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FMG Professional Liability Quarterly Report

A summary of the important professional liability topics by our expert team members for the fourth quarter.

PCAOB FACES CONSTITUTIONAL SHOWDOWN AFTER JARKESY

By: William R. Covino and Nancy M. Reimer

When the Supreme Court decided Sec. & Exch. Comm'n v. Jarkesy, 603 U.S. 109 (2024) last summer —holding that the SEC could not impose civil penalties without giving respondents the option of defending themselves before a jury in federal court —we predicted Jarkesy's analysis would be invoked by practitioners in defending enforcement actions brought by other agencies. We were right. The Public Company Accounting Oversight Board ("PCAOB") is now in the spotlight.

In John Doe v. PCAOB, No. 1:24-cv-780-ACR (D.D.C.), the New Civil Liberties Alliance has moved for summary judgment, arguing PCAOB's enforcement regime is unconstitutional. The parallels to Jarkesy are unmistakable. PCAOB staff investigate and prosecute, PCAOB-employed hearing officers adjudicate, appeals go to the SEC—and juries never enter the picture. However, the Board wields the power to impose hundreds of thousands of dollars in penalties and suspend auditors or firms from practice—sanctions that can cripple or even destroy careers and businesses—all without the involvement of a jury or an Article III judge.

The Supreme Court's Jarkesy decision found that when agencies like the SEC seek to impose civil penalties for conduct akin to common law fraud, the Constitution affords respondents the right to a jury trial in federal court. The Court rejected the argument that such cases fall under the "public rights" exception, emphasizing that punitive sanctions affecting private rights must be triable before a jury. The NCLA's challenge to the PCAOB builds on this reasoning, arguing that the Board's in-house proceedings—where private actors act as prosecutor, judge and jury—violate not only the Seventh Amendment, but also due process and separation of powers principles.

The timing of this motion only heightens the uncertainty. In a separate PCAOB matter where we serve as counsel, oral arguments on similar issues, including Jarkesy were just pushed, *sua sponte for a second time*, from November 2025 to May 2026. Whether coincidence or not, the delay underscores how unsettled these constitutional questions are and highlights the ripple effects Jarkesy is already sending through other enforcement regimes.

This motion is a strong step in challenging the PCAOB's constitutional authority, but it will still be some time before the courts bring clarity. One way or another, a decision must be made—and its consequences will reach far beyond this single case.

For now, a few takeaways emerge. Constitutional challenges to PCAOB's enforcement are here and they will shape how these proceedings are defended. Accounting firms and counsel are well advised to track these developments closely and to preserve the right to a jury trial whenever possible to avoid an inadvertent waiver.

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LIMITED SCOPE OF ENGAGEMENT BARS CLAIM AGAINST ATTORNEY

By: Nancy Reimer and Julia Ruch

A Massachusetts Superior Court judge recently granted a defense motion for judgment on the pleadings in *Orbian v. Burns & Levinson*. The decision reminds us of the importance of lawyers understanding and adhering to the scope of their retainer agreements.

The case involved a lawyer who was engaged by Orbian to review an executive agreement between Orbian and its general counsel. Orbian requested that the lawyer only review Schedule 1 of the contract "to determine that there [would] be no untoward, inequitable consequences to either party." Schedule 1 entitled the general counsel to receive money upon either his retirement or other certain events, such as the sale of the company. Orbian expressed that it did not anticipate "too many 'comments' or suggestions" on the agreement and the lawyer determined that "nothing seemed amiss." The lawyer billed the client for his time, and Orbian thanked him for his work.

Years later, following a series of whistleblower complaints regarding his workplace behavior, Orbian terminated the general counsel and was required to make a payout pursuant to Schedule 1. Orbian then sued the lawyer, alleging if the lawyer had "flagged the absence of a morality clause in his review," litigation could have been avoided.

The Massachusetts Superior Court disagreed. The judge found that the lawyer's duty to Orbian was limited to the scope of the engagement letter, i.e., the review of Schedule 1, and did not extend to the entire agreement. The judge explained that although Orbian may wish "in hindsight… that a morality clause had been included does not mean that [the lawyer's] performance was deficient or caused Orbian harm."

Attorneys should always be mindful of the scope of their engagement agreements. *Orbian v. Burns & Levinson* serves as a success story of a lawyer who did not exceed the scope of his representation, despite post hoc attempts at expansion by their client.

A motion for reconsideration is currently pending.

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NEW MASSACHUSETTS HOME INSPECTION LAW: WHAT REAL ESTATE PROFESSIONALS NEED TO KNOW

By: Jessica Gray Kelly and Paul Miller

On October 15, 2025, a major change in Massachusetts residential real estate transactions relative to home inspections took effect. Under the new legislation, titled An Act Relative to the Affordable Homes Act, sellers and their agents are prohibited from conditioning acceptance of an offer on a buyer's agreement to waive, limit, or restrict a home inspection. Likewise, an offer cannot be accepted if, before acceptance, the buyer has communicated an intent to waive an inspection. In practical terms, the long-standing tactic of signaling or requiring waived inspections to win bidding wars is no longer permissible. Buyers still retain the choice to forgo an inspection, but only after proper disclosures and without any influence from the seller or the seller's agent.

The rules apply broadly to "residential property"—one-to-four-unit residential buildings, condominium units and residential co-op shares—by definition. The law also introduces a separate mandatory disclosure, the Massachusetts Mandatory Residential Home Inspection Disclosure, which must be delivered and signed no later than the first written offer to purchase. The disclosure affirms the deal is not contingent on waiving inspection rights, acknowledges the buyer's right to choose a licensed inspector and ensures a reasonable period to complete and review an inspection before deciding whether to proceed. Critically, any contract provision that would "render a home inspection meaningless"—for example, by unreasonably limiting scheduling or eliminating a buyer's ability to withdraw based on inspection results—is also barred. That said, the regulation expressly allows reasonable negotiation of (1) a monetary repair-cost threshold that must be exceeded for a buyer to terminate and (2) reasonable limits on deposit refunds if the buyer exits after the inspection. There are also enumerated exceptions for, among other things, intra-familial transactions, estate planning transfers and foreclosure sales.

This change will undoubtedly alter negotiation dynamics and standard offer strategies in competitive markets. It is imperative that brokers and agents become well-versed in the details of the new regulation, update their internal policies and checklists and provide training on proper disclosures and exceptions. This is because violations of the new regulation may constitute unfair or deceptive acts under M.G.L. c. 93A, can lead to disciplinary action by the Board of Registration of Real Estate Brokers and Salespersons and, in litigation, serve as evidence of misrepresentation. Notably, a broker's failure to provide the disclosure is itself deemed an unfair or deceptive act under Chapter 93A when undertaken in a business context.

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GEORGIA COURT OF APPEALS TACITLY AFFIRMS HOMEOWNERS ASSOCIATIONS' ABILITY TO UTILIZE COVENANTS NOT TO SUE

By: Marissa A. Dunn and A. Ali Sabzevari

On September 10, 2025, the Court of Appeals of Georgia decided the case of Kinnaird v. Morningview Homeowners Association, Inc. In this case, Kinnaird (homeowner) applied to the Association's Architectural Review Committee to install solar panels on his roof. His application was denied. Kinnaird sued the Association for a declaratory judgment, asking the trial court to declare a ban on solar panels unlawful and not in accordance with the covenants. He also sued for breach of contract, breach of legal duty, interference with property rights, injunction and attorneys' fees.

In response, the Association argued that the Declaration contained a covenant not to sue, barring suits for decisions made by the Architectural Review Committee. The relevant provisions of the declaration read as follows:

Plans and specifications are not approved for engineering or structural design or quality of materials, and by approving such plans and specifications[,] neither the ARC, the members thereof, nor the [HOA] assumes liability or responsibility therefor, nor for any defect in any structure constructed from such plans and specifications. Neither … the [HOA] [nor] the ARC … shall be liable in damages to anyone submitting plans and specifications to any of them for approval or to any owner or property affected by these restrictions by reason of mistake in judgment, negligence or nonfeasance arising out of or in connection with the approval or disapproval or failure to approve or disapprove any such plans or specifications.

Every person who submits plans or specifications and every owner agrees that such person or owner will not bring any action or suit against … the [HOA], [or] the ARC … to recover any damages and hereby releases, remises, quitclaims and covenants not to sue for any claims, demands and causes of action arising out of or in connection with any judgment, negligence or nonfeasance and hereby waives the provisions of any law which provides that a general release does not extend to claims, demands and causes of action not known at the time the release is given.

The trial court agreed with the Association's interpretation and dismissed the suit under the covenant not to sue.

On Appeal, the Court of Appeals applied standard rules of contractual interpretation and found that the trial court erred. Instead, the trial court found that the Declaration did bar suits, but barred suits flowing from engineering design, quality of materials or defects in the structure of construction. It did not bar "all suits" flowing from a decision by the Architectural Review Committee, because of the context in which the covenant was placed in the Declaration.

The Court found that Kinnaird's suit was not of the type barred by the Declaration's covenant not to sue, but that Kinnaird would be barred from bringing suit for defects or the other barred reasons. The case was remanded to the trial court to consider the issues on the merits.

The Court of Appeals' decision affirms that covenants not to sue are enforceable within the context of the Declaration and under ordinary rules of contractual interpretation. This case is a major win for Associations fighting allegations that covenants not to sue are unconscionable or unenforceable under Georgia law.

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GIDOR V. MAGNUS: PENNSYLVANIA SUPREME COURT CLARIFIES STATUTE OF REPOSE FOR HOME INSPECTIONS

By: Nicholas S. Franos

In *Gidor v. Magnus*, the Pennsylvania Supreme Court addressed whether 68 Pa. C.S. § 7512 ("Section 7512") of the Pennsylvania Home Inspection Law constitutes a statute of repose or a statute of limitations. The Court held that the plain language of the statute, combined with contextual analysis, establishes that Section 7512 is a statute of repose, substantially limiting the liability window for home inspectors.

Background

In May 2017, Gidor entered into an agreement to purchase a home. Before completing the purchase, Gidor contracted with Magnus to perform a home inspection. On June 6, 2017, Magnus delivered his inspection report, which did not disclose any issues with the home's foundation. Relying on this report, Gidor purchased the property.

During the winter of 2018-2019, structural damage occurred due to the absence of a foundation beneath part of the home. Gidor filed a complaint against Magnus on August 21, 2019. Magnus responded by asserting that Gidor's claims were time-barred under Section 7512, arguing that the statute operates as a statute of repose. Gidor countered that Section 7512 was a statute of limitations subject to equitable tolling under the discovery rule.

The Court's Analysis

Section 7512 states:

"An action to recover damages arising from a home inspection report must be commenced within one year after the date the report is delivered."

Although the text appears straightforward, ambiguity arose regarding its characterization. To resolve this, the Court examined analogous statutes and case law. It found strong parallels between Section 7512 and Pennsylvania's Construction Statute of Repose, which Magnus cited in support of his position. Guided by precedent, the Court concluded that Section 7512 is a statute of repose.

As a result, Gidor could not invoke the discovery rule to toll the one-year period until the winter of 2018–2019 when the damage was discovered. Because the complaint was filed more than two years after the inspection report was delivered, the claim was time-barred.

Significance for Inspection Firms

The Gidor decision significantly narrows the timeframe for claims against home inspectors and the companies that employ them. This ruling provides greater predictability and clarity regarding potential liability exposure.

To manage risk effectively:

- Maintain accurate records of all inspection reports.
- Implement a tracking system, such as a centralized log or software tool, that monitors report delivery dates and flags those approaching the one-year cutoff.
- Ensure that delivery dates are clearly documented and routinely updated.

By doing so, inspection firms and individual inspectors can reduce the likelihood of disputes and ensure compliance with the statute's strict timeframe.

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ARE YOU ACTUALLY COVERED? A CYBER INSURANCE WARNING FOR REAL ESTATE ATTORNEYS

By: William R. Covino and Nancy M. Reimer

For real estate practitioners, this might be the most important client alert you read this year. Imagine this scenario: you are a real estate closing attorney who has received the funds necessary to pay off a seller's pre-existing mortgage. You follow your firm's written policies, best practices and every safeguard you know of to try to ensure the disbursement is sent to the correct recipient. Yet, despite your best efforts, you later learn that the email you relied upon—and even the "confirmation" you received by telephone—were both generated by a fraudster. Your electronic systems had been compromised, your client's payoff information accessed and you were duped into diverting the funds necessary to satisfy a pre-existing mortgage to a criminal's account. The funds are gone, and there is no way to recoup them at this stage.

While this scenario would undoubtedly be a nightmare—one becoming all too common given the sophistication of cyberattacks and AI-driven impersonation—you may initially take a deep breath, assuming: "at least my insurance will cover this." But will it?

Unbeknownst to many experienced practitioners, several insurance carriers are writing policies containing exclusions to carve out cyber-related incidents unless you or your firm opt for additional coverage. While these provisions vary, they may broadly exclude coverage arising out of the "commingling, improper use, theft, stealing, conversion, embezzlement or misappropriation of funds or accounts." Consequently, they may exclude coverage for social engineering schemes, fraudulent or altered wire instructions, email compromise or impersonation, misdirected or diverted disbursements or losses arising out of system intrusions or phishing attacks. In other words, the very scenario practitioners are often most concerned about is carved out of the policy entirely.

The moment you realize your policy does not cover this loss is the moment you realize that you are left shouldering it yourself. For every real estate practitioner reading this article, follow this simple recommendation: talk to your broker about your cyber coverage. Confirm whether your E&O policy provides comprehensive cyber-coverage for cyber-induced wire fraud, or whether you need a cyber endorsement or cyber policy. Otherwise, you may discover—far too late—your insurance won't resolve this nightmare, and you will be personally on the hook for the loss.

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ABSOLUTE LITIGATION PRIVILEGE CONTINUES ITS EXPANSION IN ILLINOIS

By: Donald Patrick Eckler

In the recent decision, of *Lewis v. Kalbhen*, 2025 IL App (1st) 242110, the Illinois Appellate Court, First District, reaffirmed and meaningfully expanded the scope of the absolute litigation privilege, providing important protection for parties, counsel and litigation support professionals facing claims arising out of conduct undertaken in connection with active litigation.

The case arose out of a contentious divorce proceeding. During the litigation, counsel for the wife retained a private investigative firm to run a license plate search and conduct a background investigation on a third party believed to be financially entangled with the husband. The resulting report contained identifying and financial information, including a Social Security number. After the divorce resolved, the third party sued the wife and the investigative firm, asserting claims for intrusion upon seclusion, public disclosure of private facts, statutory privacy violations, and injunctive relief.

The trial court entered summary judgment for all defendants, and the appellate court affirmed, holding that the absolute litigation privilege barred every common law claim asserted.

As to the wife, the plaintiff argued that her conduct asking a friend to photograph a license plate and forwarding that photograph to her divorce counsel was personal, intrusive, and unrelated to the litigation. The appellate court rejected that framing. The court focused not on motive, but on relevance. Once counsel was retained and litigation was pending, actions taken to identify potential witnesses or financial entanglements fell squarely within the scope of conduct pertinent to the litigation.

The court emphasized that the privilege applies not only to statements, but also to conduct undertaken in furtherance of litigation objectives. Because the investigation ultimately led to discovery relevant to dissipation and asset distribution issues, the wife's actions were protected, even if they were initially motivated by personal concerns.

The most significant aspect of the decision concerns the claims against the private investigative firm. The plaintiff argued that the absolute litigation privilege should not extend to non attorneys, particularly where no written engagement agreement existed and the investigator allegedly acted without compensation.

The appellate court disagreed. It held that investigators retained by counsel act as agents of the attorney and are entitled to the same absolute immunity, provided their work pertains to pending or contemplated litigation. Extending the privilege to investigators, the court explained, is necessary to preserve counsel's ability to investigate claims fully and to obtain information needed to advance a client's case without fear that litigation support professionals will later become targets of derivative lawsuits.

The court also rejected the argument that the scope of the investigation rendered it excessive or irrelevant. Background information, including historical data and identifying details, was deemed reasonably connected to potential dissipation claims and discovery strategy.

Illinois's approach places it firmly within the majority of jurisdictions that interpret the absolute litigation privilege broadly and extend its protection beyond attorneys and parties to those acting at counsel's direction in furtherance of litigation. Many courts across the country recognize that investigators, consultants, and other litigation support professionals must be afforded the same protection as counsel when their conduct is tied to advocacy and case development.

To read the full blog post, click here.

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WHEN THE APPELLATE CLOCK STARTS TICKING: ELECTRONIC DOCKETS, STAMPS AND A HARSH RESULT

By: Donald Patrick Eckler

A recent decision from the Illinois Appellate Court, First District reinforces the simple but unforgiving truth for litigants seeking to appeal: when a judgment order appears on the electronic docket, the clock starts, and a missing date or stamp will not save a late notice of appeal. Practitioners must actively monitor orders rather than wait for perfect clerical form.

In *Carr v. City of Chicago*, 2025 IL App (1st) 241639, the estate of a 13-year-old who died after a police chase challenged a jury verdict in favor of the City. The allegations were serious. The teen was a passenger in a van that fled a traffic stop. The pursuit continued over wet roads until the van struck a fire hydrant and parked vehicles, ejecting him. He was pinned beneath another vehicle and died five days later. The estate alleged the officers engaged in willful and wanton conduct and that their actions caused his death. At trial, the issues centered on whether the pursuing officer's conduct rose to that level and whether it proximately caused the injury, in light of governmental immunity. The jury returned a verdict for the City.

Post trial, the estate timely moved for a new trial, arguing evidentiary error and confusing jury instructions. The motion was denied in a written order signed July 12, 2024, and later bearing that date on its face. The estate filed its notice of appeal on August 14, 2024. The City moved to dismiss for lack of appellate jurisdiction, asserting that the notice was filed after the 30-day deadline. Both parties agreed on the dates of signing and filing of the notice. They disagreed on when the order was entered for purposes of triggering the appeal period.

The dispute turned on the absence of a clerk's file stamp on the signed order when it appeared on the docket. The estate argued the order was not filed until the stamp was added weeks later, on the same day the notice of appeal was accepted. The court rejected that view. It held that posting the signed order to the electronic docket on July 12 constituted filing. It noted that the parties accessed the order through the docket and that actual notice or a file stamp was not required. The clerk's later action correcting the stamp was deemed a ministerial step that did not alter the entry date. The notice of appeal was therefore untimely, and the court dismissed the appeal for lack of jurisdiction.

For practitioners in Illinois, the lesson is clear. Electronic availability of a signed order is enough to trigger the timeline for appeal. Waiting for a stamp or email notice is risky. Firms should build in procedures to check electronic dockets frequently, especially when rulings are expected.

Additionally, when filing a notice of appeal through the electronic system, ensure the date of the order appealed from is accurate. An incorrect future date caused the first attempted filing here to be rejected, adding avoidable delay. Even a favorable verdict can become vulnerable if procedural requirements are overlooked. The safest path is early docket review, prompt filings and careful verification that the form and timing of appellate documents match the rules.

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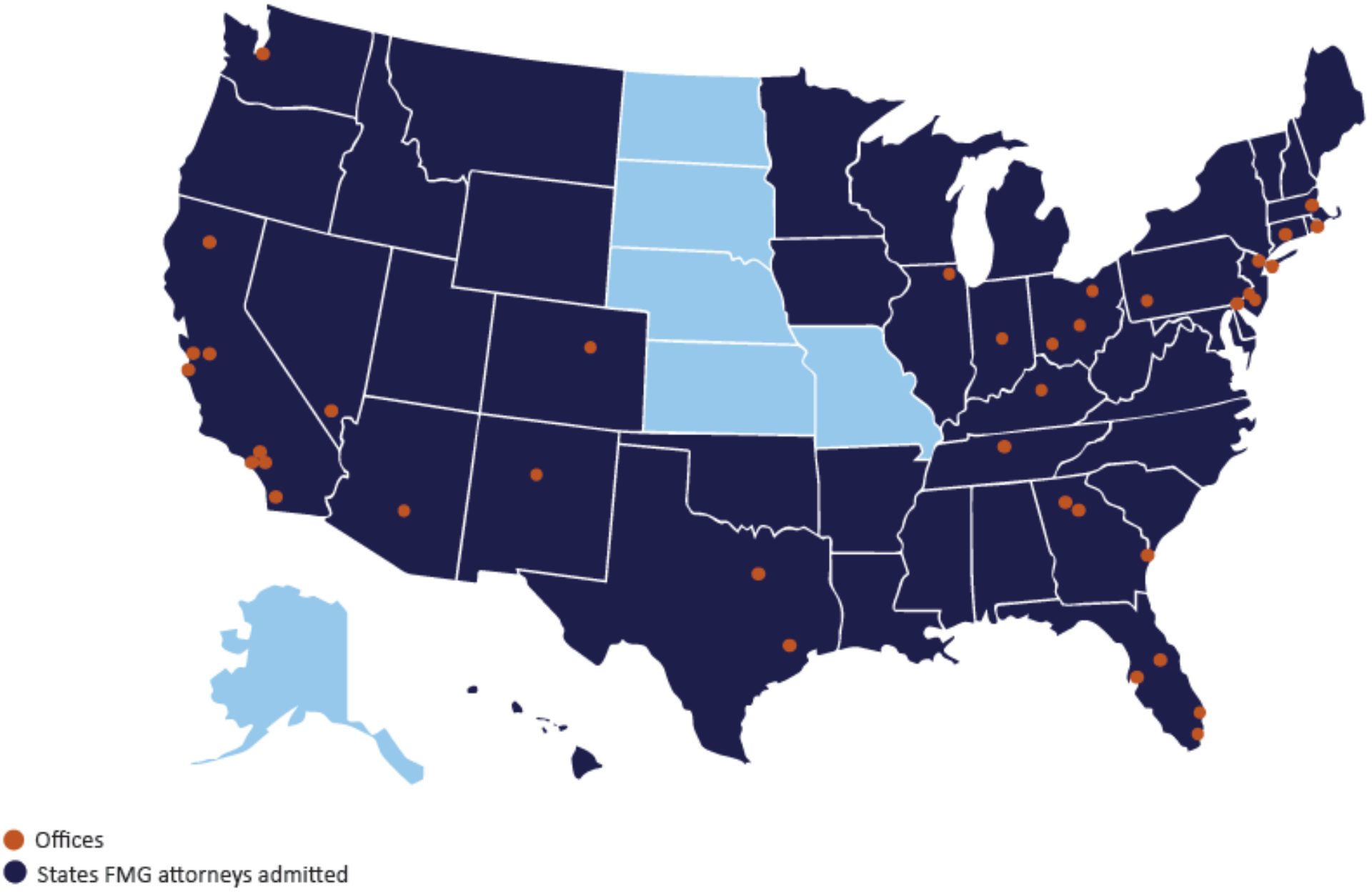

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