EDITORS’ NOTEPAD

Of special note in this issue is the following information about ALFA’s new Go Team Hotline

The ALFA International global legal network has been serving the transportation industry for almost 30 years through ALFA’s Transportation Practice Group. Over 70 member law firms across the United States provide outstanding legal services at reasonable rates to trucking companies, motor coach carriers, and other transportation businesses wherever they operate.

On May 1, 2008, the ALFA Transportation Practice Group will have a new service available for its transportation clients. THE ALFA GO TEAM HOTLINE.

ALFA knows that its transportation clients must often confront time-sensitive emergencies, where delays in response can prove costly if not disastrous. ALFA lawyers also know that crises do not always occur during normal business hours. 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 beginning on May 1, 2008.

Here’s how the service works. An ALFA client needing immediate legal support calls the ALFA GO TEAM HOTLINE at 1-866-540-ALFA (2532). An ALFA operator will field the call and provide the ALFA client with location-specific contact information for 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, where you need it and when you need it.

Contact your ALFA lawyer today for more details about the ALFA GO TEAM HOTLINE. But remember that number, 1-866-540-ALFA (2532). When transportation emergencies arise, help is on the way!

THE ALFA GO TEAM HOTLINE — 1-866-540-ALFA (2532)

In addition to the Go Team Hotline, ALFA offers to you the Transportation Update which The Transportation Practice Group of ALFA International has published for about seventeen years. Please note that in addition to this issue of the Transportation Update we have an archive of many recent issues on the website. 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 Katherine Garcia.
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 section headings are as follows: **Cases, Regulations, and Statutes**; **Verdicts and Settlements**; **Practice Tips**; and **Articles**.

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 and Settlements** section addresses the results of litigation affecting the trucking industry. We encourage you to report to us about any verdict or settlement that you think is of interest to the trucking community. You may report all such results to the editors of the *Update* or to Michael K. Sheehy.

Michael can be reached as follows: msheehy@plunketcooney.com. In this issue of the *Update*, we feature an excellent result by **Larry Warren**, who defended Evenson Trucking Co. and received a defense verdict by effectively using the ECM of the truck. Please also see the excellent result that was achieved by **J. Philip Davidson** and **P. Jay Skolaut** – their result is featured under the Practical Tips section of this issue.

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, **Gareth W. Notis** discusses the use of Electronic Toll Collection Technology. As aforesaid, **Philip Davidson** and **Jay Skolaut** achieved an excellent result at trial, and the result that was achieved serves as an excellent reminder of the need for a Rapid Response to an accident. They also discuss seal coating and friction testing – both crucial to the outcome.

**Articles** provide in depth analysis of issues, developments, and concerns that are relevant to the transportation industry. **Dennis Keene** discusses the constitutionality of the Graves Amendment and two cases of significance that are on interlocutory appeal – very well done. **Eric R. Benton** discusses a Ninth Circuit decision that concerns “transportation charges” and he explores the state of the law on this subject in other jurisdictions as well. **Eric R. Benton** also provides an Article that discusses the construction and the application that various courts have given to the terms “Motor Carrier” and “Broker”

In the section immediately following **Articles**, please see the **ALFA Member Publications and Speaker/Conference Roles of Note**. If the topic of the publication or of the speaker/ conference role of the ALFA member is of interest to you, please just contact the ALFA member directly (we have provided the contact information so that you can easily do so). Please check out what ALFA’s **Peter Doody**, **Greg Conforti**, and **Andrew Gauen** are up to.

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

**WILL FULTON**

wfulton@whf-law.com

**MARC HARWELL**

marc.harwell@leitnerfirm.com

**FUTURE EVENTS**

The Transportation Practice Group of ALFA International presents a multi-day seminar for members of the Trucking Industry each year. The **2008 Transportation Seminar** will be held in Palm Beach, Florida at the Breakers from April
30 to May 2, 2008 (Some of you might be interested to know that the owners of the NFL recently held their annual meeting at this resort). At present, we plan to offer the following topics for discussion/presentation: Managing the Scene of the Accident; Preserving Evidence at the Scene; E-Discovery and Spoliation; Defending Independent Theories of Liability and Damages against the Company; Defending against Allegations of Criminal Conduct; and A Mock Trial. The Fact Pattern that will be used by the presenters at the conference is as follows:

FACTS OF THE ACCIDENT

The accident that is the subject of this lawsuit occurred at approximately one o’clock in the afternoon on April 1, 2004 at the intersection of Pine Street and Martin Luther King Boulevard in Chattanooga, Tennessee. The sky was clear. The streets were dry.

Martin Luther King Boulevard is a flat, straight road that runs east and west through the downtown Chattanooga area. Pine Street is a two-lane road that intersects with the westbound traffic of Martin Luther King Boulevard. A yield sign controls access from Pine Street to Martin Luther King Boulevard. At the intersection, traffic on Pine Street must turn right and upon doing so first enters the rightmost lane on Martin Luther King Boulevard – a lane that is reserved for traffic that is moving to the access ramp of Highway 27 North. The next lane is a lane that permits access to Highway 27 North or continued westbound movement. A third lane is just for westbound traffic. The posted speed limit for traffic on Martin Luther King Boulevard is 30 miles per hour. At the time of the accident, the traffic volume was light. A busy fast-food restaurant is near the scene. Liza Hurst was one of two team drivers of the white Freightliner tractor that was pulling a cream colored trailer for Nevada Transit, Inc. (“NTI”). NTI has been “paperless” for 24 months. This included all financial records relating to the operations of the company. Cell phone records for cell phones assigned to drivers were included. All entries in the driver qualification files had been paperless prospectively only for 12 months. All log files had been stored electronically on a rolling 6 month basis for 2 years. All communications between NTI and it drivers on the road (other than emergency communications) were accomplished by a Qualcomm system with a 30 day retention system.

NTI scanned all communications with its field adjusters and outside counsel and communicated with both groups extensively by email. NTI had not finalized its document retention policies at the time of this accident. NTI’s Safety Director was aware from colleagues in the industry that they were taking steps to anticipate electronic discovery but had not implemented any policies on this issue.

Ms. Hurst’s team driver was Greg Allen. The trucking company had assigned the truck to a single company driver, Greg Allen. At the time of the accident, Ms. Hurst had been a long haul driver for various trucking companies for fifteen years. For the three-month period preceding the accident, she had accumulated twenty out of one hundred company points for a couple of infractions of company policy. On the day of the accident, she had a delivery scheduled for 3:30 in the afternoon at Koch Foods, Inc. in Atlanta, Georgia, which is approximately a two hour drive from Chattanooga depending upon the traffic. She had just finished lunch at the Pig Shack after having made a delivery at the Koch Foods center in Chattanooga. She had a couple of beers with her barbeque sandwich at lunch. Ms. Hurst had taken over the driver’s responsibilities following lunch and had been driving for approximately five minutes before the accident occurred.

Ms. Hurst was stopped on Pine Street and was waiting to turn right onto Martin Luther King Boulevard. She would then access Highway 27 South to I-24 to I-75 South.

Collin Reynolds was operating a 2003 grey and black Ninja motorcycle. He was traveling westbound on Martin Luther King Boulevard. After having moved a distance of approximately 3-5 feet, she heard her co-team member, Mr. Allen, exclaim, “No, don’t!” Upon hearing the exclamation, Ms. Hurst immediately applied the brakes of the vehicle (using her foot), and at about the same time the motorcycle impacted the driver’s front corner of the Freightliner.

Mr. Reynolds’ Ninja motorcycle fishtailed prior to the impact of the tractor-trailer. The impact between the vehicles occurred in
the rightmost lane of westbound traffic on Martin Luther King Boulevard. The Freightliner sustained damage to the left front corner and to the bumper and to the grill. Mr. Reynolds’ Ninja motorcycle was a total loss. Mr. Reynolds literally flew through the air and collided with the pavement. He sustained severe injury to the head, neck, right shoulder, arm, hip, and leg. Both vehicles were towed from the scene and Mr. Reynolds was removed from the scene by ambulance.

The sealed refrigerated trailer contains time sensitive cargo with a value of $150,000. The truck and its load were never weighed. The freight was shipped by the single largest customer of NTI, Acme Specialty Foods. Acme was very dissatisfied with the on-time delivery performance of NTI.

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

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

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

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

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

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

**Regional Directors for Content**

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

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

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

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

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

**FUTURE ISSUES OF TRANSPORTATION UPDATE**

The summer issue of *Transportation Update* will be published in July.

**CONTENTS**

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

1. **EDITORS NOTEPAD**

2. **FUTURE EVENTS**

3. **FUTURE ISSUES OF TRANSPORTATION UPDATE**

4. **CASES, REGULATIONS AND STATUTES**

   Arkansas  
   California  
   Connecticut  
   New York  
   Oklahoma  
   South Carolina  
   Tennessee  
   Virginia

5. **VERDICTS AND SETTLEMENTS**

   *Rainy Night in Georgia*  
   by Larry Warren

6. **PRACTICE TIPS**

   *Slippery When Wet… More Benefits to Getting There Early* by J. Philip Davidson & P. Jay Skolaut

   *Electronic Toll Collection (ETC) - A Double-Edged Litigation Tool* by Gareth W. Notis

7. **ARTICLES**

   *Graves Amendment* by Dennis Keene

   *Defining Transportation Charges* by Eric R. Benton

   *Motor Carrier or Broker of Cargo?* by Eric R. Benton

8. **ALFA MEMBER PUBLICATIONS AND SPEAKER/CONFERENCE ROLES OF NOTE**

9. **TRANSPORTATION PRACTICE GROUP DIRECTORY OF MEMBER FIRMS**
CASES, REGULATIONS, & STATUTES

ARKANSAS

LOGO LIABILITY DOCTRINE CALLED INTO QUESTION IN ARKANSAS.

For years, trucking companies doing business in Arkansas have faced potential liability under the “logo liability” rule for accidents involving trucks with which they are only loosely associated. That rule, which spawned from federal regulations, effectively supplanted traditional agency/ respondeat superior principles of state law and triggered liability even where the company had very minimal connection to the vehicle or the load in question.

However, on November 16, 2007 Honorable Leon Holmes, United States District Court, E.D., granted summary judgment to Penske Truck Leasing, Co. L.P. in a wrongful death case involving two Penske trucks. Brown v. Truck Connections Int’l, Inc., 526 F.Supp.2d 920 (E.D.Ark.,2007). Penske had contracted with Truck Connections International, Inc. (“TCI”) whereby TCI, as an independent contractor, would shuttle Penske trucks from one rental location to another. TCI hired drivers whose negligence led to the accident that resulted in two deaths. At the time of the accident, both Penske trucks bore the Penske logo and the Department of Transportation numbers registered to Penske. Plaintiff argued that Penske was liable for the accident on five theories: 1) TCI was an employee of Penske, not an independent contractor; 2) Penske had a non-delegable duty to ensure public safety; 3) the drivers were “statutory employees” of Penske; 4) Penske was liable under the “logo liability” doctrine; and 5) Penske had independent liability under state and federal law for negligent hiring of TCI. The court concluded that plaintiff had not presented sufficient facts to survive summary judgment under theories 1 and 5. The court further concluded that the commercial trucks in this case were not inherently dangerous; therefore, plaintiff’s theory under Restatement (Second) of Torts § 428 was inapplicable. The court also held that the operative regulation forming the basis of plaintiff’s “statutory employee” claim defined “individual” as a human being. Since TCI was not a human being, it was not the “statutory employee” of Penske.

Finally, the court rejected plaintiff’s claim that the logo liability doctrine pinned liability on Penske for this accident. Noting that the logo liability doctrine historically had applied to situations where a lease agreement provided for one party to operate a truck bearing another party’s logo for its own use and benefit, the court pointed out that there, in fact, was no lease agreement in this case. Instead, Penske and TCI entered into a transportation agreement designed to cause TCI to shuttle Penske’s trucks from one location to another. Unlike the traditional owner/operator lease agreement situation, here TCI did not lease Penske’s trucks for the purpose of operating them on the highway for its own use. This fact could have been sufficient to avoid the logo liability doctrine.

In reaching its decision, however, the court commented further on the continued viability of the “logo liability doctrine” in Arkansas. Specifically, the court stated, “[T]o the extent courts have applied the logo liability doctrine in the past, further application of the doctrine has been brought into question by the agency from which it originated. The Interstate Commerce Commission created the regulations that courts originally relied on in imposing logo liability. After the Commission realized this development, it changed the regulations and offered the following commentary:

We prefer that courts decide suits of this nature by applying the ordinary principles of State tort, contract, and agency law. The Commission did not intend that its leasing regulations would supersede otherwise applicable principles of State tort, contract and agency law and create carrier liability where none would otherwise exist. Our “regulations
should have no bearing on this subject. Application of State law will produce appropriate results.” Id. at 925.

While the lack of a traditional owner/operator lease agreement may limit the holding in this case to its facts, the language of this opinion sends a strong message that the logo liability doctrine in Arkansas is vulnerable, if not extinct.

Jerry Sallings, Esq.
WRIGHT, LINDSEY & JENNINGS, LLP
200 West Capitol Ave, Ste. 2300
Little Rock, AR 72201
Phone: 501.212.1284
Fax: 501.376.9442
jsallings@wlj.com
www.wlj.com

CALIFORNIA

AUTO LEASING LIABILITY AND MOTOR CARRIER STATUS

California’s Second District Court of Appeal (Los Angeles) has issued a significant decision clarifying the definition of “motor carrier” for purposes of auto leasing company liability in the interstate context. In Castro v. Budget Rent-A-Car Systems, Inc., 154 Cal. App. 4th 1162 (2007), the Second District affirmed a summary judgment for Budget Rent-A-Car (“BRAC”) based on its interpretation of the term “motor carrier” as used in federal legislation. In the same opinion it rejected plaintiff’s alternative argument that BRAC should be held liable under California’s non-delegable duty doctrine. In so holding, it rejected personal injury and loss of consortium claims by Mario Castro and his wife.

Castro arose out of a two vehicle accident occurring in Alabama on July 22, 2002. Plaintiff was a passenger in a car which collided with an overturned truck owned by BRAC. BRAC had previously leased the truck to Carlos Diaz, dba Carlos Diaz Fresh Produce. At the time of the accident, the truck was being driven by Diaz’ employee, Jose Lopez. Lopez was allegedly intoxicated, leading to the overturn which preceded, and precipitated, the accident involving plaintiff. Diaz was in the business of delivering produce from Alabama to Florida. BRAC had no involvement in that enterprise. Prior to the accident, the Federal Motor Carrier Safety Administration (“FMCSA”) had issued BRAC a United States Department of Transportation (“DOT”) number. BRAC was also registered with the state of Alabama as a motor carrier. Although BRAC was registered with the state of Alabama as an “Interstate Carrier”, its paperwork with FMCSA showed it did not operate as a motor carrier. Diaz had purchased liability protection from Budget in connection with the truck rental because he did not have his own insurance. BRAC held a certificate of self-insurance from the state of Alabama at the time of the accident.

BRAC moved for summary judgment on the ground that Alabama law applied. In Alabama, vehicle owners have no liability to injured third parties in straight permissive use situations, absent evidence of negligent entrustment. Plaintiffs opposed the motion by arguing that BRAC was a “motor carrier” and thus subject to liability under federal law governing interstate transportation. Los Angeles Superior Court granted the motion, holding that the federal transportation statutes did not apply and further holding that Alabama law applied--meaning that plaintiff could not recover from BRAC based on its ownership of a truck being permissively driven.

The Second District affirmed. Even though BRAC had voluntarily complied with the federal motor vehicle legislation by carrying the minimum liability insurance of $750,000, the court focused instead on the fact that BRAC was not, in this specific case, acting as a motor carrier, defined as someone in “the business of transporting, for compensation, the goods of property of another.” Id. at 1174. In reaching its decision, the court noted that BRAC’s mere act of leasing its truck to a third party (Diaz) did not render BRAC a motor carrier because “...it did not retain possession or control over the truck or otherwise operate the truck to transport goods.” Id. at 1174. Because BRAC was not deemed a motor carrier, the federal transportation legislation did not overcome the normal presumption that Diaz was operating as an independent contractor.
The court also held that Alabama law applied and California law did not. Under Alabama law, the vehicle owner (BRAC) faces no liability simply by virtue of permissive use. In reaching this result, the court goes through an interesting choice of law analysis. Under that analysis, it concluded that Alabama’s state interest in controlling its highways would be more adversely affected through application of California’s non-delegable duty doctrine than would California be harmed through application of Alabama law (under which vehicle owners are not liable for the conduct of permissive users, absent “negligent entrustment” or other extenuating circumstances not present in the facts of this case).

**COMMENT**

This case underscores the judicial reality that California courts can disregard a car rental company’s general mode of operation and focus, instead, on the way it functioned in the specific case which is the subject of the lawsuit. BRAC prevailed here because it had no involvement in or control over the interstate transportation business of its lessee, Diaz. The mere act of entering a vehicle lease with someone who operates such a business did not render BRAC liable as a “motor carrier”. Because the court applied substantive Alabama law, plaintiffs were not even able to recover the minimum financial responsibility limit ($15,000) which would have been available under California law against the vehicle owner in a permissive use situation.

However, the Connecticut Supreme Court did not express an opinion as to whether a cause of action arises for third-party spoliation of evidence. Id. A third-party spoliator is a party not alleged to have committed the underlying tort as to which the loss or destroyed evidence related. Since Rizzuto, at least one trial court has recognized a cause of action for third-party intentional spoliation of evidence. See, Diana v. Net Jets Servs., 2007 Conn, Super LEXIS 3491 (December 12, 2007), The Appellate Court has not yet addressed the issue of third-party intentional spoliation of evidence.

The essential elements of an intentional spoliation of evidence claim are: (1) the defendant’s knowledge of a pending or impending civil action involving the plaintiff; (2) the defendant’s destruction of evidence; (3) in bad faith, that is, with intent to deprive the plaintiff of his cause of action; (4) the plaintiff’s inability to establish a prima facie case without the spoliated evidence; and (5) damages. Id.

To establish proximate causation, the plaintiff must prove that the defendant’s intentional, bad faith destruction of evidence rendered the plaintiff unable to establish a case in the underlying litigation. Rizzuto, supra at 246 (quoting Smith v. Atkinson, 771 So. 2d 429, 434 (Ala. 2000)). Once the plaintiff satisfies this burden of proving proximate causation, a rebuttable presumption arises that but for the fact of spoliation of evidence, the plaintiff would have recovered in the pending case in the underlying litigation.
or potential litigation. Id. Then, the burden shifts to the defendant/spoliator to rebut the presumption in disproving the inferred element of the plaintiff’s prima facie case. The defendant may rebut this presumption by producing evidence showing that the plaintiff would not have prevailed in the underlying action even if the destroyed evidence had been available. The defendant / spoliator must overcome the rebuttable presumption or else be liable for damages.

The measure of damages that the plaintiff is entitled to recover is the full amount of compensatory damages that the plaintiff would have received if the underlying action had been pursued successfully. Rizzuto, supra at 248 (quoting Hannah v. Heeter, 213 W. Va. 704 (2003)). In determining the proper measure of damages, the trial court is guided by the purpose of compensatory damages, which is to restore a victim of intentional spoliation of evidence to the position that person would have been in if the spoliation wrong had not been committed.

Our Connecticut Supreme Court does not recognize a separate tort for negligent spoliation of evidence. Rizzuto, supra. Where negligent spoliation of evidence has occurred, our Connecticut Supreme Court does not permit the trier of fact to draw an adverse inference that the evidence would have been unfavorable to the spoliator. Beers v. Bayliner Marine Co., 236 Conn. 769 (1996).

The Appeals Court in Graham v. Dunkley, 852 N.Y.S 2d 169, 175 (N.Y. App. Div. 2008), held that “there can be no real dispute that the rental and lease of vehicles, and the conditions under which such transactions occur, are economic activities which impact the national market” and “Congress may choose to preempt state liability schemes in order to effectuate regulation of economic activities which affect interstate commerce.”

The opinion of the court which was without dissent held that “actions against rental and leasing companies based solely on vicarious liability may no longer be maintained” in the State of New York. Id.

While plaintiffs may well seek leave to appeal this decision to New York’s highest State Court, the New York Court of Appeals, it is unlikely that leave will be granted in light of this strong well written opinion in favor of preemption.
PREEMPTION AND THE OKLAHOMA WORKERS COMPENSATION ACT

The recent case of Craft v. Graebel-Oklahoma Movers, Inc., 178 P.3d 170, (Okla. 2007) issued by the Oklahoma Supreme Court addressed whether a Plaintiff may utilize the requirements of the Federal Motor Vehicle Safety Act and Federal Motor Carrier Act to preempt the exclusive remedy provision of the Oklahoma Workers Compensation Act. The court also addressed potential civil liability under the Federal Motor Carrier Act for companies who perform inspection services under the Act.

In Craft, Plaintiff was an employee of Propack, a subcontractor of Graebel-Oklahoma Movers. Propack leased equipment and employees to Graebel, and Plaintiff and other Propack employees were returning from a packing job for Graebel when the van in which the employees were riding was struck in the rear by another vehicle. Plaintiff was injured and filed a workers’ compensation claim. Plaintiff was then adjudicated permanently and totally disabled by the workers’ compensation court.

Plaintiff then brought an action against Graebel in district court claiming they were liable to Plaintiff under common law and federal law. Graebel maintained a contract with Propack which enabled it to require Propack’s vehicles be in working order, and Plaintiff presented evidence Propack employees regularly were informed of the poor condition of the vans. Graebel alleged Plaintiff’s claims were barred since they were her “principal employer” under the Workers’ Compensation Act. Plaintiff admitted Graebel was her “principal employer” under the Act; however she maintained that federal law preempted the exclusive remedy provision of the Oklahoma Workers’ Compensation Act.

Plaintiff also brought an action against Central City Mobile Services, Inc. alleging they also violated federal law. Plaintiff presented evidence that Propack had routinely sent their vans to Central City for inspection and repair, and according to Central City’s own inspection reports, the vehicle in which the Plaintiff was riding had passed federal inspection, including functioning seatbelts. However, Plaintiff presented evidence the seat belt to be used by her was broken and unusable when Central City performed their inspection. Central City maintained they only had a duty to warn Plaintiff of a defect, and because Plaintiff knew the seatbelt was broken Central City owed her no duty.

The trial court granted summary judgment to both Defendants. The court of civil appeals affirmed both rulings.

The Oklahoma Supreme Court reversed and remanded the matter as to both Defendants. As to Graebel, the court held neither the Federal Motor Vehicle Safety Act, 49 U.S.C. § 30103, nor the Federal Motor Carrier Act, 49 U.S.C. §§ 31101-31162, preempted the Oklahoma Workers’ Compensation Act.
SOUTH CAROLINA

DUI LEGISLATION IN NEGOTIATIONS

Broadly understood to be among the nation’s most lenient, South Carolina’s DUI law is the subject of intense negotiations within the South Carolina General Assembly which are likely to yield substantial changes in the first few months of 2008. Proposals include efforts to assist prosecutors in obtaining convictions and to enhance the penalties meted out for such convictions. The question—as always with deals brokered via South Carolina’s notoriously compromising legislative process—is how much of the intended reform will remain once the bill reaches its final draft.

The South Carolina General Assembly attempted a similar reform of the state’s DUI policy with the 2003 enactment of the “per se” DUI statute, S.C. CODE § 56-5-2933 “Driving with an unlawful alcohol concentration.” Prior to 2003, defendants in South Carolina were subject to prosecution only under the original DUI statute, S.C. CODE § 56-5-2930, “Operating motor vehicle while under influence of alcohol or drugs.” The original DUI statute did not criminalize driving with any particular blood alcohol content. Instead, it outlawed driving by individuals intoxicated “to the extent that the person’s faculties to drive are materially and appreciably impaired.” Under this remarkably narrow and ambiguous standard, criminal defense attorneys traditionally have had a field day overcoming the beyond a reasonable doubt standard. The 2003 “per se” DUI law was designed to remedy this issue.

Like the “per se” DUI laws in force in virtually every state, South Carolina’s statute was designed to convert DUI from the type of criminal offense open to creative lawyering and jury persuasion, to an absolute culpability offense more akin to speeding or disregarding a stop sign. However, the bill’s opponents interposed into its final draft an array of loopholes which frustrated the “per se” DUI statute’s purpose. For example, police officers prosecuting a DUI case under the new statute had to demonstrate an “articulable suspicion” for the initial traffic stop, which created precisely the maneuvering room defense attorneys enjoyed under the original statute. Further, DUI arrests arising out of roadblock or checkpoint stops had to be prosecuted under the original DUI statute, as did defendants not submitting to a blood alcohol test. Finally, for a conviction under the supposedly “per se” DUI statute, the arresting officer was required to issue DUI specific, Miranda-type warnings before conducting field sobriety tests, and to follow painstaking procedures regarding videotaping and administration of the blood alcohol tests. As a result of the myriad problems with the “per se” DUI law, current prosecutorial practice is to charge virtually all DUI cases under the original statute, despite its essentially unworkable “materially and appreciably impaired” standard.

Legislators currently are debating the merits of several proposals designed to toughen the penalties for DUI convictions. The primary development is the implementation of a tiered sentencing system. Under this approach, which has broad-based legislative support, the sentence attending upon a conviction would depend on the offender’s blood alcohol level in addition to his number of previous offenses. For example, under one proposal penalties would range from 48 hours in jail for a first offense of driving with a blood-alcohol level of .08 percent—the legal limit for adults—to seven years in prison for a fourth offense of driving with a blood-alcohol level of .16 percent or greater. Wrangling among legislators as to which offense should trigger the tier system continues, but drivers and companies doing business in South Carolina can expect some version of this concept to be adopted shortly.

The more interesting and important issue, though, is the question of what will be done to facilitate prosecution and conviction. While several defense-friendly provisions have been extracted, convictions stemming from roadblock and checkpoint stops will now be allowable under the “per se” law, and the “articulable suspicion” requirement will be reduced to a more prosecutorially workable “reasonable suspicion.” Numerous obstacles to prosecution also remain entrenched in the statute. One is that the DUI specific Miranda-type warnings with which arresting officers have had so much trouble remain. The same is true of the detailed videotaping and testing
procedures police are required to comply with. With the continuation of the elevated evidentiary burdens placed on policemen—who, incidentally, act as the prosecutor for most DUI offenses in South Carolina—defense attorneys will continue to enjoy a high success rate in defending DUI cases brought to trial.

Most important among the defense weapons though is that suspects continue to enjoy the right to refuse blood alcohol tests. Mandatory testing of those refusing it would implicate exhausting constitutional considerations, of course, but other states have circumvented this problem by imposing harsh sentences for those who refuse testing. Under current South Carolina law by contrast, drivers refusing blood alcohol tests face a comparatively brief 90-day administrative suspension of their driver’s license. Further, most of these drivers are able to obtain with relative ease a provisional license on the authority of which they can drive to and from work, to doctor’s appointments, on ordinary errands, and the like. And in the event drivers are unaware that they are free to decline field sobriety testing, police officers are required to inform suspected intoxicated drivers of that right as part of the DUI specific Miranda-type warnings.

Taken together, the various proposals being bandied around the Statehouse suggest that while the severity of punishment for DUI convictions is likely to increase the relative avoidability of such convictions will remain high.

Duke Highfield, Esq.

Benjamin Traywick, Esq.
YOUNG CLEMENT RIVERS, LLP
28 Broad Street
Charleston, SC 29401
Phone: 843.720.5456
Fax: 843.579.1330
dhighfield@ycrlaw.com
btraywick@ycrlaw.com
www.ycrlaw.com

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SOUTH CAROLINA

SUPREME COURT REFUSES TO EXPAND NEGLIGENT ENTRUSTMENT

In the recent case of Gadson v. ECO Services of South Carolina, 374 S.C. 171, 648 S.E.2d 585 (2007), the South Carolina Supreme Court refused to relax the requirements for recovery under a theory of “negligent entrustment” of a vehicle to an intoxicated person.

Joseph Jenkins was employed by ECO Services, a solid waste contractor. Jenkins’ job required him to drive an ECO vehicle on most days, including the day of the accident. After completing his route and instead of immediately returning the vehicle to ECO, Jenkins traveled to a nearby town and picked up several friends, including Plaintiff Gadson and his cousin John Jenkins (“John”). The group made several stops in the ECO vehicle, including one to a gas station where John purchased one or two wine coolers which he shared with another passenger. The group then traveled in the ECO truck to a local boat ramp where they spent “about an hour” talking. On the way home, Jenkins allowed John to drive the ECO vehicle. John lost control of the truck and crashed, ejecting Gadson from the vehicle. Gadson filed suit against ECO and Jenkins, alleging negligence and negligent entrustment. The jury found both ECO and Jenkins liable for negligent entrustment - ECO for negligently entrusting the vehicle to Jenkins, and Jenkins for negligently entrusting the vehicle to John.

The South Carolina Court of Appeals reversed the jury’s verdict as to ECO but affirmed as to Jenkins. Before doing so, however, the court of appeals first adopted § 308 of the Restatement (Second) of Torts (1965). This section states:

It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as
to create an unreasonable risk of harm to others

Noting that Jenkins 1) knew that his cousin John had been drinking alcoholic beverages; and 2) was apparently familiar with Johns’ character based on their familial relationship, the court of appeals concluded that Jenkins “knew of should have known that John’s use of the vehicle was likely to cause harm.” *Gadson v. ECO Services of South Carolina*, 374 S.C. 171, 648 S.E.2d 585, 587 (2007).

On further appeal, the South Carolina Supreme Court reversed. The Supreme Court explicitly declined to adopt § 308 of the *Restatement (Second) of Torts* “based on this set of facts.” Instead, the Court examined the case under the existing, and far more stringent, test for negligent entrustment, which requires:

(1) knowledge of or knowledge imputable to the owner that the driver was either addicted to intoxicants or had the habit of drinking; (2) the owner knew or had imputable knowledge that the driver was likely to drive while intoxicated; and (3) under these circumstances, the entrustment of a vehicle by the owner to such a driver

*Jackson v. Price*, 288 S.C. 377; 342 S.E.2d 628, 631 (Ct. App. 1986) (quoting *McAllister v. Graham*, 339 S.E.2d 154 (S.C.Ct. App.1986)). The court determined that under the proper analysis, even in the light most favorable to Gadson, there was no evidence presented to support the contention that Jenkins knew his cousin John was intoxicated, had a habit of being intoxicated, or was likely to drive while intoxicated.

The Supreme Court’s ruling in *Gadson* is interesting for several reasons. At a very basic level, the reversal shows the Supreme Court’s reluctance to expand the scope of negligent entrustment to the degree espoused by the court of appeals. While the Supreme Court’s test requires knowledge of addiction to intoxicants or at least knowledge of a habit of consumption, the court of appeals’ test would have allowed recovery even though the driver had consumed less than two wine coolers. In fact, *Gadson* is not the first time the Supreme Court has rejected the Court of Appeals’ adoption of § of the *Restatement (Second) of Torts*. In *Lydia v. Horton*, 355 S.C. 36, 583 S.E.2d 750 (2003), the Supreme Court reversed a Court of Appeals ruling which not only adopted §§ 308 and 390 of the *Restatement (Second) of Torts*, but used these sections to recognize a first party cause of action for negligent entrustment. Furthermore, the unfortunately vague language of the opinion, declining “to adopt [§ 308 of the Restatement] based on this set of facts” leaves the opinion susceptible to competing interpretations. By declining to adopt a standard extending liability to anyone who supplies a “thing” to a person who the supplier should know is likely to use it in such a manner as to create an unreasonable risk of harm to others and instead by applying the strict test from *Jackson v. Price*, is the Supreme Court restricting vehicular negligent entrustment claims to “intoxicated driver” situations only? Or is this strict standard intended to apply only to negligent entrustment claims involving alcohol? If it is the former, does this foreclose all negligent entrustment claims based upon, for example, entrusting a vehicle to an employee with an unfavorable driving history?

Most significant, however, may be the potential outcomes available under the negligent entrustment test set forth in *Jackson v. Price* and reaffirmed in *Gadson*. As the *Gadson* dissent points out, the current test requires knowledge of the driver’s drinking addiction or habit. This being the case, a person could not be held liable for negligent entrustment even if the person supplied a grossly intoxicated driver with a vehicle, so long as the supplier was not aware of the driver’s drinking habits. While some may argue such a result does not comport with the principles behind the theory of negligent entrustment, it appears to be firmly entrenched as the law in South Carolina.

*Duke Highfield, Esq.*

*Brandt Horton, Esq.*

YOUNG CLEMENT RIVERS, LLP
28 Broad Street
Charleston, SC 29401
Phone: 843.720.5456
Fax: 843.579.1330
dhighfield@ycrlaw.com
bhorton@ycrlaw.com
www ycrlaw.com
TENNESSEE

NEGLECTFUL ENTRUSTMENT ELEMENTS

In 2005, Valerie Watrous was killed by an automobile driven by Jack Johnson while she was walking down the street. Her husband, Trent Watrous, filed a wrongful death action against Jack and a claim of negligent entrustment against his parents. Trent Watrous alleged that Jack Johnson was under the influence at the time of the accident and that the parents knew Jack had a problem with drugs and/or alcohol and had a history of drunk driving. Further it was alleged that the parents provided the car and funds to operate the car. Trent Watrous claimed that the parents were negligent because they made it possible for him to drive the car in spite of having knowledge of the risk this posed to the public.

The court began its analysis by stating the law in regard to negligent entrustment from the Restatement (Second) of Torts.

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them. Restatement (Second) of Torts § 390 (1965).

This section is a “special application” of § 308 of the Restatement. It states:

It is negligence to permit a third person to use a thing or engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others. Restatement (Second) of Torts § 308 (1965).

The court summarized the plaintiff’s burden stating, “a plaintiff must demonstrate that a chattel was entrusted to one incompetent to use it with knowledge of the incompetence, and that its use was the proximate cause of injury or damage to another.”

The court began its application of the law by discussing West v. East Tennessee Pioneer Oil Co., 172 S.W.3d 545,554 (Tenn. 2005), which abrogated a 50 year-old rule, that a father, with knowledge his son was “a drunk and reckless driver,” was not liable for negligent entrustment, because the father had given the vehicle as a gift, and therefore, relinquished control over the vehicle.

The court first discussed the facts regarding the issue of whether the parents bought the car for Jack. The court concluded that a genuine issue of material fact existed regarding whether the parents purchased the automobile for Jack.

The court continued by stating that whether the parents negligently entrusted the car to Jack does not end with whether they purchased the car but whether they provided the means necessary to operate the car. The court stated that the parents, like the defendants in West, provided the means for Jack to operate the automobile. The court principally relied on the fact that the parents repaid a title loan Jack secured with the car. Because the automobile would have been repossessed had the parents not made the payment, the court concluded that the parents, in effect, “repurchased” the automobile for Jack. In addition, the fact the parents provided for almost all of Jack’s expenses and gave him a $100 check the day of the accident, further supported the Plaintiff’s argument that the parents provided the necessary means to operate the automobile.

This decision affirms that a party may be held liable for negligent entrustment, if they provide the essential means to operate the automobile and knew or should have known that person is likely to use the automobile in a manner that creates an unreasonable risk for others.

Richard Krieg, Esq.
LEWIS, KING, KRIEG & WALDROP, P.C.
P.O. Box 2425
Knoxville, TN 37901
Phone: 865.546.4646
Fax: 865.523.6529
dkrieg@lewisking.com
www.lewisking.com
TENNESSEE

STANDARDS FOR THE ADMISSION OF WITNESS STATEMENTS AND AWARDING OF PUNITIVE DAMAGES WITH NO FINDING OF NEGLIGENCE IN TENNESSEE

In Maggard v. Ford Motor Company, 2007 WL 4255272 (M.D. Tenn. 2007), the United States District Court for the Middle District of Tennessee considered issues involving the admission of witness statements under the evidentiary hearsay rules and the justifications of the award for punitive damages at the trial level.

This diversity action arose out of an accident when the plaintiff, Maggard, attempted to place her Ford Windstar into Park before exiting the vehicle. Upon exiting the vehicle, it began to roll backwards and caused injury to Maggard’s right leg. It was discovered during the investigation of the underlying case that Ford had problems with its vehicles getting stuck between the Park and Reverse modes when drivers attempted to place the vehicle in Park, which on occasion resulted in the vehicle shifting into Reverse mode on its own. This is what is known as the “illusory park” phenomenon. Ford was aware of the problem and made the decision not to take corrective action, because such occurrences were “rare.”

At the trial level, the plaintiff was awarded compensatory damages of $3,300,000 and punitive damages over $9,000,000. Ford appealed on 19 different grounds, which the appeals court analyzed separately. For the purposes of this summary, we focus upon the following issues:

1) Was it error to exclude the statements of the plaintiff’s daughter, Holly Maggard, taken after the accident under hearsay evidentiary rules when such statements could have also been used for impeachment?

2) Was the standard of proof met at trial to award punitive damages under Tennessee law?

3) Could the jury have awarded punitive damages based on a finding of strict liability alone when it also found that Ford was not negligent?

4) Was the punitive damages award excessive?

WITNESS STATEMENTS

Ford raised on appeal the fact that it was precluded from introducing statements made by the plaintiff’s daughter to a police officer after the accident indicating that her mother had slipped when getting into the car and pulled the gear shift from park to reverse through the testimony of the police officer. The trial court excluded the statements after a pre-trial hearing on the issue because they were not made by a party opponent and were not excited utterances, as they were made 30 to 40 minutes after the accident at a separate location from the accident. However, the trial court noted during the hearing that if the plaintiff’s daughter denied making these statements at trial, then Ford could impeach her with leading questions to show that she made an inconsistent statement.

At trial, the plaintiff’s daughter claimed that she did not recall what she told the police officer but denied that she could have made the statements because she was not in a physical position in the vehicle to see if her mother slipped. The trial court precluded the investigating officer from testifying about these statements.

The Middle District found that the statements of the plaintiff’s daughter could likely have come in evidence through the testimony of the investigating officer under Federal Rule of Evidence 613 concerning extrinsic evidence of inconsistent statements. However, because defense counsel did not raise this specific rule in its argument for the admission of the statements and because the statements themselves would not likely have altered the outcome of the case, the court concluded that, this potential error was not harmful or determinative of the case.

STANDARD OF PROOF FOR PUNITIVE DAMAGES

Ford raised several grounds of appeal based on the argument that the standard of proof was not met for punitive damages under Tennessee law at trial. The appeals court held that there was clear and convincing evidence that Ford acted recklessly so as to justify an award of punitive damages at trial. First, Ford stipulated that:
1) Ford knew of many claimed incidents where individuals allegedly placed the gear shift lever in between park and reverse, 2) Many incidents of vehicles allegedly shifting into reverse when not properly positioned into park have been reported by Ford, and 3) Ford had notice that vehicles can move rearward if an individual does not position the gear shift into park. Further, the experts for Ford and its own company representative admitted at trial that they had knowledge of the “illusory park” phenomenon and had not taken available corrective action because the problem was “rare.”

Considering the above, the Middle District found that there was clear and convincing evidence that Ford acted recklessly so as to justify an award of punitive damages.

**PUNITIVE DAMAGES AWARD WITHOUT FINDING OF NEGLIGENCE**

It was also argued on appeal by Ford that the jury’s finding that it was not negligent made an award of punitive damages irreconcilably inconsistent. However, the trial court instructed the jury that punitive damages would be appropriate if Ford acted “recklessly.” In fact, the appeals court found that even Ford’s own Proposed Verdict Form allowed for an award of punitive damages upon a finding of strict liability alone. The Middle District further held that, given the proof at trial, it was not inconsistent for the jury to find that Ford was not negligent in its design of the Ford Windstar but was strictly liable for failing to give an adequate warning about illusory park. Consequently, there was no inconsistency in the jury’s finding that Ford was liable under strict liability and not negligence.

**AWARD OF PUNITIVE DAMAGES**

The final ground for appeal was based on the argument that the punitive damages award, which was three times the award of compensatory damages, was excessive. The Middle District found that a review of punitive damages for gross excessiveness in violation of the Due Process Clause of the Fourteenth Amendment requires analysis of the following factors:

1) the degree of reprehensibility of the defendant’s misconduct,

2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and

3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

The case of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), made it clear that the most important of the above factors involved the reprehensibility of the conduct and set out factors to examine reprehensibility. In examining the factors for reprehensibility in this case, the appeals court found that: 1) the harm was physical, not economic, 2) the evidence supported a view of Ford’s conduct as evincing an indifference to or a reckless disregard for the health and safety of others, 3) the target of the conduct, drivers and passengers, would usually be financially vulnerable, 4) the conduct by Ford was not an isolated incident but involved repeated actions. Although the appeals court found that the fifth factor, that the conduct involves intentional malice, trickery or deceit, was not met, all other factors supported a punitive damages award.

The Middle District also examined the remaining factors concerning the amount of the award, the disparity between actual or potential harm and the punitive damages award, and the difference between punitive damages to civil penalties authorized or imposed in similar cases. Looking at the disparity between the actual or potential harm and the punitive award, the Middle District found that, because four of the five reprehensibility factors were met, the 3:1 ratio between punitive damages and compensatory damages awarded by the trial court was not excessive. Further, the appeals court found that the applicable maximum civil penalty for a design defect to be applied could have been $800,000 or $15,000,000, and, considering the punitive damages award of $9,000,000, the proof supported upholding the award of punitive damages at trial.

Therefore, the proof at trial supported all three of the factors set out in the *State Farm* case, and the punitive damages award was upheld.
In a recent declaratory judgment action, the United States District Court for the Eastern District of Virginia considered whether an insurance policy issued in Georgia to an interstate motor carrier must, by operation of law, have its $100,000 policy limits increased to $750,000 based on the “Out of State Insurance” provision contained within the policy, Virginia’s minimum insurance requirements for interstate trucking businesses and applicable federal regulations. Canal Ins. Co. v. Barker, 2007 WL 3551508 (E.D. Va. 2007).

This dispute arose out of an accident in Brunswick County, Virginia. Justin Colvard, a commercial truck driver, was employed by James M. Barker, III (“Barker”), who operated a trucking company known as Barker & Son. While driving Barker’s tractor trailer, Colvard had an accident with an automobile occupied by Denise Penn and Houstonia Clymer. Both Penn and Clymer (“the Claimants”) claimed injuries from the accident.

At the time of the accident, Colvard, as a permissive user of Barker’s truck, was insured by a “Basic Automobile Policy” issued by Canal Insurance Company (“Canal”). According to the Declarations Page, this policy provided $100,000 in liability coverage. Canal filed a declaratory judgment action to determine the policy limits. Canal contended that, consistent with the Declarations Page, its policy limits were $100,000. The Claimants argued that the policy must provide $750,000 in coverage because of the “Out of State Insurance” clause in the policy. Pursuant to the “Out of State Insurance” provision, the $100,000 policy limits would be increased to the amount required by the law of another state for non-residents. The federal court found that this term of the contract was undisputed; therefore, if the insured were operating the vehicle in a state (other than Georgia) that had minimum policy limits for nonresidents, then the policy would provide coverage in the amount required by the foreign state.

The district court determined that Virginia does not require interstate motor carriers who are registered in another state to maintain a minimum amount of insurance when traveling on Virginia roads and highways. After examining numerous Virginia statutes concerning minimum insurance limits and the regulation of motor carriers, the court found that Virginia does not require interstate motor carriers who are registered in another state to maintain a minimum amount of insurance. The court did find that federal motor carrier regulations required Barker to maintain a financial responsibility of $750,000. However, the District Court determined that this
regulation may be satisfied in three different ways: liability insurance with an MCS-90 endorsement, a surety bond, or self-insurance. The regulations do not necessarily require a motor carrier to satisfy the financial responsibility through insurance.

In this case, Barker’s policy had limits of $100,000 and did not contain an MCS-90 endorsement. Therefore, court determined that the policy was not being used to satisfy the federally mandated financial responsibility limits. Further, the claimants could not rely on the “Out of State Insurance” provision in the policy to increase the limits to the federally mandated financial responsibility limits. This contract provision that allowed the policy limits to be increased to a foreign state’s minimum limits was triggered only by state law, not federal law.

The claimants further contended that the insurance contract should be reformed to provide $750,000 in coverage based upon a decision from the Supreme Court of Georgia in Richards v. State Farm Mut. Auto. Ins. Co., 555 S.E.2d 506 (Ga. Ct. App. 2001). In Richards, the Supreme Court of Georgia recognized that where liability insurance coverage is legislatively mandated, then a third party beneficiary, i.e. victims of automobile accidents, may be permitted to bring an action for equitable reformation. Id. at 507-508. The District Court found this position without merit, as Georgia only requires minimum limits of $100,000 for motor carriers. Therefore, even if the claimants were permitted to reform the contract to comply with applicable law, the limits of the policy would still be $100,000. Because Canal Insurance issued a policy in Georgia with limits of $100,000 in compliance with Georgia’s statutory limits, the claimants’ contention to reform the insurance contract failed as a matter of law. As such, Penn’s and Clymer’s Counterclaims fail as a matter of law.

This case is currently on appeal in the Fourth Circuit.

VERDICTS AND SETTLEMENTS

RAINY NIGHT IN GEORGIA

Larry D. Warren, a shareholder in ALFA International’s San Antonio, Texas firm, Ball & Weed, PC., received a defense verdict in a trucking case which was tried in Brownsville, Texas. After a five day trial, a Cameron County jury found no fault on Evenson Trucking Company and its driver, Malissa Box. Instead, the jury voted 11-1 to place 100 percent of the accident fault on the plaintiff.

On March 9, 2005, Malissa Box was west bound on I-10 in a heavy rain when she saw plaintiff Deniss Felix spinning out of control on the left shoulder. Box began breaking and steering to the right when the plaintiff's Toyota pick up bounced off the guardrail and rolled into the path of the Evenson tractor. The plaintiff’s pickup was broadsided. The plaintiff ultimately had eighty-one thousand dollars ($81,000.00) in medical treatment, including coblation treatment to the C5-6 spine.

The plaintiff claimed that the Evenson Truck had changed lanes to the left and caused her to lose control. She was supported in this position by two friends who were travelling behind her. The defense was able to discredit these two witnesses by using the trucks ECM and a reconstructionist, Dr. Eric Moody. In addition, the defense established that the
plaintiff’s two eyewitnesses were one quarter of a mile behind the plaintiff with two tractor-trailers between them and the plaintiff. This one quarter mile distance along with heavy truck spray on this “Rainy Night in Georgia” made these two friends comments highly incredible.

It seems by the time the jury returned its verdict the plaintiff thought “it was raining all over the world”.

Larry Warren, Esq.
BALL & WEED
10001 Reunion Place, Ste. 600
San Antonio, TX 78216
Phone: 210.731.6350
Fax: 210.785.2950
ldw@ballandweed.com
www.ballandweed.com

PRACTICE TIPS

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SLIPPERY WHEN WET... MORE BENEFITS TO GETTING THERE EARLY

In October of 2002, our firm was retained to respond to an occurrence involving a motor coach accident along U.S. Highway 40 in rural Wallace County, Kansas, just east of the Colorado border. The occurrence involved an eastbound motor coach carrying 34 members of the Kansas School for the Deaf’s high school football team, their coaches and cheerleaders. The motor coach failed to negotiate a slight right radius curve on a downhill gradient in a light cold but not freezing rain. The motor coach left the roadway just before a bridge, rolled down a steep embankment, flipped, and came to rest on its crushed roof in the adjacent dry creek bed. While scene photographs were horrific, most of the injuries suffered were minor, with the greatest exception being the team’s coach, who died as a result of his injuries.

Our firm’s Critical Response Team was notified within a few hours and was on scene with a retained accident reconstructionist shortly thereafter. Once on scene, it was apparent that the roadway had recently been partially resurfaced. In speaking with the local highway department office we learned that just ten days before the accident, an asphalt “seal coat” had been applied to the surface. The seal coat is an oil-based liquefied asphalt emulsion material that after application penetrates the roadway surface to seal small cracks in the surface to extend the life of the pavement. Sand is typically used in conjunction with the seal coat to bind with excess material to help keep the material off vehicles traveling through the area and in an effort to achieve an acceptable roadway friction coefficient. Seal coating is very common throughout the United States.

While at the scene the Monday morning after the Sunday occurrence, we observed and photographed the Kansas Department of Transportation (“KDOT”) operating a “skid sled” trailer fitted with calibrated friction testing and data collecting equipment. The trailer was being pulled by a KDOT pickup truck. It became clear that KDOT was conducting skid tests on the area where the bus left the roadway. We later learned that KDOT was using a Locked Wheel Dynamic Surface Friction Test Vehicle manufactured and operated in accordance with the American Society for Testing and Materials (“ASTM”), Standard E 274-97, the Standard Test Method for Skid Resistance of Paved Surfaces Using a Full-Scale Tire.

These devices are generally not available outside of the federal and state departments of transportation and certain university and government research facilities. The test provides very accurate data relative to the road surface coefficient of friction. The coefficient of friction is the value given to the force of friction acting between the motor vehicle and the road. State highway departments use this type of testing equipment and resulting data for highway safety
and maintenance forecasting. While roadway surfaced friction testing is commonly obtained by accident reconstructionists by various methods, the ASTM Standard E 274-97 protocol is not commonly used or available in an immediate post accident situation. A dry road has an average coefficient of friction of between 0.6 and 0.8, while a snowy or icy road’s coefficient of friction is significantly less. In a typical case, a roadway’s coefficient of friction is somewhat static over relatively long periods of time, assuming that intervening roadway resurfacing is not an issue.

However, this was not the typical case because of the recently applied seal coat and a light rain that began only a short time prior to the occurrence. Coupled with our experienced drivers’ hospital bed statement, our own observations of the newly resurfaced roadway, and the observation of detail data collection by KDOT, we began investigating the relationship between the resurfacing and the coefficient of friction experienced by the subject motor coach leading up to the occurrence. Our experienced driver was certain that the motor coach lost traction due to a slickness as he encountered the freshly resurfaced area of the roadway.

We learned that the recent application of the seal coat by KDOT personnel, coupled with recent rain, created the possibility that the road’s surface friction coefficient could have experienced significant variations at or about the time of the accident. This can occur because various constituents of the emulsified asphalt seal coat leach out of the roadway’s surface after it comes into contact with standing water. This process can be seen by the naked eye and appears as a soapy film on the roadway surface. This chemical process can create significant variability in the road’s coefficient of friction in the first few days after the seal coat is exposed to precipitation. In other words, the surface slickness develops and subsequently diminishes over a fairly brief time frame when water is applied to the seal coat. Weather data indicated that the subject occurrence was perhaps the first liquid precipitation on the roadway since KDOT applied the seal coat. In fact, testing of the road surface just a few days after the occurrence revealed friction coefficients much closer to the proscribed minimum standards.

At the time of the occurrence and for several weeks thereafter, the skid sled manufacturer was not available to mobilize a unit and testing staff to the site of the occurrence and thus could not have delivered accurate data regarding the roadway condition at the time of the occurrence as was obtained by KDOT. As such, the only accurate evidence regarding the co-efficient of friction at or about the time of the accident was in the possession of KDOT. Initial contact with KDOT within hours of the occurrence resulted in us being directed to KDOT’s counsel who informed us that the skid testing was work product and would not be produced.

While nearly all of the 34 persons on the bus sustained some form of injury, the accident claimed the life of only one person. We defended the motor carrier and its driver, who was the owner of the motor coach enterprise, with regard to all of the claims that arose out of the accident. In response to the wrongful death action, which also included personal injury claims filed by the decedent’s two minor sons who were also on the bus and witnessed their father’s death, we asserted an affirmative defense comparing the fault of KDOT, alleging that the State had failed to properly warn drivers of the hazardous surface conditions relative to the recent application of asphalt seal coat to the road and that the State had failed to maintain the highway in a reasonably safe condition for ordinary travel.

We then moved the court for an order to join the Secretary of the Kansas Department of Transportation as a necessary defendant, which motion was granted. This allowed us to file a cross-claim against KDOT, alleging that KDOT was responsible for a percentage of the fault under the theory of comparative implied indemnity in the event that the defendants settled with the plaintiffs. We also asserted claims to recover for property damage for the totaled motor coach and serious injuries to our client driver. A settlement was then achieved with the plaintiffs in exchange for a release to the benefit of our clients. At this point, the parties amended the caption to reflect the new position of the parties—the bus driver and bus owner were now positioned as plaintiffs and KDOT was the sole defendant.
In overruling KDOT’s Motion for Summary Judgment, the District Court held that our client’s claim for comparative implied indemnity could be maintained against KDOT.

After the court’s determination that we could maintain a cause of action against KDOT, we faced the issue of the discoverability of the KDOT test data, which we greatly suspected would prove our claim that the asphalt seal coat reduced the roadway coefficient of friction to a point that KDOT was comparatively at fault for the occurrence. Without direct evidence regarding the road’s coefficient of friction within the first 24 hours of the occurrence, we were unlikely to meet our burden of proof on our claims against KDOT. In response to our discovery requests, KDOT admitted that a skid test was performed at the request of a KDOT staff attorney but objected to production of the test results pursuant to the attorney work product doctrine.

In order to get the results of the skid tests, we were forced to file an Application for Claimed Work Product Information. In Kansas, materials that are protected by the attorney work product privilege will only be produced upon order of the court if the requesting party can establish a “substantial need for the materials” and that the party is “unable without undue hardship to obtain the substantial equivalent of the materials by other means.”

To establish a “substantial need for the materials”, we cited Rackers v. Siegfried, 54 F.R.D. 24 (W.D. Mo. 1971), a case where the plaintiff sought certain work product materials in the form of an insurance adjuster’s notes, measurements and diagrams relating to the length of skidmarks left by the defendant’s automobile at the scene of an accident. The plaintiff stated that it had a substantial need of the materials and was unable to obtain the equivalent of the documents because the accident report by the investigating police officer was erroneous as to the length of the skidmarks. Id. at 25. The court allowed the production of the documents over the objection of the defendant because the “critical materiality of the measurement of the skid marks” was “apparent from the direct bearing the measurement” had on “the issues of both negligence and injuries (causation).” Id. at 25.

With regard to the issue of “undue hardship”, we argued that at the time of the accident, comparable skid sleds were not available in time to produce accurate data, given the changing conditions of the road’s surface due to heavy rains that followed in the days after the occurrence. Again, even if we could have obtained a similar skid sled in the weeks following the subject occurrence, the lapse of time would have made it impossible to obtain the substantial equivalent of the material sought—the coefficient of friction at the time of the accident or shortly thereafter, when the seal coat was still volatile.

The court eventually ordered KDOT to produce the skid test results, and as expected the skid test results revealed that the road’s surface coefficient of friction was well below the professional standards established by the road construction industry. This led to a negotiated settlement from KDOT which offset settlements previously achieved with the motor coach passengers.

In closing, we believe this case illustrates the importance of an early, “no stone left unturned” approach to the initial response in a significant exposure case. Here the experienced driver, who himself suffered life threatening injuries, was interviewed in the hospital as soon as he was able. He confirmed a loss of control sequence that was consistent with a slick road situation where the weather data did not support ice as a contributing factor. Had we not been on site, we would not have seen KDOT collecting data that later proved there was a temporary and extreme decline in the coefficient of friction on the roadway caused by the recent application of the seal coat. Also, we were easily able to show that KDOT had not posted temporary signs warning of the potential for slick road conditions due to its recent road work.
ELECTRONIC TOLL COLLECTION (ETC) - A DOUBLE-EDGED LITIGATION TOOL

Implementation of tolls on roads and parkways is becoming more prevalent throughout the United States and Canada as municipalities seek to fund highway, bridge and tunnel maintenance and construction projects. First introduced in Norway in 1986, Electronic Toll Collection ("ETC") is a mechanism that aims to eliminate the delay on toll roads and track toll evaders. It is an adaptation of military "identification friend or foe" technology. ETC determines whether the vehicles passing are enrolled in the program, alerts enforcers for those that are not, and electronically debits the accounts of registered vehicle owners without requiring them to stop. Recognition is accomplished by a combination of a camera which photographs the vehicle and a radio frequency keyed computer which searches for a driver’s window/bumper mounted transponder to verify and collect payment.\(^1\)

Examples of ETC are: I-Pass in Illinois, Fastrak in California, Good To Go! in Washington, MnPass in Minnesota, TollTag in Louisiana, Fast Lane in Massachusetts, Sunpass in Florida, and E-Zpass used in Eastern states ranging from Maine to Virginia.

ETC can be an effective tool for transportation companies to track toll expenses, hasten routes in congested areas, and monitor driver location. However, with increasing regularity, both plaintiff and defense counsel are seeking to obtain ETC records of an individual vehicle during their pre-suit investigation and during discovery in litigated matters. ETC records can be used in both the civil and criminal context as circumstantial evidence to indisputably establish the location of a vehicle at a particular time and place. Examples of practical uses in litigated matters are:

- Juxtaposing ETC records against a driver's log or daily trip log can demonstrate consistency or abnormality in recordkeeping.
- In a “hit and run” scenario, ETC records can confirm or disprove that a truck was at an accident location.
- ETC records can establish that a driver has exceeded his or her allotted driving time for a particular day.
- ETC records can show irregularities in a daily or customary route.

In a recent matter in Massachusetts, Estate of Irene Dean v. Ryder Truck Rental, Inc., 2007 WL 2110723 (Mass. Super., 2007), ETC records were used to disprove the involvement of a driver and truck in a “hit and run” accident that resulted in the death of a pedestrian. The plaintiff administrator brought a wrongful death action against defendants, a truck rental company and its former driver, arising out of a motor vehicle accident that caused the death of his elderly mother. According to witness statements, an unidentified truck had just started from a stopped position at a traffic signal when the decedent stepped in front of the truck. The truck did not stop. There were no details of the identification of the truck. The accused driver had driven the same route the two days preceding the day of the accident.

The court utilized the records from the driver’s log, eyewitness accounts of the driver’s delivery times at certain points, and the truck’s toll transponder to piece together his whereabouts at the time of the accident. Ultimately, the court determined from the undisputed record compiled during discovery that the truck in question was approximately twenty-four (24) miles away from

\(^1\) Life in the Slow Lane, Robert W. Poole Jr., Wall Street Journal, November 5, 2007
the scene when the accident occurred. The truck’s ETC records from Massachusetts Turnpike, a toll road, figured prominently in the court’s reasoning. The court allowed summary judgment in favor of the driver and his employer because there was no genuine issue of fact that the tractor-trailer unit operated by the driver was not at the accident scene at the relevant time.

ETC records and even digital images of vehicles passing through toll booths can be powerful evidence to disprove a plaintiff’s theory of truck location, speed, or a driver’s trip time. Conversely, such records can be used with equal force to fortify a plaintiff’s theory of liability. Because inadvertent disclosure during discovery can devastate the defense posture of a case in suit, ETC records should be gathered cautiously during a pre-suit investigation and used judiciously during litigation. Nevertheless, ETC records should be considered as a valuable investigatory tool in litigated matters.

Gareth W. Notis, Esq.
MORRISON MAHONEY, LLP
250 Summer Street
Boston, MA 02210
Phone: 617.737.8857
Fax: 617.342.4821
gnotis@morrisonmahoney.com
www.morrisonmahoney.com

ARTICLES

FEDERAL DISTRICT COURT RULES THE GRAVES AMENDMENT, 49 U.S.C. § 30106, UNCONSTITUTIONAL, BUT WILL THE DECISION STAND?

On August 10, 2005, President Bush signed into law the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (“SAFETEA-LU”), Pub. L. No. 109-59, 119 Stat. 1144. Among other things, the law, which is referred to as the Graves Amendment, amends United States Code, Title 49, Chapter 301, to preempt state laws that impose vicarious liability on rental and leasing companies for injuries caused by the negligence of one of its renters or lessees.1

The relevant portion of the Graves Amendment states as follows:

§ 30106. Rented or leased motor vehicle safety and responsibility
(a) In General. An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation or possession of the vehicle during the period of the rental or lease, if –

(1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and

(2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner)


The statute broadly defines “motor vehicle” to mean “a vehicle driven or drawn by mechanical power and manufactured primarily for use on public streets, roads and highways, but does not include a vehicle operated only on a rail line.” 49 U.S.C. § 30102(a)(6). Although no reported case has dealt with the issue, there does not appear to be any prohibition against applying the Graves Amendment to leased tractor trailers if the lessor or renter is solely in the business of renting or leasing vehicles.

Several courts have examined the constitutionality of the Graves Amendment and, although the statute has generally been held constitutional, two have ruled it unconstitutional. See Vanguard Car Rental USA, Inc. v. Huchon, 532 F. Supp. 2d 821 (M.D. Fla. 2007) (holding Graves Amendment preempts all state statutory and common law to the extent those laws hold owners in the business of renting or leasing motor vehicles vicariously liable for the negligence of drivers).
Procedurally, Huchon began as a personal injury action against, amongst others, Alamo Financing, LP, as the owner of a leased car that purportedly caused Huchon’s injuries. The case was removed to United States District Court on diversity jurisdiction grounds. Vanguard Car Rental USA, Inc., Alamo’s parent company, then filed a declaratory judgment action against Huchon asserting that the Graves Amendment preempted the state tort vicarious liability claim brought by Huchon. The District Court consolidated the underlying tort and declaratory judgment actions. Vanguard Car Rental moved for summary judgment based on the Graves Amendment. Huchon’s attorneys, aided by the Center for Constitutional Litigation in Washington, D.C., challenged the constitutionality of the statute, arguing that it violated the Commerce Clause of the United States Constitution, art. I, § 8. The United States moved to intervene to defend the statute’s constitutionality.

In denying Vanguard Car Rental’s Motion for Summary Judgment, the federal court ruled that 49 U.S.C. § 30106 is outside of the Congressional powers created by the Commerce Clause and hence, unconstitutional. In so holding, the District Court analyzed the Commerce Clause powers that give Congress the authority to regulate: 1) use of channels of interstate commerce, 2) the instrumentalities of interstate commerce (meaning persons or things in interstate commerce), and 3) activities substantially related to interstate commerce.

1. CHANNELS OF INTERSTATE COMMERCE

“Channels of Interstate Commerce are ‘interstate transportation routes through which persons and goods move.’” Huchon, 2007 WL 2875388 at *7 (citing United States v. Ballinger, 395 F.3d 1218, 1225-26 (11th Cir. 2005)). Prior to Huchon, one district court in Florida had already ruled that this basis gave Congress the authority to enact the Graves Amendment. See Garcia v. Vanguard Car Rentals, 510 F. Supp.2d 821, 835 (M.D. Fla. 2007). The Huchon court, however, distinguished Garcia by noting that the decision hinged on an admission made in Garcia, which was not present in Huchon. The court further expressly disagreed with the Garcia analysis and determined that the Graves Amendment regulates tort liability and does not directly regulate either the channels of interstate commerce, or the use of those channels. Id.

2. THE INSTRUMENTALITIES OF INTERSTATE COMMERCE

A basic tenet several courts have relied upon to uphold the constitutionality of the Graves Amendment is that Congress is authorized to regulate the “instrumentalities of interstate commerce.” See Garcia, 510 F.Supp.2d at 835; Seymour v. Penske Truck Leasing Corp., No. 4:07-cv-015, 2007 WL 2212609 (S.D. Ga. July 30, 2007). The Seymour court had “no trouble concluding that 49 U.S.C. § 30106 . . . regulates commercial transactions (rentals or leases) involving instrumentalities of interstate commerce (motor vehicles – ‘the quintessential instrumentalities of modern interstate commerce’).” Seymour, 2007 WL 2212609 at *2. The Huchon court discounted a series of cases holding a similar proposition by noting that the cases relied upon by Vanguard Car Rentals on this issue deal with statutes that directly regulate the use of automobiles, whereas 49 U.S.C. § 30106 “regulates tort liability rather than . . . the car itself, or its use.” Huchon, 2007 WL 2875388 at *8.

3. ACTIVITIES SUBSTANTIALLY RELATED TO INTERSTATE COMMERCE

The Huchon court applied the four-factor test enunciated by the U.S. Supreme Court for determining whether a regular activity “substantially affects” interstate commerce in evaluating a challenge to the constitutionality of the Graves Amendment. See United States v. Morrison, 529 U.S. 598, 610-12 (2000).
contains an express jurisdictional element limiting the statute’s reach, 3) whether the activity is commercial or economic in nature and 4) whether the connection between the activity and its effect on interstate commerce is attenuated. Id. In analyzing these factors the Huchon court was not convinced that vicarious tort liability for rental and leasing companies would undercut some larger federal regulatory scheme for the car rental industry or that the vicarious tort liability substantially affects interstate commerce. Id. at *10. In short, the Huchon court determined that there is no basis under the Commerce Clause for Congress to enact the Graves Amendment. Id.

Plaintiff’s law firms have viewed the Huchon decision as giving rental and leasing companies a strong incentive to assure that their customers are adequately insured, as well as another method by which victims of motor vehicle accidents involving leased or rented vehicles will be compensated for their injuries.1 However, Huchon and a companion case, Dupuis v. Vanguard Car Rental USA, Inc., No. 6:06-cv-1360, 2007 WL 2788609 (M.D. Fla. Sept. 24, 2007), are currently the subject of an interlocutory appeal to the U.S. Court of Appeals for the Eleventh Circuit. This appellate decision will certainly be one to watch as widespread implications for federal preemption and vicarious liability may hinge on the constitutional validity of the Graves Amendment. In the meantime, since the majority of state and federal courts have held the statute to be valid, motor vehicle rental and leasing companies facing lawsuits premised on a state’s vicarious liability law should continue to argue that the cause of action is preempted based on this federal statute.

Dennis Keene, Esq.
HUNTER MACLEAN
200 East Julian Street
Savannah, GA 31412
Phone: 912.944.1662
Fax: 912.236.4936
dkeene@huntermaclean.com
www.huntermaclean.com

DEFINING TRANSPORTATION CHARGES 2

In Emmert Industrial Corp. v. Artisan Assoc., 497 F. 3d. 982, (9th Cir. 2007), the Court of Appeals for the Ninth Circuit. This appellate decision will certainly be one to watch as widespread implications for federal preemption and

1 As the Plaintiff’s bar has organizations such as the Center for Constitutional Litigation and the American Association for Justice assisting its efforts, TRALA (Truck Renting & Leasing Association) is extensively involved in this litigation across the country for leasing and rental companies. Its website is http://www.trala.org

2 This article was prepared by Eric R. Benton for online publication as part of the library of LexisNexis Expert Commentaries available on Lexis.com. Expert Commentaries are authoritative analyses of important cases, codes, statutes, rulings, emerging issues, or legal topics of general interest authored by leading practice area experts. LexisNexis Expert Commentaries are available as links from the cases and other primary source material they address, as well as in a searchable group file under Search; By Source; Secondary Legal on Lexis.com. Reproduced with permission. ©2007 by Matthew Bender & Co., Inc., A Member of the LexisNexis Group. All rights reserved.

3 The term “broker” is defined as “a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.” 49 U.S.C. §13102 (2) (2007)
performed. Artisan objected to some of the charges and after protracted negotiations only paid $4.2 million. Some of the charges were for Emmert’s employees to travel to Japan to inspect the equipment. In addition, Emmert had to select the routes to take from the ports and pay a third party to evaluate the amount of strain placed on the bridges on the selected routes.

The last services performed by Emmert were in 1997; however, suit was not brought for the amount not paid until 2003. Emmert brought suit for breach of contract for not paying the amount invoiced, breach of contract for not allowing it to continue to haul additional shipments when the contract named it the “primary carrier” and a quantum meruit claim for the services rendered. Emmert brought an action under diversity jurisdiction against Artisan in the United States District Court for the District of Oregon.

**District Court Decision.** The district court granted a Motion for Summary Judgment in favor of Artisan under 49 U.S.C. § 14705 which limits the time in which a carrier may bring suit against a shipper for freight charges to 18 months. In addition, the district court found that Emmert did not have a contractual right to any additional work. Emmert appealed to the Ninth Circuit.

**Ninth Circuit Decision.** On appeal to the Ninth Circuit, Emmert argued for the first time that 49 U.S.C. § 14705 applied only to a carrier’s charges that were owed under a filed tariff. The Ninth Circuit decided to hear the argument raised for the first time because Emmert’s argument to this court presents statutory interpretation questions of first impression, and because resolution of those questions is likely to broadly impact entities engaged in transporting goods in interstate commerce, [the Court chose] to address Emmert’s arguments.\(^4\)

After a thorough but brief discussion of the history of rate regulation under the Interstate Commerce Act and the ICC Termination Act of 1995, the court relied upon a plain meaning of the language contained in 49 U.S.C. §14705 (a) to reject Emmert’s argument.

The language of §14705 provides:

[a] carrier providing transportation or service subject to jurisdiction under chapter 135 must begin a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues.

In addition to arguing that the charges must be contained in a filed tariff, Emmert argued that there was no federal question jurisdiction over a claim absent a filed tariff. The court held that the 18 month period of limitations is not restricted to charges under a filed tariff or even to claims arising under federal law.

Emmert also argued that some of the charges were not for transportation but for engineering, research and third party services. The court examined the definition of transportation contained in 49 U.S.C. §13501 and held such charges are within the statutory definition. Transportation is defined so as to include

(B) services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property.


The court of appeals affirmed the judgment of the district court in part and remanded for further findings. Specifically, the Court found that Emmert’s claims for payment were time barred under 49 U.S.C. §14705. With respect to the breach of contract claim for Artisan’s refusal to award it additional work after being named the “primary carrier,” the court remanded that claim back to the district court to determine what that designation entailed.

**Commentary on Emmert.**

The court noted that there are few reported decisions on how broad the term “services” is interpreted when determining what is included as part of a carrier’s transportation. The court relied on the decisions rendered in the First Circuit and Fifth Circuit in reaching its holding. In PNH Corp. v. Hullquist Corp., 843 F. 2d 586 (1st Cir. 1988), the First Circuit, in dicta, determined that all of a motor carrier’s services were incident to the carriage and delivery. In this 1988 decision, the court found that if the shipment was in storage and not

\(^4\) 497 F. 3d 982 at 986.
temporarily in transit, the storage facilities would be considered “transportation” as defined by 49 U.S.C. § 10102 (26).\(^5\)

In a similar case wherein the court considered if storage falls within the definition of “transportation services,” the Fifth Circuit in Centraal Stikstof Verkoopkantoor, N.V. v. Ala. State Docks Dept., 415 F. 2d 452 (5th Cir. 1969) found that all “services rendered by a common carrier in connection with transportation of goods shall be covered by the Act.”\(^6\) In this case, contrary to the PNH Corp decision, the court found that the storage company was a mere warehouseman and not a common carrier.

In spite of the weak precedent, the Ninth Circuit seems to have come to the correct conclusion. The Ninth Circuit’s definition of “services” is consistent with Congressional intent to define the term “services” broadly. Cleveland, Cincinnati, Chi. & St. L. Ry. Co. v. Dettlebach, 239 U.S. 588 (1916).

The Emmert decision may be more important for what it does not discuss as it is for what it does discuss. Without citing any case precedent, the Ninth Circuit holds in Emmert that “none of Emmert’s affirmative claims presents a federal question.”\(^7\) The Ninth Circuit evidently overlooked the decision in Thurston Motor Lines, Inc. v. Jordan K. Rand, LTD., 460 U.S. 533 (1983) that reversed and remanded an earlier decision of the Ninth Circuit on this issue. In Thurston, the carrier sought review, by a writ of certiorari, of a Ninth Circuit decision that affirmed the district court judgment dismissing the carrier’s freight charge claim for lack of subject-matter jurisdiction. The Ninth Circuit had dismissed the suit as a “‘simple contract-collection action,’[and] the court could not ‘discern any proposition of federal law that a court need confront in deciding what, if anything, can be recovered.’”\(^8\) In a very terse holding, the Supreme Court stated “[t]he court of appeal’s attempt to distinguish this most troublesome precedent is wholly unconvincing.”\(^9\) The Supreme Court’s decision in Thurston seemed to settle the issue of whether freight charges were allowed to be brought in federal court under federal question jurisdiction until Transit Homes of America v. Morgan Drive Away, 173 F. Supp. 2nd 1192 (N.D. Ala. 2001). In Transit Homes, the court dismissed a claim for freight charges arising under a contract when it found that it did not have subject-matter jurisdiction. The Transit Homes court held that a claim for freight charges does not arise under a federal statute when there is not an applicable filed tariff. The court went on to proclaim that “[w]hen a carrier brings a claim to recover amounts owed under a federally required tariff, there is no question that original jurisdiction exists under 28 U.S.C. § 1337.”\(^10\)

The Transit Homes decision was followed by the United States District Court for the District of Maryland in Mastercraft Interiors, Ltd. v. ABF Freight Systems, Inc., 350 F. Supp. 686 (D.C. Maryland 2004). In this decision, the court adopted Transit Homes and held that contracts between a shipper and carrier under 49 U.S.C. § 14101 (b) (1) are controlled by state law. As such, freight charges arising under a contract are not to be decided under federal law because there is not federal question jurisdiction.

These cases were followed by a decision in the Eastern District of Michigan in 2005. In Central Transport International v. Sterling Seating, Inc., 356 F. Supp. 2nd 786 (E.D. Mich. 2005), the court while considering whether a freight claims case should be remanded to state court, found that even a tariff reference was not sufficient to confer federal question jurisdiction. Central claimed federal question jurisdiction existed because Congress has enacted an extensive federal statutory scheme that preempted state law claims and the freight charges were file under a federal tariff. The extensive federal statutory scheme Central alludes to is

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5 The court went on to find that temporary storage services to a single entity did not constitute “motor vehicle transportation” within the Carmack Amendment. PNH Corp. v. Hullquist Corp., 843 F. 2d 586, 591 (1st Cir. 1988).

6 Emmert at 989 quoting Central Stikstof at 456.

7 Emmert at 9747.

8 Thurston at 533 quoting Thurston Motor Lines, Inc. v. Jordan K. Rand LTD., 682 F. 2d 811 at 812 (9th Cir. 1982).

9 Thurston at 535. In Henslin, Doing Business as Car Transportation Co., dba CAR Transportation Co. v. Roaasti Trucking, Inc, 69 F. 3d 995 (9th Cir. 1995), the 9th Circuit found that because the product being shipped was commodities exempt from federal regulation, there was no federal question jurisdiction. In C.A.R. Transportation Brokerage Company, Inc. v. Darden Restaurants et. al 213 F. 3d, 474 (9th Cir. 2000), the Ninth Circuit found federal question jurisdiction “because any action between carriers and shippers arising from the filed rate presents a federal question. C.A.R. Transportation at 478.

10 Transit Homes at 1195
the ICC Termination Act of 1995 ("ICCTA") which prohibited a state or political authority from enacting or enforcing a law or regulation that relates to price, route or service of any motor carrier.¹ The court in Central found that bringing a state law claim for freight charges under a contract was not within the prohibition against bringing a claim that relates to price, route or service of a motor carrier.

The Central court also found that the Transit Homes decision was more decisive than the U.S. Supreme Court’s decision in Thurston Motor Lines. Citing extensively from Transit Homes, the court outlines the filed-rate doctrine and its lead in to the demise of the Interstate Commerce Commission. The court notes that prior to the passage of ICCTA, a carrier was required to maintain a filed tariff. Therefore, since carriers are no longer required to maintain a filed tariff, the Thurston decision no longer has application to freight charge claims.

Emmert is now in the Transit Homes side of the ledger when considering whether freight charges present a federal question for purposes of jurisdiction. The Ninth Circuit’s adoption of this position without discussing the prior precedent to the contrary will not diminish it being cited as support to keep freight charge claims out of federal court. The federal district courts’ efforts to keep such cases off their dockets have picked up a powerful ally in the Ninth Circuit with this decision. However, state court judges must now interpret federal law with respect to what services are within the scope of the term “transportation services” and when a claim is timely filed.

Eric R. Benton, Esq.
LORANCE & THOMPSON
2900 North Loop West
Suite 500
Houston, TX 77092
Phone: 713.868.5560, x381
Fax: 713.864.4671
erb@loranceandthompson.com
www.loranceandthompson.com

MOTOR CARRIER OR BROKER OF CARGO ²

In KLS Air Express, Inc. v. Cheetah Transportation LLC, 2007 U.S. Dist. Lexis 162161 (August 23, 2007), the United States District Court for the Eastern District of California addresses the difficult area of determining liability for a damaged shipment that has been handled by several carriers or brokers.

KLS claimed that it required Cheetah to have insurance covering the shipment in the amount of $250,000.³ Cheetah only required $100,000 in cargo coverage from Sonko. The level of insurance coverage held by Hemi-Express is not indicated in the Court’s opinion. KLS filed a cargo claim with Cheetah for $275,540.00, which Cheetah denied and forwarded to Sonko.

Commentary on KLS v. Cheetah.

This case represents a common business practice in the transportation industry. A shipper can, either with or without the shipper’s knowledge, tender a load of freight to a motor carrier or a broker who will then tender the freight to another motor carrier or broker. A transportation entity can operate as both a motor carrier and a property broker. A “motor carrier” is defined by 49 U.S.C. § 13102 (14) as “a person

³ Cheetah’s cargo insurance had a deductible of $250,000 on a policy with $250,000 limits. Thus there is an issue of whether Cheetah had any insurance as allegedly required by KLS.
providing commercial motor vehicle . . . transportation for compensation.” A “broker” is defined as a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.” 49 U.S.C. §13102 (2) (2007).

Motor carriers and brokers must be licensed by the Federal Motor Carrier Safety Administration. Motor carriers and brokers, however, are subject to different liability regimes for loss or damage to cargo. When a motor carrier damages cargo in interstate transportation, its liability is controlled by 49 U.S.C. § 14706, commonly referred to as the “Carmack Amendment.” This federal statute’s liability provisions preempt state law claims against the motor carrier for damage to an interstate shipment.4 “The [Carmack Amendment] . . . is paramount and supersedes all state laws as to the rights and liabilities and exemptions created by such transaction.” Adams Express Co. v. Croninger, 226 U.S. 491, 505 (1913).

A broker’s liability is determined under state law negligence or, if a contract is present, breach of contract claims.5 The Carmack Amendment is not applicable to the duties undertaken by a broker.6 Generally, a broker’s duties owed to the shipper are to arrange transportation with a reputable carrier. What constitutes a “reputable carrier” is subject to interpretation.

In practice, the determination of when an entity is acting as a motor carrier or a broker has proven to be problematic. The court’s opinion provides a good discussion of these problems. The court first addresses the Carmack Amendment claim. The court notes the Carmack Amendment’s liability scheme distinguishes between “carriers” and “freight forwarders” and “brokers.” Only “carriers” and “freight forwarders,” not “brokers,” can be liable to the shipper of goods for damages during transit.

KLS at p. 9 (citing Prof'l. Communs., Inc. v. Contract Freighters, Inc., 171 F. Supp. 2d 546, 551 (D. Md. 2001)).

The Court next addresses an important issue that is often overlooked by transportation professionals and the courts, especially when the entity is licensed as both a “carrier” and a “broker” by the Federal Motor Carrier Safety Administration. The Court notes that “a carrier


5 “[A]n action for negligence requires a showing that (a) Defendant owed the Plaintiff a legal duty, (b) Defendant breached that duty, and (c) the breach was a proximate or legal cause of the injuries the plaintiff suffered.” Chubb Group of Insurance Cos v. H.A. Transportation Systems, Inc., 243 F. Supp. 2d 1064 (C.D. Cal. 2002) (citing Ann M. v. Pacific Plaza Shopping Center, 6 Cal. 4th 666, 673 (1997)).


is not automatically considered a broker because it requests another carrier to perform the transportation.” KLS at 12.

In fact, 49 C.F.R. § 371.2 (a) states that motor carriers are not brokers when they arrange transportation of shipments which they have accepted and are legally bound themselves to transport.7 Similarly, 49 C.F.R. §371.7 (b) states that a broker cannot represent itself to be a motor carrier and that any advertising by the broker must show its status as such.8

In the present case, KLS offered evidence that Cheetah was licensed as a motor carrier and that Cheetah’s advertising did not state it was operating as a broker. This evidence coupled with testimony that Cheetah was acting as the carrier and that Cheetah was KLS’ sole point of contact was enough to create a fact issue sufficient to defeat KLS’ motion for summary judgment.

The Court next addressed the state law claims that could be brought against Cheetah as a broker in the event that it was found not to be a motor carrier. The more interesting state law claim is the claim KLS brought against Cheetah for negligent

7 “The difference between a carrier and a broker is often blurry. The crucial distinction is whether the party legally binds itself to transport, in which case it is considered a carrier.” CGU International Insurance PLC v. Keystone Lines Corp., 2004 U.S. Dist. Lexis 8123 at 5 (May 3, 2004).

8 The courts are more lenient than the regulations. “Clearly, there is no rigid test to determine carrier status . . . . It is necessary to examine the expectations of the parties and the circumstances of the specific transaction in each case for indicia of carriage and brokerage services.” Tokio Marine & Fire Insurance Co. v. Megafaux, Inc., 2006 Cal. App. Unpub. Lexis 6964 at 10-11 (August 9, 2006).
hiring of Sonko for failing to ensure Sonko had adequate insurance. A broker’s duty to hire a “reputable” carrier has often been presumed to mean the carrier was duly licensed, had a satisfactory safety record and was adequately insured.

The court finds that brokers do not have a duty to hire a carrier with specific insurance coverage. Plaintiff cites no case law establishing or recognizing a duty of the part of a broker to ensure that its carrier has adequate insurance to cover potential losses or damages to the cargo. Moreover, this court has been unable to locate any cases that are directly on point.

KLS at 18 (citing Chubb Group of Insurance Cos v. H.A. Transportation Systems, Inc., 243 F. Supp. 2d 1064 (C.D. Cal. 2002)).

The transportation industry has struggled to sift through the differing roles and differing liability regimes in order to determine liability when a shipment is transferred from the shipper to entities that can operate as either a broker or a carrier or when the shipment is transferred to a variety of entities operating in a variety of capacities. This opinion sheds some light on how the courts are going to treat cargo loss or damage claims when the shipment is handled by a broker or brokers.

Proclaiming to be a broker is not sufficient if the entity has accepted the freight and is legally bound to transport it. Absent a contractual obligation, the issue of when an entity becomes legally bound to transport the freight requires further clarification by the courts. The court’s finding that there is not a duty to hire a carrier with a specific amount of insurance is significant to the transportation industry. How that lack of a duty is actually handled between shippers and brokers remains to be seen. Presumably, it is the duty of the shipper’s dock workers to determine the level of insurance held by the carrier that shows up to their docks to pick up the freight. Putting this type of responsibility on the person on

the dock has been problematic in other areas, and presumably a similar problem will occur in determining levels of insurance held by the carrier. Therefore, shippers are well advised to enter into contracts with their brokers where this duty is addressed.

Eric R. Benton, Esq.
LORANCE & THOMPSON
2900 North Loop West
Suite 500
Houston, TX 77092
Phone: 713.868.5560, x381
Fax: 713.864.4671
erb@loranceandthompson.com
www.loranceandthompson.com

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11 In Chubb, the court noted that it seemed unlikely that the shipper would have paid more for the transportation so that its insurance company would be compensated in the event of loss; therefore, it found the broker did not have a duty to select a carrier with insurance to cover the loss. Chubb.
ALFA MEMBER PUBLICATIONS AND SPEAKER/CONFERENCE ROLES OF NOTE

ALFA member Peter S. Doody will be speaking at the DRI Trucking Law Seminar in Phoenix on April 17th. The topic is “In-Cab Cameras- The View From the Jury Box”

On the panel with Peter will be Bruce Moeller, who is the President and CEO of DriveCam Inc. The panel will address the latest technology of In-Cab Cameras and industry trends and evidentiary issue regarding the use of the captured video sequence at trial. Peter can be reached as follows:

Peter S. Doody
HIGGS, FLETCHER & MACK LLP
401 West “A” Street, Ste. 2600
San Diego, CA 92101
Office: 619.236.1551
Direct: 619.595.4258
Fax: 619.696.1410
Cell: 858-414-6317

ALFA members Greg Conforti and Andy Gauen are speaking at the ATA conference in August regarding the synergy that needs to occur and the competing interests of the safety and claims departments of trucking companies. They will also examine the issue of defining accidents as preventable v non-preventable. These two ALFA members may be reached as follows:

Gregory D. Conforti
JOHNSON AND BELL, LTD.
33 West Monroe, Suite 2700
Chicago, IL 60603
Office: 312.372.0770
Direct: 312.984.0249
Fax: 312.372.2881
Cell: 312.371.8963

Andrew C. Gauen
MERRICK, HOFGEDT & LINDSEY
710 Ninth Avenue
Seattle, WA 98104
Office: 206.682.0610
Direct: 206.467.2673
Fax: 206.467.2689
Cell: 206.910.9911

TRANSPORTATION PRACTICE GROUP DIRECTORY OF MEMBER FIRMS

DOMESTIC

ALABAMA

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

ALASKA

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

ARIZONA

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

ARKANSAS

WRIGHT, LINDSEY & JENNINGS LLP
Little Rock, Arkansas
Tel: (501) 371-0808
Michael D. Barnes
mbarnes@wjl.com
Greg T. Jones
gjones@wjl.com
Jerry J. Sallings
jsallings@wjl.com
CALIFORNIA
HAIGHT, BROWN & BONESTEEL, L.L.P.
Los Angeles, California
Tel: (310) 215-7100
Peter A. Dubrawski
pdubrawski@hbblaw.com
William O. Martin, Jr.
wmartin@hbblaw.com
Krsto Mijanovic
kmijanovic@hbblaw.com
Christian Stouder
cstouder@hbblaw.com

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

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

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

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

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

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

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

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

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

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

DICKINSON & GIBBONS, PA.
Tampa/Sarasota/ Naples/
Ft. Myers/St.Peterburg, Florida
Tel: (941) 366-4680
A. James Rolfe
ajrolfes@dglawyers.com

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

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

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

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

PAINE HAMBLEN LLP
Coeur d’Alene, Idaho
Tel: (208) 664-8115
Ausey H. Robnett
ausey.robnett@painehamblen.com

ILLINOIS
BROWN & JAMES, P.C.
Belleville, Illinois
Tel: (618) 235-5590
Beth Kamp Veath
bveath@bjpc.com
Kenneth M. Burke
kburke@bjpc.com
Sandra Cook
scook@bjpc.com

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

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

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

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

DICKINSON & GIBBONS, PA.
Tampa/Sarasota/ Naples/
Ft. Myers/St.Peterburg, Florida
Tel: (941) 366-4680
A. James Rolfe
ajrolfes@dglawyers.com

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

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

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

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

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

**IOWA**

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

### KANSAS

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

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

### KENTUCKY

**HARLIN PARKER**
Bowling Green, Kentucky
Tel: (270) 842-5611
Marc A. Lovell
lovell@harlinparker.com

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

### LOUISIANA

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

### MASSACHUSETTS

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

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

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

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

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

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

MINNESOTA

HALLELAND LEWIS
NILAN & JOHNSON
Minneapolis, Minnesota
Tel: (612) 338-1838
Sheila Kerwin
skerwin@halleland.com

MISSISSIPPI

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

MISSOURI

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

MISSOURI (CONT.)

BROWN & JAMES, PC.
St. Louis, Missouri
Tel: (314) 421-3400
Joseph R. Swift
jswift@bijpc.com
Jeffrey L. Cramer
jcramer@bijpc.com
Kurt Schmid
kschmid@bijpc.com

NEVADA (CONT.)

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

NEW HAMPSHIRE

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

NEW JERSEY

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

NEW MEXICO

BUTT THORNTON & BAEHR PC
Albuquerque, New Mexico
Tel: (505) 884-0777
Martin Diamond
madiamond@btblaw.com
Paul T. Yarbrough
ptyarbrough@btblaw.com
S. Carolyn Ramos
scramos@btblaw.com

NEW YORK

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

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

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

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

NORTH CAROLINA

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

NORTH DAKOTA

VOGEL LAW FIRM
Fargo, North Dakota
Tel: (701) 237-6983
M. Daniel Vogel
dvogel@vogellaw.com
Robert B. Stock
rstock@vogellaw.com

OHIO

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

OKLAHOMA

NELSON, ROSELIUS, TERRY, O’HARA & MORTON
Oklahoma City, Oklahoma
Tel: (405) 705-3600
Derrick T. DeWitt
dewitt@nrtlaw.com
Robert W. Nelson
rnelson@nrtlaw.com

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

OREGON

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

PENNSYLVANIA

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

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

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

RHODE ISLAND

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

SOUTH CAROLINA

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

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

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

TENNESSEE

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

LEWIS, KING, KRIEG & WALDROP, P.C.
Knoxville, Tennessee
Tel: (512) 479-0300
Richard W. Krieg
dkrieg@lewisking.com

BURCH, PORTER & JOHNSON, PLLC
Memphis, Tennessee
Tel: (901) 524-5000
Melissa A. Maravich
mmaravich@bpjlaw.com

TEXAS

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

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

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

TEXAS (CONT.)

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

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

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

BALL & WEED, P.C.
San Antonio, Texas
Tel: (210) 731-6300
Larry D. Warren
ldw@ballandweed.com
Mark A. Cooper
mac@ballandweed.com
<table>
<thead>
<tr>
<th>INTERNATIONAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>AUSTRALIA</td>
</tr>
<tr>
<td>CORNWALL STODART</td>
</tr>
<tr>
<td>Melbourne, Victoria</td>
</tr>
<tr>
<td>Tel: 61-3-9608-2000</td>
</tr>
<tr>
<td>Elizabeth Guerra-Stolfa</td>
</tr>
<tr>
<td><a href="mailto:e.guerra@cornwalls.com.au">e.guerra@cornwalls.com.au</a></td>
</tr>
<tr>
<td>Levent Shevki</td>
</tr>
<tr>
<td><a href="mailto:l.shevki@cornwalls.com.au">l.shevki@cornwalls.com.au</a></td>
</tr>
</tbody>
</table>

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

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

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

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

| WEST VIRGINIA |
| ROBINSON & MCELWEE PLLC |
| Charleston, West Virginia |
| Tel: (304) 344-5800 |
| Edward J. George |
| ejg@ramlaw.com |
| ROBINSON & MCELWEE PLLC |
| Clarksburg, West Virginia |
| Tel: (304) 622-5022 |
| Stephen F. Gandee |
| sfg@ramlaw.com |

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

<table>
<thead>
<tr>
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</tr>
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<tr>
<td>CANADA</td>
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<tr>
<td>FASKEN MARTINEAU DUMOULIN LLP</td>
</tr>
<tr>
<td>Vancouver, British Columbia</td>
</tr>
<tr>
<td>Tel: (604) 631-3131</td>
</tr>
<tr>
<td>William Westeringh</td>
</tr>
<tr>
<td><a href="mailto:wwesteringh@fasken.com">wwesteringh@fasken.com</a></td>
</tr>
</tbody>
</table>

| WASHINGTON (CONT.) |
| PAINE HAMBLEN LLP |
| Spokane, Washington |
| Tel: (509) 455-6000 |
| Scott C. Cifrese |
| scott.cifrese@painehamblen.com |
| Troy Nelson |
| troy.nelson@painehamblen.com |

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

| WEST VIRGINIA |
| ROBINSON & MCELWEE PLLC |
| Charleston, West Virginia |
| Tel: (304) 344-5800 |
| Edward J. George |
| ejg@ramlaw.com |
| ROBINSON & MCELWEE PLLC |
| Clarksburg, West Virginia |
| Tel: (304) 622-5022 |
| Stephen F. Gandee |
| sfg@ramlaw.com |

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

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

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

| WEST VIRGINIA |
| ROBINSON & MCELWEE PLLC |
| Charleston, West Virginia |
| Tel: (304) 344-5800 |
| Edward J. George |
| ejg@ramlaw.com |
| ROBINSON & MCELWEE PLLC |
| Clarksburg, West Virginia |
| Tel: (304) 622-5022 |
| Stephen F. Gandee |
| sfg@ramlaw.com |

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

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

| WEST VIRGINIA |
| ROBINSON & MCELWEE PLLC |
| Charleston, West Virginia |
| Tel: (304) 344-5800 |
| Edward J. George |
| ejg@ramlaw.com |
| ROBINSON & MCELWEE PLLC |
| Clarksburg, West Virginia |
| Tel: (304) 622-5022 |
| Stephen F. Gandee |
| sfg@ramlaw.com |

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