EDITORS’ NOTEPAD

The Transportation Practice Group of ALFA International has published the Transportation Update for about eighteen years. Please note that in addition to this issue of the Transportation Update we have an archive of many recent issues on the ALFA website at ALFA Transportation Update Archives, http://www.alfainternational.com/practices/groupdetail.aspx?pgid=57.

If your first contact with the Transportation Update is through our website, you can be added to our email distribution list by contacting us through Katie Garcia (kgarcia@alfa international.com). Please add the 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 want to receive the 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.

Our primary method of distribution of the Transportation Update is by email. Electronic publication allows us to include hyperlinks for the use of our readers.¹ 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 substantive/informative section headings are as follows: The Editors’ Notepad (this section) where the Editors often provide sources of information and points of interest; ALFA Member Publications and Speaking Engagements; Cases, Regulations, and Statutes; Verdicts, Appeals, and Settlements; Practice Tips; and Articles.

The ALFA Member Publications and Speaking Engagements section lets you know what your ALFA lawyers are doing to share their knowledge and experiences to assist in the defense of claims and cases.

Under the Cases, Regulations, and Statutes section of the Transportation Update, we report to you about developments in the statutory, regulatory, and common law around the country that are of general interest to the trucking community.

The Verdicts, Appeals, and Settlements section addresses the results of litigation affecting the trucking industry and also provides information about significant results achieved by ALFA firm lawyers. We encourage you to report to the Editors any verdict, appeal, or settlement that you think is of interest to the trucking community.

¹ All hyperlinks are in blue. 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.
The **Practice Tips** section of the *Update* features articles which address matters of practical interest to 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 issue, we feature the following:

- **Second Circuit Adopts “Bright Line” Test for Determining Removability** – Fredric V. Shoemaker, Greener Burke Shoemaker P.A.
- **FMCSR and the Standard of Care for CMV Operators** – Marc H. Harwell and David A. Chapman, Leitner, Williams, Dooley & Napolitan

**Articles** provide in depth analysis of issues, developments, and concerns that are relevant to the transportation industry. In this issue, we feature the following:

- **Preparing Your Witness for a Deposition While Protecting Attorney Work Product and the Attorney-Client Privilege** – Paul J. Skolaut, Hinkle Elkouri Law Firm L.L.C.

The Editors suggest the following for sources of information and points of interest that we think you will find to be helpful:

- **“Free” Training Material from the Federal Government**
  
  The Federal Railroad Administration (FRA) released in January 2009 an educational video for truck drivers designed to promote safety at highway-rail grade crossings. The video reviews the legal responsibilities of drivers as they approach and travel over highway-rail grade crossings and is available in both English and Spanish. The video is downloadable from the website listed below and should be of interest to your safety and training personnel. We expect the Plaintiffs’ bar and “transportation safety” experts hired exclusively by Plaintiffs will now assert in crossing cases that your company had a poor safety program if your driver had not seen this material prior to the accident. [http://www.fra.dot.gov/us/content/2109](http://www.fra.dot.gov/us/content/2109)

- **A Primer for the FMCSA’s CSA 2010 Initiative**
  
  The FMCSA is in the process of rolling out a new methodology to replace SAFER and SafeStat which have been seriously discredited. DOT’s Audit Department was so concerned by a 2004 audit of SafeStat that it barred public access to FMCSA motor carrier ratings and published a Warning. This emerging issue is a very critical one, and we will have articles on this topic frequently. Also, a good informational website can be found at: [http://www.fmcsa.dot.gov/safety-security/sca2010/home.htm](http://www.fmcsa.dot.gov/safety-security/sca2010/home.htm). Contact the Editors or another ALFA attorney if you require additional information.

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

**Will H. Fulton**
DINSMORE & SHOHL, LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202
Tel: (502) 581-8009
Fax: (502) 581-8111
Will.fulton@dinsaw.com

**J. Philip Davidson**
HINKLE ELKOURI LAW FIRM L.L.C.
2000 Epic Center
301 North Main St.
Wichita, KS 67202
Tel: (316) 660-6205
Fax: (316) 264-1556
p davidson@hinklaw.com

**Jay Skolaut**
HINKLE ELKOURI LAW FIRM L.L.C.
2000 Epic Center
301 North Main St.
Wichita, KS 67202
Tel: (316) 660-6220
Fax: (316) 264-1556
jskolaut@hinklaw.com
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DISCLAIMER
The ALFA Transportation Update does not create an attorney-client relationship between the reader and any attorney nor does it render legal advice on any specific matter. No reader should act or refrain from acting on the basis of any statement in the ALFA Transportation Update without seeking advice from qualified legal counsel on the particular facts and circumstances involved. Readers are responsible for obtaining such advice from their own legal counsel.
FUTURE EVENTS

Each year, the Transportation Practice Group of ALFA International presents a multi-day seminar for members of the Trucking Industry. The 2011 Transportation Seminar will be held in Dana Point, California from May 4, 2011 to May 6, 2011. The official web site of this venue is http://www.ritzcarlton.com/en/Properties/LagunaNiguel/Default.htm. The luxurious Ritz-Carlton Laguna Niguel, pictured below, is located between Los Angeles and San Diego, and sits atop a 150 foot bluff that overlooks the Pacific Ocean.

In addition to the spa and other amenities offered by the Ritz-Carlton, the Ritz-Carlton Laguna Niguel offers the perfect location for golfing, surfing, or simply lounging at the beach. Our Program Chair for the 2011 seminar is Joe R. Swift of Brown & James, P.C. of St. Louis, Missouri who can be reached at (314) 421-3400 and jswift@bjpc.com.

The theme of this year’s seminar is “Asleep at the Wheel: A Wake Up Call!” The program is designed to identify emerging issues and provide real world approaches and solutions to some of the vexing problems attorneys and claims professionals see on a daily basis.

From a litigation perspective, those of us on the front lines are seeing increasingly specialized plaintiff’s lawyers. The 2011 Transportation Seminar will kick off with a focus group evaluation of the cross-examination of a company safety director. This will allow the audience to “share the pain” of a strident cross-examination and offer insight and strategies for when it is your company’s turn to “face the music” of cross-examination.

A team of legal experts and industry representatives will then update attendees on some of the knottiest legal entanglements facing the industry today, including indemnification issues among shippers, carriers, and drivers; developments concerning MCS-90 and liability issues; and the current status of the Medicare payback rules and strategies for dealing with them.

How safe is your truck and what forces are out there to threaten your load? Attendees will hear an update on truck security and some hair-raising experiences companies need to be aware of.

The tired, distracted driver is currently the focus of the FMCSA as well as plaintiff’s lawyers across the country. Attendees will hear the latest on the topic that seems to be on everyone’s mind.

The 2011 Transportation Seminar will also offer attendees break out options which will include a good ole fashioned town hall meeting to discuss with a group of seasoned veterans any topic you care to bring; a lively discussion of the latest in texting and hours of service; and a report and update on CSA 2010, one of the most revolutionizing forces to hit the industry.

Lastly, attendees will reconvene to see what the focus group thought of the cross-examination of the company safety director. This will allow attendees to pick up some perspective on how effective your company safety director’s testimony strategy may be from real world observers and a focus group of jurors.

The 2011 Transportation Seminar is sure to provide outstanding professional development at an unforgettable venue. For more information regarding the 2011 Transportation Seminar, please contact Katie Garcia at kgarcia@alfainternational.com or an ALFA attorney listed at the end of this newsletter.

The Chairman of the Transportation Practice Group for 2010-2011 is Peter Doody of Higgs, Fletcher & Mack, LLP, San Diego, California, who can be reached at (619) 236-1551 and doody@higgslaw.com. Our Vice-Chair is P. Clark Aspy of Naman, Howell, Smith & Lee, LLP, Austin, Texas, who can be reached at (512) 479-0300 and aspy@namanhowell.com. The Chair Emeritus is Danny M. Needham of Mullin, Hoard & Brown, LLP, Amarillo, Texas, who can be reached at (806) 372-5050 and dmneedham@mhba.com.
ALFA’S GO TEAM HOTLINE

ALFA knows its transportation clients must often confront time-sensitive emergencies. The ALFA Go Team Hotline is designed to offer ALFA clients immediate legal and other support services, 24 hours a day and 7 days a week.

The service works as follows: An ALFA client needing immediate legal support calls the ALFA Go Team Hotline at 1-866-540-ALFA (2532). An ALFA operator will provide location-specific contact information about experienced transportation lawyers, accident reconstructionists, and other transportation industry experts.

When you contact the ALFA Go Team Hotline, you are connected to a full-service emergency response team, when you need it. Contact your ALFA lawyer today for more details about the ALFA Go Team Hotline. Remember, 1-866-540-ALFA (2532).

FUTURE ISSUES OF TRANSPORTATION UPDATE

The Spring 2011 issue of Transportation Update will be published in May 2011.
CASES, REGULATIONS, & STATUTES

CALIFORNIA

A New Tort is Born: Legally Parked Commercial Truck Liability

Lawson v. Safeway Inc., California Court of Appeal, First District, Division One (December 30, 2010)

Only in California. A California Court of Appeal has found personal injury tort liability against a trucking company whose driver legally and lawfully parked his tractor trailer off the highway in front of a hotel.

In Crescent City, California, a Safeway Inc. truck driver legally parked his tractor trailer off the side of southbound Highway 101 in front of the Anchor Beach Inn hotel. The tractor trailer was parked parallel to the southbound lane of Highway 101. The truck driver had parked at this location at least 40 times in the past. The driver would drive at night and sleep during the daytime. There were no signs or red curbs in front of the Anchor Beach Inn to prohibit parking.

Just south of the Anchor Beach Inn was the T-intersection of Highway 101 and a street by the name of Anchor Way. There is a stop sign on Anchor Way for traffic turning onto Highway 101.

On a clear afternoon, the co-defendant, Mr. Kite, was driving a pick-up truck on Anchor Way, and had come to a full stop at the intersection of Highway 101 before initiating his left hand turn. Mr. Kite looked to his immediate left to check for southbound traffic on Highway 101, but his view was partially obstructed by the parked Safeway Inc. tractor trailer, which was about 80 feet to his left. Mr. Kite crept his pick-up truck forward past the stop sign until he decided the intersection was clear. Meanwhile, a trike (three-wheel) motorcycle driven by plaintiff, Mr. Lawson, with his wife on the back was proceeding southbound on Highway 101. Thinking the intersection was clear, Mr. Kite drove his pick-up truck forward onto Highway 101 directly into the path of the Lawsons’ trike, which impacted with the driver’s side of Mr. Kite’s pick-up truck. Mrs. Lawson was thrown from the trike and received serious injury.

Plaintiffs’ counsel brought suit against Mr. Kite for failing to yield the right of way, and against Safeway Inc. on a theory of “unsafe parking.” It was uncontested at trial that the Safeway Inc. tractor was lawfully parked. Plaintiffs argued the Safeway Inc. tractor, as parked, partially obstructed the sight lines of vehicles attempting to enter Highway 101 from Anchor Way. The jury returned with a special verdict finding Safeway Inc. 35% comparatively negligent for causing the accident.

The California Court of Appeal upheld the verdict. It reasoned the truck driver had a duty to park both legally and safely especially since the commercial truck was 65 feet long, 13 feet tall, and 8 feet wide. The Court was persuaded by expert testimony from plaintiffs’ truck driving expert who opined commercial truck drivers have special licenses and are trained, or should be, to be aware of the risk of blocking other drivers’ sight lines when parking. The Court of Appeal stated it agreed with the premise that drivers should ordinarily have no exposure to liability if they are legally parked. The Court also recognized that parked vehicles often obstruct sight views of oncoming traffic. However, the court blatantly reasoned “but, this case is different.” The primary reason cited by the court was that “the case involves an extremely large commercial truck. Such trucks create a greater than normal risk because by sheer size they obstruct more of the view than smaller vehicles.” And, licensed commercial truck drivers when parking their large tractor trailers should be aware of the need to take extra precautions.

This is a dangerous ruling by this California Court of Appeal. The Court, in essence, states that commercial truck drivers have a greater duty of care when parking their vehicles. This Court has created a new obligation under California law. Every time, and anywhere, the driver parks his or her truck, the driver must also make sure the truck is parked “safely” under the particular circumstances. “Safe parking” is a vague and unworkable legal standard which promises to be applied with the benefit of focused hindsight. This is an equally dangerous decision since the court expeditiously creates a new basis of liability simply on the grounds a tractor trailer is “an extremely large vehicle.” We can expect this unfortunate
decision to be often cited by the plaintiffs’ bar in any California trucking case where liability is being asserted against a tractor trailer which is otherwise being operated lawfully.

Peter S. Doody  
HIGGS FLETCHER & MACK, LLP  
401 West A Street  
Suite 2600  
San Diego, CA 92101-7913  
Tel: (619) 236-1551  
Fax: (619) 696-1410  
doody@higgslaw.com  
www.higgsfletchermack.com
ILLINOIS

U.S. District Court for the Northern District of Illinois Grants Summary Judgment In A Negligent Entrustment Case.

The Northern District of Illinois recently granted summary judgment in favor of defendant XTRA Lease LLC in a case where the defendant, XTRA Lease LC, who engaged in the business of leasing trailers, leased a trailer to a driver who got into a motor vehicle accident. Johnson v. XTRA Lease LC, 2010 U.S. Dist. LEXIS 16174 (N.D. Ill. 2010). Defendant XTRA leased a trailer to a third party customer, but is not in the business of operating tractors, and each trailer it leases is leased subject to a set of policies and procedures.

The accident in question involved a vehicle operated by plaintiff and a truck that had been unidentified in the police report with no specific facts. In fact, the traffic report only identified the offending truck by the name on the trailer, which of course was XTRA in red-lettering. Defendant XTRA filed a motion for summary judgment, arguing that it owed no duty to the plaintiff. Plaintiff argued that a statutory employment relationship existed between the unknown driver and XTRA. The Court rejected this argument, noting there was no precedent for this type of argument. Further, the Court noted there was no evidence that the unknown driver was incompetent or unfit and that the driver’s incompetency was the proximate cause of plaintiff’s injuries.

In the subject case, the Court noted that XTRA was engaged in the trade of leasing trailers. Plaintiff argued that a statutory employment relationship existed between the unknown driver and XTRA. The Court rejected this argument, noting there was no precedent for this type of argument. Further, the Court noted there was no evidence that the unknown driver was incompetent or unfit and that the driver’s incompetency was the proximate cause of plaintiff’s injuries.

Often times, plaintiff’s attorneys will attempt to hold an entity liable for an accident based on the fact that its logos or insignia are printed on a trailer involved in the incident. The Court here makes it clear that a plaintiff must clear a high hurdle (actual knowledge of clear evidence of incompetency) before liability will attach to an owner of a vehicle who has rented out its equipment.
KANSAS


Last March, we reported that the Kansas Court of Appeals had upheld Kansas’ $250,000.00 statutory cap on non-economic damages, despite a trend among other state courts to find similar statutes unconstitutional. Less than a year later, the Kansas Supreme Court is preparing to weigh in on this debate, and this time, the statutory cap could be in serious jeopardy.

On February 18, 2011, the Kansas Supreme Court will hear, for the second time, oral arguments in Miller v. Johnson. In Miller, the plaintiff, a 28 year old female, agreed to have her right ovary removed by the defendant surgeon in order to relieve ongoing menstrual pain. Although the surgery initially appeared to be a success, the plaintiff’s pain returned after a month. A second surgeon recommended that the plaintiff have an appendectomy, to which she agreed. Prior to the second surgery, an ultrasound was performed which revealed that the plaintiff’s right ovary was intact, and that the left ovary had been mistakenly removed during the prior surgery. A year later, the plaintiff had to have her right ovary removed.

A jury awarded plaintiff $760,000.00 in damages, including $400,000.00 for non-economic damages. Due to Kansas’ statutory cap on such damages, this award for non-economic damages was reduced by the court to $250,000.00. The plaintiff filed an appeal challenging the constitutionality of the statutory cap, which appeal was taken up by the Kansas Supreme Court. The Kansas Supreme Court initially heard oral arguments in the case in October of 2009. Since that time, the Kansas Supreme Court has had to replace two of its justices, thus necessitating a second round of oral arguments.

Given that a decision has not already been rendered, the prevailing view is that the Kansas Supreme Court will find the statutory cap unconstitutional. One reason belief is that the Kansas Supreme Court is now more “liberal” than it has been in the past. This is in contrast to the executive and legislative branches of the Kansas government, which have become much more conservative as a result of the elections last November. With increasingly conservative executive and legislative branches, the “liberal” justices on the Kansas Supreme Court may determine this is the right moment to find the statutory cap unconstitutional, believing there may not be any more “liberal” justices appointed once the so-called existing “liberals” retire. Currently in Kansas, a nine member nominating commission – comprised of five lawyers elected by other lawyers and four non-lawyers appointed by the governor – selects three candidates for each Supreme Court opening. The governor then chooses one of the three candidates for the vacancy. However, Sam Brownback, the former U.S. Senator and recently elected Governor of Kansas, has expressed interest in taking the power to appoint Kansas’ Supreme Court justices away from the Kansas Bar in favor of the executive and legislative branches. The obvious result of this move would be the nomination and selection of more conservative justices. If the statutory cap is found to be unconstitutional, there will undoubtedly be an effort to amend the Kansas Constitution to allow for such limits on non-economic damages, as the cap is a popular tort reform and cost control measure. How quickly such a measure is organized will of course depend on when the ruling is made by the Supreme Court.
TENNESSEE


In *Mills v. Fulmarque, Inc.*, No. CT-005990-05 (Tenn. Ct. App. Dec. 23 2010), Mr. and Mrs. Mills (the “plaintiffs”) sued The Royal Group, Inc. (the “Royal Group”) and others on December 20, 2002, alleging personal injuries arising from an April 24, 2002 accident. On January 2, 2004, Royal Group amended its Answer to allege the comparative fault of Aaron Rents, Inc. (“Aaron Rents”). Because the one-year statute of limitations for personal injury suits had already run, the plaintiffs utilized Tenn. Code Ann. § 20-1-119’s 90-day window to amend their Complaint on January 26, 2004 to name Aaron Rents as defendant. On April 4, 2004, Aaron Rents filed its Answer, alleging the comparative fault of Fulmarque, Inc. (“Fulmarque”). Plaintiffs then filed a Second Amended Complaint on April 30, 2004, naming Fulmarque as defendant.¹

Fulmarque moved for summary judgment, arguing that because Aaron Rents was not sued within one-year from the date of injury, the naming of Fulmarque in the Royal Group’s Answer did not trigger a 90-day window within which the plaintiffs could add Fulmarque as a defendant. As such, Fulmarque asserted that plaintiffs’ claim against Fulmarque was time-barred. The trial court granted Fulmarque’s motion for summary judgment, and the plaintiffs appealed to the Tennessee Court of Appeals.

This case presented a question of first impression in Tennessee. Pursuant to Tenn. Code Ann. § 20-1-119, if an originally-named defendant, who was sued within the “initial” statute of limitations (e.g., one-year from date of injury), asserts the comparative fault of another party in its answer, the plaintiff then has an additional 90 days to amend its complaint to add the comparative tortfeasor identified in the defendant’s answer.

In *Mills*, Aaron Rents was sued within the 90-day limitation period allowed by Tenn. Code Ann. § 20-1-119, but outside the one-year statute of limitations for personal injury claims. Thus, the question on appeal was whether Tenn. Code Ann. § 20-1-119 permitted Aaron Rents to assert the comparative fault of Fulmarque, even though Aaron Rents was sued outside the one-year limitation period for personal injury claims. Accordingly, the court had to consider whether the term “applicable statute of limitations,” as used in Tenn. Code Ann. § 20-1-119, refers only to the one-year limitation period for personal injury actions or to the limitation period as extended by the 90-day window.

The court held that the term “applicable statute of limitations” does not refer only to the one-year limitation period for personal injury, but also to the limitation period as extended by the 90-day window. In other words, the court found that Tenn. Code Ann. § 20-1-119 allowed plaintiffs to amend their Complaint to name Fulmarque within 90 days from Aaron Rent’s identification of Fulmarque in its Answer, even though Aaron Rents was not sued within the one-year limitations period, because Aaron Rents was “named in an amended complaint filed within the applicable statute of limitations.”

In justifying its holding, the court first looked to the plain language of Tenn. Code Ann. § 20-1-119 and found it to “suggest” that successive 90-day periods are allowed every time a defendant asserts the comparative fault of another. However, because the court found the language to be ambiguous, the court then examined “the purpose, objective and spirit behind the legislation.” In doing so, the court noted that Tenn. Code Ann. § 20-1-119 was enacted to coincide with Tennessee’s comparative fault scheme, which is based upon “concepts of fairness and efficiency.” The court further described Tenn. Code Ann. § 20-1-119 as:

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¹ Suit was originally filed in the Western District of Tennessee but was later dismissed because the addition of Fulmarque destroyed diversity jurisdiction. The case was subsequently re-filed in Shelby County Circuit Court.
“remedial,” in that it “should be construed liberally.” Based on those principles, the court found the term “applicable statute of limitations” to extend to the limitation period as extended by Tenn. Code Ann. § 20-1-119’s 90-day window.

Marc H. Harwell

Matthew R. Jackson
LEITNER, WILLIAMS, DOOLEY & NAPOLITAN
801 Broad Street
3rd Floor
Chattanooga, TN 37402
Tel: (423) 424-3908
Fax: (423) 308-0908
marc.harwell@leitnerfirm.com
matt.jackson@leitnerfirm.com
www.leitnerfirm.com
Calculating Damages under the Hospital Lien Act

In *Shelby County Healthcare Corp. v. Baumgartner*, No. W2008-01771-COA-R3-CV (Tenn. Ct. App. Jan. 26, 2011), the Tennessee Court of Appeals considered whether a hospital lien had been impaired and, if so, the damages the hospital was entitled to recover.

John Baumgartner was taken to the Regional Medical Center in Memphis, Tennessee (the “MED”) after an automobile accident in Arkansas. The total cost of medical services rendered to Baumgartner was $529,840.30. Pursuant to Tennessee’s Hospital Lien Act, Tenn. Code Ann. § 29-22-101, et seq. (“HLA”), the MED filed an Affidavit for Hospital Lien and sent a copy to Baumgartner. Later, the MED filed an Amended Affidavit and mailed a copy to Baumgartner and his insurer, Nationwide. The MED did not provide a copy of the Affidavit or Amended Affidavit to the other driver in the accident or his insurer, Hartford.

Within a few days of the filing of the Amended Affidavit of Hospital Lien, Nationwide and Hartford reached settlements with Baumgartner whereby both insurers paid their policy limits. Nationwide paid $25,000.00 and Hartford paid $100,000.00 directly to Baumgartner. Nothing was paid to the MED for its hospital lien.

Subsequently, the MED filed suit against Baumgartner, his wife, Nationwide, and Hartford, seeking a judgment for the full amount of the hospital lien, plus attorneys’ fees, on the basis of breach of contract and impairment of the MED’s hospital lien. The MED argued it was entitled to recover the entire amount of the medical services provided to Baumgartner based on Tenn. Code Ann. § 29-22-104(b)(1), which reads in regards to impairment of a hospital lien: the hospital “may recover from the one accepting such release or satisfaction or making such settlement through reasonable cost of such hospital care, treatment and maintenance.”

Nationwide and Hartford took the position that the MED’s damages could not exceed one-third of the amount paid to the Baumgartners in settlement. For this position, the insurers relied on Tenn. Code Ann. § 29-22-101(b), which provides that a hospital lien “shall not apply to any amount in excess of one-third of the damages obtained or recovered by such person by judgment, settlement or compromise.”

The trial court granted summary judgment for the MED against Nationwide and awarded the MED $8,333.33 (one-third of $25,000), plus interest. The trial court also granted summary judgment to the MED against Hartford, but for reasons that are not apparent from the opinion, it awarded the MED the full policy limits, $100,000.00. Attorneys’ fees were denied by the trial court, which found that attorneys’ fees were not permitted by the HLA.

On appeal, the Court of Appeals held that the MED’s hospital lien had been properly perfected and was impaired. As for damages, the court held that the MED “may recover only the damages that are attributable to the impairment of its lien by Hartford and Nationwide, in light of the fact that, had the MED’s lien been honored, the MED would have received only one-third of the amounts paid to the Baumgartners by Hartford and Nationwide.” The court also held that attorneys’ fees were not recoverable.

In reaching its decision, the Court of Appeals considered the legislative history of the HLA and noted that the full amount of Baumgartner’s medical expenses had never been the responsibility of Nationwide or Hartford. Instead, Nationwide and Hartford each had a duty under the HLA to pay one-third of the settlement monies to the MED. The Court also pointed out that the provisions of Tenn. Code Ann. § 29-22-104(b)(1) and § 29-22-101(b) are not contrary to each other because there could be cases where one-third of the damages obtained by the injured person equals or exceeds the cost of the hospital care. An example of this is a person obtaining a settlement that includes money for pain and suffering. As the court stated, “The ‘damages obtained’ under § 29-22-101(b), or the ‘settlement’ made in impairment of the lien under § 29-22-104(b)(1), may be more, or may be less, than the reasonable costs of the medical care, depending on the circumstances.”

Accordingly, the Court of Appeals reversed the trial court’s award of $100,000.00 against Hartford.
and held that the award of $8,333.33 against Nationwide was correct. The case was remanded for a determination of whether the MED was entitled to consequential damages apart from attorneys’ fees from Nationwide.

Marc H. Harwell

Blair Bennington Cannon
LEITNER, WILLIAMS, DOOLEY & NAPOLITAN
801 Broad Street
3rd Floor
Chattanooga, TN 37402
Tel: (423) 424-3908
Fax: (423) 308-0908
marc.harwell@leitnerfirm.com
blair.cannon@leitnerfirm.com
www.leitnerfirm.com
VERDICTS, APPEALS AND SETTLEMENTS

Newly Reported Verdicts

SOUTH CAROLINA

Venue:
United States District Court, Columbia Division

Result:
Defense verdict

Counsel for Defendants:
Duke R. Highfield and Brandt Horton of Young Clement Rivers LLP, Charleston, South Carolina

Facts:
A multiple vehicle accident that occurred on Interstate 20 began when a car occupied by the two plaintiffs made contact with the tractor trailer belonging to a long-time client. The plaintiffs’ vehicle contacted the tractor trailer in the middle lane, spun around, and entered the outside lane facing the opposite direction. Upon entering the outside lane, the plaintiffs’ vehicle was struck by an oncoming vehicle, causing a chain reaction that involved three more vehicles. The plaintiffs’ vehicle ultimately ended up in the woods adjacent to the Interstate, and one of the plaintiffs had to be extracted from the car by emergency responders. Plaintiffs brought suit alleging the tractor trailer struck the back of their vehicle, causing the accident. They claimed significant physical injuries including permanent spinal trauma, loss of feeling and control in extremities, traumatic brain injury and multiple surgeries. All total, plaintiffs alleged medical costs in excess of $500,000.00.

Partner Duke Highfield and associate Brandt Horton engaged in extensive discovery, ultimately establishing that the tractor trailer did not cause the accident and proving the majority of the plaintiffs’ alleged injuries pre-dated the wreck. The pair retained an accident reconstruction expert who confirmed that the physical evidence proved the plaintiffs’ vehicle lost control before the collision. Yaw marks established that the plaintiffs lost control in the outside lane, drifted across the middle lane and into the inside lane before crossing in front of the tractor trailer and making contact. These facts were important in light of the testimony of one plaintiff that their vehicle had moved into the middle lane and was under control for several minutes prior to impact. Mr. Highfield and Mr. Horton were able to further undermine this testimony after discovering a recorded statement one plaintiff provided to her own insurance company two weeks after the accident, where she stated their vehicle was in the outside lane at all times. The investigating state trooper also provided favorable testimony for the defense, particularly after Mr. Horton was able to get one plaintiff to testify that he believed the trooper had “conspired with the truck driver to shift blame for the accident to the plaintiff.”

Mr. Highfield and Mr. Horton also attacked the damages claims by retaining an orthopedic surgeon as an expert witness. The doctor explained to the jury that almost all of the claimed injuries were either pre-existing or entirely unrelated to the accident. Also helpful was a handwritten letter by one plaintiff written ten years before the accident. Because the defense cast a wide net during discovery, they uncovered the letter which described in detail almost all of the physical injuries the plaintiff was claiming were caused by the accident.

The pair also secured favorable pre-trial rulings on the admissibility of certain evidence and testimony, severely limiting the plaintiffs’ case. For instance, they convinced the court to prevent the plaintiffs’ treating physicians from providing any opinion testimony (such as diagnosis, prognosis or future limitations) because the plaintiffs failed to designate these doctors as expert witnesses. Moreover, the court prevented the plaintiffs from providing any testimony regarding several aspects of their damages claim that they did not specifically identify in their discovery responses.

Ultimately, Mr. Highfield and Mr. Horton convinced the jury that the tractor trailer driver did nothing to contribute to the accident. The jury took less than one hour to return a full defense verdict.
Duke R. Highfield
YOUNG CLEMENT RIVERS, LLP
28 Broad Street
Charleston, SC 29401
Tel: (843) 720-5456
Fax: (843) 579-1330
dhighfield@ycrlaw.com
bhorton@ycrlaw.com
www.ycrlaw.com

Brandt R. Horton
YOUNG CLEMENT RIVERS, LLP
28 Broad Street
Charleston, SC 29401
Tel: (843) 720-5456
Fax: (843) 579-1330
dhighfield@ycrlaw.com
bhorton@ycrlaw.com
www.ycrlaw.com
OKLAHOMA

Venue:
District Court of Lincoln County, Oklahoma

Result:
Defense verdict

Counsel for Defendants:
Joseph R. Farris and Jeremy K. Ward of Feldman, Franden, Woodard & Farris, Tulsa, Oklahoma

Facts:
A tractor trailer was traveling east on Interstate 44 between Oklahoma City and Tulsa, Oklahoma. According to the driver of the tractor trailer, he was traveling in the right (outside) lane when it began to rain. He slowed down due to decreased visibility. A Toyota 4Runner began passing the tractor trailer in the left (inside) lane. When the 4Runner was parallel with the tractor, it started to lose control (probably as the result of hydroplaning). The 4Runner collided with the jersey divider, and spun out in front of the tractor at almost a 90 degree angle. The front of the tractor struck the rear passenger side quarter panel of the 4Runner, causing the 4Runner to spin several times in the grass after leaving the pavement. The tractor trailer driver stopped his vehicle and walked back to render aid. While the truck driver was on his way back to the accident scene, he noticed the plaintiff wandering around in a dazed state on the edge of the highway. The driver kept the plaintiff out of the roadway and saw to his medical condition until emergency personnel arrived who transported the plaintiff to the emergency room.

Because of the plaintiff’s condition he was unable to give the investigating Highway Patrolman a coherent explanation of what happened. Later however, after he had filed suit, plaintiff began to have a recollection of the accident which was markedly different from that of the truck driver. Plaintiff testified he was traveling in the right (outside) lane when he suddenly noticed the semi just a few feet behind him. Plaintiff claimed that the tractor trailer started to maneuver to the left (inside) lane to pass when all of a sudden the plaintiff was rear ended, causing him to lose control, strike the jersey divider, and then be redirected in front of the tractor where the collision occurred.

Third party witnesses at the scene testified that the plaintiff was confused, dazed, and repeatedly asking about the location of his wife. Witnesses helped look for the plaintiff’s wife until they realized there was no one else in the 4Runner at the time of the accident.

At trial plaintiff’s accident reconstruction expert from El Paso, TX attempted to provide expert testimony consistent with plaintiff’s story. In particular, plaintiff’s accident reconstruction expert testified that the trailer hitch on the 4Runner was bent upwards, indicating an initial rear end straight-on collision. On the other hand Defendant’s accident reconstruction expert provided testimony consistent with the semi driver’s story. Among other things, Defendant’s expert was able to demonstrate the fallacy in plaintiff’s theory by showing that there was nothing on the front of the tractor trailer low enough to have impacted the trailer hitch.

Defendants requested a neurological IME on the plaintiff. Based on testimony from multiple witnesses that plaintiff was confused at the accident scene, and the laceration to plaintiff’s head, the IME doctor opined that plaintiff suffered a concussion during the accident. The neurologist went further and noted that with concussions there is both anterograde amnesia and retrograde amnesia (i.e., loss of memory before and after the accident). The longer the post-trauma amnesia, the longer the pre-trauma amnesia. Based on testimony by the Oklahoma Highway Patrol officer that plaintiff was still confused at the hospital, the neurologist knew that plaintiff had suffered substantial post-accident amnesia, and therefore, he would have suffered at least some pre-accident amnesia. The neurologist testified that plaintiff’s vivid recollection of how the accident occurred was inconsistent with head injuries.

There was no dispute that the plaintiff was substantially injured during the accident; therefore, defense counsel merely defended the case from a liability perspective. The parties
waived a jury and tried the case to Judge Vassar who returned a defense verdict.

Joseph R. Farris

Jeremy K. Ward
FELDMAN, FRANDEN, WOODARD & FARRIS
Williams Center Tower II
Two West Second Street
Suite 900
Tulsa, OK 74103
Tel: (918) 764-3126
Fax: (918) 584-3814
jfarris@tulsalawyer.com
jward@tulsalawyer.com
www.tulsalawyer.com
MISSOURI

The “Rules of the Road” were not violated in Missouri. Joe Swift of the St. Louis ALFA International firm of Brown & James defended an LTL carrier in federal court in Springfield, Missouri. The plaintiff’s lawyers were well versed in and attempted to apply the “Rules of the Road” method. The accident involved a rear end collision at night on an interstate highway. The tractor trailer driver contended the plaintiff pulled on to the travel portion of the roadway while poorly lighted and while traveling less than the posted minimum. The plaintiff contended he suffered a closed head injury. The jury apparently did not believe that he did. The plaintiff demanded $2,200,000.00 from the jury. The jury awarded a verdict of $81,376.00, but assessed the plaintiff 20% fault for a net verdict of $65,100.80.

Joseph R. Swift
BROWN & JAMES, PC.
1010 Market Street
20th Floor
St. Louis, MS 63101
Tel: (314) 421-3400
Fax: (314) 421-3128
jswift@bjpc.com
www.brownjames.com
Joe Swift and Mike Ward of ALFA International firm Brown & James, St. Louis, Missouri, recently won a week and a half long trial in one of the notorious judicial hellholes, Madison County, Illinois. Mike and Joe’s client, Slay Transportation, a hazardous materials motor carrier, collided with another commercial motor vehicle on an interstate highway. The case included fatigued driver issues and a driver’s alleged non-compliance with the physical requirements of the Federal Motor Carrier regulations due to his diabetic condition. The jury awarded over $3,000,000.00 in damages but only assessed 7% fault to Slay.
PRACTICE TIPS

Second Circuit Adopts “Bright Line” Test for Determining Removability

Transportation practitioners are frequently charged with assessing whether a case may be removed from a “trucker-unfriendly forum” to the safe-haven of federal court. Removal of a suit from state to federal court requires that the amount in controversy exceed the $75,000.00 jurisdictional amount in addition to the presence of diversity of citizenship.

In states where the procedure or custom is that the complaint does not specify an amount of damages being sought (like Idaho, except above a lesser state court jurisdictional requirement), does the mere allegation of serious injuries provide a defendant with enough information to trigger the 30-day clock for removal of the suit from state court? Must a defendant guess that the allegation of serious injuries is sufficient to value the case above $75,000.00 and therefore hurry to remove the case, or can a defendant wait until the amount is specified by plaintiff in some post-complaint writing?

28 U.S.C. § 1446(b) actually contemplates an initial pleading that fails to provide sufficient information that the case is removable. It provides a 30-day clock from defendant’s receipt of a paper from which it may first be ascertained that the case is one which is or has become

removable. However, some district courts in various circuits have nevertheless required defendants to discern from the allegations that the damages sought exceed the jurisdictional amount.

In Moltner v. Starbucks Coffee Co., 624 F.3d 34 (2d Cir.2010), the Second Circuit adopted a “bright line” rule and rejected a “guesswork” standard. Joining the Eighth Circuit, the Second Circuit starts the 30-day removal clock ticking upon defendant’s receipt of a definitive writing. In Idaho state courts, defendants can use written discovery to request, within 30 days, the plaintiff’s statement of the total damages. In other circuits, perhaps Moltner could now be used to spearhead similar arguments for a bright line rule.

Fredric V. Shoemaker
GREENER BURKE SHOEMAKER P.A.
950 West Bannock
Suite 900
Boise, ID 83702
Tel: (208) 319-2600
Fax: (208) 319-2601
fshoemaker@greenerlaw.com
www.greenerlaw.com
State Statutes, the Federal Motor Carrier Safety Regulations, and Determining the Applicable Standard of Care for Commercial Motor Vehicle Operators

In what appears to have been an anomalous Tennessee decision, the United States District Court for the Eastern District of Tennessee recently held that a state statute governing roadway use by all Tennessee motorists provided a more specific, and therefore controlling, standard of care than the Federal Motor Carrier Safety Regulations for a commercial motor vehicle operator involved in a fatal accident.

The case, styled Parks v. Daily Express, Inc., No. 3:08-cv-519, 2010 WL 2389389 (E.D. Tenn. June 8, 2010), arose out of an accident immediately prior to which Daily Express, Inc. driver Dennis Thompson was hauling a wide load as he approached a construction zone along Interstate 40 at approximately 7:30 a.m. The construction zone contained two narrow lanes, one of which was bordered by a continuous concrete barrier. Mr. Thompson, after checking his rearview mirror to ensure that the left lane was clear of traffic, maneuvered his tractor trailer unit to the left such that it was approximately two feet across the center line dividing the two westbound lanes of Interstate 40. The decedent thereafter passed Mr. Thompson’s tractor trailer unit in the left lane, bringing her driver’s side tires into the grass median on the left side of the road and maintaining her passenger’s side tires “just barely” on the roadway pavement. When she fully re-entered the interstate in front of the tractor trailer unit, the decedent struck the concrete barrier on the right side of the roadway and flipped at least twice before coming to rest in the median. It was undisputed that the tractor trailer unit never made contact with the decedent’s vehicle. Id. at *1-3.

In his Amended Complaint, the next friend of the decedent alleged that Mr. Thompson “failed to position his truck sufficiently in the narrowed roadway of the construction zone such that [the decedent] would have been unable to pass on the left.” Id. at *3. In support of this allegation, and in response to a dispositive motion filed by the defense, the plaintiff proffered expert testimony that “Mr. Thompson failed in his duty to demonstrate the required minimal skills necessary while operating the involved commercial motor vehicle (the ‘CMV’), as required by FMCSR §§ 383.111 and 390.3(b), including, but not limited to, the regulatory and industry standards related to space management, as well as the associated, recognized, and well-established standards for defensive driving.” Id. at *4. Specifically, the plaintiff’s expert concluded that “a professional CMV driver, hauling a ‘wide load’ in [Mr. Thompson’s situation] would have moved further to the left [than he did], centering the CMV in such a manner as to effectively discourage any passing attempt by oncoming vehicles . . .” Id. at *5.

In response, the defense argued that Tenn. Code Ann. §§ 55-8-115(b) and 55-8-123(1) comprised the applicable standard of care for Mr. Thompson despite the fact that both statutes were general “rules of the road” requiring all Tennessee motorists to drive “as close as practicable to the right-hand curb or edge of the roadway . . .” Id. at *4. Noting that “there is nothing to stop the Tennessee legislature from imposing even stricter requirements on [CMV] drivers,” the district court found that “where Tennessee has promulgated statutes directing drivers to align their vehicles, as Mr. Thompson did, ‘as closely as practicable to the right-hand edge of the roadway,’ the relevant standard of care in this case is provided by Tennessee law, rather than by the general federal regulations and the various manuals to which plaintiff points.” Id. at *5.

Without engaging in a lengthy discussion on the preemptive effect of the Federal Motor Carrier Safety Regulations, the Parks case is an instructive reminder that state statutes applicable to all drivers may dictate even a CMV operator’s duty of care if the state law at issue is more specific than, and does not conflict with, the FMCSR. After all, “[t]he FMCSRs establish minimum standards for motor carrier safety” and do not “evince an intent to occupy the field completely since the concept of ‘minimum standards’ suggests the possibility of supplemental standards imposed by the states.” Yellow Freight System,
Inc. v. Amestoy, 736 F.Supp. 44, 46 (D.Vt.1990). However, “any such state standard would have to be genuinely supplemental” in order to control a driver’s duty of care to the exclusion of the FMCSR. See id. In practice, it is therefore likely that federal regulations outside of general propositions (such as those found in 49 CFR § 390.11 requiring “observance” of regulatory duties by a motor carrier) control the dispositive issues in a given case. See, e.g., Fortner v. Tecchio Trucking, Inc., 597 F.Supp.2d 755, 758 (E.D.Tenn.2009) (noting that it is well established in Tennessee that FMCSR violations may be characterized as negligence per se).
New Law on Carmack Amendment Statute of Limitations: When Does State Law Control a Carmack Amendment Claim?


As the shipment transaction becomes less formal it is not unusual to see goods transported using shipping instructions found on a fax or an email. Surprisingly, there are few decisions that address when a Carmack claim is time barred if there is no tariff or Uniform Bill of Lading. Other than a brief reference in a previous Nebraska state court decision, the *Lexington* case is the first opinion to address this issue directly. The ruling in *Lexington* is likely to shape future decisions concerning when a claim is time barred under the Carmack Amendment.

Most often a motor carrier and shipper will exchange shipping documents which reference a two-year time limit for filing claims. This time limit is incorporated into the shipment transaction with the shipping documents. The statute which establishes the two-year time limit is in the nature of a contract and is not a true statute of limitations:

49 U.S.C. § 14706 (e)
Minimum Period for Filing Claims.—

(1) In general.— A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section.

The *Lexington* case began with a Houston company that specialized in the design of large computer systems. Burr Computer Environments ordered several oversized battery units for a project in New Jersey. The project fell through and the items remained in storage for several years. Burr then requested the warehouse ship the equipment to its offices in Texas. The warehouse was operated by a crane and rigging company that used a “rigging” ticket as a bill of lading. This ticket was intended for crane rental and did not have any language regarding carrier tariffs or terms and conditions for transportation.

The rigging warehouse contacted Daybreak Express to move the shipment to Houston, Texas. Daybreak picked up the shipment at the warehouse and moved it the four miles to its terminal. It then brokered out the load to another carrier to move the shipment from New Jersey to Texas. At delivery four of the six pieces were noted as damaged.

The case was originally filed in state court as a breach of contract case. Plaintiff had argued that an adjuster had entered into a settlement agreement when he had only put a final number on amount of the claim for damages. The case was removed to federal court on the complete preemption doctrine of the Carmack Amendment. Daybreak Express argued that the contract claim was merely artful pleading for damage to goods in transit across state lines. Plaintiff moved to remand and maintained that it was only a breach of contract case for a settlement agreement and not a claim for damaged goods. The case was sent back to state court.

After depositions revealed that the breach of contract claim was without merit, plaintiff added a Carmack Amendment claim. This cause of action was added over four years after the original claim had been denied. The judge denied the Motion for Summary Judgment and the case was tried to the bench. Over two years after closing arguments, the judge issued a ruling that plaintiff had made his Carmack Amendment case and assessed attorney’s fees against the defendants. The trial judge also found that the New Jersey statute of limitations controlled. The Court of Appeals reversed and rendered a take nothing judgment. In reaching this decision, the Court analyzed what state law would have the most significant relationship to the case and if a later filed Carmack claim would relate back to the initial breach of contract claim.
Daybreak Express had originally argued for the default four year statute of limitations found in 28 U.S.C. § 1658. The Court ruled that this is a catch all provision but only applies to causes of action created after 1990. Plaintiff had argued for the New Jersey six-year statute for property damage. When confronted with a question of which state law to apply, a Texas court will apply procedural laws of Texas and the substantive law of another jurisdiction. A statute of limitations is rule of procedure. Therefore, the Texas statute of limitations will apply.

The Court of Appeals determined that a claim for cargo damage was most akin to a tort claim for property damage. Therefore, it is the two-year statute of limitations for Texas tort claims which controls a case for damage to goods shipped across state lines.

A significant issue was the relation-back doctrine. The claim could continue under Texas law if the plaintiff could show that the later filed Carmack claim related back to the original breach of contract case. The Court of Appeals relied on the federal court ruling which granted the Motion to Remand. Plaintiff had originally maintained that it was only a contract case in order to defeat the complete preemption doctrine of the Carmack Amendment. A later filed claim can relate back if it is based on the same transaction.

The Court found, as the plaintiff had argued on remand, that the breach of contract claim had a wholly separate basis from the claim for damaged goods. Each cause arose from separate events and depended on the testimony of separate witnesses. Therefore, the later filed Carmack claim did not relate back to filing the lawsuit. “Lexington’s claim for breach of the purported settlement agreement cannot be both un-preempted and less than wholly distinct from the interstate transportation of goods by a common carrier.” Daybreak Express, Inc. v. Lexington Ins. Co., 2011 Tex. App. LEXIS 143 (Tex. App. Houston 14th Dist. Jan. 11, 2011). Plaintiff’s claim was time barred by the Texas two-year statute of limitations which controls claims for personal injury and property damage.

The trend since deregulation is to move away from the traditional bill of lading and other shipping documents. Often, neither the shipper nor the carrier have incorporated the standard documentation into the transaction. We can expect to see this issue come up frequently as the industry continues to move to a more informal shipment transaction. When are there terms and conditions on the reverse side of a fax or an email!
Preventing Your Witness For A Deposition While Protecting Attorney Work Product And The Attorney-Client Privilege

A. Introduction

To prepare a witness for a deposition, a decision must be made regarding what, if any, documents the witness will review prior to the deposition. If the witness reviews all of the documents produced in the case, the witness may “grow a brain” during the deposition and begin espousing about facts the witness knew nothing about prior to the deposition preparation session. If the witness does not review any of the documents produced in the case, the witness may be unprepared for the deposition and provide factually inaccurate responses to questions during the deposition. However, if only certain documents are selected by counsel for the witness to review, the party risks having to produce such documents. This could provide the opposing party a needless advantage by revealing your case strategy and the documents you believe are key to the case.

B. A Brief Summary of the Attorney Work Product Doctrine and the Attorney-Client Privilege

The thought processes of attorneys are cloaked with two primary forms of protection – the attorney work product doctrine and the attorney-client privilege.

The attorney work product doctrine was first defined in Hickman v. Taylor, 329 U.S. 495 (1947) and was codified in Rule 26(b) (3) of the Federal Rules of Civil Procedure. Rule 26(b)(3) states that “[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).” Fed.R.Civ.P. 26(b)(3)(A).

An exception to this general rule exists when the materials being sought are otherwise discoverable under Rule 26(b)(1) – i.e., they are relevant – and when the party seeking the materials “shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” Fed.R.Civ.P. 26(b)(3)(A)(i) and (ii).

Rule 26(b)(3)(B) creates two classes of attorney work product. Ordinary work product is comprised of “documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative.” Opinion work product is comprised of “documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative”, which contain “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the party concerning the litigation.” Opinion work product is provided greater protection than “ordinary” work product, as Rule 26 requires the court to “protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.” Fed.R.Civ.P. 26(b)(3)(B). See also Upjohn Co. v. United States, 499 U.S. 383 (1981) and Sporck, 759 F.2d at 316. This has been interpreted to mean that “opinion” work product is virtually immune, in that “no showing of relevance, substantial need or undue hardship should justify compelled disclosure of an attorney’s” opinion work product. Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480 (4th Cir.1973), rehearing, 509 F.2d 730, 734 (4th Cir.1974), cert. denied, 420 U.S. 997, 95 S.Ct. 1438, 43 L.Ed.2d 680 (1975); later appeal, Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215 (4th Cir.1976). See also Snowden By and Through Victor v. Connaught Laboratories, Inc., 137 F.R.D. 325, 331 (D.Kan.1991).

The attorney-client privilege is “the oldest of the privileges for confidential communications known to the common law.” Upjohn Co. v. U.S., 449 U.S. 383, 389-390 (1981). In general, the attorney-client privilege protects any communication, made between privileged persons (i.e., attorney, client or agent), in confidence, for the purpose of obtaining or providing legal assistance for the client. See United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D.Mass.1950). By protecting communications between the attorney and
the client, the attorney-client privilege encourages “full and frank communication between attorneys and their clients”, promotes “broader public interests in the observance of law and administration of justice”, and “recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.” *Upjohn*, 449 U.S. at 389-90.


In *Sporck v. Peil*, 759 F.2d 312 (3d Cir.), cert. denied, 474 U.S. 903 (1985), the Third Circuit addressed whether the selection process of defense counsel in grouping certain documents together was work product entitled to protection under Rule 26. In *Sporck*, prior to the defendant’s deposition, which was expected to last a week, defendant’s counsel prepared the defendant Sporck by showing him some of the 100,000 documents produced in the case, which documents had been selected and compiled by defense counsel.

At the beginning of the Sporck’s deposition, plaintiff’s counsel asked Sporck whether he had “occasion to examine any documents” for his deposition. When he responded affirmatively, plaintiff’s counsel requested that he identify and produce all documents examined, reviewed or referred to by Sporck in preparation for his deposition. Defense counsel refused to identify the documents, claiming that all the documents had previously been produced and that the select grouping of the documents was attorney work product protected from discovery. The deposition continued, with defense counsel agreeing to allow plaintiff’s counsel to ask Sporck about his reliance on certain documents in the context of specific factual questions posed by plaintiff’s counsel.

Following the deposition, plaintiff filed a motion to compel, which was granted by the district court. The district court agreed that “the select grouping of documents constituted attorney work product,” but held that the grouping of documents did not constitute “opinion” work product entitled to absolute protection. The Third Circuit accepted the case on writ of mandamus.

The Third Circuit agreed with the defendant, finding that the selection and compilation of documents by counsel in preparation for depositions was entitled to protection as “opinion” work product. *Id.* at 316. Taking a practical approach to discovery, the court noted that “without the protection that the work product doctrine accords his preparation, defense counsel may have foregone a sifting of the documents, or at the very least chosen not to show the documents to petitioner” and that as a result, “petitioner may not have been as well-prepared for his deposition, and neither plaintiff nor defendant would have realized the full benefit of a well-prepared deponent’s testimony.” *Id.* at 317. As such, the Third Circuit concluded that defense counsel’s selection and grouping process was work product entitled to protection under Rule 26(b)(3).

In so ruling, the court relied on similar decisions, including *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144 (D.Del.1982) (holding that binders containing documents selected by counsel which were reviewed by principals, officers, and employees were entitled to protection as work product because “[i]n selecting and ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case”) and *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 616 (S.D.N.Y.1977) (holding that notebooks representing “counsel’s ordering of ‘facts,’ referring to the prospective proofs, organizing, aligning, and marshalling empirical data with the view to combative employment that is the hallmark of the adversary enterprise” were entitled to protection as work product).

D. Does Rule 612 remove any protection that defense counsel’s selection process would ordinarily be entitled to under the work product doctrine?

In addition to finding that the documents selected by counsel were not “opinion” work product, the district court in *Sporck* also found that plaintiff was entitled to production of the documents pursuant to Rule 612 of the
Federal Rules of Evidence. Rule 612 states, in relevant part, that if “a witness uses a writing to refresh memory for the purpose of testifying, either – (1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.” Fed.R.Evid. 612.

The Third Circuit never reached this issue, noting that plaintiff’s counsel failed to establish the first two requirements of Rule 612 – i.e., counsel failed to establish that the witness relied on any documents in giving his testimony, or that those documents influenced his testimony. As such, the Third Circuit left the door open for such questioning, noting that had counsel first elicited specific testimony from the witness, and then questioned the witness as to which documents informed that testimony, the work product the defendants sought to protect – counsel’s opinion of the strengths and weaknesses of the case as represented by the group identification of documents selected by counsel – would not have been implicated. “In such a case, deposing counsel would discover the documents through his own wit, and not through the wit of his adversary.” Id. at 319-320. In so ruling, the court was clear to point out that it was not approving “in effect the use of the work product doctrine to prevent an identification of documents reviewed by a witness in preparation for his deposition”, but rather suggested a proper means of questioning by which the documents relied upon by a witness could be identified without implicating the work product doctrine.

Following the Third Circuit’s opinion in Sporck, the U.S. District Court for the District of Kansas had an opportunity to address this issue in Aguinaga v. John Morrel & Co., 112 F.R.D. 671 (D.Kan.1986). Relying on Sporck, the district court in Aguinaga concluded that the process of selecting and compiling [] documents is protected by the attorney opinion work product doctrine”. Id. at 683-684 (emphasis added).

In Aguinaga, plaintiffs were union members who had not been rehired when a closed plant reopened. The plaintiffs filed suit against their union and their former employer. In preparation for the deposition of defendant’s employee who was involved in hiring the new workforce after the plant reopened, defendants’ counsel showed the employee certain files counsel had assembled. During the deposition, plaintiffs’ counsel asked the employee what documents he used to refresh his recollection in preparing for his deposition. Defendants’ counsel objected and instructed the employee not to answer the question, asserting that such information was protected by the attorney-client privilege and the attorney work product doctrine.

In determining whether such information was protected by the attorney work product doctrine, the court stated that the purpose of Fed.R.Evid. 612 is “to allow an adverse party to have access to those writings which have an impact on the testimony of the witness.” Id. at 683. Noting the plaintiffs already had the documents at issue, the court found the only possible purpose for requiring disclosure by the witness of the documents reviewed prior to his deposition “would be to inform plaintiffs of the attorneys’ process of selection and distillation of documents.” Id. As such, the court held that counsel’s process of selecting and compiling documents was protected by the attorney work product doctrine as it constituted “opinion” work product. The district court remanded the case finding that the trial court had committed clear error by ordering the identification of such documents.

Similarly, in Stone Container Corp. v. Arkwright Mut. Ins. Co., 1995 WL 88902 (N.D.Ill.1995), the defendant sought an order compelling the plaintiff to produce those documents which he used to refresh his recollection in preparing for his deposition. Again, all of the documents sought by the defendant had been previously produced. Following Sporck, the court held that requiring plaintiff’s counsel to produce the documents that plaintiff’s counsel selected for the witness to review prior to his deposition would violate Rule 26(b)(3) by requiring plaintiff’s counsel “to reveal his evaluation of the documents and his opinion of the most important legal and factual issues in the litigation.” Id. at *4.
In reviewing his counsel’s point of view), were relevant or important from counsel as to what documents the mental impressions of his reviewed would be to reveal the specific documents he ordering” the witness to identify that would be served by party, in that the “only purpose been produced to the opposing party in preparation for the defendant in preparation for his deposition had previously been produced to the opposing party, in that the “only purpose was critical issue and because of professed lack of recollection by deposed defendants who had reviewed memorandum just before their depositions), the court ultimately required disclosure of the documents, holding that the “selecting and grouping of information does not transform discoverable documents into work product. “Id. (emphasis added) (citations omitted).

To the extent Aguinaga and Audiotext were inconsistent, the district court made it clear in Pepsi-Cola Bottling Co. of Pittsburg, Inc. v. PepsiCo., Inc., 2001 WL 1478659 (D.Kan.2001) that Audiotext should control. In finding that a witness is required to answer a deposition question concerning what documents the witness reviewed in preparation for the deposition, the court noted that the identities of the documents reviewed by the witness were “objective facts” and were not “the opinion or thought processes of an attorney” and that the “selecting and grouping of information does not transform discoverable documents into work product”. Id. at *3.

In addressing defendant’s assertion that plaintiff could draw conclusions as to why certain documents were chosen by defendant’s counsel, thus revealing defendant’s strategy, the court relied on the following portion of the Sporck dissent:

The problem with [this] theory is that it assumes that one can extrapolate backwards from the results of a selection process to determine the reason a document was selected for review by the deponent. There are many reasons for showing a document or selected portions of a document to a witness. The most that can...
be said from the fact that the witness looked at a document is that someone thought that the document, or some portion of the document, might be useful for the preparation of the witness for his deposition. This is a far cry from the disclosure of the a [sic] lawyer’s opinion work product. Even assuming that the documents were the subject matter is so undifferentiated that its potential for invasion of work product is minuscule at best.

Sporck, 759 F.2d at 319. See also In re San Juan Dupont Plaza Hotel Fire Litigation, 859 F.2d 1007, 1015 (1st Cir.1988) (stating that “not every item which may reveal some inking of a lawyer’s mental impressions, conclusions, opinions, or legal theories is protected as opinion work-product . . . [w]ere the doctrine to sweep so massively, the exception would hungrily swallow up the rule”).

The court’s opinion continued by advising counsel that if it was concerned about disclosing litigation strategy by identifying documents shown to the witness prior to the witness’ deposition, the attorney could simply alter his choices as to the documents selected for the witness to review. Id. at *3.

The opinions in Audiotext and Pepsi-Cola, were recently affirmed in State v. Sprint Corp., 258 F.R.D. 421 (D.Kan.2009), a complex securities class action lawsuit brought by the State of New Jersey and its Division of Investment against the Sprint Corporation and several individuals, alleging that the defendants made misleading statements in its SEC filings which suggested that Sprint had entered into new, long-term contracts with its top two executives, William T. Esrey and Ronald T. LeMay. The statements were allegedly misleading because Sprint failed to disclose the possibility or inevitability that Mr. Esrey and Mr. LeMay would be terminated as a result of certain tax shelters entered into by the executives.

During the defendants’ depositions, counsel for Sprint refused to allow the witnesses to respond to questions posed by plaintiff’s counsel concerning what documents the witnesses reviewed at the direction of defense counsel in preparation for the deposition. More specifically, counsel would instruct the witness to exclude from the witness’ answer documents the witness reviewed at the direction of or with counsel, thereby responding with only those documents reviewed by the witness in the ordinary course of the witness’ work at Sprint.

Plaintiffs filed a motion to compel asserting that they were entitled to answers to these questions to determine (1) whether the content of the document refreshed the recollection of the witness and the impact and influence the content of the document had on the witness’ testimony pursuant to Rule 612, or (2) whether the content of the document did not refresh the recollection of the witness and may qualify as recorded recollection under Rule 803(5).

The defendants responded by claiming that the identity of the specific documents selected by counsel for the witnesses to review prior to their depositions was protected by the attorney work-product doctrine, and that requiring the witnesses to identify the documents would improperly provided plaintiff with a “roadmap” of defense counsel’s strategies and opinions. Similar to Aguinaga, all of the documents at issue had been previously produced by the plaintiffs.

The district court ultimately rejected the defendants’ assertion that the identity of specific documents selected by counsel for review prior to a deposition is protected by the work-product doctrine. The court found that “defense counsel’s selection and grouping of the documents does not magically transform them into work product”, noting that “having prepared literally hundreds of witnesses for deposition and trial while in private practice, the undersigned simply believes it is too big a leap to suggest that the mere identification of documents a witness reviews at the direction of counsel improperly provides a roadmap of the attorney’s strategies and opinions.” Id. at 436. As such, the court held that “the rule that selecting and grouping of information does not transform discoverable documents into work product applies to a deposition inquiry relating to what documents a deponent reviewed prior to his deposition.” Sprint, 258 F.R.D. at 436 (quoting Pepsi-Cola Bottling Co. of Pittsburg, Inc. v. PepsiCo., Inc., 2001 WL 1478659, *3 (D.Kan.2001)).

The court did not reach the issue of whether Fed.R.Evid. 612 or 803(5) applied,
because the deponent did not answer the question regarding the documents posed at his deposition, and as such, there was no way of knowing which rule might apply. The court entered an order directing defense counsel not to instruct any deponent not to testify as to documents reviewed at the discretion of counsel, including the identity of the documents. The court ordered the defendants to produce the documents reviewed by the deponents at the direction of counsel in preparation for their depositions, and allowed plaintiff to examine the witnesses on the contents of each document, and whether the contents of the document refreshed the deponent’s recollection.

Other district courts have similarly found, in a variety of circumstances, that disclosure of documents reviewed by the witness prior to the witness’ deposition is required. See In re Seroquel Products Liability Litigation, 2008 WL 591929 (M.D.Fla.) (district court upheld order by magistrate requiring defendant to identify and produce documents reviewed by defense witnesses prior to their deposition); Peil v. National Semiconductor Corp., 105 F.R.D. 463 (E.D.Penn.1984) (documents reviewed in preparation for witness’ deposition were subject to production with marginal notes of counsel redacted or, if a particular document had been previously produced, were subject to identification to enable plaintiff to identify the document from among those documents previously produced, in that requested documents were not prepared by attorneys and did not solely contain counsel’s mental impressions of the case); Nutramax Lab., Inc. v. Twin Lab. Inc., 183 F.R.D. 458 (D.Md.1998) (documents supplied by plaintiff’s counsel to prepare two management officials for deposition were subject to disclosure based on implied waiver of work product protection, and documents supplied by plaintiff’s counsel to prepare other witnesses for deposition were not subject to disclosure under evidence rule, absent proof that witnesses used documents to refresh their memory for the purpose of testifying); Federal Deposit Ins. Corp. v. Wachovia Ins. Serv., Inc., 241 F.R.D. 104 (D.Conn.2007) (insurance agent’s subpoena seeking disclosure of all documents reviewed by representative in preparation for deposition would not reveal thought processes of insurer’s attorney as subpoena was not limited to only those documents which the attorney revealed to the representative, documents were not created by counsel, documents were not generated in anticipation of litigation, and there was no indication documents were intended to be kept private); Heron Interact, Inc. v. Guidelines, Inc., 244 F.R.D. 75 (D.Mass.2007) (documents which deponent used to refresh his memory prior to, but not during, the deposition were subject to disclosure in that the documents would not tread on plaintiff counsel’s thought processes since it was not attorney’s summaries which were at issue, but rather, the notations of the deponent himself); and, Resolution Trust Corp. v. Heiserman, 151 F.R.D. 367, 374-75 (D.Col.1993) (counsel did not have to produce all documents selected for witness’ review, but should the witness testify that he reviewed certain documents that refreshed his recollection, he would be required to produce those documents).

F. Courts have recently adopted a functional analysis to determine whether documents reviewed in preparation for a deposition are protected by the attorney opinion work product doctrine.

New York and Connecticut have adopted a “functional” analysis to determine whether disclosure of documents used to prepare witnesses is required. The analysis requires the court to first determine whether the documents have sufficient “impact” on the witness’ testimony. If so, then the court engages in a balancing test to consider whether production is necessary for fair cross-examination or whether the examining party is simply engaging in a “fishing expedition”. See Bank Hapoalim, B.M. v. American Home Assurance Co., 1994 WL 119575 (S.D.N.Y.); In re Rivastigmine Patent Litigation (MDL No. 1661), 486 F.Supp.2d 241 (S.D.N.Y.2007); Calandra v. Sodexho, Inc., 2007 WL 1245317, *4 (D.Conn. 2007); and Donjon Marine Co., Inc. v. Buchanan Marine, L.P., 2010 WL 2977044, *2 (D.Conn.2010).

G. Selecting and compiling documents in preparation for a deposition is protected by the attorney-client privilege.
At least one court has found that requiring counsel to identify the documents used during deposition preparation would violate the attorney-client privilege. In *Alexander v. Federal Bureau of Investigation*, 186 F.R.D. 200, 203 (D.D.C.1999), the district court held that plaintiffs were not entitled to know what documents defendant’s counsel “gave to his client to review in preparation for the deposition, as this would be tantamount to inquiring into the substance of what was discussed between an attorney and client in furtherance of legal services.”

H. Conclusion

In almost every deposition, you can count on the deponent being asked the following question: “Did you review anything in preparation for your deposition today?” By giving some thought to what documents, if any, the witness reviews prior to the deposition, you can effectively prepare your witness without unnecessarily being forced by the opposing party to produce documents that may provide opposing counsel a glimpse of your theory of the case.

**J. Philip Davidson**

**Jay Skolaut**

HINKLE ELKOURI LAW FIRM L.L.C.
2000 Epic Center
301 North Main St.
Wichita, KS  67202
Tel: (316) 660-6220
Fax: (316) 264-1556
pdavidson@hinklaw.com
jskolaut@hinklaw.com
www.hinklaw.com
TRANSPORTATION PRACTICE GROUP
DIRECTORY OF MEMBER FIRMS

DOMESTIC

ALABAMA

MCDOWELL KNIGHT ROEDDER & SLEDGE, L.L.C.
RSA Battle House Tower
11 North Water Street, Suite 13290
Mobile, Alabama 36602
Tel: (251) 432-5300

Brian P. McCarthy
bmccarthy@mcdowellknight.com

ARIZONA

RENAUD COOK DRURY MESAROS, PA
One North Central Avenue, Suite 900
Phoenix, Arizona 85004-4417
Tel: (602) 307-9900

Tamara N. Cook
tcook@rcdmlaw.com
William W. Drury, Jr.
wdrury@rcdmlaw.com

ARKANSAS

WRIGHT, LINDSEY & JENNINGS LLP
200 West Capitol Avenue, Suite 2300
Little Rock, Arkansas 72201
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 LLP
6080 Center Drive, Suite 800
Los Angeles, California 90045
Tel: (310) 215-7100

Peter A. Dubrawski
pdubrawski@hbblaw.com

Bradford Hughes
bhughes@hbblaw.com

Krsto Mijanovic
kmijanovic@hbblaw.com

William O. Martin, Jr.
wmartin@hbblaw.com

CALIFORNIA (CONT.)

HIGGS, FLETCHER & MACK, L.L.P.
401 West “A” Street, Suite 2600
San Diego, California 92101
Tel: (619) 236-1551

Peter S. Doody
doody@higgslaw.com

COLORADO

HALL & EVANS, L.L.C.
1125 17th Street, Suite 600
Denver, Colorado 80202-5800
Tel: (303) 628-3300

Lance G. Eberhart
eberhart@hallevans.com

Peter F. Jones
jonesp@hallevans.com

Bruce A. Menk
menkb@hallevans.com
COLORADO (CONT.)

HALL & EVANS, L.L.C.
1125 17th Street, Suite 600
Denver, Colorado 80202-5800
Tel: (303) 628-3300

Lee Merreot
merreotl@hallevans.com

CONNECTICUT (CONT.)

HALLORAN & SAGE LLP
315 Post Road West
Westport, Connecticut 06880
Tel: (203) 227-2855

Thomas P. O’Dea, Jr.
odea@halloran-sage.com

CONNECTICUT

HALLORAN & SAGE LLP
One Goodwin Square
225 Asylum Street
Hartford, Connecticut 06103
Tel: (860) 522-6103

Melissa Rotenberg Arcaro
Arcaro@halloran-sage.com

Carl R. Ficks, Jr.
ficks@halloran-sage.com

FLORIDA

FOWLER WHITE BURNETT P.A.
One Financial Plaza
100 Southeast Third Avenue, 21st Floor
Fort Lauderdale, Florida 33394
Tel: (954) 377-8100

Edward J. Briscoe
ebriscoe@fowler-white.com

FOWLER WHITE BURNETT P.A.
Espirito Santo Plaza
1395 Brickell Avenue, 14th Floor
Miami, Florida 33131
Tel: (305) 789-9200

Christopher E. Knight
cknight@fowler-white.com

(continued on next page)
FLORIDA (CONT.)

FOWLER WHITE BURNETT P.A.  (continued)

J. Michael Pennekamp  
jpennekamp@fowler-white.com

Patricia D. Amaducci  
pamaducci@fowler-white.com

TAMPA/SARASOTA/FT. MYERS/NAPLES  
ST. PETERSBURG
DICKINSON & GIBBONS, P.A.
401 North Cattlemen Road  
Suite 300  
Sarasota, Florida 34232  
Tel: (941) 366-4680

A. James Rolfes  
ajrolfes@dglawyers.com

Jeffrey D. Peairs  
jpeairs@dglawyers.com

FLORIDA (CONT.)

FOWLER WHITE BURNETT P.A.
Phillips Point - West Tower  
777 South Flagler Drive  
Suite 901  
West Palm Beach, Florida 33401  
Tel: (561) 802-9044

Michael J. Drahos  
mdrahos@fowler-white.com

Christopher E. Knight  
cknight@fowler-white.com

GEORGIA

HAWKINS & PARNELL, LLP  
4000 SunTrust Plaza  
303 Peachtree St., NE  
Atlanta, Georgia 30308-3243  
Tel: (404) 614-7400

Warner S. Fox  
wfox@hplegal.com

Alan F. Herman  
aherman@hplegal.com

(continued on next page)
GEORGIA (CONT.)

HAWKINS & PARNELL, LLP  (continued)

William H. Major
wmajor@hplegal.com

David H. Wilson
dwilson@hplegal.com

HUNTER, MACLEAN, EXLEY & DUNN, P.C.

200 E. Saint Julian Street
P.O. Box 9848
Savannah, Georgia 31412
Tel: (912) 236-0261

Dennis B. Keene
dkeene@huntermaclean.com

Bradley M. Harmon
bharmon@huntermaclean.com

Nicholas Laybourn
nlaybourn@huntermaclean.com

IDAHO

GREENER BURKE SHOEMAKER PA

950 W. Bannock Street
Suite 900
Boise, Idaho 83702
Tel: (208) 319-2600

Richard H. Greener
rgreener@greenerlaw.com

Fredric V. Shoemaker
fshoemaker@greenerlaw.com

Christopher C. Burke
cburke@greenerlaw.com
IDaho (CONT.)

PAINE HAMBLEN LLP
701 E. Front Avenue, Suite 101
Coeur d'Alene, Idaho 83814
Tel: (208) 664-8115

Scott C. Cifrese
scott.cifrese@painehamblen.com

Ausey H. Robnett
ausey.robnett@painehamblen.com

ILLINOIS (CONT.)

JOHNSON & BELL, LTD.
33 West Monroe Street, Suite 2700
Chicago, Illinois 60603
Tel: (312) 372-0770

Robert M. Burke
burker@jbltd.com

Gregory D. Conforti
confortig@jbltd.com

ILLINOIS

BROWN & JAMES, P.C.
Richland Plaza 1
525 West Main Street, Suite 200
Belleville, Illinois 62220-1547
Tel: (618) 235-5590

Beth Kamp Veath
bveath@bjpc.com

INDIANA

BECKMAN, KELLY & SMITH
5920 Hohman Avenue
Hammond, Indiana 46320-2423
Tel: (219) 933-6200

Eric L. Kirschner
ekirschner@bkslegal.com

Julie R. Murzyn
jmurzyn@bkslegal.com
INDIANA (CONT.)

BOSE MCKINNEY & EVANS LLP
111 Monument Circle
Suite 2700
Indianapolis, Indiana 46204
Tel: (317) 684-5000

Robert B. Clemens
rclemens@boselaw.com

Steven D. Groth
sgroth@boselaw.com

Kelly Scanlan
KScanlan@boselaw.com

Alan S. Townsend
atownsend@boselaw.com

IOWA

WHITFIELD & EDDY P.L.C.
317 Sixth Avenue, Suite 1200
Des Moines, Iowa 50309-4195
Tel: (515) 288-6041

Stephen E. Doohen
doohen@whitfieldlaw.com

Bernard L. Spaeth, Jr.
spaeth@whitfieldlaw.com

KANSAS

BAKER STERCHI COWDEN & RICE L.L.C.
51 Corporate Woods
9393 West 110th Street, Suite 500
Overland Park, Kansas 66210
Tel: (913) 451-6752

Hal D. Meltzer
meltzer@bscr-law.com

James R. Jarrow
jarrow@bscr-law.com

(continued on next page)
KANSAS (CONT.)

BAKER STERCHI COWDEN & RICE L.L.C. (continued)

Shawn M. Rogers
rogers@bscr-law.com

Marcos A. Barbosa
barbosa@bscr-law.com

HINKLE ELKOURI LAW FIRM L.L.C.
2000 Epic Center
301 North Main Street
Wichita, Kansas 67202
Tel: (316) 267-2000

J. Philip Davidson
p davidson@hinklaw.com

Paul J. Skolaut
jskolaut@hinklaw.com

KENTUCKY

HARLIN PARKER
519 E. Tenth Street
Bowling Green, Kentucky 42101
Tel: (270) 842-5611

Marc A. Lovell
lovell@harlinparker.com

DINSMORE & SHOHL LLP
Lexington Financial Center
250 W. Main Street, Suite 1400
Lexington, Kentucky 40507
Tel: (859) 425-1000

Colleen P. Lewis
colleen.lewis@dinslaw.com

DINSMORE & SHOHL LLP
101 South Fifth Street, Suite 2500
Louisville, Kentucky 40202
Tel: (502) 581-8000

Will H. Fulton
wfulton@whf-law.com

James T. Lewis
jlewis@whf-law.com
**LOUISIANA**

**LEAKE & ANDERSSON, L.L.P.**  
1100 Poydras Street, Suite 1700  
New Orleans, Louisiana 70163  
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**  
25 South Charles Street  
Suite 1400  
Baltimore, Maryland 21201  
Tel: (410) 539-5040

Thomas V. McCarron  
tmccarron@semmes.com

**MASSACHUSETTS**

**MORRISON MAHONEY LLP**  
250 Summer Street  
Boston, Massachusetts 02210  
Tel: (617) 439-7500

**MORRISON MAHONEY LLP**  
10 North Main Street  
Fall River, Massachusetts 02720  
Tel: (508) 677-3100

**MORRISON MAHONEY LLP**  
Tower Square  
1500 Main Street, Suite 2400  
Springfield, Massachusetts 01115  
Tel: (413) 737-4373

**MORRISON MAHONEY LLP**  
446 Main Street  
Suite 1010  
Worcester, Massachusetts 01608  
Tel: (508) 757-7777

Lee Stephen MacPhee  
lmacphee@morrisonmahoney.com

Sean F. McDonough  
smcdonough@morrisonmahoney.com

Gareth Notis  
gnotis@morrisonmahoney.com
MICHIGAN

PLUNKETT COONEY
535 Griswold Street, Suite 2400
Detroit, Michigan 48226
Tel: (313) 965-3900

Michael K. Sheehy
msheehy@plunkettcooney.com

Robert A. Marzano
rmarzano@plunkettcooney.com

PLUNKETT COONEY
38505 Woodward Avenue
Suite 2000
Bloomfield Hills, Michigan 48304
Tel: (248) 901-4000

PLUNKETT COONEY
Bridgewater Place
333 Bridge N. W., Suite 530
Grand Rapids, Michigan 49504
Tel: (616) 752-4600

TIMESHERIDAN

tsheridan@plunkettcooney.com

MINNESOTA

NILAN JOHNSON LEWIS, P.A.
400 One Financial Plaza
120 South Sixth Street
Minneapolis, Minnesota 55402
Tel: (612) 305-7500

Sheila Kerwin
skerwin@nilanjohnson.com

Stanley Siegel
ssiegel@nilanjohnson.com

MISSISSIPPI

DANIEL COKER HORTON & BELL, P.A.
4400 Old Canton Road, Suite 400
Jackson, Mississippi 39211
Tel: (601) 969-7607

Jack Ables
jables@danielcoker.com

B. Stevens Hazard
shazard@danielcoker.com
MISSOURI

BAKER STERCHI COWDEN & RICE L.L.C.
Crown Center
2400 Pershing Road, Suite 500
Kansas City, Missouri 64108-2533
Tel: (816) 471-2121

James R. Jarrow
jarrow@bscr-law.com

Hal D. Meltzer
meltzer@bscr-law.com

Shawn M. Rogers
rogers@bscr-law.com

MISSISSIPPI (CONT.)

DANIEL COKER HORTON & BELL, P.A.
1712 15th Street, Suite 400
Gulfport, Mississippi 39501
Tel: (228) 864-8117

J. Wyatt Hazard
whazard@danielcoker.com

Jason Strong
jstrong@danielcoker.com

Nathan Schrantz
nschrantz@danielcoker.com

DANIEL COKER HORTON & BELL, P.A.
265 North Lamar Blvd., Suite R
Oxford, Mississippi 38655-1396
Tel: (662) 232-8979

Mitchell Driskell
mdriskell@danielcoker.com

Marcos A. Barbosa
barbosa@bscr-law.com
MISSOURI (CONT.)

BROWN & JAMES, P.C.
1010 Market Street, 20th Floor
St. Louis, Missouri 63101
Tel: (314) 421-3400

Joseph R. Swift
jswift@bjpc.com

Jeffrey L. Cramer
jcramer@bjpc.com

Kurt A. Schmid
kschmid@bjpc.com

MONTANA (CONT.)

AXILON LAW GROUP, PLLC
P. O. Box 161801
3091 Pine Drive, Unit 3-B
Big Sky, Montana 59716
Tel: (406) 995-4776

Gary D. Hermann
ghermann@axilonlaw.com

MONTANA

AXILON LAW GROUP, PLLC
111 North Higgins Avenue
Suite 400
Missoula, Montana 59802
Tel: (406) 532-2630

Dean A. Hoistad
dhoistad@axilonlaw.com

NEW HAMPSHIRE

WADLEIGH, STARR & PETERS, P.L.L.C.
95 Market Street
Manchester, New Hampshire 03101
Tel: (603) 669-4140

Marc R. Scheer
mscheer@wadleighlaw.com

NEBRASKA

BAYLOR, EVNEN, CURTISS, GRIMIT & WITT, LLP
1248 “O” Street, Suite 600
Lincoln, Nebraska 68508
Tel: (402) 475-1075

Walter E. Zink II
wzink@baylorevnen.com
NEW MEXICO

BUTT THORNTON & BAEHR PC
4101 Indian School Road, NE
Suite 300 South
Albuquerque, New Mexico 87110
Tel: (505) 884-0777

Paul T. Yarbrough
ptyarbrough@btblaw.com

Martin Diamond
madiamond@btblaw.com

S. Carolyn Ramos
scramos@btblaw.com

NEW YORK

CARTER, CONBOY, CASE, BLACKMORE, MALONEY & LAIRD, P.C.
20 Corporate Woods Blvd.
Albany, New York 12211-2350
Tel: (518) 465-3484

Edward D. Laird
elaird@carterconboy.com

William J. Decaire
wdecaire@carterconboy.com

DAMON MOREY LLP
The Avant Building
Suite 1200
200 Delaware Avenue
Buffalo, New York 14202-2150
Tel: (716) 856-5500

Joseph Dunbar
j dunbar@damonmorey.com
NEW YORK (CONT.)

LESTER SCHWAB KATZ & DWYER, LLP
120 Broadway
New York, New York 10271-0071
Tel: (212) 964-6611

Felice Cotignola
fcotignola@lskdnylaw.com

Melvin Katz
mkatz@lskdnylaw.com

Robert N. Dunn
rdunn@lskdnylaw.com

HANCOCK & ESTABROOK, LLP
1500 AXA Tower I
100 Madison Street
Syracuse, New York 13202
Tel: (315) 471-3151

Maureen E. Maney
mmaney@hancocklaw.com

Timothy P. Murphy
tmurphy@hancocklaw.com

NEW YORK (CONT.)

HANCOCK & ESTABROOK, LLP (continued)

Janet D. Callahan
jcallahan@hancocklaw.com

Mark J. Schulte
mschulte@hancocklaw.com

YOUNG MOORE AND HENDERSON P.A.
3101 Glenwood Ave., Suite 200
Raleigh, North Carolina 27612
Tel: (919) 782-6860

David M. Duke
dmd@youngmoorelaw.com

Shannon S. Frankel
ssf@youngmoorelaw.com
NORTH DAKOTA

VOGEL LAW FIRM
218 NP Avenue
Fargo, North Dakota 58107-1389
Tel: (701) 237-6983

M. Daniel Vogel
dvogel@vogellaw.com

Robert B. Stock
rstock@vogellaw.com

OHIO

DINSMORE & SHOHL LLP
255 East Fifth St., Suite 1900
Cincinnati, Ohio 45202-3172
Tel: (513) 977-8200

Colleen P. Lewis
collen.lewis@dinslaw.com

FRANTZ WARD LLP
2500 Key Center
127 Public Square
Cleveland, Ohio 44114-1230
Tel: (216) 515-1660

Brett K. Bacon
bbacon@frantzward.com

T. Merritt Bumpass, Jr.
mbumpass@frantzward.com

M. Neal Rains
mrains@frantzward.com

Christopher G. Keim
ckeim@frantzward.com
OHIO (CONT.)

CRABBE, BROWN & JAMES LLP
500 South Front St., Ste. 1200
Columbus, Ohio 43215-0014
Tel: (614) 228-5511

Robert C. Buchbinder
rbuchbinder@cbjlawyers.com

Vincent J. Lodico
vlodico@cbjlawyers.com

OKLAHOMA

FELDMAN FRANDEN WOODARD & FARRIS
900 Williams Center Tower II
Two West Second Street
Tulsa, Oklahoma 74103
Tel: (918) 583-7129

Joseph R. Farris
jfarris@tulsalawyer.com

F. Jason Goodnight
jgoodnight@tulsalawyer.com

OKLAHOMA (CONT.)

FELDMAN FRANDEN WOODARD & FARRIS (continued)

Curtis J. Roberts
croberts@tulsalawyer.com

OREGON

COSGRAVE VERGEER KESTER LLP
805 SW Broadway, 8th Floor
Portland, Oregon 97205
Tel: (503) 323-9000

Derek J. Ashton
dashton@cvk-law.com

Robert E. Barton
rbarton@cvk-law.com

Walter H. Sweek
wsweek@cvk-law.com
PENNSYLVANIA

MCNEES WALLACE & NURICK LLC
100 Pine Street
P.O. Box 1166
Harrisburg, Pennsylvania 17108
Tel: (717) 780-7850

Curtis N. Stambaugh
cstambaugh@mwn.com

Kandice J. Giurintano
kgiurintano@mwn.com

GERMAN, GALLAGHER & MURTAGH, P.C.
The Bellevue
200 S. Broad Street, Suite 500
Philadelphia, Pennsylvania 19102
Tel: (215) 545-7700

Robert P. Corbin
corbinr@ggmfirm.com

Gary R. Gremminger
gremmingergr@ggmfirm.com

PENNSYLVANIA (CONT.)

MEYER, DARRAGH, BUCKLER, BEBENEK & ECK, P.L.L.C.
U.S. Steel Tower
Suite 4850
600 Grant Street
Pittsburgh, Pennsylvania 15219
Tel: (412) 261-6600

Paul R. Robinson
probinson@mdbbe.com

RHODE ISLAND

HIGGINS, CAVANAGH & COONEY LLP
The Hay Building
123 Dyer Street
Providence, Rhode Island 02903
Tel: (401) 272-3500

Stephen B. Lang
slang@hcc-law.com

James A. Ruggieri
jruggieri@hcc-law.com

John F. Kelleher
jkelleher@hcc-law.com
SOUTH CAROLINA

YOUNG CLEMENT RIVERS LLP
28 Broad Street
Charleston, South Carolina 29401
Tel: (843) 720-5456

Duke R. Highfield
dhighfield@ycrlaw.com

NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street
Meridian Building, 17th Floor
Columbia, South Carolina 29201
Tel: (803) 799-2000

Christopher J. Daniels
chris.daniels@nelsonmullins.com

NELSON MULLINS RILEY & SCARBOROUGH LLP
Poinsett Plaza, Suite 900
104 S. Main Street
Greenville, South Carolina 29601
Tel: (864) 250-2300

William S. Brown
william.brown@nelsonmullins.com

TENNESSEE

LEITNER, WILLIAMS, DOOLEY & NAPOLITAN, PLLC
801 Broad Street
Third Floor, Pioneer Building
Chattanooga, Tennessee 37402
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
LEITNER, WILLIAMS, DOOLEY & NAPOLITAN, PLLC
(continued)

David W. Noblit
david.noblit@leitnerfirm.com

LEWIS, KING, KRIEG & WALDROP, P.C.
One Centre Square, Fifth Floor
620 Market Street
Knoxville, Tennessee 37902
Tel: (865) 546-4646

Richard W. Krieg
dkrieg@lewisking.com

Benjamin W. Jones
bjones@lewisking.com

Mary Ann Stackhouse
mstackhouse@lewisking.com

BURCH, PORTER & JOHNSON, PLLC
130 North Court Avenue
Memphis, Tennessee 38103
Tel: (901) 524-5000

Melissa A. Maravich
mmaravich@bpjlaw.com

LEWIS, KING, KRIEG & WALDROP, P.C.
424 Church Street, Suite 2500
Nashville, Tennessee 37219
Tel: (615) 259-1366

John R. Tarpley
jtarpley@lewisking.com

David A. Changas
dchangas@lewisking.com
LEITNER, WILLIAMS, DOOLEY & NAPOLITAN, PLLC
414 Union Street, Suite 1900
Bank of America Building
Nashville, Tennessee 37219
Tel: (615) 255-7722

Richard Mangelsdorf, Jr.
chuck.mangelsdorf@leitnerfirm.com

George H. (Chip) Rieger, II
chip.rieger@leitnerfirm.com

Jim Catalano
jim.catalano@leitnerfirm.com

MULLIN HOARD & BROWN, L.L.P.
500 S. Taylor
Suite 800, LB 213
Amarillo, Texas 79101
Tel: (806) 372-5050

Danny M. Needham
dmneedham@mhba.com

Christopher W. Weber
cweber@mhba.com

NAMAN, HOWELL, SMITH & LEE, P.L.L.C.
8310 Capital of Texas Hwy N.
Suite 490
Austin, Texas 78731
Tel: (512) 479-0300

P. Clark Aspy
asley@namanhowell.com

Michael Thomas
thomas@namanhowell.com
TEXAS (CONT.)

STRASBURGER & PRICE, L.L.P.
901 Main Street, Suite 4400
Dallas, Texas 75202
Tel: (214) 651-4300

Mark Scudder
mark.scudder@strasburger.com

Samuel J. Hallman
sam.hallman@strasburger.com

Annie J. Jacobs
annie.jacobs@strasburger.com

TEXAS (CONT.)

LORANCE & THOMPSON, P.C.
2900 North Loop West, Suite 500
Houston, Texas 77092
Tel: (713) 868-5560

Eric R. Benton
erb@lorancethompson.com

Melanie Cheairs
mrc@lorancethompson.com

TEXAS (CONT.)

MOUNCE, GREEN, MYERS, SAFI,
PAXSON & GALATZAN, P.C.
100 N. Stanton, Suite 1700
El Paso, Texas 79901-1334
Tel: (915) 532-2000

Carl H. Green
green@mgmsg.com

Darryl S. Vereen
vereen@mgmsg.com

Dan L. Fulkerson
dlf@lorancethompson.com

Ryan T. Hand
rth@lorancethompson.com
TEXAS (CONT.)

LORANCE & THOMPSON, P.C.  (continued)

Cynthia Huerta
ch@lorancethompson.com

Roger Oppenheim
rdo@lorancethompson.com

David Prasifka
dwp@lorancethompson.com

Walter F. Williams III
wfw@lorancethompson.com

MULLIN HOARD & BROWN, L.L.P.
1500 Broadway, Suite 700
Lubbock, Texas 79401
Tel: (806) 765-7491

Danny M. Needham
dmneedham@mhba.com

TEXAS (CONT.)

NAMAN, HOWELL, SMITH & LEE, P.L.L.C.
400 Austin Avenue, Suite 800
Waco, Texas 76701
Tel: (254) 755-4100

P. Clark Aspy
aspy@namanhowell.com

Jerry P. Campbell
campbell@namanhowell.com

UTAH

CHRISTENSEN & JENSEN, P.C.
15 West South Temple, Suite 800
Salt Lake City, Utah 84101
Tel: (801) 323-5000

Dale J. Lambert
dale.lambert@chrisjen.com

Geoff Haslam
geoffrey.haslam@chrisjen.com
VIRGINIA

MORRIS & MORRIS, P.C.
700 East Main Street, Suite 1100
Richmond, Virginia 23219
Tel: (804) 344-8300

D. Cameron Beck, Jr.
cbeck@morrismorris.com

Joseph M. Moore
jmoore@morrismorris.com

WASHINGTON

MERRICK, HOFSTEDT & LINDSEY, P.S. (continued)

Washington Trust Financial Center
717 W. Sprague Avenue, Suite 1200
Spokane, Washington 99201-3505
Tel: (509) 455-6000

Scott C. Cifrese
scott.cifrese@painehamblen.com

VIRGINIA

MERRIS & MORRIS, P.C.
700 East Main Street, Suite 1100
Richmond, Virginia 23219
Tel: (804) 344-8300

WASHINGTON

MERRICK, HOFSTEDT & LINDSEY, P.S.
3101 Western Avenue, Suite 200
Seattle, Washington 98121-1024
Tel: (206) 682-0610

Thomas J. Collins
tcollins@mhlseattle.com

Andrew C. Gauen
agauen@mhlseattle.com

WASHINGTON

PAINE HAMBLEN LLP
Washington Trust Financial Center
717 W. Sprague Avenue, Suite 1200
Spokane, Washington 99201-3505
Tel: (509) 455-6000

Scott C. Cifrese
scott.cifrese@painehamblen.com

WEST VIRGINIA

ROBINSON & MCELWEE PLLC
700 Virginia Street East
400 Fifth Third Center
Charleston, West Virginia 25301
Tel: (304) 344-5800

Edward J. George
eig@ramlaw.com
### WEST VIRGINIA (CONT.)

**ROBINSON & MCELWEE PLLC**  
140 West Main Street  
Suite 300  
Clarksburg, West Virginia 26301  
Tel: (304) 622-5022

- Stephen F. Gandee  
  [sfg@ramlaw.com](mailto:sfg@ramlaw.com)

---

**WISCONSIN**

**WHYTE HIRSCHBOECK DUDEK S.C.**  
555 East Wells Street  
Suite 1900  
Milwaukee, Wisconsin 53202-3819  
Tel: (414) 273-2100

- Jack Laffey  
  [jlaffey@whdlaw.com](mailto:jlaffey@whdlaw.com)

---

### WYOMING

**MURANE & BOSTWICK, LLC**  
201 North Wolcott  
Casper, Wyoming 82601  
Tel: (307) 234-9345

- Kathleen J. Swanson  
  [kjs@murane.com](mailto:kjs@murane.com)

---

**MURANE & BOSTWICK, LLC**  
508 West 27th Street  
Cheyenne, Wyoming 82001  
Tel: (307) 634-7500

- Greg Greenlee  
  [ggg@murane.com](mailto:ggg@murane.com)

- Loyd E. Smith  
  [les@murane.com](mailto:les@murane.com)
INTERNATIONAL

AUSTRALIA

CORNWALL STODART
Level 10
114 William Street
Melbourne, Victoria 03000
Tel: 61-3-9608-2000

Levent Shevki
l.shevki@cornwalls.com.au

CANADA

BORDEN LADNER GERVAIS
1000 Canterra Tower
400 Third Avenue S.W.
Calgary, Alberta T2P 4H2
Tel: (403) 232-9500

Bruce Churchill-Smith
bchurchillsmith@blgcanada.com

FASKEN MARTINEAU DUMOULIN LLP
2900 - 550 Burrard St.
Vancouver, British Columbia V6E 0A3
Tel: (604) 631-4894

William Westeringh
wwesterinhg@fasken.com