

TRANSPORTATION Update

A regular publication of the ALFA International Transportation Practice Group

ALFA International Transportation Practice Group Reports from around the country concerning Legislation, Regulations and Decisions of Interest.

EDITORS' NOTEPAD

The Transportation Practice Group of ALFA International has published *Transportation Update* for about sixteen years. In response to the requests of clients, we updated our extensive website in 2005. We now have an archive of many recent issues of *Transportation Update* on the website including this one. If your first contact with *Transportation Update* is through our website, you can be added to our email distribution list by contacting us through Katherine Garcia. Please add *Transportation Update* to the subject line, and we will email the current issue and each subsequent issue to you as it is published. If you wish to receive *Transportation Update* in hard copy format, contact an ALFA attorney listed at the end of this newsletter, and they can provide this service for you.

The *Transportation Update* is published on our web site, and our primary method of distribution is by email. Electronic publication allows us to include [hyperlinks](#) for the use of our readers. We encourage you to use the hyperlinks feature and our section headings to quickly get to the information that is most interesting to you. The section headings are as follows: Case Notes, Verdicts and Settlements, Practice Tips, and Articles.

Under the Case Notes section of the *Transportation Update*, we report to you about developments in the statutory, regulatory, and common law around the country. The developments under the Case Notes section are of general interest to the trucking community.

The **Verdicts and Settlements** section addresses the results of litigation affecting the trucking industry. We encourage you to report to us about any verdict or settlement that you think is of interest to the trucking community. You may report all such results to the editors of the Update or to Michael K. Sheehy. Michael can be reached as follows: msheehy@plunkettcooney.com.

The **Practice Tips** section of the Update features articles which address matters of practical interest to both those who manage litigation for motor carriers and those who represent them. The essays in this section generally have widespread application throughout the country. In this edition of the Update, **Lee Stephen MacPhee** discusses issues associated with various advances in technology (such as Lane Departure Warning Systems, Rollover Stability Systems, Collision Warning Systems, GPS Data Centers, etc.) and the Federal Rules of Discovery. His Practice Tips is titled [Advances in Commercial Vehicle Technology Systems and the New Rules Regarding E-Discovery: A Perfect Storm?](#)

Under **Practice Tips**, we also feature an essay by **Duke Highfield** and **Benjamin Traywick** titled [The Trouble with Alcohol, Drugs, Driving, and Firing](#) which addresses the pitfalls that confront employers in the transportation industry when dealing

continued on next page



WILL H. FULTON, ESQ.

Co-Editor
WOODWARD,
HOBSON & FULTON, LLP
2500 National City Tower
Louisville, Kentucky 40202
(502) 581-8000
wfulton@whf-law.com
www.whf-law.com



MARC HARWELL

Co-Editor
LEITNER, WILLIAMS,
DOOLEY & NAPOLITAN
801 Broad Street, 3rd Floor
Chattanooga, Tennessee 37402
(423) 265-0214
marc.harwell@leitnerfirm.com
www.leitnerfirm.com

¹ All hyperlinks are [underlined](#).

Hyperlinks can be activated by placing the cursor on them and left clicking with the mouse. Links in the Contents go to specific points in the newsletter. Links to websites take you to the website, and links to email addresses open an email addressed to that person.

EDITORS' NOTEPAD (CONT.)

with employee/driver alcohol and drug abuse.

Under the **Articles** section we feature several articles of interest, and they are as follows:

Larry Warren and **Nathan Mechler** have prepared an article that addresses *MCS90B Endorsements* and its application in a *foreign jurisdiction* such as Mexico.

Jerry Sallings analyzes a recently issued opinion from Washington DC that vacates the FMCSA's *11 hour rule and the 34 hour restart provision*.

John Tarpley and **Chris McCarty** present insight into the introduction of *blogged statements into evidence*.

Will Fulton, **Lisa Lang**, and **Shane O'Bryan** discuss considerations for the *effective discovery of electronic data* – this is a follow up article to a series of insightful commentaries from this Kentucky firm about electronic discovery complexities.

We welcome comments, suggestions for improvement, and topics which you would like for us to address in future issues. It is our goal to provide timely relevant information to members of the trucking community. Our editors can be contacted as follows:

WILL FULTON
wfulton@whf-law.com

MARC HARWELL
marc.harwell@leitnerfirm.com

FUTURE EVENTS

The Transportation Practice Group of ALFA International presents a multi-day seminar for members of the Trucking Industry each year. **The 2008 Transportation Seminar will be held in Palm Beach, Florida at The Breakers from April 30 to May 2, 2008.**

At present, we plan to offer the following topics for discussion/presentation: Managing the Scene of the Accident; Preserving Evidence at the Scene; E-Discovery and Spoliation; Defending Independent Theories of Liability and Damages against the Company; Defending against Allegations of Criminal Conduct; and A Mock Trial.



We will likely use panel discussions and breakout sessions to present the materials and foster the exchange of information. We will include representatives of trucking companies and insurance companies in the presentations to ensure that the program provides more perspective and insight for you. If you want us to address a particular topic or have an idea about the presentation of a subject, please let us know. Our seminars are offered in response to requests from clients and from guests who attend our conference and seminars. We always want to hear from you.

The internet site for the venue is www.thebreakers.com.

Questions, comments and suggestions about this program can be directed to our program chair, Danny M. Needham, at the number listed below or by email at dmneedham@mhba.com. Logistical questions about the program can be directed to Katherine Garcia at the number listed below or by email at kgarcia@alfainternational.com. We will also post information on our website at www.alfainternational.com.

Contact Information

Group Chair:
Gregory D. Conforti
(312) 372-0770

Group Vice-Chair:
Paul T. Yarbrough
(505) 884-0777

Program Chair:
Danny M. Needham
(806) 372-5050

ALFA Contacts:
Katherine Garcia
(312) 642-2215
Amy Sammon
(312) 642-5244

Regional Directors for Content

WEST: Joseph Balestrieri,
ROBINSON & WOOD, INC.,
San Jose, CA

CENTRAL: Martin Diamond,
BUTT THORNTON & BAEHR PC,
Albuquerque, NM

SOUTH: John Tarpley,
LEWIS, KING, KRIEG &
WALDROP, P.C.,
Nashville, TN

MIDEAST: Robert Burke,
JOHNSON & BELL, LTD.,
Chicago, IL

EAST: Curtis Stambaugh,
MCNEES WALLACE & NURICK LLC,
Harrisburg, PA

FUTURE ISSUES OF TRANSPORTATION UPDATE

The winter issue of
Transportation Update will be
published in January.

CONTENTS

The following links are to
sections of this newsletter.
Activate a link by clicking on
desired link:

1. EDITORS NOTEPAD

2. FUTURE EVENTS

3. FUTURE ISSUES OF TRANSPORTATION UPDATE

4. CASES, REGULATIONS AND STATUTES

Georgia
Illinois
New Mexico
North Carolina
Ohio
Pennsylvania
South Carolina
Tennessee
Sixth Circuit

5. VERDICTS AND SETTLEMENTS

Arkansas
Colorado
Nevada

6. PRACTICE TIPS

[Advances in Commercial
Vehicle Technology Systems
and the New Rules Regarding
E-Discovery: A Perfect Storm?](#)
By Lee Stephen MacPhee

[The Trouble with Alcohol, Drugs,
Driving, and Firing.](#) By Duke
R. Highfield & Benjamin A.
Traywick

7. ARTICLES

[MCS90B Endorsement-
Does the Endorsement
Apply Coverage to a Foreign
Jurisdiction Which is Outside
of the Exclusive Coverage
Territory of the Insurance
Policy?](#) By Larry D. Warren
and Nathan L. Mechler

[DC Strikes Down 11-Hour
Rule](#) By Jerry J. Sallings

[Blogging for Evidence](#)
By John R. Tarpley and
Chris W. McCarty

[Considerations for Effective
Discovery of ESI](#) By Will
H. Fulton, Lisa K. Lang,
and P. Shane O'Bryan

8. TRANSPORTATION PRACTICE GROUP DIRECTORY OF MEMBER FIRMS

CASES, REGULATIONS, & STATUTES

GEORGIA

FAVORABLE GEORGIA RULING ON GRAVES AMENDMENT CASE

The United States District Court, Southern District of Georgia, recently entered summary judgment on behalf of a national truck leasing company represented by Dennis Keene of Hunter Maclean in Savannah, Georgia, holding that 49 U.S.C. §30106, commonly referred to as the Graves Amendment, which is part of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub.L. No. 109-59, 119 Stat. 1144, preempts state law vicarious liability claims brought against a leasing company when one of its rented trucks is involved in a highway collision. In [Seymore v. Penske Truck Leasing Co., L.P.](#), 2007 WL 2212609 (S. D. Ga. 2007), the plaintiff received severe personal injuries resulting from an accident with a rented Penske truck. The driver of the rented truck, who is not the same person that rented the vehicle, was cited for drunk driving. As the owner of the rented truck, the plaintiff sued Penske under two theories. First, the plaintiff alleged that Penske is liable based on Georgia's financial responsibility law, which imposes financial liability on a rental company, if its renter fails to have insurance coverage. Second, the plaintiff claimed

that as the owner of the truck, Penske is vicariously liable for the actions of the renter. A separate lawsuit against the renter was filed in state court. The summary judgment motion argued that the Graves Amendment preempts state laws that seek to hold a motor vehicle rental company/ lessor vicariously liable for injuries caused by the driver of one of its rented vehicles and that Georgia's Financial Responsibility statute does not create a direct cause of action against an insured leasing company. The relevant portion of the Graves Amendment states as follows: § 30106. Rented or leased motor vehicle safety and responsibility

(a) In general. An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if-

(1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and
(2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).

.....

49 U.S.C. § 301063

The plaintiff Seymore did not argue the applicability of the Graves Amendment. Instead, he argued that it is an unconstitutional exercise

of Congress' Commerce Clause power. The court quickly discounted the argument noting that the Amendment regulates the rental of motor vehicles, "which are the quintessential instrumentalities of modern interstate commerce." Summary judgment was also granted as to the applicability of Georgia's financial responsibility statute as that statute does not permit a direct action against a leasing company when the leasing company is not self-insured. In this instance, Penske is not self-insured, and Georgia's financial responsibility statute does not create a cause of action against it.



Dennis B. Keene
HUNTER, MACLEAN
EXLEY & DUNN
200 E. Saint Julian Street
Savannah, GA 31412
Tel: (912)236-0261
dkeene@huntermaclean.com
www.huntermaclean.com

ILLINOIS

ILLINOIS COURTS ALLOW PLAINTIFFS TO COLLECT DAMAGES FOR MEDICAL BILLS WHICH ARE UNPAID AND FOR WHICH THE PLAINTIFF HAS NO RESPONSIBILITY TO PAY

The rule in Illinois has long been that a plaintiff may recover the cost of reasonable medical bills necessarily incurred in obtaining treatment for injuries sustained due the negligence of another. If a medical bill has been paid, there is a presumption that the bill was fair and reasonable.

In today's environment, it is well known that medical care providers' bills are frequently paid by insurance carriers at a reduced rate from the amount reflected on the bill. Medical care providers frequently accept the reduced rate as payment in full.

In *Arthur v. Catour*, 833 N.E.2d 847 (Ill. 2005), the Illinois Supreme Court was faced with the issue of whether the full amount of the bill or only the amount accepted as payment in full by the medical care provider represented the fair and reasonable expense for which plaintiff could seek compensation. Since the plaintiff was not responsible for that portion of the bill which was written off, defendant logically argued that the amount for which the Plaintiff had no responsibility to pay could not be included as an item of compensatory damages. Rather than setting forth a bright line rule, the Illinois Supreme Court held that while a plaintiff cannot make out a *prima facie* case that the entire bill was reasonable, based upon the unpaid bill alone, the plaintiff may establish through other means (such as testimony of the treating physician or an expert witness) that the entire bill was fair and reasonable even though the plaintiff had no obligation to pay it in full.

In a dissenting opinion, Justice McMorrow cautioned that the court should have issued a bright line opinion and decided whether the entire bill was admissible or whether only that portion of the bill which was paid and/or for which the plaintiff was responsible for payment was the just measure of damages. Justice McMorrow cautioned that the majority's holding would create undue expenses and issues in trials where each side would have to call witnesses to establish whether or not the bill was reasonable.

As Justice McMorrow anticipated, there continues to be controversy in Illinois regarding the admissibility of unpaid medical bills which the plaintiff is not responsible to pay. In Wills v. Foster, 867 N.E.2d 1223 (Ill. App. Ct. 2007), the Illinois Appellate Court held that when medical expenses are paid through Medicare or Medicaid, the plaintiff has not incurred liability for the complete medical expense billed by the doctor, has not bargained for insurance coverage, and has not paid premiums as part of a contractual relationship. Therefore, the application of the collateral source rule does not apply, and the plaintiff can only recover the amount of the medical bill actually paid by Medicare or Medicaid.

In Kunz v. Little Company of Mary Hospital and Health Care Centers, 869 N.E.2d 328 (Ill. Ct. App. 2007), the Illinois Court of Appeals held that a party seeking admission of an unpaid bill into evidence can establish the bill's reasonableness by

introducing the testimony of a person having knowledge of the services rendered and the usual and customary charges for such services in a similar geographic area. The court held that an expert can render such testimony without having any knowledge of the billing practices of the individual medical care providers involved. All that the expert needs to know is that the fees are reasonable for the general geographic region. The court held that whether the doctor is familiar with the billing process or practices of individual physicians, whose bills are at issue, can be raised during cross examination and weighed by the jury.

Thus, as Justice McMorrow predicted, trials within trials regarding the reasonableness of medical bills are likely to continue in Illinois personal injury actions.



Robert M. Burke
JOHNSON & BELL, LTD.
33 West Monroe Street
Suite 2700
Chicago, Illinois 60603
Tel: (312)984-9818
burker@jbltd.com
www.jbltd.com

NEW MEXICO

18-WHEELERS ARE NOT INHERENTLY DANGEROUS

In Valdez v. Yates Petroleum Corp., 155 P.3rd 786 (N.M. Ct. App. 2007), an employee truck driver of an independent contractor hired by the defendant petroleum company to haul fresh water to its drilling site was involved in an accident resulting in the death of the decedent. The New Mexico Court of Appeals affirmed the trial court's decision that the operation of an 18-wheel water truck was not inherently dangerous and that the petroleum company could not be held liable for its selection of the independent contractor.

New Mexico law provides that unless the work of an independent contractor is inherently dangerous the employer of the independent contractor will generally not be held responsible for the negligence of said contractor or his employees. This reflects the rationale that an employer should not be able to immunize himself from liability by hiring an independent contractor to perform work that is inherently dangerous.

New Mexico articulates a three-pronged test to determine whether an activity is inherently dangerous. First, the activity must involve an unusual or peculiar risk of harm that is beyond the normal routine matter of customary human activity. That is, how rare is the activity and the public's

exposure to it? Second, is the activity such that in the absence of reasonable precautions there is a high probability that harm will result from the activity itself? Third, even if the activity is carried out in its ordinary and expected manner (even without the negligence of a particular actor) does danger flow from the activity itself notwithstanding the existence of reasonable precautions aimed at reducing the expected risk?

In this case, the New Mexico Court of Appeals concluded as a matter of law that the operation of large, 18-wheel trucks on the highway is not inherently dangerous. The court observed that the operation of such trucks is neither unusual, nor does it pose a particular risk. To the contrary, it is a common, daily occurrence with which the motoring public is well aware and therefore poses no peculiar risk. Moreover, it is the negligence of the driver and not the activity itself (when carried out in an ordinary manner) which creates the risk of harm. The court specifically rejected the notion that the probability of harm associated with operating a large truck is any greater than to the operation of a motor vehicle generally.

Of particular note, the New Mexico Court of Appeals observed that the accident involving a large truck is more likely to result in a greater harm in the event of an accident. However, in doing so, the court specifically stated that the analysis should not focus on the resultant damage but rather the danger presented by the activity

itself. The negligence of the driver (not the peculiar risk of harm associated with the operation of the 18-wheel truck on the highway) was the proximate cause of the accident.



Martin Diamond

BUTT THORNTON & BAEHR PC
P.O. Box 3170
Albuquerque, NM 87190
Tel: (505) 884-0777
madiamond@btblaw.com
www.btblaw.com

NORTH CAROLINA

NORTH CAROLINA LEGISLATIVE CHANGE ALLOWS EXPERTS TO TESTIFY REGARDING VEHICLE SPEED IN TRANSPORTATION CASES

Prior to December 1, 2006, experts in accident reconstruction in the State of North Carolina were prohibited from testifying as to their opinion on the speed of vehicles involved in accidents. Specifically, North Carolina law stated that:

A witness who investigates but does not see a wreck may describe to the jury the signs, marks, and conditions he found at the scene, including damage to the vehicle...

however, he cannot give an opinion as to its speed. The jury is just as well qualified as the witness to determine what inferences the facts will permit or require.

Shaw v. Sylvester, 116 S.E.2d 351, 355 (N.C. 1960).

Since *Shaw*, many commentators, including some judges on the Court of Appeals, have expressed their frustration with the precedent set by *Shaw*. They have continually urged the Supreme Court of North Carolina to review the issue of allowing such expert testimony as to the speed of vehicles in accidents based on the technological and scientific advancements now available to accident reconstructionists.

In a sharply written opinion issued by the North Carolina Court of Appeals in *Van Reypen v. Teeter*, 624 S.E. 2d 401 (N.C. Ct. App. 2006), Justice McCullough adhered to the *Shaw* precedent, but in doing so he severely criticized it. Referring to the *Shaw* precedent as “archaic,” Justice McCullough urged the Supreme Court to “set aside a rule that no longer can be justified.” *Id.* at 406. When the North Carolina Supreme Court accepted the Van Reypen case for discretionary appeal, it appeared as though the supreme court would do as Justice McCullough recommended; however, a short time later, the North Carolina Legislature enacted the Motor Vehicle Driver Protection Act of 2006, and the supreme court refused to review the case. N.C. Gen. Stat. §8C-1, Rule 702 (Editors Notes, 2006).

The Motor Vehicle Driver Protection Act of 2006 went into effect on December 1, 2006. *Id.* The Act includes a significant addition to Rule 702 of the North Carolina Rules of Evidence concerning the testimony of experts. N.C. Gen. Stat. §8C-1, Rule 702 (2006). Specifically, subsection (i) was added to Rule 702, stating:

A witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation *may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving.*

Id. at § (i) (emphasis added). It appears that the N.C. legislature realized the need for accident reconstruction experts to be able to give their opinion as to the estimated speed of the vehicles involved in accidents.

The Editors Notes on the additions to the rule state that the new subsections will be applicable to “offenses” occurring on or after December 1, 2006. Although the term “offenses” typically suggests criminal application, Rule 702 has never been limited to criminal cases only. Therefore, it would follow that the application of these additions is not limited to criminal matters but applies to civil proceedings as well. As such, experts should now be allowed to testify as to the speed of vehicles involved in accidents concerning both civil and criminal proceedings.

This change in North Carolina law regarding the admissibility of expert testimony with respect to the speed of vehicles will have a significant impact on transportation cases in North Carolina. Because North Carolina is a contributory negligence state, if an expert is able to prove that a plaintiff was speeding and that the excessive speed contributed to the accident, the plaintiff is generally unable to recover from the defendants. Further, if an expert is able to prove that the actual speed of a tractor-trailer was not excessive, the defense is generally strengthened. [It is important to remember that plaintiffs will have the same opportunity to offer expert testimony regarding vehicle speed and will be able to prove a defendant’s excessive speed, if the facts allow]. Therefore, because North Carolina has joined the majority of jurisdictions in allowing expert testimony with respect to vehicle speeds, juries will be afforded the opportunity to make a more accurate determination of the facts in transportation cases in North Carolina.



David M. Duke
Shannon S. Frankel
 YOUNG MOORE &
 HENDERSON, PA
 3101 Glenwood Avenue
 Raleigh, North Carolina 31627
 Tel: (919) 782-6860
dmd@youngmoorelaw.com
ssf@youngmoorelaw.com
www.youngmoorelaw.com

OHIO

The Ohio Legislature recently passed Amended Substitute H.B. No. 67 with several provisions applicable to the transportation industry. Those changes, and their effective dates, are as follows:

1. OHIO REV CODE ANN § 5577.05, which deals with maximum lengths for various types and combinations of vehicles being operated on public highways, is amended with regard to “saddlemount vehicle transporter combinations”, defined as:

any combination of vehicles in which a straight truck or commercial tractor tows one or more straight trucks or commercial tractors, each connected by a saddle to the frame or fifth wheel of the straight truck or commercial tractor in front of it. OHIO REV CODE ANN § 5577.01 (not amended).

Under former OHIO REV CODE ANN §5577.05, such vehicles could not exceed 75 feet in length. Under the new law, such vehicles still may not exceed 75 feet “when operated on any roadway not designated as an interstate, United States Route or state route, not to exceed three saddlemounted vehicles, but which may include one fullmount.” (OHIO REV CODE ANN §5577.05(C)(5)(b)) However, when driven on one of the above roads, the maximum allowable length is extended to 97 feet, but again, “not to exceed three saddlemounted vehicles, but which may include

one fullmount. (OHIO REV CODE ANN §5577.05 (C)(5)(a). The act also allows these longer vehicles on “reasonable access travel on all other roadways for a distance not to exceed one road mile from any interstate, United States route, or state route.” Id.

The effective date of this statute is June 30, 2007.

2. OHIO REV CODE ANN §5537.16 empowers the Ohio Turnpike Commission to adopt traffic rules regarding the use of “Jake brakes” on the turnpike. A violation of the Commission rules are considered a minor misdemeanor for the first offense, but a fourth degree misdemeanor for subsequent violations. Previously, the Commission had authority to regulate only speed, axle loads, vehicle loads and vehicle dimensions. This provision took effect on July 1, 2007 and as yet, there has been no action by the Commission regarding “jake brakes.”

3. A formerly uncodified law specifying that “three or fewer steel coils are deemed to be a nondivisible load for purposes of special permits issued under section 4513.34 of the Revised Code” and which places the “maximum overall gross vehicle weight of the vehicle and load” at not exceeding 92,000 pounds expired on June 30, 2007. Am. Sub. H.B. 67, Section 555.07 extends this uncodified law to June 30, 2009.

4. The bill also effects those companies operating school buses and/or motor vans in that it places specific duties on those

companies. It amends OHIO REV CODE ANN §3327.10 and requires that:

not later than 30 days after June 30, 2007, each owner of a school bus or motor van shall obtain the complete driving record for each person who is currently employed or otherwise authorized to drive the school bus or motor van. (OHIO REV CODE ANN §3327.10 (F)(1))

It further provides:

- That an owner is prohibited from allowing a person to operate a school bus or motor van for the first time before obtaining the complete driving record. (OHIO REV CODE ANN §3327.10 (F)(1))
- Thereafter, owners shall obtain the person’s driving record not less frequently than semiannually if the person remains employed or “otherwise authorized to drive the school bus or motor van.” Id.
- If there is a break in the driver’s operation of either type of vehicle for a year or more, an owner cannot allow that driver to operate either vehicle until it obtains a complete driving record. Id.
- An owner is prohibited from allowing a driver of either type of vehicle for six years after the date of a violation for which six points under Ohio’s point system. Id. at (F)(2).
- An owner shall not permit any person to operate such a vehicle unless “that person meets all other requirements

contained in rules adopted by the state board of education prescribing qualifications of drivers of school buses and other student transportation.” Id. at (F)(3).

For otherwise qualified drivers, if a driver was convicted of or plead guilty to a violation of OHIO REV CODE ANN §4511.10 (point system), or a substantially similar ordinance prior to two years before this statute becomes law, is not a disqualifying event under (F)(2), above.

The effective date of this statute is July 1, 2007.



Vincent J. Lodico

CRABBE, BROWN & JAMES, LLP
500 South Front Street
Suite 1200
Columbus, Ohio 43215
Tel: (614) 228-5511
vlodico@cbjlawyers.com
www.cbjlawyers.com

PENNSYLVANIA

TRANSPORTATION COMPANIES MAY BENEFIT FROM COURT'S REJECTION OF DEPARTMENT OF REVENUE'S TAX APPORTIONMENT PROCEDURE

On April 27, 2007, Pennsylvania's Commonwealth Court upheld its prior decision in FedEx Ground Package Systems, Inc. v. Commonwealth, 922 A.2d 978 (Pa. Cmwlth. Ct. 2007) in which a three-judge panel rejected the Department of Revenue's longstanding interpretation of Pennsylvania's "revenue-miles" apportionment fraction, which is used to apportion the income and value of transportation companies for Corporate Net Income Tax and Franchise Tax purposes. The court determined that the numerator of the apportionment fraction should be computed by multiplying "Pennsylvania miles" by "Pennsylvania average receipts" per mile rather than by multiplying "Pennsylvania miles" by "everywhere receipts per mile." The Commonwealth filed a Notice of Intent to Appeal with the Pennsylvania Supreme Court on May 25, 2007. Although the Commonwealth Court's decision is not yet final, transportation companies should consider filing protective refund claims if it appears they have overpaid Pennsylvania corporate taxes under the method of calculation adopted by the court.

Companies doing business in multiple states generally apportion their income and value to Pennsylvania using

a three-factor apportionment formula that measures the volume of property, payroll, and sales in Pennsylvania. However, transportation companies are subject to a special apportionment procedure. The Tax Reform Code of 1971 provides that the business income of railroad, truck, bus and airline companies must be apportioned based on the ratio of "total revenue miles within this Commonwealth" to "total revenue miles of the taxpayer everywhere." A "revenue mile" is defined as "the average receipts derived from the transportation by the taxpayer of persons or property one mile." The Department of Revenue has historically divided total receipts by total miles, then multiplied that number by Pennsylvania mileage to arrive at Pennsylvania "revenue miles," which is the numerator of the apportionment fraction. However, this is a "shortcut" that really results in apportionment based on a pure mileage ratio and ignores variances that may result from different types of hauling and different costs incurred in different geographical areas.

The Commonwealth Court ruled that FedEx Ground Package System should be allowed to use a numerator based on revenues actually realized from mileage traveled in Pennsylvania. As the company's average receipts per mile in Pennsylvania were \$2.94 (compared to \$3.93 per mile everywhere), the Department's "shortcut" method substantially overstated the company's Pennsylvania tax liability. The court determined that the Department's interpretation of the statute essentially reduces the apportionment fraction to Pennsylvania miles over

"everywhere miles." The majority stated that this was clearly not the intent of the General Assembly. Otherwise, it would not have specifically defined "revenue mile" in terms of "average receipts." Importantly, the majority also rejected the Department's interpretation of the statute because it failed "to limit the numerator of the fraction to Pennsylvania activity," which is a fundamental principle of tax apportionment.

As a practical matter, some companies may not be able to readily break out Pennsylvania revenues or may be charging rates that are uniform throughout their coverage area. However, transportation companies with the ability to access detailed data should evaluate past Pennsylvania Corporate Tax Reports and file protective refund claims if they believe they have overpaid Pennsylvania tax.



Sharon Paxton
MCNEES, WALLACE,
& NURICK, LLC
100 Pine Street
Harrisburg, PA 17101
Tel: (717) 237-5393
spaxton@mwn.com
www.mwn.com

SOUTH CAROLINA

BLOOD ALCOHOL TEST RESULTS – A LOWER STANDARD

The Supreme Court of South Carolina recently issued an opinion that liberalizes the admissibility of evidence of a driver's consumption of alcohol in motor vehicle accident cases. In Lee v. Bunch, 647 S.E.2d 197 (S.C. 2007), the South Carolina Supreme Court reversed a court of appeals ruling that this type of evidence should have been excluded in the case sub judice. The case involved a motor vehicle accident in which the Plaintiff, John David Lee, had collided with defendant, Robert Allen Bunch, who was driving across the road on which Lee was driving, on a perpendicular path. Lee's motorcycle collided head-on with the side of Bunch's car, throwing Lee from the motorcycle and causing him to sustain numerous and serious personal injuries. As is typical, there was conflicting testimony as to the cause of the accident and as to which party's wrongdoing had more greatly contributed to the accident.

Several hours after the accident as he underwent treatment in the emergency room, Lee spoke with the police officer who was investigating the accident. In conversing with Mr. Lee, the police officer detected the smell of alcohol on Lee's breath. As a result, the police officer proposed a blood alcohol test to which Lee consented and which revealed a blood alcohol level of .036%. At the time, the

South Carolina Driving under the Influence Statute established .10% as the legal standard for intoxication. At a pre-trial hearing in the civil matter, Lee's attorney moved to exclude the results of the blood-alcohol test. The trial court denied the motion, finding that Lee's alcohol consumption would be probative on the question of liability, which the conflicting testimony cast very much into question. The jury ultimately resolved the conflicting testimony in favor of the defendant Bunch, finding that Lee's own negligence had constituted the most substantial contribution to the accident.

Somewhat surprisingly, the South Carolina Court of Appeals ordered a new trial on the basis that the evidence of Lee's consumption of alcohol should have been excluded and that the trial courts' ruling to the contrary had constituted reversible error. The trial court's admissibility ruling had been conducted under Rule 403 of the South Carolina Rules of Evidence, under which courts compare a given piece of evidence's probative value to the case versus its prejudicial effect in the event that it is admitted. Only when prejudice introduced substantially outweighs its probative value should the evidence be excluded. The court of appeals' reversal of the trial court's admissibility ruling regarding the alcohol consumption evidence is surprising because under South Carolina law an appellate court's review of a trial court's admissibility rulings are governed by an abuse of discretion standard which gives great deference to the trial court's ruling. State v. Myers, 596 S.E.2d 488, 492 (S.C. 2004). Indeed, "a

trial judge's decision regarding the comparative probative value and prejudice effect of evidence should be reversed only in exceptional circumstances." State v. Adams, 580 S.E.2d 785, 794 (S.C. Ct. App. 2003).

Noting initially that it found the probative value of Lee's blood-alcohol test results to be slight at best, the court of appeals made two specific findings which governed its opinion. First, with respect to the blood-alcohol test itself, the court emphasized that the .036% blood-alcohol level reflected in the results was well below the .10% established standard for criminal culpability under the D.U.I. statute. Second, the appellate court emphasized that – aside from the blood-alcohol test results themselves – no specific evidence was presented at trial which supported the theory that Lee was impaired at the time of the accident. This lack of supporting evidence for defendants' intoxication theory led the court to find that the prejudice of admitting the evidence of alcohol consumption outweighed its probative value, reversed, and ordered a new trial. On this point, the court relied upon extant South Carolina case law which had held that the mere presence of marijuana in a litigant's system could not, without additional evidence of intoxication, be admitted into evidence. Kennedy v. Griffin, 595 S.E.2d 248 (S.C. Ct. App. 2004).

On certiorari, the South Carolina Supreme Court took issue with the court of appeals' view of the evidence. First, the South Carolina Supreme Court

disagreed with the court of appeals' finding that no evidence was submitted at trial—aside from the blood-alcohol test—that supported the theory that Lee was intoxicated at the time of the accident and that such intoxication had contributed to the accident. The South Carolina Supreme Court found precisely such support in the fact that an eyewitness to the accident had testified that Lee's speed at the time of the accident was 5 to 10 miles per hour in excess of the posted speed limit. Further, the investigating officer had concluded that the impact had occurred left of the center line, suggesting that Lee had strayed from his permissible lane of travel. Addressing the court of appeals' emphasis on the fact that the blood-alcohol test results indicated a blood alcohol level below the criminal threshold, the supreme court focused instead upon expert testimony offered by the defendant Bunch. This expert testimony had shown that while the blood-alcohol level at the time of the test was .036%, the test had been taken several hours after the accident had occurred. Therefore, testified the expert, Lee's likely blood-alcohol level at the time of the accident was much closer to, if not exceeding, the legal criminal limit.

The crux of the supreme court's differing view of the evidence—vis-à-vis the court of appeals' view—was that the supreme court considered the blood-alcohol test results to be supported by additional evidence of Lee's intoxication. The concern in the Kennedy case which had prompted the exclusion of the evidence was that the jury was likely to be misled and

as a consequence the litigant prejudiced by the admission of the evidence regarding marijuana. Although the supreme court in the *Lee* case conceded that the blood-alcohol test results were prejudicial to Lee, the court found that (given the additional evidence of intoxication) the risk of prejudice did not substantially outweigh the blood-alcohol test results' probative value. Therefore, under Rule 403, the blood alcohol test results should have been admitted.

Evaluating the significance of the supreme court's rationale in this case, probably its most prominent feature is that in its wake civil courts are in no way bound by the criminal DUI standard of .10% in evaluating the admissibility of evidence of consumption of alcohol. A second interesting component of the South Carolina Supreme Court's analysis is the court's apparent willingness to find supporting evidence of intoxication in seemingly innocuous facts. While it is difficult to quibble with the court's finding Mr. Lee's apparent crossing of the center line to be evidence of his intoxication, one reasonably might question the court's reliance upon a single eyewitness's testimony regarding Mr. Lee's speed at the time of the accident. First, the eyewitness was a lay person with no particular expertise in estimating motor vehicle speeds. Second, her testimony was that Mr. Lee's speed had exceeded the posted limit by only 5 to 10 miles per hour. For a case (the central issue of which is the probative value of a given piece of evidence) to turn upon such testimony certainly suggests a result oriented opinion.



Duke. R. Highfield



Benjamin A. Traywick
YOUNG CLEMENT RIVERS, LLP
28 Broad Street
Charleston, SC 29402
Tel: (843) 720-5456
dhighfield@ycrlaw.com
btraywick@ycrlaw.com
www.ycrlaw.com

TENNESSEE

TENNESSEE COURT EXAMINES ELEMENTS OF NEGLIGENT ENTRUSTMENT

In *Person v. Wilson*, 2007 WL 1855171 (Tenn. Ct. App. 2007), an unlicensed 16 year-old driver (Bobby Wilson) was involved in an automobile accident at the intersection of a country road with Virginia Dell Person. Wilson was driving his parents, sister, and cousin. His mother was the only licensed driver in the car, but because of dizzy spells she had to stop driving that

day. The family was waiting at a gas station, and they decided to let Bobby, who had not yet obtained his license, drive the vehicle. Bobby had experience driving on the family farm, and evidence showed that Mr. and Mrs. Wilson had allowed him to drive on several prior occasions to various locations. He had never exhibited any reckless tendencies in his prior driving experience.

After Bobby had been driving for a short time, the Wilsons decided to take a shortcut that placed them on Warren Road, with which they were not familiar. Once they were on this road, they needed to locate and turn onto Asbury Road, but they did not know where it was. As Bobby drove along, he did not see Asbury Road or the stop sign at the intersection. He drove through the stop sign and collided with the vehicle being driven by Person. It was undisputed that the stop sign on Warren Road was bent, partially obstructed by foliage, and somewhat faded. There was a dispute as to whether the stop sign was visible.

Two separate civil actions were filed. Person filed a claim against the County for its failure to maintain the stop sign and filed a claim against Bobby and his parents for Bobby's negligent operation of the vehicle. A separate civil action was filed by Ms. Wilson, Mr. Wilson, and Jennifer Wilson, the sister, against the County for the injuries they sustained in the wreck. The cases were consolidated for discovery and trial purposes. At the bench trial,

the court found Bobby Wilson 50% at fault and Coffee County 50% at fault. Bobby, who also filed a claim against the County, was denied any recovery because he was 50% at fault, and under Tennessee's modified comparative fault law was barred from recovery. The County appealed, claiming that the trial court erred by allocating fault against it.

The County contended that the parents were liable for negligent entrustment. The appellate court citing Harper v. Churn, 83 S.W.3d 142, 146 (Tenn. Ct. App. 2001) set forth the elements for negligent entrustment as follows:

- 1 an entrustment of a chattel;
- 2 to a person incompetent;
- 3 with knowledge that the person is incompetent; and
- 4 that is the proximate cause of injury or damage to another.

Negligent entrustment is not based upon imputed negligence but on the separate act of negligently entrusting the vehicle to an incompetent driver. (see Ali v. Fisher, 145 S.W. 3d 557 (Tenn. 2004). The court found that, for one to be negligent for entrusting a vehicle to another, "it must affirmatively show that the entruster had at that time knowledge of such facts and circumstances relating to the incompetency of the entrustee to operate the motor vehicle as would charge the entruster with knowledge of such incompetency." Harper at 146.

The court found that there was no evidence that the Wilsons negligently entrusted the vehicle to Bobby. His prior driving

history showed no evidence of recklessness, and further showed that he had actually driven the vehicle as much as his mother had. The court further cited a Tennessee case, Dukes v. McGimsey, 500 S.W.2d 448 (Tenn. Ct. App. 1973), which states that negligent entrustment cannot be inferred based on the mere fact that the driver did not have a license. The court further held that Bobby's sister, Jennifer, was not negligent in riding with her brother, based upon the fact that she was under the supervision of her parents, and there would have been no justification for her protesting her brother's driving.



John R. Tarpley



David A. Changas

LEWIS, KING, KRIEG & WALDROP, PC
201 Fourth Avenue North
Nashville, TN 37219
Tel: (615) 259-1366
jtarpoley@lewisking.com
dchangas@lewisking.com
www.lewisking.com

SIXTH CIRCUIT

SIXTH CIRCUIT DECISION

The case of Surles v. Greyhound Lines, Inc., 2005 WL 1703153 (E.D. Tenn. 2005) results from an incident that occurred on a Greyhound bus in Manchester, Tennessee, shortly after September 11, 2001. A passenger, Damir Igric, behaved suspiciously on the bus, which was traveling from Michigan to Georgia. After a routine stop in Horse Cave, Kentucky, Igric began walking back and forth on the bus and asking every 15 to 20 minutes the driver when the bus would stop. The bus did not have an entry-resistant barrier next to the driver's seat. The driver, Garfield Sands, was driving on Interstate 24 traveling approximately 65 to 70 miles per hour when, without warning, Igric attacked him from behind with a boxcutter, slitting his throat. Igric then grabbed the steering wheel. Sands was unable to overtake him, and Igric jumped on the steering, trying to get the bus into the median. Sands finally managed to push Igric away from the wheel, but he lost control of the bus in the process. It careened off the road and into the ditch. Sands survived, but Igric was killed. The plaintiff in this case, Sharon Surles, was rendered a paraplegic after damaging her spinal cord.

Surles brought suit in the United States District Court for the Eastern District of Tennessee shortly after the accident. At trial, she recovered 8 million dollars in compensatory damages. The jury awarded no punitive

damages. The evidence at trial showed that her past medical care totaled \$1,580,945, and the low end estimate of future medical care was \$4,677,116. Both parties appealed. The plaintiff only appealed as to discovery of prior incident reports and the subsequent failure of the jury to award punitive damages based upon the fact that it did not have evidence of the defendant's prior conduct in certain areas. The defendant asserted that the district court abused its discretion in the following ways: (1) in admitting plaintiff's proffered experts as qualified and finding their testimony reliable; (2) in admitting prior incident reports into evidence; (3) in declining to instruct the jury on state of the art principles; and (4) in denying its motion for mistrial. The defendant further alleged that the district court should have granted its motion for judgment as a matter of law.

The defendant argued that the court failed to properly apply Daubert in allowing the plaintiff's experts. In specific, the defendant argued against the qualifications and the reliability of the testimony of the plaintiff's experts. Essentially, the defendant argued that the court abandon its gatekeeping role under Daubert. The plaintiff called one expert who had a law enforcement background and then worked as a consultant in the issues of threat management. The second expert was a mechanical engineer who had a specific focus on busses for a period of several years. In fact, in the early 1990's, he had designed an entry-resistant barrier to protect bus drivers from passengers. Both of these experts were admitted. The

Sixth Circuit upheld the district court's decision to allow them to testify based upon Daubert and its progeny and Rule 702 of the Federal Rules of Evidence. The court found that the testimony of the experts, while not possessing "scientific" expert knowledge, did constitute "technical or other specialized knowledge" under Rule 702.

The court also affirmed the district court's decision to limit the plaintiff's discovery of prior incidents that were "substantially similar" to the one at issue to four years prior to the date of incident. The defendant made a showing that to go beyond this scope, which the plaintiff originally requested, would be unduly burdensome. Citing very specific facts, the defendant argued that the incidents were not substantially similar, and thus should have been excluded. The court disagreed and found that the district court did not abuse its discretion because the incidents that were admitted at trial were substantially similar to the one at issue.

The court also refused to overturn the district court's decision on the defendant's request for a jury instruction on state of art. The court cited Webster v. Edward D. Jones & Co., L.P., 197 F3d 815, 820 (6th Cir. 1999), which states that a district court commits reversible error in refusing to give a jury instruction where "(1) the omitted instructions are a correct statement of the law; (2) the instruction is not substantially covered by other delivered charges; (3) the failure to give the instruction impairs

the requesting theory of the case.” The court further found that state of the art instructions generally were given in the context of product liability cases rather than the negligence context. The court further found that generally accepted rule is that industry standards may be proven as some evidence of care but are not conclusive. The defendant had cited the fact that there were no federal regulations requiring passenger barriers to be placed in busses. The court further found that the district court’s instruction on proximate cause was sufficient. Finally, it stated that mere compliance with the state of the art does not suffice to relieve common carriers of liability in negligence.

The fourth area in which the Sixth Circuit refused to overturn the lower court was on the issue of the granting of mistrial. The defendant argued that plaintiff’s counsel’s statements in his closing argument were overly prejudicial. Plaintiff’s counsel had stated in his argument that the jury’s decision would determine what kind of life the plaintiff would live in the next 20 years, or whether she would even live those years. The court disagreed that this was prejudicial.

Finally, the court refused to overturn the lower court’s decision to deny the defendant’s motion for judgment as a matter of law based upon the fact that the incident in question was foreseeable.

The court refused to reverse itself on the limiting scope of its decision on the admissibility of

prior incident reports beyond the scope of the four years prior to the date of the incident, and thus did not overrule the lower court’s decision on punitive damages.



Richard W. Krieg



David A. Changas
LEWIS, KING, KRIEG
& WALDROP, PC
P.O. Box 2425
Knoxville, TN 37901
Tel: (865) 546-4646
rkrieg@lewisking.com
dchangas@lewisking.com
www.lewisking.com

VERDICTS AND SETTLEMENTS

ARKANSAS VERDICT IN TRUCKER’S ATTEMPTED MURDER CASE

Verdict: Not guilty of attempted murder second degree (3 counts), aggravated assault (3 counts), criminal mischief, battery in the second degree (3 counts), and endangering the welfare of a minor, second degree.

Judge: Honorable Harold Irwin (Lawrence County Circuit Court)

Prosecuting Attorneys: Carl A. Powell and Joe Grider

Exposure: 126 years and/or fines up to \$120,000

Defense Attorneys: Jerry J. Sallings, Wright, Lindsey & Jennings LLP

Facts: On Sunday morning October 3, 2004, Barbara Garcia was driving an 18-wheeler for Comstar pulling a load on a rural two-lane highway in north Arkansas. A 2000 Lincoln LLS driven by Glen Talley and occupied by his wife and 4-month old child passed Garcia’s truck. The accounts between Talley and Garcia vary as to the events leading up to the crash, but ultimately the Lincoln was struck in the driver’s side, spun from the highway and flipped to the hood before coming to rest. Talley claims that Garcia was angry because he passed her and, therefore, she began to ram him in the rear. Garcia says that

Talley was angry because she initially kept him from passing and that once he did pass her he began to slam on his brakes trying to get her to pull over for a confrontation. There were two independent witnesses following the truck who gave accounts similar to Talley's. Pretrial investigation uncovered the fact that Talley had a long history of violent behavior including two separate bar-room brawls that resulted in misdemeanor assault charges; an aggravated assault charge that was reduced to a misdemeanor when he drove through a police roadblock; a misdemeanor domestic battery charge filed by his ex-girlfriend; and assault charges resulting from Talley's behavior in other incidents. The trial judge refused to allow any of the prior activity of Talley into evidence. Talley and his wife, an attractive lady, gave tearful testimony at trial of the ordeal that they claimed traumatized their daughter, Jade. There were no serious injuries suffered by any of the Talleys. Prior to the criminal charges being filed, the Talleys' retained Bobbie McDaniel, a prominent plaintiff attorney from north Arkansas (his son is now the elected Arkansas Attorney General). McDaniel filed a multi-million dollar lawsuit claiming punitive damages for the "road rage" evidenced by Garcia. Garcia grew up in New York City and was operating out of California. However, the local jurors found compelling the fact that photographs taken of the Lincoln taken shortly after the accident failed to evidence any damage to the rear of the Lincoln that would have been consistent with Talley's account of the

accident. Garcia also did a good job testifying. The jury returned with not guilty verdicts on all counts in less than 45 minutes. Since the criminal verdict came in, there has been no activity in the civil case.



Jerry J. Sallings
 WRIGHT, LINDSEY &
 JENNINGS, LLP
 200 W. Capitol Avenue
 Suite 2300
 Little Rock, AR 72201
 Tel: (501) 371-0808
jsallings@wlj.com
www.wlj.com

**Favorable Arkansas Trial Verdict
 Where Trucker's Drug Test Was
 Positive**

Verdict: Defense verdict on wrongful death claim.

Judge: Honorable Bynum Gibson
 (Desha County Circuit Court)

Prosecuting Attorneys: Charles
 Sidney Gibson, Dermott, Arkansas

Demand: \$850,000

Blackboarded Damages:
 \$3,000,000

Defense Attorneys: Jerry J.
 Sallings, Wright, Lindsey &
 Jennings LLP

Offer: \$300,000

Plaintiff Expert: Larry Williams,
 accident reconstructionist

Defendant Expert: John Bentley,
 accident reconstructionist,
 Bentley Technical Services, Inc.
 110 Shady Lane, Perryville, AR
 72126, Ph: 501-333-2480

Facts: On April 4, 2006 at around 8:00am, Jeffery Currens was operating an 18-wheeler for a small company out of Forrest City, Arkansas. He was hauling a load of grain on a two lane highway outside of Dumas, Arkansas. As he approached a curve to his left he realized that a blue pickup traveling toward him was in his lane. Currens was traveling 60mph and could not stop. At the last second, Currens pulled to the left to avoid the truck, the blue truck at that time pulled into his path and a collision occurred that resulted in the death of the driver of the blue pickup. The area of impact was not in Currens lane, but there was an independent witness following Currens' truck who gave a statement to the police that the blue truck was in the wrong lane. A drug screening test was taken from Currens that revealed positive results for marijuana, cocaine and methamphetamine. However, a drug screening test of the deceased driver revealed positive results for cocaine. Currens was ultimately charged with negligent homicide but the civil jury trial proceeded before the criminal case. Shortly after the accident, plaintiff's counsel, Mr. Gibson, had obtained a statement from the independent

witness stating that he claimed he was really not sure whether the blue truck was in the wrong lane prior to the accident or not. Although there were motions to exclude the drug test results from both drivers, the trial judge allowed all of the drug evidence in at trial. The jury returned a defense verdict. Currens' civil counsel, Jerry Sallings, also represented him in the criminal charge of negligent homicide. Currens' motion to suppress the drug test in the criminal trial was granted. Shortly after the civil trial verdict and the motion to suppress were granted, the criminal charges were dismissed. An interesting issue in the civil trial was whether evidence of positive drug screening results would be admissible to establish intoxication. Both parties relied upon the case of *Simco v. Ellis*, 303 F.3d 929 (8th Circuit 2002) for the proposition that since drug screening tests are incomplete and therefore not reliable, and because any evidence of intoxicants is extremely prejudicial, absent a confirmation test of the presence of intoxicants, the screening test would not be allowed. The trial judge held that there was sufficient evidence of intoxication of Currens in addition to the drug screening test (dilated eyes, accident occurring outside of his driving lane) that evidence of drug screening results would be admissible as to Currens. The court held that the drug screening results would be admissible as to Jones because he was making a claim for wrongful death damages and the jury was instructed to consider his "sobriety", his "life expectancy", and his expected

"moral contributions to his children".

Jerry J. Sallings
 WRIGHT, LINDSEY
 & JENNINGS, LLP
 200 W. Capitol Avenue
 Suite 2300
 Little Rock, AR 72201
 Tel: (501) 371-0808
jsallings@wlj.com
www.wlj.com

VERDICT REPORT COLORADO

Bruce Menk of the Denver ALFA firm of Hall & Evans, LLC recently tried a case of admitted liability on behalf of Motor Cargo which is a subsidiary of UPS Freight. The case arose out of a low speed accident where the Motor Cargo tractor-trailer rear-ended an automobile being driven by the plaintiff. The plaintiff claimed to have injured his shoulders, neck and back as a result of the accident. Over the course of the next five years, the plaintiff had three major surgeries: an open repair of his right rotator cuff; bilateral decompressive laminectomies and medial facetectomies of both his L-4 and L-5 vertebrae as well as a L4-5 discectomy; and an anterior cervical discectomy and fusion of C3-6. Medical bills totaling \$141,000 were admitted into evidence at trial.

At the time of the accident, the plaintiff was 52 years old and was employed as a Brew house Supervisor at Coors. He claimed that his injuries caused him to retire early at age 59, resulting in an economic loss of \$569,000.

Prior to trial, the plaintiff's lowest demand was \$1,950,000. The Defendant had made an opening offer of \$100,000. Two weeks before trial, the plaintiff was approached with the proposition that the defendant would probably pay \$500,000 if that would settle the matter. The plaintiff simply rejected that suggestion. During the trial, the plaintiff was offered \$300,000, which was withdrawn when the jury retired for deliberations. After a day of deliberations, the jury returned a verdict in favor of the plaintiff in the amount of \$120,000.

The style of this case is Martinez v. Carder and Motor Cargo, Inc., and it was tried in the District Court of Jefferson County Colorado (Case No., 2005-CV-1129).



Bruce A. Menk
 HALL & EVANS, L.L.C.
 1125 17th Street, Suite 600
 Denver, CO 80202-2037
 Tel: (303) 628-3348
menkb@hallevans.com
www.hallevans.com

VERDICT REPORT NEVADA

Rasey v. Federal Express involves a personal injury, multiple vehicle accident. The defendant Nastor was the driver for Fed Ex. While attempting to execute a lane change, the right front of the Fed Ex truck struck the left rear of the vehicle that the defendant Carlson was operating. This impact caused Carlson's vehicle to spin counter clockwise and travel sideways into on-coming traffic where it collided with the plaintiff's vehicle.

The plaintiff's mother was operating the vehicle, and the plaintiff's 15 year old son was a passenger. The plaintiff's mother alleged that she sustained various soft tissue and epidermal injuries with residual pain in the right leg below the knee. She also complained of chronic pain and impaired capacity to perform employment duties. The plaintiff's son complained of soft tissue injuries plus emotional trauma. The plaintiff brought suit against Federal Express Corporation, Bush Transportation Systems, Inc., Nastor, Carlson, and Galabiz. The defendant Carlson was operating a vehicle owned by the defendant Balabiz, and the defendant Nastor was operating the Fed Ex vehicle in the scope and course of his employment.

The defendant Nastor alleged that he was properly operating his vehicle while in the process of attempting to yield the right of way to an oncoming emergency vehicle. Mr. Nastor further stated that Mr. Carlson hit the Fed Ex truck which ultimately caused Mr.

Carlson's vehicle to spin out of control. According to Mr. Carlson, Mr. Nastor negligently merged into Carlson's lane of travel absent any warning.

During the third day of trial, the plaintiff's son settled for \$1,500. At the close of evidence, the defendants Fed Ex, Galabiz, and Bush Transportation were dismissed as a matter of law. The jury deliberated for two hours and found in favor of the defendant Carlson. The plaintiff was awarded \$147,288 against the defendant Nastor. Rasey v. Federal Express Corporation, Consolidated Case Nos. CV A451567B and A454521B, Decided on March 28, 2007 in Nevada's Eighth Judicial District Court, Dept. 7 by Judge Stewart Bell.



Jonathan B. Owens
ALVERSON, TAYLOR,
MORTENSEN & SANDERS
7401 W. Charleston Blvd.
Las Vegas, NV 89117
Tel: (702) 384-7000
jowens@alversontaylor.com
www.alversontaylor.com

MACDONALD V. ATC/ VANCOM OF NEVADA AND BROOKER

MacDonald v. ATC/ Vancom of Nevada and Brooker is a personal injury case involving a collision between a bicyclist and an ATC

bus. The plaintiff brought suit against ATC claiming that the defendant Booker negligently operated the bus while in the course of her employment. The plaintiff alleged that she was struck down by the bus which then ran over the plaintiff's legs. The plaintiff claimed to have suffered a fractured right angle, a fractured left foot, and a spinal injury. She was wheelchair bound for six weeks.

The defendant argued that the plaintiff was negligent for failing to wear a helmet. During closing arguments, the plaintiff's attorney asked the jury to award \$15,216 in past medical expenses, \$625,000 for past pain and suffering, \$249,895 in future medical expenses, and \$750,000 for future pain and suffering. After a one day trial, the jury deliberated for forty-five minutes and found the plaintiff to be 20% at fault and the defendants to be 80% at fault. The jury ultimately awarded the plaintiff \$47,170.25. McDonald v. ATC/Vancom of Nevada LTD and Brooker, Case No. CV A485373, Decided on March 3, 2007 in Nevada's Eighth Judicial District Court, Dept. 12 by Judge Michelle Leavitt.

Jonathan B. Owens
ALVERSON, TAYLOR,
MORTENSEN & SANDERS
7401 W. Charleston Blvd.
Las Vegas, NV 89117
Tel: (702) 384-7000
jowens@alversontaylor.com
www.alversontaylor.com

HERSHEY V. HENRI SPECIALTIES COMPANY, INC. AND SCHMIDT

Hershey v. Henri Specialties Company, Inc. and Schmidt is a personal injury case involving a multiple vehicle rear-end collision. According to the plaintiff, she was rear-ended by the defendant Schmidt while stopped for traffic on Interstate Highway 15. The plaintiff alleged that this collision propelled her forward causing her to impact the vehicle in front of her. The defendant Schmidt was operating his vehicle while in the course and scope of his occupational duties as a sheet metal worker for Henri Specialties. Mr. Schmidt admitted rear-ending the plaintiff's vehicle; however, he stated that she struck the vehicle in front of her first. The motorist and passenger in the vehicle ahead of the plaintiff stated that they both felt two separate impacts.

As a result of the accident, the plaintiff alleged that she sustained a herniated cervical disk, residual chronic pain, and will require future surgery. The plaintiff's physician testified that her chronic pain caused limited range of motion. The physician testified that the plaintiff will require ongoing medical management. However, a video surveillance showed the plaintiff with full range of motion, and it was the opinion of a physician on behalf of the defendant that the plaintiff had made a full recovery. After a five day trial, the jury deliberated for two-plus hours and found in favor of the defendants. Hershey v. Henri

Specialties Company, Inc. and Schmidt, Case No. CV_A476598, Decided on March 9, 2007 in Nevada's Eighth Judicial District Court, Dept. 23, by Judge Charles Thompson.

Jonathan B. Owens
ALVERSON, TAYLOR,
MORTENSEN & SANDERS
7401 W. Charleston Blvd.
Las Vegas, NV 89117
Tel: (702) 384-7000
jowens@alversontaylor.com
www.alversontaylor.com

PRACTICE TIPS

ADVANCES IN COMMERCIAL VEHICLE TECHNOLOGY SYSTEMS AND THE NEW RULES REGARDING E-DISCOVERY: A PERFECT STORM?¹

Advances in technology have had a continuing, profound impact on each of us and owners and operators of commercial vehicles are certainly no exception. Newer on-board safety technologies, such as Lane Departure Warning Systems ("LDWS"), Rollover Stability Systems and Collision Warning Systems can be expected to present new opportunities and challenges. The American Trucking Associations-supported Federal Motor Carrier Safety Administration's proposed rule regarding the use of electronic on-board recording devices on commercial vehicles, which some say outlines a sensible approach to the greater implementation of technology designed to improve safety and document driver compliance with work and rest rules, will likely further change the landscape. Layered over existing technology such as computerized equipment management systems (such as Qualcomm's GlobalTRACS®), GPS datacenters built into a shipping containers, advances in the technology of motor vehicle event data recorders ("black boxes"), and even mundane voice- and e-mail communications, owners and operators of commercial vehicles now routinely have access to electronic data of incomprehensible,

¹ Author is Lee Stephen MacPhee of Morrison Mahoney, LLP, located in Boston, MA.

unprecedented proportions. At the same time these technologies advance, the Federal Rules of Civil Procedure (“Fed.R.Civ.P.”) with respect to production of electronic evidence (“e-discovery²”) also advance. Fed.R.Civ.P Rule 34³ provides for the discovery of documents and other information from opposing parties. Historically, “documents” has meant tangible paper documents, but as the business world has changed with technology, the scope of discovery in litigation has been transformed. The text of Rule 34 provides for e-discovery by permitting the discovery of any “electronically stored information - including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained - translated, if necessary, by the respondent into [a] reasonably usable form.” As with all other discovery, computer or electronic data (including metadata) is discoverable if the information is relevant to the subject matter of the lawsuit; not unnecessarily cumulative or duplicative; the burden or expense does not outweigh its benefit; and it is not subject to a claim of privilege nor protected by the work product doctrine.

Consequently, a formerly-routine litigation document request might now trigger a “litigation hold⁴”

² E-discovery has also been described as “electronically stored information” or “ESI.”

³ E-discovery is also impacted by Rules 16, 26, 33, 37 and 45.

⁴ A “litigation hold” is a notice given to all necessary employees and others (e.g. outside contractors and lawyers) that removes certain documents and information from the normal information retention and destruction system. A proper litigation hold prevents inadvertent destruction of documents through

demand seeking the retention of “any and all electronic data relevant to the operation of the commercial vehicle in the thirty days prior to the accident, including maintenance.” Generally, a party to litigation has a duty to preserve evidence over which it had control and “reasonably knew or could foresee was material to a potential legal action.” The implications to an operator of a fleet of commercial vehicles might well be enormous, to say nothing of the cost and logistics associated with such an effort, however, the scope of what it is necessary to preserve will vary widely between and even within organizations depending on the nature of the claim and the information at issue.

And what are the consequences of failing to preserve electronic evidence? The courts have imposed a number of sanctions available for a party’s failure to preserve (or intentional deletion of) electronic discovery. Spoliation of evidence has been defined as “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” Generally, in order to prove spoliation, a party must show (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a “culpable state of mind” and (3) that the destroyed evidence was “relevant” to the party’s claim or defense. In the seminal decision regarding

the regular working of an information retention system.

the obligations of parties to preserve electronic evidence, Zubulake v. UBS Warburg LLC, 2004 WL 1620866 (S.D. N.Y. 2004), the court precluded the assertion of affirmative defenses and otherwise precluded certain efforts important to the defense of the case at trial.

The new Federal Rule of Evidence 37(f) provides what was thought to be a “safe harbor” provision for the destruction of electronically stored information; however, there is considerable debate as to the application of the Rule. Rule 37(f) provides that “[a]bsent exceptional circumstances, a court may not impose sanctions ... for failing to provide electronically stored information lost as a result of a routine, good-faith operation of an electronic information system.” However, courts have held that good faith will be measured by preservation steps taken by the defendant and its compliance with the court orders on discovery; that good faith may require that even information not “reasonably accessible” be preserved. Of course, the term “absent exceptional circumstances” is subject to judicial discretion. One court has ruled that “informal archiving”, with no written policy, is not a “routine, good faith operation.” Traditional document retention policies may not be adequate given the advent of the new Rules.

To avoid sanctions or criminal liability, owners and operators of commercial vehicles should consider working with counsel to develop an information

retention policy, replacing existing document retention policies. In policy development, coordination among in-house counsel, information technology managers, safety managers, risk managers and human resource managers is critical. To form an effective policy, one needs to know how the system captures data; when the system backs up; when data is destroyed; the system's components (i.e. hardware, laptops, etc); where systems are located; and whether third party vendors are involved, among other things. Ultimately, it will be necessary to determine whether the company is best served by a policy that minimizes the amount of data routinely retained in full consideration of all regulatory requirements.

For enterprises like owners and operators of commercial vehicles, the e-discovery rules are particularly unfortunate because the burden lies exclusively on the defendant. Further, it is a "single-edged sword" in that claimants rarely are in possession, custody or control of similar data necessary to be preserved. Consequently, the concept of the "nuisance value" of even a claim of modest damages can take on a whole new meaning.



Lee Stephen MacPhee
MORRISON MAHONEY LLP
250 Summer Street
Boston, MA 02210
Tel: (617) 439-7500
lmacphee@morrisonmahoney.com
www.morrisonmahoney.com

THE TROUBLE WITH ALCOHOL, DRUGS, DRIVING, AND FIRING

If United States Department of Health and Human Services data are any indication, every employer will be forced at some point to address the issue of employee alcohol or drug abuse. According to the most recent statistics, more than seven percent of all Americans are alcohol-dependent, and nearly ten percent are addicted either to alcohol or to illicit drugs. For the eighteen to twenty-five year-old demographic, the composite rate skyrockets to twenty-one percent. These numbers are sobering, so to speak, particularly for large employers whose workforce is sufficiently numerous to constitute a viable sample across which the statistics are likely to hold true.

The rate of substance abuse and dependency is frightening for any employer; for the transportation industry, the news is even worse. According to the federal government's most recent figures, 17,000 Americans are killed in

alcohol-related motor vehicle accidents each year. Though more detailed figures are unavailable, the liability created by these accidents is immense. Clearly, the industry has a strong interest in ferreting out and eliminating drivers who exhibit signs of this type of dangerous behavior. Equally clear is that the public as a whole will benefit—in the form of safer highways—by a bus industry that remains vigilant in this regard. Yet industry employers must be careful in how they handle situations in which they become aware of or suspect alcohol or drug abuse by their drivers.

Under federal judicial opinions of both established and recent vintage, employee discipline stemming from alcohol or drug dependency can create problems for the employer under the Americans with Disabilities Act. Pernice v. City of Chicago, 237 F.3d 783 (7th Cir. 2001) a case from the United States Court of Appeals for the Seventh Circuit, is representative of these cases. Daniel Pernice had been a driver for the City of Chicago's Department of Aviation for twenty years. While off-duty from work, Mr. Pernice was arrested for possession of cocaine and related disorderly conduct. He continued to work as a bus driver while the charges against him were pending; eventually, the charges were dismissed. Nevertheless, Mr. Pernice sought voluntary treatment for his "self-acknowledged drug addiction," undertaking both inpatient and outpatient treatment. In the course of taking treatment, Mr. Pernice submitted a medical leave request—accompanied

by a letter from his doctor—seeking time off “for the purpose of dealing with his drug dependency.”

Ultimately, the City of Chicago Aviation Department conducted its own investigation, which led to Mr. Pernice’s termination from employment. Mr. Pernice subsequently filed suit against the City, alleging that by firing him his employer had violated the Americans with Disabilities Act, 42 United States Code Section 12101 *et seq.* Specifically, his allegation was that his cocaine addiction constituted a qualifying disability under the ADA, and that his firing as a result thereof was unlawful under the statute. At first blush—and particularly in light of the addiction and vehicular fatality statistics cited above—it would seem far-fetched to argue that a federal anti-discrimination statute would prohibit a bus operator from firing a cocaine addicted bus driver. Yet the court reasoned that, in a proper case, the ADA might have just that effect.

The key to the problem, as the Seventh Circuit and other courts have analyzed it, is what specific reason the employer gives for its employee’s termination. In Pernice, the court eventually let the City off the hook because the City’s Personnel Board based its termination decision on a proper basis: the employee’s arrest and actual possession of cocaine. Mr. Pernice had avoided criminal conviction, but he did not contest the allegation that he had in fact possessed the cocaine. The opinion is clear, however, that alcohol and drug addiction can be considered disabilities under the ADA. Further, the court

reasoned that if the firing decision had been made on the basis of the fact of Mr. Pernice’s addiction—as opposed to an arrest resulting therefrom—the court might have reached a different result and held the firing to have been unlawful under the ADA.

From a policy standpoint, this rationale is questionable. First, it seems to acknowledge as fact what is very much open for debate: that alcoholism and cocaine dependency are in the abstract or should be considered for purposes of the statute to be “disabilities” in the first instance. Second, and more troubling, it seems to require an employer who becomes aware that one of its drivers is an alcoholic or drug addict to await some actual misconduct—an arrest, possession or use on the job, an accident—to initiate disciplinary action. In light of the safety concerns implicated by alcohol and drug addiction among bus drivers, this state of affairs hardly makes sense.

The Pernice interpretation of the ADA does provide some guidance to industry employers presented with similar situations. First, it is important to keep in mind that while disciplinary action may be prohibited in the absence of some punishable conduct other than the addiction itself, cooperative intervention is always both permissible and encouraged. Second, in cases in which the driver has in fact engaged in some punishable conduct, it is essential that the employer set forth proper reasons for taking whatever disciplinary action is decided upon. The report of findings should state that the disciplinary action

has been taken, for example, as a result of the driver’s having been found to have possessed marijuana on the workplace premises— not for the driver’s being known to be a habitual smoker of marijuana. Such distinctions can make all the difference to a court analyzing the evidence presented.



Duke R. Highfield



Benjamin A. Traywick

YOUNG CLEMENT RIVERS, LLP
P.O. Box 993
Charleston, SC 29402
Tel: (843) 720-5456
dhighfield@yrcrlaw.com
btraywick@yrcrlaw.com
www.yrcrlaw.com

ARTICLES

MCS90B ENDORSEMENT--DOES THIS ENDORSEMENT APPLY COVERAGE TO A FOREIGN JURISDICTION WHICH IS OUTSIDE OF THE EXCLUSIVE COVERAGE TERRITORY OF THE INSURANCE POLICY?

By: Larry D. Warren¹ and
Nathan L. Mechler²

I. INTRODUCTION

On Wednesday, April 7, 2004, an American bus company operating a route from Houston, Texas to Monterrey, Mexico was involved in a fatal accident in the city of Monterrey in the State of Nuevo Leon, Mexico. Two (2) members of the Morquecho family, Virginia and Jaime Morquecho, were killed while six (6) other family members received varying degrees of injury. The American Bus Company, Garcia's Tours, was insured for operations in the United States under a Lincoln General Insurance Company commercial auto policy.

Subsequently, the Morquecho family filed a lawsuit in Texas against Garcia Tours alleging negligence on the part of Garcia Tours and its driver as a proximate cause of the deaths and injuries of the Morquecho family. Garcia Tours made a request upon Lincoln General Insurance Company to defend them in the lawsuit. Lincoln General Insurance Company denied coverage based on the

¹ Larry D. Warren is a shareholder of Ball & Weed, PC., located at 10001 Reunion Place, Suite 600, San Antonio, Texas 78216

² Nathan L. Mechler is an associate of Ball & Weed, PC.

coverage territory condition, which stated that the insurance policy would only be effective in the United States, Canada and Puerto Rico. On the other hand, Garcia Tours insists that the United States Transportation MCS 90B Endorsement calls for Lincoln General Insurance Company to pay any judgments that might arise out of this Mexico accident.

A relatively new issue which will have major implications on the future coverage of motor carrier insurance policies concerns the interpretation of the MCS90B Endorsement. This article will discuss the language of the MCS90B Endorsement, the existing cases which have addressed the interpretation of this endorsement, and the leading arguments discussing whether the endorsement should or should not extend coverage to foreign jurisdictions beyond the coverage limitations within the actual insurance policy.

II. BACKGROUND

A. MCS90B Endorsement

Federal regulations require that commercial motor carriers obtain a minimum level of financial responsibility, i.e. insurance, to operate a motor vehicle which transports passengers.³ Proof of financial responsibility includes a MCS90B Endorsement.⁴ The purpose of these regulations and this endorsement "was to assure that injured members of the public would be able to obtain judgments collectible against negligent authorized carriers."⁵

³ 49 C.F.R. § 387.31(a).

⁴ 49 C.F.R. § 387.31(d).

⁵ *Canal Ins. Co. v. First Gen. Ins. Co.*, 889 F.2d 604, 611 (5th Cir. 1989), modified on other

The relevant portions of the endorsement read:

In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment received against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to [these regulations] regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere.... It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon...shall relieve the company from liability or from the payment of any final judgment....

However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident...for any payment that the company would not have been obligated to make under the provision of the policy except for

grounds, 901 F.2d 45.

the agreement contained in this endorsement.

From the language of the endorsement, the insurer's obligations are triggered when the policy to which it is attached provides no coverage to the insured.⁶ The endorsement is able to accomplish this purpose and effect by reading out only the clauses in the insurance policy which would limit the ability of a third party victim to recover for his loss.⁷ Of course, if the insurance company pays a claim which it was obligated to pay according to the endorsement but excluded from paying under the insurance policy, the insurer is entitled to reimbursement from the insured.

Thus, the issue of this article arises: If an accident occurs in a foreign jurisdiction beyond the coverage territory of the insurance policy, does the MCS90B Endorsement read out the coverage limitations of the insurance policy thus requiring the insurance company to pay the third party's claims?

B. Cases Interpreting the MCS90B Endorsement

Two cases concerning the interpretation of the MCS90B Endorsement have recently been decided by Texas federal district courts. These cases are Lincoln General Insurance Company v. Autobuses Tierra Caliente, Inc., 2005 WL 2219241 (N.D. Tex., Sept. 13, 2005) (hereinafter "Autobuses") and Lincoln General Insurance Company v.

⁶ T.H.E. Ins. Co. v. Larsen Intermodal Servs., Inc., 242 F.3d 667, 672 (5th Cir. 2001).

⁷ Id. at 673.

Maria de la Luz Garcia, Civil Action No. H-04-2897 (S.D. Tex. July 29, 2005) (hereinafter "Garcia Tours"). Despite that the facts of each case are nearly identical, each court went opposite directions in its ruling.

The facts in each case are as follows: An insurance company enters into a contract with a bus company. The policy coverage extends only to the United States, Puerto Rico, and Canada; however, the required MCS90B Endorsement is attached to the policy. The insured bus is traveling from Texas to Mexico, and while in Mexico it is involved in an accident which kills and/or injures several victims. These victims and their families then file suit against the insured bus company; however, the insurance company denies that it owes a duty to defend the insured because the accident at issue is not covered by the policy. While the victims' suit against the insured is ongoing, the insurance company files a separate action requesting a declaratory judgment stating that the accident occurred outside the policy territory; therefore, the insurer has no duty under the circumstances to defend, pay, or indemnify the insured. The separate actions filed by the insured are the two cases at issue regarding the interpretation of the MCS90B Endorsement.

1. Lincoln General Insurance Company v. Autobuses Tierra Caliente, Inc.

In Autobuses, the federal court denied Lincoln's Motion for Summary Judgment and invited the bus company to file its own. The court indicated that the

MCS90B Endorsement extends coverage to the accident which occurred in Mexico.⁸ The court reasoned that the Department of Transportation (DOT) has the authority to protect the public from motor carriers traveling between the United States and places outside of the United States.⁹ Thus, the district court of the Northern District of Texas determined that the general jurisdiction of the Department was not limited to travel merely within the United States. The court has since abated this action while the 5th Circuit Court of Appeals considers Lincoln General Insurance Company v. Maria de la Luz Garcia.

2. Lincoln General Insurance Company v. Maria de la Luz Garcia

The federal court in the Southern District of Texas in Garcia Tours, reached the opposite conclusion of its sister court in the Northern District. Namely, the Garcia Tours court concluded that the MCS90B Endorsement does not extend coverage to the accident which occurred in Mexico.¹⁰ Specifically, the court held that the endorsement did not apply to the accident in Mexico because such a result would extend the jurisdiction of the DOT beyond the confines of the United States which is contrary to the DOT's statutory authority.¹¹

III. LEADING ARGUMENTS

A. MCS90B Endorsement Does Not Extend Coverage

⁸ 2005 WL 2219241 at *5.

⁹ Id.

¹⁰ Civil Action No. H-04-2897 (S.D. Tex. July 29, 2005).

¹¹ Id.

The opponents of coverage rely on a single argument to support their position that the MCS90B Endorsement does not extend coverage to accidents in foreign land. The crux of this argument focuses on the jurisdiction of the DOT. In particular, they propose that the endorsement has no effect regarding an accident occurring outside of the United States because the DOT has no jurisdiction to regulate transportation beyond the United States' borders.

The jurisdiction of the DOT, "as a creation of Congress, has only the power bestowed upon it by its constituent legislation...."¹² Pursuant to statute, the DOT has jurisdiction over transportation of a motor carrier to the extent that passengers or property are transported by the carrier:

1. *between a place in – a State and a place in another State;*
 - A. a State and no other place in the same State through another State;
 - B. the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;
 - C. the United States and another place in the United States through a foreign country *to the extent the transportation is in the United States;* or
 - D. the United States and a place in a foreign country *to the extent the transportation*

¹² *Travelers Indem. Co. v. Western Amer. Spec. Trans. Servs., Inc.*, 235 F.Supp.2d 522, 528 (W.D. La. 2002) (citing *Reliance Natl. Ins. Co. v. Royal Indemnity Co.*, 2001 U.S. Dist. Lexis 12901, 2001 WL 984737 (S.D.N.Y. Aug. 24, 2001)).

*is in the United States....*¹³

The clear language of the statute above limits the DOT's ability to regulate transportation of foreign commerce between the United States and a foreign country "to the extent the transportation is in the United States." In other words, the DOT's jurisdiction and the endorsement's applicability "appl[y] throughout the entire portion of the [route] taking place within the United States."¹⁴ Consequently, the endorsement in the instant scenario would not extend coverage to the accidents in Mexico.

The opponents of coverage cite to additional language in the United States Code as support. For example, the Code provides that the "Secretary of Transportation shall prescribe regulations to require minimum levels of financial responsibility...for the transportation of passengers... by motor vehicle[s] in the United States between a place in a State and...a place outside the United States."¹⁵ The key language again restricts the DOT's authorization to regulate transportation within the United States. As noted above, the MCS90B Endorsement is included as proof of financial responsibility.¹⁶ Thus, reading this into the provision above, the DOT must prescribe endorsements such as the MCS90B for the transportation of passengers in the United States.

Because the applicability of the

¹³ 49 U.S.C. § 13501 (emphasis added).

¹⁴ See *Project Hope v. M/V IBN Sina*, 250 F.3d 67, 74 (2nd Cir. 2001) (interpreting that the jurisdictional reach of the Department regarding another provision of the Motor Carrier Act).

¹⁵ 49 U.S.C. § 31138 (emphasis added).

¹⁶ 49 C.F.R. § 387.31(d).

endorsement cannot extend beyond the jurisdictional reach of the DOT, the opponents of coverage reason that the territorial limitations of the insurance policy are controlling. An interpretation of the courts agreeing with the opponents of coverage will result in insurers not having to pay for a final judgment rendered against its insured for an accident occurring in a foreign country beyond the coverage of the insurance policy.

B. MCS90B Endorsement Does Extend Coverage

The proponents of coverage attack the jurisdictional argument by stating that the issue is not one of federal jurisdiction at all, but merely an issue of contract interpretation. Even so, the proponents argue, that to limit the endorsement to only the United States is adverse to the purpose of the statute and contrary to the plain language of the endorsement.

There is no question that the purpose of the endorsement is to ensure that the public who are injured by the negligence of commercial carriers are able to obtain judgments against the insurance company.¹⁷ This of course is true even when the insurance policy itself would exclude coverage. The policy at issue clearly excludes coverage in Mexico, but because the endorsement is to trigger the insurance company's obligations to pay when the insurance policy would not provide coverage, the proponents argue that the accidents in

¹⁷ *Canal Ins. Co.*, 889 F.2d at 611.

Mexico are covered.¹⁸ In fact, the proponents point out that if Congress intended for the endorsement to exclude accidents occurring beyond United States soil, it could easily have written this into the endorsement. Rather, they argue the MCS90B Endorsement must read out the territorial limitations of the policy and protect the injured third parties' rights to recover. Such a reading runs parallel with the statutory intent.

The proponents continually refer to the plain language of the endorsement, such as: the insurer must pay for judgments rendered against the motor carrier "whether or not such negligence occurs on *any route* or in any territory authorized to be served by the insured or *elsewhere...*" Although the policy excludes coverage to Mexico, the endorsement provides the coverage to any route or elsewhere. Mexico, the proponents illustrate, is clearly included as "any route" or "elsewhere."

Moreover, the proponents' reference to the endorsement's terms that "no condition, provision, stipulation or limitations contained in the policy...shall relieve the company from liability or from the payment of any final judgment..." As a result, the proponents plead that the coverage limitations in the policy cannot restrict the insurer's obligation to pay a final judgment against the insured as in the instant cases.

In the alternative, if jurisdiction limits the applicability of the

¹⁸ *T.H.E. Ins. Co.*, 242 F.3d at 672.

endorsement, the proponents of coverage plead that the negligence in these cases still occurred within the United States. In particular, the victims in these suits sued the motor carrier for negligence, as well as negligent entrustment.¹⁹ Negligent entrustment is: 1) when an owner entrusts a vehicle; 2) to an incompetent or reckless driver; 3) that the owner knew or should have known to be incompetent or reckless; 4) that the driver was negligent on the occasion in question; and 5) that the driver's negligence proximately caused the accident.²⁰ Pursuant to the definition, the proponents argue that the owners' negligence of entrusting the vehicle occurred within the United States. However, the Fifth Circuit has already held that this reasoning is flawed.²¹

In sum, the purpose and intent of the endorsement favor providing insurance coverage to the injured public. The actual language of the endorsement strongly supports this proposition.

IV. CONCLUSION

The applicability of the MCS90B Endorsement in foreign soils is still unknown, as Autobuses and Garcia Tours are still not final. In Autobuses, the court has administratively closed the case, but is contemplating reconsidering

¹⁹ Not only did the proponents sue the motor carriers on these issues, but the judgment found the motor carriers liable for negligent entrustment. In addition to negligent entrustment, the same argument is made for negligent hiring and/or negligent supervision.

²⁰ *Williams v. Steves Industries, Inc.*, 699 S.W.2d 570, 571 (Tex. 1985).

²¹ See *Lincoln General v. Reyna*, 401 F.3d 347, 350-51 (5th Cir. 2005) (holding that but-for the negligent act of the incompetent driver, there would be no negligent entrustment so the place of the injury-causing accident determines the coverage territory of the insurance policy).

the insurer's motion for summary judgment and will do so pursuant to Garcia Tours.²² At this time, Garcia Tours has been orally argued and briefed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit's ruling is expected some time this Summer or early this Fall.

Although the purpose and intent behind the endorsement favor extending coverage to the victims of commercial motor vehicle accidents, the law appears to strongly favor limiting the endorsement's reach to only accidents occurring on United States soil. Until the Fifth Circuit rules on this issue, we can only speculate as to the boundaries of the MCS90B Endorsement. What is certain is that this decision will have major implications affecting the future of motor carrier insurance coverage.

²² The court in Autobuses has not ruled on any of these motions.



Larry D. Warren



Nathan L. Mechler

BALL & WEED, P.C.
10001 Reunion Place, Ste. 600
San Antonio, TX 78216
Tel: (210) 731-6350
Tel: (210) 731-6381
ldw@ballandweed.com
nlm@ballandweed.com
www.ballandweed.com

D.C. CIRCUIT STRIKES DOWN 11-HOUR RULE

On July 24, 2007, the United States Court of Appeals, District of Columbia Circuit, decided Owner-Operator Independent Drivers Association, Inc. v. Federal Motor Carrier Safety Administration, 494 F.3d 188 (D.C. Cir. 2007). The petitioners in this case challenged certain provisions of the Federal Motor Carrier Safety Administration's proposed rule changes to 49 C.F.R. § 395, involving hours of service. The specific issues decided were: (1) the 11 hour daily driving limit; (2) the 34 hour restart provision; (3)

the provision that rendered the 14-hour daily on-duty limit non-extendable; and (4) the provision that modified the sleeper-berth exception to require one period in the berth to be at least 8 hours in duration. The court struck down the 11-hour rule and the 34 hour restart provision but let stand the modified sleeper berth provision and the provision that rendered the 14-hour daily on-duty limit non-extendable.

The History.

This case was initiated by petitions filed by two groups: (1) the Public Citizen, Inc., et. al. ("Public Citizen"); and (2) the Owner-Operator Independent Drivers Association ("OOIDA"). Public Citizen sought review of the proposed change to expand the 10 hour daily driving limit to 11 hours and the 34 hour restart provision. OOIDA sought review of the provision rendering the 14-hour daily on-duty limit non-extendable and the modification of the sleeper berth exception.

A brief history leading up to this decision will be helpful.

The 10-hour rule has been in effect, mostly unchanged, since 1941. The Motor Carrier Act of 1935 provides that "[t]he Secretary of Transportation may prescribe requirements for [qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier." 49 U.S.C. § 31502(b) . To this end, the Interstate Commerce Commission (ICC), conducted hearings and issued a report supporting its rule limiting motor carriers' hours of service. Ex Parte No. MC-2, In

the Matter of Maximum Hours of Service of Motor Carrier Employees, 3 M.C.C. 665 (I.C.C. Dec. 29, 1937).

The first ICC rule limited drivers to working a maximum of 12 hours in any 24-hour period. 49 C.F.R. § 191.4 (1938). The original 12-hour requirement was changed to 10 hours in 1941. 49 C.F.R. 191.3(b) (1941). In 1962, the 24-hour cycle was removed and replaced with a period of off-duty hours. 27 Fed. Reg. 3553 (Apr. 13, 1962)

The Motor Carrier Safety Act of 1984 requires the Secretary of Transportation to "prescribe regulations on commercial motor vehicle safety" to ensure that, inter alia, "the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely." 49 U.S.C. §31136(a)

The ICC Termination Act of 1995 requires the Federal Highway Administration to promulgate a rule "dealing with a variety of fatigue-related issues pertaining to commercial motor vehicle safety." 109 Stat. 803 (1995) (*codified in scattered sections of 49 U.S.C.*).

In 2000, the authority to regulate CMVs was transferred from the FHWA to the Federal Motor Carrier Safety Administration (FMCSA). 42 U.S.C. §113.

On April 28, 2003, the hour requirements for CMV drivers were changed for property-carrying vehicles. 68 Fed. Reg. 22516 (Apr. 28, 2003) . The rules remained the same for

passenger-carrying CMVs. 49 C.F.R. § 395.5(a) (2003) . However, the requirements were relaxed for property-carrying CMVs: drivers could now drive more than 11 cumulative hours after 10 hours off-duty. 49 C.F.R. § 395.3(a) (2003).

In 2004, the D.C. Circuit vacated the FMCSA's new rule for property-carrying vehicles on the grounds that it was arbitrary and capricious because it did not consider the rule's impact on drivers' health. *Pub. Citizen v. Fed Motor Carrier Safety Admin* , 374 F. 3d 1209 (D.C. Cir. 2004). In response to the D.C. Circuit's action, Congress, in the Surface Transportation Extension Act of 2004, extended the new hours-of-service regulation until the FMCSA promulgated a new regulation or until September 2005. 108 Pub. L. 310, § 7(f). In August 2005, the FMCSA, after considering the issues required by the D.C. Circuit, promulgated the rule anew. 70 Fed. Reg. 50071 (Aug. 25, 2005)

The ICC wrote in 1937 that “[a] fatigued driver, whether that fatigue results from excessive hours of work or other causes, may become an inattentive, careless, or otherwise unsafe driver. The regulations set out hereinafter are designed to prevent, on the basis of currently available information, the unsafe conditions which are associated with excessive fatigue.” 3 M.C.C. at 668. Since 1937, there have been numerous studies on the connection between hours spent driving and fatigue and between fatigue and automobile accidents. See, e.g., *Deborah M. Freund,*

Office of Motor Carrier Safety, publication No. DOT-MC-99-129, An Annotated Literature Review Relating to Proposed Revisions to the Hours-of -Service Regulation for Commercial Motor Vehicle Drivers (Nov. 1999) , available at http://dmses.dot.gov/docimages/pdf46/77837_web.pdf (conducting a near—exhaustive literature review) ; Federal Motor Carrier Safety Administration, U.S. Department of Transportation, *Regulatory Impact Analysis and Small Business Analysis for Hours of Service Options* ch. 8 (2002), available at http://dmses.dot.gov/docimages/pdf88/240882_web.Pdf (citing dozens of scientific studies in its comprehensive analysis of the connection between “driver fatigue, sleep, and truck—related accidents”); David Polin, *Cause of Action Against Trucker or Truck Driver for Injuries Caused by Driver Fatigue*, 17 *Causes of Action* 2d 105 (2006) (listing 20 such studies, scientific and otherwise, in the bibliography) . The FMCSA undertook a review of the relevant scientific literature and came to the same conclusion the ICC arrived at in the 1930s: after a certain amount of hours spent driving, commercial truck drivers become fatigued and their presence on the road is a significant safety concern. *Hours of Service of Drivers*, 70 Fed. Reg. 3339 (Jan. 24, 2005).

In a case regarding the DOT's rule for motor carriers' safety fitness ratings, the D.C. Circuit approvingly cited several studies finding that fatigue plays a significant role in truck drivers' accidents. *Am. Trucking Assn's v. U.S. Dep't of Transp.*, 166 F.3d 374 (D.C. Cir. 1999) .

With this background, the D.C. Circuit in this case reviewed the FMCSA's second attempt to modify the hours of service rules.

The Court's Analysis.

The court noted its authority to review the FMCSA rule under the Administrative Procedure Act (“APA”) and stated that the rule must be set aside if it is “arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law,” or if it was promulgated “without observance of procedure required by law”. Public Citizen argued four points in support of its contention that the 11-hour daily driving limit and the 34-hour restart provisions were “arbitrary and capricious” in violation of the APA rule. The court agreed with Public Citizen on two of the arguments and did not analyze the remaining two arguments.

First, the court found that the FMCSA violated the APA's requirements for notice and comment rule-making by failing to disclose in time for comment the methodology of a model that was central to the agency's justification for the rules. Specifically, the APA requires that an agency publish notice of proposed rule-making, including “either the terms or substance of the proposed rule or a description of the subjects and issues involved,” 5 U.S.C. § 553(b) (3), and that it “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments”. *Id.*

§ 553(c). The court went on to state that it is “integral” to these requirements of disclosure that the agency identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary. The court noted that the FMCSA had published studies and data that were used in the original proposed rule that was previously struck down in Public Citizen vs. FMCSA, 374 F.3d 1209 (D.C. Circuit 2004); however, the latest proposed change relied upon modifications to these published studies. These modifications were not publicized or timely made available for commentary.

Second, the court agreed with Public Citizen that the FMCSA, once it did finally disclose to the public its methodology for the latest proposed rules, failed to provide a reasoned explanation for a number of the methodology’s critical elements. In order to satisfy the APA’s “arbitrary and capricious” standard, an agency must articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. Motor Vehicle Manufacturers Association vs. State Farm Mutual Auto Insurance Company, 463 U.S. 29, 43 (1983). The “agency” must cogently explain why it has exercised its discretion in a given manner”, Id. at 48”, and that explanation must be “sufficient to enable us to conclude that the agency’s action was the product

of reasoned decision-making”. Id. at 52

Public Citizen challenged the FMCSA’s computer graphs that were utilized to plot the relationship between fatal crashes and hours of driving; and Public Citizen challenged the cumulative fatigue from increased weekly driving and working hours allowed by the 34-hour restart rule. The court agreed with the Public Citizen and found that the FMCSA’s failure to adequately explain these issues was “arbitrary and capricious” in violation of the APA. As a result, the court vacated the provisions in the 2005 rule that increased the daily driving limit from 10 to 11 hours and vacated the 34-hour restart provision.

On the other hand, the court had little difficulty denying the petition filed by OOIDA seeking to set aside the modifications of the sleeper berth exception and the provision that rendered the 14-hour daily on-duty limit non-extendable.

OOIDA challenged the 14-hour daily on-duty limit provision claiming that the FMCSA did not take into account the effects of loading and unloading operations on driver fatigue, thus enabling receivers and companies to abuse the off-duty hours and force drivers to use them as unpaid time. The court quickly refuted this claim stating that the FMCSA noted in its data that it had reviewed comments from drivers and industry associations regarding how the limit was working in practice and this, the court said, was adequate consideration of the issue.

The OOIDA also challenged the modification to the sleeper-berth provision claiming that the FMCSA: 1) failed to consider the adverse economic impact that the modified sleeper berth exception would have; 2) the problems associated with team drivers who carry hazardous materials; 3) the failure to provide adequate notice of the rule change; and 4) the failure to provide scientific data to support the premise that drivers need 7-8 consecutive hours of sleep each day. Again the court had little difficulty refuting all of these claims and, therefore, refused to vacate the sleeper berth provision or the provision rendering the 14-hour off-duty limit non-extendable.

Conclusion

The reasons that the court relied upon in vacating the FMCSA provisions extending the daily drive time from 10-11 hours and permitting a 34-hour restart were essentially technicalities. The FMCSA could correct these technicalities of notice and explanation of the methodologies. However, language in the court’s opinion hints that even if the technicalities are resolved, the provisions would have a hard time surviving attack. Specifically, the court stated, “Public Citizens critique of the model persuades us not only that it was prejudiced by FMCSA’s failure to provide an opportunity for comment, but also that FMCSA failed to provide an adequate explanation for its decision to adopt the 11-hour daily driving limit and the

34-hour restart provision.” Likely, the 10-hour daily driving limit is here to stay.

Jerry J. Sallings
 WRIGHT, LINDSEY
 & JENNINGS, LLP
 200 W. Capitol Avenue
 Suite 2300
 Little Rock, AR 72201
 Tel: (501) 371-0808
jsallings@wlj.com
www.wlj.com

BLOGGING FOR EVIDENCE

Jury members take their seats. Just before a short recess, your opponent finished her direct examination of the Plaintiff. This case involves a trucking accident, a classic he said, she said situation. On direct, the Plaintiff related her version of a story in which the Defendant’s tractor trailer changed lanes without using a turn signal, thus forcing the Plaintiff off the road and into a tree.

Standing up to cross, you look down for one last read. In one hand, you hold a printout of a statement the Plaintiff made a few days after the wreck: “Truth be told, I was looking through my console for a Celine Dion CD. I have no idea if the moron used his turn signal.”

The catch? You pulled that quote from the Defendant’s MySpace blog.

I. BLOG NATION

In the case of In re Ramon Stevens, the California Court of Appeals defined “blog” as “[a]

Web site (or section of a Web site) where users can post a chronological, up-to-date e-journal entry of their thoughts.”¹ When attempting to describe what exactly a blog might offer potential users, the popular blogging service *Blogger* offers a more expansive definition:

A blog is a personal diary.
 A daily pulpit. A collaborative space. A political soapbox.
 A breaking-news outlet.
 A collection of links. Your own private thoughts.
 Memos to the world.²

Blogs not only tell us what their authors do; they also tell us what their authors think. And those thoughts can be as random as the people responsible for them.

Although we are not always sure what to make of blogs, we do know they are multiplying. According to recent statistics, a new blog comes online every second of every day.³ Further, blogs both new and old produce an average of fifty-thousand new posts every hour.⁴

To the world, blogs illustrate a growing movement from the private to the public. Where once teenage girls poured their hearts into leather-bound diaries, they now splash them across MySpace pages in big, pink letters.

To lawyers, on the other hand,

¹ In re Stevens, 119 Cal. App. 4th 1228, 1236 (Cal. Ct. App. 2004) (citing *Netlingo: The Internet Dictionary* (June 11, 2004), at <http://www.netlingo.com/inframes.cfm>).

² <http://www.blogger.com/tour-start.g>

³ It’s the links, stupid: Blogging is just another word for having conversations, *The Economist* (Aug. 20, 2006), at http://www.economist.com/surveys/displaystory.cfm?story_id=6794172.

⁴ *Id.*

blogs represent a source of largely underutilized information.

II. PUBLIC INVITATION

Obviously, blogs often contain personal information. This is the type of information that, in normal circumstances, would lead lawyers head-on into privacy issues. So far, however, courts have remained clear that the Internet is not a private forum, but a public one.⁵

For example, in United States v. Gines-Perez, a 2002 opinion out of the United States District Court for the District of Puerto Rico, Judge Daniel Dominguez remained “convinced that placing information on the information superhighway necessarily makes said matter accessible to the public[.]”⁶ After noting the lack of clear precedent to support his opinion, Judge Dominguez still found it “obvious that a claim to privacy is unavailable to someone who places information on an indisputably, public medium, such as the Internet, without taking any measures to protect the information.”⁷

In Guest v. Leis, a 2001 Sixth Circuit opinion, Judge Alan Norris offered similar sentiments regarding privacy and the Internet.⁸ During an

⁵ See Four Navy Seals & Jane Doe v. AP, 413 F. Supp. 2d 1136, 1147 (S. D. Cal. 2005); see also United States v. Lifshitz, 369 F.3d 173, 190 (2d Cir. 2004); Guest v. Leis, 255 F.3d 325, 333 (6th Cir. 2001).

⁶ United States v. Gines-Perez, 214 F. Supp. 2d 205, 225 (D.P.R. 2002). The decision was later reversed and remanded by the First Circuit, but not based on Judge Dominguez’s Internet privacy analysis. See United States v. Gines-Perez, 90 Fed. Appx. 3 (1st Cir. 2004).

⁷ Gines-Perez, 214 F. Supp.2d at 225.

⁸ Guest, 255 F.3d at 333.

online obscenity investigation, authorities seized two computer bulletin board systems.⁹ In responding to bulletin board members' allegations that said seizures violated the Fourth Amendment, Judge Norris dismissed their arguments by noting that "[u]sers would logically lack a legitimate expectation of privacy in the materials intended for publication or public posting."¹⁰

By applying current case law to your trucking accident Plaintiff, it is clear that her *MySpace* blog is just as much your space as it is hers.

III. HARD EVIDENCE

Perhaps the most public, and controversial, use of blog evidence in civil litigation involves *Washingtonienne*, a blog written by former United States Senate assistant Jessica Cutler.¹¹ In *Steinbuch v. Cutler*, a 2006 case from the United States District Court for the District of Columbia, plaintiff Robert Steinbach sued Ms. Cutler for invasion of privacy and intentional infliction of emotional distress after *Washingtonienne* posted entries "detailing [their] social and sexual activities[.]"¹² After a recent amended complaint added co-defendant Ana Marie Cox, author of the widely popular blog *Wonkette*, the case remains ongoing and promises to offer great insight not only into the dalliances of Washington elite but also into modern jurors' readiness to hear and evaluate blog-based evidence.

⁹ See *Id.*, at 330-332.

¹⁰ *Id.*, at 333.

¹¹ See *Steinbuch v. Cutler*, 463 F. Supp. 2d 4 (D.D.C. 2006).

¹² *Id.*

Outside of defamation and invasion of privacy suits, we are hard pressed to find civil litigators harnessing the Internet with any degree of success. For example, in *Nicholson v. City of Chattanooga*, a 2005 civil rights case from the United States District Court for the Eastern District of Tennessee, the plaintiff garnered very little weight with "an unidentified and unauthenticated document purporting to be an internet 'web blog[.]'"¹³ Judge R. Allan Edgar noted that the blog "purport[ed] to be . . . written by one of the emergency medical professionals sent to the scene of the shooting" at issue.¹⁴ However, although the information cited may have appeared useful, Judge Edgar immediately diffused any usefulness by questioning the blog's origin and author.¹⁵

However, just because we have yet to see an overabundance of blog based evidence appear within appellate opinions, more and more stories are continuing to pile up at the trial and pre-trial level. For example, in a recent case handled by two attorneys at our law firm, pictures found on a female plaintiff's MySpace page led to an immediate and positive settlement for our client. In that case, the plaintiff claimed permanent injury and loss of range of motion to her neck as the result of a car accident. Out of curiosity, one of our associate attorneys searched MySpace to see if the plaintiff had her own blog. After scanning through more than thirty "hits" showing people with the same name, he found her. Even more amazingly, the pictures on the

¹³ *Nicholson v. City of Chattanooga*, No. 1:04-CV-168, 2005 U.S. Dist. LEXIS 42041, *21 (E.D. Tenn. 2005).

¹⁴ *Id.*

¹⁵ See *Id.*

plaintiff's MySpace page clearly showed that she possessed the full range and use of her allegedly injured neck. When this page and its pictures were shown to the plaintiff's attorney, a case that once looked as if it were going to trial was then settled within a matter of weeks.

As the preceding case and *Nicholson* seem to illustrate, the key question is not *if* lawyers should introduce blog-based evidence, but *how* lawyers should introduce blog-based evidence.

IV. CAREFUL INTRODUCTION

One word immediately comes to mind when suggesting the introduction of blogs into evidence: hearsay. To understand how we can avoid this pitfall, let us again revisit your trucking accident Plaintiff.

Obviously, the first time the Plaintiff's blog is mentioned on cross-examination, opposing counsel will barely leave her seat before shouting a hearsay objection. Assuming that many judges will be unfamiliar with the word blog, let alone its introduction into evidence, it may be wiser to begin this process during discovery rather than at trial.

It would be unwise to inquire about blogs within interrogatories or requests for production. This offers an opposing party the opportunity to delete harmful blog entries. At deposition, however, you can either pull up the blog immediately on a laptop or simply call a member of your staff and have him/her save a copy of the blog's archives to his/her computer.

Luckily for you, the Plaintiff was questioned about her blog at an earlier deposition. While proceeding through your usual line of questions, you discovered that the Plaintiff keeps a blog. Not yet knowing what you may find on this blog, yet astutely foresee a possible hearsay objection at trial, and you proceed with the following questions:

- Does this blog have a name or title? Please spell it.
- What is its full web address?
- How long have you kept this blog?
- To view your blog, does a person need a password?
- If so, who has one?
- If not, does that mean anyone may view it?
- To post on your blog, do you need a password?
- Does anyone else have your blog's password?
- Has anyone else ever posted on your blog?
- If something is written on your blog, you wrote it, is that correct?

The foregoing questions should protect you from any arguments opposing counsel may make regarding origin, author and access, but you are still not completely out of the woods as to hearsay.

In attempting to prove that the Plaintiff took her eyes off the road at the time of the accident, you are offering the blog entry as "a statement, other than one made by the declarant while testifying at the trial or hearing,

offered in evidence to prove the truth of the matter asserted."¹⁶ By the simplest of definitions, this is hearsay. Thus, to avoid your opponent's objection, you must rely on a hearsay exception. Here, the Plaintiff's blog entry about looking through the console for a Celine Dion CD should come in as an admission by a party-opponent: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . the party's own statement, in either an individual or a representative capacity."¹⁷ By taking the time to establish origin, author and access during the Plaintiff's deposition, you can now qualify the blog entry as the Plaintiff's "own statement" in an "individual" capacity, thus clearly qualifying under the exception. Despite the foregoing, what should happen if the judge sustains your opponent's hearsay objection? In terms of the blog's introduction into evidence, you are now blocked. Yet the important portion pertaining to her failure to look for the Defendant's turn signal can still come in to impeach. "A basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness."¹⁸ Thus, because the Plaintiff's blog entry remains inconsistent with her previous testimony on direct, it can and should be used to impeach.

V. CONCLUSION

The fictional Plaintiff's blog entry represents the mere tip of the

¹⁶ *Fed. R. Evid. 801(c)*.

¹⁷ *Fed. R. Evid. 801(d)(2)(A)*.

¹⁸ NOTE: Much of this article was originally published in the *Tennessee Bar Association Journal* and has been reprinted with permission. *United States v. Hale*, 422 U.S. 171, 176 (U.S. 1975).

iceberg in terms of ways in which blogs can be utilized during litigation. Imagine knowing that you could have access to the opposing party's personal diary, yet choosing not to look? Better yet, imagine knowing that you could introduce helpful diary entries into evidence, yet never bothering to do so? By failing to recognize and utilize party and/or witness blogs, that is precisely what many of us are doing.



John R. Tarpley
LEWIS, KING, KRIEG
& WALDROP, PC
201 Fourth Avenue, North
Nashville, TN 37219
Tel: (615) 259-1366
jtarples@lewisking.com
www.lewisking.com



Chris W. McCarty
LEWIS, KING, KRIEG
& WALDROP, PC
P.O. Box 2425
Knoxville, TN 37901
Tel: (865) 546-4646
cmccarty@lewisking.com
www.lewisking.com

CONSIDERATIONS FOR EFFECTIVE DISCOVERY OF ESI

This is the second in a series of articles on electronic discovery by members of the Louisville, Kentucky ALFA firm. The first article in the series can be found in a previous issue of Transportation Update archived on the ALFA website. The final article in the series will appear in the next issue of the ALFA Transportation Update. Ms. Lang and Shane O'Bryan are senior associates at Woodward, Hobson & Fulton. Mr. Fulton is a partner. Feel free to contact the authors with questions.

There can be no question we live in an electronic age. Gone are the days when a single computer filled an entire room and cell phones were only for the rich and famous. Today computers are so small many Americans have at least one computer in their home and cell phones are commonplace. Times have changed and so have the Federal Rules of Civil Procedure. On December 1, 2006, the Federal Rules of Civil Procedure were amended to make clear that the term "document" includes any type of information that is stored electronically.

While Electronically Stored Information (ESI) has been a part of discovery for sometime now, it has become increasingly difficult to include all forms of ESI, many dynamic in nature, under the traditional concept of a "document." Some forms of ESI are far different from paper documents, and Rules 33, 34, and 45 were amended to keep

pace with the rapidly changing technology.

This article will focus on the lawyer's role in the discovery process and provide practical tips for preparing, requesting, and responding to discovery requests relating to ESI. This article will also address how an Electronic Discovery Expert can help you navigate through this process.

I. The Role of Lawyers

Lawyers are responsible for selecting, producing, and preserving ESI. These are important responsibilities that cannot be entirely delegated to the client. To do so can have devastating consequences for the lawyer and client alike. Consider for example one of the leading cases in the e-discovery arena, Zubulake v. UBS Warburg, LLC.¹ In that case, the plaintiff moved to sanction the defendant for failing for two years to produce discoverable emails requested by the plaintiff and deleting others. Because the defendant failed to take reasonable steps to guarantee that relevant data was preserved and its lawyers failed to adequately oversee the process, the court held that

1. an adverse inference would be given to the jury with respect to emails deleted or irretrievably lost through recycling of the defendant's backup tapes;
2. the defendant would have to pay the cost of re-deposing individuals involved with the emails produced late; and
3. the court ordered the defendant to pay for the

¹ 2004 WL 1620866 (S.D.N.Y. 2004).

cost of the plaintiff's motion for sanctions.

To avoid these problems, lawyers must be completely familiar with the client's Information Technology Systems and work in concert with the client to get this information. Lawyers must know what electronic evidence exists; how is it created; where it resides; and how is it stored. Lawyers also need to know what efforts will be needed to get it; how long the process takes; and how much the process is likely to cost. Only then will the parties be in a position to establish the necessary boundaries for discovery involving ESI.

Whether the lawsuit is filed in federal court or state court, it is important for the parties to work together to establish these boundaries. The Federal Rules of Civil Procedure imposes this obligation on the litigants in federal court by requiring that they meet and confer, develop a planning report, and exchange initial disclosures. While there is no explicit requirement in state court, it is important for litigants to try and work together in a similar fashion.

II. Rules 34 and 45

Federal Rule of Civil Procedure 34(a)(1) has been amended to include "electronic information (including . . . sound recordings, images, and . . . data . . . stored in any medium. . .)." This rule change mandates that "discovery of electronically stored information stands on equal footing with discovery of paper documents" and that "a Rule 34 request for production

of ‘documents’ should be understood to encompass . . . electronically stored information” unless otherwise stated.² Rule 34(c) also makes clear that non-parties can be compelled to produce documents pursuant to the subpoena powers in Rule 45. In fact, Rule 45 tracks the language of Rule 34.

The term ESI as it is discussed in Rule 34(a)(1) appears in a number of other amendment such as Rules 26(a)(1), 26(b)(2), 26(b)(5)(B), 26(f), 34(b), 37(f), and 45. The Committee Notes to Rule 34 advise that ESI has the same broad meaning under these Rules as it has under Rule 34(a)(1).³ While references to these “documents” appear in discovery rules that are not amended (Rules 30(f), 36(a), and 37(c)(2)), the Committee Notes indicate that “these references should be interpreted to include electronically stored information as circumstances warrant.”⁴

Rule 34(a)(1) now also expressly permits parties “to inspect, copy, test or sample” ESI. However, the rule is “not meant to create a routine right of direct access to a party’s electronic information system” and “courts should guard against undue intrusiveness resulting from inspecting such systems.”⁵

A. Forms of Production

Rule 34(b) has been amended to allow a requesting party to identify the format in which the

² Committee Notes to Fed. R. Civ. P. 34(a).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

ESI is produced. If no format is specified, however, the responding party must produce ESI in either (1) the form(s) in which it is ordinarily maintained, or (2) the form(s) that is reasonably usable. The responding party is not obligated to produce the same ESI in more than one format, but a responding party may be required to produce different types of ESI in different formats. If the information to be produced is searchable by electronic means in its original format, the responding party should not produce it in a form that removes or significantly reduces this feature.

Before drafting requests for production, the requesting party should obtain basic information regarding the opposing party’s technological systems. The requesting party should prepare these requests with laser-like precision. Gone are the days when requests begin with “Produce any and all documents....” Broad requests will only result in the production of data so voluminous that it will require a great deal of time and expense to process and analyze the data and may ultimately not help the requesting party build its case. Keep in mind 1GB of data is equivalent to 500,000 typed pages!

The requested format should depend, in large part, on the method the requesting party intends to use when working with the information. The five basic forms of production are:

1. Hard copies, for which there is still a place;
2. Paper-like images of data, such as PDF and TIFF formats, which are often used in

conjunction with character recognition(OCR) software for converting from hard copies;

3. Native data, which requires special software to view, such as SAP or even MS-Word;
4. Data exported to electronic formats such as databases and spread sheets (sometimes call “quasi-native format); and
5. Hosted formats, such as web sites.⁶

A case may require one or more different forms of production of ESI. With the help of an electronic discovery expert, the most reasonable and cost-effective form of production can be established. For example, a series of emails might best be presented in a grid form such as a spreadsheet with the columns: from, to, date, subject, date sent, etc. An email attachment, on the other hand, might best be presented as a paginated document in PDF format.

When receiving a production request, a responding party must first consider possible locations for the information. Is the information from a desktop? A server? A cellphone? A cellphone provider? Tape backups? The location of the information may significantly affect the availability and, therefore, the expense associated with obtaining that information.

B. Accessibility

Once the location is determined, the responding party must

⁶ *Crag Ball, Get On Board the EDD Train, n. (June 12, 2006).*

determine whether the ESI requested is reasonably accessible. Rule (26)(b)(2)(B) provides that a party is not obligated to provide ESI that the responding party designates as “not reasonably accessible because of undue burden or cost,” so long as that party identifies those sources. For example, a requesting party may serve a discovery request for the production of all emails discussing the development of a particular product including emails that are stored on magnetic backup tapes for a particular time period. In responding to this discovery request, the responding party should identify the backup tapes that may contain the requested information, but the responding party should state that it is not providing the information contained on the backup tapes because the information is not reasonably accessible due to undue burden or cost. The responding party will have the burden of showing that the requested ESI is not reasonably accessible.

If the requesting party can demonstrate good cause for compelling the production of the ESI that is not reasonably accessible, the court does have the discretion to order production and specify conditions (such as cost shifting) for the discovery.⁷ Rule 26(b)(2)(B) provides that a court may order discovery from sources that are not reasonably accessible upon a showing of good cause and after considering the limitations of Rule 26(b)(2)(C). This requires the court to weigh the benefits of the

⁷ Fed. R. Civ. P. 26(b)(2)(B).

discovery against the burdens imposed by the production.⁸ The committee notes to Rule 26(b)(2)(B) list the factors to be considered in the court’s good cause determination:

1. The specificity of the discovery request;
2. the quantity of information available from more accessible sources;
3. the failure of the responding party to produce relevant information that seems likely to have existed but is no longer available from more accessible sources;
4. the likelihood of finding relevant, responsive information that is not available from more easily accessible sources;
5. the likely importance and utility of the additional ESI;
6. the importance of the issues at stake in the litigation; and
7. the parties’ resources.

The requesting party has the burden of showing that the need for the discovery outweighs the burden and cost of locating, retrieving and producing the inaccessible data.⁹ Therefore, even inaccessible ESI may be discovered if good cause exists for its production.

C. Cost Shifting For Production of Inaccessible ESI

If the court determines that good

⁸ See *Disability Rights Council of Greater Washington v. Washington Metropolitan Transit Authority*, 2007 WL 1585452 (D.D.C. June 1, 2007).

⁹ Fed. R. Civ. P. 26(b)(2)(B) Committee Notes.

cause exists for the discovery of ESI that is not reasonably accessible, there is still the question of who should pay the costs associated with restoring and searching the inaccessible data. This is an important issue because of the significant costs associated with restoring inaccessible ESI. The traditional rule is that the producing party bears the costs associated with production.¹⁰ However, because the costs associated with the discovery of ESI are significant, particularly inaccessible ESI, courts are questioning the validity of the presumption that the producing party should bear the costs of searching and restoring inaccessible ESI.

In the context of the discovery of inaccessible ESI, the leading case on cost shifting is *Zubulake I*,¹¹ which lists the following factors for the court to consider in deciding whether to shift costs to the requesting party:

1. the extent to which the discovery request is specifically tailored to discover relevant information;
2. the availability of the information from other less burdensome sources;
3. the total cost of the production compared to the amount in controversy;
4. the total cost of the

¹⁰ See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1975).

¹¹ 217 F.R.D. 309 (S.D.N.Y. 2003) (This is the first of Judge Sheindlin’s seven pretrial opinions addressing electronic discovery issues in the *Zubulake* case). In addition, to *Zubulake I*, two other cost shifting approaches have been used by the courts. See *McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001); and *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002).

production compared to the resources of each party;

5. the relative ability of each party to control costs and its incentive to do so;
6. the importance of the issues at stake in the litigation; and
7. the relative benefits to the party of obtaining the information.

In Zubulake III, Judge Scheindlin applied the above factors and shifted 25% of the cost of restoring and searching 77 backup tapes to the requesting party.¹² Finally, the court held that even when cost shifting is appropriate, it is only applicable to costs related to restoring and searching data on the backup tapes. Other costs, such as review and production of the electronic data after restoration, should always be borne by the responding party. The rationale behind this caveat is that cost shifting is only appropriate for inaccessible data.¹² After the data has been restored, it is no longer inaccessible and the responding party should bear the costs of production just as in the production of any other accessible data.¹³

If you request cost shifting to the requesting party, you must be prepared to address each of the above factors and explain the costs associated with the production to the court. To do so effectively, you should remember two key points to successfully

¹² The total cost of restoring and searching the 77 backup tapes was approximately \$175,000. See Zubulake III, 216 F.R.D. 280, 287 (S.D.N.Y. July 24, 2003).

¹³ Costs associated with the production of accessible ESI are always borne by the producing party.

address discovery requests for inaccessible ESI:

1. You must understand your client's data and be prepared to answer the following questions:
 - Why the data is not reasonably accessible?
 - In what format is the data contained?
 - How much inaccessible data exists?
 - What is it likely to contain?
 - How much it will cost to produce the inaccessible ESI?
 - What active data sources are likely to contain the same information that has been requested from the inaccessible source?
2. Address the following issues early with opposing counsel and the Court:
 - What types of inaccessible data you have.
 - Why the data is not reasonably accessible.
 - Methods to avoid spoliation.

D. Searching and Organizing Information

Once you have identified reasonably accessible ESI, you will need to narrow the resulting ESI set to only that data important to your lawsuit. Key words or phrases of interest can be used to achieve this goal. Key words or phrases can be combined logically so that ESI containing both key word X AND key word Y can yield one result set, while another result set might contain ESI with either

key word X OR key word Y. A computer forensic expert can be particularly useful in this regard. A computer forensic/electronic discovery expert can not only help a responding party identify the original form of its information and its location, the expert can also assist by creating efficient search terms and provide other optimization techniques that will limit your ESI set thus saving time, money, and resources.

III. Rule 33 (Interrogatories to Parties)

The changes to Federal Rule of Civil Procedure 33 parallel those of Rule 34. Rule 33 recognizes the importance of ESI and contains the same broad meaning set forth in.

Because business information is usually stored only in electronic form, Rule 33(d) now also explicitly permits a responding party to produce business records in lieu of answering an interrogatory as long as the burden of deriving the answer is substantially the same for both parties.

However, a responding party producing business records may be required to provide the requesting party with some combination of technical support, information on application software, or other assistance. The important question to consider will be whether that support will allow the requesting party to derive or ascertain the answer from the ESI as readily as the responding party. The need to protect sensitive interests of

confidentiality or privacy may mean that a responding party may provide the answer itself rather than produce its business records.

When preparing interrogatories, the requesting party may want to consider propounding more than one set. The first set of interrogatories can be used to determine basic information regarding the opposing party's hardware, software, type of information stored, and people who have the most knowledge regarding those systems.

With answers to basic interrogatories, the requesting party can draft more targeted interrogatories regarding issues relating to the opposing party's Information Technology staffing, internet access and use, back up systems, email, and remote access issues. Given the limited number of interrogatories permitted under both state and federal rules, it is critical for the parties to come to an agreement as to the number of interrogatories that may be propounded as soon as possible. If an agreement is impossible, the requesting party may need to seek the court's assistance immediately.

Parties may also consider developing an agreed order on preservation of ESI (and paper documents). An order can outline the agreed-upon time periods, key players, location of information, information to be preserved, form of productions, etc This would be particularly helpful during the parties' Rule 16 conference with the court. In addition,

as the case develops and the parties better understand the allegations and defenses, the terms of the preservation order can be modified. A time period that seemed important when the complaint was filed may not be important after six months of discovery. Of course, the existence of a good preservation order depends heavily on whether the parties can come to an agreement on its terms.

IV. Conclusion

The amended Rules are the keys to discovery in this electronic age. Failure to embrace the keys in a given case can and will have devastating effects on the litigation, the lawyers, and the parties. Lawyers must make sure their clients comply with their duties to preserve and produce ESI; they must work diligently with opposing counsel to plan for and identify problems that might arise in the course of litigation; and they must seek the assistance of other qualified professionals such as a forensic computer expert when the circumstances warrant it. It is vital to understand the Rules and contemplate their application from the moment that litigation is reasonably anticipated.

Knowing the nature of your client's data and addressing these issues early with the court and opposing counsel will ensure that you take a consistent approach in the currently inconsistent world of electronic discovery.



Will H. Fulton



Lisa K. Lang



P. Shane O'Bryan
 WOODWARD, HOBSON & FULTON
 2500 National City Tower
 101 South 5th Street
 Louisville, KY 40202-3175
 Tel: (502) 581-8000
wfulton@whf-law.com
llang@whf-law.com
sobryan@whf-law.com
www.whf-law.com

TRANSPORTATION PRACTICE GROUP DIRECTORY OF MEMBER FIRMS

DOMESTIC

ALABAMA

BOWRON, LATTI & WASDEN, P.C.
Mobile, Alabama /
Pensacola Florida
Tel: (850) 435-8901
Jeffrey U. Beaverstock
jub@bowronlatta.com

BRADLEY ARANT ROSE
& WHITE LLP
Montgomery, Alabama
Tel: (334) 956-7700
William C. McGowin
wmcgowin@bradleyarant.com

ALASKA

DELANEY WILES, INC.
Anchorage, Alaska
Tel: (907) 279-3581
Clay A. Young
cay@delaneywiles.com

ARIZONA

RENAUD COOK DRURY
MESAROS, PA
Phoenix, Arizona
Tel: (602) 307-9900
Tamara N. Cook
tcook@rcdmlaw.com
William W. Drury, Jr.
wdrury@rcdmlaw.com

ARKANSAS

WRIGHT, LINDSEY
& JENNINGS LLP
Little Rock, Arkansas
Tel: (501) 371-0808
Michael D. Barnes
mbarnes@wlj.com
Greg T. Jones
gjones@wlj.com
Jerry J. Sallings
jsallings@wlj.com

CALIFORNIA

HAIGHT, BROWN
& BONESTEEL, L.L.P.
Los Angeles, California
Tel: (310) 215-7100
Peter A. Dubrawski
pdubrawski@hbblaw.com
William O. Martin, Jr.
wmartin@hbblaw.com
Christian Stouder
cstouder@hbblaw.com
Krsto Mijanovic
kmijanovic@hbblaw.com

HIGGS, FLETCHER & MACK, L.L.P.
San Diego, California
Tel: (619) 236-1551
Peter S. Doody
doody@higgslaw.com

ROBINSON & WOOD, INC.
San Jose, California
Tel: (408) 298-7120
Joseph C. Balestrieri
jcb@robinsonwood.com
Art Casey
ajc@robinsonwood.com
Jonathan L. Lee
jll@robinsonwood.com

COLORADO

HALL & EVANS, L.L.C.
Denver, Colorado
Tel: (303) 628-3300
Peter F. Jones
jonesp@hallevans.com
Bruce A. Menk
menkb@hallevans.com
Lance G. Eberhart
eberhartl@hallevans.com

CONNECTICUT

HALLORAN & SAGE LLP
Hartford, Connecticut
Tel: (860) 522-6103
Steven H. Malitz
malitz@halloran-sage.com

HALLORAN & SAGE LLP
Westport, Connecticut
Tel: (203) 227-2855
Thomas P. O'Dea, Jr.
odea@halloran-sage.com

FLORIDA

FOWLER WHITE BURNETT P A
Fort Lauderdale, Florida
Tel: (954) 377-8100
Christopher E. Knight
cknight@fowler-white.com

FOWLER WHITE BURNETT P A
Miami, Florida
Tel: (305) 789-9200
Edward J. Briscoe
ebriscoe@fowler-white.com
Christopher E. Knight
cknight@fowler-white.com
J. Michael Pennekamp
jpennekamp@fowler-white.com

DICKINSON & GIBBONS, P.A.
Sarasota, Florida
Tel: (941) 366-4680
A. James Rolfes
ajrolfes@dglawyers.com

FLORIDA (CONT.)

FOWLER WHITE BURNETT P A
West Palm Beach, Florida
Tel: (561) 802-9044
Christopher E. Knight
cknight@fowler-white.com

GEORGIA

HAWKINS & PARNELL, LLP
Atlanta, Georgia
Tel: (404) 614-7400
Warner S. Fox
wfox@hplegal.com
Alan F. Herman
aherman@hplegal.com
William H. Major
wmajor@hplegal.com

HUNTER, MACLEAN, EXLEY
& DUNN, P.C.
Savannah, Georgia
Tel: (912) 236-0261
Dennis B. Keene
dkeene@huntermaclean.com

IDAHO

GREENER BURKE
SHOEMAKER PA
Boise, Idaho
Tel: (208) 319-2600
Richard H. Greener
rgreener@greenerlaw.com
Fredric V. Shoemaker
fshoemaker@greenerlaw.com

ILLINOIS

BROWN & JAMES, P.C.
Belleville, Illinois
Tel: (618) 235-5590
Beth Kamp Veath
bveath@bjpc.com
Tara L. Morris
tmorris@bjpc.com

ILLINOIS (CONT.)

JOHNSON & BELL, LTD.
Chicago, Illinois
Tel: (312) 372-0770
Robert M. Burke
burker@jbltd.com
Gregory D. Conforti
confortig@jbltd.com

QUINN, JOHNSTON, HENDERSON
& PRETORIUS, CHTD.
Peoria, Illinois
Tel: (309) 674-1133
Gregory A. Cerulo
gcerulo@qjhp.com
David Collins
dcollins@qjhp.com
R. Michael Henderson
mickhenderson@qjhp.com

INDIANA

BECKMAN, KELLY & SMITH
Hammond, Indiana
Tel: (219) 933-6200
Eric L. Kirschner
ekirschner@bkslegal.com
Julie R. Murzyn
jmurzyn@bkslegal.com

BOSE MCKINNEY & EVANS LLP
Indianapolis, Indiana
Tel: (317) 684-5000
Steven D. Groth
sgroth@boselaw.com
Bernie Too Keller
bkeller@boselaw.com
Alan S. Townsend
atownsend@boselaw.com
Jennifer Walker
jwalker@boselaw.com

IOWA

WHITFIELD & EDDY P.L.C.
Des Moines, Iowa
Tel: (515) 288-6041
Bernard L. Spaeth, Jr.
spaeth@whitfieldlaw.com

KANSAS

BAKER STERCHI COWDEN
& RICE L.L.C.
Overland Park, Kansas
Tel: (913) 451-6752
Hal D. Meltzer
meltzer@bscr-law.com
James R. Jarrow
jarrow@bscr-law.com
Shawn M. Rogers
rogers@bscr-law.com

HINKLE ELKOURI
LAW FIRM L.L.C.
Wichita, Kansas
Tel: (316) 267-2000
J. Philip Davidson
pdavidson@hinklaw.com

KENTUCKY

WOODWARD, HOBSON
& FULTON, L.L.P.
Louisville, Kentucky
Tel: (502) 581-8000
Will H. Fulton
wfulton@whf-law.com
James T. Lewis
jlewis@whf-law.com

LOUISIANA

LEAKE & ANDERSSON, L.L.P.
New Orleans, Louisiana
Tel: (504) 585-7500
Louis P. Bonnaffons
lbonnaffons@leakeandersson.com
Craig M. Cousins
ccousins@leakeandersson.com
Stanton E. Shuler, Jr.
sshuler@leakeandersson.com

MARYLAND

SEMMES, BOWEN
& SEMMES PC.
Baltimore, Maryland
Tel: (410) 539-5040
Thomas V. McCarron
tmccarron@semmes.com

MASSACHUSETTS

MORRISON MAHONEY LLP
 Boston, Massachusetts
 Tel: (617) 439-7500
 Lee Stephen MacPhee
Imacphee@morrisonmahoney.com
 Sean F. McDonough
smcdonough@morrisonmahoney.com
 Gareth Notis
gnotis@morrisonmahoney.com

MORRISON MAHONEY LLP
 Fall River, Massachusetts
 Tel: 508-677-3100
 Lee Stephen MacPhee
Imacphee@morrisonmahoney.com
 Sean F. McDonough
smcdonough@morrisonmahoney.com
 Gareth Notis
gnotis@morrisonmahoney.com

MORRISON MAHONEY LLP
 Springfield, Massachusetts
 Tel: (413) 737-4373
 Lee Stephen MacPhee
Imacphee@morrisonmahoney.com
 Sean F. McDonough
smcdonough@morrisonmahoney.com
 Gareth Notis
gnotis@morrisonmahoney.com

MORRISON MAHONEY LLP
 Worcester, Massachusetts
 Tel: (508) 757-7777
 Lee Stephen MacPhee
Imacphee@morrisonmahoney.com
 Sean F. McDonough
smcdonough@morrisonmahoney.com
 Gareth Notis
gnotis@morrisonmahoney.com

MICHIGAN

PLUNKETT COONEY
 Detroit, Michigan
 Tel: (313) 965-3900
 Henry B. Cooney
hcooney@plunkettcooney.com
 James R. Lilly
jlilly@plunkettcooney.com
 Michael K. Sheehy
msheehy@plunkettcooney.com

PLUNKETT COONEY
 Grand Rapids, Michigan
 Tel: (616) 752-4600
 Henry B. Cooney
hcooney@plunkettcooney.com
 Timothy Sheridan
tsheridan@plunkettcooney.com

MISSISSIPPI

DANIEL COKER HORTON
 & BELL, P.A.
 Jackson, Mississippi
 Tel: (601) 969-7607
 B. Stevens Hazard
shazard@danielcoker.com
 J. Wyatt Hazard
whazard@danielcoker.com

MISSOURI

BAKER STERCHI COWDEN
 & RICE L.L.C.
 Kansas City, Missouri
 Tel: (816) 471-2121
 James R. Jarrow
jarrow@bscr-law.com
 Hal D. Meltzer
meltzer@bscr-law.com

BROWN & JAMES, P.C.
 St. Louis, Missouri
 Tel: (314) 421-3400
 Joseph R. Swift
jswift@bjpc.com

MONTANA

AXILON LAW GROUP, PLLC
 Big Sky, Montana
 Tel: (406) 995-4776
 Gary D. Hermann
ghermann@axilonlaw.com

AXILON LAW GROUP, PLLC
 Billings, Montana
 Tel: (406) 532-2630
 Gary D. Hermann
ghermann@axilonlaw.com

AXILON LAW GROUP, PLLC
 Missoula, Montana
 Tel: (406) 532-2630
 Dean A. Hoistad
dhoistad@axilonlaw.com

NEBRASKA

BAYLOR, EVNEN, CURTISS,
 GRIMIT & WITT, LLP
 Lincoln, Nebraska
 Tel: (402) 475-1075
 Walter E. Zink II
wzink@bayloreven.com

NEVADA

ALVERSON, TAYLOR,
 MORTENSEN & SANDERS
 Las Vegas, Nevada
 Tel: (702) 384-7000
 J. Bruce Alverson
balverson@alversontaylor.com
 Jack C. Cherry
jcherry@alversontaylor.com
 Jonathan B. Owens
jowens@alversontaylor.com

PERRY & SPANN, P.C.
 Reno, Nevada
 Tel: (775) 829-2002
 Victor A. Perry
vperry@perryspann.com
 Charles W. Spann
cspann@perryspann.com

NEW HAMPSHIRE

WADLEIGH, STARR
& PETERS, P.L.L.C.
Manchester, New Hampshire
Tel: (603) 669-4140
Marc R. Scheer
mscheer@wadleighlaw.com

NEW JERSEY

GERMAN, GALLAGHER
& MURTAGH
Moorestown, New Jersey
Tel: (215) 545-7700
Gary R. Gremminger
gremminger@ggmfirm.com

NEW MEXICO

BUTT THORNTON & BAEHR PC
Albuquerque, New Mexico
Tel: (505) 884-0777
Martin Diamond
madiamond@btblaw.com
J. Duke Thornton
jdthornton@btblaw.com
Paul T. Yarbrough
ptyarbrough@btblaw.com

NEW YORK

CARTER, CONBOY, CASE,
BLACKMORE, MALONEY
& LAIRD, P.C.
Albany, New York
Tel: (518) 465-3484
Edward D. Laird
elaird@carterconboy.com
John T. Maloney
jmaloney@carterconboy.com

DAMON & MOREY LLP
Buffalo, New York
Tel: (716) 856-5500
Thomas J. Drury
tdrury@damonmorey.com
Joseph Dunbar
jdunbar@damonmorey.com

NEW YORK (CONT.)

LESTER SCHWAB KATZ
& DWYER, LLP
New York, New York
Tel: (212) 964-6611
Felice Cotignola
fcotignola@lskdnylaw.com
Robert N. Dunn
rdunn@lskdnylaw.com
Melvin Katz
mkatz@lskdnylaw.com

SMITH, SOVIK, KENDRICK
& SUGNET, P.C.
Syracuse, New York
Tel: (315) 474-2911
Kevin E. Hulslander
khulslander@smithsovik.com
Michael P. Ringwood
mringwood@smithsovik.com

NORTH CAROLINA

YOUNG MOORE
AND HENDERSON P.A.
Raleigh, North Carolina
Tel: (919) 782-6860
David M. Duke
dmd@youngmoorelaw.com
Shannon Frankel
ssf@youngmoorelaw.com

NORTH DAKOTA

VOGEL LAW FIRM
Fargo, North Dakota
Tel: (701) 237-6983
M. Daniel Vogel
dvogel@vogellaw.com
Michael T. Andrews
mandrews@vogellaw.com

OHIO

HERMANN, CAHN
& SCHNEIDER, LLP
Cleveland, Ohio
Tel: (216) 781-5515
Hunter Scott Havens
hhavens@hcsattys.com
Peter J. Krembs
pkrembs@hcsattys.com

CRABBE, BROWN & JAMES LLP
Columbus, Ohio
Tel: (614) 228-5511
Robert C. Buchbinder
rbuchbinder@cbjlawyers.com
Vincent J. Lodico
vlodico@cbjlawyers.com

OKLAHOMA

WHITTEN, NELSON, MCGUIRE,
TERRY & ROSELIUS
Oklahoma City, Oklahoma
Tel: (405) 705-3600
Robert Nelson
nelson@whitten-nelson.com
Derrick T. DeWitt
ddewitt@whitten-nelson.com

FELDMAN FRANDEN
WOODARD & FARRIS
Tulsa, Oklahoma
Tel: (918) 583-7129
Joseph R. Farris
jfarris@tulsalawyer.com
Thayla P. Bohn
tpbohn@tulsalawyer.com
F. Jason Goodnight
jgoodnight@tulsalawyer.com
John R. Woodard III
jwoodard@tulsalawyer.com

OREGON

COSGRAVE VERGEER
KESTER LLP
Portland, Oregon
Tel: (503) 323-9000
Walter H. Sweek
wsweek@cvk-law.com
Derek J. Ashton
dashton@cvk-law.com
Robert E. Barton
rbarton@cvk-law.com

PENNSYLVANIA

MCNEES WALLACE
& NURICK LLC
Harrisburg, Pennsylvania
Tel: (717) 780-7850
Curtis N. Stambaugh
cstambau@mwn.com
Michael R. Kelley
mkelley@mwn.com

GERMAN, GALLAGHER
& MURTAGH
Philadelphia, Pennsylvania
Tel: (215) 545-7700
Robert P. Corbin
corbinr@ggmfirm.com
Judy Delaney
delaneyj@ggmfirm.com
Gary R. Gremminger
gremminger@ggmfirm.com

MEYER, DARRAGH, BUCKLER,
BEBENEK & ECK, P.L.L.C.
Pittsburgh, Pennsylvania
Tel: (412) 261-6600
Paul R. Robinson
probinson@mdbbe.com

RHODE ISLAND

HIGGINS, CAVANAGH & COONEY LLP
Providence, Rhode Island
Tel: (401) 272-3500
Stephen B. Lang
slang@hcc-law.com
James A. Ruggieri
jruggieri@hcc-law.com

SOUTH CAROLINA

YOUNG CLEMENT RIVERS LLP
Charleston, South Carolina
Tel: (843) 577-4000
Duke R. Highfield
dhighfield@ycrlaw.com

NELSON MULLINS RILEY
& SCARBOROUGH LLP
Columbia, South Carolina
Tel: (803) 799-2000
Christopher J. Daniels
chris.daniels@nelsonmullins.com

NELSON MULLINS RILEY
& SCARBOROUGH LLP
Greenville, South Carolina
Tel: (864) 250-2300
William S. Brown
william.brown@nelsonmullins.com

TENNESSEE

LEITNER, WILLIAMS, DOOLEY
& NAPOLITAN, PLLC
Chattanooga, Tennessee
Tel: (423) 265-0214
Alan B. Easterly
alan.easterly@leitnerfirm.com
Marc H. Harwell
marc.harwell@leitnerfirm.com
Steven W. Keyt
steven.keyt@leitnerfirm.com
Paul R. Leitner
paul.leitner@leitnerfirm.com
Gary S. Napolitan
gary.napolitan@leitnerfirm.com
David W. Noblit
david.noblit@leitnerfirm.com

LEWIS, KING, KRIEG
& WALDROP, P.C.
Knoxville, Tennessee
Tel: (865) 546-4646
Richard W. Krieg
dkrieg@lewisking.com

TENNESSEE (CONT.)

BURCH, PORTER
& JOHNSON, PLLC
Memphis, Tennessee
Tel: (901) 524-5000
Sam L. Crain, Jr.
scrain@bpjlaw.com

LEITNER, WILLIAMS, DOOLEY
& NAPOLITAN, PLLC
Nashville, Tennessee
Tel: (615) 255-7722
Richard Mangelsdorf, Jr.
chuck.mangelsdorf@leitnerfirm.com
Jim Catalano
jim.catalano@leitnerfirm.com

LEWIS, KING, KRIEG
& WALDROP, P.C.
Nashville, Tennessee
Tel: (615) 259-1366
John R. Tarpley
jtarpoley@lewisking.com

TEXAS

MULLIN HOARD & BROWN, L.L.P.
Amarillo, Texas
Tel: (806) 372-5050
Danny M. Needham
dmneedham@mhba.com
Christopher W. Weber
cweber@mhba.com

NAMAN, HOWELL, SMITH
& LEE, L.L.P.
Austin, Texas
Tel: (512) 479-0300
P. Clark Aspy
aspy@namanhowell.com

STRASBURGER & PRICE, L.L.P.
Dallas, Texas
Tel: (214) 651-4300
Mark Scudder
mark.scudder@strasburger.com
Samuel J. Hallman
sam.hallman@strasburger.com

TEXAS (CONT.)

MOUNCE, GREEN, MYERS, SAFI,
PAXSON & GALATZAN, P.C.
El Paso, Texas
Tel: (915) 532-2000
Carl H. Green
green@mgmsg.com
Darryl S. Vereen
vereen@mgmsg.com

LORANCE & THOMPSON, P.C.
Houston, Texas
Tel: (713) 868-5560
Eric R. Benton
erb@lorancethompson.com
Melanie Cheairs
mrc@lorancethompson.com
Brian T. Coolidge
btc@lorancethompson.com
Dan L. Fulkerson
dlf@lorancethompson.com
Ryan T. Hand
rth@lorancethompson.com
Cynthia Huerta
ch@lorancethompson.com
Roger Oppenheim
rdo@lorancethompson.com
David Prasifka
dwp@lorancethompson.com
Shannon L. Rankin
slr@lorancethompson.com
Walter F. Williams III
wfw@lorancethompson.com

MULLIN HOARD & BROWN, L.L.P.
Lubbock, Texas
Tel: (806) 765-7491
Danny M. Needham
dmneedham@mhba.com

BALL & WEED, P.C.
San Antonio, Texas
Tel: (210) 731-6300
Larry D. Warren
ldw@ballandweed.com
Mark A. Cooper
mac@ballandweed.com

TEXAS (CONT.)

NAMAN, HOWELL, SMITH
& LEE, L.L.P.
Waco, Texas
Tel: (254) 755-4100
P. Clark Aspy
aspy@namanhowell.com
Jerry P. Campbell
campbell@namanhowell.com

UTAH

CHRISTENSEN & JENSEN, P.C.
Salt Lake City, Utah
Tel: (801) 323-5000
Dale J. Lambert
dale.lambert@chrisjen.com
Geoff Haslam
geoffrey.haslam@chrisjen.com

VIRGINIA

MORRIS & MORRIS, P.C.
Richmond, Virginia
Tel: (804) 344-8300
D. Cameron Beck, Jr.
cbeck@morrismorris.com
Jacqueline G. Epps
jepps@morrismorris.com
Joseph M. Moore
jmoore@morrismorris.com

GENTRY LOCKE RAKES
& MOORE LLP
Roanoke, Virginia
Tel: (540) 983-9300
E. Scott Austin
scott_austin@gentrylocke.com
Charles "Trey" Smith, III
trey_smith@gentrylocke.com

WASHINGTON

MERRICK, HOFSTEDT
& LINDSEY, P.S.
Seattle, Washington
Tel: (206) 682-0610
Thomas J. Collins
tcollins@mhlseattle.com
Andrew C. Gauen
agauen@mhlseattle.com

PAINE HAMBLEN LLP
Spokane, Washington
Tel: (509) 455-6000
Troy Nelson
troy.nelson@painehamblen.com

WEST VIRGINIA

ROBINSON & MCELWEE PLLC
Charleston, West Virginia
Tel: (304) 344-5800
Edward J. George
ejg@ramlaw.com
Stephen F. Gandee
sfg@ramlaw.com

WYOMING

MURANE & BOSTWICK, LLC
Casper, Wyoming
Tel: (307) 234-9345
Kathleen J. Swanson
kjs@murane.com

MURANE & BOSTWICK, LLC
Cheyenne, Wyoming
Tel: (307) 634-7500
Greg Greenlee
ggg@murane.com
Loyd E. Smith
les@murane.com

INTERNATIONAL

AUSTRALIA

CORNWALL STODART
Melbourne, Victoria
Tel: 61-3-9608-2000
Elizabeth Guerra-Stolfa
e.guerra@cornwalls.com.au
Levent Shevki
l.shevki@cornwalls.com.au

CANADA

PARLEE MCLAWS LLP
Edmonton, Alberta
Tel: (780) 423-8500
Terry R. Davis
tdavis@parlee.com

FASKEN MARTINEAU
DUMOULIN LLP
Vancouver, British Columbia
Tel: (604) 631-3131
William Westeringh
wwesteringh@van.fasken.com