# MAKING TRACKS

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A Transportation and Logistics Law Firm

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## Moseley Marcinak Newsletter Contents

# Via Executive Order, the Biden Administration Takes Aim at Non-Compete Agreement

BY ROCKY ROGERS

On July 9, 2021, President Biden issued a sweeping executive order addressing several different topics aimed at promoting "competition in the American economy."[1] Notably, the Executive Order builds upon the Obama Administration's prior efforts[2] to curtail the use of non-competition agreements (aka "non-competes") in private-sector American employment agreements. Several states already ban non-competes, but the Order seeks to address the practice at the federal level, which would then be uniform across all states.

Citing data from CBS News and the Economic Policy Institute that indicates roughly half of private-sector business require at least some employees to enter non-competes, which cumulatively impacts between 36 and 60 million workers, the Order encourages the Federal Trade Commission ("FTC") to utilize its statutory rulemaking authority to ban or limit non-competes.[3] While the focus is upon non-competes, the specific language of the Order seemingly is actually broader. It calls upon the FTC "to curtail the unfair use of non-compete clauses or agreements that may unfairly limit worker mobility." Based upon this language, the Executive Order arguably embraces other clauses or provisions common in employment agreements that may "limit worker mobility."

As is common with such Orders, its language paints broad strokes but leaves many questions unanswered. For example, it does not mandate that the FTC issue any rules. Further, it leaves to the discretion of the FTC to limit or outright ban non-competes, should the FTC even take up the issue. Additionally, are only non-competes that "unfairly limit worker mobility" affected, and who makes that decision? Moreover, who decides if other clauses common to employment agreements, such as non-solicitation provisions or provisions requiring repayment of signing bonuses, costs of training, or other incentives to be refunded if the employee swaps jobs, unfairly limit worker mobility and therefore are subject to regulation? Simply put, there is still a lot of gray area.

According to data from the Economic Policy Institute, albeit based upon a small sample size, 21% of companies in the "transportation" sector require all employees to sign non-competes whereas 37% require at least some employees to sign non-competes.[4] This is not necessarily surprising given the high rate of turnover in the industry and that profits are often driven by advantages gained through proprietary information and practices, particularly in the 3PL sub-sector. Therefore, arguably those in the transportation industry do have legitimate interests they seek to protect via non-competes.

You may ask, where does this new Order leave us? For now, nothing has changed (yet). The Executive Order does not have the effect of law. The enforcement of non-competes for now will still be resolved by state law. As noted,

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[1] July 9, 2021 White House Briefing Room Fact Sheet: Executive Order on Promoting Competition in the American Economy.
[2] *See* April 15, 2016 Executive Order: Steps to Increase Competition and Better Inform Workers to Support Continued Growth of the American Economy; May 2016 Executive Order: Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses.
[3] *See* Fact Sheet, supra n.l.
[4] https://www.epi.org/publication/noncompete-agreements/

some states already ban non-competes. Many states that do not outright ban non-competes have placed limitations such as duration, geographic reach, and what "tiers" of employees are subject to non-competes. Accordingly, it's important to know what state choice of law is provided for in any employment agreements and what that state's law says about the availability of non-competes. This is an area where careful contract drafting can create a strategic advantage under existing law.

It will be interesting to see whether the FTC does, in fact, take up the call from the Biden Administration and utilize its rulemaking authority to address non-competes and other similar restrictive employment clauses. If it does, what will be the final rule that emerges? Will the FTC's rule be challenged? For now, the Executive Order raises more questions than it answers, but it does serve as a good reminder to review your current employment agreements for compliance with existing law. As the law on non-competes continues to change, your agreements should keep pace or run the risk of being deemed unenforceable. Additionally, those in the transportation field should begin to consider other mechanisms by which to protect their proprietary and other interests through means other than non-competes.

# Not Bad Faith After All – Fourth Circuit Court of Appeals Agrees Insurer's Rejection of Unreasonable Time-Limited Demands Was Not Bad Faith

BY MEGAN M. EARLY-SOPPA

In a recent unpublished per curium opinion[1], the Fourth Circuit Court of Appeals affirmed the South Carolina federal trial court's decision to grant summary judgment to an insurer in a case involving claims of insurance bad faith. The decision calls into question certain tactics recently gaining popularity with plaintiffs' attorneys in personal injury cases, in both South Carolina and elsewhere.

The appeal stems from two personal injury claims. Claimants, William and Angela Reynolds, were injured in a car accident involving a driver insured by Columbia Insurance Company (CIC). In the months after, counsel for the Reynolds made two time-limited settlement demands on CIC, both of which CIC rejected for specified reasons.

The first time-limited demand was made only six weeks after the accident, before the Reynolds' counsel was even able to obtain medical records for his clients. The demand was for the full $1 million limits under the CIC policy and expired within ten days (the "January Demand"). No medical bills or records were provided with the January Demand. Defense counsel hired by CIC ("defense counsel") timely responded to the January Demand, indicating CIC was in the process of gathering information so that there could be a reasonable opportunity to evaluate the Reynolds' claims. The only materials CIC had been able to obtain when it responded to the January Demand were two air-ambulance bills totaling over $60,000 and generally describing the nature and severity of the Reynolds' injuries. Defense counsel requested the Reynolds sign authorizations such that CIC could obtain their medical records as part of CIC's investigation into their claims, to which counsel for the Reynolds agreed, but he refused to extend the ten-day time-limited demand to allow for CIC to obtain and review the medical records. Accordingly, the deadline under the January Demand expired without any action by CIC.

Several months after the January Demand expired, the Reynolds' counsel forwarded to defense counsel the Reynolds' complete medical bills indicating, medical costs collectively exceeding $650,000.00. Three weeks after receipt of the

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[1] *Columbia Ins. Co. v. Waymer* , 2021 U.S. App. LEXIS 18568 (D.S.C. Feb. 3, 2020). While the case has been designated as unpublished, it can still be cited under Rule 32.1 of the Federal Rules of Appellate Procedure, though it has no binding precedential value. Nevertheless, it offers a glimpse into the Fourth Circuit's thinking on these types of issues, which is valuable in future, similar cases.

Reynolds' complete medical records and billing, CIC offered to pay the full $1 million limits. The Reynolds, through their counsel, rejected CIC's offer to pay full policy limits and countered with a second fifteen-day time-limited demand ("the May Demand"). In the May Demand, the Reynolds offered CIC two options. Under the first option, the parties would skip trial on liability or damages and instead only litigate whether CIC acted in bad faith when it rejected the January Demand. If the jury found CIC had acted in bad faith, CIC would pay the Reynolds $3.5 million. If the jury found CIC had not acted in bad faith, then CIC would pay the Reynolds the $1 million liability limits available under its policy. The second option involved litigating the extent of the Reynolds' injuries via trial as well as the existence of bad faith by CIC. If the jury found CIC had acted in bad faith, then CIC would be obligated to pay the Reynolds whatever the jury determined the Reynolds' damages (for both the personal injury and bad faith claims). Importantly, the second option mandated CIC give up its right to appeal the reasonableness/excessiveness of any jury verdict. Under the second option, if the jury found CIC had not acted in bad faith, it still would be obligated to pay the Reynolds the full $1 million under its policy. Under either option, CIC would have to agree to waive certain defenses regarding the real party in interest and the enforceability of any release given by the Reynolds.

CIC ultimately rejected both options under the May Demand. The Reynolds' personal injury action was tried against CIC's insured in state court. A special referee awarded $6.5 million in damages to the Reynolds. CIC then paid its $1 million liability limits.

CIC filed a declaratory judgment action in South Carolina federal court seeking a declaration its failure to accept the January Demand and/or May Demand did not constitute bad faith.[2] The South Carolina federal trial court agreed with CIC, finding its actions did not constitute bad faith and granted summary judgment in favor of CIC. The Reynolds appealed the decision to the Fourth Circuit.

On appeal, the Fourth Circuit upheld the federal trial court's ruling that CIC acted reasonably in rejecting both demands. The Court concluded there was no bad faith under the circumstances because there existed an objectively reasonable basis for refusing the January Demand because CIC was deprived of reasonable time to investigate the claim. While the Fourth Circuit acknowledged South Carolina courts had not previously addressed whether a lack of time to investigate constitutes an objectively reasonable basis for refusing a "short-fuse demand," it agreed with the federal trial court in applying authorities from other jurisdictions holding an insurer, acting with diligence and due regard for its insured, is allowed a reasonable time to investigate a claim and there exists no obligation upon the insurer to accept a demand without reasonable time for an investigation. The Court acknowledged under this amorphous standard there may be close calls, but it reinforced the rule that the totality of the circumstances dictate whether an insurer has acted in bad faith.

As for the May Demand, the Fourth Circuit noted South Carolina courts have not previously addressed such "unorthodox" settlement tactics and demands. Similarly, there was no binding authority on whether an insurer acts in bad faith when refusing to settle on behalf of its insured when doing so gives up significant rights it may have in future bad faith litigation, and further noting Florida courts (which are notorious for bad faith litigation) have rejected such constitutes bad faith. Since the May Demand was conditioned upon CIC giving up real and substantial rights and defenses in any subsequent bad faith litigation, the Fourth Circuit agreed with the federal trial

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[2] Separately, CIC's insured brought an insurance bad faith action against CIC in South Carolina state court. CIC removed that case, which was consolidated with CIC's declaratory judgment action.

court that CIC's refusal of the May Demand did not constitute bad faith.

What Does This Mean? The reasonableness of rejecting policy limit timed demands, and therefore exposure for insurance bad faith, will continue to be decided on a case-by-case basis. Key considerations include the specific facts of the accident, the information counsel provides to an insurance company in connection with its time-limited demand, the information the insurer can obtain by its own means, whether the insurer acted with reasonable diligence in obtaining and/or requesting the necessary information to analyze the value of a claim, the reasonableness of the time afforded by the demand, and whether the insurer, in accepting the demand, is asked to give up significant rights of its own. With that said, this ruling does demonstrate the Fourth Circuit's views on the reasonableness of timed-demands with no supportive information and such "unorthodox" settlement tactics.

## *Handshoe*—Stepping Squarely into Multiple Removal Issues

BY LESESNE PHILLIPS

A case from the United States District Court for the Eastern District of Kentucky recently held removal to federal court based upon federal question jurisdiction under the Carmack Amendment was inappropriate and remanded the case for further proceedings in state court. The case, *Handshoe v. Day Brothers Auto & RV Sales, LLC, et al.*[1], involved two plaintiffs, a husband and wife, that purchased a motor home from one of the defendants, Day Brothers Auto & RV Sales, LLC, in Kentucky. After purchase, the plaintiffs contacted Day Brothers to arrange for warranty work on the motor home. Day Brothers took possession of the motor home but decided that it needed to be sent to Indiana for the manufacturer to complete the warranty work. Day Brothers did not inform the plaintiffs of its plan to send the motor home to Indiana. Day Brothers, itself, arranged for the transport of the motor home by hiring Star Fleet Trucking, Inc., which in turn hired a driver to drive the motor home to Indiana. During transportation from Kentucky to Indiana, the driver attempted pass under an overpass without sufficient height clearance causing damage to the motor home.

The plaintiffs filed a lawsuit in Kentucky state court alleging negligence and breach of contract against Day Brothers, Star Fleet, and the driver. Star Fleet and the driver removed the case to federal court, stating in the Notice of Removal that Day Brothers consented to removal. The plaintiffs in turn filed a motion to remand the case back to state court. The plaintiffs argued that the Carmack Amendment did not apply because the plaintiffs were not aware of the transport of the motor home from Kentucky to Indiana and were not parties to the bill of lading between Day Brothers and Star Fleet. Additionally, while Star Fleet and the driver indicated in the removal papers that Day Brothers consented to removal of the case to federal court, Day Brothers filed a brief stating it did not "consent" to remove the case to federal court but instead indicated only that it did not object to removal and took no official position on removal.

In addressing the motion to remand, the court found two issues with removal in this case. The first was that the consent to removal was not unanimous. In the context of removal from state court to federal court, all defendants must

[1] 2021 U.S. Dist. LEXIS 128227 (E.D.Ky. July 9, 2021).

unanimously consent to the removal. This rule of unanimity must be followed in order to remove the case to federal court even if there is clear subject matter jurisdiction before the federal court. While other defendants may vouch for the consent of another defendant in a notice of removal, Day Brothers' subsequent position in the case that it only offered "no objection" to removal undercut the unanimous consent requirement. Accordingly, the court raised serious concern whether the unanimous consent requirement for removal was met under the circumstances.

However, even assuming the consent aspect of approval was met, the court determined the Carmack Amendment did not preempt the plaintiffs' state law claims and therefore did not provide a basis for federal question jurisdiction. While the case involved damage to goods in interstate commerce caused by a motor carrier, the court emphasized the plaintiffs were not directly involved with or informed of the shipment. The plaintiffs were not listed on the bill of lading as any party, such as the consignor, consignee, or shipper. The Court noted the Carmack Amendment establishes a carrier is only liable to the person entitled to recover under the receipt or bill of lading. In this case, the court found Star Fleet was the carrier responsible for transport of the motor home and Day Brothers was the shipper. In the court's view, there was no indication the plaintiffs were a party to the bill of lading. Further supporting the court's view, it found the plaintiffs were not even aware of the interstate shipment of the motor home. The Court, acknowledging that there were many open questions as to whether a party not listed on the bill of lading can assert a Carmack Amendment claim, ultimately found any doubts must be resolved in favor of remand.

This case presents two important considerations for removal under the Carmack Amendment. First, if there are multiple defendants in the case, all defendants must unanimously agree to removal. While one party can, in the Notice of Removal, represent to the court that all defendants consent to removal, it is important to ensure all defendants do, in fact, consent. The Handshoe Court, citing other decisions, held a "noncommittal, no-objection" does not suffice to constitute consent for purposes of the unanimity requirement. Accordingly, any attorney looking to remove a case would be well-advised to obtain written confirmation from counsel for all defendants that they affirmatively consent to the case being removed to federal court and should not simply rely upon a "no objection" response.

Next, this case raises important questions of who can recover under a bill of lading for purposes of a Carmack Amendment claim. *Handshoe* does not overturn prior authorities holding a party may nevertheless recover under a bill of lading where they are not listed on the bill of lading, but where the circumstances, as a whole, establish that party was involved in the shipping transaction as either the consignor, consignee, or shipper. Also, *Handshoe* does not suggest Star Fleet's liability to Day Brothers would not be pursuant to the Carmack Amendment. However, where, as here, a plaintiff had no knowledge whatsoever of the shipping transaction, is not listed on and is not in possession of the bill of lading, *Handshoe* suggests the Carmack Amendment does not govern the carrier's liability to said plaintiff. This means the plaintiff, in such circumstances, is not limited to recovery under Carmack and may sue the carrier under traditional tort and breach of contract theories. Additionally, the carrier may not have Carmack defenses available to those claims. Accordingly, it is imperative that a carrier fully understand the background of any given shipping transaction to ensure it understands the scope of its potential liability.

# Technicality Crashes Privacy Protection Act Claims Against Law Firms Soliciting Business from Motor Vehicle Accident Records

BY WILSON JACKSON

The Drivers' Privacy Protection Act of 1994, 18 U.S.C. § 2721, *et seq.*, ("DPPA" or the "Act") protects "personal information" about individuals held by state Departments of Motor Vehicles. The Act requires that certain information must be held confidential and may be disclosed by an "authorized recipient" only pursuant to one of the listed exceptions. The Act lists fourteen exceptions for disclosing personal information.

Congress explained that DPPA was a necessary response to a series of abuses of drivers' personal information in the 1980s and 1990s. For example, actress Rebecca Schaeffer was a fatal victim of this abuse. An obsessed fan was able to obtain Schaeffer's address through the California DMV and used that information to stalk and kill her. Congress also referenced a ring of Iowa home robbers who targeted victims by finding the home address associated with the license plates of expensive cars.

The Act defines "personal information" as "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. § 2725(3). A "motor vehicle record" is defined as "any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles." 18 U.S.C. § 2725(1). While the Act does not define "authorized recipient," the United States Supreme Court has held the DPPA regulates resale and redisclosure of personal information by private persons who have obtained the information from a state DMV. *See Reno v. Condon*, 528 U.S. 141 (2000).

In the early 2000s, there was a considerable split between the federal circuit courts about the use of private information pursuant to the DPPA's litigation exception. In *Maracich v. Spears*, 675 F.3d 281 (4th Cir. 2012), the Fourth Circuit held that a lawyer's use of personal information obtained from the DMV was permitted by the DPPA's exception for information to be used in litigation. Specifically, the Fourth Circuit explained that "solicitation is an accepted and expected element of, and is inextricably intertwined with, conduct satisfying the litigation exception under the DPPA, such solicitation is not actionable by persons to whom the personal information pertains." *Id.* at 284. This conflicted with the Third Circuit's view that "[t]he Act contains no language that would excuse an impermissible use merely because it was executed in conjunction with a permissible purpose." *Pichler v. Unite*, 542 F.3d 380, 395 (3rd Cir. 2008).

On appeal from the Fourth Circuit's decision in *Maracich*, the Supreme Court examined the

scope of the DPPA's "litigation" exception. The Supreme Court held "[s]olicitation of prospective clients is not a permissible use 'in connection with' litigation or 'investigation in anticipation of litigation' under (b)(4), the litigation exception, of the DPPA." *Maracich v. Spears*, 570 U.S. 48, 76 (2013). The Court further explained, as additional support for its ruling, that state DMV records contain "the most sensitive kind of information," including Social Security Numbers and medical information.

However, in a recent DPPA case, a federal court in North Carolina entered summary judgment in favor of several law firm defendants who obtained driver information from accident reports and sent advertisements to those individuals marketing legal services. In *Hatch v. Demayo*, 2021 U.S. Dist. 12042 (M.D.N.C. Jan. 22, 2021), the plaintiffs were involved in separate car accidents and provided their driver's licenses to law enforcement in connection with law enforcement's investigation of the accident. The plaintiffs' information was then included, along with law enforcement's findings, on a standard DMV-349 form that was then provided to the North Carolina DMV. The law firm defendants collected information from the plaintiffs' DMV-349s themselves or by purchasing accident report data aggregated by a third party. Later, plaintiffs received unsolicited marketing materials from the law firm defendants, which informed plaintiffs about their legal services. Plaintiffs filed suit against the law firm defendants alleging violations of the DPPA.

The North Carolina federal court noted, "[t]he DPPA holds liable certain parties for the misuse of a driver's information if that data has been collected from a 'motor vehicle record.'" *Hatch*, 2021 U.S. Dist. Lexis at *2. It also affirmed a party may bring a civil action against any person "who knowingly obtains, discloses or uses personal information, from a motor vehicle record for purposes not otherwise permitted." *Id.* at *13–*14. The court then conducted an extensive analysis of other courts' treatment of the scope of the DPPA, acknowledging there is a difference in authority as to whether a DPPA violation exists when the individual defendant did not obtain the information directly from the DMV and whether driver's license information voluntarily given to law enforcement is a motor vehicle record. *See Id.* at *15–*24 & n.4. Ultimately, in granting the law firm defendants' motion for summary judgment, the court focused on the inadequacy of plaintiffs' complaint. Specifically, the court found plaintiffs failed to allege that the accident report was a motor vehicle record. The court explained that plaintiffs' argument—that the accident report was essentially a motor vehicle record because it relied on information taken from a driver's license or DMV database—was insufficient. In doing so, the court distinguished other courts that had applied this expansive view of the DPPA, including a case from the United States District Court for the Western District of North Carolina. *See Hatch v. Demayo*, 2021 U.S. Dist. LEXIS 55601 (M.D.N.C. March 24, 2021) (distinguishing as non-controlling *Gaston v. LexisNexis Risk Sols. Inc.*, 2020 U.S. Dist. LEXIS 160012 (W.D.N.C. Sep. 2, 2020) which granted summary judgment for a class of plaintiffs who sued for DPPA violation arising out of a company obtaining, disseminating, and selling personal information gleaned from a North Carolina accident report, DMV-349). Accordingly, it now appears there is a split regarding the scope of the DPPA even within the various North Carolina federal courts.

The line of cases discussed herein are important because such information is frequently obtained through the DMV during the investigation of a claim. Additionally, they are important because solicitation can directly impact the frequency of litigation and which lawyers are retained to bring those cases. The *Hatch* decision has been appealed to the Fourth Circuit Court of Appeals. Perhaps a decision from the Fourth Circuit will clarify the scope of the DPPA, and specifically whether law firms may obtain information on potential personal injury plaintiffs from accident reports for the purpose of soliciting business. We will continue to monitor these developments.

# THE ROAD AHEAD-
## Past and Future Events

### *Past*

- On May 12, 2021 Rob was a guest presenter to the Great West Leadership Symposium which was presented virtually. Rob's talk concerned risk management and corporate management in the age of nuclear verdicts.
- On May 27, 2021 Rob conducted a webinar as part of the Cottingham and Butler Summit series. Rob talked on transportation contracts.
- June 5 – 7, 2021 Fred and Rocky attended the Conference of Freight Counsel in Annapolis, Maryland.
- Fred attended the Specialized Transportation Symposium on June 22 – 24, 2021 in Birmingham, Alabama.
- Blair attended the GMTA annual meeting June 20-23, 2021 in Amelia Island, Florida.
- Rob spoke on corporate governance to the North Carolina Trucking Association Annual Conference held in Charleston on July 18-21, 2021. Jase Robertson (of Duck Dynasty fame, podcast Unashamed) had the unenviable task of following the always fun Rob as a speaker on the podium.
- Rob attended and participated in the NC Trucking benchmarking group at the Grove Park Inn in Asheville.
- Rob presented to the The Expedite Association of North America on July 24 in Cleveland, Ohio. Here, the speaker to follow Rob was Frank Abagnale (of Catch Me If You Can fame). Or maybe it was someone pretending to be Abagnale.
- Rob attended the SC Trucking Association Annual Conference at Myrtle Beach on August 2-4. Rob is a member of the Board of Directors.
- Rob was a guest presenter at the CCJ Symposium in Birmingham, AL on August 9-11. Rob also moderated a panel on technology in safety departments.
- Rob attended and presented on corporate management to the annual meeting of the American College of Transportation Attorneys in Chicago on August 19-20.
- Rob, Rocky and Fred taught two sessions of the SMC3 advanced course on LTL transportation. Rob discussed contracts, Rocky taught on insurance, and Fred wooed the group with his knowledge of DOT regulatory and compliance issues.

### *Future*

- Rob will speak to the Tarwheels Captive on September 13-14 at the Grove Park Inn.
- Rob and Fred will teach sessions at the Motor Carrier Insurance Educational Foundation in Orlando on October 6-7.
- Rob and Blair will present to the Marsh Fleet Solutions group in Nashville, TN September 15-17.
- Megan and Wilson are headed to PA for the TIDA conference on October 13-15.
- Rob will be among the presenters at the SCTA Legal Forum on October 20 in Columbia.
- On November 2, Rob and the folks at Avalon Risk Management will collaborate on a webinar for the TIA.
- Rob will present at the GMTA Leadership Meeting at Battery Park, Atlanta November 18-19.

## MOMAR PAST AND UPCOMING WEBINARS

- October 21st We hope you will attend our upcoming Webinar. The topic will be announced as soon as possible.

***Check the Archive section of our website for previously recorded webinars, some of which include:***

- January and February 2021- 2020 Year in Review Series
- March 2021- ABC's of Coverage
- August, 2021 – Fireside Chat with Rob Moseley and Live Q&A

## CONGRATULATIONS CORNER

- After Rob and Robin celebrated 3 graduations this Spring, they are proud to announce that their daughter, English, is attending her first year of law school in Birmingham.
- Karen and Doug did tie the knot on June 12th with a honeymoon that followed in Boston, Massachusetts.
- Fredric and his dad had a great time in Wyoming this summer fishing and horseback riding.
- We are pleased to announce that Hannah Healey has joined the firm as our newest paralegal.

## NEW-- BUCKY'S REPORT

Bucky joined in the celebration of our Office Manager's wedding in June; notice the stylish earrings to match the gown! It was a welcome release for him, as he seems always to be concentrating on a complex legal issue in order to provide whatever advice he can to our attorneys. Notice the steely-eyed stare! He hasn't let his new celebrity status go to his head.

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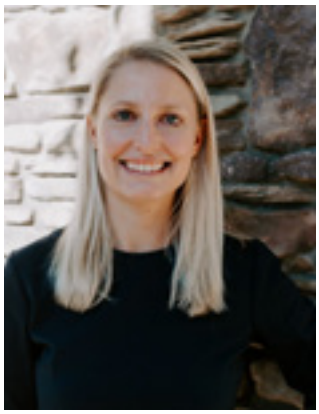

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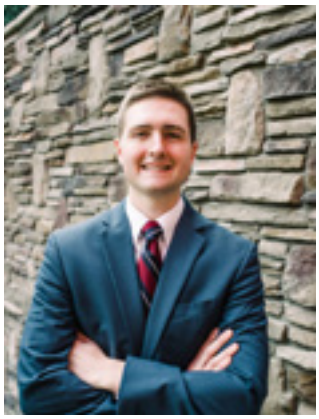

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