# insights

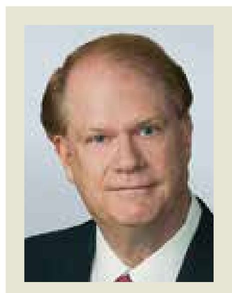
SHUMAKER
Shumaker, Loop & Kendrick, LLP

A Newsletter from Shumaker, Loop & Kendrick, LLP | Autumn 2015

**4** Independent Contractors under the New Labor Paradigm
**8** Cuba Today
**11** Preliminary Relief in Arbitration
**12** It's Time to Check Your Ticket for 2016 and Beyond
**14** A Checklist for Employers
**17** Regulation of Drones
**19** Dawn of a new Statutory Scheme to Protect Tenants
**21** Documentation for an Investment Fund
**25** Say it Ain't So Bobby

## What to Do When the Government Comes Calling

In today's complex world of e-commerce and international competition, increasingly governmental agencies (both state and federal) are resorting to "dawn raids" (i.e., unannounced service of search warrants) on businesses to aid them in their investigations. The tactic is becoming more common and is typically used by the FBI for investigation of antitrust violations, securities fraud, cyber threats and a variety of other crimes. Unfortunately, often "innocent" companies are subjected to this method of investigation—even if they are not the actual targets of the investigation. These raids usually occur without warning around the opening of business when a group of armed FBI agents arrive with a search warrant and demand all of the company's records, files, data, servers, cell phones. Typically the agents also request to "interview" officers and employees. More and more frequently, we are being asked by our clients for advice on what to do and what not to do if their company is the subject of such a raid.



by Michael M. Briley

First of all, it helps to understand how this process begins. Usually, as the result of a complaint (which could come from a competitor, an employee, a former employee, a vendor or a customer), a company becomes either the target of an investigation and is suspected of participation in an unlawful activity or it is chosen as a potential witness. A secret grand jury is convened by the government (unknown to anyone else) and warrants are issued for the collection of company records and "evidence." Sometimes the agencies obtain search warrants from courts as the result of secret wire taps on employee phones (including cell phones) and other information from informants—some who have obtained immunity under amnesty provisions. Most federal agencies (like the Department of Justice, the FTC, SEC, EPA, etc.) use the FBI to conduct these early stage investigations and to execute search warrants.

In order to enhance the ability to capture the best evidence "by surprise," the warrants are then served by well-trained FBI agents familiar with both the investigation and the law. The recipient of one of these warrants is at an enormous disadvantage because typically he or she is unprepared, confused, and frightened. However, there are certain things that you can do to prepare your company for this type of event in a way that complies with the law yet enhances the ability of your lawyers to successfully deal with the investigation.

It is also important that you protect your employees in this circumstance by making certain that they know in advance what their rights are and what they are required to do and what they do not have to do. Advance planning is critical so that panic and bad choices do not follow the arrival of the agents. It is "too late" to start trying to protect your interests when the investigators show up. Every company needs to develop a "Search Warrant Action Plan" ("SWAP") as a part of its crisis or emergency response plan so that everyone will know in advance what to do. Accordingly, we recommend that you adopt a SWAP

that includes the following protocols and explanations and advise your employees with respect to each—before the government arrives.

1. First and foremost, if you do not already have a crisis or emergency response team and protocols, develop them immediately. It is critically important that your employees avoid panic and keep as calm and collected as possible in these situations. The first person who will be confronted by investigators will likely be a receptionist or similar employee who will be understandably terrified at the sight of a dozen armed federal agents coming through the door and demanding records. The first step to a good plan is to develop a written emergency response notification list which includes the names, titles, phone numbers (including cell numbers), email and text addresses for your immediate response officers in your order of preference for contact. Since your first choice on your list may not be available, the receptionist (or other "greeter") should be trained to locate the first available name on this list. If you have in-house counsel, that person would likely be first, otherwise a high level officer who is experienced and trained to deal with this situation. You also need to try to contact your outside counsel immediately (if you do not have in house counsel), but you likely will need to respond before your outside counsel can be located and present. The agents will normally allow a reasonable amount of time for a responsible officer to arrive, but that period of time is not great!

A search warrant authorizes the agents to locate and seize (take) all materials described in the warrant.

2. The SWAP officer (if not your in-house lawyer) must then contact legal counsel immediately. Someone will need to verify the validity of the search warrant and verify its purpose and scope. The officer should ask to see the agents' credentials (to be certain that they are who they say they are) and to obtain a copy of the search warrant. A search warrant authorizes the agents to locate and seize (take) all materials described in the warrant. You may not refuse or resist. But, you also do not have to provide materials beyond what the warrant specifically dictates. Some are more specific than others, but all warrants will describe the type of materials to be produced. The agents may look in all files, offices, drawers, safes, cabinets that are likely to contain or may possibly contain relevant materials and you must provide access to them to such places—even if previously locked or secured. It is important, however, that you do not inadvertently expand the scope of the warrant by trying to "help" or by agreeing or consenting to seemingly harmless requests to look at other things. In order to be valid, a search warrant must be signed by a judge or magistrate with jurisdiction over the premises to be searched and it must state "with particularity" the place to be searched and the nature of the materials to be seized. It must also be executed within ten days of issuance.

3. The SWAP officer should clearly express to the agents that it is the company policy to cooperate. Cooperation is very important, but "helping" the investigation is not only unnecessary but also not advised.

4. The agents should be directed to the precise location of the records sought by the warrant. If you can collect (assemble) these records in one room that is suggested; however, do not allow the agents to "wander" away from the appropriate offices to look at other areas, etc.

5. All employees need to be advised (preferably in writing and before any raid) about their rights in the event of a raid. You may not at any time tell employees that they cannot or should not talk to investigators (that is deemed to be obstruction of justice), but you may tell them:

   (a) They are not required to talk to the agents or to answer any questions.

   (b) A statement (by the agents) that there is presumption of guilt on the part of anyone who refuses to answer in question is nonsense. Agents often tell employees that "if you won't talk to us you must be guilty" as an intimidation tactic which should be anticipated and ignored.

   (c) They are entitled to have their own lawyer present before they answer any questions. It is okay if they want to use the company lawyer for this purpose at this stage of an investigation, but because the company lawyer may deem it to be a conflict of interest to represent company employees under certain circumstances, it is a good idea to pre-select several local criminal law attorneys and to have their contact information available to employees. Most criminal lawyers are happy to be included on such a list and it is okay for the company to agree to pay their fee at this juncture.

   (d) Statements by agents that such interviews are "off the record," offers of immunity or statements to the effect that "you are not the person who we are interested in for this" are to be disregarded. No statement to a government official is ever "off the record" and investigative agents have absolutely no authority or ability to grant immunity to witnesses or to give assurances that are not or that they will not become targets of the investigation.

   (e) If they choose to answer questions, however, they must tell the truth. Often lying to agents has a more serious consequence than the crime that is being investigated. Answers should obviously be limited to facts (not opinions) that they actually, personally know to be true.

6. Employees should be told that they do not have to stay at work during an investigation and may leave (or go home) if they choose. If they choose to leave, however, they must leave behind any company computers, or other company devices or documents and files. They may take strictly personal items, however.

7. It is important to keep an accurate log of everything that the agents take. If you have the time and ability to copy files (either electronically or hard copy), do so. You can demand a reasonable amount of time to make copies of what is being taken and it will be of enormous value to your lawyers going forward.

8. It should be discussed with the agents that a procedure needs to be agreed upon to protect potentially privileged documents or material and/or trade secrets and business confidential material.

9. Arrange for the search to be videotaped if possible.

10. Request that the agents not attempt to interview employees without counsel present.

11. Send an email out to all employees that advises of the search, expresses the company policy to cooperate, expresses the belief that the company has not committed any wrongful acts and that advises employees to contact a SWAP team member with any questions or concerns.

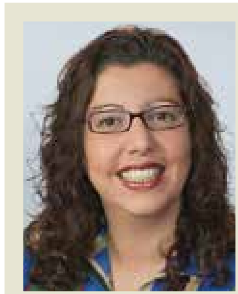
The foregoing guidelines will apply to the "dawn raid" situation where agents arrive unexpectedly at the company. The more common method of investigation involves the service upon the company of a subpoena, civil investigative demand ("CID") or informal written or telephone request for information and/or documents. Obviously any such requests should be forwarded to counsel immediately for handling. Because counsel will have some time to respond to these types of requests, your SWAP involvement will not be necessary. It will be necessary, however, in such event to suspend your record retention program and advise employees to not destroy documents (including emails and texts) as pertains to matters which are the subject of the investigation.

*For additional information, contact Mike Briley at mbriley@slk-law.com or 419.321.1325 (Toledo) or David Axelrod at daxelrod@slk-law.com or 614.628.4427 (Columbus).*

## Your Drivers Are Now Your Employees:

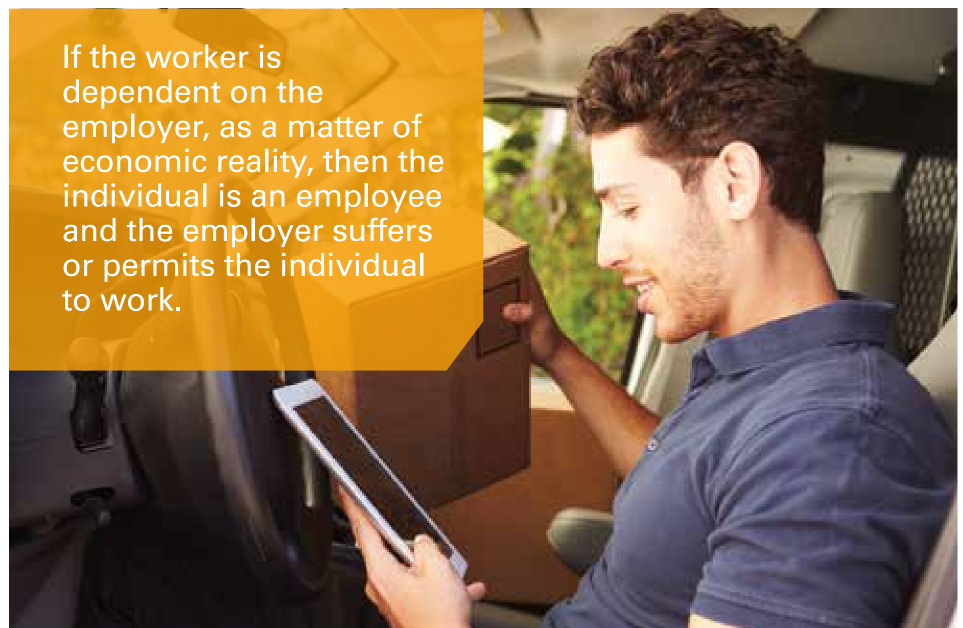
# Independent Contractors under the New Labor Paradigm

The U.S. Department of Labor (the "DOL") has been hard at work this summer, as the end of President Obama's second term draws to a close. The DOL has finally formalized its longstanding trend of challenging independent contractor classifications into actual guidance, in the form of Administrator's Interpretation No. 2015-1 (the "AI"), the one and only interpretation of the Fair Labor Standards Act ("FLSA") the DOL has issued this year. While this interpretation falls far short of an actual regulation, it remains the only available DOL guidance on independent contractor issues since the Wage & Hour Division ceased issuing opinion letters in 2009. In formulating this analysis, the WHD Administrator has opted to ignore the long-standing policy and practice under which entire segments of the economy have functioned for decades. This article will review the AI's formulation of the FLSA's economic realities test and then apply it to one critical segment of the economy—the motor carrier industry.



by Mechelle Zarou

and Michael M. Briley



If the worker is dependent on the employer, as a matter of economic reality, then the individual is an employee and the employer suffers or permits the individual to work.

### The Economic Realities Test under the FLSA

The independent contractor model is firmly entrenched in various industries, and encompasses outside sales representatives, owner-operator haulers, software consultants, skilled tradesmen and others who perform work that is not subject to the control of any employer. While most courts rely on the common law "right to control" test to determine whether a worker is properly classified as an independent contractor in workers' compensation, tax, and other contexts in which this issue can arise, the DOL stands firmly on the side of a more rigid test, known as the "economic realities" test, which applies under the FLSA.

According to the Administrator, this test stems from the definitions used in the FLSA, which defines "employ" quite broadly, to include "to suffer or permit to work." (29 U.S.C. 203(g)) This broad definition was designed to include third parties who illegally hired child laborers when the FLSA was enacted, to prevent employers

from using agents to evade the FLSA's requirements. Thus, the "suffer or permit" standard broadens the scope of employment relationships covered by the FLSA, to include those entities who "suffer or permit" an individual to work if, "as a matter of economic reality, the individual is dependent on the entity." (AI at 4)

Thus, the thrust of the economic realities test is to determine whether the worker is really in business for himself or herself, and therefore truly independent. If the worker is dependent on the employer, as a matter of economic reality, then the individual is an employee and the employer suffers or permits the individual to work. The economic realities test includes the following factors, and no one factor is more important than the others:

1) **Integral to the Business.** If the work the worker performs is integral to the business, then it is more likely that the worker is economically dependent on the employer.

2) **Worker's Opportunity for Profit/ Loss Based on Managerial Skill.** A worker in business for himself faces the possibility of profit, but also the risk of loss. The worker's managerial skill affects the opportunity for profit and loss beyond the current job. Managerial skill includes such decisions on whether to hire others, purchase materials and equipment, whether to advertise, whether to buy or rent space and management of time schedules and scarce resources. If the worker's decision in such areas impacts the profit/loss of the business, more so than working more or fewer hours or having technical abilities, then the worker is more likely to be an independent contractor.

3) **Relative Investments of the Employer and the Worker.** The worker should make some investment (and therefore undertake at least some of the risk for a loss) in order to indicate that the business she is operating is truly independent. And this investment must not be relatively minor when compared with that of the employer, it must be significant in nature and magnitude relative to the employer's investment. In the examples, the AI cites to case law where even a rig welder's investment in an equipped truck costing between $35,000 and $40,000 did not indicate the rig welder was independent, when contrasted against the employer's much more significant investment in its business.

4) **Whether the Work Performed Requires Special Skills and Initiative.** The AI considers a worker's business skills, judgment and initiative, not technical skills, in determining whether this factor is met. This factor is really more of a reminder that just because carpenters, construction workers and electricians are typically considered independent contractors, it is not because of their specialized technical skills that are used to actually perform the work. It is because of their business skills and initiative, which are used in an independent way to operate independent businesses.

5) **Permanent or Indefinite Relationship Between the Worker and Employer.** According to the AI, permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee. Typically, independent contractors work one project for an employer, and do not work continuously or repeatedly for an employer. However, a lack of permanence does not equate to an independent contractor relationship. The "operational characteristics intrinsic to the industry" are relevant to this inquiry, which is to say, the lack of permanence must result from the worker's own independent business initiative in seeking out other work, and not simply be the result of the industry norm.

6) **Nature and Degree of Control Exercised by the Employer.** The worker must control meaningful aspects of the work, such that the worker is actually conducting his own business. In addition, the worker's control must be more than theoretical; the worker must actually exercise it. Thus, a contract that says the worker can hire his own helper is insufficient to show independence. The worker must actually exercise the option and employ a helper or helpers to demonstrate independence. Further, the AI notes that "the 'control' factor should not play an oversized role in the analysis of whether a worker is an employee or an independent contractor. All possibly relevant factors should be considered."

Under the FLSA's economic realities test, only those workers who operate independent, as well as large-scale and successful businesses, are likely to qualify as independent contractors. The key factor that most independent workers will not be able to overcome is the "relative investment in the business" as compared to the employer, since few independent contractors have invested in their businesses to an extent that would come even close to the investment most employers have made into their much-larger businesses. Further,

many business-models rely on contractors to perform work that is integral to the business—a factor that is fatal to this analysis. Thus, with the cards stacked against a finding of an independent contractor relationship, the AI's conclusion that "most workers are employees under the FLSA's broad definitions" is accurate. And it is only a matter of time before courts (and state legislatures) start adopting the economic realities test in areas outside of the FLSA.

### Motor Carriers under the New Labor Paradigm

The independent contractor distinction has special, historical significance for the motor carrier industry. For many years, and especially since the increased competitive environment created by de-regulations of our nation's trucking companies in the late 1990s, the trucking industry has relied upon "owner-operators" (i.e., individuals who own their own truck and lease their truck and their services as a driver to trucking companies). The reasons for this are mainly economic ones: since the cost of motor carrier equipment is significant, trucking companies can expand or retract their capacity requirements quickly and without adding significant capital costs by contracting with owner-operators to deliver freight.

This practice has made the nation's motor carrier industry much more competitive (both inter and intra-modally) as well as more flexible to market demand, since the carriers are freed from the necessity of increasing or decreasing work force and capital equipment demand on short notice. The economics of the relationship between owner-operators and trucking companies is largely based upon the ability of motor carrier to treat owner-operators as independent contractors as opposed to employees.

The reasons for this distinction in the motor carrier industry have been historically viewed with respect by courts and administrative agencies. Owner-operators typically meet the historical common law test for independence in that owner-operators own (or lease) their own "tools" (i.e., the truck); bring their own tools to the job; are free to work for multiple carriers simultaneously; are free to hire their own drivers and helpers; and are not required to accept dispatch or carry their own liability insurance and workers' compensation insurance (or its equivalent).

Unfortunately, however, due to public safety needs, certain federal regulations imposed upon motor carriers have been misinterpreted by some courts and agencies as evidence of a level of "control" sufficient to destroy the independent contractor status for owner-operators. For example, by law, motor carriers must have "control" over all trucks operating under load pursuant to their operating authority, and motor carriers must be responsible to the public for all operations conducted pursuant to their licensed operating authority. While this "control" requirement is limited strictly only to those specific points in time when the truck is operating under load for the carrier, some courts and agencies have mistakenly expanded their definition of "control" during this limited period as a basis to deny the characterization of owner-operators as true independent contractors. If owner-operators bring their own equipment to the relationship, are free to accept or decline work, may hire their own drivers or helpers, and perform services to multiple carriers during any given period of time when under contract with a carrier, then the owner-operator is no different from the "classic" independent contractor—the plumber—who can refuse the job, bring tools to the job, can set hours of work and can work for multiple customers.

While this analysis might hold true under the common law "right to control" test that remains in place in most states for purposes of workers' compensation, discrimination and taxation issues, it most likely will not pass muster under the FLSA's economic realities test as described in the AI. Under the AI, most of the factors of the economic realities test will favor an employment relationship for any owner-operator who owns or leases a single truck:

1) **Integral.** Owner-operators driving for a motor carrier are hauling freight, which is obviously integral to the business of a motor carrier.

2) **Opportunity for Profit/Loss.** Owner-operators who do not own/lease multiple trucks will not have the opportunity to realize greater profits, nor face the risk of loss. Simply driving more hours is insufficient to meet this factor.

3) **Relative Investment.** Owner-operators who do not own/lease multiple trucks will not have as significant of an investment in their business as the motor carrier itself will, even considering that a fully-outfitted truck can run in the hundreds of thousands of dollars.

4) **Business Skill and Initiative.** Owner-operators who own a single truck may not be able to demonstrate significant business decision-making to satisfy this factor. Those who advertise, lease space, make judgments on the best motor carriers to drive for, and employ other drivers and helpers are likely to meet this criteria.

5) **Permanence of the Relationship.** Owner-operators who continually drive for the same motor carrier will not satisfy this criterion, regardless of their level of independence and their business acumen.

6) **Degree of Control Exercised by Employer.** Owner-operators must be in control of meaningful aspects of their work, such that they are operating an independent business. Owner-operators must actually exercise this control—so it is insufficient if they drive for a motor carrier that allows them to drive for other carriers and hire their own drivers or helpers. Owner-operators must actually drive for other carriers and employ drivers/helpers in order to satisfy this factor.

In light of this analysis, the best possible way for a motor carrier to insulate itself against a challenge under the FLSA's economic realities test is to, whenever possible, use fleet owners with several (more than one) drivers, and ensure that the fleet owner's drivers are W-2 employees and not 1099 independent contractors. The fleet owner can be an independent contractor as to you, the motor carrier, but its drivers must be its employees. While a motor carrier could still face a challenge that it is a joint employer over the drivers employed by the fleet owner, this risk is much lower than the risk of a finding that the carrier's independent owner-operators are actually its employees.

In addition to contracting only with fleet owners and owner-operators who own/lease more than one truck, motor carriers can also take the following steps:

1) Encourage all owner-operators to also haul for other carriers while under contract with you. Owner-operators' ability to show that they hauled for other motor carriers while under contract with you is critical to demonstrating independence.

2) Do not give any clothing or accessories to an owner-operator that has your company name or logo on it—not even the gift of a cap!

3) If you have a subsidiary company that leases trucks to owner-operators, the equipment lease **must** be completely independent from the independent contractor agreement with your operating company. For example, you cannot make the equipment lease terminable if the independent contractor agreement is cancelled with your operating company. As long as owner-operators make the lease payments, they keep the equipment—even if they are now hauling for your competitor.

4) If you lease Qualcomm or similar GPS/communication equipment to owner-operators, be certain that they understand they have a choice to buy or lease that equipment from someone else (as long as it meets reasonable specifications and is compatible with your satellite system).

5) Always let owner-operators choose their own routes. Pay by percentage of haul only (not by mileage).

6) Never force dispatch—they must have the right to reject loads (for **any** reason). And remember, your written policy against forced dispatch must be in place in actual practice. There can be no "unspoken rule" that turning down a load will remove an owner-operator from the call list.

7) Never tell owner-operators that their contracts will be terminated if they do not accept any certain volume or number of loads. Again, written policy and actual practice must match.

8) Whenever possible use a third party provider to provide training. You can train with regard to your specific company operations, but you should never provide training directly on general truck driving skills or methods. Allow owner-operators to schedule company-specific training at their convenience, not yours.

Despite these practices, motor carriers will continue to face legal challenges to their long-standing and sensible business model. A vast number of products move by truck, and many, if not most, trucking companies utilize independently contracted owner-operators. Efforts to attack and destroy this historical relationship in the motor carrier industry, if successful, will substantially increase the cost of transportation of our nation's goods; which cost will ultimately have to be borne by consumers.

*For additional information, contact Mechelle Zarou at mzarou@slk-law.com or 419.321.1460, or Mike Briley at mbriley@slk-law.com or 419.321.1325.*

## Bridging the Divide:
# Cuba Today

For the last half century, the United States and Cuba have been separated by more than just the 247 miles between the Port of Miami and Puerto de la Habana. Because of the economic embargo in place for much of that time, the two countries have been worlds apart. Recently, however, President Barack Obama has restored relations with Cuba, which has many U.S. businesses contemplating the prospects of potential new lucrative business opportunities. And for good reason. After all, Cuba represents more than 11 million potential consumers who have had little access to American goods and services for more than 50 years. And the Obama administration has recently promulgated amended regulations specifically intended "to allow more business opportunities for the nascent Cuban private sector."

By Maria C. Ramos

To understand the recent changes, the latest of which went into effect on September 21, 2015, some background is necessary. For over fifty years, the ability to travel to Cuba and do business or trade with Cuban nationals has been governed by a byzantine set of regulations administered by the Department of Treasury's Office of Foreign Assets Control (OFAC) and the Department of Commerce's Bureau of Industry and Security. Specifically, travel to Cuba—and the ability to engage in commercial transactions with Cuban nationals—has been regulated under the Cuban Assets Control Regulations (CACR). Trade with Cuba is governed by the Export Administration Regulations (EAR). Under the CACR and EAR, the ability to travel to Cuba or do business or trade with Cuban nationals requires a license or an exception to the license requirement.

If the transaction does not satisfy the specifically enumerated criteria, then a specific license is required.

Under the CACR, licenses are generally available for only twelve categories of travel: family visits, official government business, journalistic activity, professional research and meetings, educational activities, religious activities, public performances or competitions, support for the Cuban people, humanitarian projects, activities of private foundations or research or educational institutes, transmission

of information or informational materials, and certain export transactions. Licenses are either general or specific license.

If a traveler meets the specific requirements set forth in the CACR for travel to Cuba under one of those twelve categories, then he or she is entitled to a general license. If a traveler does not meet the specific regulatory requirements for one of the twelve categories (but is still traveling within one of those twelve categories), he or she can apply to OFAC for a specific license. Because general licenses do not require an application to OFAC, they make travel to Cuba far easier.

The same is true for doing business in Cuba or with a Cuban national. A U.S. person wanting to do business with a Cuban national is required to have a general or specific license. A person can transact business under a general license, without express approval from OFAC, if the transaction satisfies the specifically enumerated requirements in the CACR. If the transaction does not satisfy the specifically enumerated criteria, then a specific license is required. An OFAC general license authorizes the exportation from the United States (and the reexportion of 100% U.S.-origin items from third countries) to Cuba only when licensed by the Bureau of Industry and Security, which currently authorizes limited categories of items under the EAR.

In January, OFAC and the Bureau of Industry and Security announced new rules amending the CACR and EAR to implement the policy changes President Obama announced on December 17, 2014. On September 18, 2015, OFAC and the Bureau of Industry and Security announced additional changes to build on the previous one. Here is a general summary of the changes announced in January and the additional ones announced more recently:

**Increased Travel to Cuba:** There are three major changes to U.S. travel policy. First, the recent changes to CACR increase the types of travel (within the twelve categories) that qualify for a general license. And on a related note, close relatives (i.e., someone related to a person by blood, marriage, or adoption and is no more than three generations removed) may now accompany authorized travelers for certain educational, journalistic, professional research, and religious activities, as well humanitarian projects. Please keep in mind, though, that travel simply for the sake of tourism is still banned. Second, carrier services—defined as any person subject to U.S. jurisdiction wishing to provide carrier services to Cuba by aircraft or vessel—were previously required to obtain authorization from OFAC. Now, any person subject to U.S. jurisdiction is authorized to provide "carrier services." Third, travel service providers—i.e, travel agent, ticket agents, tour operators, etc.—are now authorized to provide travel services in connection with travel to Cuba.

**No More Spending Limits for Travelers:** Under previous versions of the regulations, travelers were permitted to pay for living expenses and goods for personal consumption while in Cuba. But those expenses could not exceed the "maximum per diem rate" for Havana, Cuba in effect at the time of travel. The "maximum per diem rate" was published in the Department of State's "Maximum Travel Per Diem Allowances for Foreign Areas." Under the recent changes, there is no limit on living expenses. So authorized travelers may engage in transactions ordinarily incident to travel within Cuba. In addition, travelers may bring back up to $400 in merchandise with them. And yes, that includes Cuban cigars (although no more than $100 worth).

**Use Debit and Credit Cards:** Previously, travelers were expressly precluded from engaging in any transaction involving a credit card or debit card, unless specifically authorized to do so. That prohibition was deleted by the recent changes. Now, travelers can engage in credit card and debit card transactions. It is worth keeping in mind, however, that there are few ATMs in Cuba, and it will be awhile before many establishments have the means to process credit card payments. As such, many transactions will still require cash.

**Remittances:** Under the old CACR, U.S. persons could not donate more than $2,000 per quarter to a Cuban national (other than a prohibited government official or member of the Cuban communist party). Additionally, U.S. persons could not carry more than $10,000 to Cuba. Those limits have been completely removed.

**Cuban Operations Now Permitted:** This may be one of the most significant changes. Any U.S. person engaged in the following categories of authorized activities may establish and maintain a physical presence in Cuba: news bureaus; certain exporters (such exporters of agricultural products and construction materials); entities providing mail or parcel transmission services; providers

of telecommunications or internet-based services; entities organizing or conducting educational activities; religious organizations; and carrier and travel service providers. Importantly, entities permitted to establish and maintain a physical presence in Cuba are also authorized to employ Cuban nations, as well as open and maintain bank accounts.

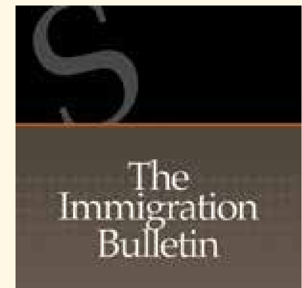
**Banking**: There are three major changes when it comes to banking. First, under a new general license, persons traveling under one of the twelve authorized categories may open and maintain bank accounts in order to access funds while in Cuba for authorized transactions. Second, depository institutions are permitted to open correspondent accounts at Cuban banks. But Cuban banks are not generally licensed to open depository accounts at U.S. banks. Third, depository institutions are permitted to maintain accounts for certain Cuban nationals in the United States in a nonimmigrant status.

**Telecommunications**: Under the recent changes, U.S. persons may engage in transactions that establish mechanisms to provide commercial telecommunications. For instance, U.S. persons are authorized to establish fiber-optic cable and satellite facilities to link the United States (and other third countries) to Cuba. In addition, U.S. telecommunications or internet-based service providers may establish a physical presence in Cuba and engage in marketing. Finally, in some instances, U.S. persons may engage directly with the Cuban state-owned telecommunications company.

In sum, while we have come a long way, the attempt to bridge the divide between the U.S. and Cuba has not eroded all the necessary obstacles to engage in free trade as we know it. Contrary to what some think, those changes did not end the trade embargo. Travel to Cuba and the ability to do business with Cuban nationals—although more widely permitted—nonetheless remain subject to byzantine regulations. Companies and individuals looking to do business in Cuba must be vigilant in staying up to date with the latest changes to those regulations. Continue to check back with our Shumaker Blog, *The Immigration Bulletin* at http://theimmigrationbulletin.com/ for updates on the status of U.S. relations with Cuba.

*For additional information, contact Maria Ramos at mramos@slk-law.com or 813.227.2252.*

## What's Trending on Shumaker Blogs?



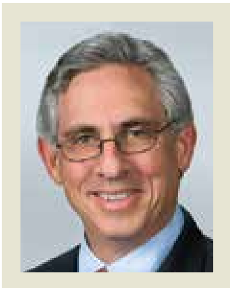

http://theimmigrationbulletin.com/

http://shumakersportsreport.com/

http://shumakersocialmedia.com/

# Preliminary Relief in Arbitration

A historical drawback to arbitration was that parties couldn't obtain emergency relief from an arbitrator to preserve the status quo pending the full arbitration. Parties seeking emergency relief needed to go to court to obtain a temporary restraining order or preliminary injunction. Nearly all federal and state courts allowed parties to do so to prevent irreparable harm, and the injunction (if issued) would stay in place until the final arbitration award was issued.



By Peter R. Silverman

This procedural gap ran counter to some of the reasons parties like arbitration. Instead of the speed, economy, and confidentiality the parties sought, they ended up litigating their preliminary relief in the public along with the time and expense of court-mandated rules, briefing, discovery and evidence.

Aware of this gap, the major arbitration providers (AAA, JAMS, and CPR) have developed new rules and procedures for arbitrators to issue preliminary relief. Under each set of rules, when a clause provides for arbitration administered by one of those administrators, a party in need of emergency relief applies for that relief with the administrator. The administrator then promptly appoints an emergency arbitrator. Either party can challenge the arbitrator for bias.

Assuming no bias, the emergency arbitrator sets a schedule to hear the evidence with all the flexibility that arbitration allows.

Assuming no bias, the emergency arbitrator sets a schedule to hear the evidence with all the flexibility that arbitration allows. Testimony can be given in writing, or by phone, or by video, all as the arbitrator deems fair. The arbitrator can ask for briefs or dispense with them. Nothing is open to the public.

If the emergency arbitrator issues an award, the emergency arbitrator retains authority over the matter until the parties choose their regular arbitrator in the ordinary course. Arbitrators generally have the power to issue sanctions for failure to comply with their orders.

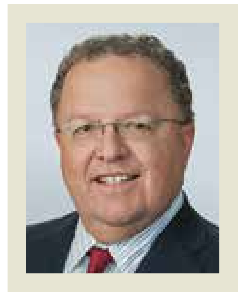
These procedures have not been in place long, and have been invoked only about ten times to date. Thus there's no track record as to how well the process works, but it's well thought out and a good development for those who prefer the economy, speed, and confidentiality of arbitration.

*For additional information, contact Peter Silverman at psilverman@slk-law.com or 419.321.1307.*

## The ObamaCaravan Rolls On:

# It's Time to Check Your Ticket for 2016 and Beyond

Businesses are watching the sixth year of the Affordable Care Act ("ACA") unfold. By now, supporters and critics have had a rollercoaster ride of hopes and expectations, most easily seen in the business community. Deadlines for employers have been set, extended and altered as the ACA has been rolled out and the legal challenges defeated. The ACA will continue to create ripples in reporting for all employers and employees, as the mandates continue and the information-gathering intensifies.



By James H. Culbreth

Here is what we have already seen, and where we are going, as the ObamaCaravan moves forward:

### The ObamaCaravan Started Moving in 2010

The ACA was signed into law on March 28, 2010, and, although the legal effects were delayed for six months, the impact on individual and employer group health plans was immediate. Early implementation considerations for employers included "grandfathering" group medical plans (or not), dealing with the new benefits required and old restrictions prohibited by the ACA, and the initial review of the "employer mandate" and the "play-or-pay" rules applicable to "large group employers." Even as the ObamaCaravan started, employers had to learn a new lexicon of group medical plan terms that would influence decisions for the next decade.

The ACA rests upon the concept of "shared responsibility," the requirements that large group employers offer affordable and adequate medical coverage to full time employees, and that individuals not covered by an employer's plan obtain individual coverage.

### The Early Stations for the ObamaCaravan

While group health plans were dropping lifetime limits on medical coverage and adding dependent coverage to age 26, employers were aware of the legal challenges to the ACA's funding methods. The ACA rests upon the concept of "shared responsibility," the requirements that large group employers offer affordable and adequate medical coverage to full time employees, and that individuals not covered by an employer's plan obtain individual coverage. In each case, noncompliance by large group employers or individuals result in

financial penalties, which were quickly challenged as impermissible *mandates* that Congress could not impose on citizens. The U.S. Supreme Court disagreed with that interpretation on June 28, 2012, finding that the penalties were, in fact, taxes and could be imposed by Congress.

The ObamaCaravan left the most recent station with the Supreme Court's decision on June 25, 2015, upholding another critical funding aspect the ACA. The Supreme Court upheld and affirmed the administration's position that federal subsidies should be available for qualifying individuals purchasing medical insurance through the state insurance exchanges established to help individuals obtain medical insurance.

### What's Ahead for the ObamaCaravan, and Will it Stay on Track

Small and mid-sized employers know to carefully monitor the number of full-time employees, and are aware of the penalties that can result if a large group employer fails to offer affordable and adequate coverage to eligible employees. In 2016, the definition of large group employer will revert to the 50+ definition contained in the statute, with implications for employers who have previously avoided the employer mandate. 2015 brought additional reporting and recordkeeping requirements for all employers, with the new IRS Form 1095-C for 2014 requiring covered employers to report monthly information on all employees, even part-time employees whose hours determine full-time equivalent employees. The "Applicable Large Employer" information in Form 1095-C is the backbone of federal oversight, but 2015 presents a challenge for covered employers who must provide additional information to employees and the IRS.

The tax on employer-sponsored high-cost health plans, referred to by its critics as the "Cadillac Tax," begins in 2018. Intended to both limit an employer's use of excessively generous benefits and to generate funds for the subsidies offered to low-income individuals, this 40% excise tax applies to the employer sponsoring the group health plan. An "excess benefit" generally is one where the cost of coverage exceeds annual limits of $10,200 for individual and $27,500 for family coverage. Although the tax was predicted in 2013 to affect 3% of all medical benefit plans, it is budgeted to raise billions in revenue. Opposition from both employers and unions is growing, and this excise tax will become a major obstacle to the ObamaCaravan as 2018 approaches.

As the ObamaCaravan rolls on, significant change is unlikely until after the 2016 election cycle, and then only if the political power shifts significantly towards opposition to the ACA. Many of the ACA reforms are widely popular even as the burden on employers increases and the costs remain a problem. The most likely path for the ObamaCaravan is steady implementation with some funding changes (altering the Cadillac Tax) and relief for smaller employers. The societal forces powering the ObamaCaravan will keep it moving and should keep it in the forefront of business planning.

*This article originally appeared in the Charlotte Biz Journal in August 2015.*

*For additional information, contact Jim Culbreth at jculbreth@slk-law.com*

# Healthcare Reform Reminder

– BY WYATT J. HOLLIDAY

As highlighted in the adjacent article, the Affordable Care Act requires that employers who have 50 or more employees provide affordable, minimum value healthcare to those employees. However, if an employer can be aggregated with another company due to mutual ownership, it may be required to offer such coverage even if it has fewer than 50 employees.

Starting in 2016, if an employer is required under the law to provide health insurance, it is also required to provide each employee with an IRS form 1095-C, and to file copies of those with the IRS. Failure to provide and file these forms can result in significant penalties.

The filing deadline for these reports is fast approaching. The employee forms must be postmarked February 1, 2016 and the filing with the IRS is due on or before February 28 (March 31 if filed electronically). If you are (or may be) subject to the reporting requirement, you should contact your accountant or payroll provider to ensure you are ready for the filing. If you are unsure if these requirements apply to you, Shumaker's Employee Benefits Practice Group can assist you in determining your responsibilities under the law.

# Evaluating Your FLSA Compliance in Advance of the 2016 Updates: A Checklist for Employers

The U.S. Department of Labor ("DOL") recently issued its proposed updates to the Fair Labor Standards Act's white collar overtime exemptions. These revisions, particularly the proposed increase in the salary level test, will significantly impact an employer's business and its wallet. This article provides a brief background of the Fair Labor Standards Act ("FLSA"), a discussion of the proposed changes, and a recommend--ation on how to proceed in light of the proposal.

by Katherine S. Decker

and Mechelle Zarou

These revisions, particularly the proposed increase in the salary level test, will significantly impact an employer's business and its wallet.

## Background

The FLSA requires certain employers to pay non-exempt workers at least minimum wage for every hour worked as well as overtime at a rate of one and a half times the regular hourly rate for all hours worked over forty in a workweek. Additionally, the FLSA requires employers to keep certain records for every non-exempt worker, including:

1) the employee's full name and social security number;
2) address, including zip code;
3) birth date if younger than 19;
4) sex and occupation;
5) the time and day of week when an employee's workweek begins;
6) hours worked each day;
7) total hours worked each workweek;
8) basis on which the employee's wages are paid;
9) regular hourly pay rate;
10) total daily or weekly straight-time earnings;
11) total overtime earnings for the workweek;
12) all additions to or deductions from the employee's wages;
13) total wages paid each pay period; and,
14) the date of payment and the pay period covered by the payment.

Some employees, however, are subject to one of several narrowly tailored

exemptions commonly known as the white collar exemptions. The white collar exemptions apply to employees employed as bona fide executive, administrative, or professional employees as well as certain computer, outside sales, and highly compensated employees. To be exempt, employees must perform certain duties and be paid on a salary basis of not less than $455 per week. The most common exemptions—the executive, administrative, and professional exemptions—require the duties listed in Figure A (below).

Another commonly utilized exemption, the highly compensated employee exemption, borrows from the executive, administrative, and professional exemptions. The highly compensated employee exemption requires employees to: (i) perform office or non-manual work; (ii) receive total annual compensation of at least $100,000 (including a weekly salary of at least $455); and (iii) customarily and regularly perform at least one of the duties identified in the executive, administrative, or professional employee exemptions.

An employer's failure to comply with the FLSA carries significant penalties. First, the FLSA provides for the payment of back wages for up to three years. While the statute of limitations for a general FLSA claim is two years, the statute of limitations extends to three years if an FLSA violation is willful, *i.e.*, that the employer either knew or showed reckless disregard for whether its conduct violated the FLSA. To exploit the third year, the employee must show that the employer willfully violated the FLSA.

Second, the FLSA provides that an employer who violates the FLSA "shall be liable" for liquidated damages in an amount equal to unpaid back wages. (29 U.S.C. §216(b)) To avoid liquidated damages, an employer must show that it acted in good faith and had reasonable grounds for believing it was in compliance with the FLSA.

Lastly, and perhaps most significantly, the FLSA requires the employer to pay for the prevailing employee's attorneys' fees. Because of this fee shifting provision, FLSA violations can be very costly, even if the actual wages owed are relatively low. Given the substantial liability that employers may face in FLSA litigation, compliance is essential.

### Proposed Changes and Status

Earlier this spring, President Obama issued a Presidential Memorandum instructing the DOL to update the white collar exemptions, last amended in August of 2004. In response, on July 6, 2015 the DOL published a Notice of Proposed Rulemaking ("NPRM") in which it advanced several significant changes. First, the NPRM proposes to increase the salary level from $455 per week to the 40th percentile of weekly earnings for full-time salaried workers. The estimated 2016 level is approximately $970 per week ($50,440 annually) or more than double the current salary level of $455.

The second recommended change relates to the highly compensated employee exemption. The NPRM proposes to increase the salary from $100,000 annually to the 90th percentile of earnings for full-time salaried workers or $122,148.

**FIGURE A**

| EXECUTIVE | ADMINISTRATIVE | PROFESSIONAL |
| --- | --- | --- |
| • The employee's primary duty must be management;<br>• The employee must customarily and regularly direct the work of at least two full time employees or their equivalent; **and**,<br>• The employee must be able to hire or fire others, or the employer must give particular weight to the employee's recommendations on hiring, firing, promoting or demoting other employees. | • The employee's primary duty must be non-manual, office work related to the employer or the employer's customers' management or business operations;<br>• The primary duty includes the exercise of discretion and independent judgment in matters of significance. | • The employee's primary duty requires the performance of work requiring advanced knowledge in a field of science or learning that is acquired through a prolonged course of specialized intellectual instruction. |

Additionally, the NPRM considers whether to include nondiscretionary bonuses and incentive payments as a part of the new salary level test for the executive, administrative, and professional exemptions. Currently, the DOL only considers an employee's actual salary when determining compliance with the executive, administrative, and professional exemptions.

Lastly, the NPRM proposes to establish a mechanism for annual, automatic updates of the salary and compensation levels to ensure that the salary levels are based on current data.

The DOL is currently reviewing the comments submitted during the 60-day comment period that recently ended on September 4, 2015. We anticipate that the DOL will issue the final rule sometime in late 2015 or in the first quarter of 2016. After publication of the final rule, employers will have at least 30 days, and potentially longer, before the rule becomes effective.

### Checklist for Compliance

To ensure FLSA compliance, we recommend that employers reevaluate their current exempt workforce by following the checklist below. This checklist also provides a good guideline for determining whether any employees are currently misclassified as either exempt or non-exempt.

- ☐ Determine how many, if any, workers (whether currently exempt or not), currently exceed the $455 weekly salary level, but will fall below the proposed $970 weekly salary level.
- ☐ Confirm that the affected workers satisfy the duties tests under the applicable exemptions.
- ☐ Assess, to the extent possible, the amount of overtime hours the affected employees currently work (and are likely to work in the future).
- ☐ Assess the amount of annual overtime each affected employee is likely to receive based on the estimated overtime hours.
- ☐ Assess the proportion of the affected workers' salaries that are paid as discretionary bonus, as opposed to base salary. Can more of the salary be paid as base salary instead of discretionary bonus? If so, enough to satisfy the new salary basis test?
- ☐ Assess whether it would be more financially reasonable to hire additional part-time/full-time/seasonal employee(s) to avoid the need for any overtime hours.
- ☐ Determine how to best to comply with the salary level changes, based on the estimated economic costs involved:
    - ☐ Increase the affected employees' salary to meet the new salary level (assuming the employees satisfy the duties test) or adjust bonus plan to ensure more of annual salary is paid as base salary;

    **OR**

    - ☐ Reclassify the affected employees as non-exempt, with a detailed understanding of potential overtime costs;

    **OR**

    - ☐ Hire additional employees as needed to ensure no overtime hours for current employees.
- ☐ If choosing to reclassify the affected employees as nonexempt, develop recordkeeping procedure to satisfy the FLSA's recordkeeping requirements.

This brief discussion introduces you to a brief background of the FLSA and the implications of the DOL's proposed changes to the white collar exemptions.

*For additional information, contact Kate Decker at kdecker@slk-law.com or 419.321.1452, or Mechelle Zarou at mzarou@slk-law.com or 419.321.1460.*

# Regulation of Drones

These days, it is difficult to read or watch the news without seeing or hearing about unmanned aircraft systems, more commonly known as drones. Drones first crept into the national consciousness as military tactical devices, but now may be purchased easily at the store or online in various shapes and sizes. Although it may be easy to acquire a drone, there are rules about how, where and for what purpose a drone may be flown, and the Federal Aviation Administration ("FAA") and Department of Transportation ("DOT") are in the process of safely integrating drones into U.S. airspace. Currently, there are three different types of permissible drone operations: model aircraft (hobby or recreational), public (governmental) and civil (non-governmental).

by Barbara G. Rivas

. . . there are rules about how, where and for what purpose a drone may be flown, and the Federal Aviation Administration ("FAA") and Department of Transportation ("DOT") are in the process of safely integrating drones into U.S. airspace.

### Model Aircraft Operations

Model aircraft operations are for hobby or recreational purposes only. The FAA has partnered with several industry associations to promote drone safety through a campaign known as "Know Before You Fly."

Model aircraft safety guidelines include:

- Fly below 400 feet and stay clear of obstacles
- Maintain a visual on the drone
- Keep away from and do not interfere with manned aircraft operations
- Do not fly within five miles of an airport without contacting the airport and control tower before flying
- Do not fly near people or stadiums
- Do not fly a drone weighing more than 55 pounds unless it has been certified by an aeromodeling community-based organization
- Do not be careless or reckless

Flying within the above parameters does not presently require any permission from the FAA, but any flight falling outside the above parameters (including non-hobby or non-recreational operation) requires FAA authorization. For example, using a drone to take pictures for your personal use is recreational and does not presently require FAA authorization, but using that same drone to take pictures to sell to a third party would be considered neither a hobby nor recreational, and is not allowed without FAA authorization.

Recently, much of the news on drones relates to violations of the above guidelines. Earlier this year, a drone crashed into empty seats at the U.S. Open during a match. Its operator was found at a marina on the

opposite side of the stadium after the incident and charged with reckless endangerment and operating a drone in a New York City public park outside of a prescribed area. Drones have also caused disruptions in air travel. Pilots reported nearly 700 close calls with drones through August of 2015, which is roughly triple the number recorded for all of 2014. One of these instances occurred in restricted airspace over Washington, D.C., and the U.S. military scrambled fighter jets as a precaution. Unauthorized drone operators may be subject to fines of up to $25,000 and up to 20 years in jail.

## Public Operations

Public operations are limited by federal statute to certain governmental operations. Whether a drone operation qualifies as "public" is determined on a flight-by-flight basis based on drone ownership, the operator and the purpose of the flight. For public operations, the FAA issues a Certificate of Waiver or Authorization ("COA") allowing certain public agencies and organizations to operate a particular drone for a particular purpose in a particular area. COAs are issued for a specific period of time, often up to two years. Once a COA is issued, the FAA will work with the operating organization to ensure that operation of the drone does not interfere with other aviation operations, and often these drones are not permitted in populated areas and the operator must maintain a visual to ensure separation from other aircraft. Common public operations uses to date include firefighting, law enforcement, border patrol, disaster relief, military training and search and rescue.

## Civil Operations

If an operation is not for recreational purposes and does not meet the statutory requirements of a public operation, it is considered a civil operation and requires FAA authorization. There are two methods of authorization: (1) Section 333 exemption and (2) a Special Airworthiness Certificate ("SAC").

Section 333 exemptions require the filing of a petition and the obtainment of a civil COA and may be used to perform commercial operations in controlled, low-risk environments. As of July 2015, the FAA had granted 823 such exemptions, with permitted uses ranging from aerial photography to agricultural assessment. While the FAA reviews each petition on a case-by-case basis, it is authorized to issue a summary grant if it has previously granted an exemption for a similar request. For example, petitions focused on film and television production are likely to be analyzed through a summary grant. Operation under Section 333 exemptions also requires a recreational or sport pilot license and a driver's license. Most commercial users will look to the Section 333 exemption.

Obtaining a SAC is a more detailed process, and requires disclosure of how the drone is designed, constructed and manufactured, including engineering processes, software, configuration and quality assurance, as well as the reason and location of proposed drone flights. SACs can fall into the experimental category, which allows for research and development, crew training and market surveys, or the restricted category, which allows for special class drones and production flight testing of new drones.

## The Future

The FAA and DOT expect to finalize specialized rules governing drones by the end of 2015, including drone registration requirements, although certain states and municipalities have already enacted laws governing drones, which are beyond the scope of this article. Until the federal rules are released, we can expect an increase in the use of drones.

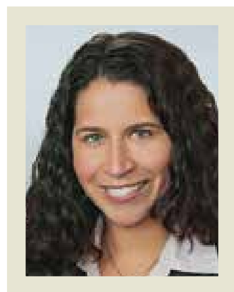
There are proponents and opponents of drones in general, but there is a specific group seeing a potentially dangerous outcome of the proliferation of drones. An open letter initiated by Elon Musk and Stephen Hawking has circulated on the Internet on behalf of Artificial Intelligence and robotics researchers which urges a ban on "offensive autonomous weapons beyond meaningful human control," essentially fearing that drones could combine with self-detonating weapons and lead to this century's nuclear arms race. Hopefully that fear does not come to fruition. Developments in drone technology allowing sandwiches to be delivered in a fast and efficient manner, however, would be nice.

*For additional information, contact Barb Rivas at brivas@slk-law.com or 419.321.1327.*

**The Sun May Have Set on the Federal Protecting Tenants at Foreclosure Act, but in the Sunshine State it is the**

# Dawn of a new Statutory Scheme to Protect Tenants

In May 2009, the *Protecting Tenants at Foreclosure Act* became federal law, one of several measures enacted through the *Helping Families Save Their Homes Act*. The Act or "PTFA" as it was commonly called, changed the landscape of post-foreclosure possession procedures in every state, ushering in a uniform and a mandatory protocol for the disposition of occupied residential properties following foreclosure. In essence, PTFA established that title at foreclosure sales would be *subject to the rights of bona fide tenants*. Specifically, tenants with a written lease could continue to occupy the property until the expiration of the lease (with some exceptions), or, in the case of a month to month tenancy, the new owner's delivery of a 90 day notice to vacate.



by Adria Maria Jensen

. . . PTFA established that title at foreclosure sales would be *subject to the rights of bona fide tenants*.

In Florida, the PTFA requirements stood in stark contrast to the traditional post-foreclosure processes, which permitted the purchaser at foreclosure to be "let into immediate possession." Indeed, most judgments explicitly directed the clerk of court to issue forth a writ of possession without further order of the court. The sunset of PTFA on December 31, 2014, left many wondering whether Florida would return to an *immediate post-foreclosure possession* model. The Florida legislature quickly responded in the negative and on June 2, 2015, Florida Governor Rick Scott signed into a law a new statute titled "Termination of Rental Agreement Upon Foreclosure," Florida Statutes §83.561 (the "Statute"), which became effective immediately.

The Statute provides that a tenant occupying residential property may remain in possession, post-foreclosure, for 30 days after the new owner (purchaser at foreclosure) delivers a written notice. The required notice must state: (1) that the rental agreement is terminated upon delivery of the notice; and (2) that the tenant's occupancy is terminated 30 days after delivery. The notice must be delivered to the tenant as provided in the lease (although it is highly unlikely that the new owner would be able to even ascertain the tenant's identity prior to the issuance of the certificate of title, let alone the terms of the lease) or if no delivery method is specified, by mail,

or via hand delivery (which includes posting the notice at the property).

Of note, Fla. Stat. §83.561, is only applicable under specific circumstances. First, the prior owner(s) of the foreclosed properties or the child, spouse or parent of the prior owner are not tenants and thus ineligible for the protections of the Statute. Similarly, the Statute does not apply if the alleged tenant's rental agreement is not the result of an arms-length transaction or if the agreement requires payment of rent which is substantially less than fair market value (unless the rent is subsidized due to a federal, state or local subsidy). It should also be noted that the Statute explicitly states that the new owner does not assume any obligations of the (prior) landlord unless the purchaser assumes the prior lease or enters into a new lease agreement with the tenant, even though the new owner may demand and collect rent payment during the 30 days. Where the tenant does not vacate the property within 30 days after delivery of the notice, the purchaser may apply *to the court* for a writ of possession, upon the filing of a sworn affidavit reflecting that (a) the required 30-day notice of termination was delivered to the tenant; and (b) the tenant failed to vacate as required. Once a writ of possession is issued and delivered to the sheriff, a deputy will post same at the property and then put the new owner in possession within 24 hours of posting. Once in possession, the new owner may then change the locks and remove the tenant's remaining personal property from the premises.

For tenants, particularly those who may have been unaware of the pending foreclosure, the Statute is quite beneficial, by providing additional time for relocation. However, for investors at foreclosure sale, particularly those eager to "flip" (purchase, market and sell) the property quickly, the enactment of the Statute may prove quite burdensome. For instance, not only will the purchaser be required to wait a minimum of 30 days to gain possession of an occupied property, but as currently written, the prescribed process to obtain a writ will inevitably result in additional delays. Pursuant to the Statute, where the tenant does not vacate the property within 30 days after delivery of the notice, the purchaser may only then apply *to the court* for a writ of possession. Implicitly, the purchaser is required to file a motion with the court (in addition to the prescribed affidavit) so as to obtain an order directing the clerk to issue the writ. Further, where judges are reluctant to enter the order *ex parte*, purchasers will be required to schedule a hearing on the matter, which in certain counties can take several weeks or even months. Thus, purchasers will have increased carrying costs as well as attorney's fees and court costs. Although, the purchaser at foreclosure is entitled to collect rent during the 30 day period (and arguably thereafter until the occupant is dispossessed), it is unlikely that the tenant will pay the rent and impractical for the purchaser to enforce said right.

In the few months since the enactment of Fla. Stat. §83.561, purchasers have experienced substantial delays in obtaining possession of foreclosed properties, even where the occupant does not qualify for protections thereunder. The Statute has made obtaining a writ from the clerk without court order, even where one may be appropriate, virtually impossible. Timeframes for obtaining possession, post-foreclosure, can vary widely by county and even by judge. With the Statute in its infancy it is hard to predict whether it will undergo revisions to address some of these challenges. However, one thing is certain, legal protections for tenants in foreclosures are here to stay in the Sunshine State.

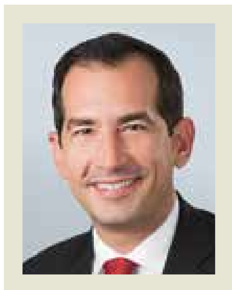
Shumaker has a group of dedicated attorneys with experience and expertise in a wide array of post-foreclosure issues including possession (as discussed here), as well as condominium and homeowners' association disputes and title defects and municipal and governmental disputes. This group is the recipient of *Corporate America* magazine's Legal Elite's Best Post-Foreclosure Practice (Florida).

*For additional information, contact Adria Jensen at ajensen@slk-law.com or 941.364.2739.*

## FATCA Compliance:

# Documentation for an Investment Fund

In the Fall 2012 issue of *insights*, Tom Cotter (then a Shumaker attorney) discussed the proposed Foreign Account Tax Compliance Act ("FATCA") documentation requirements that were to begin phasing in January 1, 2013. The goal of FATCA is to increase federal tax revenue and penalties from a wider global population of newly discovered U.S. persons, their accounts, and any advisors or representatives who help them evade U.S. tax laws. As explained in the Fall 2012 article, since the U.S. does not have direct jurisdiction over foreign recipients of U.S.-sourced income, FATCA encourages compliance by requiring U.S. persons that make payments overseas to comply with documentation requirements and withhold a 30% penalty tax from the payment, unless an exemption applies. A failure to comply can lead to penalties against the U.S. person.



by John P. Dombrowski

FATCA requires withholding agents to document each recipient of a payment that leaves the U.S.

Shumaker recently represented a domestic hedge fund that added European investors. The fund was setup as a domestic limited partnership designed to purchase and hold a domestic operating target corporation. Although both the limited partnership and operating corporation are based in the U.S., since the fund is designed to eventually send gains offshore, FATCA required the firm to identify, classify and report all investors in the fund.

FATCA requires withholding agents to document each recipient of a payment that leaves the U.S. A "withholding agent" is defined as "all persons, in whatever capacity acting, having the control, receipt, custody, disposal, or payment of any withholdable payment." A "withholdable payment" is defined as "any payment of interest (including any original issue discount), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income, if such payment is from sources within the United States, and any gross proceeds from the sale or other disposition of any property of a type which can produce interest or dividends from sources within the United States."

In the context of an investment fund, this means any person or entity that anticipates transferring money from the U.S. must determine who the ultimate beneficiary of those funds will be, both for reporting purposes and for withholding purposes. Whereas Form W-9 is used to obtain the necessary reporting information for payments made to U.S. persons, W-8 forms are used to obtain the necessary information from foreign individuals and entities. Unlike the W-9 regime which utilizes

a single form, however, the W-8 offers five different forms to choose from depending on the identity of the foreign recipient receiving the income (i.e. individual, corporation, partnership, trust, or foreign government or organization) and the type of income being earned.

The following is a step-by-step guide for withholding agents to follow to comply with FATCA reporting requirements as they pertain to foreign investors:

1. **Determine if the payment is derived from effectively connected income ("ECI") or not.**

   If the withholdable payment emanates from ECI, the foreign taxpayer must submit a Form W-8ECI to the withholding agent, in addition to being subject to other U.S. tax reporting requirements. If the payment is not from ECI, then go to step 2 below for advice on the appropriate W-8 form.

   A foreign individual or entity must first have a U.S. trade or business in order to have effectively connected income. According to Field Service Advisory 199909004, the active trade of securities is considered a U.S. trade or business, whereas the mere investment in securities will not be classified as such. While no bright line test exists to distinguish an investor from an active trader, courts have stated that the relevant considerations are the taxpayer's investment intent, the nature of the income to be derived from the activity, and the frequency, extent, and regularity of the taxpayer's securities transactions. Whereas an investor is primarily interested in the long-term growth potential of stocks, an active trader purchases and sells securities with reasonable frequency in an endeavor to catch the swings in the daily market movements.

   In the context of Shumaker's recent representation of the hedge fund, this required us to examine the activities of the limited partnership itself, since determination of whether or not each nonresident partner investor will be engaged in a U.S. trade or business is made at the partnership, rather than the partner, level. Since the partnership aims to purchase and hold the shares of the operating entity target, we determined the partnership's activities will not rise to the level of active trading, and therefore the nonresident partner investors will not be engaged in a U.S. trade or business. Because the investor partners will not be engaged in a U.S. trade or business, they were required to submit a W-8 form aside from Form W-8ECI.

2. **If the payment is not derived from ECI, determine the right type of form.**

   If there is no effectively connected income involved, then the identity of the foreign recipient determines the appropriate W-8 form to comply with FATCA, and the following table can be used:

| FOREIGN RECIPIENTS | DESIGNATED W-8 FORMS |
|---|---|
| Individuals | W-8BEN |
| Foreign Intermediaries, Foreign Flow-Through Entities, and certain U.S. branches of foreign entities | W-8IMY |
| Entities Not Taxed as Flow-Through or Disregarded Entities | W-8BEN-E |
| Foreign Government or Other Exempt Foreign Organization | W-8EXP |

   As shown above, if the nonresident investor is an individual, Form W-8BEN is applicable. If the investor is a foreign government or other foreign exempt entity, then Form W-8EXP is the appropriate form. If neither of the preceding applies, FATCA requires the withholding agent to determine if the entity is taxed as a flow-through entity or as a corporation in that entity's relevant tax jurisdiction.

   Considering the synonyms for "corporation" or "disregarded entity" that exist around the world, a withholding agent would be well advised to confirm the relevant entity's tax treatment with that entity's legal counsel since the forms that apply to flow-through entities and corporate-like entities are substantially similar.

3. **Common issues related to all W-8 forms.**

   Although the withholding agent is charged with reporting under FATCA, the recipient of the payments is responsible for filling out the form and returning it to the agent. Upon receipt, there are some common issues the withholding agent should review before accepting the form.

   First, each form requires the foreign individual or entity to provide a taxpayer identification ("ID") number. This ID number could be a U.S. taxpayer ID number (social security number or international taxpayer ID number ("ITIN")), a foreign tax identifying number ("FTIN"), or even a global intermediary ID number ("GIIN") in limited circumstances. From past experience, foreign taxpayers often neglect to provide this number;

however, it is crucial to provide as each form requires an ID number except under a very limited set of circumstances.

Second, a part of the form often overlooked is the "Claim of Tax Treaty Benefits" section. Although the taxpayer may have provided the address elsewhere on the form, if the taxpayer fails to provide the country of residence in the relevant section (by writing in the country of residence and checking the relevant few box(es), depending on the form), the taxpayer will forgo the decreased rates of withholding potentially available under the applicable treaty. Even if the parties do not foresee the need to claim treaty benefits, clients are advised to claim the benefits now to provide flexibility if circumstances change in the future, especially since there is no downside to claiming these benefits.

In Shumaker's representation of the hedge fund, over 50% of the returned forms were either lacking an ID number or failed to claim treaty benefits.

4. **Classification issues common to Forms W-8BEN-E and W-8IMY.**

   On Forms W-8BEN-E and W-8IMY, a taxpayer must document both "chapter 3" and "chapter 4" status. Chapter 3 status refers to defining the type of entity receiving the payment for withholding tax purposes. On Form W-8BEN-E (used for entities taxed as corporations), the choices include many of the common business forms such as a corporation, estate, and grantor trust. On Form W-8IMY (used for entities taxed as partnerships), the choices include many common "pass-through" entity forms including a withholding foreign partnership, qualified intermediary, nonqualified intermediary, and U.S. branch of a foreign entity.

On the other hand, chapter 4 status defines the type of entity by way of activity and reporting requirements. A taxpayer must first decide whether to classify itself as a foreign financial institution ("FFI") or non-financial foreign entity ("NFFE"), as the classifications are generally divided by this determination aside from a few unique classifications such as an exempt retirement plan or international organization. Even this initial decision, however, must be approached with caution depending on an entity's investment activities. For example, in the above-described hedge fund the firm helped set up, one the investors was an Isle of Man corporation organized to acquire and hold interests in the hedge fund. Treasury Regulations define an FFI as an entity that (among other things) "is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, or any interest (including a futures or forward contract or option) in such securities, partnership interests, or commodities." Although the investor entity was organized specifically to invest in a partnership, which makes it appear analogous to an FFI, we ultimately classified the entity as an NFFE since its investment activity (i.e. one investment meant to be held for the long term) failed to rise to the level of an active investment trade or business. Unfortunately, after making this initial determination, a taxpayer is then faced with a labyrinth of regulations to come to a conclusion as to which of the 31 different FATCA classifications to choose.

## Conclusion

When foreign investment comes into the U.S., the withholding agent carries the burden of compliance in both terms of reporting and withholding the correct amount for U.S. income tax purposes. For reporting purposes, the withholding agent needs to (1) know the investment (i.e will it generate ECI or not), (2) determine the right form, (3) know how to correctly fill out each form, and (4) know all of the various FATCA classifications used to identify certain entities. Due to the difficulty in understanding the FATCA regulations, withholding agents should work closely with their foreign investors to determine the right choices at each step throughout the process, since a failure to properly fill out the form could result in a loss of income tax treaty benefits for the investor.

*For additional information, contact John Dombrowski at jdombrowski@slk-law.com or 419.321.1411.*

## welcome

**Jason W. Davis**
Tampa
*Litigation; Community Associations*

**Tyler H. Gordon**
Tampa
*Corporate*

**Monica H. Johnson**
Tampa
*Community Associations*

**Brooke E. Loucks**
Charlotte
*Litigation; Medical Malpractice*

**Natalie L. McEwan**
Tampa
*Immigration*

**Mathew S. Poling**
Tampa
*Real Estate*

**Matthew C. Spaulding**
Toledo
*Litigation*

**Megan M. Stacy**
Charlotte
*Litigation*

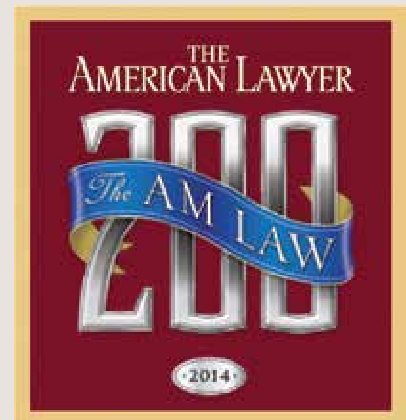
**Yuliya V. Swaim**
Sarasota
*Litigation*

**Brandon M. Taaffe**
Sarasota
*Broker-Dealer Litigation*

**Christina D. Trimmer**
Charlotte
*Intellectual Property*

**Charles A. Wood, Jr.**
Sarasota
*Broker-Dealer Litigation*

Shumaker is an Am Law 200 and *National Law Journal* Top 350 firm.



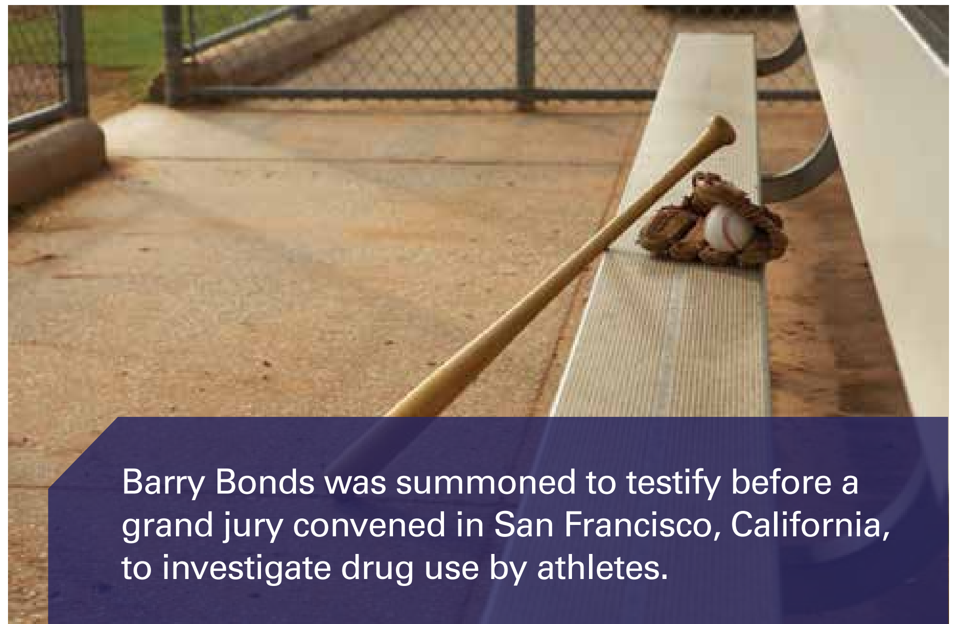
# "Say it Ain't So Bobby:"

## A Brief Commentary on *United States v. Barry Lamar Bonds*

### I. Introduction

More so than the other major sports, the sport of baseball has an especially rich lore which covers a wide range from the noble, to the comic and fabulous, with a strong dose of scandal and depravity in between. For a sublime moment, consider for example, Babe Ruth's called shot in the 1932 World Series between the New York Yankees and the Chicago Cubs, where he allegedly indicated where his home run would land. For the comic and zany, consider Jimmy Piersall of the New York Mets, who ran the bases backward in 1963 upon hitting his 100th career home run, or the pitcher Rube Waddell, of the Philadelphia Athletics, who upon hearing a fire truck siren would leave the pitcher's mound during a game to chase the fire truck. Returning to the noble, who can forget Lou Gehrig's farewell speech at Yankee Stadium in 1939. For scandal we can mention Shoeless Joe ("Say It Ain't So") Jackson who in 1921 was banned from baseball merely for being associated with the scoundrels who allegedly tried to fix the 1919 World Series. More recently on the scandal front, we can point to Pete Rose, now relegated to autographing baseball paraphernalia in Las Vegas, who admitted to gambling on his players. Which finally leads us to the steroid scandal of the late 1990s and early 2000s, and a little nugget of grand jury testimony (hereafter "the Testimony") by Barry Bonds who, as a result of the Testimony, has a chance for baseball immortality, in the baseball "Hall of Shame," but not the Hall of Fame.

By Moses Luski



Barry Bonds was summoned to testify before a grand jury convened in San Francisco, California, to investigate drug use by athletes.

As reported, in *United States v. Barry Lamar Bonds*, 784 F.3d 582 (9th Cir. 2015) (*en banc*), Barry Bonds was summoned to testify before a grand jury convened in San Francisco, California to investigate drug use by athletes. Barry Bonds was granted transactional immunity from prosecution, the broadest form possible, to ensure his cooperation. As stated in the dissenting opinion in *Bonds*: "[t]he purpose of immunizing a witness in exchange for his testimony is to ensure that the witness, freed from the specter of prosecution will provide complete and truthful testimony." *Id*. at 602 (Rawlinson, J., dissenting). Notwithstanding the foregoing grant of immunity, during the Grand Jury proceeding Barry Bonds "gave a rambling, non-responsive answer to a simple question." *Id*. at 582 (*per curiam*). In the *Bonds* case this testimony was called "Statement C." For purposes of this paper, and, with apologies to Barry Bonds, who has allegedly characterized the various steroid

creams allegedly applied on him as "the clear" and "the cream," we are calling the testimony at issue "the Testimony."

## II. The Testimony

During the Grand Jury proceedings at issue in the *Bonds* case, the following question and answer exchange took place during the testimony given by Barry Bonds:

Q. Did Greg, your trainer, ever give you anything that required a syringe to inject yourself with?

A: I've only had one doctor touch me. And that's my only personal doctor. Greg, like I said, we don't get into each others' personal lives. We're friends, but I don't – we don't sit around and talk baseball, because he knows I don't want – don't come to my house talking baseball. If you want to come to my house and talk about fishing, some other stuff, we'll be good friends. You come around talking about baseball, you go on. I don't talk about business. You know what I mean?

Q. Right.

A. That's what keeps our friendship. You know, I am sorry, but that – you know, that – I was a celebrity child, not just in baseball by my own instincts. I became a celebrity child with a famous father. I just don't get into other people's business because of my father's situation, you see.

*Id.* at 583 (Kozinski, J., concurring).

At best, the Testimony could be characterized as humorous, amusing and somewhat bizarre soliloquy. We could view the Testimony as another example of the "boys will be boys" mentality that permeates the baseball locker room. Clearly, the Testimony could be the basis of a great locker room war story about how the show-boating Bonds threw the "Feds" off the scent; another triumph for the bad boys of baseball. The problem for Barry Bonds was that the Testimony was given in the context of a grand jury investigation where Barry Bonds had been granted transactional immunity and was under a legal duty to testify in a straightforward truthful manner. Thus, the United States Attorney (hereafter the "Government"), who was conducting a complex investigation into a serious matter was presumably not amused by the Testimony. From the Government's point of view, the best that could be said of the Testimony was that it was an act of disrespectful, self-absorbed arrogance and that at worst it was a violation of federal criminal law.

## III. Procedural Summary

From a reading of *Bonds*, it is obvious that the Government thought the Testimony was more than a show of arrogance and disrespect. The Government concluded the Testimony constituted a felony obstruction of justice under 18 U.S.C. § 1803 and so indicted Barry Bonds on a count of obstruction of justice based on the Testimony.

If we equate the trial of the case to a baseball game, the Government was ahead going into the bottom of the ninth with the following runs scored:

1. Guilty on one count of felony obstruction of justice under 18 U.S.C. § 1803;
2. Denial of post-verdict motion for acquittal on the obstruction count; and
3. Affirmation of verdict by a three judge panel of the Ninth Circuit Federal Court of Appeals, *United States v. Bonds*, 730 F.3d 890 (9th Cir. 2013).

Going into the bottom of the ninth, Barry Bonds, with seemingly insurmountable odds against him, petitioned the entire Ninth Circuit Federal Court of Appeals for an *en banc* hearing, that is, a hearing by all the judges of the Court. Improbably, this motion was granted. See *United States v. Bonds*, 757 F.3d 994 (9th Cir. 2015). This would be the equivalent of the last batter for the home team fouling off a two strike, two out pitch in the bottom of the ninth. The grant of the *en banc* hearing gave Bonds new life in his controversy with the Government. The next development in the matter dramatically ended the case in favor of Bonds in the same manner that a winning home run ends a game victoriously with just one swing of the bat.

After taking up the case, the *en banc* panel tersely ruled as follows:

*Per Curiam:*

During a grand jury proceeding, defendant gave a rambling, non-responsive answer to a simple question. Because there is insufficient evidence that [the Testimony] was material, defendant's conviction for obstruction of justice in violation of 18 U.S.C. § 1503 is not supported by the record. Whatever section 1503's scope may be in other circumstances, defendant's conviction here must be reversed.

*Bonds, 784 F.3d at 582.*

## IV. Strategic Overview

The *Bonds* case paired two implacable foes of unlimited strength and resources. A United States Attorney, if he wishes, given the great latitude granted him by the doctrine of prosecutorial discretion prevalent in the American legal system, can bring the entire resources of the Government to bear against any defendant it targets. Regardless of how one may feel about him, in Barry Bonds, the Government faced an adversary endowed with breath taking arrogance, unshakable self-confidence, and unlimited resources.

The Government prosecuted Barry Bonds because it would not tolerate Bonds' disrespect and obstruction of the Grand Jury proceeding. The prosecution was intended to serve as a deterrent to future witnesses. Additionally, the Government may have thought Bonds had exposed himself to possible secondary criminal liability for "cover up" activity incidental to more serious conduct for which he had not been charged. Whether such obstruction amounted to a criminal offense was beside the point. It is in the interest of the Government to encourage witnesses to testify forthrightly before the Grand Jury. The *Bonds* case is a caution to future witnesses that the Government will not tolerate a witness who impedes a grand jury investigation.

As for Barry Bonds, he has always operated as a law unto himself with little regard to normative value systems, undeterred by any obstacle put in his way, and, when such an obstacle presents itself, he doesn't just overcome it, he destroys it. These qualities are what have made him such a legendary, aloof and not very likable, but superlative, competitor. Obviously, when it came to a dispute with the Government over alleged illegal use of steroids, Bonds' approach was the same. He would either destroy the Government's position or go down swinging.

Ultimately, Bonds prevailed in this saga, but his victory was hollow, a pyrrhic victory if you will. Bonds was convicted as a felon in a United States District Court in 2011, the conviction was affirmed by a panel of the Ninth Circuit Court of Appeals in 2013, and only after years of being labeled as a felon and millions of dollars of legal fees later did Bonds squeak by with a narrow victory handed by the Ninth Circuit Court of Appeals on a reconsideration *en banc* in 2015.

I would propose that the true victor in the *Bonds* case is the Government, which laid a very strong marker for future witnesses that want to play fast and loose with a grand jury. Mr. Bonds is millions of dollars poorer and his reputation has not been rehabilitated one bit. This victory in federal court might burnish his bad boy legend, but will not get him elected into the Baseball Hall of Fame.

It could be argued that the *Bonds* case represents an abuse of the prosecutional discretion and that the Government was out to get Bonds. In fact, Judge Kozinski's concurring opinion expresses concerns along those lines. *Id.* at 584. I don't think so. Bonds' behavior was a threat to the integrity of our federal judicial system. It could not be tolerated. Further, as will be seen from the legal analysis which follows, Bonds' legal position was not air tight. The legal analysis, and hence the ultimate result, could have gone either way. Thus, it was not unreasonable for the Government to charge Barry Bonds with obstruction of justice.

## V. Legal Analysis

The *Bonds* case is remarkable for the diversity of viewpoints as to the interpretation of the so called "omnibus clause" of the federal statute which defines obstruction of justice. As stated in *Bonds*:

Title 18 U.S.C. § 1503(a), which defendant was convicted of violating, provides in relevant parts as follows: Whoever corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). Known as the omnibus clause, this language was designed to proscribe all manner of corrupt methods of obstructing justice. We have held that a defendant corruptly obstructs justice if he acts with the purpose of obstructing justice. As should be apparent, section 1503's coverage is vast. By its literal terms, it applies to all stages of the criminal and civil justice process, not just to conduct in the courtroom but also to trial preparation, discovery and pretrial motions.

*Id.* at 583 (Kozinski J., concurring) (internal quotation marks and citations omitted).

The *Bonds* case produced four concurring opinions and one dissent. The broad sweep of the omnibus clause in the obstruction of justice statute combined with the diversity

of judicial opinions as to its meaning should give pause to any grand jury witness who intends to play fast and loose with his testimony. If the witness falls on the wrong side of the line, he could be convicted as a felon. Mr. Bonds, with his super-human athlete's will (or arrogance depending on one's view point) and his unlimited resources, chose to test the limits of the Government with some very provocative, non-responsive testimony and almost lost. Most potential grand jury witnesses would not survive the legal, emotional, and financial consequences were they to follow Mr. Bonds' example.

The opinions in the *Bonds* case are briefly summarized as follows:

1. The *per curiam* opinion, which was the opinion of the court in the *Bonds* case, tersely ruled that the Testimony in the context of the proceedings was not material and, therefore, could not serve as the basis of a conviction. *Id*. at 582 (*per curiam*). Significantly, the opinion of the Court in *Bonds* does not rule out the possibility that a single statement from someone's grand jury testimony could constitute the basis for an obstruction of justice conviction. The Court holds only that in the context of the *Bonds* case, the Testimony was not indictable.

2. Judge Kozinski's concurrence elaborates on the *per curiam* opinion and applies a materiality test to the Testimony. It cautions that the broad sweep of the statutory language has the potential to be abused by a prosecutor which, under the American system of laws, has absolute discretion to charge or not to charge. The broad sweep of the statutory language also has the potential to violate the due process requirement that individuals receive fair notice of what constitutes criminal conduct. Accordingly, the materiality requirement must be applied to make the obstruction statute square with due process. "Materiality screens out many of the statute's troubling applications by limiting convictions to those situations where an act has a natural tendency to influence, or was capable of influencing, the decision of the decision-making body." *Id*. at 585 (Kozinski, J., concurring) (internal quotation marks and citations omitted).

   The Kozinski concurrence observed that while the Testimony might be irritating or obnoxious, it did not intrinsically mislead or impede the decision maker, it was just part of the push and pull of litigation. Judge Kozinski felt that the Testimony standing on its own or in context of the entire proceeding was not material for purpose of applying the obstruction of justice statute. Of significance to Judge Kozinski was that ultimately Barry Bonds did answer the questions posed, hence the Testimony could not be material. Importantly, Judge Kozinski's concurrence took the view that, in a different context, where the Testimony was part of numerous evasive statements, it might constitute an indictable statement under the obstruction of justice statute. *Id*. at 582-86. (Kozinski, J., concurring).

3. The concurrence of Judge N.R. Smith took a much narrower view and opined that a single statement, such as the Testimony under any context could not as a matter of law constitute a criminal obstruction of justice. Judge Smith cited two reasons: (i) the Government has a duty and opportunity to clarify "merely misleading or evasive testimony" by further examination; and (ii) the Government must show "that truthful but misleading or evasive testimony must amount to a refusal to testify before it is material." *Id*. at 588 (Smith, J., concurring). In Judge Smith's view, an indictment based on a single truthful but evasive statement can never serve as the basis of conviction for obstruction of justice. *Id*. at 587-90 (Smith, J., concurring)

   The standard of materiality used by Judge Smith differed from that used by Judge Kozinski. The standard used by Judge Smith was "the endeavor must have the natural and probable effect of interfering with the administration of Justice." *Id*. at 587. This standard would establish a higher bar than the standard used by Judge Kozinski which focuses on the tendency of a statement to influence the decision making body.

4. The concurrence of Judge Reinhardt argues for an even more restrictive application of the obstruction of justice statute. Judge Reinhardt agreed with Judge Smith's narrow concurrence. However, he went further and using an "original intent" construction based on legislative history at the time of enactment of the statute concluded that the obstruction statute should never apply to in court testimony, but only to acts committed outside the courtroom. *Id*. at 590-94 (Reinhardt, J., concurring).

5. The concurrence of Judge Fletcher also argues for a narrow interpretation of the obstruction statute based on an "original intent" analysis. He said Bonds could only

be convicted if he gave his testimony "corruptly," and that, based on the legislative history, "corruptly" was equivalent to bribery in the sense of paying money to improperly influence a government official. Since in court testimony by its very nature can never constitute bribery, the Testimony could not constitute obstruction of justice as a matter of law. *Id*. at 594-601 (Fletcher, J., concurring)

6. Judge Rawlinson, dissenting, in a witty and lengthy opinion, argued, with apologies to the author of "Casey at the Bat," that the Testimony, viewed in the light most favorable to the Government, established an obstruction of justice and that the verdict of the Grand Jury should not be disturbed. *Id*. at 601-11 (Rawlinson, J., dissenting).

## VI. The Score Card

The *Bonds* case is remarkable for the diversity of judicial views as to what constitutes an obstruction of justice under the omnibus clause of 18 U.S.C. § 1503(a). There were literally six differing judicial score cards as to whether a seemingly innocuous but evasive and disrespectful answer could constitute an obstruction of justice.

An individual who has been granted immunity and requested to testify before the grand jury needs to tread carefully before providing evasive and non-response testimony such as Barry Bonds did. Such an individual needs to remember that the prosecutor in the American legal system has great discretion in determining whether to bring a criminal case and oftentimes may bring a criminal case regardless of its merits just to establish deterrence so as to indirectly punish an accused. The broad net cast by the text of the obstruction of justice statute as well as the differing judicial interpretations as to its meaning gives a prosecutor even more cover in exercising his prosecutorial discretion against a recalcitrant or disrespectful witness. The individual called to testify before a grand jury should consult counsel and educate himself as to how to testify in a manner that protects his best interests, but also satisfies his legal obligation to testify truthfully. Failure to tread carefully could result at worst in a felony conviction and, at best, in many sleepless nights and substantial legal bills.

Play ball!

*For additional information, contact Moses Luski at mluski@slk-law.com or 704.945.2161.*

# Diversity at Shumaker

Shumaker is proud to be INVOLVED and actively participates in organizations that support diversity initiatives in our communities.

### Tampa

- "Bubbles and Baubles" Professional Women's Network Kick-Off Event, November 5, 2015.
- Pride Scholarship Reception at Stetson University College of Law, October 23, 2015. Tampa partner, Michele Leo Hintson, attended the event on behalf of Shumaker and addressed reception attendees. The event was hosted by Shumaker to coincide with the Florida Association of LGBT Allies and Lawyers (FALLA) Conference.
- Erin Aebel spoke at the Women Leaders in Healthcare Law Conference on September 28-29, 2015 in Washington, D.C.
- George Edgecomb Bar Association End of Summer Social, September 2015.

### Toledo

- Holiday with Heart Charity Gayla, December 6, 2015.
- United Way Women's Initiative "A Night of Inspiration," October 22, 2015.
- Wine Tasting Networking Event, October 21, 2015.
- Toledo Women's Bar Association Fall Kick-Off Luncheon, September 30, 2015.
- Toledo attorney, Cheri Budzynski, attended the NALP/ALFDP Diversity and Inclusion Summit, June 12, 2015.

# slknews

**Erin Aebel** moderated a panel on "Decoding Health Care – Modern Healthcare Technology: Curiosity Creates Cures" in October in Tampa, Florida. Erin spoke at the Women Leaders in Healthcare Law Conference in September in Washington, D.C. and was a presenter at the annual meeting of the American Health Lawyers Association. She also was a panelist at a sold-out event jointly hosted by the Tampa Bay MGMA and the Suncoast Healthcare Executives in May.

**Steve Berman** spoke on Grammar Usage and Writing at the Certified Bankruptcy Assistant Program for Judicial Assistants, Paralegals and Legal Secretaries in October in Tampa.

**Steve Bimbo** and **Al Windle** presented "The Design Professional's Standard of Care," at the Construction Specifications Institute, Charlotte Chapter, in October.

**Mike Briley** served as a speaker at the 2015 Antitrust Institute held in Columbus, Ohio in October. Mike was elected Vice-Chairman of the Antitrust Law Section of the Ohio State Bar Association Section for 2016 and Chairman of the Section for 2017.

**Ron Christaldi** chaired the Eye Ball Gala in October in Tampa which benefitted the Lions Eye Institute Foundation.

**Jennie Compton** was honored for community leadership at the Celebration of Outstanding Leadership annual awards luncheon hosted by the Greater Sarasota Chamber of Commerce. Jennie was selected as a Fellow of the Litigation Counsel of America.

**Jim Culbreth** was a speaker at the "Greater Charlotte Plan Sponsors Best Practices Workshop" in June that focused on critical updates and issues regarding organization's retirement plans.

**Tom Curran** has been elected Co-Chair of the Hillsborough Education Foundation's 2015 Teaching Tools Luncheon. Tom also graduated from the Hillsborough County Bar Association's Bar Leadership Institute.

**Duane Daiker** has been named Chair-Elect of the Appellate Practice Section of The Florida Bar.

**Brad deBeaubien** has been named to the Board of Directors for the Tampa Bay Bankruptcy Bar Association.

**Dan DeLeo** has been elected to the Economic Development Corporation of Sarasota County's Board of Directors.

**Lenny Dosoretz** has been appointed Chair of the Public Policy Committee of Emerge Tampa Bay.

**Lenny Dosoretz** and **Erin McKenney** graduated from Tampa Connection.

**Julio Esquivel** was honored with the 2015 Individual Impact Award from the Tampa Bay Businesses for Culture and the Arts (TBBCA) for his exemplary leadership in support of arts and cultural organizations in Tampa over nearly two decades.

**Jack Gillespie** spoke at the 2nd Annual Commercial & Residential Landlord-Tenant Law Seminar in Dayton, Ohio in October and also at the Ohio State Bar Association's "Advanced Topics in Real Estate" seminar in August in Columbus, Ohio.

**Dan Hansen** was a presenter at the Northeast Surety & Fidelity Claims Conference in Atlantic City, New Jersey in September.

**Michele Hintson** has been appointed to serve on the Board of Directors of the Pace Center for Girls – Pasco and has also been appointed to serve as Vice-Chair of the Pasco Economic Development Council's Growth Task Force.

**Michele Hintson** and **Brian Lambert** were invited to speak to the Tampa chapter of CSI, Inc. in May.

**Warren Kean** spoke at the American Bar Association's LLC Institute in Washington, DC on November 13, 2015 on the topic of S-Corporation LLCs.

**Moses Luski** presented a seminar to North Carolina and South Carolina realtors on the changes in closing disclosures under TILA and RESPA which will took effect on August 1, 2015. Moses presented the "Shumaker Legal Minute" at the monthly meeting of the Latin American Chamber of Commerce in Charlotte, North Carolina in July.

**Suzi Marteny** has been named to the Executive Committee of the American Diabetes Association's Lakewood Ranch Tour de Cure.

**Erin McKenney** has been elected to the Board of Directors of The Tampa Connection.

**Brian McMahon** was a speaker at the Ohio State Bar Association's "Franchise Law" CLE seminar in May.

**Scott Newsom** spoke at the International Foundation of Employee Benefit Plans 61st Annual Employee Benefits Conference in Honolulu, Hawaii on November 8-11, 2015 on the topic of "Withdrawal Liability – Advanced Topics." He also spoke to the Employers' Association of Northwest Ohio in July in Toledo, Ohio on "Employer Responsibility under the

Affordable Care Act: Legal Update."

**Cate O'Dowd** has been re-elected to serve on the Board of Directors of the Raymond James Gasparilla Festival of the Arts. Cate has also been reappointed to the City of Tampa's Barrio Latino Commission and has also been named Vice-Chair.

**Mary Ellen Pisanelli** has been appointed to the University of Toledo Board of Trustees by Gov. John Kasich. Mary Ellen will serve until July 2023.

**Mike Pitchford** spoke at a seminar sponsored by the National Business Institute (BNI) in June in Tampa.

**Tom Pletz** spoke with the students in the Masters Program in Educational Leadership at Lourdes University in Toledo in May.

**Maria Ramos** was selected to be part of Class III of The Florida Bar Wm. Reece Smith, Jr. Leadership Academy ("Academy") as an Academy Fellow. Maria was invited by the International Visitor Leadership Program (IVLP) to speak to a delegation of distinguished visitors from Russia as part of the Labor Migration and Migrant Adaptation Program. She was also invited by Representative Kathy Castor to attend the Family Defender Orientation. Maria has been appointed to a three-year term on The Florida Bar's Judicial Administration and Evaluations Committee.

**Michael Robbins** has been named General Counsel of the Florida Holocaust Museum.

**Jennifer Roeper** has been reappointed to serve on The Florida Bar Immigration & Nationality Board Certification Committee for a three-year term. She has also been appointed to the Advisory Board (Pasco County) of Metropolitan Ministries as it builds new housing units and expands its ability to serve the homeless of Pasco County.

**Rebecca Shope** was a recipient of the 2015 "20 Under 40 Leadership Recognition Award." Rebecca was selected at the 20th Anniversary of the awards ceremony from a field of 148 candidates.

**John Siciliano** has been inducted as a Fellow of the Ohio State Bar Foundation.

**Christian Staples** was elected Chair of the Mecklenburg County Bar Young Lawyers Division for a one-year term that began July 1, 2015.

**Todd Timmerman** was named President-Elect of the Hillsborough County Bar Foundation.

**Mark Wagoner** was a speaker at the Ohio State Bar Association's 2015 Annual Convention and CLE Seminar in April in Sandusky, Ohio.

**David Waterman** was honored with the Touchstone Lifetime Achiever Award. The award was presented by the Press Club of Toledo at the 17th Annual Touchstone Awards held in Toledo, Ohio in October.

**Brian Willis** was a speaker at Pecha Kucha Night Tampa Bay. Pecha Kucha Nights take place in over 800 cities around the world and are informal and fun gatherings where creative people get together and share their ideas. Brian was also a guest speaker at Tampa's Urban Core Board Member Roundtable in October.

**Tom Wood** has been elected Chairman of the Board of Directors for the MacDonald Training Center, Inc.

**Mechelle Zarou** presented at the Ohio State Bar Association's Annual Convention in May on the "Ways to Avoid the Seven Mistakes Every Plaintiff's Attorney Hopes Employers Make." Mechelle also presented to the American Immigration Lawyers Association ("AILA") Texas Chapter Spring Conference on "Best Practices for L-1A Visas." The AILA Texas Chapter encompasses the states of Texas, New Mexico and Oklahoma. Most recently, Mechelle presented to the Toledo Transportation Group regarding the impact on the trucking industry of the Wage & Hour Administrator's Interpretation No. 2015-1 on independent contractor misclassification, as well as the NLRB's Browning-Ferris Industries decision on joint employer status. Also in October, Mechelle was a panelist at the Sylvania, Ohio town hall meeting and discussed "The Impact of Marijuana if Legalized."

congratulations

***Chambers USA Guide to America's Leading Business Lawyers 2015***

The following Shumaker attorneys were recognized as leading lawyers in their fields, as well as three practice groups:

**Michael E. Born:** Natural Resources & Environment (Ohio)

**Douglas G. Haynam:** Natural Resources & Environment (Ohio)

**William L. Patberg:** Natural Resources & Environment (Ohio)

**Peter R. Silverman:** Franchising (Nationwide)

**Darrell C. Smith:** Corporate/M&A & Private Equity (Florida)

**Louis E. Tosi:** Natural Resources & Environment (Ohio)

**Gregory C. Yadley:** Corporate/M&A & Private Equity (Florida)

**State Rankings:**

**Florida:** Corporate/M&A and Private Equity

**Ohio:** Natural Resources & Environment

**Nationwide:** Franchising (Recognised Practitioner)

***Best Lawyers® 2016* "Lawyer of the Year"**

**Gregory T. Lodge:** Toledo Employment Law - Management

**John N. MacKay:** Toledo Banking and Finance Law

**Gregory M. Marks:** Sarasota Tax Law

**Cynthia L. Rerucha:** Toledo Real Estate Law

**Gregory C. Yadley:** Tampa Corporate Law

**The following were selected by their peers for inclusion in *The Best Lawyers in America®* 2016:**

Anthony J. Abate
W. Thad Adams, III
M. Scott Aubry
Jaime Austrich
David F. Axelrod
John C. Barron
Neema M. Bell
Jenifer A. Belt
Thomas C. Blank
Michael E. Born
Eric D. Britton
John H. Burson
C. Philip Campbell, Jr.
C. Graham Carothers, Jr.
Douglas A. Cherry
Ronald A. Christaldi
David H. Conaway
David J. Coyle
Terrance K. Davis
Scott G. Deller
Gary R. Diesing
Thomas P. Dillon
Edwin G. Emerson
Vivian C. Folk
Jack G. Fynes
Bruce H. Gordon
Cheryl L. Gordon
William H. Gosline
Douglas G. Haynam
John W. Hilbert, II
W. Kent Ihrig
John S. Inglis
Regina M. Joseph
Warren P. Kean
John D. Kocher
Kathleen A. Kress
Gregory T. Lodge
Paul R. Lynch
John N. MacKay
Gregory M. Marks
Ernest J. Marquart
Timothy C. McCarthy
Michael S. McGowan
Brian N. McMahon
Steven A. Meckler
Donald M. Mewhort, Jr.
John K. Nelson
Robert B. Norris
John H. Northey, III
Michael J. O'Callaghan
William L. Patberg
Mary Ellen Pisanelli
Thomas G. Pletz
David J. Rectenwald
Cynthia L. Rerucha
Joseph A. Rideout
James I. Rothschild
Stephen A. Rothschild
Michael G. Sanderson
Gregory S. Shumaker
John J. Siciliano
Peter R. Silverman
Joseph S. Simpson
Darrell C. Smith
Scott M. Stevenson
John L. Straub
William H. Sturges
William R. Swindle
J. Todd Timmerman
Louis E. Tosi
Michael T. Trocke
Mark D. Wagoner

David F. Waterman

Martin D. Werner

James F. White, Jr.

David W. Wicklund

Steele B. Windle III

Dennis P. Witherell

Thomas M. Wood

Kathryn J. Woodward

Gregory C. Yadley

Mechelle Zarou

### 2015 Florida *Super Lawyers®*

Anthony J. Abate

Jaime Austrich

Steven M. Berman

C. Philip Campbell, Jr.

C. Graham Carothers, Jr.

Steven J. Chase

Douglas A. Cherry

Ronald A. Christaldi

Jennifer B. Compton

Mark A. Connolly

Jonathan J. Ellis

Bruce H. Gordon

Benjamin R. Hanan

Mark D. Hildreth

John S. Inglis

Ernest J. Marquart

Suzette M. Marteny

J. Todd Timmerman

Gregory C. Yadley

### 2015 Florida Rising Stars

Kelly Zarzycki Andrews

Deirdre F. Aretini

Michael D. Bressan

Hugo S. “Brad” deBeaubien

Timothy C. Garding

Michele Leo Hintson

Hunter G. Norton

Kathleen G. Reres

Mindi M. Richter

Jennifer G. Roeper

Brian W. Schaffnit

Meghan O’Neill Serrano

Brian C. Willis

### *Florida Trend’s* Florida Legal Elite 2015

Erin Smith Aebel

Jaime Austrich

Douglas A. Cherry

Ronald A. Christaldi

Cheryl L. Gordon

Michele Leo Hintson

Suzette M. Marteny

Maria del Carmen Ramos

Gregory C. Yadley

### Shumaker recognized by AHA

For the eighth year in a row, Shumaker has been named a Gold Fit-Friendly Worksite by the American Heart Association. The American Heart Association’s Fit-Friendly designation recognizes the steps Shumaker has taken in acknowledging the importance of a healthy workplace for its employees and in creating a culture of physical activity in the workplace.

### Shumaker received Metropolitan First-Tier rankings in the 2016 *U.S. News - Best Lawyers* “Best Law Firms” rankings.

Toledo office attorneys, Donald M. Mewhort, Jr. and James F. White, Jr. were recognized for their 50 years of service to the legal profession at the Ohio State Bar Association’s (OSBA) District 4 Annual Meeting on September 29th at The Toledo Club. Congratulations!

Donald F. Mewhort, Jr.

James F. White, Jr.

*Both pictured with John D. Holschuh, Jr., 2015-2016 OSBA president and Louise A. Jackson, OSBA Board of Governors District 4 representative.*

# Spotlight on Shumaker Alum:

Shumaker takes pride in good relations with alums, and in this article we spotlight one of them:

**James (Jim) T. Holder,** who currently holds the positions of Executive Vice President, General Counsel and Corporate Secretary with Sykes Enterprises, Incorporated.

Jim left Shumaker in 1989 to join a private consortium of companies based in Tampa. In 1993, at the request of Shumaker partner, Jim White, (who was temporarily leaving Shumaker to become Chief Operating Officer for Checkers Drive-In Restaurants, a company that Shumaker had just taken public) Jim joined Checkers as a real estate attorney. Months later, Jim was promoted to be Checkers' General Counsel. Jim tells us that his Checkers' experience put him on a career path that paved the way for where he is today. At Checkers, Jim served in various capacities, including Corporate Secretary, Chief Financial Officer, Senior Vice President and General Counsel and finally as Special Counsel.

In an interview for this article, Jim told us that he is proud to be celebrating fifteen years with Sykes, which he joined in December 2000 as General Counsel. He is responsible for world-wide corporate legal matters including corporate organization, litigation, regulatory compliance, contracts, conducting the annual shareholder meetings and Board of Director representation. Jim is also responsible for global insurance and global real estate for Sykes.

Jim is proud of the culture at Sykes and its loyalty to employees; one of the main reasons he has been there for so long. He has been very fortunate to have been with Sykes through a period of large growth. When he started, Sykes had approximately $500 million in revenue and has now reached about $1.4 billion in revenue. One of the other things Jim enjoys about working at Sykes is that he feels like he is back in school learning every day. Sykes is located in 21 countries which provides unlimited opportunities to learn and significant travel.

Jim has enjoyed a 30 year relationship with Shumaker. One that began as attorney number four in the Tampa office (with Bruce Gordon, John Inglis and Kevin Graham), but which has continued uninterrupted since the day he left to go in-house. Jim stated that he has enjoyed a mutual loyalty with Shumaker that is rare in this business. Jim commented that in his experience, any firm can do good legal work. Shumaker, however has demonstrated through their partners, that it really cares about the relationship and wants him to succeed. This has always been very important to him.

Sykes Enterprises is a global leader in providing comprehensive customer contact management solutions and services in the business process outsourcing arena. Headquartered in Tampa, Florida, Sykes provides an array of customer contact management solutions to market leaders around the world, in the communications, financial services, technology, healthcare and transportation and leisure industries.

Announcing the relocation of our Charlotte office, effective October 19, 2015

Shumaker, Loop & Kendrick, LLP
is proud to announce our new location in Charlotte.

101 South Tryon Street, Suite 2200
Charlotte, North Carolina 28280-0002
Phone: 704.375.0057 | Fax: 704.332.1197

We are conveniently located in the
Bank of America Plaza in the heart of downtown Charlotte.

If you'd like to receive an electronic copy of Shumaker's *insights* Newsletter, or if you have a suggestion for topics you would like to see in future issues, send us an email at newsletters@slk-law.com

**insights**

A Newsletter from Shumaker, Loop & Kendrick, LLP

1000 Jackson Street
Toledo, Ohio 43604-5573

CHARLOTTE
101 South Tryon Street
Suite 2200
Charlotte, North Carolina 28280
704.375.0057

COLUMBUS
Huntington Center
41 South High Street
Suite 2400
Columbus, Ohio 43215
614.463.9441

SARASOTA
240 South Pineapple Avenue
10th Floor
Sarasota, Florida 34236
941.366.6660

TAMPA
Bank of America Plaza
101 East Kennedy Boulevard
Suite 2800
Tampa, Florida 33602
813.229.7600

TOLEDO
1000 Jackson Street
Toledo, Ohio 43604
419.241.9000

This is a publication of Shumaker, Loop & Kendrick, LLP and is intended as a report of legal issues and other developments of general interest to our clients, attorneys and staff. This publication is not intended to provide legal advice on specific subjects or to create an attorney-client relationship. Additionally, while we welcome electronic communications from our clients, we must advise non-clients who may contact us that an unsolicited e-mail does not create an attorney-client relationship, and information of non-clients who send us unsolicited e-mails will not be held in confidence unless both parties subsequently agree to an attorney-client relationship.

Our practice of involvement spans the entire community.

Whether it's our commitment to clients, or to our work in the community, involvement lies at the core of everything we do.

SHUMAKER®

Shumaker, Loop & Kendrick, LLP

Attorneys at Law

CHARLOTTE | COLUMBUS | SARASOTA | TAMPA | TOLEDO

slk-law.com

©2015 Shumaker, Loop & Kendrick, LLP