CARR MALONEY PC

LEGALLY SPEAKING

VOLUME XXXVI: February 2018

NLRB CHANGES STANDARDS FOR JOINT EMPLOYERS

On December 14, 2017, the National Labor Relations Board changed the tests for determining whether entities are joint employers and whether an employer's policy is lawful. The Board noted that the changes are necessary to provide clarity and certainty for employees, employers and unions. [CLICK HERE TO READ MORE]

ASSESSING TOTAL LOSS DAMAGE: THE IMPLICATIONS OF THE BROAD EVIDENCE RULE

When an insured property owner suffers a total loss, insurance adjusters frequently find themselves embroiled in settlement negotiations and attempt to limit the company's payout by closely assessing damages. While this assessment plays an important role at the pre-lawsuit settlement stage, it warrants strategic advocacy at the litigation stage. [CLICK HERE TO READ MORE]

EXEMPTION OF PROFESSIONALS FROM OVERTIME

Employers are not required to pay time and one-half for more than 40 hours of work in a single week to certain "exempt" employees who are paid a salary. The most common application of this exemption is for administrative and executive employees. However, when an individual is not part of senior management, the criteria required to be met for those two classifications are not usually found. [CLICK HERE TO READ MORE]

PLUS MORE CARR MALONEY NEWS, ANNOUNCEMENTS AND DEVELOPMENTS

Carr Maloney PC is a litigation firm providing comprehensive legal services throughout the mid-Atlantic region. Businesses and individuals use the firm as a single resource to meet all of their legal needs. Recognizing that each client's legal issue comes with its own specific complexities, we simplify the complex.

NLRB CHANGES STANDARDS FOR JOINT EMPLOYERS AND LAWFUL POLICIES IN EFFORT TO BRING NEEDED CERTAINTY FOR EMPLOYERS

By Bernard G. Dennis, III, Esq.

On December 14, 2017, the National Labor Relations Board changed the tests for determining whether entities are joint employers and whether an employer's policy is lawful. The Board noted that the changes are necessary to provide clarity and certainty for employees, employers and unions.

In *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB 156, the Board rejected the recent standard adopted in *Browning-Ferris Industries of California, Inc.*, 362 NLRB 186 (2015). In the 3-2 decision, the Board returned to the pre-*Browning-Ferris* standard that joint-employer status requires proof of "direct and immediate" joint control over essential employment terms. Further, "limited and routine" control will not result in joint-employer status.

The Board's decision notes five major problems with the *Browning-Ferris* standard, which permitted a finding of joint-employer status in instances where entities reserved but did not exercise joint control, exerted indirect control, or exerted "limited and routine" control.

Applying the pre-*Browning-Ferris* standard, the Board upheld the administrative law judge's decision that Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co. were joint employers of seven employees who were terminated after engaging in work stoppages due to wage, benefits and safety issues.

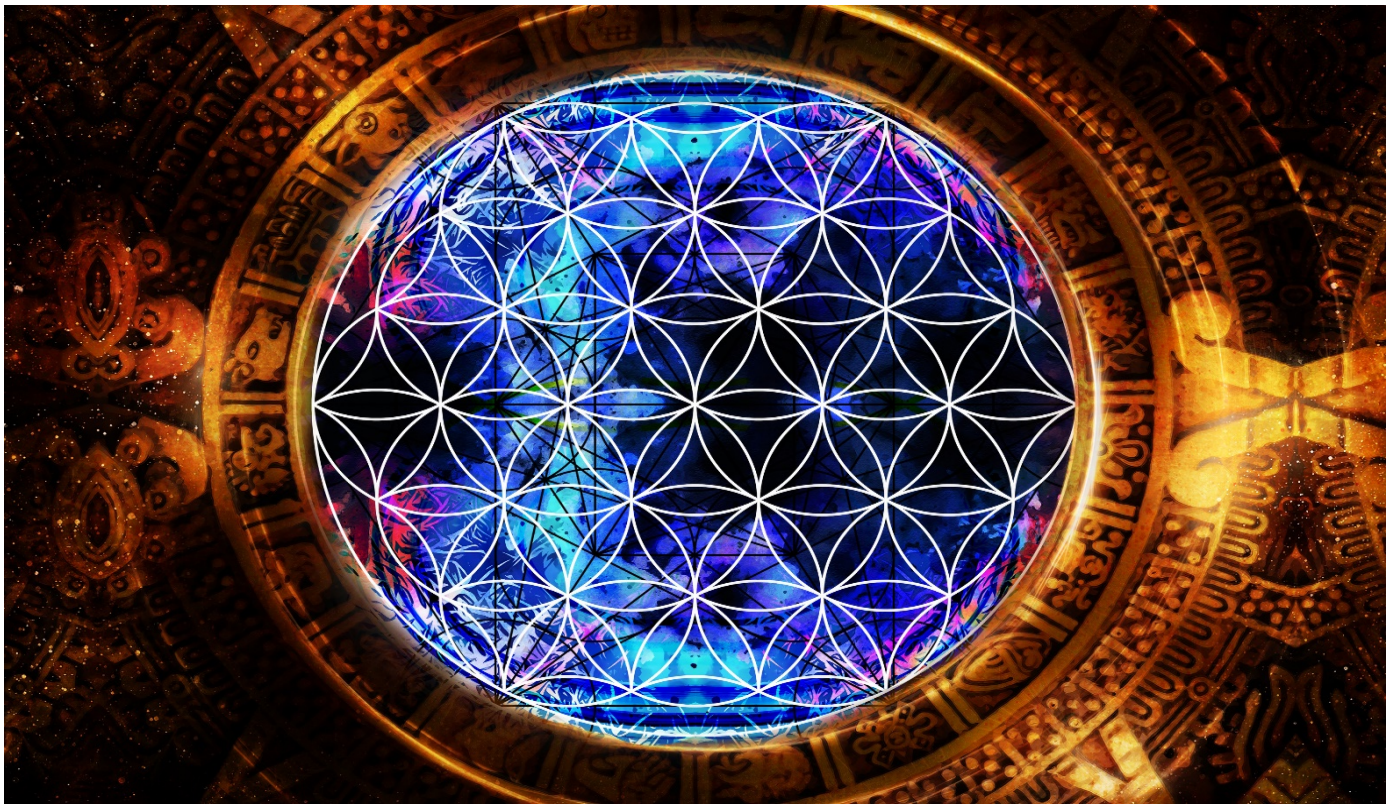
In *Boeing Company*, 365 NLRB 154, the Board abandoned the test previously established in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), to determine the legal propriety of employer rules, including work rules, policies, and employee handbook provisions. The 4-1 decision established a new test which requires the Board to evaluate a facially neutral policy for (1) the nature and extent of the potential impact on NLRA rights and (2) legitimate justifications associated with the employer rule. **(continued on next page)**

CARR MALONEY PC

Bernard Dennis focuses his practice on general litigation and appellate practice areas of complex business, medical malpractice, employment and insurance.
His experience evaluating and negotiating the settlement of claims prior to filing suit enables him to provide unparalleled legal service to his clients.

Prior to entering private practice, Bernard served as an Assistant State's Attorney for the Central Processing Unit Bond Hearing Division of the Montgomery County (MD) State's Attorney Office. He represented the State of Maryland in hearings before District Court Commissioners on a wide variety of cases, and this experience made him skilled at evaluating a defendant's probable cause, likelihood to appear, and danger to the community.

He is an active Member of the Montgomery County (MD) Chamber of Commerce.



NLRB CHANGES STANDARDS FOR JOINT EMPLOYERS AND LAWFUL POLICIES IN EFFORT TO BRING NEEDED CERTAINTY FOR EMLPOYERS

(continued from previous page)

The application of this new test will result in three categories of employer rules:

Category 1: Rules designated as lawful to maintain because either (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on NLRA rights is outweighed by justifications associated with the employer rule.

Category 2: Rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

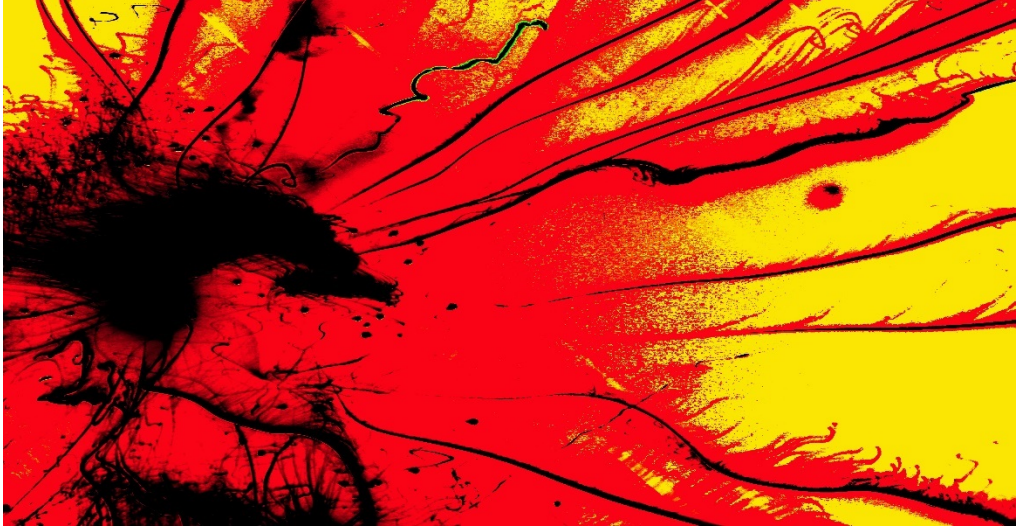
Category 3: Rules designated as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the employer rule.

The new test supplants the *Lutheran Heritage* test that would make a rule illegal upon a showing that either (1) employees would reasonably construe the language to prohibit NLRA-protected activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of NLRA-protected activity.

Applying this new test, the Board reversed the administrative law judge's finding that a Boeing Company rule constituted unlawful interference with the exercise of NLRA-protected rights. The Board found that Boeing's justifications for restrictions on the use of camera-enabled devices on its property outweighed the rules limiting adverse effect on the exercise of protected rights. The Board also found that "no-camera" rules are generally "Category 1" rules.

In both decisions, the Board repeatedly stressed its duty to provide "certainty and clarity" to parties involved in labor disputes. It remains to be seen whether these new standards accomplish the Board's goal or whether these decisions will be challenged in the federal courts.

BERNARD G. DENNIS, III is licensed to practice law in the District of Columbia and Maryland.



CARR MALONEY PC

ASSESSING TOTAL LOSS DAMAGE: THE IMPLICATIONS OF THE BROAD EVIDENCE RULE

By Aleksandra Rybicki, Esq.

When an insured property owner suffers a total loss, insurance adjusters frequently find themselves embroiled in settlement negotiations and attempt to limit the company's payout by closely assessing damages. While this assessment plays an important role at the pre-lawsuit settlement stage, it warrants strategic advocacy at the litigation stage.

Consider the following scenario. Twenty years ago, Walter Windfall bought a building for $1 million to start his law firm. One day, the building, which Walter had insured, burns to the ground. Like many insurance policies, Walter's policy allows recovery of the actual cash value (ACV) of his property but does not define ACV. Walter's appraiser says that replacing the building will cost $3 million.

Under the Fair Market Value Rule, currently used in 11 states,[1] Walter would be entitled to the difference between the fair market value of the property before and after the loss. Since the property was destroyed entirely, applying the Fair Market Value Rule would overcompensate Walter because he would be gaining an entirely new building with a much longer useful life.

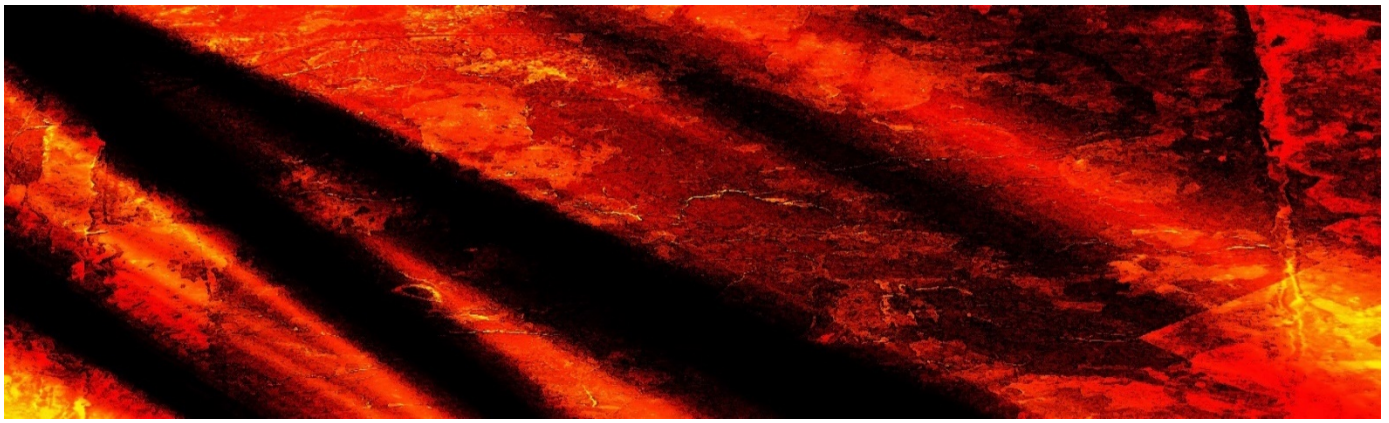
In contrast, under the Replacement Cost Minus Depreciation Rule, used in 4 states,[2] the replacement cost is reduced by the loss in the property's residual value. Thus, if at the end of its 50-year useful life, the building would have had a residual value of $200,000, the building's depreciation – the cost of the building minus the residual value ($1 million - $200,000) – would be $800,000. Applying the Replacement Cost Minus Depreciation Rule ($3 million - $800,000), it would cost Walter's insurance company $2.2 million to make Walter whole.

While this approach seems sound because Walter is not getting an entirely new building, there are circumstances under which this method would be unfair. If, for example, at the time of the fire, Walter's building was obsolete – that is, if it had very little value to Walter for purposes of either use or sale – $2.2 million would overcompensate Walter. When applying both calculations, it is possible for the insured to end up in a better position after the loss than before the loss and, thus, provides insureds with an incentive to cause a loss. **(continued on next page)**

Aleksandra Rybicki is a litigation attorney who focuses her practice on complex litigation and liability matters, including general, professional and product liability.

Aleksandra graduated from the George Washington University School of Law, where she was Editor of the American Intellectual Property Law Association Journal. While attending law school, she was a Judicial Intern for both the Honorable Wendell P. Gardner, Jr., Associate Judge for the Superior Court of the District of Columbia, and the Honorable Kiyo A. Matsumoto, United States District Court Judge for the Eastern District of New York.

Prior to joining Carr Maloney, Aleksandra was a Law Clerk for the Honorable Sean D. Wallace, Associate Judge in the Circuit Court for Prince George's County, Maryland.



THE IMPLICATIONS OF THE BROAD EVIDENCE RULE

(continued from previous page)

Approximately 20 states[3] have addressed these issues by adopting the Broad Evidence Rule. The Broad Evidence Rule originated in the seminal case *McAnarney v. Newark Fire Ins. Co.*, 159 N.E. 902 (N.Y. 1928) (explained in *SR Int'l Bus. Ins. Co. v. World Trade Center Props., LLC*, 445 F. Supp. 2d 320, 342-45 (S.D.N.Y. 2006)), where the Court held that all factors that bear on the value of the property should be considered when determining the payment that would restore the insured to the status quo ante. Such factors include market value, replacement cost, depreciation, original cost, condition of the property, location, use, assessed value and offers to sell. The Broad Evidence Rule is an inclusive valuation method that allows any evidence that can establish correct property value. Specifically, the Rule allows an accurate determination of the loss incurred without overcompensating insureds. Although many courts have used the Rule since then, courts refrain from referring to admission of more expansive evidence as doing so under "the Broad Evidence Rule." Additionally, courts have not specifically enumerated the factors to be considered under the Rule, or what weight should be given to each factor.

Both Maryland and Virginia have adopted the Broad Evidence Rule, while the District of Columbia and West Virginia remain undecided. The Maryland Court of Appeals held that the determination of "cost of production less depreciation" was not the only factor in ACV analysis. Rather, it was merely one among other sources of evidence. *Schreiber v. Pacific Coast Fire Ins. Co.*, 75 A.2d 108, 111 (Md. 1950). Since then, Maryland courts have routinely considered several factors contributing to the determination of damages. For example, in *Fred Frederick Motors, Inc. v. Krause*, 12 Md. App. 62 (Md. 1971), the Court of Special Appeals rejected the determination that a car dealer's recovery was limited to the cost of repairs of the damaged cars and held that "if a plaintiff can prove that after repairs his vehicle has a diminished market value from being injured, then he can recover in addition to the cost of repairs the diminution in market value, provided the two together do not exceed the diminution in value prior to the repairs."

Likewise, Virginia adopted the Broad Evidence Rule in 1961, when in an action to recover under an insurance policy for windstorm damage to property, the court held that replacement or reproduction costs, less depreciation, was an important factor in determining ACV. *Harper v. Penn Mut. Fire Ins. Co.*, 199 F. Supp. 663, 665 (E.D. Va. 1961) (applying Virginia law). The Court reasoned that "strict adherence to either of the recognized tests of 'market value' or 'reproduction cost less depreciation' will merely serve to shackle the trier of fact in all cases."

Given the state of the law, insurers should define ACV in their policies by incorporating factors courts have considered under the Broad Evidence Rule. This approach prevents overcompensation and provides adjusters and their attorneys bargaining power at both the settlement and litigation stages. If a policy lacks an ACV definition, attorneys practicing in Broad Evidence Rule jurisdictions, like Maryland and Virginia, should seek admission of relevant evidence to accurately determine damages. Attorneys in undecided jurisdictions should cite to neighboring jurisdictions and advocate for the Rule's adoption.

1) Alabama, California, Delaware, Georgia, Maine, Missouri, Nebraska, New Mexico, North Dakota, Texas, and Washington.
2) Illinois, Louisiana, Ohio, Oregon.
3) Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Vermont, Virginia, Wisconsin.

CARR MALONEY PC

EXEMPTION OF PROFESSIONALS FROM OVERTIME

By Edward J. Krill, Esq.

Employers are not required to pay time and one-half for more than 40 hours of work in a single week to certain "exempt" employees who are paid a salary. The most common application of this exemption is for administrative and executive employees. However, when an individual is not part of senior management, the criteria required to be met for those two classifications are not usually found.

For highly skilled workers with advanced training and significant technical responsibilities, employers may consider utilizing an additional exemption that is available for "professional" employees. This classification requires compliance with some rather specific conditions, as follows:

Paid a salary: This requires the payment of at least $455 per week on a regular basis for all weeks in which the employee does any work. Thus, payment of an hourly rate of, for example, $50 per hour for 20 hours of work meets the dollar amount but if it is based on recorded hours and varies with the number of hours of work, it is not considered a salary even if the actual dollar amount per week never drops below $455. Employees paid on an hourly basis cannot normally qualify as exempt from overtime under any circumstances.

Primary Duty is "Professional": When an employee meets all the criteria for this classification, their work responsibilities must be primarily to do the work that meets this standard. An obvious example of that would be a physician, lawyer, CPA or engineer whose principal function is to compare product orders to delivery invoices. Where only part of the work, in terms of both time and importance, meets the definition of professional, the question is whether the primary duties, the major focus of the work, is within the scope of the applicable professional field and function.

"Professional" Work requires "Advanced Knowledge": Being extremely skilled and experienced in work that is primarily manual rather than intellectual is not "professional" work. Many types of workers regard themselves as "professional" and refer to their job titles with that term. Examples would be "professional" mechanics, automotive technicians, electricians and lawn maintenance personnel. The "advanced knowledge" required for professional status must be in a recognized field of science that is normally acquired at a college level of education through a formal course of studies. **(continued on next page)**

Ed Krill has been practicing business law with a focus on health care and hospitals for more than 35 years. He helps clients find solutions to regulatory and contractual problems that make business sense and that avoid litigation and protracted controversy.

Ed counsels healthcare providers and professionals on a variety of issues, including credentialing and accreditation standards, licensure, discipline, labor and employment matters, practice structure and the buying and selling of practices and interests in practices. He is well-versed in Medicare regulations and other professionals.

Ed is a frequent speaker on health law topics at seminars and taskforce meetings of the American Health Lawyers Association, District of Columbia Hospital Association and Academy of Medicine of Washington, DC. He is also a founding member of the American Society of Hospital Attorneys.

EXEMPTION OF PROFESSIONALS FROM OVERTIME

(continued from previous page)

A Degree is Usually Required: Professional status cannot be acquired through high school level education and normally is conferred after a number of years of advanced educational effort at an accredited college or university. Most institutions of higher learning post their course offerings and available degrees on line. A good first step in determining whether an individual can meet the criteria for professional status is to determine whether the work that this person will do is taught as a component of such curriculum and whether the employee has a degree in a recognized field of study and course work. This is not to say that there are not apprenticeships for entry into a recognized profession. Virginia, Vermont, California and Washington do not require a law school education to obtain a license to practice. Further, certain highly responsible computer system designers and operators can be exempt without a formal college degree. Teachers can qualify as professionals based on their duties as assigned by the school or school system.

Subordinates to Professionals are Usually Not Exempt: The Department of Labor has taken the position that certain health care occupations are not "professional" occupations. Examples are LPN's, radiology technicians, pharmacy assistants and surgical technicians. These roles are considered supportive and non-discretionary. The final criteria of independence in decision-making and discretion as to methods and process is not seen as met. Paralegals are similarly considered non-exempt by the Department of Labor given their normal lack of independence, close supervision and supportive role, even though they frequently possess a college or even a law school degree. These employees have the formal training but lack the autonomy to be considered a "professional." However, dental hygienists and medical technologists are considered "professionals."

"Creative" Professionals are Exempt: The details of exemption for professionals can be found Department of Labor Regulations at 20 CFR Part 541. A special category of employees who may qualify as professionals under Department of Labor criteria are writers, actors, artists, composers and journalists. The primary requirement here is that the artist be very independent in doing their work with emphasis on their invention, imagination and originality. The editor of a publication may not be viewed as sufficiently original in their work to be considered a professional.

ED KRILL is licensed to practice law in the District of Columbia and Maryland.

CARR MALONEY PC

NEWS AND ANNOUNCEMENTS

CARR MALONEY MEMBERS FEATURED ON LEGAL TALK NETWORK

Carr Maloney Equity Member Jan E. Simonsen and Member Tracy D. Scott were Featured Guests on the December 19, 2017 edition of Legal Talk Network's *The Insurance Law Podcast*, sponsored by A.M. Best Company. Ms. Simonsen and Ms. Scott had an in-depth discussion on 'The Complexity of Negligent Security Claims', including the differences between negligent security and premises liability claims, how they work, who is most affected by them and what businesses can do to protect themselves. The podcast can be found at the Legal Talk Network and on Soundcloud.

CARR MALONEY EQUITY MEMBER THOMAS MCCALLY TO APPEAR AT ALA NATIONAL CONFERENCE

On May 3rd, Carr Maloney Equity Member Thomas L. McCally will present "The Importance of Drafting Effective and Accurate Employment Documents" to the Association of Legal Administrators 2018 Annual Conference at the Gaylord National Resort & Convention Center in National Harbor, Maryland. Mr. McCally, who heads the Employment and Labor Law practice at Carr Maloney, has more than 25 years' experience in virtually every issue in employment, labor and benefits counseling and litigation, including complex litigation, class actions and multidistrict litigation (MDL). For more information on this event, including registration details, please visit the ALA Conference website.

CARR MALONEY MEMBER KELLY LIPPINCOTT TO BE FEATURED PANELIST ON A.M. BEST WEBINAR

On February 22nd, Carr Maloney Member Kelly M. Lippincott will be a Featured Panelist on the A.M. Best Webinar titled "How Smart Data is Remaking Insurance Claims". New tools and greater availability of third party-data change how insurers evaluate claims, screen for fraud and settle cases faster, increasingly ahead of actual notice. Ms. Lippincott, who focuses her practice on insurance coverage, product liability, and professional liability, will examine what tools are being used, what types and sources of data are making the greatest impact and the issues insurers face as they rely more heavily on data-based claims automation. For more information on this event, including how to register, please visit the AM Best website.

CARR MALONEY MEMBER MARIANA BRAVO TO JOIN HNBA LEADERSHIP GROUP AT 2018 HISPANIC NATIONAL BAR ASSOCIATION ADVOCACY DAY

On February 27th and 28th, Carr Maloney Member Mariana D. Bravo will join the HNBA leadership group at the 2018 Hispanic National Bar Association Advocacy Day in Washington, D.C. The HNBA hosts Advocacy Day each year in fulfillment of HNBA's mission to be *The National Voice of the Hispanic Legal Community* and to advocate on issues that affect the Latino community. Ms. Bravo, who also serves as HNBA's Vice President of External Affairs, will join HNBA's Board of Governors, HNBA members from across the country and leaders from affiliated state and local Hispanic bar associations to address issues of common concern to the Hispanic community. Please visit the HNBA website for additional information on this event.