. at 629–32; *Bisso*, 349 U.S. at 90–91; 46 U.S.C. § 30509(a); *Tunkl*, 60 Cal. 2d at 98–101; *City of Santa Barbara*, 41 Cal. 4th at 777–78.

[27] *Tunkl*, 60 Cal. 2d at 98–101; *City of Santa Barbara*, 41 Cal. 4th at 777–78; Thompson, 2020 WL 4188126, at *4–6; *Shute*, 499 U.S. at 593–95.

[28] *Bisso*, 349 U.S. at 90–91; *Tunkl*, 60 Cal. 2d at 98–101.

[29] *The Harrisburg,* 119 U.S. 199 (1886); *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375 (1970).

[30] *The Harrisburg,* 119 U.S. at 213–14; *Moragne*, 398 U.S. at 387–409.

[31] *See The Harrisburg, supra*, at 213–14.

death actions absent statutory authorization.[32] Although consistent with nineteenth-century common-law doctrine, the decision increasingly conflicted with maritime realities by denying recovery where negligence resulted in death. As maritime activity developed, the limitation created by *The Harrisburg* became inconsistent with broader principles of fairness and accountability.[33]

Congress responded through measured statutory reform rather than wholesale doctrinal change. The enactment of the Death on the High Seas Act (DOHSA), enacted in 1920, created a federal wrongful-death remedy for certain deaths occurring beyond territorial waters. The Jones Act, enacted in 1920, similarly provided seamen and their families with remedies for former negligence. These statutes address some of the limitations created by *The Harrisburg*, but questions remained regarding the broader availability of maritime wrongful-death remedies.[34]

Even so, these statutes did not establish a comprehensive system of recovery. Significant gaps remained, leaving certain claims dependent upon state law or beyond the reach of existing federal legislation. The *Tungus v. Skovgaard* illustrates this fragmented framework by recognizing that admiralty courts sometimes rely upon state-created wrongful-death remedies.[35] These legislative developments demonstrate that the shortcomings identified in *The Harrisburg* were addressed incrementally rather than all at once.

The Supreme Court fundamentally reshaped maritime wrongful-death law in *Moragne v. States Marine Lines, Inc.*[36] In rejecting *The Harrisburg,* the Court recognized a general maritime cause of action for wrongful-death resulting from the breach of a maritime duty.[37] More importantly, the Court acknowledged that existing doctrine no longer reflected contemporary maritime policy and produced unjustifiable inconsistencies within admiralty law.[38]

The significance of *Moragne* lies not merely in recognizing a new remedy, but in demonstrating that admiralty law remains capable of measured doctrinal development when longstanding legal rules no longer serve modern maritime realities.[39] Rather than abandoning established maritime principles, the Court refined existing doctrine to better fulfill those principles under changing conditions.[40]

Subsequent decisions reinforce this evolutionary approach. *Sea-Land Services, Inc. v. Gaudet* expanded the damages available

[32] *Id.*
[33] *Id.* at 213–14.
[34] 46 U.S.C. §§ 30301–30308.
[35] 46 U.S.C. § 30104.
[36] *Moragne*, 398 U.S. at 387–409.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*

under the general maritime wrongful-death remedy,[41] *Dooley v. Korean Air Lines Co.* emphasized that judicial development must remain consistent with statutory limitations established by Congress,[42] and *Norfolk Shipbuilding & Drydock Corp. v. Garris* confirmed that general maritime law recognizes a wrongful-death action based on the negligent breach of a maritime duty.[43] Collectively, these decisions demonstrate that admiralty law develops incrementally, adapting existing doctrine while preserving its underlying commitments to accountability, fairness, and uniformity.[44]

The evolution of maritime wrongful-death doctrine illustrates a recurring characteristic of admiralty jurisprudence.[45] When changing maritime conditions exposed significant shortcomings in existing legal rules, Congress and the courts refined those rules while preserving the fundamental principles upon which they rested.[46]

The Titan disaster presents a comparable challenge. Traditional maritime waiver doctrine often operates under the assumption that participants can reasonably evaluate the risks they choose to assume. Modern experimental maritime ventures, however, may involve highly technical systems, substantial operator control over safety information, and environments where participants cannot realistically verify or independently evaluate material risks. These circumstances raise questions that traditional waiver doctrine was not developed to address.

Accordingly, the historical evolution of maritime wrongful-death doctrine supports the Meaningful Maritime Consent Framework (MMCF). Just as admiralty law previously refined existing doctrine when changing maritime conditions exposed significant accountability gaps, a structured framework can likewise assist courts in evaluating the information available to participants before determining the degree of deference to afford a liability waiver.[47] The following part examines the principles governing modern maritime waiver doctrine and the assumptions underlying contemporary waiver enforcement.

III. Modern Maritime Waiver Doctrine and the Limits of Informed Consent

[41] *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974).
[42] *Dooley v. Korean Air Lines Co.*, 524 U.S. 116 (1998).
[43] *Norfolk Shipbuilding*, 532 U.S. at 818–21.
[44] *Moragne*, 398 U.S. at 387–409; *Sea-Land,* 414 U.S. at 584–91; *Norfolk Shipbuilding*, 532 U.S. at 818–21.
[45] *Moragne*, 398 U.S. at 387–409; *Norfolk Shipbuilding*, 532 U.S. at 818–21.
[46] *Moragne*, *supra*, at 387–409; Norfolk Shipbuilding, *supra*, at 818–21; *The Harrisburg*, 119 U.S. at 213–214.
[47] *Moragne* and *Norfolk Shipbuilding*, *supra*.

While Part II demonstrated that maritime law has adapted to changing conditions while preserving its core principles, Part III examines how those principles shape modern maritime waiver doctrine. Although maritime law generally respects contractual freedom, courts also seek to ensure that participants knowingly assume the risks they agree to undertake.[48]

a. Freedom of Contract in Maritime Law

Maritime law generally favors the enforcement of contracts voluntarily entered by competent parties. Courts have long recognized that contractual predictability promotes stability in maritime commerce and allows parties to allocate risks according to their respective interests.[49] This principle illustrates the broader maritime preference for certainty and uniformity in commercial and recreational activities conducted on navigable waters.

The principle of contractual freedom goes beyond commercial shipping contracts and frequently appears in recreational maritime activities. Operators of scuba-diving charters, sport-fishing excursions, sailing trips, white-water rafting expeditions, and similar ventures routinely require participants to sign liability waivers before engaging in potentially hazardous activities. Courts have often enforced such agreements in circumstances where the waiver was clear, participation was voluntary, and no overriding maritime or public-policy limitation applied.[50]

The Supreme Court's decision in *Carnival Cruise Lines, Inc. v. Shute* illustrates the general willingness of the courts to enforce contractual provisions in maritime settings.[51] Although *Shute* involved a forum-selection clause rather than a liability waiver, the Court stressed that maritime law generally favors enforcement of contractual provisions that promote predictability and efficiency unless enforcement would be fundamentally unfair. The decision reflects the principle that parties are generally free to allocate risks and responsibilities through private agreement.[52]

The rationale supporting enforcement of maritime waivers is well established. Individuals are generally free to decide whether the benefits of an activity outweigh its risks. Likewise, operators may be unwilling or unable to provide certain experiences if they remain exposed to unlimited liability for every potential injury. Maritime waivers, therefore, play an important role in facilitating activities that might otherwise become economically unrealistic.[53]

---

[48] *Shute*, 499 U.S. at 593–95; *Bisso*, 349 U.S. at 90–91.
[49] *Shute*, *supra*, at 593–95.
[50] *Shultz*, 224 F.3d at 1272–75.
[51] *See Shute*, *supra*.
[52] *Id.*
[53] *Id.*; *see also Shultz*, 224 F.3d at 1272–75.

b. Public Policy Limits on Contractual Freedom

Despite the importance of contractual freedom, maritime law has never treated liability waivers as automatically enforceable.[54] Courts have consistently recognized that public policy limits parties' ability to contract away responsibility for unsafe conduct.

One of the clearest expressions of this principle appears in *Bisso v. Inland Waterways Corp.*[55] In *Bisso*, the Supreme Court invalidated a contractual provision that sought to exempt a towing company from liability for its own negligence.[56] The Court explained that maritime law seeks both to discourage negligent conduct and to prevent parties with greater bargaining power from using contracts to escape accountability.[57]

Although *Bisso* involved a commercial towage agreement rather than a passenger waiver, its reasoning still influences modern maritime waiver analysis. Congress has similarly imposed statutory limitations on contractual freedom. Under 46 U.S.C. § 30509, vessel owners transporting passengers generally may not include contractual provisions that limit liability for personal injury or death resulting from negligence.[58] The statute reflects a legislative resolve that certain passenger protections are too important to be waived through private agreement.[59]

Together, *Bisso* and § 30509 demonstrate that maritime law placed important limitations on contractual provisions that attempt to eliminate responsibility for negligent conduct affecting passenger safety. Freedom of contract remains important, but it is not absolute.[60]

b. Assumption of Risk, Participant Understanding, and Meaningful Consent

Another recurring theme in waiver cases is the concept of assumption of risk. Courts are generally more willing to enforce liability waivers when participants knowingly and voluntarily assume the natural hazards of a particular activity.[61]

The classic formulation of the assumption-of-risk doctrine appears in *Murphy v. Steeplechase Amusement Co.*[62] There, Justice

---

[54] *Bisso*, 349 U.S. at 90–91.
[55] *Id.* at 90–91.
[56] *Id.*
[57] *Id.*
[58] 46 U.S.C. § 30509(a).
[59] *Id.*
[60] *Bisso*, 349 U.S. at 90–91; *see also* 46 U.S.C. § 30509(a).
[61] *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 482–83 (1929).
[62] *Id.*

Cardozo observed that a participant who voluntarily engages in an activity accepts the dangers that are obvious, necessary, and inherent in the activity itself.[63] Although *Murphy* was not a maritime case, its reasoning has influenced modern recreational-risk legal philosophy and provides a useful framework for understanding maritime waiver disputes.[64]

Maritime courts frequently apply similar reasoning. In *Shultz v. Florida Keys Dive Center, Inc.*, the Eleventh Circuit enforced a liability release signed by a recreational scuba diver who later drowned during a diving excursion. The court concluded that neither federal maritime law nor 46 U.S.C. § 30509 invalidated the waiver under the circumstances presented.[65] The ruling illustrates judicial willingness to enforce waivers in recreational maritime activities where participants voluntarily engage in the activity and the circumstances do not trigger a federal or maritime law limitation on enforcement.[66]

These decisions share an important assumption: assumption of risk is meaningful only when participants have a reasonable opportunity to understand and evaluate the risks they choose to accept. Accordingly, courts frequently examine not only whether a waiver was signed, but also whether participants received adequate notice of the rights relinquished and the dangers involved.[67]

As maritime ventures rely upon more specialized technologies and increasingly complex operating environments, waiver analysis must account for the participant's ability to evaluate operator-controlled risks. A signature may establish assent, but the significance of that assent depends in part on the material information reasonably available when the participant agreed to proceed.[68]

d. Information Imbalance and Modern Waiver Enforcement Information

As maritime activities become increasingly dependent on advanced technologies, traditional waiver analysis faces new challenges. Participants often rely on operators for information regarding vessel design, testing, maintenance, and operational limitations. This reliance creates a substantial information imbalance because participants frequently lack the expertise necessary to independently evaluate those technical decisions.[69]

---

[63] *Id.* at 482–83.
[64] *Id.*
[65] *Shultz*, 224 F.3d at 1272–75.
[66] *Id.*
[67] *Thompson*, 2020 WL 4188126, at *4–6; *Shute*, 499 U.S. at 593–95.
[68] *Tunkl*, 60 Cal. 2d at 98–101; *Thompson*, 2020 WL 4188126, at *4–6; *Shute*, 499 U.S. at 593–95.
[69] *Thompson*, 2020 WL 4188126, at *4–6; *Tunkl*, 60 Cal. 2d at 98–101.

This limitation becomes especially significant when the operator controls information that cannot be independently verified by participants before they assume the risk.[70]

Recent decisions illustrate the importance of examining the circumstances surrounding the assent in waiver enforcement. In *Thompson v. Over the Line VI, LLC*, the court held that disputes regarding the presentation and understanding of liability waivers may affect their enforceability.[71] Similarly, courts have recognized that exculpatory clauses may become unenforceable when overreaching, gross negligence, or substantial disparities in knowledge undermine the agreement's legitimacy.[72]

This concern does not diminish contractual freedom. It identifies a circumstance relevant to waiver enforcement: when material risk information is inaccessible to the participant, courts may need to examine the conditions under which consent was obtained rather than treating the existence of a signature alone as conclusive.[73]

The Titan disaster illustrates the challenges that traditional maritime waiver doctrine may not adequately address in experimental maritime ventures. The following Part applies these principles to the Meaningful Maritime Consent Framework.[74]

IV. The Titan Disaster and the Challenge of Meaningful Maritime Consent

The Titan disaster provides a useful case study for examining the limits of traditional maritime waiver doctrine. Existing maritime law generally enforces liability waivers when participants voluntarily engage in dangerous activities and receive adequate notice of the risks involved.[75] In many recreational settings, courts reasonably presume that participants can evaluate those risks and decide whether the benefits of participation outweigh the potential dangers. The Titan expedition, however, raised questions about whether that assumption remains appropriate when a venture involves experimental technology, substantial information imbalances, and a non-survivable operating environment.[76]

This article does not argue that Titan's liability waivers were necessarily unenforceable or that experimental maritime ventures should be prohibited. Rather, Titan demonstrates why courts should

[70] *Tunkl*, 60 Cal. 2d at 98–101; *Thompson*, 2020 WL 4188126, at *4–6.
[71] *See Thompson* and *Tunkl*, *supra*.
[72] *Thompson*, 2020 WL 4188126, at *4–6; *City of Santa Barbara*, 41 Cal. 4th at 777–78.
[73] *Shultz*, 224 F.3d at 1272–75; *Thompson*, 2020 WL 4188126, at *4–6; Tunkl, 60 Cal. 2d at 98–101.
[74] *See Shultz, supra*; *see Thompson, supra*. at *4–6; Tunkl, 60 Cal. 2d at 98–101.
[75] *Tunkl*, 60 Cal. 2d at 98–101; *Shultz*, 224 F.3d at 1272–75; *Thompson*, 2020 WL 4188126, at *4–6.
[76] *Thompson*, 2020 WL 4188126, at *4–6; *Tunkl*, 60 Cal. 2d at 98–101.

examine whether participants possessed sufficient information to realistically evaluate the risks before relying upon a signed waiver to resolve the analysis.

The Titan expedition places that problem in concrete terms. Participants knowingly entered an extreme deep-ocean environment, but OceanGate controlled much of the technical information necessary to assess the vessel itself.[77] Maritime waiver doctrine generally assumes that participants can assess the risks they choose to accept.[78] Titan tests that assumption where key safety information is controlled almost entirely by the operator.

a. Information Controlled by the Operator

One of the hallmarks of the Titan expedition was the extent to which participants depended on OceanGate for information about the vessel's safety. OceanGate maintained substantially greater access to engineering data, test results, maintenance records, operational procedures, and technical assessments of the vessel's performance.[79] Participants had little practical ability to independently verify this information.[80]

Such informational disparities do not automatically invalidate a waiver. They do, however, raise important questions regarding the quality of participant consent. If meaningful consent depends on understanding the risks being assumed, courts must consider whether participants possessed sufficient information to evaluate those risks.[81]

b. Independent Safety Warnings and Internal Concerns

The informational imbalance becomes more significant when viewed alongside evidence that concerns about Titan's design and operation existed before the deadly voyage. In 2018, the Marine Technology Society's Manned Underwater Vehicles Committee sent a letter to OceanGate expressing concern regarding the company's decision to operate outside customary classification and certification practices. The committee warned that operating outside accepted industry standards could have catastrophic consequences and urged an independent review.[82]

---

[77] TITAN MBI Report, at 296–97; OceanGate Expeditions, Titan Expedition Materials and Participant Information (2023).

[78] *Tunkl*, 60 Cal. 2d at 98–101; *Thompson*, 2020 WL 4188126, at *4–6.

[79] TITAN MBI Report, at 262–66; Titan Expedition Materials and Participant Information.

[80] *Id.*

[81] *Tunkl*, 60 Cal. 2d at 98–101; *Thompson*, 2020 WL 4188126, at *4–6.

[82] Marine Technology Society, Manned Underwater Vehicles Committee Letter to OceanGate, at 1 (Mar. 27, 2018).

Additional concerns were raised by former OceanGate operations director and engineer David Lochridge. According to litigation filings and later testimony before the Coast Guard's Marine Board of Investigation, Lochridge questioned aspects of the vessel's design, testing, and safety practices.[83] Whether those concerns ultimately proved correct is less important than the fact that they existed and were discussed among individuals with specialized knowledge of the vessel.

The relevance of this evidence is not that it establishes negligence. Rather, it illustrates the type of information that a reasonable participant would likely consider material when deciding whether to assume the risks of the activity. A reasonable participant would likely view concerns raised by industry experts, former employees, or independent reviewers differently from generalized warnings that an activity is dangerous.[84]

The existence of such concerns also illustrates the distinction between ordinary recreational risks and risks associated with specialized engineering decisions. Participants may willingly accept the inherent hazards of deep-ocean exploration while remaining unaware of information about testing, certification, design choices, or operational practices known primarily to the operator. As the informational disparity between the operator and the participant increases, courts should exercise greater caution when determining whether a signed waiver reflects meaningful informed consent.[85]

c. Participant Reliance and the Limits of Independent Evaluation

Titan also draws attention to the practical limits of participant decision-making in highly technical environments. Maritime waiver doctrine often assumes that participants can weigh risks against benefits and make well-informed choices. That assumption is generally reasonable when the material risks of an activity are observable, commonly understood, or reasonably capable of independent evaluation by the participant.[86]

Experimental technologies present a different situation. Most participants lack the expertise necessary to evaluate engineering decisions involving advanced materials, pressure-hull design, structural fatigue, or deep-ocean operating systems. Even if such information were available, many participants would be unable to

[83] *David Lochridge v. OceanGate, Inc.*, Complaint and Related Filings (2018); Testimony of David Lochridge, TITAN MBI Report, at 306–07.

[84] *Tunkl*, 60 Cal. 2d at 98–101; MTS Letter (2018); Lochridge, Complaint and Related Filings (2018).

[85] *See Tunkl, supra,* at 98–101; *see Thompson, supra,* at *4–6; TITAN MBI Report, at 296–97.

[86] *Shultz*, 224 F.3d at 1272–75; *see Thompson, supra.*

independently assess its significance. As a result, participants rely heavily on the operator's technical expertise and the material safety information available to them before deciding whether to participate.[87]

This reliance does not eliminate personal responsibility. Participants remain free to decide whether to engage in risky activities. Nevertheless, where meaningful evaluation of risk depends upon specialized knowledge controlled by the operator, courts should carefully examine whether the participant possessed sufficient information to understand and evaluate the material risks before determining the degree of deference to afford a signed liability waiver.[88]

The inquiry therefore turns to the information reasonably available to Titan participants before they agreed to proceed. Engineering concerns, testing limitations, and departures from accepted industry practices could materially affect a participant's evaluation of the expedition even when the inherent hazards of deep-ocean travel were already understood.[89]

d. Why Titan Supports Heightened Judicial Scrutiny

The Titan disaster instead illustrates the circumstances in which traditional waiver analysis may require closer examination before the courts determine the appropriate level of deference to afford a liability waiver.[90]

When a maritime venture involves experimental technology, substantial operator control over safety information, limited opportunities for participant verification, and a non-survivable environment, courts should closely examine whether meaningful informed consent was realistically possible. Such scrutiny remains consistent with traditional maritime principles emphasizing reasonable care, accountability, and informed decision-making. [91]

This approach does not require courts to determine whether participants fully understood every technical aspect of a maritime venture. Nor does it require disclosure of every conceivable risk. Rather, it recognizes that meaningful informed consent depends upon a participant's access to material information that a reasonable participant would consider important when deciding whether to undertake an activity involving extraordinary risks.[92]

---

[87] TITAN MBI Report, at 262–66.

[88] *See Shultz*, *Thompson,* and *Tunkl, supra.*

[89] MTS Letter, at 1; David Lochridge, *Lochridge v. OceanGate, Inc.,* Answer to Complaint, Affirmative Defenses, and Counterclaims, at 10–12 (W.D. Wash. Aug. 15, 2018); TITAN MBI Report, at 306–07.

[90] *Tunkl*, 60 Cal. 2d at 98–101; *City of Santa Barbara*, 41 Cal. 4th at 777–78.

[91] *Kermarec*, 358 U.S. at 630–32; *See also Tunkl, supra*, at 98–101.

[92] *Tunkl*, 60 Cal. 2d at 98–101; *Prosser & Keeton, supra* note 5, § 68.

Titan therefore illustrates why courts should examine the circumstances under which consent was obtained, rather than relying solely upon the existence of a signed liability waiver, when determining the degree of deference to afford that waiver.[93]

The following Part proposes the Meaningful Maritime Consent Framework (MMCF), a structured method for evaluating that question while preserving maritime law's commitment to contractual freedom, safety, accountability, and fairness.[94]

V. Meaningful Maritime Consent Framework (MMCF)

The preceding discussion demonstrates that maritime law has consistently attempted to balance freedom of contract, accountability, and safety. Courts generally enforce liability waivers when participants knowingly assume risks, but they have also recognized limits when public policy, inadequate disclosure, or serious misconduct undermine the validity of consent. The Titan disaster highlights the difficulty of applying traditional waiver principles to experimental maritime ventures involving emerging technologies, substantial information imbalances, and non-survivable operating environments.[95]

The MMCF does not displace maritime law's longstanding respect for contractual freedom. Instead, it asks whether a signed waiver reflects meaningful informed consent under the circumstances presented. The question is not whether waivers should exist, but whether courts should assume that a signed waiver necessarily reflects meaningful informed consent under all circumstances. [96]

To address this concern, this article proposes the Meaningful Maritime Consent Framework (MMCF). Under this approach, courts evaluating liability waivers in experimental maritime ventures should apply heightened scrutiny when circumstances suggest that meaningful informed consent may not have been realistically possible. Rather than focusing solely on the existence of a signed waiver, courts should consider whether the participant possessed sufficient information to reasonably understand and evaluate the risks being assumed.[97]

No single factor should be determinative. Instead, courts should evaluate the totality of the circumstances to determine whether meaningful informed consent was realistically possible before determining the degree of deference to afford a liability waiver. This

[93] *Thompson*, 2020 WL 4188126, at *4–6; *Shultz*, 224 F.3d at 1272–75.
[94] *Tunkl*, 60 Cal. 2d at 98–101; *Shultz*, 224 F.3d at 1272–75; *Thompson*, 2020 WL 4188126, at *4–6; *City of Santa Barbara*, 41 Cal. 4th at 777–78.
[95] *Tunkl*, *supra*; *see also City of Santa Barbara,* 41 Cal. 4th at 777–78; *Thompson*, 2020 WL 4188126, at *4–6.
[96] *Shute*, 499 U.S. at 593–95; *Bisso*, 349 U.S. at 90–91.
[97] *Tunkl*, 60 Cal. 2d at 98–101; *Thompson*, 2020 WL 4188126, at *4–6.

approach preserves freedom of contract while recognizing that certain maritime ventures present challenges not contemplated by traditional waiver doctrine.[98]

A. Factors Supporting Heightened Judicial Scrutiny

Under the proposed MMCF, courts evaluating liability waivers in experimental maritime ventures would consider several nonexclusive factors:[99]

1. Access to Material Safety Information: Courts should consider whether participants had access to information that a reasonable person would view as important in deciding whether to undertake the activity. Under the proposed MMCF, this factor focuses on material safety information bearing on the nature and magnitude of the particular risks presented, rather than on disclosure of every conceivable danger.[100]

2. Operator Control Over Risk-Related Information: Courts should evaluate the extent to which information concerning safety, testing, design, maintenance, and operational limitations was under the operator's control. The greater the operator's control over material risk-related information, the more difficult it becomes for participants to independently understand and evaluate those risks before deciding whether to undertake the activity.

3. Experimental or Novel Technology: Courts should consider whether the activity involves technologies that lack established operation histories, accepted safety standards, or independent verification. Experimental technologies may create risks that are uncertain, evolving, or difficult for participants to understand without specialized expertise.[101]

[98] *See Tunkl, supra*; *see also City of Santa Barbara*, 41 Cal. 4th at 777–78.
[99] *See Tunkl, supra*, at 98–101.
[100] *Tunkl*, 60 Cal. 2d at 98–101; *Prosser & Keeton, supra* note 5, § 68.
[101] TITAN MBI Report, at v–vii.

4. Ability to Independently Evaluate Risk: Courts should examine whether participants possessed a realistic opportunity to independently assess the risks involved. Where a participant's ability to independently understand and evaluate material risks depends upon highly technical information or specialized knowledge unavailable to ordinary participants, reliance upon the operator correspondingly increases.[102]

5. Severity of Potential Harm: The magnitude of potential harm should also be considered. Activities involving a substantial risk of catastrophic injury or death justify heightened judicial scrutiny because participants may have only one reasonable opportunity to understand and evaluate the material risks before deciding whether to undertake the activity.[103]

6. Availability of Rescue or Recovery: Finally, courts should consider whether the operating environment permits meaningful rescue, recovery, or mitigation following a failure. In non-survivable environments, such as deep-ocean exploration, participants must rely almost entirely upon the safety decisions made before the activity begins.[104]

The presence of any single factor should not determine the outcome. Rather, where multiple factors are present, courts should apply heightened judicial scrutiny and determine, based upon the totality of the circumstances, whether meaningful informed consent was realistically possible.[105]

B. Advantages of the MMCF

The MMCF offers several advantages. First, it preserves freedom of contract by allowing participants to voluntarily assume extraordinary risks when they possess sufficient material information to make an informed decision. Second, it promotes accountability by encouraging operators to disclose material information relevant to participant decision-making. Third, it remains consistent with existing maritime principles that emphasize reasonable care, informed consent, and public policy limitations on contractual freedom.[106]

Most importantly, the MMCF avoids the extremes of either automatically enforcing or automatically invalidating waivers in experimental ventures. Instead, it provides courts with a structured method for evaluating whether meaningful informed consent was realistically possible under the circumstances presented.[107]

---

[102] *Tunkl*, 60 Cal. 2d at 98–101; *Thompson*, 2020 WL 4188126, at *4–6.
[103] *City of Santa Barbara*, 41 Cal. 4th at 777–78.
[104] TITAN MBI Report, at 316–17; OceanGate, Titan Expedition Materials and Participant Information.
[105] *See Tunkl, City of Santa Barbara,* and *Thompson, supra.*
[106] *See Tunkl, City of Santa Barbara,* and *Shute, supra.*
[107] *See id.*

C. Consistency with Maritime Law's Historical Development

The development of maritime wrongful-death remedies illustrates that admiralty law has historically adapted when existing doctrine no longer addressed changing maritime conditions. For many years, *The Harrisburg* barred recovery for wrongful-death under general maritime law. Over time, however, courts and the legislature recognized that this rule created significant accountability gaps. Congress responded through statutes such as the Death on the High Seas Act and the Jones Act, while the Supreme Court ultimately recognized a general maritime wrongful-death action in *Moragne v. States Marine Lines, Inc.*[108]

The evolution of wrongful-death doctrine illustrates an important principle. Maritime law is not static. Admiralty courts have historically modified and refined legal doctrines when changing conditions exposed shortcomings in existing rules. At the same time, those developments have remained grounded in the longstanding maritime principles of safety, accountability, uniformity, and fairness.[109]

The MMCF follows this tradition by providing courts with a structured method of evaluating consent in emerging maritime contexts. It does not eliminate the freedom of contract or invalidate liability waivers. Instead, it provides courts with a structured method for evaluating consent in circumstances involving experimental technology, substantial information imbalance, and non-survivable operating environments. These circumstances were largely absent from the traditional maritime waiver cases that shaped modern maritime waiver doctrine.[110]

By focusing on the participant's ability to understand and evaluate material risks, the MMCF seeks to preserve both freedom of contract and maritime accountability. In this respect, it represents an incremental refinement of existing principles rather than a departure from them.[111]

D. Application Beyond Titan

Although inspired by the Titan disaster, the MMCF is not limited to deep-ocean tourism. Similar issues may arise in future maritime ventures involving advanced submersibles, autonomous

---

[108] *The Harrisburg*, 119 U.S. at 213–14; 46 U.S.C. §§ 30301–30308; 46 U.S.C. § 30104; *Moragne*, 398 U.S. at 387–409.

[109] *Moragne*, 398 U.S. at 387–409; *Norfolk Shipbuilding*, 532 U.S. at 818–21.

[110] *Tunkl*, 60 Cal. 2d at 98–101; *Thompson*, 2020 WL 4188126, at *4–6.

[111] *Moragne*, 398 U.S. at 387–409; *Norfolk Shipbuilding*, 532 U.S. at 818–21; *Tunkl*, 60 Cal. 2d at 98–101.

vessels, remote exploration technologies, and other maritime activities that depend upon specialized engineering and operator-controlled material information.[112]

As maritime technology continues to evolve, courts will likely confront situations in which participants are asked to assume material risks that cannot be readily observed or independently evaluated. The MMCF provides a flexible framework for addressing those situations while remaining faithful to maritime law's commitment to safety, accountability, fairness, and freedom of contract.[113]

VI. CONCLUSION

The Titan disaster illustrated the growing tension in modern maritime ventures between contractual freedom and the need for meaningful accountability. Although the passengers aboard Titan signed liability waivers acknowledging the possibility of injury or death, the circumstances surrounding the voyage demonstrate that a signed agreement alone may not fully resolve whether consent was adequately informed. As maritime activities increasingly involve experimental technologies, specialized engineering and extreme operating environments, traditional waiver doctrine may not always adequately account for the realities of modern risk.

This article examined the development of maritime waiver doctrine, the historical evolution of admiralty law, and the challenges that arise when participants are asked to assume risks they may not be capable of independently evaluating. The analysis does not suggest that liability waivers should be abandoned or that experimental waivers should be prohibited. Rather, it argues that courts should carefully examine the circumstances surrounding consent before determining the degree of deference a waiver should receive.

The Meaningful Maritime Consent Framework provides a structured method for conducting that inquiry. By focusing on the participant's access to material safety information, the operator's control over risk-related information, the complexity of the technology involved, and the practical ability of participants to evaluate the risks presented, the framework preserves the importance of contractual freedom while recognizing that consent depends upon more than the existence of a signed agreement.

Maritime law has historically adapted when existing doctrines no longer adequately address changing conditions. The development of maritime wrongful-death remedies demonstrates that admiralty law can evolve while remaining grounded in its traditional commitments to safety, accountability, fairness, and uniformity. The MMCF follows

[112] TITAN MBI Report, at v–vii; Titan Expedition Materials and Participant Information, at 2.

[113] *See Tunkl, Thompson,* and *Moragne, supra.*

that same tradition by offering an incremental refinement of waiver analysis rather than a departure from established maritime principles.

As private maritime exploration continues to expand into increasingly remote, technologically complex, and hazardous environments, courts will likely confront new questions regarding the relationship between contractual assent and informed decision-making. The Meaningful Maritime Consent Framework provides a principled approach for evaluating those questions while preserving both the freedom to engage in maritime innovation and the obligation to ensure that consent remains meaningful.

IS THE COMMONWEALTH PERFORMING ITS FIDUCIARY DUTY WITH THE SPLURGE OF DATA CENTERS?

By Kimberly A. Moore, B.S.*

I. Introduction

The world is rapidly becoming an artificial intelligence (AI) driven society, creating a huge demand in the construction of data centers. Data centers are large buildings utilized to house computer servers, data storage systems, networking equipment, and the power and cooling systems that keep them running.[1]

On this front, Pennsylvania is quickly emerging as a primary hub for these facilities. Before this acceleration of technological advances, individuals relied on resources nature provided, enshrining the protection of ambient air, surface and ground water, and wild flora and fauna in the Pennsylvania Constitution through the Environmental Rights Amendment. Yet the continuous expansion of data centers represents a breach of the Commonwealth's constitutional mandate to protect environmental resources under Article 1, Section 27.[2]

The Pennsylvania Environmental Rights Amendment (ERA) was adopted on May 18, 1971, and relied on Article I, Section 27 of the Pennsylvania Constitution which reads:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.[3]

---

* Kimberly Moore graduated Peirce College *Summa Cum Laude* with a B.S. in Paralegal Studies, where she was inducted into the *Lambda Epilson Chi* (LEX) Honor Society. She is a Pennsylvania Certified Paralegal through the Keystone Alliance and is currently employed as a full-time paralegal. The author wishes to thank her parents for their endless support and dedication that they instilled in her, demonstrating that hard work truly pays off.

[1] Rebecca Leppert, *What we know about energy use at U.S. data centers amid the AI boom, Pew Research,* (October 24, 2025) https://www.pewresearch.org/short-reads/2025/10/24/what-we-know-about-energy-use-at-us-data-centers-amid-the-ai-boom/.

[2] Pa. Const. art. I, § 27.

[3] *Id.*

The proposal was introduced on the first Earth Day in 1970, by Pennsylvania's Legislator Franklin L. Kury.[4] It received unanimous assent from both the Pennsylvania House of Representatives and the Pennsylvania Senate. The following year, over one million voters were in favor of the Amendment, accounting for nearly a ration of four to one which ultimately led to its ratification.[5]

The ERA serves as an environmental safety net for its community and residents. For centuries, Pennsylvanians suffered from extreme environmental and industrial pollution caused by relentless exploitation of the state's natural resources. The state had been marred with deforestation and unregulated coal mining leading to underground mine fires, water pollution from acid mine drainage and acid water impoundments.[6] As one Pennsylvania resident put it, "We uglified our land and we called it progress."[7]

The drafters decided to place the amendment in Article I of the Pennsylvania Constitution—The Declaration of Rights—to highlight and outline the core and vital rules of free government and liberty.[8] PennFuture, an environmental advocacy group in the Commonwealth explains "This placement means that Pennsylvanians' environmental rights are placed alongside and on par with our fundamental political rights such as freedom of speech, freedom of assembly, freedom of religion, the right to trial by jury, and the right to bear arms."[9] Only three other states (including Montana, Rhode Island, and New York) share Pennsylvania's commitment to safeguarding these constitutional environmental protections.[10]

II. Amendment Revival

For decades, the ERA laid dormant as Pennsylvania courts offered minimal enforcement towards the rules viewing it as a non-binding guideline rather than a self-executing constitutional right.[11] However, forty years after its ratification, the Pennsylvania Supreme

[4] *Environmental Rights Amendment*, PennFuture, https://pennfuture.org/Environmental-Rights-Amendment (last visited Oct. 28, 2026) (under "What is the Environmental Rights Amendment*"* section).

[5] *Environmental Rights Amendment*, *supra* (under "What is the Environmental Rights Amendment?" section).

[6] *Environmental Rights Amendment*, *supra* (under "Why Do We Have an Environmental Rights Amendment?" section).

[7] *Id*

[8] *Environmental Rights Amendment*, *supra* (under "What is the Environmental Rights Amendment?" section).

[9] *Id.*

[10] *Environmental Rights Amendment*, *supra* (under "What is the Environmental Rights Amendment?" section).

[11] Richard Rinaldi, *Dormant for Decades, the Environmental Rights Amendment of Pennsylvania's Constitution Recently Received a Spark of Life from Robinson Township v. Commonwealth*, 24 WIDENER L.J. 435, 436 (2015).

Court revitalized the Amendment in 2013 with its landmark decision of *Robinson Township v. Commonwealth*.[12] The townspeople argued that Pennsylvania Oil and Gas Act (Act 13) had violated Article 1 Section 27 because it forced municipalities within the Commonwealth to permit oil and gas operations in all zoning districts.[13]

The Act restricted municipalities in their ability to balance oil and gas development between "the preservation of natural, scenic, historic and esthetic values of the environment by requiring a municipality to allow industrial uses in nonindustrial areas with little ability to protect surrounding resources and community."[14] The *Robinson* court separated the ERA into three clauses defining its rights and obligations:

1. The individual environmental rights (clean air, pure water, and the preservation of natural, scenic, historic and esthetic values of the environment).[15]
2. The common ownership of Pennsylvania's public natural resources is of the people including future generations.[16]
3. The Commonwealth's duties with respect to Pennsylvania's commonly owned public natural resources, also known as the public trust doctrine.[17]

The court concluded in a plurality decision that several provisions of Act 13 were unconstitutional in part and violated Section 27 because it did not allow local governments to regulate oil and gas operations that were degrading the aesthetic quality.[18] This moved the provision from being largely dormant, into an active legal tool for environmental protection.

The amendment was further solidified years later into binding precedent in the 2017 case, *Pennsylvania Environmental Defense Foundation v. Commonwealth*.[19] Here, the court considered the three-part *Payne* test to determine whether leasing public and state lands for oil and gas development and utilizing the revenue for non-environmental and general budgetary purposes violated the ERA.[20] The three-part test is as follows:

12 *Robinson Twp. v. Commonwealth*, 52 A.3d 419 (Pa. Commw. Ct. 2012).
13 *Id.*
14 *Id.*
15 *Robinson Tp., Washington Cnty. v. Com.*, 83 A.3d 901, 951 (Pa., 2013).
16 *Id.* at 954.
17 *Id.* at 958.
18 *See Robinson Twp.,* 83 A.3d at 910.
19 *See Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 929–30 (Pa. 2017).
20 *Id.*

1. Was there compliance with all applicable statutes and regulations[21]
2. Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?[22]
3. Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?[23]

The Pennsylvania Supreme Court decisively rejected the *Payne* test reasoning that the *Payne* test was "unrelated to the text of Section 27 and the trust principles in it and strips the constitutional provision of its meaning." Furthermore, the court concluded the public trust provision of Section 27 as self-executing, and the Commonwealth is made the trustee and has obligations to conserve and maintain public natural resources for all people.[24]

III. Data Center Locations vs. How the Public is Responding

The continuous proliferation of proposed data center projects is threatening to infringe upon residents' constitutional guarantees under the Environmental Rights Amendment. According to the Data Center Proposal Tracker, there are about seventy active data centers in Pennsylvania and about sixty-four additional sites being proposed.[25] More than twenty of these proposed centers are "hyperscale" facilities according to PennFuture.[26] This is enough water and energy usage that equates to a small city.[27] The tracker demonstrates that many of these centers are being proposed in rural areas, which is causing disruptions to its residents.

Pennsylvania residents have voiced major concerns but these computing faculties are able to be built faster than local governments

[21] *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Cmwlth. 1973).
[22] *Id.*
[23] *Id.*
[24] *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d at 937 (Pa. 2017).
[25] *Pennsylvania Data Center Map & Tracker*, Track Data Centers https://trackdatacenters.com/state/pennsylvania (last visited October 28, 2026).
[26] PennFuture Staff, *PennFuture Supports a Statewide Moratorium on Data Center Development*, PennFuture (April 16, 2026) https://pennfuture.org/post/PennFuture-Supports-a-Statewide-Moratorium-on-Data-Center-Development.
[27] *Id.*

can make stricter rules and regulations.[28] Based on a survey from Quinnipiac University, 68% of Pennsylvania residents are opposed to these developments and building an AI data center in their community.[29] PennFuture is advocating for real protection from these developments and calling for a statewide moratorium until state lawmakers can adopt stricter policies are enacted, ensuring that data centers are cited properly, have regulated water usage, and clean energy.[30] Guardrails are crucial at a time like this to maintain our electricity grid and to prevent our air, water, and climate from further pollution.[31]

IV. The Public Trust Doctrine: Evaluating Pennsylvania's Legislative Response to Data Centers

The ERA vested in the Commonwealth a fiduciary duty as trustee of the natural resources within its borders. This is not a duty bestowed on any specific agency; rather, courts have held that all Commonwealth agencies and entities share this obligation to prevent degradation, diminution, and depletion of the state's and community's natural resources for benefit of current and future generations.[32] That means bodies like the Pennsylvania Historical and Museum Commission share the same duty to the public regarding nature preservation as does PennDOT and the Department of Community & Economic Development.[33] Data centers have long been around without drawing attention, however they have increased in demand which is becoming a major concern because without proper regulations, they will cause significant, irreparable harm to the environment.[34]

Realizing the impact this has had on their residents and the economy, Pennsylvania lawmakers have proposed bills aiming to

[28] Rachel McDevitt, *Green Group Calls for Halt to Data Centers in Pa. Until New Laws Are Passed*, 90.5 Wesa (March 25, 2026) https://www.wesanews.org/environment-energy/2026-03-25/pennfuture-data-centers-moratorium.

[29] Kurt Bresswein, *Data Centers Are Coming to the Lehigh Valley, and this Township is Trying to get the Rules Right*, Lehigh Valley Live (March 2, 2026) https://www.lehighvalleylive.com/bethlehem/2026/03/data-centers-are-coming-to-the-lehigh-valley-and-this-township-is-trying-to-get-the-rules-right.html.

[30] PennFuture Staff, *PennFuture Supports a Statewide Moratorium on Data Center Development*, PennFuture (April 16, 2026) https://pennfuture.org/post/PennFuture-Supports-a-Statewide-Moratorium-on-Data-Center-Development.

[31] *Id.*

[32] Pa. Const. art. I, § 27.

[33] *Feudale v. Aqua Pennsylvania, Inc.*, 122 A.3d 462 (Cmwlth. 2015), *affirmed* 135 A.3d 580 (Pa. 2016).

[34] *As The World Changes, New Land Uses are Emerging: Data Centers are Looking to Move in and Pennsylvania Must be Prepared*, PennFuture (last visited October 28, 2026) https://pennfuture.org/Data-Centers.

regulate data center projects.[35] The following bills have recently been passed by the Pennsylvania House of Representatives and are awaiting decisions in the Senate:

- House Bill 2246: Legislation that establishes mandatory water usage reporting and planning requirements for large-scale data centers prior to construction[36]
- House Bill 2150: "An Act providing for annual reporting of energy consumption and water consumption by data centers"[37]
- House Bill 1834: Legislation that aims to protect everyday utility customers from paying for infrastructure costs driven by high-energy data centers and establishes clean energy and low-income energy assistance funds.[38]

These bills merely rely on reporting requirements that do not substitute for real policy or prevention.[39] Fines and disclosure of usage are half-hearted measures that are unlikely to affect or prevent large companies with endless funds from continued proposals. True constitutional guardrails would halt the state from funding tech projects that infringe upon our public trust doctrine.

Instead, Pennsylvania plans to give up about $2 billion in tax revenue by 2031 without guarantee that developers will be in accordance with the environmental rules.[40] As specified in *PEDF v. Commonwealth,* the ERA is established as a public trust of public natural resources of all the people, the Commonwealth is commanded to conserve and maintain them.[41] They are not performing their trustee duties when they fast-track or incentivize data centers without properly evaluating if they infringe upon the people's constitutional rights. Failure to regulate and implement stricter policies that enforce protection towards the amendment, the Commonwealth would be allowing actions that cause unreasonable

[35] Kate Huangpu, *What's Next for Data Centers in Pa.? State Lawmakers are Split on How to Regulate Them*, Spotlight PA (May 18, 2026) https://www.spotlightpa.org/news/2026/05/data-center-regulation-bills-pass-pennsylvania-house-stall-senate-capitol/.

[36] H.B. 2246, 2025-2026 Reg. Sess. (Pa. 2026).

[37] H.B. 2150, 2025-2026 Gen. Assem., Reg. Sess. (Pa. 2026).

[38] H.B. 1834, 2025-2026 Gen. Assem., Reg. Sess. (Pa. 2025).

[39] Kate Huangpu, *Lawmakers Up Transparency For Data Centers, Leave $2B Tax Exemption Untouched in PA Budget*, Spotlight PA (July 20, 2026) https://www.spotlightpa.org/news/2026/07/data-center-pennsylvania-budget-2026-regulations-stalled-capitol/.

[40] *Id.*

[41] *PEDF v. Commonwealth,* 161 A.3d 911 (Pa. 2017).

impairment to the environment for current and future generations to come.

V. Unchecked Water Permitting and Breach of Fiduciary Care

Data centers utilize vast quantities of water. This primarily occurs by the constant need of evaporative cooling equipment to remove heat that is generated by the computer processing chips to avoid poor operation.[42] Pennsylvania directly uses water to humidify data center server rooms to prevent buildup of static electricity.[43]

According to Environmental and Energy Study Institute (EESI), a medium-sized data center can consume up to 110 million gallons of water per year just for cooling purposes which is equivalent to about 1,000 households. Larger data centers can utilize up to 5 million gallons per day, equaling to about 1.8 billion annually which is equivalent to a town of up to 50,000 people.[44]

In 2021, just one of Google's data centers in Oregon used up 355 million gallons of water. In 2023, all of Meta's data centers guzzled around 1.4 billion gallons of water worldwide.[45] About 672 million of these gallons came from local water sources which is provided to residential customers, causing irreversible damage. This is something permanent and leaves a growing concern of water depletion of communities' local water supply.[46] In Pennsylvania, water conservation is key in providing safe and healthy consumable water to the public and future generations. It is a limited resource and becomes a competition between people and data centers.[47]

Under the ERA of the Pennsylvania Constitution, the right to pure water is a self-executing individual right.[48] First revived by the plurality in *Robinson Township v. Commonwealth* (2013) and later codified into binding majority precedent by *PEDF v. Commonwealth* (2017), Section 27 creates immediate constitutional obligations that do not depend on enabling legislation from the General Assembly to

[42] Andy Yencha, *Data Centers and Water Use in Pennsylvania*, Pennstate Extension (October 20, 2025) https://extension.psu.edu/data-centers-and-water-use-in-pennsylvania (under "How Do Data Centers Use Water" section).
[43] *See id.* under "How Do Data Centers Use Water" section.
[44] Miguel Yañez-Barnuevo, Data Centers and Water Consumption, Environmental and Energy Studies Institute (EESI) (June 25, 2025) https://www.eesi.org/articles/view/data-centers-and-water-consumption.
[45] Molly Elise Bush, *Construction and Consequences: The Human Impacts of Artificial Intelligence Data Centers,* UAB Institute for Human Rights Blog (October 2, 2025) https://sites.uab.edu/humanrights/2025/10/02/construction-and-consequences-the-human-impacts-of-artificial-intelligence-data-centers/.
[46] *Id.*
[47] *Water Conservation,* Pa. Dep't of Env'tl Prot. (last visited October 28, 2026) https://www.pa.gov/agencies/dep/residents/my-water/water-conservation.
[48] Pa. Const. art. I, § 27.

take effect.[49] Just as *Robinson Township* struck down statewide zoning uniformity (Act 13) because it forced industrial uses into incompatible areas, localized water permitting creates external spillover effects that disregard the interconnected nature of ecosystems.[50] For instance, in February of 2024, a federal lawsuit was filed in the U.S. District Court by several residents in Oregon who could not drink their water due to nitrate contamination.[51]

The pollution stems partly from industrial food processors and data centers at the port. These facilities produce fertilizer-heavy wastewater, which is sent to local farms and spread over fields.[52] A data center subsidiary (Amazon Data Services, Inc.) agreed to a $20.5 million settlement for the nitrate pollution in exchange for no admission of liability, leaving residents without long-term guarantees against further impacts.[53]

In Pennsylvania, the Susquehanna River Basin Commission (SRBC), is an interstate federal-state governmental agency that coordinates the management conservation, and planning of water resources across the entire Susquehanna River Basin. They have a strong interest in any industry that has potentially high-water demands to avoid spillover affects like in Oregon.[54] They are encouraging the utilization of innovative, water-saving technologies like dry and hybrid cooling which creates a closed-loop system and can greatly reduce the water demand.[55]

Instead of enforcing and legally mandating a resourceful technology like this to preserve water and improve our environment, House Bill 2150 was passed for data centers to only report their water consumption. By importing private trust law into Section 27, PEDF bound the Commonwealth to strict fiduciary duties of loyalty and care for the benefit of present and future residents. Under trust law, a trustee cannot satisfy its duty by merely watching and counting the destruction of the trust asset. Since *PEDF* completely discarded the *Payne v. Kassab* balancing test, economic trade-offs can no longer justify nor defend a trustee's failure to conserve a resource.[56]

---

[49] *PEDF v. Commonwealth,* 161 A.3d 911 (Pa. 2017); *see also Robinson Township*, *supra.*

[50] *Robinson Township*, *supra*

[51] Alex Baumhardt, Amazon to Pay $20.5 million Settlement Over Northeast Oregon Nitrate Pollution, Oregon Public Broadcasting (OPB) (March 31, 2026) https://www.opb.org/article/2026/03/31/amazon-fine-northeast-oregon-boardman-nitrate-pollution-well/.

[52] *Id.*

[53] *Id.*

[54] *Data Centers & Water Use,* Susquehanna River Basin Commission (SRBC) (last visited October 28, 2026) https://www.srbc.gov/regulatory/data-centers/.

[55] Andrew D. Dehoff, *Townships Much Consider Data Center Impacts on This Vital Natural Source*, Susquehanna River Basin Commission (October 2025) https://www.srbc.gov/about/news/docs/data-centers-what-about-water.pdf.

[56] *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Cmwlth. 1973).

VI. Call to Action

There is little debate that our natural resources provide us with vital physical and mental benefits. They sustain life by providing us with natural foods, fresh oxygen, and healthy water. Like in *Robinson Township v. Commonwealth*, we must take strong initiative as residents and fight back before the environmental amendment slowly loses its power like before.[57] Recently, in Upper Macungie, a proposed data center covering a 2.6 million square-foot at a former Air Products site was shut down after numerous residents packed the room during a board meeting fighting against it.[58] Now, less than ten miles away in South Whitehall, multiple data center buildings are being proposed on an undeveloped farmland of over five million square feet.[59] The more residents are voicing their concerns and opposing to what is being proposed in their community, lawmakers will have no other choice but to enact stricter policies.

[57] *See Robinson Township, supra.*

[58] Jessica Heisey, '*Pure Excitement': Neighbors Celebrate Data Center Rejection, But Prep for Next Fight,* WFMZ (May 28, 2026) https://www.wfmz.com/news/area/lehighvalley/lehigh-county/western-lehigh-county/pure-excitement-neighbors-celebrate-data-center-rejection-but-prep-for-next-fight/article_20c31eeb-5b84-4f63-a129-ff17aedfed23.html.

[59] Kurt Bresswein, *Residents Oppose 5-million-Square-Foot Data Center Proposed Across From High School,* Lehigh Valley Live (January 20, 2026) https://www.lehighvalleylive.com/lehigh-county/2026/01/residents-oppose-5millionsquarefoot-data-center-proposed-across-from-high-school.html.



— ACKNOWLEDGEMENTS —

The 1865 extends its sincere gratitude to Lackawanna College for its continued support of the Journal and its mission. Special thanks to Kelly A. Musti, PT, DPT, GCS, Associate Vice President of Academic Affairs and Dean of Health Sciences; and Ivy Kempf, J.D., Legal Studies Program Director, for their encouragement, guidance, and dedication to the Journal's continued success; and to Lauren Guzzo, J.D., Program Specialist, for her invaluable assistance.

As always, congratulations to the student staff editors for their exceptional ability to balance academic responsibilities with their work on the Journal. Best of luck to those editors pursuing law school. Their dedication and performance on the Journal suggest they will make valuable contributions to the Bar.

Finally, a special thanks goes to the Journal's "outside editors" for their critical role in the double-blind, peer-review process. Volume Five of *The 1865: Lackawanna Law Journal* would not have been possible without the above contributions.