# THE DEFENSE LINE

S.C. DEFENSE TRIAL ATTORNEYS' ASSOCIATION

## IN THIS ISSUE:



## 2016 EXECUTIVE OFFICERS

**(l to R) James B. Hood, Secretary**
**Ronald K. Wray, Immediate Past President**
**William S. Brown, President**
**David A. Anderson, President-Elect**
**Anthony W. Livoti, Treasurer**


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**Summer Meeting**
**Renaissance Hotel**
**Asheville, NC**
**July 28-30**

**Annual Meeting**
**Ritz Carlton**
**Greensboro, GA**
**November 10-13**

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

# THE DefenseLINE

# President's Message

by William S. Brown

Henry Ford said "Coming together is a beginning; keeping together is progress; working together is success." As this year rolls along, the SCDTAA is off to a great start of working together and success. The SCDTAA Board is made up of intelligent, dedicated, and energetic people. I am finding it a great pleasure as President to work with each Board member and each Committee of the SCDTAA. The SCDTAA Board and Committees have been active and working hard thus far this year. We have already had a Long Range Planning Meeting in conjunction with the South Carolina Bar Convention. It was a great time to get together and focus on the needs ahead for our association.

By the time of the publication of this issue of *The DefenseLine*, we will also have had our Annual PAC Golf Tournament. The PAC Golf Tournament is how we fund the SCDTAA's Political Action Committee. Through the money raised in this golf tournament, we are able to support candidates for key positions within our state government. This allows us an opportunity to ensure that our voice is heard in the State Legislature when issues come before the Legislature that are important to our Association and its members. We appreciate everyone who has participated in and supported the PAC Golf Tournament through the years.

In April, we also had our Legislative and Judicial Reception in Columbia at the Oyster Bar. This was a great opportunity for our members to meet, talk with, and engage in a relaxed social atmosphere with legislators and judges. Each year, we receive tremendous thanks and praise for this event from the legislators who attend. The SCDTAA Officers were also involved in the DRI Regional Meeting, which provided an opportunity to exchange ideas and brainstorm issues with leaders of the defense organizations from states from Alabama to Kentucky.

In May, we had our Annual Trial Academy which was held this year in Greenville. The Trial Academy, in my humble opinion, is one of the best things we do as an Association. In today's world when settlements are the norm and trial experience is harder to come by, it is a wonderful way to help young lawyers build their trial skills. This is a program that members of the bench and bar have praised for the quality of the educational program and experience it provides.

We will then move into the summer with our Summer Meeting which will be in Asheville. This year we will be in downtown Asheville at the Renaissance Hotel. This gives us the opportunity to be more involved in the Asheville community. We are looking forward to the excitement and vibrancy of downtown Asheville as part of this meeting. Please make your plans to attend. The agenda is being finalized and will present top notch continuing legal education opportunities, as well as an ability to interact with your fellow defense attorneys.

Although it is a great pleasure to work with the tremendous individuals who are active in the SCDTAA, I would encourage all members of the association to become more involved and active. If you are not actively involved currently, or know someone who is not actively involved, please consider the many opportunities available to become an active member. The SCDTAA has numerous committees, meetings, and events that can use your energy, knowledge, and enthusiasm. The active participation in a committee or helping to plan an event will be rewarding to you and allow you to meet fellow defense attorneys who can be of assistance to you as your career continues to develop. Encouraging young lawyers in your firm to become involved in the SCDTAA can be a tremendous building block for the development of a referral network and network within the Defense Bar to help them as they progress in their career. This will be a benefit to these young lawyers, as well as a benefit to the SCDTAA, to develop future leaders of our Association.

We are also always eager to hear from any of our members on how we can improve what the SCDTAA does and better serve our members. We look forward to seeing you at the upcoming meetings and events of the SCDTAA and working together for success of the Association and its members.

**Upcoming Events**

# SCDTAA Trial Academy Recap
## Greenville, SC • May 25-27

by Claude T. Prevost III

Every year the SCDTAA hosts and sponsors a trial academy, which promotes civil justice and provides an opportunity for young lawyers to sharpen their trial advocacy skills. Top trial attorneys from around the state provided workshops and practice tips for the academy participants. The Trial Academy took place Wednesday, May 25 through Friday, May 27. On Friday, May 27, several mock trials took place before Circuit Court judges in Greenville.

The Trial Academy is a great chance for lawyers to observe and participate in a live mock trial as a witness or juror. We had another great year of participation in the juror and witness pool. The Supreme Court signed an order providing one Rule 403 Civil Jury Trial experience credit for those who attended and served as jurors.

Also, the YLD sponsored a happy hour at the Trial Academy on Wednesday, May 25 at 6:00 PM in Greenville. We hope you can join us next year.

# Fall Boot Camp
## Columbia, SC • September 22

by Giles M. Schanen, Jr.

### REGISTRATION IS OPEN FOR SCDTAA'S MOTIONS PRACTICE BOOT CAMP IN COLUMBIA!

On September 22, 2016 in Columbia, the SCDTAA will present its first Motions Practice Boot Camp, sponsored by AWR Court Reporting. This one day program will provide insight, strategies, and practical tips on all aspects of motions practice from federal and state judges, prominent members of the plaintiff and defense bar, and a panel of federal law clerks. In addition, each participant will have the opportunity to prepare for and argue a mock motion hearing before a judge or experienced practitioner in a courtroom setting. Five hours of CLE credit for attendees of the program is anticipated.

The program will be limited to 32 participants, and slots will be assigned on a "first come, first served" basis, so please apply immediately if you wish to attend. The cost of the program is $200 for SCDTAA members, and $250 for associates of member firms.

Please visit the SCDTAA website, www.scdtaa.com, to download the registration form or register online.

If you have questions,
please contact SCDTAA headquarters at
(803) 252-5646, or email aimee@jee.com.

# Editors' Note

by Alan G. Jones, James T. Irvin III, and Geoffrey W. Gibbon

It is springtime in South Carolina and thus time for our first edition of The DefenseLine for 2016. As always, our goal is to bring our readers a publication full of practical and useful knowledge for the practice of law in South Carolina. In addition, we have an opportunity to provide recaps of the exciting times the SCDTAA had in 2015 as well as preview the upcoming year. At the outset, the editors would like to thank everyone who has volunteered the time and effort that went into the articles and updates in this issue.

In this issue, *The DefenseLine* proudly presents a profile of South Carolina Supreme Court Chief Justice Costa M. Pleicones, including unique insight into the influences in his law practice.

For the practitioner, we have included several articles to assist you in and out of the courtroom, and provide useful and timely updates to your knowledge base. We also include a special interview with DRI's former Women in the Law Committee chair Lana A. Olson. And, our Legislative Committee has provided critical updates on current legislative issues going on in the State House.

We hope you will enjoy the recaps of the exciting events SCDTAA held in 2015 and take note of the upcoming events for 2016, including our Summer Meeting in Asheville. The SCDTAA is, first and foremost, the byproduct of a talented and dedicated membership. These events provide excellent opportunities to not only network among each other but also to meet and learn from some of the best and brightest in our field.

As you read through this Spring 2016 edition of *The DefenseLine*, we invite you to join us in upcoming activities. If you are not yet a member, now is an excellent time join. We look forward to seeing you in 2016!

*Jones*

*Irvin III*

*Gibbon*

## Hemphill Award Call for Nominations

Nominations are due to Aimee Hiers at SCDTAA Headquarters by July 13, 2016.

SCDTAA
1 Windsor Cove, Suite 305
Columbia, SC 29223

For more information contact Aimee at aimee@jee.com

**Eligibility**:
The candidate must be a member of the South Carolina Bar and a member or former member of the SCDTAA. He or she may be in active practice, retired from practice, or a member of the judiciary.

**Criteria**:
The award should be based upon distinguished and meritorious service to the legal profession and/or the public. The candidate should be, or should have been, an active, contributing member of the Association. The candidate also should have been instrumental in developing, implementing, and carrying through the objectives of the SCDTAA.

**Procedure**:
Nominations should be made by letter, with any supporting documentation and explanations attached. A nomination should include the name and address of the individual, a description of his or her activities in the Association, the profession and the community, and the reasons why the nominee is being put forward.

MEMBER NEWS

# SCDTAA Docket

### Richardson Plowden's Charleston Office Relocates to 171 Church Street

Richardson Plowden & Robinson, P.A. is pleased to announce its Charleston office has relocated to 171 Church Street in downtown Charleston. The new location was a result of the Firm's growth.

On January 4, 2016, the Firm began operating out of the Church Street office complex, a historic Charleston building. The Firm will temporarily be located in Suite 230 until renovations to the permanent Suite 150 are complete. The convenient location provides for easy access to downtown Charleston restaurants, businesses, and shops, as well as to Interstate 26. Convenient parking is available for clients, visitors and employees in the parking garage next door, which has a canopied walkway to the building. The main office phone number is 843.805.6550. The Charleston office mailing address is P.O. Box 21203, Charleston, SC 29413.

### Wall Templeton elects Peden Brown McLeod, Jr. shareholder

Wall Templeton is pleased to announce Peden Brown McLeod, Jr. as newly elected shareholder.

Brown is a graduate of the University of South Carolina School of Law and has worked with Wall Templeton in its Charleston office since the firm was founded in 2011. Brown worked with Wall Templeton's predecessor firm, Elmore & Wall, PA.

His practice focuses on insurance defense in a variety of claims including wrongful death, simple and complex accidents, property damages, and premises liability claims.

### Uniform Law Commission Honors Nelson Mullins' Ed Mullins For Work on S.C. Legislative Initiatives

The Uniform Law Commission has honored Edward W. Mullins, Jr., of counsel in Nelson Mullins Riley & Scarborough LLP's Columbia office, with a Blacksmith Award for his efforts to forge four enactments through the S.C. Legislature. The acts address issues of human trafficking, deployed parents, military voting, and family support.

Mr. Mullins represents the State of South Carolina in The Uniform Law Commission, which studies and considers drafts of specific statutes in areas of the law where uniformity between the states is desirable. Mr. Mullins has served as a commissioner since 2011.

Following are summaries of the acts with which Mr. Mullins assisted:

- The Uniform Act on Prevention of and Remedies for Human Trafficking is a comprehensive new law directed against human trafficking. Human trafficking, a form of modern day slavery, is a global concern that affects the United States on federal, state, and local levels.
- The Uniform Deployed Parents Custody and Visitation Act (UDPCVA) standardizes and simplifies the rules covering custody and visitation issues for deployed parents. The goal of the UDPCVA is to facilitate expeditious and fair disposition of cases involving the custody rights of a member of the military.
- The Uniform Military and Overseas Voters Act seeks to simplify the process of absentee voting for United States military and overseas civilians by making the process more uniform, convenient, secure, and efficient.
- The Uniform Interstate Family Support Act (UIFSA) seeks to ensure that state borders are not obstacles for collecting child support from reluctant parents obligated to pay.

### Nineteen Turner Padget Lawyers Named Among Best Lawyers in America

Turner Padget Graham & Laney P.A. announces that 19 of its attorneys have been included among Best Lawyers in America for 2016. In addition, four attorneys earned the additional distinction as Lawyers of the Year by the publication. As one of the oldest and most distinguished legal directories, Best Lawyers conducts peer-review surveys to compile its annual list of top attorneys across several practice areas. Moreover, only one lawyer in each practice area and designated metropolitan area is honored as the Lawyer of the Year, making this award particularly significant.

The Turner Padget attorneys named as Lawyers of the Year for the 2016 list are:

<u>Columbia</u>

- Catherine H. Kennedy – Litigation: Trust & Estates
- Frank G. Shuler, Jr. – Litigation: ERISA
- W. Duvall Spruill – Litigation: Real Estate

<u>Greenville</u>

- Eric K. Englebardt – Arbitration

The Turner Padget attorneys named among Best Lawyers in America for 2016 are:

<u>Charleston</u>

- Michael G. Roberts – Health Care Law
- John S. Wilkerson – Professional Malpractice Law: Defendants

Columbia

- J. Kenneth Carter, Jr. – Products Liability Litigation: Defendants
- Michael E. Chase – Workers' Compensation Law: Employers
- Cynthia C. Dooley – Workers' Compensation Law: Employers
- Catherine H. Kennedy – Litigation: Trust and Estates
- Lanneau Wm. Lambert, Jr. – Banking and Finance Law
- Edward W. Laney IV – Personal Injury Litigation: Defendants
- Steven W. Ouzts – Mass Tort Litigation / Class Actions: Defendants
- Thomas C. Salane – Insurance Law
- Frank G. Shuler, Jr. – Litigation: ERISA
- W. Duvall Spruill – Litigation: Real Estate

Florence

- J. René Josey – Appellate Practice
- Arthur E. Justice, Jr. – Employment Law: Management
- Julie Jeffords Moose – Commercial Litigation
- John M. Scott III – Tax Law

Greenville

- Eric K. Englebardt – Arbitration

Myrtle Beach

- R. Wayne Byrd – Commercial Litigation
- William E. Lawson – Litigation: Construction

### John H. Guerry joins Richardson Plowden's Charleston Office

Richardson Plowden & Robinson, P.A. is pleased to announce that John H. Guerry has joined the Firm as an associate attorney in the Charleston office. Guerry will focus his practice in general litigation.

### Richardson Plowden Names Rollins as Shareholder

Richardson Plowden is pleased to announce that Cliff Rollins has been named a shareholder in the Firm. Cliff focuses his practice in Employment and Construction Law in the Columbia office.

### H. Mills Gallivan Named to the Lawyers for Civil Justice Board of Directors

Gallivan, White & Boyd, P.A. is pleased to announce that Greenville attorney H. Mills Gallivan has been named to the Board of Directors of Lawyers for Civil Justice (LCJ). LCJ is a partnership of leading corporate counsel and defense bar practitioners who work to help restore and maintain balance in the civil justice system. LCJ collaborates with the business and defense bar communities to propel reasonable reform initiatives. Gallivan will be serving a 3-year term on the LCJ Board of Directors.

### Turner Padget Appoints Office Managing Shareholders and Practive Group Leaders Across the Firm

Columbia, S.C., Jan. 19, 2016 – Turner Padget Graham & Laney, P.A. announces firmwide leadership appointments for 2016. The firm's Executive Committee has named office managing shareholders and practice group leaders as part of its efforts to align operations with the firm's strategic plan.

The shareholders appointed to leadership roles include:

Office Managing Shareholders:

- R. Hawthorne (Thorne) Barrett – Columbia
- Eric K. Englebardt – Greenville
- J. René Josey – Florence
- Jimmy C. (Jim) Powell, Jr. – Myrtle Beach

Practice Group Leaders:

- C. Pierce Campbell – Business Litigation
- Michael E. Chase – Workers' Compensation
- Nicholas William Gladd – Product Liability
- Arthur E. Justice, Jr. – Professional Liability / Employment
- Michael G. Roberts – Business Transactions
- John S. Wilkerson – Insurance Litigation

### Twenty-Three Gallivan, White & Boyd Attorneys Named to Best Lawyers in America

Greenville, SC – Gallivan, White & Boyd, P.A. is pleased to announce that 23 of its attorneys have been named to the 2016 edition of Best Lawyers in America, one of the most respected peer-reviewed publications in the legal profession. Gallivan, White & Boyd attorneys are recognized in 18 different practice areas.

Columbia

- Johnston Cox - Insurance Law; Personal Injury Litigation: Defendants
- Gray T. Culbreath – Bet-the-Company Litigation; Commercial Litigation; Mass Tort Litigation/Class Actions: Defendants; Personal Injury Litigation: Defendants; Product Liability Litigation: Defendants
- John E. Cuttino – Litigation: Construction; Personal Injury Litigation: Defendants; Product Liability Litigation: Defendants

William R. Harbison – Workers' Compensation Law: Employers

- John D. Hudson, Jr. – Insurance Law; Litigation : Insurance
- John T. Lay, Jr. – Bet-the-Company Litigation: Commercial Litigation; Insurance Law; Mass Tort Litigation/Class Actions: Defendants; Personal Injury Litigation: Defendants; Product Liability Litigation: Defendants

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• Shelley S. Montague – Insurance Law; Litigation : Insurance

• Curtis L. Ott – Commercial Litigation; Product Liability Litigation: Defendants

Greenville

• W. Howard Boyd, Jr. – Bet-the-Company Litigation; Commercial Litigation; Product Liability Litigation: Defendants

• Deborah C. Brown – Employment Law: Management; Workers' Compensation Law: Employers

• Stephanie G. Flynn – Personal Injury Litigation : Defendants

• H. Mills Gallivan – Arbitration; Mediation; Workers' Compensation Law: Employers

• Paul D. Greene – Litigation: Construction

• Jennifer E. Johnsen – Commercial Litigation; Employee Benefits (ERISA) Law; Insurance Law

• C. Stuart Mauney – Mediation; Personal Injury Litigation: Defendants; Professional Malpractice Law : Defendants

• C. William McGee – Personal Injury Litigation: Defendants; Product Liability Litigation: Defendants

• Phillip E. Reeves – Insurance Law; Personal Injury Litigation: Defendants; Product Liability Litigation: Defendants

• T. David Rheney – Insurance Law; Personal Injury Litigation: Defendants; Product Liability Litigation: Defendants

• Greg P. Sloan – Personal Injury Litigation – Defendants; Railroad Law

• Ronald G. Tate, Jr. – Commercial Litigation

• Thomas E. Vanderbloemen – Appellate Practice; Copyright Law, Litigation: Intellectual Property; Trademark Law

• Daniel B. White – Commercial Litigation; Mass Tort Litigation/Class Actions: Defendants; Personal Injury Litigation: Defendants; Product Liability Litigation: Defendants; Railroad Law

• Ronald K. Wray II – Commercial Litigation; Product Liability Litigation: Defendants; Railroad Law

### Collins & Lacy Attorneys Selected as 2015 Legal Elite of the Upstate

Three Collins & Lacy, P.C. attorneys have been selected to Greenville Business Magazine's 2015 Legal Elite of the Upstate. The attorneys recognized are Jack Griffeth (Insurance Law), Ross Plyler (Civil Litigation), and Logan Wells (Insurance Law), who together make up a majority of the firm's Greenville office.

### Eight McKay Attorneys Selected for Midlands Legal Elite

McKay, Cauthen, Settana & Stubley, P.A. is pleased to announce that eight of our attorneys have been selected for the 2015 Midlands Legal Elite:

• Mark D. Cauthen - Workers' Compensation and Construction Law

• Julius W. "Jay" McKay, II - Healthcare Law

• Daniel R. Settana - Civil Litigation Defense

• M. Stephen Stubley - Workers' Compensation

• Temus C. Miles, Jr. - Government Affairs Defense

• Brandon Jones - Insurance Law

• Charles Kinney - Insurance Law

• James E.L. "Eddie" Fickling - Labor & Employment Law

The Midlands Legal Elite awardees, an honor presented by Columbia Business Monthly, are attorneys nominated by their peers in one of twenty different practice areas. The top attorneys in each area are then selected.

### Turner Padget Elects Audra Byrd as Shareholder

Turner Padget Graham & Laney, P.A. announces that Audra Byrd has been elected as a shareholder of the firm, effective Jan. 1, 2016. Based in the Myrtle Beach office, Byrd is a member of Turner Padget's Business and Commercial Litigation Practice.

Byrd counsels clients involved in business disputes and probate litigation. She represents insurance companies, large corporations, small businesses and individuals. Her work has included matters ranging from shareholder oppression to business defamation and civil conspiracy, and she advises corporate clients with debt collection and contract disputes. She also regularly defends personal injury and premises liability claims.

### Two McKay Firm Attorneys Earn CCP Designation Brandon Jones and Eddie Fickling Complete CLM Claims College to Earn CCP

McKay, Cauthen, Settana & Stubley, P.A. is pleased to announce that two of its attorneys, Brandon Jones and James E. L. "Eddie" Fickling, have completed the necessary courses to earn their CCP designation from the CLM Claims College.

To earn the CCP designation, professionals must successfully complete all three levels of the CLM Claims College. Brandon and Eddie were a part of the first group of professionals to complete all three. The CCP designees can also choose to continue their studies and earn the Advanced Claims Professional (ACP) designation.

### Turner Padget's Lanny Lambert Accepted into the American College of Mortgage Attorneys

Turner Padget announces that Columbia-based shareholder Lanneau Wm. "Lanny" Lambert, Jr. was accepted into the American College of Mortgage Attorneys. College inductees are nominated by the organization's fellows, and include a collegial group of lawyers from each state who are highly experienced in finance transactions secured by real estate and related areas. As a member of the College, Lambert will support the organization's mission to improve and reform laws and procedures affecting real estate secured transactions.

### Elmore Goldsmith Elects New Shareholder

Elmore Goldsmith, P.A. has announced that Bryan P. Kelley has been elected a shareholder of the firm effective as of January 1, 2016.

Kelley joined the firm in 2009. He is licensed to practice in the federal and state courts of North and South Carolina. He represents general contractors, subcontractors, developers, owners and surety companies in construction and surety claims and disputes. He has served as a lecturer on a variety of construction industry topics for Carolinas Associated General Contractors.

### Collins & Lacy Welcomes Kelsey Brudvig

Collins & Lacy, P.C. is pleased to announce Kelsey Brudvig has joined the firm's Columbia office as an associate practicing in the areas of retail & hospitality law and professional liability defense.

Brudvig's experience includes serving as a staff attorney for the South Carolina Supreme Court, where she had the opportunity to become familiar with a vast array of issues arising in civil and criminal appeals. At Collins & Lacy, Brudvig will be defending national and regional leaders in retail, hospitality, and entertainment sectors doing business in the Palmetto State in claims involving liability, loss prevention, food adulteration, third party torts, and alcohol liability. She will also represent healthcare providers, physicians, nurses, pharmacists, financial and investment advisors, attorneys, insurance brokers and agents in professional liability litigation.

### Attorney John E. Cuttino Named President-Elect of DRI – The Voice of the Defense Bar

Gallivan, White & Boyd, P.A. is pleased to announce that Columbia attorney John E. Cuttino has been named President-Elect of DRI–The Voice of the Defense Bar (DRI). Cuttino will serve as President-Elect from October 2015 until he becomes President in October 2016. DRI is the leading organization for lawyers and in-house counsel who defend businesses and individuals in civil litigation. DRI is committed to improving the civil justice system; enhancing the skills, knowledge, and professionalism of its members; and anticipating and addressing issues relevant to defense attorneys and the civil justice system.

### H. Mills Gallivan Named President-Elect of the Federation of Defense and Corporate Counsel

Gallivan, White & Boyd, P.A. is pleased to announce that shareholder H. Mills Gallivan has been named President-Elect of the Federation of Defense & Corporate Counsel (FDCC) with his term as President-Elect ending in July of 2016. The FDCC is composed of recognized leaders in the legal community. The FDCC is dedicated to promoting the knowledge, fellowship, and professionalism of its members as they pursue the course of a balanced justice system and represent those in need of a defense in civil lawsuits.

### Sowell Gray Included in 2016 Edition of Best Law Firms

Sowell Gray Stepp & Laffitte, LLC has been ranked among the nation's most prominent law firms in key practice areas by U.S. News – Best Lawyers, a publication that recognizes the top practices in the nation.

Sowell Gray was recognized as a Tier One law firm in the areas of: commercial litigation; insurance law; personal injury litigation: defendants; and workers' compensation law: employers. The firm was also recognized in the areas of litigation: construction and product liability litigation: defendants.

"Best Law Firms" ranks more than 11,000 firms in 120 practice areas in 170 metropolitan areas and eight states. Rankings are based on a rigorous evaluation process that includes client and lawyer evaluations and peer review from leading attorneys in the same practice areas.

To be eligible for a ranking, a law firm must have at least one lawyer who is included in Best Lawyers. Six Sowell Gray members – Becky Laffitte, Biff Sowell, Bobby Stepp, Cal Watson, Grady Beard, and Monty Todd– were highlighted in ten practice areas in that publication. Becky Laffitte was named Insurance Law Lawyer of the Year.

### Collins & Lacy Attorney Elected President of SCDTAA Young Lawyers Division

Collins & Lacy, P.C. is pleased to announce Claude Prevost has been elected president of the Young Lawyers Division (YLD) of the South Carolina Defense Trial Attorneys' Association (SCDTAA). Prevost assumed the role in December 2015.

### Gallivan, White & Boyd, P.A. Named "Best Law Firm" by U.S. News and Best Lawyers in America

Gallivan, White & Boyd, P.A. has been ranked in the 2016 "Best Law Firms" list by U.S. News & World Report and Best Lawyers® regionally in 22 practice areas. The "Best Law Firms" rankings are based on a rigorous evaluation process that includes the collection of client and lawyer evaluations, peer review from leading attorneys in their field, and review of additional information provided by law firms as part of the formal submission process. Best Lawyers states, "Firms included in the 2016 'Best Law Firms' list are recognized for professional excellence with persistently impressive ratings from clients and peers." Gallivan, White and Boyd has been ranked a Tier 1 or Tier 2 "Best Law Firm" in the following practice areas:

<u>Columbia, South Carolina – TIER 1</u>

- Commercial Litigation
- Insurance Law

Continued on next page

- Mass Tort Litigation / Class Actions: Defendants
- Personal Injury Litigation: Defendants
- Product Liability Litigation: Defendants
- Workers' Compensation Law: Employers

Greenville, South Carolina – TIER 1

- Commercial Litigation
- Insurance Law
- Mass Tort Litigation / Class Actions: Defendants
- Mediation
- Personal Injury Litigation: Defendants
- Product Liability Litigation: Defendants
- Workers' Compensation Law: Employers

Greenville, South Carolina – TIER 2

- Copyright Law
- Employment Law: Management
- Litigation: Intellectual Property
- Professional Malpractice Law: Defendants

### Three Gallivan, White and Boyd Attorneys Elected as Partners

Three of Gallivan, White & Boyd, P.A.'s brightest attorneys have been elected as partners by the firm's shareholders. Janice Holmes (Columbia), Jared Pretulak (Greenville), and Grayson Smith (Columbia) received this election at the partnership's annual meeting in December.

### Hedrick Gardner Recognizes Leading Columbia Attorney

Hedrick Gardner Kincheloe & Garofalo LLP, a leading regional litigation and dispute management law firm, is pleased to announce that Dewana Looper has been promoted to Partner in the firm's Columbia office. Dewana initially began practicing law in the firm's Charlotte office in 2008, defending employers and insurance carriers in contested claims before the North Carolina Industrial Commission. Dewana relocated to South Carolina in 2009 and further expanded her practice, gaining extensive experience representing businesses and insurance carriers before the South Carolina Industrial Commission. She also regularly counsels employers regarding employment policies and employment disputes.

### Elizabeth McMillan Named a 2016 Leadership in Law Honoree

McAngus Goudelock & Courie, a regional insurance defense firm, is pleased to announce that attorney Beth McMillan is a Leadership in Law Award honoree, presented by South Carolina Lawyers Weekly. The award will be presented at the publication's eighth annual event in Charleston on March 10, 2016.

The Leadership in Law Award recognizes legal professionals from across the Palmetto State who have achieved success in their law practice, made contributions to society and have had an impact on the legal industry.

McMillan's practice focuses on professional liability defense, coverage and bad faith, healthcare malpractice, business litigation, employment law, products liability, securities litigation, and general litigation. She has extensive experience in trial work and has tried and arbitrated numerous cases in the areas of professional liability, products liability, construction, business litigation, warranty defense, and personal injury defense work. She has also represented and consulted with numerous companies regarding employment issues and litigation.

### Collins & Lacy Ranked Tier 1 in 2016 "Best Law Firms"

Collins & Lacy, P.C. is pleased to announce the firm has been recognized in the "Best Law Firms" 2016 list, just released by the U.S. News – Best Lawyers®.

The business defense firm earned a "Tier 1" ranking in the area of workers' compensation law and was also recognized in the areas of banking and finance law, criminal defense: white collar, employment law : individuals, insurance law and mediation.

### Columbia Attorney Amy L.B. Hill Joins Gallivan, White and Boyd

Gallivan, White & Boyd, P.A. is pleased to announce that attorney Amy Hill has joined the firm as a partner in the firm's Columbia, South Carolina, office. Hill is a litigation attorney with years of experience and has been recognized in the legal profession by entities such as Benchmark Lititgation, South Carolina Super Lawyers, the South Carolina Bar, and the University of South Carolina Law School Alumni Association.

Hill's legal practice places an emphasis on business and commercial litigation with a particular focus on probate litigation as well as lender liability and FINRA litigation.

### Turner Padget Named as Finalist for Benchmark's South Carolina Law Firm of the Year

Turner Padget Graham & Laney, P.A. announces that it has been named by Benchmark Litigation as a finalist for the third annual U.S. awards for South Carolina Litigation Firm of the Year. Turner Padget joins four other leading firms from across the state, and was chosen by the legal directory's editorial panel. This announcement follows Turner Padget's recognition in the 2016 Benchmark Litigation guide as a "highly recommended" firm in South Carolina.

### The McKay Firm Selected as Best Law Firm in America for 2016

McKay, Cauthen, Settana & Stubley, P.A. is pleased to announce that the firm has again received recognition in U.S News and World Report's "Best Law Firms" 2016. The publication is considered to be one of the most respected attorney referral services in the nation.

The law firm received rankings in both Medical Malpractice Law and Workers' Compensation Law. Best Lawyers recognizes the top 4% of practicing

attorneys across the US. Over 17,000 attorneys provided almost 600,000 law firm assessments, and almost 7,500 clients provided more than 40,000 evaluations.

This is the seventh year that the law firm has been selected for this honor.

### McKay & Stubley Selected for Best Lawyers in America

The law firm of McKay, Cauthen, Settana & Stubley, P.A. is pleased to announce that two of the firm's partners, Mr. Julius W. "Jay" McKay, II, and Mr. M. Stephen Stubley, have been selected for inclusion in The Best Lawyers in America® 2016. This will be Mr. McKay's second year receiving the top honor and Mr. Stubley's third.

Mr. McKay was selected for inclusion in Best Lawyers® in the area of medical malpractice law: defendants. He also practices in health care law, products liability, commercial litigation, government defense, appellate law, and professional licensure disputes. He has also been named as one of South Carolina Super Lawyers for the past seven years. His grandfather, Douglas McKay, Sr., started the McKay Firm in 1908.

Mr. Stubley was selected for inclusion in Best Lawyers® in the area of workers' compensation law: employers. He practices in the areas of workers' compensation, workers' compensation appeals, subrogation, and civil defense litigation.

### Tuner Padget's Lanny Lambert Elected as Leader of the National Conference of Bar Presidents

Turner Padget Graham & Laney P.A. announces that Lanneau Wm. ("Lanny") Lambert, Jr. has been elected as president of the National Conference of Bar Presidents (NCBP). Lambert, a shareholder in the firm's real estate practice group, is the first member from South Carolina to be elected as president of the organization since 1970. He will guide the NCBP in its mission to educate and train local and state bar association leaders.

### Columbia Attorney John E. Cuttino Receives Leadership in Law Honor

Gallivan, White & Boyd, P.A. is pleased to announce that Columbia attorney John E. Cuttino has been selected as one of the honorees for the 2016 Leadership in the Law Awards by South Carolina Lawyers Weekly. Honorees were nominated by peers and colleagues and selected by the publisher and staff of South Carolina Lawyers Weekly. Cuttino is one of only 30 South Carolina attorneys to receive the Leadership in Law recognition this year.

Cuttino received this honor as a result of his outstanding accomplishments and leadership in the legal profession. Cuttino is President-Elect of DRI - The Voice of the Defense Bar (DRI) and will serve as President of DRI beginning October 2016. He is also an active member of the International Association of Defense Counsel (IADC), National Foundation for Judicial Excellence (NFJE), South Carolina Defense Trial Attorneys' Association (SCDTAA), and Eagle International Associates, Inc.

### Fifteen Gallivan, White & Boyd Attorneys Recognized as "Legal Elite" by Greenville Business Magazine

The law firm of Gallivan, White & Boyd, P.A. is pleased to announce that fifteen of the firm's attorneys were recognized as being among Greenville's "Legal Elite" for 2015 by Greenville Business Magazine. This recognition includes attorney Cory Ezzell honored as Greenville Workers' Compensation Lawyer of the Year. Gallivan, White & Boyd's complete list of "Legal Elite" include:

- T. Cory Ezzell – Greenville Workers' Compensation Lawyer of the Year
- W. Howard Boyd, Jr. – Civil Litigation
- Deborah Casey Brown – Labor Law
- H. Mills Gallivan – Workers' Compensation
- Paul D. Greene – Construction Law
- Jennifer E. Johnsen – Healthcare Law, Insurance Law
- Stuart C. Mauney – Personal Injury
- W. Duffie Powers – Bankruptcy Law
- Jared M. Pretulak – Workers' Compensation
- Phillip E. Reeves – Insurance Law, Personal Injury
- T. David Rheney – Insurance Law, Personal Injury
- Ronald G. Tate, Jr. – Construction Law
- Thomas E. Vanderbloemen – Intellectual Property
- Daniel B. White – Civil Litigation
- Ronald K. Wray – Civil Litigation

### Turner Padget Continues Litigation Practice Growth with Two Attorneys

Turner Padget Graham & Laney, P.A. announces the continued expansion of its litigation practice with the addition of two associates. R. Allyce Bailey joins Turner Padget's Columbia office, and Sarah Fragale is based in Charleston. These new attorneys support the firm's strategic commitment to building its South Carolina offices, bringing the total number of new hires since January to eight lawyers.

Bailey practices in insurance litigation where she represents defendants in bodily injury, contract disputes, and other litigation.

Fragale brings five years of experience in litigation, focusing on construction defect, premises liability, and personal injury defense.

### Legal Publisher Chambers Recognizes Nelson Mullins' Brunson, Phillips

Legal directory publisher Chambers and Partners has recognized Nelson Mullins Riley & Scarborough LLP in its national category for the Firm's product liability and mass torts litigation. The organization also lists Charleston partner Robert H. Brunson as a recognized practitioner in nationwide product liability and Charleston partner G. Mark Phillips as a



Continued on next page

notable South Carolina practitioner in general commercial litigation. Overall, the organization ranked 33 Nelson Mullins attorneys in six states and the District of Columbia for their local legal practices. The organization also ranked four of the Firm's practices in South Carolina. They are:

- Litigation: General Commercial, South Carolina
- Corporate/M&A, South Carolina
- Corporate/M&A: Banking & Finance, South Carolina
- Environment, South Carolina

### John T. Lay, Jr. Becomes President-Elect of IADC

At its Annual Meeting in July, held at The Broadmoor in Colorado Springs, Colorado, the International Association of Defense Counsel (IADC) elected John T. Lay, Jr. President-Elect for the 2015-2016 term. The IADC is the preeminent invitation-only global legal organization for attorneys who represent corporate and insurance interests. Founded in 1920, the IADC's members hail from five continents, 40 countries and all 50 U.S. states. The core purposes of the IADC are to enhance the development of skills, promote professionalism, and facilitate camaraderie among its members, their clients, as well as the broader civil justice community.

### Gray T. Culbreath & John T. Lay, Jr. Chosen as "Litigation Stars" by Benchmark Litigation

Gallivan, White & Boyd, P.A. Columbia attorneys Gray T. Culbreath, and John T. Lay, Jr. have been chosen as "Litigation Stars" by Benchmark Litigation. Benchmark Litigation has been conducting research on litigators, firms, and cases since 2008. "Litigation Stars" are selected after a six-month research period where Benchmark Litigation researchers examine recent casework handled by attorneys, interview clients, and ask individual litigators to offer their professional opinions on peers.

### Three Sowell Gray Attorneys Highlighted in Benchmark Litigation

Benchmark Litigation, a definitive guide to the country's leading lawyers and firms, has named Sowell Gray Stepp & Laffitte, LLC, one of the top litigation firms in South Carolina.

Additionally, the guide has named individual Sowell Gray members Biff Sowell and Bobby Stepp as local "Litigation Stars" and member Amy Hill as a "Future Star."

### "Best Lawyers 2016" Guide Lists 68 Nelson Mullins S.C. Attorneys

Sixty-eight Nelson Mullins Riley & Scarborough attorneys based in South Carolina have been selected for inclusion in The Best Lawyers in America® 2016.

**The Charleston, S.C., lawyers listed are:**

- William Bobo, Jr. – Real Estate Law
- Michael T. Cole – Mass Tort Litigation/Class Actions: Defendants, Product Liability Litigation: Defendants
- Jennifer Williams Davis – Tax Law
- John B. Hagerty – Corporate Law
- John C. McElwaine – Copyright Law, Trademark Law
- Elizabeth Scott Moise – Insurance Law
- Thomas F. Moran, – Tax Law
- Charles R. Norris – Insurance Law
- G. Mark Phillips – Product Liability Litigation: Defendants
- Newman Jackson Smith – Environmental Law, Government Relations, Environmental Litigation, Water Law
- John C. von Lehe, Jr., Appellate Law, Tax Law

**The Columbia, S.C., lawyers listed are:**

- Stuart M. Andrews, Jr. – Healthcare Law
- George S. Bailey – Trusts and Estates Litigation, Tax Law, Trusts and Estates
- Edward D. Barnhill, Jr. – Real Estate Law: Real Estate Litigation
- Jody A. Bedenbaugh – Banking and Finance Law
- C. Mitchell Brown – Appellate Law, Commercial Litigation
- Thomas A. Brumgardt – Business Organizations, Corporate Governance Law, Corporate Law, Mergers & Acquisitions
- George B. Cauthen – Bankruptcy and Creditor-Debtor Rights/Insolvency and Reorganization Law, Bet-the-Company Litigation, Bankruptcy Litigation
- Karen Aldridge Crawford – Environmental Law, Environmental Litigation
- Christopher J. Daniels – Personal Injury Litigation: Defendants, Product Liability Litigation: Defendants
- Travis Dayhuff – Healthcare Law
- Gus M. Dixon – Corporate Law, Mergers & Acquisitions Law, Securities/Capital Markets Law
- Dwight F. Drake – Government Relations
- David E. Dukes – Bet-the-Company Litigation, Commercial Litigation, Patent Litigation, Securities Litigation, Personal Injury Litigation: Defendants, Product Liability Litigation: Defendants
- Mark C. Dukes – Intellectual Property Litigation, Technology Law
- Debbie Whittle Durban – Litigation – Labor & Employment
- Carl B. Epps III – Personal Injury Litigation – Defendants
- Robert W. Foster, Jr. – Personal Injury Litigation: Defendants, Product Liability Litigation: Defendants
- Daniel J. Fritze, – Corporate Law, Mergers & Acquisitions Law, Securities/Capital Markets Law, Securities Regulation
- James C. Gray, Jr. – Administrative/Regulatory Law, Insurance Law

• Sue Erwin Harper – Employment Law – Management, Labor & Employment Litigation

• Bernard F. Hawkins, Jr. – Environmental Law, Environmental Litigation

• P. Mason Hogue, Jr. – Corporate Law, Mergers & Acquisitions Law, Mergers & Acquisitions Litigation, Securities/Capital Markets Law

• William C. Hubbard – Commercial Litigation, Banking & Finance Litigation, Mass Tort Litigation /Class Actions: Defendants

• S. Keith Hutto – Commercial Litigation, Franchise Law, Banking & Finance Litigation

• Kenneth Allan Janik – Employee Benefits (ERISA) Law, ERISA Litigation, Tax Law

• J. Mark Jones – Commercial Litigation

• Frank B.B. Knowlton – Bankruptcy Litigation, Mortgage Banking Foreclosure Law, Product Liability Litigation: Defendants

• D. Larry Kristinik III – Commercial Litigation, Securities Litigation

• John F. Kuppens – Commercial Litigation, Product Liability Litigation: Defendants

• James K. Lehman – Commercial Litigation, Mergers & Acquisitions Litigation, Securities Litigation

• Cory E. Manning – Commercial Litigation

• Steven A. McKelvey, Jr. – Franchise Law

• Edward W. Mullins, Jr. – Bet-the-Company Litigation, Commercial Litigation, Personal Injury Litigation: Defendants

• Edward E. Poliakoff – Government Relations

• James F. Rogers – Mass Tort Litigation/Class Actions: Defendants, Product Liability Litigation: Defendants

• R. Bruce Shaw – Mass Tort Litigation/Class Actions: Defendants, Personal Injury Litigation: Defendants, Product Liability Litigation: Defendants

• B. Rush Smith, III – Bet-the-Company Litigation, Commercial Litigation, Financial Services Regulation Law, Banking & Finance Litigation, Mass Tort Litigation/Class Actions: Defendants,

• David G. Traylor, Jr. – Mass Tort/Class Actions: Defendants, Personal Injury Litigation: Defendants, Product Liability Litigation: Defendants

• Ralston B. Vanzant, II – Real Estate Law

• Daniel J. Westbrook – Healthcare Law

• Thad H. Westbrook – Banking and Finance Litigation

• George B. Wolfe – Economic Development Law, Government Relations

**The Greenville, S.C., attorneys listed are:**

• William S. Brown – Commercial Litigation

• John M. Campbell, Jr. – Tax Law

• Lane W. Davis – Commercial Litigation, Personal Injury Litigation: Defendants, Water Law

• William H. Foster, – Employment Law: Management

• Neil E. Grayson – Mergers and Acquisitions, Securities/Capital Markets Law, Securities Regulation

• John M. Jennings – Corporate Governance, Mergers and Acquisitions, Securities/Capital Markets Law

• Neil C. Jones – Intellectual Property Litigation

• Timothy E. Madden – Family Law

• Samuel W. Outten – Commercial Litigation, Legal Malpractice Law: Defendants, Product Liability Litigation: Defendants

• A. Marvin Quattlebaum, Jr. – Bet-the-Company Litigation, Commercial Litigation, Insurance Law

• Bo Russell – Mergers and Acquisitions, Venture Capital Law

• Reid T. Sherard – Family Law

• Rivers S. Stilwell – Commercial Litigation, Construction Litigation

**The Myrtle Beach, S.C. attorneys listed are:**

• James F. McCrackin – Trusts and Estates

• John Stewart, Jr. – Real Estate Law

### Hedrick Gardner Attorneys Selected for Inclusion in The Best Lawyers in America© 2016

Hedrick Gardner is pleased to announce that two South Carolina attorneys were recently selected by their peers for inclusion in The Best Lawyers in America© 2016, including Columbia attorneys:

• R. Daniel Addison: Workers' Compensation Law: Employers

• Edwin P. Martin, Jr.: Workers' Compensation Law: Employers

### Turner Padget's Brittany Boykin Elected to the South Carolina Bar House of Delegates

Turner Padget is pleased to announce that Charleston-based associate Brittany F. Boykin was appointed to the South Carolina Bar House of Delegates for the 2016-2018 term. In her two-year term, which begins on July 1, 2016, Boykin, and delegates from across the state, will help establish policy for the Bar's 15,000 members.

At Turner Padget, Boykin is a member of the Insurance Litigation practice. She represents the interests of carriers, individuals, and businesses, and has a wide practice, which includes defending personal injury claims, construction defects, and trucking and transportation matters. She has tried numerous cases to juries throughout the state, and has been recognized as a South Carolina Rising Star by Super Lawyers magazine.

### Best Lawyers in America Honors Seven Collins & Lacy Attorneys with One Named as 2016 Lawyer of the Year

The annual list is compiled by Best Lawyers where tens of thousands of leading lawyers evaluate and vote on their professional peers. This is a significant

Continued on next page

honor that is widely and highly regarded by both clients and legal professionals. The attorneys include:

Columbia

- Ellen M. Adams – Workers' Compensation Law: Employers
- Christian E. Boesl – Workers' Compensation Law: Employers
- Joel W. Collins – Criminal Defense: White-Collar
- Peter H. Dworjanyn – Litigation - Insurance-Workers' Compensation Law: Employers
- Stanford E. Lacy – Workers' Compensation Law: Employers

Greenville

- Jack D. Griffeth – Arbitration: Employment Law: Individuals; Insurance Law: Mediation; 2016 Lawyer of the Year
- L. Henry McKellar, Banking and Finance Law-Litigation - Banking and Finance

### Richland County Bar Elects Jody Bedenbaugh as President

The Richland County S.C. Bar Association has elected Jody A. Bedenbaugh, a partner in Nelson Mullins Riley & Scarborough LLP's Columbia office, to serve as president. Mr. Bedenbaugh practices in the areas of banking, creditor rights, and bankruptcy.

### Fred W. "Trey" Suggs III Elected to SCDTAA Board of Directors

Roe, Cassidy, Coates & Price, P.A. is pleased to announce that Fred W. "Trey" Suggs III has been elected to the Board of Directors of the South Carolina Defense Trial Attorneys' Association.

### Seven Richardson Plowden Attorneys Selected to 2016 edition of Best Lawyers in America®

The 2016 edition of The Best Lawyers in America® features seven Richardson Plowden & Robinson, P.A. attorneys who were selected by their peers: Leslie A. Cotter, Jr. for legal malpractice law; Frederick A. Crawford for health care law; Steven W. Hamm for administrative and regulatory law; Steven J. Pugh for products liability litigation; Anthony E. Rebollo for tax law; Frank E. Robinson, II for real estate law; and Franklin J. Smith, Jr. for construction law. Smith was also selected as a 2016 "Lawyer of the Year" for Columbia, S.C. for construction law.

### Eugene "Gene" H. Matthews of Richardson Plowden Honored with the Legion of Merit by the President of the United States

Richardson Plowden & Robinson, P.A. is pleased to announce that attorney Eugene "Gene" H. Matthews was recently recognized with the Legion of Merit by the President of the United States of America. Matthews was awarded for his exceptionally meritorious conduct in the performance of outstanding service as Commanding Officer in the United States Navy from December 2013 to November 2015. The Legion of Merit is the fifth ranking award provided to a military service member.

Matthews focuses his practice in employment and labor law. He earned his Juris Doctor from the University of Virginia in 1995. Prior to earning his Juris Doctor, Matthews earned his Masters of Arts in International Relations from Yale University in 1989. Before practicing law, Matthews served as an intelligence officer for the Central Intelligence Agency (CIA). He also has served as an intelligence officer for the United States Navy Reserve. Matthews is a member of the South Carolina Bar and the North Carolina Bar Association. He is certified by the South Carolina Supreme Court as a mediator, an arbitrator, and as a specialist in employment and labor law.

### Elmore Goldsmith, PA Receives Tier One Ranking in U.S. News - Best Lawyers® 2016 "Best Law Firms"

U.S. News - Best Lawyers® have released the 2016 "Best Law Firms" rankings and Elmore Goldsmith, PA, has been recognized in two areas. For the Greenville metropolitan area, the firm has received tier one rankings for Construction Law and Litigation: Construction.

Firms included in this sixth edition are recognized for professional excellence with persistently impressive ratings from clients and peers.

### Clark Price Receives Best Lawyers "Lawyer of the Year" 2016

Roe Cassidy Coates and Price, P.A. is pleased to announce that Clark Price received Best Lawyers® "Lawyer of the Year" award for 2016. Only a single lawyer in each practice area and designated metropolitan area is honored as the "Lawyer of the Year," making this accolade particularly significant. Clark was recognized as the top lawyer in the Greenville, South Carolina region for Medical Malpractice Defense.

### Smith Moore Leatherwood Attorney Steve Farrar Named President of Federation of Defense and Corporate Counsel

Smith Moore Leatherwood is pleased to announce that attorney Steve Farrar has been elected President of the Federation of Defense and Corporate Counsel (FDCC), an invitation-only membership organization that consists of accomplished defense attorneys, corporate counsel and industry executives who have achieved professional distinction during their careers. Farrar will serve as President for one year and move to Chairman of the Board in August, 2016.

### Turner Padget Boosts Insurance Litigation Practice with Addition of Three Attorneys

Turner Padget Graham & Laney, P.A. announces the further expansion of its Insurance Litigation practice with the addition of three attorneys: Greenville-based of counsel David L. Moore, and

Charleston-based associates Brian J. Kern and William J. Horvath. These additions support the firm's commitment to continue building its five South Carolina offices, and complement the significant expansion of the Insurance Litigation practice in 2015 and further growth anticipated in 2016.

### Ogletree Deakins Opens Office in Seattle

Ogletree, Deakins, Nash, Smoak & Stewart, P.C. (Ogletree Deakins), one of the largest labor and employment law firms representing management, announced today that the firm has opened an office in Seattle, significantly expanding its capabilities in the Pacific Northwest. The office opens with shareholder Tony Byergo, who co-founded Ogletree Deakins' Kansas City office in 2005, and attorney Sarah Evans, who has practiced at Ogletree Deakins since 2012. The Seattle office is expected to experience significant growth in the near future and will collaborate with Ogletree Deakins' Portland, Oregon office, where many of the lawyers are licensed to practice law in Washington.

### Turner Padget's Kristen Nichols Named as President of Charleston CREW

Turner Padget announces that Charleston-based attorney Kristen N. Nichols was appointed as the 2016 president of Commercial Real Estate Women (CREW) Charleston. Nichols will lead CREW in the mission of advancing the achievements of local women in commercial real estate. Charleston CREW is one of the newest chapters in the national organization, and it includes members from all aspects of commercial real estate, including brokers, bankers, developers, architects and engineers, among other notable professions.

### Collins & Lacy Attorney Elected to Board of Directors for Kids' Chance of SC

Ashley Kirkham, an associate attorney practicing workers' compensation defense at Collins & Lacy, has been elected to the Kids' Chance of South Carolina board of directors, according to the law firm.

Kids' Chance of South Carolina aims to aid the children of South Carolina workers who have been fatally or catastrophically injured in a work-related accident. Founded in 1992 by the workers' compensation community, Kids' Chance has enabled such children to pursue their educational dreams without financial burden through more than $800,000 in scholarships to date.

### Elmore Goldsmith Attorneys Recognized in The Best Lawyers in America© for 2016

The law firm of Elmore Goldsmith is pleased to announce that three of the firm's attorneys have been selected by their peers for inclusion in The Best Lawyers in America for 2016. Additionally, two attorneys have been recognized as "Lawyer of the Year" in Greenville.

The following Elmore Goldsmith attorneys are included in The Best Lawyers in America for 2016:

- L. Franklin "Frank" Elmore - Construction Law and Litigation: Construction
- Mason A. "Andy" Goldsmith, Jr. - Construction Law and Litigation: Construction
- Mason A. "Andy" Goldsmith - Commercial Litigation, Bet-the-Company Litigation, Litigation: Construction, Litigation-Securities

### Attorney Ron Tate Receives Associate of the Year Award From Home Builders Association of South Carolina

Gallivan, White & Boyd, P.A. is pleased to announce that shareholder Ronald G. Tate has been chosen to receive the Home Builders Association of South Carolina (HBASC) Thomas N. Bagnal Associate of the Year award, one of the most prestigious HBASC awards. The award is given to individuals who demonstrate the same qualities as the award's namesake, Thomas N. Bagnal. These qualities include: tireless service to their community, Home Builders Association, and to the home building industry.

### Nelson Mullins' William Hubbard Recognized for Legal Innovations

Legal research service Fastcase has selected William C. Hubbard, a partner in Nelson Mullins Riley & Scarborough LLP's Columbia office and former president of the American Bar Association, as one of its Fastcase 50, a compendium of leaders in innovations in legal services delivery.

Mr. Hubbard practices in business litigation related to breach of contract, business torts, breach of fiduciary duty claims, unfair trade practices, energy and utilities disputes, and class actions. He has served as president of the ABA from 2014 to 2015.

### Four Turner Padget Attorneys Selected Among Women Leaders in the Law for 2015

Turner Padget Graham & Laney P.A. announces that four of its attorneys have been recognized by American Lawyer Media (ALM) and Fortune Magazine among the Legal Leaders' Women Leaders in the Law for 2015. The attorneys recognized include Cynthia C. Dooley, Julie Jeffords Moose, Nosizi Ralephata, and Catherine H. Kennedy. The complete list of 2015 winners is available today at www.law.com, and will be featured in Fortune's Most Powerful Women in Business issue.

Legal Leaders' list of Women Leaders in the Law showcases the top women lawyers in the country, as identified by Martindale-Hubbell, the authoritative source for attorney rankings since 1868. As more women rise to high-profile positions within large firms, in government, and as in-house counsel, Legal Leaders is proud to recognize the contributions of these outstanding attorneys.

# 2015 Annual Meeting Recap
## Amelia Island • November 5-8

by Ryan A. Earhart

The 2015 Annual Meeting was held at the recently renovated Ritz Carlton at Amelia Island, Florida on November 5-8. It was a spectacular venue that provided great food, fellowship, and CLE. The speakers were outstanding as usual and included Justice Toal's final State of the Judiciary speech, which has become an annual tradition. This year we were lucky enough to feature an indoor and outdoor college football viewing party that was well attended by the members and the judges. Nothing could beat watching Clemson defeat Florida State on the way to the National Championship game. However, half the room was not-so-secretly hoping the Seminoles might end the unbeaten streak. It was a wonderful weekend and we all look forward to next year's meeting at The Ritz at Reynold's Plantation, Georgia.

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# Legislative Reception
## A Much Anticipated Evening

by Robert E. Tyson, Jr.

On April 20, the SCDTAA hosted its annual legislative reception at the Oyster Bar in Columbia. Guests included members and staff of the House and Senate Judiciary Committees and other legislative leadership. Speaker Jay Lucas, an attorney, attended the reception and had a good time mingling with fellow attorneys. Many Representatives and Senators also enjoyed the festivities. Also in attendance were Chief Justice Costa Pleicones, United States District Court Judge Joseph F. Anderson, Jr., and other judges from the Court of Appeals and the trial bench.

Members on the House and Senate Judiciary Committees primarily are attorneys. Therefore, this reception provides members of the defense bar a great opportunity to discuss legal issues with members of the General Assembly, on top of enjoying great food and drink. Having great relationships with the members of the General Assembly enhances our ability to advocate on issues important to the defense bar. For example, bills concerning jurisdiction of Magistrates Court, confirmation of Workers' Compensation Commissioners, and amendments to the Rules of Civil Procedure are but a few of the issues weighed in on this year. Changes to these laws and others can impact significantly our practice of law so it is essential to maintain connections with our legislators.

Thank you to the members and staff of the General Assembly and the numerous Judges who came out to enjoy great food and visit with many members of the defense bar.

# Annual Summer Meeting
## Renaissance Hotel, Asheville, NC
## July 28-30

by Claude T. Prevost III

The SCDTAA Summer Meeting is scheduled for July 28 through July 30 at the Renaissance Asheville Hotel in downtown Asheville, North Carolina. The Renaissance is walking distance to Asheville's famous craft beer breweries, exceptional restaurants, and great sightseeing the downtown area has to offer. Also, this year's hotel rate is reduced from previous years. We hope lawyers and their firms will take advantage of the discounted rate and convenient location that this year's Summer Meeting has to offer. Many Judges and Commissioners will attend and/or speak and numerous topics, including Cybersecurity, Presidential Politics, and the Charleston Tragedy will be discussed.

The Young Lawyers will also be sponsoring a silent auction to benefit legal charities in South Carolina. We need your help in collecting auction items to benefit these charities. Please let us know if you or someone you know can donate auction items this year. Please be on the lookout for emails and other announcements on how you can participate in the live auction.

If you would like to be involved in the YLD, please send your contact information to Aimee Hiers (aimee@jee.com) so you can be included on email announcements and have the opportunity to get involved in the SCDTAA. We will send additional announcements for YLD events scheduled for later this year. If you have any questions about the YLD, please contact me any time.

## Tentative Agenda

### Thursday, July 28th

| | |
|---|---|
| **3:00 pm – 5:00 pm** | **SCDTAA Board of Director's Meeting** |
| **4:00 pm – 5:30 pm** | **Young Lawyers Division Meeting** |
| **4:00 pm – 7:00 pm** | **Registration Desk Open** |
| **6:00 pm – 9:00 pm** | **SCDTAA Children's Program** |
| **6:30 pm – 8:00 pm** | **Welcome Reception and Silent Auction** |

### Friday, July 29th

| | |
|---|---|
| **8:00 a.m. – 12:00 p.m.** | **Registration Desk Open**<br>**Exhibit Hall Open** |
| **8:15 a.m. – 8:30 a.m.** | **Welcome and Announcements**<br>*William S. Brown, President SCDTAA* |
| **8:30 a.m. – 9:30 a.m.** | **Ethics/Mental Health Wellness: Taking Action: Recognizing & Responding to Depression, Suicide & Substance Abuse in the Legal Profession**<br>*C. Stuart Mauney, Esq.* |
| **9:30 a.m. – 10:15 a.m.** | **Substantive Law Breakout**<br>Business/Corporate Law<br>ADR |
| **9:30 a.m. – 10:15 p.m.** | **Workers' Compensation Breakout** |
| **10:15 a.m. – 10:30 a.m.** | **Break** |
| **10:30 a.m. – 11:15 a.m.** | **Cybersecurity and Data Management for Attorneys: Are you Prepared for the Inevitable?**<br>*Marc C. Tucker, Esq.* |
| **11:15 a.m. – 12:00 p.m.** | **The Future of Courts - Thoughts on Shaping and Using the Justice System of the Future**<br>*The Honorable John C. Few, South Carolina Supreme Court* |
| **12:20 p.m.** | **Golf Tournament** |
| **12:30 p.m. – 4:00 p.m.** | **Urban Zipline Adventure** |
| **12:30 p.m. – 4:30 p.m.** | **Horseback Riding** |

Continued on next page

YOUNG LAWYERS UPDATE

# Get Involved in the YLD

by Claude T. Prevost III

The Young Lawyers Division of the SCDTAA provides opportunities for lawyers in the early years of their practice to meet other lawyers, build relationships, and to get involved in the SCDTAA. I would like to thank Trey Watkins with Wall Templeton & Haldrup, PA, for his exemplary leadership as the YLD President 2014-15. Derck Newberry with Hall Booth Smith, PC is the President-Elect of the YLD. There are other notable young lawyers who have taken a leadership role in SCDTAA and its committees:

- David Marshall (Annual Meeting/Marketing)
- Trey Watkins (Sponsorship /Membership and Diversity/Boot Camp)
- Sheila Bias (Sponsorship /Membership and Diversity)
- Jared Garraux (Marketing)
- Alan Jones (DefenseLine/Amicus Curiae/Website)
- Geoff Gibbon (DefenseLine)
- Breon Walker (Women in Law/Substantive Law)
- Derck Newberry (Substantive Law)
- John Hawk (Amicus Curiae/Website/Corporate Counsel)

Any young lawyer participation in SCDTAA committees or events is welcomed and appreciated.

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| | |
|---|---|
| **12:30 p.m. – 1:30 p.m.** | **Women in the Law Reception** |
| **6:30 p.m. – 9:00 p.m.** | **Bluegrass, Blue Jeans and Barbeque on the Blue Ridge** |

## Saturday, July 30th

| | |
|---|---|
| **7:30 a.m. – 12:30 p.m.** | **Registration Desk Open**<br>**Exhibit Hall Open** |
| **7:45 a.m. – 8:15 a.m.** | **Breakfast with the Commissioners** |
| **8:15 a.m. – 8:30 a.m.** | **SCDTAA Membership Meeting** |
| **8:30 a.m. – 9:30 a.m.** | **South Carolina Circuit Court Judicial Panel**<br>*The Honorable Robert E. Hood*<br>*The Honorable Tanya A. Gee*<br>*The Honorable Perry H. Gravely*<br>*The Honorable Jocelyn T. Newman* |
| **9:30 a.m. – 10:15 a.m.** | **The State of the Judiciary**<br>*The Honorable Chief Justice Costa Pleicones*<br>*South Carolina Supreme Court* |
| **10:15 a.m. – 10:30 a.m.** | **Break** |
| **10:30 a.m. – 11:30 a.m.** | **Workers' Compensation Breakout** |
| **10:30 a.m. – 11:00 a.m.** | **Substantive Law Breakouts**<br>Employment Law<br>Torts/Insurance |
| **11:00 a.m. – 11:45 a.m.** | **Mother Emanul AME: The Untold Story and Lessons Learned from the Charleston Tragedy**<br>*Laura J. Evans, Esq.*<br>*2016 Pro Bono Award Recipient, South Carolina Bar* |
| **11:45 a.m. – 12:30 p.m.** | **Governmental Roundtable – Election Year**<br>*Bakari T. Sellers, Strom Law Firm, CNN Contributor*<br>*Hollis "Chip" Felkel, The Felkel Group*<br>*Senator Shane Massey, Esq.* |
| **12:30 p.m.** | **Adjournment** |

# Spring 2016 Legislative Update

by Jeffrey N. Thordahl, SCDTAA Lobbyist

It has been a busy year at the South Carolina Statehouse perhaps dominated by the discussion surrounding how to increase funding to our roads and bridges as well as how to reform the governance of the Department of Transportation. However, there are many more issues being debated including several of great relevance to the SCDTAA this year.

## Workers' Compensation

Hearings on reappointments for two Commissioners whose terms expire June 30th have been held this year. The first one was for Commissioner Melody James and was short and efficient. The Judiciary Committee gave her a favorable recommendation by a vote of 9-0, with twelve abstentions. However, Commissioner Susan Barden's reappointment hearing was somewhat lengthy and involved testimony by Commissioner Barden as well as attorneys both supporting and opposing her reappointment. In the end the subcommittee moved her reappointment out of committee to the Full Senate Judiciary Committee where it was taken up on April 5th. Commissioner Barden was subsequently reappointed.

Many readers may be curious about the so-called "opt out" Workers' Compensation bills that were introduced in the 2015 Legislative Session (H.4171, H.4197, and S.674). While there is an organization with retained lobbyists to advocate for the bills there has been no legislative activity this year on any of the bills. They will need to be re-introduced next year if there is any interest left in them. It is fair to say the bills are inactive and no further action is anticipated this year.

## Magistrates Court

Two bills involving magistrates and magistrate's court have been the subject of attention this year but only in the House of Representatives. A bill, H.4457, which as introduced would have increased magistrates civil jurisdiction to $15,000, was amended to $25,000 in committee. However on the floor of the House, due in large part to the great effort of Representative Bruce Bannister, the bill was amended back to $15,000. The bill was sent to the Senate and referred to the Senate Judiciary Committee where it has not been scheduled for a subcommittee hearing. As it is already getting late in the session it may not go before a subcommittee this year.

H.4665 would require magistrates to be screened by the Judicial Merit Selection Commission. While it passed the House, like the previous bill, it has not been the subject of any further activity in the Senate.

## Budget

Last year the General Assembly funded two new at-large family court judge seats and this year the legislation authorizing them has passed the House and is pending before the Senate Judiciary Committee (H.4877). In addition, in this year's House Budget the House authorized funding for three new circuit court judges and staff. The budget is now being worked on in the Senate.

Judicial salary raises are again a topic of discussion this year. Chief Justice Costa Pleicones requested pay raises of 20% for all judges this year which amounts to roughly $5.5 million per year. Unfortunately the House budget did not include the pay raise. In recent years, where most other state employees are seeing 0-3% pay raises, it has been hard to convince the General Assembly to significantly increase judicial salaries by a one-time amount. The Senate could still include a raise in their budget.

## Judicial Elections

As is well known, Associate Justice John Few was elected to the State Supreme Court. The election was required to fill the vacancy left by the retirement of Chief Justice Jean Toal and the resulting election of former Associate Justice Costa Pleicones to the chief justice position. With the upcoming retirement of Chief Justice Pleicones, another vacancy will be created in the Chief Justice Seat. Current Associate Justice Don Beatty is the only judge who filed for the Seat. After the election most likely in May, he will become the Chief Justice.

## Elections

Finally it cannot be overlooked that elections will be held this year for all House and Senate Seats. Filing for the seats closed on March 30th. An initial look seems to indicate more primary races than usual. Notably SCTDAA Board Member Senator Shane Massey has a primary opponent. All filing results are available on the Election Commission Website - https://info.scvotes.sc.gov/Eng/Candidate/SelectElection.aspx.

INTERVIEW

# An Interview with the DRI Women in the Law Chair Lana A. Olson

by Patricia J. Trombetta

The DRI Women in the Law Committee has been chaired for the last two years by Lana A. Olson, a partner at Lightfoot, Franklin & White, LLC. Her chairmanship ended in October 2015, when she turned her gavel over to Heidi Friedman, a partner at Thompson Hine LLP. Recently, Lana took the time to sit down with me and talk about the Committee, its history, its present and future, as well as its purpose and goals.

The Women in the Law Committee ("WITL")of DRI officially came into being five years ago due to a strong commitment by DRI to foster the advancement of women in the profession and, more importantly, to create a place where women can obtain the tools to deal with issues that are unique to them. As Lana explains, the Committee grew out of the Sharing Success Seminar, which began in the 1990s, disappeared after a few years, and was resurrected by a new group of women in the 2000's. The response to the Sharing Success Seminar was so amazing that these dedicated women decided there needed to be more than a once-a-year seminar because, as great as it was, there was a void that needed to be filled. DRI gave its blessing to start this stand-alone Committee in early 2010, and it is considered a "broad range committee" since it cuts across every type of practice area.

Although the mission statement of the Women in the Law Committee has been refined since its inception, it can best be described now as a network for women lawyers that includes professional and personal development. In essence, it is about helping women lawyers succeed. Its goal is to be a positive influence and a connection for women lawyers. The Committee focuses on the positives, while acknowledging the negatives that affect women in the profession. What makes this Committee different is the fact it does not encourage the defeatist mentality; rather, it serves as a guidepost for ideas to overcome the issues that women lawyers often face. For example, the WITL Committee provides education, training, mentoring and information-sharing about how women can become better lawyers, better businesswomen, develop more business, and tackle internal challenges within their firms or companies (succession planning, origination credits, etc.).

One thing the WITL Committee does not want to be is an organization limited to women lawyers, despite its focus on them. It is important to have men as part of the conversation, because, as Lana says, "frankly some of the changes necessary in the profession cannot change just by women working on the issues." The WITL Committee is far from an exclusive "sorority," but rather a place where both genders are welcome, and their feedback is important. There are a number of men who are members of the WITL Committee, such as John Trimble, a partner at Lewis Wagner LLP. As the chair of the Law Practice Management Committee, John has been involved in multiple areas of the WITL Committee and is an outspoken advocate of the importance of the WITL Committee to him as a male attorney (and father of a female lawyer). The WITL Committee is focused on helping women succeed, and both men and women need to be involved in that conversation together for that to happen.

As chair of the Committee, Lana was involved in multi-day leadership conferences within DRI and established great connections with other Committee leaders within the organization. Through these connections, Lana was able to help foster leadership opportunities for WITL members in other substantive committees and DRI boards during her two-year tenure. Lana sees lots of opportunities for the DRI Committees to connect and coordinate to help promote women within the organization. One of the key goals of the WITL Committee is to help provide leadership opportunities, not just within the WITL Committee, but in other areas within DRI as well. Two years ago, the WITL Committee started a Promotion and Leadership subcommittee whose function is to identify and promote great women, not only to the WITL leadership, but to other Committees and Boards. The purpose is to help WITL members obtain leadership skills, get leadership training, meet other DRI leaders, and plan a pathway for whatever it is they want to do.

Although the WITL Committee can help women with leadership skills and opportunities, the Committee is in and of itself a valuable asset to women lawyers for business development. There are not only business referrals within the WITL Committee community through a referral directory that is open only to members of the Committee, but also a community page that comes out daily via e-

mail. There is a Rainmaker's Corner weekly post that is a staple on the community page providing links to articles on business development as well as practical advice from successful rainmakers. In addition, the Committee sponsors free quarterly teleconferences called "Opportunity Calling" that address in-depth issues that can assist with business development and networking skills, such as how to use your LinkedIn account more effectively, communication skills for lawyers, negotiation skills, and how to run a business, to name just a few.

In addition to the daily community page and quarterly teleconferences, every year in February, the WITL Committee holds a seminar to provide complete immersion into the issues important to women in the profession. Over 300 women from all over the country attend this annual seminar, which was held in Scottsdale, Arizona, on February 17-19, 2016, at the Omni Moteluccia Resort & Spa. This year, there were great topics, including an interactive presentation and workshop by Patricia Gillette, a partner at Orrick, Herrington & Sutcliffe, along with several great rainmakers and in-house counsel on how to be a better rainmaker. There also was a multi-part session on damages, with in-house counsel discussing setting reserves and the internal wrangling that goes on when a complaint is filed and strategy on how to deal with damages at trial. The discussion included in-house counsel from Walmart and CNA, as well as several other seasoned trial lawyers. Nationally known scholar and women's advocate, Joan Williams, a professor at UC Hastings College of the Law, presented on the issue of unconscious bias, an issue that no lawyer, male or female, should ignore. Other sessions dealt with succession planning and leadership and executive development.

WITL's future plans include the creation of a toolkit to assist State and Local Defense Organizations (SLDOs) with creating, maintaining or improving their women's committees. As part of this project, WITL is presently putting together a comprehensive list of women speakers on a variety of topics that will provide these local organizations with vetted women speakers and topics that are ready for their own seminars. The ability to record and have a podcast on various topics is already in the works for the near future, with research already being conducted to identify topics that the members want to hear. These are just a few of the great things that are in store for the members of the WITL Committee. There are wonderful things on the horizon for the WITL Committee. I am excited to be a part of this Committee and to have the opportunity to work with some spectacular women lawyers, all pushing other women to greatness.

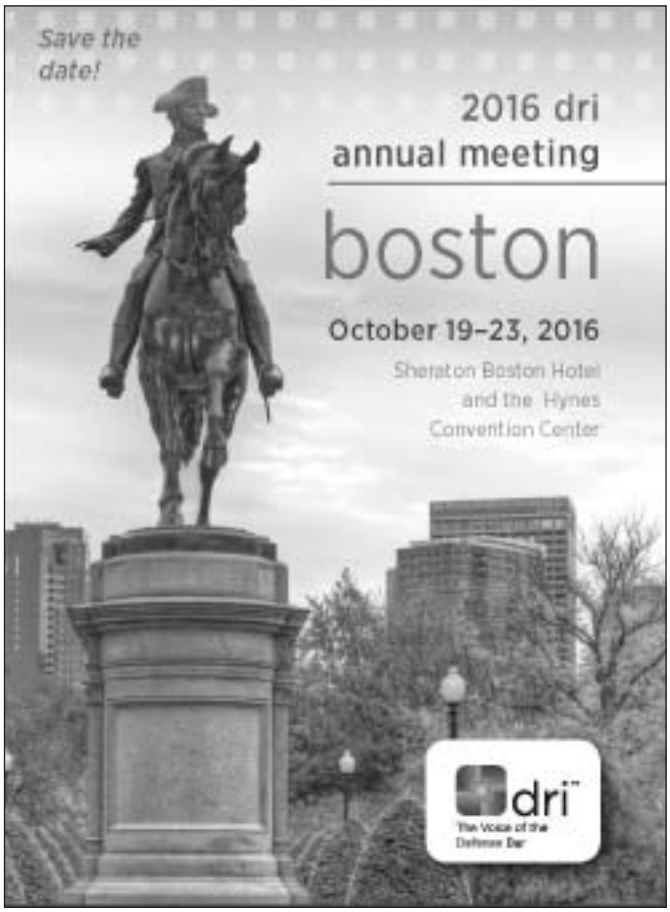
Please consider becoming involved with us. If you would like to get involved with the WITL Committee, please contact Lindsey Mignano at Lindsey.Mignano@clydeco.us. If you need more information about the upcoming seminar in February, please contact Kelly Williams (kwilliams@psmn.com), Kirsten Small (ksmall@nexsenpruet.com), or Janet Hickson (jhickson@shb.com). And, thank you, Lana, for all your hard work and devotion to women lawyers.

# DRI Update

by Gray T. Culbreath

For each issue that I write the DRI report, I wonder how often any of you read it. And more importantly, how many of you that regularly read this are actively engaged in DRI. I've been a DRI member since returning to South Carolina in 1992. Over the years I have had the opportunity to take advantage of many of the fine offerings that DRI has made in terms of CLE, programming, and networking. Many of you do the same, but many of you do not. Too often, this column is an update on what we do as opposed to a column on why you should engage in it. So let me back up from my prior columns and suggest that you should become engaged.

We all live in a professional world in which the focus is on building your book of business. That is true whether or not you are an associate seeking to become a partner, a partner seeking to grow that book, or a wise law firm leader seeking to grow your firm and ensure its future and vitality. For each of you in that station of life, DRI offers something for you. For the associate, the key to you building that book is often a network. We are often really good at networking with people we know in our home town or our state, but sometimes don't realize that new client or that new case may be sitting with someone that we don't know in an office in Nashville or Sacramento or Salt Lake City. Do you have a plan to meet that person? Do you have a mechanism to meet that person? In your office, you may have marketing expectations albeit with no marketing budget. That marketing could be writing. It could be participating in a committee. DRI gives you the opportunity to do all of those things. With multiple Substantive Law Committees and opportunities for leadership, this is a perfect time for a young lawyer to join DRI and participate. If you are a member of SCDTAA and a young lawyer, you can join DRI free for a year as well as get a voucher good to attend one free seminar. That is an almost $800.00 value. Have you taken advantage of that? If not, why not? If you want more information about this, please reach out to me and I will do everything I can to make you a member of DRI.

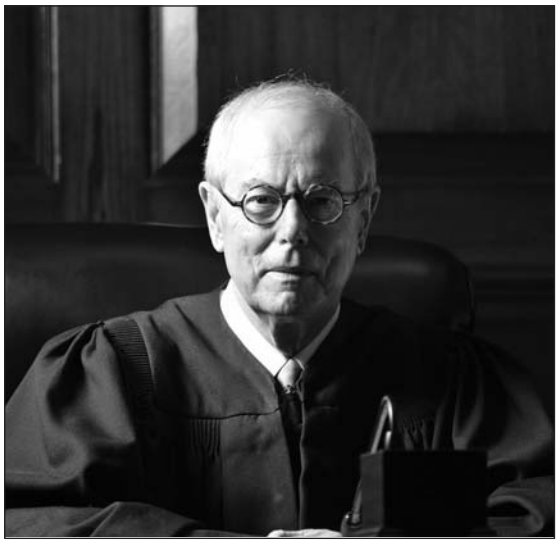



Maybe you're not a young lawyer, but instead a young partner looking to develop a practice. Have you been successful in doing that? Do you have all the tools to do it? Are you in need of some additional help, whether it be through networking, knowledge or client contact? Once again, DRI can provide you with all of those. If you are a member of SCDTAA and never joined DRI, you can join DRI for free for a year. There are many opportunities available to build your practice, meet others, or simply get involved.

Finally, for law firm leaders trying to build their firms, or prepare their firms for the coming challenges that face the practice of law, DRI is an excellent vehicle to stay abreast of those trends. Whether it be data breach, diversity or the ever emerging and robust Women and the Law Program, DRI gives you a snapshot into what the future of law looks like and helps you to prepare to be on the cutting edge of the same. I encourage you to take advantage of all these opportunities.

DRI is about to be become "South Carolina heavy" for the next two years. Our own John Cuttino will take over as President of DRI at the annual meeting in Boston this October. He will be followed by John Kuppens the following year. The upcoming annual meeting in Boston is going to be outstanding and I want to encourage all of you to go to this first time meeting of the DRI in Boston. If you have any questions about this, about membership or about anything else, please do not hesitate to contact me.

# The Honorable Costa M. Pleicones
## South Carolina Chief Justice



Chief Justice Costa M. Pleicones was born in Greenville, South Carolina, on February 29, 1944. He is the son of Lecha Pleicones and Mike Pleicones, both deceased.

Chief Justice Pleicones grew up in Columbia, South Carolina, attending its city schools through graduation from Columbia High School in 1961. He then attended Wofford College, from which he graduated in 1965 with a B.A. degree in English. Following graduation from Wofford, Chief Justice Pleicones attended the University of South Carolina School of Law, from which he received a Juris Doctor degree in 1968.

After law school, Chief Justice Pleicones entered the United States Army, serving both as an enlisted member and as an officer in the Judge Advocate's General Corps, until his release from active duty on March 1, 1973. Justice Pleicones continued his membership in the military until retirement from the United States Army Reserve at the rank of Colonel, in March 1999 after more than thirty years of active and reserve service.

Upon leaving active military service, Chief Justice Pleicones entered practice as a public defender for Richland County, South Carolina. Later, while in private practice with Lewis, Babcock, Pleicones and Hawkins, he also served as a part-time municipal judge for the City of Columbia, and as County Attorney for Richland County. In 1991 he was elected Resident Circuit Court Judge for the 5th Judicial Circuit. He served as a circuit judge from July 1, 1991, until March 23, 2000, when he was elected an associate justice of the Supreme Court of South Carolina. On May 27, 2015, Chief Justice Pleicones was elected as Chief Justice of the Supreme Court of South Carolina, and assumed office on January 1, 2016, a term which will end with his retirement on December 31, 2016.

Chief Justice Pleicones is admitted to practice before all South Carolina Courts, the United States District Court for the District of South Carolina, the United States Court of Appeals for the Fourth Circuit, the Court of Appeals for the Armed Services, and the United States Supreme Court. He is frequently called upon as a lecturer in CLE programs conducted by the South Carolina Bar and other professional organizations.

**What factors led you to a career in the law?**

With a bachelor's degree in English, I needed some credential that would lead to gainful employment. I had always been fascinated with the courtroom, and had observed many court proceedings while still in high school, as Columbia High was less than a block from the courthouse.

**What has been the biggest influence in your legal career?**

Probably the experience of having both prosecuted and defended criminal cases within three years of graduation from law school. I learned from these opposing functions lessons in principled advocacy. By that I mean a lawyer should always seek to recognize and acknowledge not only the weakness in opposing counsel's position, but also the strengths. Acknowledging the virtues of an opponent's position is not a weakness and leads to a more civil discourse.

**What advice do you have for lawyers preparing to argue in front of the Supreme Court of South Carolina?**

Leave the jury arguments at home. Concentrate less on the facts, which we know, and more on why you should prevail.

**What do you enjoy doing in your spare time?**

I stay busy with my duties on the Wofford Board of Trustees, watching Gamecock and Terrier sporting events, and doing several crossword puzzles daily.

**What are you looking forward to the most about retirement from the bench?**

Seeing what new challenges and opportunities may be out there. I have no specific plans except for a little more travel.

**What is your favorite television show?**

Chicago PD - it is the best show currently on network television. Though there are plenty of great Amazon, Netflix, and cable shows I have no time to watch.

**What was the last book you read?**

Worthy Fights by Leon Panetta.

# PAC Golf Classic Recap

by J. Andrew Delaney

The 6th annual SCDTAA PAC Golf Classic was held on March 31, 2016, at the Spring Valley Country Club in Columbia, South Carolina. This Captain's Choice format tournament was originally scheduled for September 2015 but was postponed due to heavy rains. This year's tournament sponsor was once again SEA Limited. CompuScripts sponsored the hole in one contest. Additional sponsors included EveryWord Court Reporting; Copper Dome; McKay Cauthen; Wall Templeton and Haldrup; Murphy & Grantland; Sowell Gray; and Rimkus. Committee chairs, Johnston Cox and Andy Delaney, along with Anthony Livoti and Executive Director Aimee Hiers worked to put on a successful event. Low gross went to the McAngus Goudelock & Courie team of Mark Allison, Fred Oliver, Bo Williams and Blake McKie. The first place net went to the team of Rob Tyson, Will Jordan, Paul Hoefer and Bob Horner. The closest to the pin was won by Howard VanDyne.

Thank you to the folks at Spring Valley for their hospitality in hosting the tournament and to all our sponsors and participants. We look forward to seeing you all again at the 2017 South Carolina Defense Trial Attorneys' Association PAC Golf Classic tentatively set for the spring.



ARTICLE

# Is it Still a Rose? The Effects of the *Stoneledge* Decision on Construction Defect Actions in South Carolina[1]

by William "Trey" W. Watkins, Jr and Katherine A. Stanton [2]

*Watkins, Jr.*

*Stanton*

**"[A] rose by any other name is still a rose…regardless of the title given…" [3]**

For years, the District Court of South Carolina has held that a litigant cannot disguise a claim as a negligence claim when in fact it is a claim for indemnity.[4] The two claims must be separate and distinct to both survive through judgment.[5] Recently, the South Carolina Court of Appeals adopted the District Court's rationale when it had an opportunity to address similar issues in *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015) (Stoneledge I) and *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.,* 413 S.C. 630, 635-37, 776 S.E.2d 434, 437-38 (Ct. App. 2015), *reh'g denied* (Sept. 14, 2015) (Stoneledge II) (collectively referred to as the "Stoneledge Appeals").

The Stoneledge Appeals both arise out of the same construction defect action brought by the homeowners association at Stoneledge at Lake Keowee against one of the general contractors, Marick Home Builders, LLC ("Marick"), and its subcontractors. Marick cross-claimed against its subcontractors for negligence, breach of contract, breach of warranty, contractual indemnification, and equitable indemnification. The subcontractors filed motions for summary judgment arguing Merrick's cross-claims were nothing more than masked claims for indemnity. The circuit court granted the motions and Marick appealed.

Stoneledge I addressed the circuit court's grant of Defendant Clear View Construction, LLC's ("Clear View") motion for summary judgment for Marick's crossclaims of negligence and equitable indemnity.[6] On appeal, Marick argued that its negligence cross-claim was a separate cause of action from its equitable indemnity claim; however, the Court of Appeals disagreed. Marick's allegations of negligence were dependent upon the Plaintiff prevailing against the general contractor, Marick.[7] The Court of Appeals noted "Marick's allegations demonstrate it did not sustain its own damages as a result of any negligence by the respondents. Rather, the allegations show Stoneledge is the party that suffered damages, and Marick's injuries arose exclusively from having to defend itself in Stoneledge's lawsuit."[8]

Citing to the circuit court's reliance on *Stone* and *USF&G*, the Court of Appeals held Marick's negligence claim was nothing more than a revised claim for indemnity. Thus, the Court found the negligence crossclaim was not an independent cause of action but rather a claim for equitable indemnity.[9]

The Court of Appeals applied the same analysis in Stoneledge II. In that action, the Court of Appeals addressed the circuit court's grant of the cross claimants' motions for summary judgment for Marick's crossclaims of breach of contract and breach of warranty.[10] On appeal, Marick argued its breach of contract and breach of warranty claims were separate and distinct causes of action from its equitable indemnity claim. However, Marick's allegations were dependent upon the Plaintiff prevailing against the general contractor, Marick.[11] The Court of Appeals held the allegations themselves demonstrated the breach of contract and breach of warranty claims were not independent claims because Marick did not sustain its own independent damages resulting from any breach.[12]

The Court explained Marick's damages for breach of contract and breach of warranty were all dependent on whether or not Stoneledge suffered damages

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**ARTICLE CONT.**

due to a breach by Marick.[13] If Marick was held to have breached its duties to Stoneledge, only then would Marick have damages against its subcontractors.[14] As such, Marick's claims were simply claims for equitable indemnity.[15]

Both Stoneledge Appeals illustrate a laundry list of causes of actions that are nothing more than masked claims for indemnity subject to motions for summary judgment. However, the Stoneledge Appeals do not stand for the contention that all construction defect claims will automatically be held to be masked claims for indemnity. For example, when a general contractor has an independent breach of contract action against it subcontractors that is independent of the general contractor being found liable to the owner, then those independent actions and damages should survive summary judgment. As such, the Stoneledge Appeals do not hold that a general contractor can only maintain claims for indemnity or contribution against its subcontractors in a construction defect case. Rather, a party must have an independent cause of action and damages to prevail on a claim other than indemnity.



## Footnotes

1 This article is for general informational purposes only. It does not necessarily express the opinions of the firm or any of its attorneys or clients. This article is not intended to be used as a substitute for specific advice or opinions as each case and its circumstances are different.

2 Trey Watkins is a shareholder in the Charleston office of Wall Templeton & Haldrup, P.A. with a practice focused Insurance defense including construction disputes, serious personal injury, and complex litigation. Katie Stanton is an associate at Wall Templeton & Haldrop, P.A. practicing in complex litigation, commercial litigation, and construction.

3 *South Carolina National Bank v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990)

4 *Id.; see also United States Fidelity & Guaranty Co. v. Patriot's Point Development Authority*, 788 F. Supp. 880 (D.S.C.1992) ("USF&G").

5 *See generally Id*.

6 *Stoneledge I*, 413 S.C. 615, 776 S.E.2d 426.

7 Marick alleged that the subcontractor's negligence caused Marick "to incur attorneys' fees, costs, and face potential liability to [Stoneledge]." The cross-complaint also stated, "Should [Stoneledge] prevail on [its] claims, Marick ... is entitled to recover ... legal fees and costs or [any amount it is] ordered to pay to [Stoneledge]." *Stoneledge I*, 413 S.C. at 621, 776 S.E.2d at 429.

8 *Id*.

9 *Id*. at 622, 776 S.E.2d at 430

10 *Stoneledge II*, at 635, 776 S.E.2d at 437.

11 Marick alleged the following:

"If [Stoneledge's] allegations are true, ... [the respondents] have provided defective materials or services in breach of *636 each of their contracts with Marick.... [S]aid breach of contract has resulted or could result in damage to [Stoneledge], which could or will be assessed against Marick."

"If [Stoneledge's] allegations are true ..., [the respondents] breached their express and/or implied warranties.... Should [Stoneledge] prevail on [its] claims, Marick will be damaged as a direct and proximate result of [the respondents'] breach of their express and/or implied warranties."

*Stoneledge II*, at 635-36, 776 S.E.2d at 437.

12 *Id.*

13 *Id.*

14 *Id*.

15 *Id*.

ARTICLE

# The Telephone Consumer Protection Act (TCPA): Necessary Expansion of Liability or Increased Exposure for Legitimate Business Practices

by Michael Cashman and Shana Oppenheim[1]

The Telephone Consumer Protection Act (TCPA)[2] was passed in 1991 after Congress determined that federal legislation was needed because telemarketers, by operating interstate, were escaping state-law prohibitions on intrusive, nuisance calls. The TCPA authorizes States to bring civil actions to enjoin prohibited practices and recover damages on their residents' behalf, and vest jurisdiction of this actions in the federal courts.[3] The TCPA also provides a private right of action in state or federal courts for violations of the Act or its regulations.[4] In response to rapidly expanding telecommunications technology, the Federal Communications Commission (FCC) recently released an Omnibus Declaratory Ruling and Order that potentially expands liability for business-to-consumer calls and text messages. Numerous petitioners filed a joint appeal of that order in federal district court in Washington, D.C., and while now fully briefed, the appeal remains pending. As lawsuits alleging violations of the TCPA are increasing, this article provides a brief overview of the TCPA and how the FCC operates to enforce the act, the relevant cases and developments up to the July 2015 Order, and a brief summary of TCPA cases filed in South Carolina since its inception.

## South Carolina Litigation

TCPA litigation has been increasing for many years. One study estimated "that TCPA lawsuits rose by 63 percent in 2012 alone."[5] South Carolina is no exception, particularly in the number of private TCPA claims brought. The popularity of these suits may be due to the fact that statutory damages under the TCPA may be awarded per violation with no maximum cap. As of January 2016, fifty-three cases have been brought in S.C. District Court. Of those fifty-three, sixteen settled, two were dismissed pursuant to judgments, nineteen were dismissed with no further cause given, one was transferred to another district court, and fourteen remain open. Of the open cases, six have filed motions to certify class, one has been denied and the others remain to be ruled.

## History & Background of the TCPA

In 1990, the Federal Communications Commission (FCC) received over 2,300 complaints regarding telemarketing calls.[6] In response, Congress enacted the TCPA in 1991[7] with the intent to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls" and "to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers."[8] These telemarketing calls and faxes were seen as an invasion of privacy, which tied up phone lines, and shifted the cost of advertising onto the recipients who had no prior relationship with the caller.[9] The TCPA limits telephone solicitation (e.g. telemarketing) and the use of automated telephone equipment as well as the use of automatic dialing systems, prerecorded voice messages, SMS text messages, and fax messages.[10] It further authorizes the recovery of damages, up to $500 per call, message, and fax, or up to $1,500 per communication sent in willful violation of its restrictions.[11]

*Cashman*

*Oppenheim*

## FCC and Enforcement of the TCPA

The Federal Communications Commission (FCC) was tasked with prescribing regulations to implement the TCPA.[12] The FCC "regulates interstate and international communications by radio, television, wire, satellite and cable."[13] Under the FCC rulemaking process, when Congress enacts a law affecting the field of telecommunications, the FCC develops and adopts rules to implement that law.[14] The FCC's process is focused on offering consumers the opportunity to participate in the development of those rules.

- *Notice of Inquiry (NOI)*—the FCC releases an NOI to gather information and generate ideas on a specific issue. They can be initiated by the Commission or by an outside request.
- *Notice of Proposed Rulemaking (NPRM)*—the FCC may issue a NPRM with proposed changes to the rules and the purpose of seeking further public comment to the proposals.

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ARTICLE CONT.

- *Further Notice of Proposed Rulemaking (FNPRM)*—the FCC may issue a FNPRM to address specific issues raised in the NPRM comments.
- *Report and Order (R&O)*—the R&O can "develop new rules, amend existing rules," or make a decision to do nothing. The Federal Register contains summaries of the R&O, which also contains information regarding when a rule change will become effective.

The FCC's role is not limited to developing and implementing regulations under the TCPA, it may also "start a proceeding when an outside party files a petition seeking a new law or change in existing rules."[15] Further, as noted above, the TCPA authorizes plaintiffs to bring a private right of action for actual and statutory damages.[16]

## Relevant Cases & Developments Leading up to July 2015

Over the years, the FCC has issued various TCPA rulings dealing with the scope and application of the TCPA. This section provides a brief summary of the most relevant FCC and court rulings leading up to FCC's July 2015 Omnibus TCPA order.

- *Federal Communications Commission, 1992 TCPA Order*—the FCC required telemarketers to maintain do-not-call lists. The FCC also limited calls to certain hours of the day.
- *Federal Communications Commission, 2003 TCPA Order*—the FCC and the Federal Trade Commission (FTC) put in place a national do-not-call registry.[17] Additionally, the FCC added predictive dialers—which assist in predicting when the consumer will be available to take a call—were included in the definition of auto-dialers.[18] Finally, the FCC included text (SMS) messages as "calls" under the TCPA.[19]
- *Federal Communications Commission, ACA Declaratory Ruling, 2008*—the FCC clarified that prerecorded autodialed messages to cell phone numbers, which are provided to a creditor in connection with existing debt, are calls made with the "prior express consent" of the called party, and as such are an exception to TCPA liability.
- *Satterfield v. Simon & Schuster, Inc. (2009)*—Text Messages is TCPA Calling

  The 9th Circuit held that a text message to a cellphone is a call for the purposes of the TCPA.[20]
- *Griffith v. Consumer Portfolio Serv. (2011)*—Prohibited Predictive Dialing Without Human Intervention

  The Northern District of Illinois held that the TCPA prohibited—as an automatic dialing system—the use of predictive dialing software on equipment that dials telephone numbers without human involvement.[21]
- *Ibey v. Taco Bell Corp. (2012)*—Confirmatory Opt-Out Text Message

  In 2012 the United States District Court for the Southern District of California held that an opt-out text message does not violate the TCPA.[22] The opt-out text message in this case was sent by the Plaintiff who responded to a survey regarding Taco Bell and changed his mind mid-way through, sending a "STOP" message to signal his intent.[23] He received a confirmatory text from Taco Bell acknowledging that he would receive no further messages. That opt-out confirmation was not a violation of the TCPA.[24]
- *Federal Communications Commission, 2012 TCPA Order*—the FCC revised its definition of "prior express consent" to require the consumer provide written consent to autodialed or prerecorded telemarketing calls to cell phones.
- *Federal Communications Commission, SoundBite Declaratory Ruling, 2012*—the FCC created an exception to the TCPA for single-confirmatory text messages sent in response to a consumer's opt-out request.
- *Nelson v. Santandar Consumer USA Inc. (2013)*—Preview Dialers

  On June 7 2013 the United States District Court for the Western District of Wisconsin vacated its opinion of March 8,[25] which previously held that preview dialers—whereby a person selects a telephone number by clicking on a computer screen and the system calls it—were automatic telephone dialing systems subject to regulation under the TCPA.[26]
- *Mais v. Gulf Coast Collection Bureau (2013)*—Prior Express Consent

  A unanimous 11th Circuit reversed the Southern District of Florida's ruling, which had previously departed from FCC guidance in applying the "prior express consent" requirement of the Telephone Consumer Protection Act.[27] The FCC's prior settled policy had deemed the voluntary provision of a telephone number sufficient to constitute prior express consent under the TCPA for contacting consumers through prerecorded calls.[28] The court clarified that prior express consent does not require direct consent and entertains no "meaningful distinction" between retail purchasers and medical patients filling out admission forms.[29] Further, the 11th Circuit concluded that the Hobbs Act precluded review by the district courts and granted the federal Courts of Appeal the exclusive power to review FCC Orders.[30] A recent Sixth Circuit case affirmed that prior express consent can be obtained via intermediaries.[31]
- *Federal Communications Commission, 2013, DISH Network Declaratory Ruling*—the FCC held that sellers may be held vicariously liable for violations of the TCPA committed by contractors under agency theory.

## The July 2015 Order

On July 10, 2015, the Federal Communications Commission (FCC) released the (TCPA) Omnibus Declaratory Ruling and Order, which potentially expands liability for business-to-consumer calls and text messages.[32] The Order resolved 21 petitions involving a variety of issues surrounding the enforcement and interpretation of the TCPA. When enacted, Congress appeared particularly concerned with the disruptive effect random/sequential autodialing services had on essential public safety services. An "auto-dialer" is "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[33] The TCPA prohibits calls made using an auto-dialer without first obtaining the express consent of the called party.[34] Overall, the TCPA "aimed to strike a balance between protecting consumers from unwarranted communications and enabling legitimate business to reach out to consumers that wish to be contacted."[35] As we move forward in the "digital age," the ambiguity surrounding the application of the TCPA with new technology created uncertainty as to what may constitute a violation. The FCC's July 2015 Order attempted to resolve some of these questions, and as a result may open the field of litigation further and expand the potential liability under the TCPA for businesses that utilize calls or text messages to communicate with consumers. The most significant changes in that Order are outlined below:

- Expanded the definition of auto-dialer "capacity" to include both the equipment's current and potential functionality as well as features that can be activated or de-activated or updated via software changes.

- Gave effect only to written consent given after the October 16, 2013 effective date of the rule change requiring written consent.

- Clarified ability and method by which consumers may revoke consent, concluding that "consumers may revoke consent in any manner that clearly expresses a desire not to receive further messages, and that callers may not infringe on that ability by designating an exclusive means to revoke."

- Clarified that calls placed to reassigned or wrong numbers—even when the prior number holder consented to receive such calls—are in violation of the TCPA. The FCC ruled that the caller must have the consent "not of the intended recipient of the call, but of the current subscriber (or non-subscriber customary user of the phone)." This is limited by the "one-call window" for auto-dialed calls to allow the caller to ascertain that the number has been reassigned. The window—although not giving actual knowledge of reassignment to the caller—is sufficient to give constructive knowledge.

- Included computer generated (internet-to-phone SMS text messages) in the definition of "calls" bringing them under TCPA regulation.

- Clarified that calling and texting platforms are not liable when the company "does not make or initiate a text when an individual merely uses its service to set up auto-replies to incoming voicemails." However, an app maker is a "calling party" under the TCPA if the app "automatically sends" calls or messages "of its own choosing [with little or no obvious control by the user."

- Created a safe harbor for one-time text messages responding to requests for information. The texts must be (1) "requested by the consumer"; (2) "one-time only messages sent immediately in response to a specific consumer request"; and (3) contain only the requested information "with no other marketing or advertising information."

- Created an exemption for calls or texts regarding bank fraud and healthcare emergencies. This is because such contacts are time-sensitive. Examples of bank fraud include: calls from financial institutions regarding suspicious transactions, identity theft, data-security breaches, and money transfers with additional steps. Examples of healthcare emergencies include: appointment and exam confirmation and reminders, and other closely related calls. Such calls must omit all marketing or advertising and "include information regarding how to opt out of future messages." The banking exemption is limited to "not more than three calls over a three-day period." The healthcare exemption is limited to one call or text message per day.

- Clarified that call-blocking technology is not forbidden to assist consumers from stopping unwanted autodialed calls.

Taken together this ruling potentially expands liability for companies engaged in auto-dialing, whether it be through traditional calls or more modern SMS text messages.

**Dissenting Opinions of Commissioners in the July 2015 Order**

The FCC is directed by five commissioners who are appointed by the President for five-year terms. Only three commissioners may be members of the same political party. Not surprisingly, the July 2015

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Order was subject to a number of dissenting opinions from the FCC five commissioner panel.[36]

***Dissent of Commissioner Jessica Rosenworcel (D-Conn.)***

Commissioner Rosenworcel dissented, in part, based on her view that consumer's desired fewer robo-calls.[37] For this reason, she disagreed with the carve-outs for "big banks, healthcare providers, and pharmaceutical companies."[38] Further, she believed the Commission would be placed in an untenable position of policing the speech made in these exempted calls when the same result could be accomplished through private contractual consent forms.[39]

***Dissent of Commissioner Ajit Pai (R-Kan.)***

Commissioner Pai dissented to the Order as a step in the wrong direction.[40] Viewing the TCPA as having "strayed far from its original purpose," Commissioner Pai accused the plaintiffs' bar of targeting "legitimate, domestic businesses" instead of illegal telemarketers, and "over-the-phone scam artists,"[41] and believed the Order may make abuse of the TCPA much easier for trial lawyers to the detriment of the American public.[42]

Pai based his dissent on the Order's interpretation of automatic telephone dialing systems.[43] As noted above, the TCPA defines an automatic telephone dialing system as "equipment which has the capacity" to dial sequential or random numbers at the time the call is made.[44] The Order, however, holds that an automatic telephone dialing system also consists of equipment that "*cannot* presently store or produce telephone numbers to be called using a random or sequential number generator and that *cannot* presently dial such numbers."[45] In other words, Pai found that the Order transformed the term "capacity" from a precise targeting mechanism to a broad license for plaintiff's lawyers to attack legitimate apps, software, and companies,[46] an outcome not intended by Congress in establishing the TCPA. Pai predicted this expansive definition will lead to an expansion of liability and interfere with "expected or desired communications between businesses and their customers."[47] Further, he found the Order will subject good-faith actors to liability due to the risk of calling re-assigned numbers to which the company previously had prior express consent to contact,[48] as the Order rejects the expected-recipient approach and endorses strict liability after a single attempt to call a number that has been reassigned to a new owner.[49] Finally, Pai believed the Order undermines federal Do-Not-Call rules with a carve-out for the prison payphone-industry to set up a billing relationship for future services.[50] Instead, Commissioner Pai recommended the FCC take forceful enforcement action against those who violate the federal Do-Not-Call rules, establish safe harbors, and shut down abusive law suits by closing loopholes.[51]

***Dissent of Commissioner Michael O'Rielly (R-NY)***

Commissioner O'Rielly dissented, in part, based on a theory that the Order was penalizing good-faith businesses attempting to reach consumers with modern technology.[52] Commissioner O'Rielly opined on the benefits of informational calls and texts specifically in the fields of health care, financial services, disaster-related communications, energy, and education,[53] and accused the Order of spreading liability too broadly and penalizing even good-faith companies.[54] Overall, O'Rielly writes that the threshold issue of whether or not the TCPA should apply to text messages is one that the FCC should have consulted Congress on for further guidance.[55] Specifically, O'Rielly disagreed with the interpretation of automatic telephone dialing systems stating that the Order impermissibly expands the definition beyond what the TCPA was originally concerned.[56]

**Responses to the July Order and Procedural Posture**

In one of the first decisions interpreting the TCPA's definition of automatic telephone dialing systems following the FCC's July 2015 Omnibus TCPA order, the Northern District of California held in *Luna v. Shac, LLC* that the defendant's dialing and texting platform did not constitute a prohibited auto-dialer.[57] Although the third-party mobile marketing company for a gentlemen's club used a web-based platform that had the ability to send text messages from pre-programmed lists it did not qualify as an automatic dialing system because the text message was sent to the user as a result of sufficient human intervention.[58]

***Appeal of the July 2015 Order***

On November 25, 2015, joint petitioners ACA International, Sirius XM, PACE, salesforce.com, Exact Target, Consumer Bankers Association, U.S. Chamber of Commerce, Vibes Media, and Portfolio Recovery Associates ("Petitioners"), filed the opening brief in the consolidated appeal of the July 2015 Order.[59] The Petitioners challenge the Order as "jeopardiz[ing] desirable communications that Congress never intended to ban," and "encourag[ing]" massive TCPA class actions seeking crippling statutory damages."[60] Following the lead taken by those Commissioners in dissent, the Petitioners challenge the Order on three fronts: (1) its interpretation of automatic telephone dialing system; (2) its rulings regarding reassigned numbers; and (3) its rulings regarding revocation of consent.

***The Statutory Definition of Automatic Telephone Dialing Systems***

The Petitioners argue that under the statue an automatic telephone dialing system is "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such calls."[61] Capacity, they argue, refers to present ability not potential future functionality.[62] Under the

TCPA's Order, the Petitioners argue, any smartphone could be modified into a random or sequential number generator, thus vastly expanding liability.[63] Petitioners urged that the plain language of the statue states that an automatic telephone dialing system must be able to "(1) generate random or sequential numbers; (2) use the generator to store or produce numbers to be called; and (3) dial those numbers," and furthermore be able to perform all of these tasks automatically.[64]

Petitioners also took issue with the vague nature of the Order's definition of "capacity" that includes "potential functions," which could be created by modifying equipment in cases where the potential functions are not too "attenuated" or "theoretical."[65] Petitioners contend the Order creates confusion and uncertainty with this definition and their illustration that a rotary phone is not an automatic telephone dialing system only exacerbates the issues.[66] Further, the "potential functionalities" test infringes on callers' First Amendment rights by "[t]hreatening crushing liability for millions of everyday calls simply because they came from devices that *could* be modified so that they *might* be able to generate random or sequential numbers . . .."

***Reassigned Numbers and Consent***

Petitioners further argue that the Order misinterpreted the critical TCPA defense—allowing calls if they are made "with the prior express consent of the called party"—and violated the First Amendment by interpreting "called party" to mean the current subscriber rather than the expected recipient.[68] Under the Order, callers are deterred from reaching out because of the possible liability if the caller "tries to reach a consenting customer but inadvertently reaches someone else to whom the customer's number has been reassigned."[69] This approach is unrealistic because "[t]here is no reliable way to ascertain whether a given cell phone number has been reassigned."[70] This "makes an empty promise of Congress's assurance that callers may lawfully contact willing recipients, and it chills constitutionally protected expression."[71] Further, the Order's safe harbor solution of allowing a single call to reassigned numbers before incurring liability is ineffective because "that call may not even hint that the number has been reassigned; a call may go unanswered, or a text message unreturned."[72] Petitioners urge the FCC to adopt the "expected recipient" interpretation of "called party."[73]

***Revocation of Consent***

Finally, Petitioners argue that the Commission's refusal to establish a "standardized and workable method of revoking consent" allows individuals to use whichever methods they prefer and the Commission or a jury ex post can conclude it was "reasonable" under "the totality of the facts and circumstances."[74] Such a system is unworkable and inefficient.[75] Further, the Commission "prevented callers and recipients from agreeing on a reasonable means of revocation," which flies counter to the common law concept of consent.[76]

***Procedural Posture***

The FCC's Final Brief for Respondents was submitted on February 24, 2016.[77] In it the FCC argues that the interpretation of auto dialers is consistent with the statutory text and need not be limited to "present capacity" because Congress did not use the word "present in the definition such that alternate definitions are available."[78] The FCC also argues that interpreting "called" party as "current subscriber" or "customary user"—instead of "expected recipient"—is reasonable and efficiently places the burden on the caller.[79] Finally, the FCC argues that Congress failed to directly address in the TCPA callers contracting with consumers to waive consent, thus the FCC has "broad authority" to dictate how consumers are able to revoke consent.[80]

## Conclusion

TCPA litigation has been on the rise since the inception of the statute in 1991. As telecommunications technology advances, so does the risk that legitimate business engaging in good faith solicitation and market efforts may unexpectedly find themselves in Court. While the FCC's July 2015 Order attempted to resolve some issues created by technology advances, it may have in fact increased exposure for legitimate business practices.

## Footnotes

1 Michael Cashman is litigation partner with Womble Carlyle Sandridge & Rice LLP who represents clients in the banking and consumer finance industry. Shana Oppenheim is a 3L at the College of William & Mary School of Law and serves as the Editor-in-Chief for the Journal of Women and the Law.

2 Telephone Consumer Protection Act of 1991, Pub L. No. 102-243, 105 Stat. 2394 (1991) codified at 47 U.S.C. § 227.

3 47 U.S.C.A. § 227(g)(1) (Supp. 2011).

4 47 U.S.C. § 227(b)(3), (c)(5) provides a private right of action "in an appropriate court of [a] State," "if [such an action is] otherwise permitted by the laws or rules of court of [that] State." The Supreme Court determined in *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 747, 181 L. Ed. 2d 881 (2012) that federal courts have concurrent jurisdiction over private TCPA suits, answering a circuit split as to whether these actions could also be brought in federal court.

5 Desai, King, Wolvin, Martin, A TCPA for the 21st Century: Why TCPA Lawsuits are on the Rise and What the FCC Should do About It (2013), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014_women/written_materials/b_7_2_monica_desai_a_tcpa_for_21st_century_article.authcheckdam.pdf.

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8 Senate Report No. 102-178, October 8, 1991, 1991 U.S.C.C.A.N. 1968. http://tcpablog.com/wp-content/uploads/2015/09/S.-Rep.-102-178-1991.pdf

9 *Id*. at 2.

10 Telephone Consumer Protection Act 47 U.S.C. § 227, https://transition.fcc.gov/cgb/policy/TCPA-Rules.pdf

11 *Id*. § 227(b)(3)(C)

12 Telephone Consumer Protection Act 47 U.S.C. § 227(b)(2), https://transition.fcc.gov/cgb/policy/TCPA-Rules.pdf

13 FCC, What We Do, https://www.fcc.gov/general/what-we-do.

14 Rulemaking at the FCC, https://www.fcc.gov/ general/rulemaking-fcc.

15 FCC Proceedings & Actions Overview, https://www.fcc.gov/proceedings-actions. A list of such proceedings filed in the last thirty days can be found at https://www.fcc.gov/rulemaking/most-active-proceedings

16 Telephone Consumer Protection Act 47 U.S.C. § 227(b)(3), https://transition.fcc.gov/cgb/policy/TCPA-Rules.pdf

17 In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order at 10 (Adopted June 26, 2003), https://apps.fcc.gov/edocs_public/attachmatch/FCC-03-153A1.pdf

18 *Id*. at 76.

19 *Id*. at 101.

20 *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009).

21 *Griffith v. Consumer Portfolio Serv., Inc.*, 838 F. Supp. 2d 723 (N.D. Ill. 2011).

22 *Ibey v. Taco Bell Corp.*, No. 12-CV-0583-H WVG, 2012 WL 2401972, at *1 (S.D. Cal. June 18, 2012).

23 *Id*.

24 *Id*. at *4.

25 *Nelson v. Sntander Consumer USA, Inc.*, 931 F. Supp. 2d 919 (2013).

26 *Nelson v. Santander Consumer USA, Inc.,* No. 11-CV-307, 2013 WL 5377280, at *1 (W.D. Wis. June 7, 2013)

27 *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110 (11th Cir. 2014).

28 *Id*. at 1123.

29 *Id*. at 1122-1123.

30 *Id*. at 1119.

31 *Baisden v. Credit Adjustments, Inc.*, No. 15-3411, 2016 U.S. App. LEXIS 2465 (6th Cir. Feb. 12, 2016).

32 TCPA Omnibus Declaratory Ruling and Order, https://www.fcc.gov/document/tcpa-omnibus-declaratory-ruling-and-order.

33 47 U.S.C. § 277(a)(1).

34 *Id*. § 277(b)(1)(A).

35 Michael O'Rielly, Commissioner, TCPA: It is Time to Provide Clarity, TCPA Blog, https://www.fcc.gov/news-events/blog/2014/03/25/tcpa-it-time-provide-clarity.

36 The two FCC commissioner's not cited in this article are: Mignon Clyburn (D-SC) and Thomas Wheeler (D-D.C.)

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38 *Id*.

39 *Id*.

40 TCPA Omnibus Declaratory Ruling and Order, *Dissenting Statement of Commissioner Ajit Pai,* FCC 15-72 8072-8083 (2015) https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-72A1_Rcd.pdf [hereinafter Pai Dissent].

41 *Id*.

42 *Id*.

43 *Id*. at 8074-8075.

44 *Id*.

45 *Pai Dissent* at 8075.

46 *Id*. at 8075.

47 *Id*. at 8076.

48 *Id*. at 8077.

49 *Id*. at 8078-8080.

50 *Pai Dissent* at 8081-8082.

51 *Id*.

52 TCPA Omnibus Declaratory Ruling and Order, *Dissenting Statement of Commissioner Michael O'Rielly, Dissenting in Part and Approving in Part*, FCC 15-72 8084-8078 (2015) https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-72A1_Rcd.pdf.

53 *Id*

54 *Id*.

55 *Id*. at 8087-8098.

56 *Id*.

57 *Luna v. Shac, LLC*, 122 F. Supp. 3d 936 (N.D. Cal. 2015), appeal dismissed (Nov. 20, 2015).

58 *Id.*

59 Joint Brief for Petitioners, ACA International v. Federal Communications Commissions, 15-1211 (2015), Document #1585568 [hereinafter Joint Brief for Petitioners].

60 *Id*. at 3.

61 *Id.* at 15, 21.

62 *Id*. at 15.

63 *Id*.

64 Joint Brief for Petitioners at 15, 31-32.

65 *Id*. at 16.

66 *Id*. at 35-38.

67 *Id*. at 28.

68 *Id*. at 39.

69 *Id*.

70 Joint Brief for Petitioners at 42-43.

71 *Id*. at 2.

72 *Id*. at 40.

73 *Id*. at 41-54.

74 *Id*. at 54-55.

75 *Id*. at 55-60.

76 Joint Brief for Petitioners at 60-63.

77 Brief for Respondents, ACA International v. Federal Communications Commissions, 15-1211 (2016), Document #1600585 [hereinafter Brief for Respondents].

78 *Id*. at 26.

79 *Id*. at 54-56.

80 *Id*. at 63.

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# The 2015 Amendments to the Federal Rules of Civil Procedure:
## What Changed and How the Changes Might Affect Your Practice

by Rachel A. Hedley, Giles M. Schanen, Jr. and Jennifer Jokerst[1]

Substantial new amendments to the Federal Rules of Civil Procedure became effective December 1, 2015. The following brief summary is intended to help you familiarize yourself with the new rules, which apply both to new and currently pending cases, and to prepare for the potential impact of the new rules on your day-to-day practice.

## I. Background to the 2015 Amendments.

The 2015 amendments to the Federal Rules of Civil Procedure are the culmination of nearly four years of study by the Civil Rules Advisory Committee ("Rules Committee"). In 2010, the Rules Committee held a Conference at Duke University School of Law (commonly referred to as the "Duke Conference") to address growing concerns regarding the increasing costs of civil litigation, especially during the discovery process.[2]

Following the Conference, the Duke Conference Subcommittee compiled a package of proposed amendments that were approved for publication in August 2013 by the Judicial Conference's Committee on Rules of Practice and Procedure (the "Standing Committee").[3] After accepting public comments on the proposals and holding three different hearings, the Rules Committee adopted the proposals submitted by the Subcommittee, with some revisions, at a meeting in April 2014.[4] As revised, the proposed new rules were accepted and approved, without further revision, by the Standing Committee, the Judicial Conference, the United States Supreme Court, and Congress.[5] By Supreme Court Order dated April 29, 2015, the new rules "shall take effect on December 1, 2015 and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending."[6]

## II. Summary of the 2015 Amendments.

There was near unanimous agreement among the 200 attendees of the Duke Conference that the resolution of civil actions could be greatly improved by emphasizing three goals: "advancing cooperation among the parties, proportionality in the use of available procedures, and early and active judicial case management."[7] With these goals in mind, the Rules Committee crafted a package of amendments that made changes to four primary areas: (1) timing requirements, (2) discovery provisions, (3) the scope of discovery, and (4) the preservation of electronically stored information ("ESI"). Key changes are discussed below, and a complete listing of the affected rules can be found in the chart on pages 40 - 42.

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### A. Timing Requirements

Key changes were made to Rules 4 and 16 to further the goal of "early and active case management" by parties and the court.

First, Rule 4 was amended to reduce the time period in which to effectuate service of process. Rule 4(m) now provides that the summons and complaint must be served within 90 days of the filing of the complaint, down from 120 days under the previous rule.[8] However, this timing limitation does not apply to service in a foreign country or service of a notice under Rule 71.1 (condemnation proceedings).

Second, Rule 16 was amended to reduce the time to issue a scheduling order and to change the manner in which scheduling conferences are held. Under Rule 16(b)(2), as amended, unless good cause is found for delay, the judge must issue a scheduling order within 90 days of service of any defendant, or within 60 days after any defendant has appeared, whichever is earliest. Furthermore, the scheduling conference required under Rule 16 may no longer occur by email, mail, or other means. The committee notes emphasize that "[a] scheduling conference is more effective if the court and parties engage in direct simultaneous communication."[9] Therefore, as

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indicated in the committee notes, under the new rule, the scheduling conference "may be held in person, by telephone, or by more sophisticated electronic means."

**B. Discovery Provisions**

Key changes in discovery procedures are reflected in the following amendments to Rules 16, 26, and 34.

First, Rule 16 was amended to allow the parties to include terms in the scheduling order regarding preservation of ESI and agreements between the parties concerning the effect of disclosure of materials otherwise protected by the attorney-client privilege or work-product protections, pursuant to Federal Rule of Evidence 502.[10] Additionally, Rule 16 now authorizes the court to require the scheduling order to provide that a party seeking an order related to discovery, such as through a motion to compel, must first request a conference with the court before filing a motion. The committee notes emphasize that "[m]any judges who hold such conference find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion, but the decision whether to require such conferences is left to the discretion of the judge in each case."

Second, Rules 26 and 34 were amended to allow parties to serve early requests for production. Under Rule 26(d)(2)(A), a request under Rule 34 may be delivered 21 days after service of the summons and complaint by any party to the party served, or by the party served to any plaintiff or any other party that has been served. For purposes of calculating the time to respond, however, subsection 26(d)(2)(B) provides that the early request is deemed to have been served at the first Rule 26(f) conference. Correspondingly, Rule 34(b)(2)(A) was amended to provide that a party receiving an early request for production must respond to the request, in writing, within 30 days of the initial Rule 26(f) conference.

Third, Rule 34 was amended to prevent parties from responding with general objections. Instead, Rule 34(b)(2)(B) now requires that the responding party "state with specificity the grounds for objecting to the request." Further, under subsection 34(b)(2)(C), the objection must also state whether the responding party is withholding responsive materials on the basis of the objection.

Fourth, a provision was added to subsection 34(b)(2)(B) allowing the responding party to "state that it will produce copies of documents or of [ESI] instead of permitting inspection."

Finally, Rule 26(c)(1)(B) was amended to expressly recognize the court's authority to specify the allocation of expenses for discovery or disclosure as a term in any protective order it issues. While the authority to do so already existed under the old rule, the committee notes state that the change "will forestall the temptation some parties may feel to contest" such authority.

**C. Scope of Discovery/Proportionality**

The 2015 amendments include key changes redefining the scope of discovery to incorporate a proportionality standard. Under the new Rule 26(b)(1):

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense ***and proportional to the needs of the case***, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(1) (emphasis added). Although the old rules provided that a court could impose proportional limitations on the scope of discovery based on these same factors, under former Rule 26(b)(2)(C)(iii), the clear consensus from those at the Duke Conference was that "greater emphasis on proportionality [was] needed."[11] Therefore, the proportionality requirement and related factors were moved to subsection 26(b)(1) in order to "make them more prominent, encouraging parties and courts alike to remember them and take them into account in pursuing discovery and resolving discovery disputes."[12]

Also significant in the amendment to Rule 26(b)(1) is the substitution of language regarding whether information that would be inadmissible at trial is within the scope of discovery. The old rule specified that "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The new rule has removed the "reasonably calculated" language. The Committee Report notes that the change "carries forward the central principle — nonprivileged information is discoverable so long as it is within the scope of discovery, even though the information is in a form that would not be admissible in evidence," but "is designed to curtail reliance on the 'reasonably calculated' phrase to expand discovery beyond the permitted scope."[13]

Finally, several other discovery provisions were amended to reflect the addition of the proportionality rule and the factors to consider in determining whether the discovery sought is proportional to the needs of the case. Rules 30, 31, and 33 were all amended to provide that the court must grant leave to take oral and written depositions, and may grant leave to serve additional interrogatories, "to the extent consistent with Rule 26(b)(1) and (2)."

**D. Preservation of ESI**

Rule 37(e) was amended to resolve significant disagreement among the circuit courts regarding the appropriate standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. The committee notes to Rule 37 observe that this lack of consensus has "caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough." Newly amended Rule 37(e) now expressly delineates the standards to be applied in determining whether sanctions are warranted when a party fails to preserve ESI.

Under the amended Rule 37(e):

> If electronic information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court[,] upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice[.]

Fed. R. Civ. P. 37(e). Thus, remedial measures under subsection 37(e)(1) are available if (1) a party failed to take reasonable steps to preserve ESI that it had a duty to preserve, (2) the information lost is not available through additional discovery, and (3) the opposing party is prejudiced by the loss of information.[14] If all these requirements are met, the court may order remedial measures, but only to the extent necessary to cure the prejudice suffered by the requesting party.

As the committee notes state, Rule 37(e) "recognizes that 'reasonable steps' to preserve suffice; it does not call for perfection." Factors relevant to whether preservation efforts are "reasonable" include: (1) the "routine, good-faith operation of an electronic information system"; (2) a party's sophistication; and (3) proportionality.

As described in the committee notes, under this standard, a party would not be sanctioned where, for example, the information lost is not in the party's control, or the loss is caused by events outside the party's control, such as a flood in the computer room, a "cloud" service failure, or a software attack that disrupts the system where the information is stored. However, the committee notes further explain that "[c]ourts may . . . need to assess the extent to which a party knew of and protected against such risks" in determining whether a party's efforts are reasonable.

In addition, as to the proportionality factor, the committee notes recognize that "court[s] should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts." Thus, parties are free to choose a less costly form of preservation so long is it "substantially as effective" as more costly measures. That being said, the committee notes stress the importance of "counsel becom[ing] familiar with their clients' information systems and digital data — including social media — to address" issues regarding the scope of a party's duty to preserve, because "[a] party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime."

Under Rule 37(e)(2), if the court finds that a party's loss of ESI was intentional, then the court may "(A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment." Importantly, the addition of subsection 37(e)(2) resolves a split in the circuits regarding the culpability required for an adverse inference instruction.[15] As the committee notes state,

> Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference.

Therefore, under Rule 37(e), an adverse inference instruction may only be issued if a party's conduct in failing to preserve ESI is intentional. Mere negligence or gross negligence is insufficient to warrant such instruction from the court.

## III. How the Rule Changes May Affect Your Practice

Many of these rule changes are not intended to have a significant impact on current practices and procedures. For example, while Rule 26(c) was amended to allow a provision for cost allocation in a protective order, the committee was careful to note that doing so does not indicate that cost-shifting should become the norm. As the committee notes state, "Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding." Similarly, according to the committee notes, the amendment to Rule 34(b)(2)(B) merely "reflect[s] the common practice of producing copies of documents or electronically stored information

Continued on next page

rather than simply permitting inspection." These changes will likely have little, if any, impact on your day-to-day practice, as intended by the committee and reflected in the committee notes.

Certain procedural changes, however, will inevitably affect how you manage your cases. First and foremost, the amendments to timing requirements will change the speed at which cases will progress during the early stages of litigation. As defense attorneys, the reduction to 90 days for service of process may have little impact on your practice, since you are often not the one effectuating service. However, earlier service and the shortened time for the issuance of a scheduling order will certainly speed up the early stages of a case. A Rule 26(f) conference must still be held at least 21 days before a scheduling order is due. Thus, an earlier deadline for a scheduling order consequently requires an earlier Rule 26(f) conference.

Yet, the committee notes to Rule 16 also recognize that in some cases, especially "[l]itigation involving complex issues, multiple parties, and large organizations, public or private," parties may need additional time to "establish meaningful collaboration between counsel and the people who can supply the information needed to participate [at the scheduling conference] in a useful way." To that end, the amendment to Rule 16(b)(2) allows the court upon a finding of good cause to extend the time to issue the scheduling order, which would, as a result, extend the time to hold the Rule 26(f) conference. However, the committee notes to Rule 16 emphasize that "in most cases it will be desirable to hold at least a first scheduling conference in the time set by the rule."

**General, boilerplate objections are no longer sufficient under the Rule.**

Additionally, you may see the discovery process begin earlier. The amended rules now allow early Rule 34 requests to be made prior to the Rule 26(f) scheduling conference. According to the committee notes to Rule 26, "[t]his relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference." If you are served early, make sure you note that you must respond to early requests within 30 days after the Rule 26(f) conference, not within 30 days after service of the request. However, the committee notes further recognize that discussion at the Rule 26(f) conference may result in changes to requests, and the fact that a request is received early, and therefore subject to advanced scrutiny, "should not affect a decision whether to allow additional time to respond." Thus, the fact that a request is delivered early should not stop you from seeking an extension of time to respond if needed. Early requests for production may also be a tool you want to consider using to obtain early discovery from a party. Any time after 21 days from service, you may deliver an early Rule 34 request to any plaintiff or to any other party that has been served.

One amendment that requires an immediate change in practice is the amendment to Rule 34 regarding objections to requests for production. General, boilerplate objections are no longer sufficient under the Rule. Instead, the objection must be stated with specificity, and must also state whether you are withholding documents on the basis of that objection.[16] As an example, the committee notes state:

> An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters "withheld" anything beyond the scope of the search specified in the objection.

Furthermore, in responding to any discovery request, it is important to note that the language of Rule 26(b)(1) defining the scope of discovery has changed. Practically, this means that objections and responses you are accustomed to using will also need to change in order to mirror the new language of the amended rule. For example, an objection stating that a request is beyond the scope of discovery because it is not "reasonably calculated to lead to the discovery of admissible evidence" is no longer consistent with the language of Rule 26(b)(1). Instead, the objection should state that the request is not relevant to any claim or defense asserted in the case, or is not "proportional to the needs of the case," and should include information to substantiate the lack of relevance or proportionality.

Finally, one of the most significant changes to the rules was the amendment to Rule 37(e) concerning a party's duty to preserve ESI, and prescribing available remedies when a party fails to meet this duty.

No longer can you rely on state law or inherent authority in determining when the loss of ESI warrants remedial measures. This amendment provides clear guidelines regarding the scope of a party's duty to preserve information and the circumstances necessary to warrant sanctions when a party fails to do so. This guidance will allow you to better advise your clients regarding their duty to preserve ESI when litigation is reasonably anticipated, and to inform them of the potential consequences for failing to fulfill that duty.

## IV. Conclusion

After years of discussion and comments, the Rules Committee proposed these amendments to the Federal Rules of Civil Procedure to improve cooperation among parties, emphasize proportionality in discovery procedures, and promote early and active judicial case management. Many of these changes might have little impact on your day-to-day practice, while some will require immediate changes to your current procedures. In either case, it is important to be aware of the changes and their practical application in order to better manage your cases and serve your clients.

## Footnotes

1 Rachel Hedley is Of Counsel, and Jenni Jokerst is an associate, in Nelson Mullins' Columbia, South Carolina office. Giles Schanen is a partner in Nelson Mullins' Greenville, South Carolina office.

2 Thomas Y. Allman, *The 2015 Civil Rules Package as Transmitted to Congress,* at 2 (2015) [hereinafter Allman Summary], available at https://law.duke.edu/search/google/thomas%20allman/.

3 Report from Advisory Comm. on Civil Rules to Comm. on Rules of Practice and Procedure, at 3 (May 2, 2014) [hereinafter Comm. Rep.], available at http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-may-2014.

4 Allman Summary, *supra* note 1, at 2, 3.

5 *Id*. at 2–3.

6 Supreme Court Order, April 29, 2015, available at www.supremecourt.gov.

7 Comm. Rep., *supra* note 3, at 3.

8 This 90 day time period was the result of compromise. The earlier proposal from the Rules Committee recommended a 60 day time limit for serving a summons and complaint. After receiving comments and testimony regarding the reduction, the Committee recommended the 90 day limit that was ultimately approved and implemented. *See id*. at 14.

9 For purposes of brevity and clarity, direct quotations from the rules or the accompanying committee notes will not be directly cited throughout this paper. The complete Federal Rules of Civil Procedure and committee notes, as amended, have been made available online by the Legal Information Institute, a non-profit group housed at Cornell Law School, which you can access the at https://www.law.cornell.edu/rules/frcp,

10 *See* FED. R. EVID. 502. Rule 26(f)(3)(D) was also amended to allow for the same provision in a discovery plan.

11 Comm. Rep., *supra* note 3, at 7.

12 *Id.* at 7–8.

13 *Id.* at 10.

14 In the event information is lost due to a party's failure to reasonably preserve ESI, the committee notes explain that the rule first emphasizes looking to other sources to determine if the "lost information can be restored or replaced through additional discovery." If information is stored in several locations, the loss of the information in one location is harmless if it can be retrieved from another location.

15 As the committee notes state, the amendments to Rule 37(e) supersede any state law to the contrary: "New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used."

16 As the committee notes explain, "An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been 'withheld.'"

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| **Rule 1. Scope and Purpose.** | Rule 1 was amended to expressly require that both the court and the parties construe, administer, and employ the rules "to secure the just, speedy, and inexepensive determination of every action and proceeding." |
| **Rule 4. Summons.**<br>(d) (1) *Requesting a Waiver*. . . . The notice and request [for waiver of service of a summons] must:<br><br>(C) be accompanied by a copy of the complaint, 2 copies of the waiver form appended to this Rule 4, and a prepaid means for returning the form;<br><br>(D) inform the defendant, using the form appended to this Rule 4, of the consequences of waiving and not waiving service; | The 2015 amendments abrogated Rule 84 and the appendix of forms. Instead, forms for requesting a waiver of service (forms 5 and 6 under the old rules) are now expressly incorporated into Rule 4.<br><br>Most notably, under amended Rule 4(m) the summons and complaint must be served within 90 days of the complaint being filed (down from 120 days under the old rules). The rule was also amended to specify that this timing requirement does not apply "to service of a notice under Rule 71.1(d)(3)(A)." |
| **Rule 16. Pretrial Conferences; Scheduling; Management**<br><br>(b)(2) *Time to Issue*. The judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.<br><br>(b)(3)(B) *Permitted Contents*. The scheduling order may:<br><br>(iii) provide for disclosure, discovery, or preservation of electronically stored information;<br><br>(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;<br><br>(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court; | In accordance with the timing changes in Rule 4, the time to issue a scheduling order under the new rule has been reduced to within 90 days after any defendant has been served with the summons and complaint or 60 days after any defendant has appeared, whichever is earlier (reduced from 120 and 90 days, respectively). The judge may, however, delay such issuance upon a finding of good cause for delay.<br><br>The old language of Rule 16 provided for the scheduling order to be issued at a scheduling conference "by telephone, mail, or other means." This quoted language has been deleted in the new rule. According to the committee notes, under the new rule, the scheduling conference "may be held in person, by telephone, or by more sophisticated electronic means."<br><br>Rule 16(b)(3) was also amended to add the following three items to the list of contents that may be included in a scheduling order: (1) provisions for preservation of ESI; (2) agreements reached under Federal Rule of Evidence 502 (related to the inadvertent disclosure of privileged materials); and (3) a requirement that a party must request a conference with the court before moving for a discovery order, if the court chooses. |
| **Rule 26. Duty to Disclose; General Provisions; Governing Discovery**<br><br>(b) (1) *Scope in General*. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information | Rule 26(b)(1) has been amended to emphasize the role of proportionality in defining the scope of discovery. Further, several factors to consider in determining whether the discovery sought is proportional to the needs of the case, previously included in Rule 26(b)(2)(C)(iii), have now been moved under subsection (b)(1), with the addition of a one factor: the parties' relative access to relevant information. Rule 26(b)(2)(C)(iii) now provides that the court must limit discovery if it determines that "the discovery is outside the scope permitted by Rule 26(b)(1)."<br><br>Rule 26(c) as amended expressly allows the court to provide for the allocation of expenses in a protective order. However, as the advisory committee notes state, "[r]ecognizing the |

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| within this scope of discovery need not be admissible in evidence to be discoverable.<br><br>(d) (2) Early Rule 34 Requests.<br><br>Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:<br><br>(i) to that party by any other party, and<br><br>(ii) by that party to any plaintiff or to any other party that has been served.<br><br>(B) When Considered Served. The request is considered to have been served at the first Rule 26(f) conference. | authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding."<br><br>The amendments also added a provision in Rule 26(d)(2) to allow parties to deliver early Rule 34 requests for production any time more than 21 days after service of the summons and complaint. However, the request is not considered served until the first Rule 26(f) conference.<br><br>Rule 26(d)(3) was also amended to expressly allow parties to stipulate to the sequence of discovery. Absent such stipulation or a court order, "methods of discovery may be used in any sequence" and "discovery by one party does not require any other party to delay its discovery."<br><br>Finally, Rule 26(f)(3) was amended to reflect the changes in Rule 16(b)(3), and now provides that a discovery plan must include the parties' views and proposals on preservation of ESI and agreements under Federal Rule of Evidence 502. |
| **Rule 30. Depositions by Oral Examination**<br><br>**Rule 31. Depositions by Written Questions.**<br><br>**Rule 33. Interrogatories to Parties.** | Rules 30, 31, and 33 were all amended to reflect the incorporation of the proportionality rule and factors into Rule 26(b)(1). The rules as amended provide that the court must grant leave to take oral and written depositions, and may grant leave to serve additional interrogatories, "to the extent consistent with Rule 26(b)(1) and (2)." Further, under Rule 30(d)(1) the court must allow additional time beyond the 1 day, 7 hour limit for oral depositions "consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination." |
| **Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes.**<br><br>(b)(2) *Responses and Objections.*<br><br>(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.<br><br>(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored | As previously discussed, Rule 26(d)(2) now allows parties to serve early requests for production. Rule 34(b)(2) has been amended to reflect this change, providing that an answer to an early Rule 34 request for production must be delivered in writing within 30 days after the first Rule 26(f) conference.<br><br>Rule 34(b)(2)(B) has been amended to require greater specificity in objections. Under subsection (C) as amended, an objecting party must also state whether responsive documents are being withheld on the basis of the objection.<br><br>Rule 34(b)(2)(B) was further amended to expressly allow parties to produce copies of requested documents and ESI in lieu of permitting inspection. If a party has chosen to produce documents instead of allowing inspection, the production must be completed "no later than the time for inspection specified in the request, or another reasonable time specified in the response." |

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| information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.<br><br>(C) *Objections*. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest. | |
| **Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions.**<br><br>(e) Failure to Preserve Electronically Stored Information.<br><br>If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:<br><br>(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or<br><br>(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:<br><br>(A) presume that the lost information was unfavorable to the party;<br><br>(B) instruct the jury that it may or must presume the information was unfavorable to the party; or<br><br>(C) dismiss the action or enter a default judgment. | Rule 37(a) was amended to reflect the change to Rule 34(b)(2)(B), which allows parties to produce documents and ESI in lieu of permitting inspection. Under Rule 37(a)(3)(B)(iv), a party may file a motion to compel production if a responding party fails to produce documents or fails to permit inspection, as requested under Rule 34.<br><br>Rule 37(e) was amended to provide a new provision directly addressing the duty to preserve ESI and specifying consequences for failure to do so. (Previously, Rule 37(e) provided that a party could not be sanctioned for failing to provide ESI if it was lost as the result of routine, good faith operation of an electronic information system.) As the committee notes state, the new rule "authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures." Under Rule 37(e), if a party negligently loses ESI by failing to take reasonable steps to preserve it, and the opposing party is prejudiced by the loss, the court may order remedial measures to the extent necessary to cure the prejudice. Additionally, if a party's loss of ESI is intentional, the court may provide an adverse inference instruction or dismiss the case in its entirety. Importantly, the amendments to Rule 37(e) supersede any state law to the contrary, as the committee notes specifically state that the rule "forecloses reliance on inherent authority or state law to determine when certain measures should be used." |
| **Rule 55. Default; Default Judgment.**<br><br>(c) Setting Aside a Default or a Default Judgment. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b). | According to the committee notes, the amendment to Rule 55(c) clarifies that "[t]he demanding standards set by Rule 60(b) apply only in seeking relief from a final judgment." A default judgment is not final unless it "dispose[s] of all of the claims among all parties" or "the court directs entry of final judgment under Rule 54(b)." |
| **Rule 84. Forms.** | The 2015 amendments abrogated Rule 84 and the appendix of forms. Forms for requesting waiver of service are now expressly incorporated into Rule 4. |

ARTICLE

# Empty Suits Should Stay at Home:
## South Carolina's Requirement for "Full Settlement Authority" at Mediation

by J. Christopher Clark [1]

In an age of disappearing trials, mediation has emerged as the end-game for many clients. Even in the rare case when trial is all-but-certain, mediation remains an essential waypoint on the road to the courthouse in South Carolina. On January 1, 2016, the South Carolina Supreme Court expanded the Court's mandatory Alternative Dispute Resolution (ADR) program to every county in the State.[2] This is certainly good news for trial courts struggling with clogged civil trial dockets, as mediation has consistently been shown to bring an amicable (if sometimes begrudging) end to the vast majority of civil suits of all types.[3]

But challenges remain. The success of the process requires all important stakeholders participate. This requirement is codified in Rule 6(b) of the South Carolina ADR Rules, which provides that a party or its officer, director or employee with "full settlement authority" must attend the mediation conference alongside counsel of record.[4] In cases involving insurance, the carrier must likewise send a representative with full authority, and cannot send outside counsel in lieu of a representative.[5]

The rule does not define what full authority means. No South Carolina case addresses the issue, and attorneys have guessed at its meaning with results that can be described, charitably, as mixed. For attorneys who guess incorrectly, costly and embarrassing sanctions can be the reward.

A recent Richland County Circuit Court order highlights the issue. In *Greenburg v. Five Star Quality Care, Inc. et. al.*, C.A. No. 2013-CP-40-03071, a nursing home defendant ("Five Star") was represented at mediation by two attorneys and one of the corporation's regional directors.[6] However, only one person, Five Star's outside counsel, had authority to settle on behalf of the company. Mediation failed, and the Plaintiff filed a motion for sanctions alleging Five Star failed to bring the proper corporate parties to the ADR conference. On brief, Five Star contended that the case did not settle simply because the parties disagreed about its value, as evidenced by the Plaintiff's "pie-in-the-sky" pre-mediation demand of $10,000,000.00 (later corrected to $2,000,000.00 at oral argument).

The Court was unsympathetic, finding that the failure to produce a representative from the company or insurer with full settlement authority was "abusive."[7] In connection with other discovery misconduct, the Court imposed over $34,000.00 of sanctions against Five Star, with $15,285.00 arising solely from the failure to produce a proper party at mediation.

The Court's order addresses the two central components of Rule 6(b). The first is the technical requirement that a corporate or insurance representative with full authority show up at the mediation. While Five Star managed to hail a corporate representative into the ADR conference, he could not settle the case. Five Star's attorney theoretically could, but he was not an employee of the company or its insurer.

This distinction drawn by Rule 6(b) between outside counsel for a corporation and a corporate employee makes sense. Cases simply settle more often when a duly authorized employee is present at mediation. Perhaps this is because outside counsel, no matter how deeply invested in a particular case, is still an independent agent and may not fully share the client's perspective or interest in managing sizeable risk. The United States District Court for the Northern District of California has taken up this theme by noting that one of the principal benefits of mediation is to allow affected parties to hear "first hand" their opponent's version of events [8] – an impossible outcome if counsel attends alone.[9]

Had Five Star's counsel been an in-house attorney for the company, it is likely that the requirement of Rule 6(b) would have been met. However, this distinction may be blurred for small or mid-size corporations, which sometimes rely on an outside attorney as a de-facto "in-house" attorney when there is no general counsel on staff. Even when general counsel exists, a trusted outside attorney may have such a long-standing relationship with a company that her judgment in litigation matters makes her the proxy decision-maker at mediation. In this scenario, the company may be tempted to give the attorney broad settlement authority and send her to mediation along with an employee to act

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as the "face" of the company. Rule 6(b) specifically forecloses this option.

The second and thornier question raised by the *Greenberg* order involves how a party can demonstrate that the appointed representative has arrived with "full settlement authority." Defining "full" is not particularly easy. To take just one example, the Merriam-Webster Dictionary provides a healthy range of possible definitions, including: (1) "containing as much or nearly as much as possible *or normal*"; (2) "enjoying all authorized rights and privileges," and (3) "being at the highest and greatest degree: maximum."[10] Under these definitions, "full" settlement authority could mean (1) a reasonable or "normal" degree of authority given the facts of the case, (2) a degree of authority that is completely authorized by the corporation without further warrant, or (3) the highest degree of authority necessary to resolve the dispute, such as a sum equaling the Plaintiff's last demand.

**However, most jurisdictions appear to leave the definition of "full settlement authority" squarely within the discretion of the court.**

Federal Judge David Norton of the District of South Carolina has adopted the third view. His standing order on mediation provides that "full settlement authority for the defendant means an individual who can decide to offer the plaintiff a sum up to the existing demand of the plaintiff or the applicable limits of the insurance policy, whichever is less."[11] The South Carolina Supreme Court has ratified this approach in the limited context of time-consuming multi-week litigation involving insurance carriers.[12] However, this order differentiates insurance carriers from other parties: representatives for non-insurance parties need only bring "binding authority to make a final decision for that party." Whether binding authority of $15,000.00 in the face of a $5,000,000.00 demand would be sufficient to effect a "final decision" is unclear.

The strict "plaintiff's last demand" view is an approach likely to satisfy the inquiries of hostile plaintiffs or skeptical judges. It is also likely to frustrate a fair number of defendants. The rule is inherently weighted against the defense because the plaintiff is free to choose any settlement demand, no matter how aspirational, and force the corporation to produce a representative with on-site authority to accept the figure. For example, a slip-and-fall mediation involving actual and future damages of $15,000.00 might require attendance by the corporate C.E.O. due to the plaintiff's punitive damages-driven demand of $5,000,000.00.[13] Or the adjuster on the case may need to pass the matter to her distant supervisor because the demand far exceeds the adjuster's ordinary authority, perhaps even triggering notice to an excess insurance carrier and ensnaring a whole new set of decision-makers.

Nonetheless, courts have not spilled much ink about the inconveniences faced by corporate defendants at mediation. Some have followed the strict view requiring a representative to have whatever authority is necessary to meet the plaintiff's last demand or, alternatively stated, the "anticipated amount in controversy."[14] Others simply state a representative must have sufficient authority to settle the case without further consultation from anyone else in the company.[15] This may be the strictest standard of all, as the representative must be able to respond to plaintiff's demands on-the-fly at mediation, even if those demands exceed the pre-mediation proffer.

However, most jurisdictions appear to leave the definition of "full settlement authority" squarely within the discretion of the court. Take, for instance, the Indiana case of *Conrail v. Estate of Martin*, 720 N.E.2d 1261 (Ind. App. 1999). In *Conrail*, a trial court issued an order requiring a Conrail representative with "full settlement authority" to physically appear at an ADR conference. Conrail sent a claims representative with $250,000.00 in authority; beyond that, the representative was required to call a corporate committee for additional funds. The $250,000.00 was not enough, the conference ended in an impasse, and the plaintiff brought a motion for sanctions against Conrail. The Indiana Court of Appeals concluded that Conrail violated the trial court order by sending a representative who could not make the final call on settlement. "Full settlement authority," according to the majority opinion, "is a phrase that is not difficult to interpret," and Conrail therefore simply "knew what the order was mandating."[16] In essence, Conrail had to know that the strictest "no further consultation" standard applied. Further, the Court reasoned that Conrail could not have had any difficulty in identifying the right person to send because it could simply vest the requisite authority in whomever it chose.[17]

Concurring in the result only, Judge Patricia Riley highlighted the ambiguity inherent in the phrase "full settlement authority." Because the trial court

did not define the phrase, Conrail could not know whether to send someone simply "with the power to bind Conrail to settle, or whether it meant the authority at a maximum settlement value."[18] Judge Riley also noted a decision from the Colorado Supreme Court finding that sanctions were inappropriate when a party brought settlement authority but "the settlement offer was just not adequate in the opinion of the settlement conference judge."[19]

## Conclusion

So how do you advise your clients about who must attend mediation? Well, despite the vagaries of the settlement authority issue, some clear rules emerge. First, it is not enough to send counsel into the mediation conference armed with authority from the client. Second, the problem is not cured by bringing along a corporate representative with no real authority to make decisions on behalf of the company. The days of the low-level employee attending mediation while the real decision-maker receives updates by phone are over. Third, the demand of the plaintiff or the prayer for relief must be very carefully considered. The safest approach would involve a representative who could truly respond to the plaintiff's demand, even if the representative has decided before mediation that the demand is unreasonable. Developments at mediation, including the hated-but-time-honored custom of delivering new information about damages at the conference, may change the representative's perspective on case value.

If you do bring a representative that has authority below the plaintiff's last demand, the authority should reflect both sides of the case and not simply the defendant's preferred version of the evidence. But above all else, advise your client well in advance about who must attend mediation so that the conference is an opportunity for your client, not a trap for the unprepared.

## Footnotes

1 Chris Clark practices in the Myrtle Beach office of McAngus Goudelock & Courie where he focuses on general litigation, construction, and errors and omissions claims.

2 *See* Supreme Court of South Carolina Order Re: Circuit Court Arbitration and Mediation and Family Court Mediation Pilot Program (November 12, 2015), available at http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2015-11-12-04 (last viewed April 5, 2016).

3 *See, e.g.*, Richard Calkins, Mediation: A Revolutionary Process that is Replacing the American Judicial System, Cardoza J. Conflict Resol., Volume 13, No. 1, 2011

4 S.C. ADR R. 6(b) The full text of the rule reads as follows: "The following persons shall physically attend a mediation settlement conference unless otherwise agreed to by the mediator and all parties or as ordered or approved by the Chief Judge for Administrative Purposes of the circuit: (1) The Mediator; (2) All individuals parties; or an officer, director or employee having full authority to settle the claim for a corporate party; or in the case of a government agency, a representative of that agency with full authority to negotiate on behalf of the agency and recommend a settlement to the appropriate decision making body of the agency; (3) The party's counsel of record, if any; and (4) For any insured party against whom a claim is mad, a representative of the insurance carrier who is not the carrier's outside counsel and who has full authority to settle the claim.

5 *Id.*

6 Order Granting Sanctions, *Greenburg v. Five Star Quality Care, Inc. et. al.*, C.A. No. 2013-CP-40-03071 (Richland County S.C. Ct. Com. Pl. 2013).

7 *Id.*

8 N. Dist. Cal. ADR LR 6-10(a).

9 Can other non-employee representatives attend on behalf of the insurance company or corporation? For example, it is a common practice for out-of-state insurers to hire a "local adjuster" to attend mediation on the insurer's behalf. While this practice fairly meets the language of the rule that an "insurance representative" attend the mediation, it can be hazardous when the local adjuster knows little about the case and does not have authority to independently respond to a party's demands in res. Counsel must carefully consider whether the local adjuster in this circumstance possesses the requisite "full" settlement authority as required by Rule 6(b) and as further discussed herein.

10 Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/full (emphasis added).

11 *See* Standing Order to Conduct Mediation, U.S. Dist. Ct. J. David C. Norton, *available at http://www.scd.uscourts.gov/Forms/Mediation_Alternative_Dispute_Resolution/Norton_Standing_Order_Conduct_Mediation.pdf* (last viewed April 5, 2016).

12 *See* Supreme Court of South Carolina Standing Order for Multi-Week Trial Docket for the Ninth, Fourteenth and Fifteenth Judicial Circuits (June 26, 2008), available at http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2008-06-26-02 (last viewed April 5, 2016).

13 The frequency of punitive damages awards is hotly disputed. A Department of Justice publication released in 2000 asserts that, at least in the 75 most populous U.S. counties, punitive damages were awarded in only 3.3 percent of tort cases. Tort Trials and Verdicts in Large Counties, 1996, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 179769 (Aug. 2000), pg. 7.

14 *See, e.g., In re A.T. Reynolds & Sons*, 452 B.R. 374, 384 (S.D. N.Y. 2011).

15 *See, e.g.*, Fla. R. Civ. P. 1.720; Ky. Model Ct. Mediation Rule 8.

16 *CONRAIL v. Estate of Martin*, 720 N.E.2d 1261, 1265 (1999).

17 *Id*. at 1266. Interestingly, and perhaps in a knowing nod to the circularity of its logic, the Court held that Conrail's violation was not "willful" because the representative could have been persuaded to call someone for more authority. What that authority had to be – the plaintiff's last demand, a subjectively reasonable sum in light of the facts known to the parties, or some other sum conjured by judicial fiat – is unclear.

18 *Id*. at 1267

19 *Id*. at 1268 (citing *Halaby, McCrea & Cross v. Hoffman*, 831 P.2d 902 (Colo. 1992)).

# Verdict Reports

## Type of Action: Medical Malpractice

**Injuries Alleged**: Wrongful death/conscious pain and suffering
**Name of Case**: Shirley Thomas as PR of the Estate of General Thomas v. Dr. Sabrina O'Brien
**Case number**: 2013–CP-21-351
**Trial Judge**: Hon. Michael G. Nettles
**Amount**: $ 0/ defense verdict
**Demand**: $ 300,000
**Most Helpful experts**: Dr. Gregory Valainis (infectious disease)
**Attorneys for Defendant(s)**: Julius W. "Jay" McKay, II and Kelli Sullivan (Columbia, SC)

**Description of the Case**: Plaintiff was treated by Dr. Sabrina O'Brien at Lake City Community Hospital for acute pancreatitis. Plaintiff was admitted to the hospital in the early morning hours of January 19, 2011. By 11:00 am on the same day, Plaintiff's condition worsened, despite appropriate care, and Dr. O'Brien ordered his transfer to a larger hospital with access to different types of testing. Plaintiff was transferred as soon as a bed was available, but passed away on January 21, 2011 due to sepsis secondary to acute pancreatitis.

Plaintiff claimed that Dr. O'Brien was negligent in failing to diagnose an impeding infection and was negligent in failing to order prophylactic antibiotics. The defense asserted that all of Mr. Thomas' symptoms were consistent with acute pancreatitis and that there were no signs and symptoms of infection or sepsis during Mr. Thomas's care and treatment by Dr. O'Brien.

Plaintiffs did not present any economic damages at trial and did not ask the jury for a specific number in non-economic damages. The Court granted a defense motion for a directed verdict on punitive damages.

The case went to the jury in the middle of the afternoon of trial day 4. The jury was out for less than an hour before returning a verdict in favor of the defense.

## Type of Action: Personal injury (pedestrian/auto)

**Injuries alleged**: Plaintiff alleged injury to neck and back, allegedly necessitating lumbar fusion and cervical fusion
**Name of Case**: Bobby Soles v. Van Smith Concrete Company
**Court**: Court of Common Pleas, County of Charleston
**Case #:** 2014-CP-10-0682
**Name of judge**: Hon. Roger M. Young, Sr.
**Amount**: $0
**Date of verdict**: Judgment entered 9.2.15
**Demand**: No formal / specific demand from Plaintiff's counsel
**Highest offer**: $15,000.00
**Most helpful experts**: Plaintiff's neurosurgeon, Dr. Joseph Marzluff (retired) (Charleston, SC)
Attorney(s) for defendant (and city): Curt Martin, Esq. (Charleston, SC)

**Description of the Case**: This personal injury suit arose out of a dump truck/pedestrian accident in March 2009 at Carter's Fast Stop in Ridgeville, South Carolina. Plaintiff alleged that a Van Smith truck backed into him as he was crossing the parking lot, resulting in injury to his back, shoulder, and neck. Plaintiff subsequently underwent a transforaminal interbody fusion (TIF, or lumbar fusion) at the L5-S1, and a cervical fusion at the C5-7, which he attributed to the accident. Plaintiff presented medicals in excess of $250,000.00 at trial.

The defense called into question whether the subject vehicle was, in fact, a Van Smith truck, as company records and debit transactions indicated the subject truck was not at the scene at the time of the accident. The defense also argued comparative negligence by Plaintiff, based on Plaintiff's decision to walk behind the truck, despite knowing this to be a blind spot. The jury allocated 90% of fault to Plaintiff and 10% to Defendant.

## Type of Action: Medical Malpractice

**Injuries Alleged**: Permanent nerve damage and disfigurement to right foot; $1,087,280.00 in medical bills, lost earning capacity, personal services and future medicals.

**Name of Case**: Jodi Sasko v. Dr. Robert Santrock and Midlands Orthopedics

**Case number**: 2012–CP-40-1713

**Trial Judge**: Hon. L. Casey Manning

**Amount**: $ 0/ Defense Verdict

**Demand**: Mediation demand: $ 4.3 million.

**Most Helpful experts**: Dr. Hodges Davis, Charlotte, N.C. and Dr. Fred Piehl, Columbia, S.C.

**Attorneys for Defendant(s)**: Julius W. "Jay" McKay, II and Kelli Sullivan (Columbia, SC)

**Description of the Case:** This was a case involving a Lis Franc fracture. The Plaintiff slipped on stairs and broke her second and third metatarsal bones. Plaintiff treated with a podiatrist for about 9 months before seeking an orthopedic consultation. As a result of the delay in treatment, a complicated fusion surgery was necessary. Dr. Robert Santrock performed the surgery. The Plaintiff was in the hospital for three days post surgery for monitoring of pain and swelling. During those three days, the Plaintiff was monitored by physicians from Midlands Orthopedics. Plaintiff claimed that while she was hospitalized, she suffered from an undiagnosed compartment syndrome which caused nerve damage and persistent pain, disability, and disfigurement of her right foot.

Prior to trial, the Plaintiff settled with the hospital and the podiatrist. The defense took the position that any nerve damage was the result of the delay in treatment, and that Plaintiff never had undiagnosed compartment syndrome.

The case went to the jury on day 8 at about 6 pm. The jury deliberated less than 4 hours in total and returned a defense verdict on day 9 at 11 am.

## Type of Action: Medical Malpractice

**Name of Case**: Wallace James Elston and Arline Elston v. Gilbertas Rimkus, M.D., and Associates in Surgery, P.A.

**Court**: Horry County Court of Common Pleas

**Case number**: 2013-CP-26-01194

**Name of Judge**: Hon. William H. Seals, Jr.

**Amount**: $ 0/ Defense Verdict

**Date of Verdict:** December 10, 2015

**Attorneys for defendant**: Molly H. Craig, Jennifer F. Nutter and Caroline R. Niland of Hood Law Firm, LLC, Charleston, SC

**Description of the Case**: Plaintiff alleged the Defendant physician was negligent during the Plaintiff's laparoscopic cholecystectomy. During the surgery, the Defendant completely transected the Plaintiff's common bile duct/hepatic duct. Following surgery, the Plaintiff was admitted to the hospital where he began draining bile. Plaintiff later underwent an Endoscopic Retrograde Cholangiopancreatography (ERCP) which revealed that the common bile duct/hepatic duct was transected and bile was leaking into his peritoneal cavity. The Plaintiff was transferred to a specialist at a tertiary care hospital. As a result, the Plaintiff was hospitalized several times for complications resulting from his severed bile duct and had to undergo corrective surgery.

The defense proved that injury to the hepatic duct is a known complication of this surgery which occurred in the absence of medical negligence. The jury returned a defense verdict finding that the physician did not deviate from the standard of care.

## Type of Action: Medical Malpractice

**Name of Case**: David Sherman and Harriett Sherman v. James Robert Monroe, Jr., MD, Palmetto Urology, P.A. d/b/a Palmetto Greenville Urology, and Bon Secours St. Francis Health System, Inc.

**Court**: Greenville County Court of Common Pleas

**Case number**: 2014-CP-23-00535

**Name of Judge**: Hon. Robin B. Stilwell

**Amount**: $ 0/ Defense Verdict

**Date of Verdict**: December 17, 2015

**Attorneys for defendant**: James B. Hood and A. Walker Barnes of Hood Law Firm, LLC, Charleston, SC

**Description of the Case**: An urologist was sued in a medical malpractice action. Mr. Hood's client was alleged to have failed to timely order a prostate biopsy prior to the patient developing metastatic prostate cancer. The patient died of prostate cancer three weeks before trial. The defense proved that the patient's clinical history did not warrant a biopsy until the patient's prostate-specific antigen ("PSA") levels rose 1-2 years after the plaintiffs alleged that a biopsy was warranted.

# Case Notes

Prepared by Evan T. Leadem and Jay T. Thompson

***Bank of N.Y. Mellon Trust Co., et al. v. Grier, Op. No. 5385 (S.C. Ct. App. Filed March 2, 2016)***

This insurance coverage case presented the Court of Appeals with an opportunity to resolve an issue of first impression, interpreting for the first time a section of the South Carolina Insurance Code specific to cancellation and non-renewal of a homeowner's insurance policy. The primary issue was which statute sets the requirements an insurer must follow for non-renewal of a homeowner's insurance policy.

The plaintiff had a homeowner's policy with Nationwide Property & Casualty Insurance Company ("Nationwide"). The plaintiff also had a mortgage serviced by GMAC. The plaintiff made monthly escrow payments to GMAC, which paid the plaintiff's annual insurance premiums to Nationwide out of the escrow account.

For various reasons related to maintenance of the home, Nationwide elected not to renew the homeowner's policy at the expiration of its term. Nationwide contended that it informed the plaintiff of the nonrenewal via written notice delivered by mail to the address listed on the insurance policy more than forty days before it expired, and Nationwide produced a copy of the non-renewal notice letter addressed to the plaintiff. The plaintiff contended that she never received any notice of non-renewal. Nationwide also contended that it informed the agent of the nonrenewal both by a copy of the same letter delivered by mail and by means of an electronic messaging system used internally by Nationwide agents and employees. Nationwide produced a copy of the non-renewal notice letter addressed to the agent, but the agent did not have a copy of the letter in her file. Nationwide also produced evidence that the non-renewal notice was delivered by the electronic messaging system. Finally, Nationwide notified GMAC of the nonrenewal via separate letter sent on the same day that it notified the homeowner and her agent.

Before the expiration of the policy term, GMAC issued a check to Nationwide in the same amount that had been paid one year earlier to renew the policy, and Nationwide deposited the check. Approximately eight days later, after the policy term expired, Nationwide issued a refund check back to the homeowner in the same amount that GMAC had sent to Nationwide.

After the policy term expired, but before Nationwide issued the check back to GMAC, a fire destroyed the plaintiff's home, rendering it uninhabitable. After Nationwide mailed the refund check to the plaintiff, the plaintiff filed a claim for insurance coverage. Nationwide denied the claim, contending that her policy had not been renewed and, therefore, that Nationwide's coverage obligations had terminated. The plaintiff then filed suit against Nationwide for bad faith denial of coverage and breach of contract.

Nationwide file a motion for summary judgment on the basis that the policy term expired and there was no coverage at the time of the fire. The plaintiff also filed a motion for summary judgment, relying on an audio recording of a telephone call placed by GMAC to Nationwide before GMAC issued the check to Nationwide. The plaintiff argued that the Nationwide representative in the recording informed the GMAC representative that the policy would be renewed and, therefore, that Nationwide could not in good faith contend that the policy was not renewed.

The circuit court found that Nationwide complied with the requirements of S.C. Code Ann. § 38-75-1160(A)(1) to non-renew a homeowner's insurance policy. The court further found that GMAC was not the plaintiff's agent as a matter of law, and the alleged statements by Nationwide to GMAC in the audio recording could not bind Nationwide to renew the policy. Therefore, the circuit court granted Nationwide's motion for summary judgment, denied the plaintiff's motion for summary judgment, and denied the plaintiff's motion for leave to file an amended complaint. The plaintiff appealed the decision to the Court of Appeals.

The plaintiff argued that S.C. Code Ann. § 38-75-740, not § 38-75-1160(A)(1), was the applicable provision setting forth requirements for non-renewal of the policy and that Nationwide failed to comply with § 38-75-740 by failing to deliver written notice of the nonrenewal to both the policyholder and the agent. The plaintiff contended, therefore, that Nationwide did not effectively non-renew the policy and that coverage still applied to her home at the time of loss.

Nationwide argued that § 38-75-740 did not govern nonrenewal of a homeowner's insurance policy because a more specific provision of the Insurance Code applied to nonrenewal of homeowner's insurance policies. The Court of Appeals applied the canon of statutory interpretation that "[a] specific statutory provision prevails over a more general

one." The court noted that, while § 38-75-740 governs nonrenewal generally, it does not apply to insurance policies for "which there are specific statutory provisions of law governing cancellation, nonrenewal, or renewal." S.C. Code. § 38-75-710. The court found § 38-75-1160(A)(1) to be precisely the type of "specific statutory provision" contemplated by §38-75-710 in that it applied exclusively to "property insurance on risks" located in South Carolina. Under §38-75-1160(A)(1), nonrenewal of property insurance is achieved via "deliver[ing] or mail[ing] to the named insured at the address shown in the policy a written notice" of the nonrenewal. There is no requirement under the more specific statute, the Court of Appeals held, to provide notice of nonrenewal to the homeowner's insurance agent. The Court therefore affirmed summary judgment in favor of Nationwide, finding that the general nonrenewal provision did not govern and the more specific statute on nonrenewal applied in its stead. The court also affirmed summary judgment in favor of Nationwide on the grounds that, because GMAC was not the plaintiff's agent, the alleged statements by Nationwide to GMAC could not bind Nationwide to a renewal of her insurance policy.

### *Wilson v. Willis, Op No. 5387 (S.C. Ct. App. Filed March 2, 2016)*

In this matter arising out of fourteen lawsuits alleging causes of action for, inter alia, violation of the South Carolina Unfair Trade Practices Act, common law unfair trade practices, fraud, and conversion, the Court of Appeals put its broad approval of the enforceability of arbitration clauses on full display.

Plaintiffs, a collection of individuals and insurance agents, brought suit against Southern Risk Insurance Services, LLC, and its agents for allegedly wrongful conduct arising out of their marketing and sale of insurance products in Abbeville County. The plaintiffs also named as defendants a number of insurers whose policies were sold by Southern Risk. The plaintiffs cited the insurers' alleged failure to properly investigate, train, supervise, and audit Southern Risk and its agents. Three of those insurers moved to compel arbitration of the dispute pursuant to an agency agreement they entered into with Southern Risk containing an arbitration clause. After the circuit court denied the motion to compel arbitration on numerous grounds, the insurers appealed. The Court of Appeals considered the denial of arbitrability de novo and reversed the circuit court's holding, remanding the matter back to the circuit with instructions to compel the plaintiffs to arbitrate.

The Court of Appeals first held on basic principles of contract law that the agreement between the insurers and Southern Risk constituted a valid contract in spite of the fact that Southern Risk did not sign it and the agreement did not comport with the Statute of Frauds. The Court held that, pursuant to well-settled South Carolina law, when a contract signed by only one party is nevertheless accepted by the other party, it is enforceable as if signed by both parties. The court held that, even though Southern Risk had not signed the agreement, it had accepted and acted upon the agreement by selling policies on behalf of the insurers. The court also held that because the agreement was for an indefinite period and either party could terminate it with relatively short notice, it was possible to perform under the contract in under one year, and, thus, the contract did not need to comply with the requirements of the statute of frauds.

Next, the Court of Appeals reversed the circuit court's finding that the scope of the arbitration provision excluded the plaintiffs' claims. The Court noted the strong policy of South Carolina in favor of arbitration, and the precept that motions to compel arbitration should only be denied if the arbitration clause "is not susceptible to any interpretation which would cover the . . . dispute." The Court found that the agreement contained a broadly-worded arbitration provision, and that the rights and duties that plaintiffs alleged were breached "could not exist" but for the agreement between Southern Risk and the insurers. That is, the plaintiffs' claims were "inextricably linked to [the insurer's] duties to investigate, train, supervise, and audit" Southern Risk and its agents. Thus, the court found that not only was the agreement validly executed, but its arbitration provisions governed the claims put forth by the plaintiffs.

Next, the Court of Appeals reversed the circuit court's decision that because the plaintiffs were not signatories to the agreement, they could not be bound by its terms. The Court of Appeals noted that, per the Federal Arbitration Act, parties may agree to arbitration by means other than personally signing contracts containing arbitration provisions. The court also noted that equitable estoppel prevents litigants from arguing that the lack of their signature on a contract should protect them from being compelled to arbitrate when the party consistently maintained that other provisions of the same contract be enforced to their benefit. The Court concluded that the plaintiffs could not bring their claims against the insurers were it not for the duties and authorities imposed upon the insurers by the agreement. Thus, the plaintiffs had received a direct benefit from the agreement, and were equitably estopped from arguing that the arbitration provision should not apply.

Finally, the Court of Appeals found that the type of conduct alleged to have occurred (i.e., the failure to properly supervise the activities of Southern Risk) was foreseeable to the parties and not the sort of "outrageous conduct" that would render the arbitration clause inapplicable. Further, the Court found that the insurers had not waived their right to arbitration because: (1) the amount of time it took for them to demand arbitration was acceptable; (2) they had not "taken advantage" of the judicial system by engaging in substantial discovery prior to demanding arbitration; and (3) the plaintiffs would not be preju-

Continued on next page

diced beyond "mere inconvenience" by being compelled to arbitrate.

Thus, the Court of Appeals reversed the decision and remanded the matter to the circuit court.

### *Fisher v. Shipyard Vill. Council of Co-Owners, Inc., Op. No. 27603 (S.C. Supreme Court Filed Jan. 27, 2016)*

In this dispute between residents of a condominium development and the Board of Directors of the development's property owners' association, the South Carolina Supreme Court further refined the contours of the business judgment rule and the standards by which motions for summary judgment should be determined.

As early as 1983, the Board of Directors of the property owners' association at Shipyard Village, a condominium development in Pawleys Island, was aware of water intrusion in two residential buildings on the development's property. Initial engineering reports commissioned by the Board suggested that the water leaks were the result of faulty windows and sliding glass doors, property features that were the responsibility of condominium co-owners as opposed to common features of the development. As such, the Board concluded that each co-owner was independently responsible for repairing or replacing the deficient windows and doors in order to comply with the development's requirement that all units be properly maintained. However, subsequent engineering reports revealed that the leaks were actually caused by deficient interfaces between the property's windows and stucco exterior and that it would be "difficult and impractical" for each of the co-owners to conduct their own, independent repairs. Thus, the Board attempted on various occasions to amend the development's Bylaws to recast the windows and sliding doors as community features, thereby making their repair and replacement the Board's responsibility. To fund the work, the Board proposed issuing a special assessment upon the development's residents. However, the co-owners rejected the special assessment and argued that the manner in which the Board had attempted to recast the windows and sliding doors as community features violated the development's Bylaws. After the special assessment was rejected, the Board attempted to pay for the repairs by incorporating the cost into the development's operating budgets. However, the Board never submitted the proposed budget to the co-owners for their approval, as required by the Bylaws.

Eventually, multiple suits arising out of the Board's actions were filed and later consolidated. First, a group of co-owners sued the Board, arguing that the amendment purporting to recharacterize the windows as community features was invalid under the Bylaws and that the cost of making the repairs should be borne by residents of the buildings where the water intrusion occurred, not all of the development's residents. Additionally, a group of residents of the buildings impacted by the leaks sued the Board for negligence, misrepresentation, breach of fiduciary duty, and breach of the Bylaws and Master Deed governing the development.

The circuit court ruled that the Board could not assert the business judgment rule as a defense to plaintiffs' claims because the Board's conduct was controlled by specific documents (i.e., the development's bylaws and master deed, as well as the South Carolina Horizontal Property Act), not the general corporate standard set forth by the business judgment rule. Further, the circuit court granted summary judgment in the plaintiffs' favor, finding that, as a matter of law, the Board had breached its duty to investigate substantial evidence that particular co-owners had neglected to maintain their units, which would have rendered them individually responsible for certain repairs.

The South Carolina Supreme Court first reversed the circuit court's blanket denial of the Board's right to assert the business judgment rule as a defense to plaintiffs' claims. The business judgment rule, the Supreme Court noted, states that "a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith." Stated another way, absent a showing of bad faith, dishonesty, or incompetence, courts are not to upset the judgment of corporate directors. The Supreme Court noted, however, that the rule only applies where directors have acted intra vires, or, in accordance with the powers granted to them by the corporation's articles of incorporation, bylaws, and general statutory law. Where the corporation takes action not permitted by these sources of authority, the business judgment rule does not act as a defense. The Supreme Court concluded that the business judgment rule applied in the context of a property owners' association board, and that the Board was entitled to its protections, but only as to those acts which a jury finds were within the Board's scope of authority. Those acts determined to be ultra vires, however, could not be defended against via the rule.

The Supreme Court also reversed the circuit court's grant of summary judgment on plaintiffs' claim that the Board breached its duty to investigate the water leaks. The Court noted that while duty is a matter of law for the court to decide, whether a breach of that duty has occurred is the province of the jury, and if a litigant introduces even a scintilla of evidence illustrating an issue of material fact, summary judgment is inappropriate. Here, the Court agreed that the Board had a duty to investigate, but found that the circuit court improperly ignored evidence that the Board had tried to determine the cause of the leaks by hiring engineering firms and analyzed various options for paying for the necessary repairs. Thus, the issue of whether the Board had breached its duty was for the jury to decide.

In conclusion, the Supreme Court reversed the grant of summary judgment on plaintiffs' cause of action for breach of duty to investigate, and ruled that the business judgment rule could operate as a defense to at least some of the plaintiffs' claims.

# 2016

## *Summer*

SUMMER MEETING
**July 28 - 30**
**Renaissance Hotel**
Asheville, NC

## *Fall*

FALL BOOT CAMP
**September 22**
Columbia, SC

## *Fall*

ANNUAL MEETING
**November 10 - 13**
**Ritz Carlton Reynolds Plantation**
Greensboro, GA

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION
1 WINDSOR COVE, SUITE 305
COLUMBIA, SC 29223



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