Transportation Annual Year in Review

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Transportation Annual Year in Review

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2019 Transportation Law Update

As in recent years, the controversy regarding the legal status of owner-operators and other drivers was a recurring theme in many of the cases decided in 2018, which we review in this year's edition of the Barclay Damon annual transportation law review. This issue keeps the owners of trucking companies up at night with concerns regarding how to make payroll and cover related expenses. Of course, it also troubles many drivers who are struggling to support their families. And now, legal issues arising out of those concerns are increasingly front and center in various litigation matters. A close reading of the topics summarized here will give one a taste of the different contexts in which the issue bubbles up. Issues of federalism and conflicts between federal and state law are also prevalent in the cases we reviewed this year.

1. Owner-Operator Agreements and Leasing Regulations

Part 376 of Title 49 of the Code of Federal Regulations sets out the rules regarding the relationship between authorized interstate motor carriers and the owner-operators who lease their rigs to the motor carriers. These rules have implications for the scope of liability for motor carriers, the employment status of the owner-operators, and the rights of the owner-operators to be protected from contracts of adhesion. Because of that last topic, the regulations are often referred to as the Truth in Leasing regulations.

Mervyn v. Atlas Van Lines, 882 F.3d 680 (7th Cir.), involved an owner-operator (Mervyn) who had leased his rig to Ace World Wide Moving, an agent of the well-known household goods mover, Atlas. Some four years into the lease, Mervyn filed suit against Atlas and Ace, alleging breach of contract and violations of the truth-in-leasing regulations. The regulations require leases to be in writing and to contain various provisions, including one setting out the amount to be paid to the owner-operator for equipment and driver's services, which may be expressed as a percentage of gross reserve, a flat rate per mile, or by any other mutually agreed method.

As one might expect, Atlas has a detailed and somewhat complicated system for compensating its agents, including a published tariff rate and a methodology for estimating discounts. Ace, separately, entered into a lease agreement with Mervyn that included a schedule assigning Mervyn 58 percent of line-haul charges and 100 percent of the fuel surcharge. Mervyn had 30 days after any distribution to dispute payments.

In filing suit, Mervyn claimed that Atlas and Ace were guilty of breach of contract and also (somewhat inconsistently) that his compensation was not clearly stated in the lease. His key objection seems to have been that he should have been compensated based on the original charges that the customer was billed before a certain discount was applied to the customer's charge.

The Seventh Circuit agreed with the district court that Mervyn had not established his claim and affirmed the grant of summary judgment in favor of Atlas and Ace. The terms of the agreement were clear: Mervyn had waited too long to contest the calculation and, in any event, he had been paid precisely as provided for in the contract. In 2016, a Michigan district court had found that a provision prohibiting any claim by the owner-operator after 90 days was invalid; here, though, the limitation prevented only claims contesting the calculation. Since the Truth in Leasing claim was based upon the breach-of-contract claim it, too, failed.

The trucking companies in two other cases were not successful in having Truth in Leasing allegations dismissed. The owner-operators in *Carter v. Paschall Truck Lines*, 2018 U.S. Dist. LEXIS 102787 (W.D. Ky.), alleged that they were required, as part of their arrangement with the motor carrier, to lease a truck from a leasing company that Paschall had created, and then sublease the rig back to Paschall. While the lease agreement referred to the owner-operators as independent contractors, they claimed that the agreement imposed serious restrictions upon them. They were required to lease rigs and then sublease them back to Paschall, and they could not work for anyone but Paschall. Contrary to the terms of the lease, which permitted the owner-operators to work for others if 24 hours of notice were provided, they were not, in fact, permitted to do so. In addition, claimed the plaintiffs, the pay structure and wage deduction practices meant that their hourly wages dropped below the federal minimum-wage level. All told, eight examples were set out in the complaint of provisions that allegedly violated the regulations.

Based on extensive case law, Paschall moved to dismiss, arguing that the complaint failed to allege that they suffered a loss as a result of the agreement's violation of the regulations. The court agreed with the plaintiffs, though, that the complaint met that hurdle by alleging that the owner-operators had suffered mounting debts and lost revenue as a result of company policies and the terms of the lease. The court was inclined to give the plaintiffs a chance to flesh out their allegations during the course of discovery.

The defendant in [*Yata v. BDJ Trucking Co.*, 2018 U.S. Dist. LEXIS 111726 (N.D. Ill.)](), also moved to dismiss a Truth in Leasing suit brought by two of its drivers. BDJ's policy was to pay owner-operators by the mile for line-haul work and by the hour for local work. The owner-operators alleged that BDJ deducted $150 each week and placed the money in an escrow account on which no interest was paid. The lease agreement had made no reference to escrow deductions. The drivers also claimed that BDJ controlled their work by forcing them to comply with company rules and procedures belying their supposed status as independent contractors.

In moving to dismiss, BDJ creatively argued that the plaintiffs were agents of the company and thus excluded from the protection of the regulations in light of 49 C.F.R. §376.26 (exemption for leases between authorized carriers and their agents). The court was not sure just who qualifies as an "agent" in this regard but rejected BDJ's argument. The court found it undeniable that the plaintiffs were precisely the type of claimant entitled to the protection of the regulations and allowed the lawsuit to proceed.

White v. Date Trucking, LLC, 2018 U.S. Dist. LEXIS 92905 (D. Md.), involved the interpretation of a lease agreement and the leasing regulations. It confirms that courts have moved away from the consensus view reached by the 1980s that motor carriers are liable for pretty much any negligent use of a rig leased to them.

Plaintiff White, a yard jockey at a cold-storage facility, was injured when a load bar fell from the trailer whose doors White had just opened. Presumably, the bar had been improperly fastened by the shipper and/or the driver. He filed suit against Date Trucking, the USDOT-certified trucker under whose authority the load had been moved. The court observed that the lease agreement between Date Trucking and the owner-operator, Grantland, referred to the latter as an independent contractor (as leases almost inevitably do). He carried freight, though, under Date's authority. Although the plaintiff failed to sue Grantland before the statute of limitations ran, he had sued Date, and now he moved for summary judgment seeking judgment that Date was Grantland's employer. Date cross-moved for summary judgment, arguing that it bore no liability for Grantland's negligence, if any.

Missing entirely from the plaintiff's claim was the principle developed in the 1960s and 1970s that an owner-operator is the statutory employee of the motor carrier to which his vehicle is leased and, for that reason, the motor carrier is liable for the negligence of the owner-operator. This was the legal theory used to explain the broad assumption of responsibility that the lessee/motor carrier is obligated to assume under 49 C.F.R. §376.12(c).

Instead, the plaintiff's lawyer tried to prove that the owner-operator was an actual employee, in light of the definition of "employee" at 49 C.F.R. §390.5. The court was prepared to find that Grantland was an employee of Date's but held that his status as employee has no bearing on whether Date was vicariously liable for his negligence. Date's counsel made a far more sophisticated argument, based on the 1992 amendment of 49 C.F.R. §376.12(c) which, some courts have agreed, removed the presumption of liability that, for decades, the courts had found rested with the lessee motor carrier. As we have discussed in past years, this interpretation of the 1992 amendment is questionable, but it is certainly gaining acceptance.

The court, in any event, declined to rule on Date's motion to dismiss, in light of the fact that the lease in question provides exactly the opposite of what a lease is supposed to say: Instead of the lessee assuming liability, the lease indicates that the *lessor* was to maintain control over the rig. Since neither party had addressed this deviation from the regulations, the court felt unable to rule on the impact of the leasing regulations and it denied Date's motion. The court also declined to grant Date's motion that it had no common-law liability, finding this to be a jury question that will turn on the measure of control that Date maintained over the leased auto and its driver.

It is astonishing how far the zeitgeist (look it up) reflected in *White v. Date* and other recent cases differs from that in the initial decades after the promulgation of the leasing

regulations. A motor carrier might draw what we think of as a terrible lesson from this case and others like it: that as long as it doesn't maintain control over its owner-operators, a motor carrier won't face vicarious exposure. That is the wrong type of incentive for the courts to offer and we don't think that the court necessarily meant to teach that lesson, to be sure. It did, after all, ask for briefing on §376.12(c). It is undeniable, though, that for many courts there is no longer an automatic assumption of lessee liability.

Section 376.12(c) of Title 49 of the CFR was front and center in the court's analysis in *Jackson v. Wiyou case*, 249 So.3d 845 (La. Ct. App.). Owner-operator Troyland Wise had leased his rig to ACME, a regulated carrier, subject to a proper lease agreement, which included the language from §376.12(c) giving ACME exclusive possession and control of the truck for the duration of the lease. Wise was not permitted to use the rig for any purpose other than for hauling loads for ACME. At the time of the loss, though, he was using the truck to pull a float in a Mardi Gras parade. As the truck made a right turn, Jackson, a passenger on the float, apparently lost her balance and was thrown from the float.

The tort complaint was poorly crafted, but once ACME moved for summary judgment, the focus of the debate quickly turned to 49 C.F.R. §376.12(c). Noting that the trip at issue was purely intrastate (a non-sequitur, in our view) and the fact that Wise was not in the course and scope of his employment with ACME at the time of the loss (a better rationale), the court granted ACME's motion.

In 1992, responding to industry comments, the Interstate Commerce Commission (ICC) addressed a recurring problem: carrier liability for the tortious acts of equipment owners who wrongfully continue to display the carrier's indentification devices on equipment after a lease contract had terminated. The ICC expressed frustration that certain courts had "relied on Commission regulations in holding carriers liable for the acts of equipment owners who continue to display the carrier's identification on equipment after termination of the lease contract. We prefer that courts decide suits of this nature by applying the ordinary principles of State tort, contract, and agency law ..."

Astonishingly, this attempt to protect motor carriers from dishonest owner-operators who left placards on vehicles after leases terminated – protection that was then provided in modified sign-off regulations – has been seen by some commentators and courts as changing the nature of a motor carrier's liability while leases are in effect, the broad scope of which the ICC affirmed just a few lines later.

The *Jackson* court, in any event, followed this trend, assuming that the 1992 regulatory amendments reflected a decision by the ICC to deny that the regulations impose any liability at all. Instead, the court concluded that the motor carrier is only liable if it would be found liable under state law. Finding that Wise was acting outside of the scope of his employment, the court affirmed the grant of summary judgment to ACME.

Larry Rabinovich

2. Truck Driver: Employee or Independent Contractor?

In a closely-watched case, the Supreme Court of the United States recently handed down a decision sure to disappoint motor carriers hoping to use the power of federal courts to compel owner-operators to arbitrate disputes over compensation and other working conditions. In *New Prime v. Oliveira*, 2019 U.S. LEXIS 724 (Jan. 15, 2019), New Prime was an interstate trucking company and Oliveira was a driver employed pursuant to a contract labeling him as an "independent contractor." When Oliveira brought a class action suit against New Prime for failure to pay mandated minimum wages, New Prime asked the court to invoke its authority under the Act to compel arbitration according to the terms of their agreements.

Essentially, New Prime was attempting to shepherd various claims – in particular, a class-action lawsuit filed by its drivers – into an arbitration process and get them out of the court system. It relied on the plain meaning and a common-sense understanding of the Federal Arbitration Act, 9 U.S.C. §1, to argue that the claims were subject to mandatory arbitration in light of the contractual provision in its owner-operator agreement. Had the Court accepted this argument, one could imagine that every motor carrier with access to counsel would

include an arbitration clause in its owner-operator contract and insist that virtually any dispute with drivers be handled under arbitration; defense lawyers very much liked the idea of keeping plaintiffs' lawyers away from juries, as well as avoiding the often-expensive discovery stage in litigations.

The claimants argued that New Prime referred to its drivers as independent contractors but treated them as employees; they also insisted that that the Arbitration Act did not apply to compel arbitration because of language in the Act itself which excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." New Prime insisted that, in light of the broad arbitration language in the agreements that it signed with its drivers, the question of whether the Arbitration Act applied was for the arbitrator to decide. The Court agreed with the lower courts that it was for the court, not the arbitrator, to decide whether the exception was relevant. There was no dispute that the drivers were engaged in "interstate commerce" (meaning that a different result is possible for drivers who operate locally). That left only the question of whether the owner-operator agreement was a "contract of employment." In his narrow holding, Justice Gorsuch found that in 1925, when the Act was passed, the phrase "contract of employment" referred both to actual employees and independent contractors. In short, the Court did not make any decision about the actual status of the New Prime drivers – that will be decided in the litigation going forward. All the Court held was that the attempt by New Prime to relocate what could be a difficult and expensive litigation into an arbitration setting will not work. Commentators wonder whether the industry will attempt to rely on state laws to compel arbitration. For now, all that seems clear is that the wave of cases dealing with the employment status of drivers will not be receding any time soon.

The Supreme Court of California faced a similar statutory interpretation question in the latest skirmish in the ongoing war over employment benefits due to truck drivers under California law. In *Dynamex Operations West Inc v. Superior Court*, 4 Cal. 5th 903, 416 P.3d 1, 232 Cal. Rptr.3d 1 (Cal.), two individual delivery drivers, suing on their own behalf, and on behalf of a class of allegedly similarly situated drivers, filed a complaint against Dynamex, a nationwide package and document delivery company. The plaintiffs alleged that Dynamex had misclassified its delivery drivers as independent contractors, rather than employees, and had failed to pay them overtime wages or to provide accurate wage statements.

As framed by California's highest court, the substantive issue was the proper test for determining whether workers should be classified as employees or as independent contractors for purposes of California wage orders, which impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of California employees. Notably, the *Dynamex* decision did not actually determine whether the plaintiffs were employees or independent contractors but, rather, formulated a test for the lower court to use in assessing whether to grant class status to the plaintiffs.

The court acknowledged that the oft-cited California case of *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341, 256 Cal. Rptr. 543, 769 P.2d 399 (1989), had held that control – specifically, "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired" – is the most significant consideration to determine a worker's status as an independent contractor or employee. In addition to control, other factors to be considered include, without limitation, whether the one performing services is engaged in a distinct occupation or business; whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; the length of time for which the services are to be performed; the method of payment, whether by the time or by the job; and whether or not the work is part of the regular business of the principal.

The *Dynamex* court, however, clarified that, even in *Borello*, its goal was always to tailor the employee/independent contractor test to the needs and imperatives of a given piece of legislation. The wage order at issue (Cal. Code Regs., tit. 8, § 11090) applies "to all persons employed in the transportation industry whether paid on a time, piece rate, commission, or other basis, except for persons employed in administrative, executive, or professional capacities, who are exempt from most of the wage order's provisions." The wage order goes on to define "employ" as "to engage, suffer, or permit to work;" and "employee" as "any person employed by an

employer;" and "employer" as "any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person."

The Supreme Court held that the "suffer or permit to work" definition of "employ" contained in the wage order must be interpreted broadly – to treat as "employees" and thereby provide the wage order's protection to all workers who would ordinarily be viewed as working in the hiring business. If the worker can show that he or she falls within this definition, the burden shifts to the putative employer to establish (a) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity's business; and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

Last year, we reported on *Valadez v. CSX Intermodal Terminals, Inc.*, 2017 U.S. Dist. LEXIS 66923 (N.D. Cal.), in which plaintiffs made a number of claims based on CSX's alleged misclassification of its plaintiff-drivers as independent contractors, seeking to recoup what they alleged were illegal deductions from wages and to require CSX to pay its drivers in accordance with protection provided under California law. CSX entered into contracts with drivers who were categorized as independent contractors and who leased their trucks to CSX pursuant to contractor operating-lease agreements (COLAs). The COLAs provided for compensation per load (i.e., linehaul), as well as for other types of reimbursements and accessorial charges and surcharges, such as inside delivery, waiting time, fuel, and storage. Relying on *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2049 (2015), the court held that the FAAAA did not preempt the plaintiffs' claims, noting that the FAAAA expressly does *not* regulate a state's authority to enact safety regulations with respect to motor vehicles; control trucking routes based on vehicle size, weight, and cargo; impose certain insurance, liability, or standard transportation rules; regulate the intrastate transport of household goods and certain aspects of tow-truck operations; or create certain uniform-cargo or antitrust-immunity rules. 49 U.S.C. § 14501(c)(2), (3).

In 2018, the plaintiffs moved for partial summary judgment on the employment status, but their motion was denied. 298 F. Supp.3d 1254 (N.D. Cal.). The district court looked to the *Borello* test of "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." Factors weighing in favor of employee status included CSX's right to terminate drivers without cause; that the drivers were required to abide by CSX's safety rules, accident policies, and drug and alcohol policies; and that the drivers never negotiated directly with customers but received all of their loads through CSX dispatch. On the other hand, the drivers were free to choose the days on which they worked and could (at least in theory) reject any load offered to them; could choose their routes from pickup to delivery; and were free to hire their own employees and work for companies other than CSX. In the face of competing facts which could point to either employee or independent-contractor status, the court denied the plaintiffs' motion for partial summary judgment.

Notably, the district court's decision in *Valadez* was released one month before the decision of the Supreme Court of California in *Dynamex*, discussed above. Going forward, we will watch with interest to see whether influence of the *Borello* control test will decrease and the *Dynamex* "suffer or permit to work" test will find favor Motor carrier defendant L&J argued in *Henry v. Sunshine Freight, Inc.*, 2018 U.S. Dist. LEXIS 167236 (W.D. La.), that it was not vicariously liable for the negligence of the truck driver involved in the loss, since he was not an employee and L&J did not own the truck. The court found, though, that the motor carrier's lease of the truck was sufficient to qualify the driver as a statutory employee under federal law, thereby exposing the motor carrier to vicarious liability. (See the related discussion in Section 1.)

By contrast, the court in *Feimer v. Antonio's Car Service*, 2018 N.Y. Misc. 4427 (N.Y. Sup. Ct.), looked to state law to determine that the owner-operator of a livery vehicle was an independent contractor and not an employee of the livery service, where the owner worked at his own convenience and was free to engage in other employment and was responsible for vehicle maintenance, paying insurance and taxes, was not on the livery company's payroll, and received no benefits. *Sparks v. M&D Trucking, L.L.C.*, 301 Neb. 977 (Neb.) added several layers of

analysis to the problem of identifying the vicariously liable and financially responsible party. Northern Ag brokered a load of fracking sand to M&D, which brokered it to Turbo Turtle, which engaged Johnson to actually transport the load. When Johnson was involved in an accident resulting in several fatalities, the victims sued M&D, Turbo Turtle and Johnson (but not, apparently, Northern Ag). Noting that "[t]he extent of control is the chief factor distinguishing an employment relationship from that of an independent contractor," the court found that M&D's text messages to Johnson concerning pickup and destination locations did not establish such control as to qualify M&D as Johnson's employer. The court also took particular note of the fact that M&D had both a trucking division and a brokerage division, and that Johnson's trucking operations were a distinct business from M&D's brokerage division, which provided the particular shipment to Johnson through Turbo Turtle. Finally, the court's finding that M&D acted as a broker with respect to the load in question negated the plaintiffs' argument that Johnson was a statutory employee of M&D.

In *Sappington v. Shoemaker*, 2018 Mich. App. LEXIS 3426 (Mich. Ct. App.), a shipping company paid the plaintiff to haul the company's cargo using a commercial truck, which he had leased from a leasing company. The shipping company obtained a commercial auto-insurance policy through Cherokee that covered the truck itself, while the plaintiff driver insured his personal vehicle under a Michigan no-fault insurance policy from State Farm. Subsequently, the plaintiff was injured when his co-driver drove the truck off the road.

Under the default-insurer priority rule in Michigan, the plaintiff's no-fault coverage under his own State Farm policy would have been primary, unless a statutory exception applies. The Michigan no-fault statute provided that "An employee…who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits…" under the policy covering the vehicle. The court found that (1) as a long-term lessee, the plaintiff was the "owner" of the truck; and (2) as a self-employed individual, the plaintiff was both an "employer" and an "employee," even if he was an independent contractor with respect to the shipping company. Accordingly, the statutory exception applied, and the Cherokee policy covering the truck provided primary no-fault coverage to the plaintiff.

In *Matter of Mitchell v. Eaton's Trucking Service, Inc.*, 2018 NY App. Div. LEXIS 6806 (3d Dep't), the claimant was a truck driver for Eaton's, which contracted with Quality to transport products for Quality's customers. When he was injured in the course of work, the claimant filed a workers' compensation claim and identified both Eaton and Quality as his employer.

The Workers' Compensation Board determined that Eaton was his general employer and Quality was his special employer and held that Quality was liable for 50% of the workers' compensation benefits paid to claimant. The appellate division reviewed the factors relevant to such a determination: "who controls and directs the manner, details and ultimate result of the claimant's work." The evidence showed that Eaton's drivers hauled products exclusively for Quality's customers, operating under Quality's logo and license, and did so in furtherance of the business of both Quality and its customers. Under the circumstances, the court upheld the Workers' Compensation Board's determination and found that Quality had sufficient control over the claimant's work to be considered his special employer.

In *Rychorewicz v. Welltec, Inc.*, 2018 U.S. Dist. LEXIS 123512 (S.D. Tex.), the defendant was an international oil and gas company, and the plaintiff was a field engineer who performed a variety of tasks, including driving the defendant's vehicles from satellite offices to wellsites. The defendant argued that the plaintiff was exempted from the overtime pay rules of the Fair Labor Standards Act (FLSA), pursuant to the Motor Carrier Act (MCA). The MCA exempts employees from the FLSA with "whom the Secretary of Transportation has power to establish qualifications and maximum hours of service…" For the MCA to apply, an employee must be: (1) employed by a motor carrier or private carrier as defined by 49 USC 13102, and (2) engaged in activities of a character directly affecting the safety of operation of motor vehicles in the transportation on public highways of passengers or property in interstate of foreign commerce within the meaning of the MCA. While it was undisputed that the defendant was a motor carrier authorized by the USDOT, the plaintiff challenged the defendant's classification of him, arguing that: (i) defendant was not a "motor carrier" because it did not comply with certain regulations

promulgated by the Secretary of Transportation and (ii) that the plaintiff himself did not engage in interstate commerce. The court, however, held that the alleged violations under certain USDOT regulations did not prevent the defendant from falling under the USDOT's jurisdiction. With regard to the plaintiff's second argument concerning interstate commerce, the defendant did in fact provide evidence, in the form of monthly work reports and summary documents, that the field engineers transported oil-field equipment interstate. Accordingly, the court granted defendant's motion for summary judgment.

With respect to the particularities of pleading minimum-wage and overtime violations under the FLSA, the defendants in *Rite v. Express Courier International Inc.*, 2018 U.S. Dist. LEXIS 133609 (N.D. Ga.), argued (1) that the plaintiffs had failed to assert sufficient facts to demonstrate that the plaintiffs were employees as opposed to independent contractors, and (2) that the complaint did not allege which the plaintiffs suffered minimum wage and overtime violations. The court found that the plaintiffs had pleaded their employment status sufficiently by alleging that the defendant had the power to impose a standard operating agreement maintained by a single department; set prices charged to customers; processed the plaintiffs' applications and communicated legal requirements to the plaintiffs; fielded customer complaints related to the plaintiffs; assigned the plaintiffs' routes and terminated the plaintiffs; dictated the plaintiffs' uniforms, insurance, and communication equipment; charged the plaintiffs for delays and misdeliveries; and required that plaintiffs receive written permission from the defendants before driving for another motor carrier.

With regard to the failure to identify which plaintiffs suffered from which violations, the court noted that the plaintiffs did not need to allege many details beyond a failure to pay overtime or minimum wage to covered employees to survive a motion to dismiss. However, the court further noted that while they could state a claim without alleging details such as dates, number of hours, and approximate back wages, the plaintiffs still must allege which plaintiffs suffered a minimum wage and/or overtime violation. The complaint only alleged that some plaintiffs suffered these violations. Accordingly, the court found the complaint did not sufficiently allege FLSA violations and dismissed the complaint, but also granted the plaintiffs leave to amend their complaint to sufficiently state a claim.

In *Cruz v. Lopez*, 301 Neb. 531, Werner, the general contractor on a construction project (and itself an authorized motor carrier) hired a motor carrier, Lopez, to haul away construction debris. The motor carrier's driver, Carman, was involved in an accident, and the injured claimant argued that the general contractor should be held vicariously liable for the driver's negligence. The court found insufficient evidence of Werner's alleged control over the driver to qualify him as Werner's employee (notably, the plaintiff did not allege that the driver was a "borrowed servant" of the general contractor). The general contractor never had possession of the motor carrier's dump truck that was involved in the loss; the motor carrier was under no obligation to accept an offered load; and the general contractor did not specify the routes the motor carrier would follow. Notably, the court also rejected the argument that Carman would qualify as Werner's employee under federal regulations as incorporated by reference under Nebraska law, because Lopez itself was an authorized motor carrier and, at the time of the loss, Carman was acting as an employee of Lopez and not Werner.

Gabriel Bouvet-Boisclair and Phil Bramson

3. FAAAA *Preemption*

The Federal Aviation Administration and Authorization Act (FAAAA) prohibits states from enacting or enforcing laws "related to a price, route or service of any motor carrier...with respect to the transportation of property." This provision has become a flashpoint in the ongoing national conversation about federalism and local regulation of an industry subject to significant federal regulation.

Employment Status

The truck-driver plaintiffs in *Goyal v. CSX Intermodal Terminals, Inc.*, 2018 U.S. Dist. LEXIS 164643 (N.D. Cal.), claimed that CSX had violated the California Labor Code and failed to reimburse them for various expenses because they had been misclassified as independent contractors. CSX moved for summary judgment on the basis of the truth-in- leasing regulations (see Section 1).

The court noted that the claims are very similar to those of the *Valadez* case that we discussed last year. The court reviewed the three categories of preemption – express, field, and conflict (itself divided into two headings: scenarios in which it is impossible to comply with both federal and state law and instances where complying with state law would be an obstacle to the fulfillment of federal objectives). The court found no explicit or implicit evidence that Congress had intended to preempt the field, particularly since the regulations themselves indicate that they were not intended to weigh in on whether drivers are employees or independent contractors. Conflict preemption was also not indicated and, by identifying the objective of the federal regulations as the protection of owner-operators, the court had no trouble concluding that the California regulations were not an obstacle to federal goals. The court noted that to the extent the *Valadez* court had viewed conflict preemption as a possibility, it disagreed. CSX was granted summary judgment on claims relating to vehicle purchase or lease by the owner-operator. Beyond that, the court declined to dismiss the various claims by the plaintiffs against CSX. (The *Valadez* case also proceeded as both sides engaged in motion practice. It is discussed in Section 2.)

For employers in Washington State seeking to reduce employment taxes, 2018 was a tough year. In *Gulick Trucking, Inc. v. Employment Security Department*, 2018 Wash. App. LEXIS 196, defendant Gulick Trucking sought review of the state's Employment Security Department (ESD) assessment of delinquent unemployment insurance taxes. ESD had concluded that Gulick's truck drivers were covered employees, rather than independent contractors, under Washington State's Employment Security Act (ESA). Gulick employed both company drivers and owner-operators. ESD audited Gulick and reclassified 120 owner-operators as Gulick's employees for unemployment-insurance tax purposes. Gulick argued that the FAAAA preempted the reclassification. In ruling against Gulick, the court held that the FAAAA did not preempt the reclassification because the preemption statute only prohibits states from enacting or enforcing "a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier...or any motor private carrier, broker, or freight forwarder with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The court determined that since the ESA's definition of "employment" applied only to the imposition of unemployment insurance taxes, Gulick could not show that the reclassification essentially dictated their prices, routes, or services. Thus, its preemption argument failed.

In *Johnson v. Diakon Logistics*, 2018 U.S. Dist. LEXIS 52149 (N.D. Ill.), plaintiffs who worked as delivery drivers for defendant Diakon Logistics alleged that the company had violated the Illinois Wage Payment and Collection Act (IWPCA) by making unlawful deductions from the plaintiffs' wages. Diakon required its delivery drivers to sign an agreement drafted by Diakon, which stated that the drivers were independent contractors. Despite that characterization, Diakon required its drivers to report to its facilities in the morning for at least five days per week, wear uniforms when making deliveries for Diakon, and complete their delivery routes in a specific order and time window. If drivers failed to complete their deliveries in the order specified by Diakon, they would be subject to discipline. Diakon deducted expenses from the plaintiffs' wages including insurance, truck rentals, and uniforms. The plaintiffs also alleged that Diakon was unjustly enriched by misclassifying drivers as independent contractors, thereby evading employment-related obligations such as social security contributions, workers' compensation coverage, and state disability and unemployment compensation, and forcing drivers to pay work-related expenses, such as the costs of purchasing or leasing vehicles meeting Diakon's specifications and the costs of operating, insuring, and maintaining those vehicles.

In response, Diakon argued that the plaintiffs' claims under the IWPCA and for unjust enrichment were preempted by the FAAAA. The court noted that the IWPCA was enacted to provide employees with a cause of action for the timely and complete payment of wages without employers retaliating against them. The particular provision at issue, 820 ILCS 115/9, prohibits employers from taking deductions from employees' wages unless the deductions are: "(1) required by law; (2) to the benefit of the employee; (3) in response to a valid wage assignment or wage deduction order; (4) made with the express written consent of the employee, given freely at the time the deduction is made." Diakon argued that the drivers had agreed to the deductions in written agreements signed with Diakon and that the goal of FAAAA was to encourage enforcement of agreements freely made pursuant to market forces.

However, the court observed that the FAAAA specifies that only state laws that are "related to a price, route, or service" are preempted. Thus, to be preempted, the state law or claim must "relate to" these specified categories and the court noted that Diakon advanced no argument as to how the IWPCA would relate to a route or service. As the existing case law makes clear, laws that affect the way a carrier interacts with its customers fall squarely within the scope of FAAAA preemption, while laws that merely govern a carrier's relationship with its workforce are often too tenuously connected to the carrier's relationship with its consumers to warrant preemption. Accordingly, in rejecting Diakon's preemption argument, the court found that the IWPCA merely affected Diakon's relationship with its workforce, not its customers.

The court in *MacMillan-Piper, Inc. v. Employment Security Department*, 2018 Wash. LEXIS 2929 (Wash. Ct. App.), also found no preemption. The case involved the question whether owner-operators who contracted with MacMillan-Piper, Inc. qualified for the statutory independent-contractor exemption from unemployment taxes. The court rejected MacMillan's argument for preemption, noting that MacMillan exerted extensive control over the method and detail of how the driving services were to be performed and, therefore, did not establish that it was entitled to an exemption under the State of Washington Employment Security Act.

In 2011, the ESD audited MacMillan and determined that 69 owner-operators should be reclassified as employees instead of independent contractors under the ESA. The court held that MacMillan did not establish the unemployment tax directly regulated by the transportation of property or the service of a motor carrier, nor did MacMillan distinguish prior cases which held that motor carriers are not exempt from state taxes, state lawsuits of many kinds, and perhaps most other state regulation of any consequence. MacMillan offered declarations in support of summary judgment suggesting the unemployment taxes would severely impact its business model, but none of those declarations stated that the unemployment tax would be a determinative factor affecting its model. As a result, the court found there was no preemption.

Freight Brokers

In *Finley v. Dyer*, 2018 U.S. Dist. LEXIS 182482 (N.D. Miss. 2018), the plaintiff died when the car he was driving was struck by a rig. The complaint asserted claims against Cornerstone, the broker, for negligent hiring and negligent entrustment. Cornerstone, acting as a broker, had contracted Jamac, a motor carrier, to move freight. Jamac, in turn, retained Dyer as a driver. The plaintiff alleged that while transporting the freight, Dyer negligently crossed the median and caused the collision. Cornerstone argued that the FAAAA preempted the negligent entrustment and negligent-hiring claims. Relying on established case law, the court noted that that preemption would be appropriate only if the plaintiff's claims for negligent hiring and negligent entrustment were "related to" a price, route, or service with respect to transportation offered by Cornerstone. The court explained that a negligence claim is "related to" a "service" when the claim is "centered on" or "derives" from "a bargained-for or anticipated provision of labor from" a broker or other protected carrier.

The plaintiff did not assert a general negligence claim derived from the operation of a truck. Instead, the claims were derived from Cornerstone's selection of a freight carrier, an action which the court found is indisputably a "bargained-for or anticipated provision of labor." Since the allegations derived from a broker's primary role, the court concluded that they are "related to" such a service and, thus, preemption would have been appropriate unless one of the FAAAA's preemption exceptions applies. The plaintiff pointed to the FAAAA's public-safety exemption, which provides that the FAAAA's preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. §14501(c)(2)(A). In finding a public-safety exception applicable, the court noted that the claims arising from the negligent procurement of a motor carrier clearly represent a valid exercise of the state's police power to regulate safety and, therefore, are not preempted.

In *Krauss v. Iris USA, Inc.*, 2018 U.S. Dist. LEXIS 127660 (E.D. Pa. 2018), a charity contracted to buy Lego products from IRIS, a distributor in Wisconsin. IRIS hired the giant logistics powerhouse, C.H. Robinson, which in turn hired a carrier, KV Load, to deliver the Legos. The seller (IRIS) and carrier (KV Load), though, allegedly failed to load the Legos in the safe manner that the charity had requested.

Instead, they used old pallets of the wrong size and they dangerously stacked the pallets one on top of another. The shoddy loading damaged the Legos in transit and caused a pallet to crack during delivery, injuring a volunteer for the charity and damaging a forklift. In May 2018, the court held that the plaintiff's personal-injury claim against C.H. Robinson was preempted by the FAAAA. The plaintiff filed a motion for reconsideration of that ruling on the basis of what it described as newly discovered evidence – for instance, a notation about KV Load in C.H. Robinson's internal computer system that was entered 10 days before the accident regarding the insufficiency of KV's supervision and safety controls. C.H. Robinson should not have been using this carrier; the court found, though, that this in no way impacted on the preemption analysis.

The plaintiff then pointed to C.H. Robinson's regular practice of checking the website of the Federal Motor Carrier Safety Administration (FMCSA) to see if carriers have been charged with safety violations. This, of course, is a controversial type of claim that truckers and insurers have fought hard to exclude. The court, in any event, found that it did not appear that C.H. Robinson was aware of the safety violations that the USDOT had identified with KV Load. Thus, the court concluded its preemption opinion was still correct: C.H. Robinson would have needed a heightened process to discover KV Load's latest safety violations, meaning that a tort claim against C.H. Robinson would significantly affect the broker's services. Because of that impact on the broker's primary function, the claim was preempted.

Courts around the country have split on the applicability of FAAAA preemption in cases involving bodily injury claims against brokers; various decisions in recent years have held that negligence or negligent-hiring claims for bodily injury are not preempted. The district court in *Volkova v. C.H. Robinson*, 2018 US Dist. LEXIS 19877 (N.D. Ill.), was not impressed with the logic. C.H. Robinson, which is a USDOT-authorized broker, has become a popular target for plaintiffs' lawyers since it has deeper pockets than most of the carriers that it hires. Here, C.H. Robinson was alleged to have been negligent in selecting the motor carrier whose driver was involved in a multi-vehicle accident. Citing the language of FAAAA, the court had no trouble concluding that the negligent-hiring claim related to the core service that the broker provided. Since enforcing the state law regarding negligent hiring would impact the way freight brokers hire and oversee transportation companies, the claim was preempted by FAAAA.

In line with decisions by various courts around the country, the plaintiff argued that preemption applies to cargo claims, but not bodily injury claims. The district court here, though, found no basis for such a distinction. In response to the plaintiff's claim that this left her with no claim against the broker at all, the court apparently agreed, noting that plaintiff may claim against the motor carrier and the driver. An Ohio federal district court in *Creagan v. Wal-Mart Transp., LLC*, 2018 US Dist. LEXIS 209604, agreed, finding that FAAAA precluded a negligent-hiring claim against the broker, Kirsch Transportation.

These cases stand in stark contrast to several decisions we reported on last year that declined to find that FAAAA preempted bodily injury claims against brokers. The debate will, no doubt, continue in 2019. (See a related discussion involving what we view as misguided cases finding Carmack preemption for bodily injury claims in Section 5.)

Vince Saccomando

4. MCS-90

This year's batch of MCS-90 decisions involve issues that are familiar to those of us who track these cases; some of the decisions, though, are head-scratchers and one of them is more than a bit alarming. Back in 2004(!), Barker & Son Forestry Services, which operated trucks in four states, sought the counsel of 1st Southern Insurance Services, which advertised itself as an insurance-agency expert in placing coverage for trucking companies. Barker itself was unacquainted with insurance requirements and made clear to 1st Southern that it was relying on the latter's expertise. The reliance was misplaced, at least as recounted by the district court in *Penn v. 1st Southern Insurance Services*, 324 F.Supp.3d 703 (E.D. Va.). The policy secured by the agency to cover Barker had limits of only $100,000. If, as the court assumed, the insured was subject to the insurance requirements mandated by the FMCSA, the limits should have been at least $750,000.

As background, we observe that courts have repeatedly held that it is the responsibility of the insured to alert the potential insurer that it is a motor carrier and requires policy limits of $750,000 (or $1 million or $5 million, depending upon what type of cargo it hauls). The insurer is not responsible to check up on the insured and investigate whether it is subject to FMCSA or other requirements and how it is planning to comply with those requirements. Thus, courts have repeatedly rejected claims to reform policies and raise policy limits retroactively. With that avenue closed, the claimants here tried a different approach.

Denise Penn and Houstania Clymer were badly injured in a collision with a truck being operated in Barker's business. They filed suit against Barker and secured a judgment well in excess of $2 million. The insurer paid only its $100,000 limits. Barker then assigned to the claimants any rights that it had against its insurance agent; the claimants filed suit in 2017 against the latter, alleging breach of contract and negligence. Since the policy went into effect in 2004, the loss occurred in 2005, and the policy had been the subject of a declaratory judgment action in 2007, 1st Southern moved to dismiss on grounds that the statute of limitations barred the claims. The court agreed.

The claimants, of course, were aware of the timing problem. They argued that the three-year statute for unwritten professional contracts (five for unwritten contracts) began to run only in 2016, when judgment was entered, and the available insurance was insufficient to pay the losses. Reviewing Virginia law, though, the court found that a claim for failure to procure (appropriate) insurance accrues when the defective policy was placed, not when the payout was made or should have been made. Accordingly, Penn and Clymer were time-barred. The idea of taking an assignment and suing the motor carrier's insurance broker, though, may just be coming into its own.

United Financial Casualty Co. v. Bountiful Trucking, LLC, 2018 U.S. Dist. LEXIS 193254 (D. Minn.), arose out of a fiery collision between a tractor-trailer hauling propane and a train. The truck driver was an owner-operator doing business under the name Bountiful Trucking and operating under the motor carrier authority of CHS, Inc. Bountiful was insured under a policy issued by United, but the rig at issue was not scheduled on the United policy. The Bountiful rig, though, was covered under a policy that Old Republic had issued to CHS. United, which was defending Bountiful subject to a reservation-of-rights letter, filed suit against the truckers and the claimants, seeking a declaration that it provided no coverage. CHS opposed United's motion for summary judgment, arguing that United was exposed on the basis of the MCS-90.

United's primary argument with respect to the MCS-90 was that the endorsement did not apply because the rig was being operated under CHS's authority, not Bountiful's. In the alternative, United argued that even if the MCS-90 would have applied, it would have been excess over the Old Republic policy. United also argued that the MCS-90, even when it applies, does not create a duty to defend the insured.

The court ruled mostly in United's favor, but its analysis was a bit shaky. First, though, the court made what we consider to be a fundamental error in finding that United had a duty to defend. Courts around the country have consistently found that the MCS-90 does not include a duty to defend; we wonder if the court ignored the clear precedent or was unaware of it. The court misconstrued the nature of the MCS-90: it thought that the endorsement "extended the policy's coverage to any vehicle Bountiful used, whether the vehicle was specifically listed or not". This is a misimpression – what the MCS-90 does is to require payment by the insurer under certain circumstances, even though the vehicle involved in the loss was not covered. The MCS-90 does not "extend coverage."

Turning to the question of whether United would be required to indemnify its insured in the event of a judgment, the court noted that CHS's policy with Old Republic had limits of $5 million, but also had a $5 million deductible. Since Old Republic, then, had no actual exposure, United's MCS-90 exposure was primary in nature, not excess. [CHS does not appear to have attached the MCS-90 to its own policy.]

The court seems to have passed over United's basic argument – which we think ought to have carried the day – that the MCS-90 issued by United would have applied only if Bountiful's motor-carrier authority was being used. Instead, it ruled in United's favor to the extent of finding that United's exposure was excess over Old Republic's. (We assume that Old Republic may have been helping

CHS formulate its position, but it is a bit unusual for the judge to have ruled on Old Republic's policy, where Old Republic was not a party.)

The court also seems to have misconstrued the *Yeates* decision (10th Cir. 2009) that formed the basis for the ruling. In a formulation that has proven to be slightly imprecise but which is often cited anyway, the Tenth Circuit in *Yeates* found that the MCS-90 is triggered only if: 1) the underlying policy to which the MCS-90 is attached provides no coverage for the loss; and 2) the other insurance policy covering the motor carrier is insufficient to satisfy the FMCSA financial-security requirements or provides no coverage at all. (*Yeates* was decided in the context of its odd facts: there was only one trucker involved and, for some reason, two separate insurers had issued policies to that carrier. As we have discussed over the years, the relevance of *Yeates* when the two policies at issue have different named insureds is questionable.)

The *United* court found that since a $5 million policy was in place, the United MCS-90 had not been triggered, even though that $5 million Old Republic policy was a full-deductible policy. But, the court went on, United could still be exposed under its MCS-90, if the claimants recover more than $5 million. That, we note, is contrary to the ostensible holding in *Yeates* – that if the mandated insurance is in place through another insurer, the first insurer's MCS-90 can never be triggered.

Confusion about what precisely *Yeates* held and whether the most expansive interpretation is good law remains a problem that recurs in many cases. In *Militello v. ICAN Logistics, Inc.*, 2018 U.S. Dist. LEXIS 61399 (W.D. Okla.), plaintiff's daughter was killed in a collision with a rig operated by Zeyo Wang, a driver hired by the rig's owner, Hongyue Trucking. The rig was leased by Hongyue to ICAN. Hongyue was insured by Wesco Insurance; ICAN was insured by Arch Insurance, which was not a party to the lawsuit. The court was probably on solid footing when it rejected summary judgment motion by the various parties. Its rationale for that decision is not as well grounded, though.

Wesco provided no coverage for the loss under its basic policy (presumably because the insured had failed to purchase coverage for the rig involved in the loss). It had, though, attached an MCS-90 to its policy. Wesco appears to have taken the position that its MCS-90 does not apply because ICAN, not Hongyue, was the motor carrier whose authority was being used on the date of loss. As we have explained over the years, we think that this is a stronger argument than the *Yeates* argument – that the MCS-90 is never triggered once plaintiff has recovered the minimum required limits from some other source. Wesco presented the *Yeates* argument, too but brought it up too late in the proceeding for the court to consider it.

The estate claimed that Wang was not qualified to operate a commercial rig, because he could neither read nor write English, he had already driven more hours on the day of the loss than legally permitted, he allegedly missed a sign warning of "congestion ahead," and he rear-ended the vehicle that plaintiff's daughter was driving. The complaint sought damages for wrongful death resulting from the negligence and negligence per se of ICAN, Wang, and Hongyue. ICAN sought indemnification from Hongyue and also filed a third-party complaint against Wesco. The court agreed with Wesco that the base policy provided no coverage. It also agreed that since no judgment had been entered against Hongyue, the MCS-90 endorsement had not been triggered. The court, though, held it premature to rule on whether the MCS-90 could apply; the fact that other insurance was potentially available was not itself sufficient reason to exonerate Wesco. That seems to us a proper approach. The critical issue, the court held, was whether Hongyue was transporting the goods of another for compensation.

So far, so good. The court, though, went on the cite a decision we have described in the past as poorly reasoned: *Park Insurance Co. v. Lugo*, 2015 U.S. Dist. LEXIS 45034. Instead of focusing on what courts such as *Herrod v. Wilshire Ins. Co.*, 499 Fed. Appx. 753 (10th Cir. 2012), did – whose authority was being used – *Lugo* looked to whether the motor carrier was being paid as the key factor in whether its MCS-90 applied. We wonder, how many companies work without being paid? It is disconcerting that the court disinterred the *Lugo* decision.

The insurer in *Veilleux v. Progressive Northwestern Insurance Co.*, 2018 U.S. Dist. LEXIS 155861 (D. Conn.), was also unsuccessful in winning summary judgment on the question of MCS-90 applicability. Eric Veilleux, an employee of GDS Contracting, was injured while assisting Joseph Cunningham, a truck driver who was delivering an

aerial lift to GDS. Veilleux entered into a consent judgment in the amount of $3.75 million with the (apparently related) trucking defendants whose names were displayed on the rig. He then filed suit against Progressive, seeking recovery of the policy limits of two Progressive policies – one of which had been issued to each of the two defendants that had settled with Veilleux.

Progressive denied coverage on a variety of grounds. We focus here on the question of whether the MCS-90, issued along with one of the two policies, applied. Progressive noted that the underlying loss had involved a shipment moving intrastate. As we have pointed out in the past, the clear weight of the case law supports the view that one looks to the use of the rig on the date of loss – the trip-specific approach – to determine whether or not the MCS-90 applies. Connecticut courts have specifically adopted the trip-specific approach. *Martinez v. Empire Fire & Marine Ins. Co.*, 322 Conn. 47 (2016). One would have thought that this would have been the end of the discussion about the MCS-90. The court, though, was just getting warmed up.

Citing a long line of undisputed precedent, the Connecticut Supreme Court in *Martinez* had observed that MCS-90 interpretation is governed by federal law. The federal court in *Veilleux*, though, seems to have been oddly unconvinced. The court insisted the trip-specific approach did not resolve the case, "as there remains the question of whether Connecticut law has expanded coverage (sic) under the MCS-90 endorsement." That strikes us as a very bizarre question: What does the MCS-90 have to do with state regulation?

The Connecticut Supreme Court did point out in *Martinez* that states remain free to create their own insurance requirements for motor carriers operating intrastate. In fact, the *Veilleux* court observed that Connecticut has adopted many of the federal regulations, including the financial-security mandatory limits of 49 C.F.R. §387. That, though, is a far cry from incorporating the federal filing system and the complementary MCS-90 as a Connecticut form. Citing only to a magazine article written by a plaintiff's lawyer from Kansas City, the federal court concluded that Connecticut had adopted the MCS-90 and that, by virtue of the incorporation, vehicles operating intrastate are subject to the MCS-90. On that basis, the court denied Progressive's motion for summary judgment that the MCS-90 does not apply. The decision, which is quite disconcerting, has been appealed. We know, for now, that Connecticut does not require a Form E filing for intrastate carriers, but it also does not require an MCS-90. (An ACORD form is apparently all that is required.) In any event, it seems preposterous to extend the federal filing to a purpose not intended by the insurer that made the filing or by the insured. (Bad faith claims raised in *Veilleux* are discussed in Section 12.)

Lyles v. FTL Ltd., Inc., 339 F. Supp. 3d 570 (S.D. W.Va.), involved a claimant injured in a collision with a dump truck owned by K&K and used in the business of motor-carrier FTL, pursuant to a lease agreement. Both truckers were (coincidentally) insured by National Casualty, which paid its remaining limits under the K&K policy that scheduled the dump truck. The plaintiff, though, also sought recovery under the MCS-90 endorsement which formed part of the FTL policy.

In denying that the MCS-90 applied, National Casualty made several arguments and the court agreed with all of them. First, the court argued that the motor-carrier financial-responsibility regulations apply only to interstate shipments. That would have been sufficient to defeat the plaintiff's claim, but in the "interest of thoroughness," the court also addressed and approved of National Casualty's *Yeates* argument – that the plaintiff had already recovered in excess of $750,000, the amount of protection mandated by the regulations. The plaintiff apparently attempted to distinguish – or undercut – *Yeates*, but not very effectively. She argued that the payment under the K&K policy had not been for FTL; it was easy enough for the insurer to point out that FTL was an insured under the K&K policy and FTL was included as a party to the settlement agreement. That agreement did permit plaintiff to seek additional coverage but the court, quite rightly, held that the MCS-90 is not coverage.

The third argument, which the court also accepted, revolved around a provision in the settlement agreement that required the plaintiff to hold FTL harmless for any exposure it may face. (Such provisions are not unusual, but we suspect that the plaintiff's lawyer will be more careful about that kind of provision in the future.) Any payment under the MCS-90 by National Casualty would require FTL to pay back National Casualty. That, in turn, would then trigger the "hold harmless" in the settlement agreement running from the plaintiff to FTL. Lyles would, in the end, be paying himself. To prevent this "circle of indemnity," the MCS-90 is not relevant.

Finally, in *Occidental Fire & Casualty Co. of North Carolina v. D'Line Logistics, Inc.*, decided in the closing days of 2017 (2017 U.S. Dist. LEXIS 208524 (N.D. Ill.)), the court held that in light of the FMCSA's 2005 guidance, which we have discussed in past years, the MCS-90 is triggered only by a judgment against the named insured motor carrier. Occidental had issued a policy to D'Line, a regulated interstate motor carrier. Its driver, Ravi Dyer, presumably an owner-operator, was killed in an accident; his son Daniel, who was riding as a passenger, was injured. Daniel sued his father's estate in Nevada, where the accident occurred.

The rig that Ravi had been operating was not scheduled on the Occidental policy. That left only the MCS-90 as a potential basis to impose liability upon Occidental. The court, though, noting that D'line was not a defendant in the tort case, held that the MCS-90 will not be triggered it this case, since only a judgment against the named insured could lead to an MCS-90 recovery.

The court rejected the argument by Ravi's estate that the MCS-90 should apply because Ravi was D'Lines' agent. The estate also cited to several decisions that pre-dated the FMCSA's 2005 regulatory guidance which read the word "insured" in the MCS-90 more broadly to include other entities. The court pointed out, though, that every court that has examined the issue since the guidance has held that the MCS-90 is only triggered by judgment against the named insured motor carrier.

Courts have traditionally given deference to an agency's reasonable interpretation of its own regulations. In this case, of course, the agency (well, the USDOT's) interpretation is helpful to insurers. We note that some conservative judges and legal scholars have long been suspicious of the idea of giving deference to governmental agencies. With Justices Gorsuch and Kavanaugh voting in favor, the US Supreme Court in December opted to grant certiorari in *Kiser v. Wilkie*, a case that may give the Supreme Court the opportunity to overrule the existing precedent on deference. If that happens, there may be a serious impact on MCS-90 litigations in the future.

Larry Rabinovich

5. *Carmack Amendment and Freight Claims*

Preemptive Effect

The issue in *Pro-Com Products v. Kings Express LA, Inc.*, 2018 U.S. Dist. LEXIS 181974 (C.D. Cal.), was whether a state-court action seeking to recover for breach of an agreement to provide trucking services by the defendant was properly removed to federal court. The plaintiff had filed a state-court action alleging causes of action for deceit, negligent misrepresentation, breach of contract, conversion, and negligence. The defendant had removed the action to federal court, arguing that plaintiff's causes of action were preempted by the Carmack Amendment, although the complaint did not cite to the Carmack Amendment.

The court acknowledged that federal question jurisdiction ordinarily lies only when the plaintiff alleges on the face of its complaint that the complaint arises under federal law or whether the resolution of that claim depends on the answering of the substantial question of federal law. The court went on to hold, however, that there were a "handful of extraordinary situations" where well-pleaded state law complaints are deemed to arise under federal law, and that federal courts had construed the Carmack Amendment to completely preempt the area of law with respect to the interstate transportation of goods.

In the instant case, the complaint alleged that the defendant had failed to properly transport goods, had failed to deliver goods as promised, and had wrongfully stolen or converted plaintiff's goods. Such claims arose under the Carmack Amendment and the action was properly removed to federal court.

Federal jurisdiction over Carmack Amendment disputes depends, in part, on whether the claims are in excess of $10,000. In *Raaf v. UPS Ground Freight, Inc.*, 2018 U.S. Dist. LEXIS 163867 (D. Or.), the plaintiff had contracted with the defendant for the shipment of an antique sleigh. The sleigh was damaged when it fell off a loading dock, allegedly due to the defendant's negligence. The plaintiff sent defendant a demand letter that stated that the cost of repair could easily exceed $10,000. When the defendant did not respond, the plaintiff filed an action in Oregon state court, and the defendant removed the action to federal court based on the complete preemptive effect of the Carmack Amendment.

The plaintiff moved to remand the action to state court, arguing that her complaint only sought $10,000 in damages. The defendant pointed to the demand letter and argued that the amount in controversy actually exceeded $10,0000 and that removal was proper. The court held that, given the strong presumption against removal, the plaintiff's express limitation of damages in her complaint to $10,000 meant that the dispute must be resolved under state law.

The Carmack Amendment and Personal Injury Claims (!)

The Carmack Amendment, 49 U.S.C. §14706 ("Liability of carriers under receipts and bills of lading"), provides that "[a] carrier providing transportation or service [which issues a bill of lading] ...and any other carrier that delivers the property...are liable to the person entitled to recover under the receipt or bill of lading...for the actual loss or injury to the property..." The right to recover for the actual loss or injury to the property is the only right created in the text of the Carmack Amendment. As courts have held for more than a hundred years, and as we have often noted in these pages, this right to recover for actual loss or injury to property transported in interstate commerce is exclusive and preempts claims for those same damages arising under state law.

We have noticed, though, that in a few cases, courts have found that an individual's state law claim for bodily injury may also be preempted by the Carmack Amendment, if sufficiently connected to the transportation of cargo in interstate commerce. This line of cases is not well-grounded: The courts appear to misapprehend what the Carmack Amendment does. Last year, we reported on *Krauss v. IRIS USA, Inc.*, 2017 U.S. Dist. LEXIS 193008 (E.D. Pa.), in which Krauss was injured when he was struck by a pallet of goods that was being unloaded. Krauss sued the seller of the product, the broker who arranged for the shipment, and the carrier. The complaint alleged that the carrier was negligent in loading the shipment by using substandard pallets and stacking the pallets – both actions in contravention of the directions received from the shipper. In ruling that the Carmack Amendment preempted Krauss's state law causes of action, the court adopted a "conduct" theory, under which the only claims that escaped Carmack Amendment preemption were claims based on conduct separate and distinct from the delivery, loss of, or damage to goods. In that case, because the injuries occurred while the shipment was being unloaded, the Carmack Amendment applied and preempted the plaintiff's personal-injury claims. In our view, the court reached the conclusion by a serious misreading of prior case law.

In 2018, on similar facts, the District of Nebraska followed the Eastern District of Pennsylvania down the same wrong road. In *Fergin v. Westrock Co.*, 2018 U.S. Dist. LEXIS 101163 (D. Neb) and *Fergin v. XPO*, 2018 U.S. Dist. LEXIS 189346 (D. Neb.) – two opinions involving the same shipment – Westrock contracted with a carrier, Magnum Dedicated Inc., to transport a load of corrugated cardboard from XPO's warehouse to a Westrock customer. XPO placed the corrugated cardboard on pallets and loaded the pallets of stacked corrugated cardboard into Magnum's trailer at the XPO warehouse. Fergin, an employee of Westrock's customer, was injured while unloading the trailer when a pallet of corrugated cardboard fell on him, knocking him to the ground and injuring his shoulder.

The court, adopting the "conduct-based approach," held that the causal proximity between Magnum defendants' conduct, the damage to the cardboard, and the plaintiff's injuries was sufficient under the Carmack Amendment to preempt the plaintiff's state law negligence claim against Magnum. In response to XPO's "me, too" preemption argument, the court looked to the definition of "transportation" in the Carmack Amendment, noting that the definition included "services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and the interchange of passengers and property." The court found that it was undisputed that XPO had provided services related to the transportation of goods in interstate commerce, namely the storage of and loading of the corrugated cardboard that had fallen on the plaintiff. Because XPO had provided those services, it had to be considered a "carrier" under the Carmack Amendment and the plaintiff's state law bodily injury claim against XPO was also preempted. This reasoning might work in Wonderland but should leave those of us here shaking our heads.

Both *Krauss* and *Fergin* beg the question, "What remedy is left to the injured plaintiff, after his state law claims are dismissed?" The Carmack Amendment provides no

remedy for bodily injury, but only a remedy for loss or injury to property. As such, it makes no sense to us to decide that the Carmack Amendment preempts bodily injury claims.

Contribution and Indemnification

The issue in *Helvetia Swiss Insurance Co. v. Jones*, 2018 U.S. Dist. LEXIS 160079 (M.D. Pa.), was whether the Carmack Amendment preempted state law causes of action brought by one carrier against another. The plaintiff's insured contracted with Franzman/TAT, a motor carrier, for the transportation of a piece of machinery to Chicago. The defendant, Jones, was driving a tractor trailer on a highway in Pennsylvania when he lost control of the truck and crashed, blocking both lanes of the highway. The Franzman/TAT truck braked suddenly to avoid the crash and overturned, destroying the machinery. The plaintiff paid the insurance claim for the damage and then sued the defendant, the driver of the first truck. The defendant then filed a third-party complaint seeking contribution from Franzman/TAT, alleging that it was negligent.

Franzman/TAT argued that the Carmack Amendment preempted the defendant's state law claim for contribution. The court disagreed, holding that there is no preemption unless the claim is between the shipper and the carrier. As a secondary reason, the court observed that the Carmack Amendment did not apply because the cargo at issue travelled from overseas to its inland US destination under a single through bill of lading. The issue in *Certain Underwriters at Lloyd's v. Southern Pride Trucking*, 2018 U.S. Dist. LEXIS 108176 (D. Neb.), was whether the Carmack Amendment preempted state law on the issue of apportionment of liability. The plaintiff insured a load of cargo that was damaged during transport. After paying the claim filed by its insured, the plaintiff sued four different defendants seeking to recover the loss. The plaintiff then settled with one of the defendants. An issue arose as to how any possible recovery by the plaintiff would be divided among the various remaining defendants and how the settlement would affect that recovery.

After an extensive discussion as to which Nebraska law would apply to any possible apportionment of the damages, the court addressed the plaintiff's argument that the Carmack Amendment preempted any state law on the apportionment of damages.

The court acknowledged that the Carmack Amendment was "comprehensive enough to embrace responsibility for all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation" and that it barred a shipper from seeking any other remedy that either state-statutory or common law provided against a carrier for damages to the shipper's goods that have been transferred in interstate commerce. The court went on to hold, however, that state settlement laws conflicted with the Carmack Amendment only to the extent that those laws enlarged or limited the responsibility of a carrier for damages to the shipper.

Nothing in the Nebraska common law or statutes regarding apportionment of liability among joint tortfeasors acted to alter the ultimate liability of a carrier to the shipper. The Carmack Amendment, therefore, did not preempt the state law on apportionment of liability and if the plaintiff recovered less than it would have recovered under a straight Carmack Amendment claim, it was because the plaintiff decided to settle with one of the carriers, which it was free to do under the Carmack Amendment, and not because of the operation of state law.

The issue in *Allianz Global Corporate & Specialty SE v. Victory Logistics*, 2018 U.S. Dist. LEXIS 215523 (C.D. Ill.), was whether a carrier could obtain contribution from another carrier, not involved in the shipment, that was allegedly responsible for the loss. The plaintiff's insured contracted with defendant to transport a shipment of pharmaceuticals. During the trip, the defendant's truck was rear-ended by a truck owned by Gully Transportation. The defendant's truck was towed from the scene and stored for nine days in a yard where the temperature fluctuations damaged the cargo. The plaintiff paid its insured's claim and sued both the defendant and Gully. The defendant asserted a cross-claim against Gully for negligence. Gully moved to dismiss the cross-claim, arguing that the Carmack Amendment did not allow for claims of contribution.

The court noted that the defendant's cross-claim was not for contribution but for pure negligence and that the Carmack Amendment did not preempt causes of action for negligence. Although the Carmack Amendment did preempt state law causes of action that a shipper may pursue against a carrier for lost or damaged goods, it did not govern or attempt to govern the liabilities of parties

other than the shipper and carriers of that shipper's goods. Gully was not a carrier of the goods at issue in the case and its liability in tort was not preempted by the Carmack Amendment.

Warehousemen

In *Nachmann v. Seaford Transfer, Inc.*, 2018 U.S. Dist. LEXIS 149315 (E.D. Va.), the court had to decide whether the Carmack Amendment preempted the plaintiff's claims that the defendant was negligent in the storing of her household goods that were subsequently transported by defendant in interstate commerce.

The plaintiff delivered her household goods to defendant's storage facility in Virginia. The defendant charged the plaintiff to unload the truck, place ID tags on each item, perform any necessary wrapping, and place the goods in a large vault for long-term storage. After two years, the plaintiff contacted the defendant to obtain a quote to ship the goods to New York. After the plaintiff agreed to the quote, the goods were removed from the warehouse and shipped to New York.

Upon delivery, much of the cargo was found to be wet and had visible mold and/or a mildew order. The plaintiff, unable to determine when the damage had occurred, brought an action in Virginia state court alleging breach of contract and fraud claims under Virginia law related to the storage of the goods in the warehouse, as well as a claim under the Carmack Amendment. The defendant removed the action to federal court and brought a motion to dismiss the plaintiff's state law claims, arguing that the state law claims were preempted by the Carmack Amendment.

The court held that, to the extent that the plaintiff's state law claims were based on damage that occurred during the actual loading of her goods on to the truck and the transportation of her goods, the plaintiff's claims were preempted by the Carmack Amendment. The plaintiff, however, also alleged damage to her goods while they were stored at defendant's facility.

Given the existence of a separate storage contract between the plaintiff and the defendant and the negotiation of a new agreement to actually transport the goods, the court held that there was a question as to whether the defendant was acting as a warehouseman or a shipper when the plaintiff's goods were damaged. The plaintiff's state law claims were not preempted to the extent that they were based on the defendant's actions as a warehouseman, and not a shipper.

Elements of Claim

The issue before the court in *Atlantic Specialty Insurance Co. v. Digit Dirt Worox, Inc.*, 2018 U.S. Dist. LEXIS 207066 (S.D. Fla.), was whether the plaintiff could demonstrate that it was entitled to summary judgment for damages incurred when a shipment that it insured was damaged during transit.

Employees of the plaintiff's insured drove the equipment being transported up onto the defendant motor carrier's flatbed, picked the equipment up with a fork lift, removed the tires, placed blocks on under the lift points of the equipment, and then set the equipment back down on the blocks. The defendant's driver then chained the equipment to the trailer. The equipment fell off the trailer less than a mile from the yard, suffering extensive damage. To establish the motor carrier's liability under the Carmack Amendment, a shipper must show that the goods: (1) were delivered to the carrier in good condition; (2) arrived in a damaged condition; and (3) resulted in a specified amount of damages. In this case, the court held that the plaintiff had established a prima facie case of liability on the Carmack Amendment.

To avoid liability under the Carmack Amendment, a carrier had to demonstrate that: (1) that it was free from negligence, and (2) that the damages were caused by one of five excusable factors: (a) an act of God; (b) the public enemy; (c) an act of the shipper himself; (d) public authority; or (e) the inherent nature of the goods. The defendant attempted to avoid liability by arguing that it was not negligent and that the damage was caused by the act of the shipper. The court held, however, that the defendant had not introduced evidence in admissible form demonstrating either defense. Because the defendant had the burden of proof on its affirmative defense, the court granted summary judgment to the plaintiff.

The issue in *National Union Fire Insurance Co. v. Schneider National Carriers, Inc.*, 2018 U.S. Dist. LEXIS 165628 (D.N.J.), was whether a bill of lading signed by the carrier's driver was sufficient to prove that the shipper had delivered the cargo to the carrier in

good condition, as required to state a claim under the Carmack Amendment. The plaintiff's insured contracted with defendant to ship a load of televisions and clothing from California to Wisconsin. The televisions had been shipped from China to Los Angeles in a cargo container. When they arrived in Los Angeles, the televisions were transported by local carrier to a warehouse, where a logistics company removed the televisions from the container, inspected the packaging for any damage, placed the televisions on pallets, and then shrink-wrapped the pallets. The pallets were then loaded into one of the defendant's intermodal containers. The warehouseman tendered the shipment to the defendant's driver, who accepted delivery.

The defendant issued four bills of lading for the shipment, each of which stated, "Property as described above is received in good order, except as noted" and they were signed by the driver without any notation as to any problem with the condition of the load. The court held that the law under the Carmack Amendment imposed two different evidentiary thresholds for demonstrating that a shipment was delivered in good condition to the carrier, depending on whether the freight was in a sealed container or not when delivered to the carrier. If, however, the cargo was in a sealed container, packaged so that the goods were not available for inspection, a bill of lading is not sufficient to satisfy the first prong of a Carmack Amendment claim, and the shipper must produce other reliable evidence, either direct or circumstantial, that the goods were tendered in a good condition. In this case, the court agreed with the defendant that the wrapping limited the driver's ability to inspect the shipment, necessitating the heightened evidentiary standard for sealed containers.

Standing

In *Progressive Rail, Inc. v. CSX Transportation, Inc.*, 2018 U.S. Dist. LEXIS 51801 (E.D. Ky.), the shipper, Siemens, contracted with a freight broker, who then contracted with another freight broker, Progressive Rail, to handle the shipment. Progressive Rail then contracted with CSX to transport the cargo from Baltimore, Maryland to Ghent, Kentucky. Progressive Rail, having arranged for the transportation, issued the bill of lading to CSX. The bill of lading specifically listed Progressive Rail as the shipper and Siemens' customer as the consignee. The court, however, held that under the Carmack Amendment, CSX had the obligation, as the receiving rail carrier, to issue a bill of lading covering the shipment. The court also noted, however, that the failure of a receiving rail carrier to issue such a bill of lading did not affect the rights of a party seeking to recover under the bill of lading that should have been issued. The court held that because CSX had a statutory duty to issue a bill of lading that would have named Siemens as the owner of the shipment, Siemens had standing to pursue its claims under the Carmack Amendment, even though it had not been named in the bill of lading issued by Progressive Rail.

On the other hand, in *Coyote Logistics, LLC v. MPJ Trucking, Inc.*, 2018 U.S. Dist. LEXIS 147941 (N.D. Ill.), it was actually the broker that pursued a claim against the defendant, under the Carmack Amendment, for damage to a shipment that had been handled by the defendant. The defendant moved to dismiss the plaintiff's complaint arguing that, as a broker, the plaintiff did not have standing to bring an action under the Carmack Amendment and that the plaintiff had failed to allege that had it had received an assignment of any claims from its customers with respect to the damaged shipments. The court held that the Seventh Circuit – the court of appeals that determines federal law in Illinois – had not determined whether a broker could recover under the Carmack Amendment. That did not matter in this case, though, because the broker properly alleged that it had an assignment of its customers' claims. Under the Carmack Amendment, that assignment of claims put the plaintiff in the shoes of the shipper. The defendant's motion to dismiss plaintiff's Carmack Amendment claims was denied.

Compare *Transco Lines, Inc. v. Extra Logistics, Inc.*, 2018 U.S. Dist. LEXIS 141478 (N.D. Ill.), in which the plaintiff freight broker agreed to arrange for the shipment of a load of FedEx freight from Texas to Oregon. The plaintiff contracted with the defendant for the transportation of the goods and the goods were damaged in route. The plaintiff paid FedEx's claim pursuant to the broker agreement it had with FedEx, then sued the defendant to collect those damages, arguing that the provision of a brokerage agreement that it had with the defendant allowed it to bring a claim under the Carmack Amendment, even if the statute itself did not provide for a cause of action by a broker.

The language relied upon by the plaintiff was a provision in the agreement pursuant to which the defendant acknowledged that it could be liable for damages under the Carmack Amendment. The court held that acknowledgment by the defendant that it could be held liable for damages under the Carmack Amendment was insufficient to permit the plaintiff to bring such a claim, especially in light of additional language in the agreement governing how the plaintiff was to file a claim against defendant. (Of course, since the Carmack Amendment did not apply, the plaintiff's state law cause of action for breach of contract survived. Because the brokerage agreement required the defendant to indemnify the plaintiff from any losses suffered while the cargo was in the defendant's possession, the court granted summary judgment to the plaintiff on its breach of contract claim.)

Exemptions to the Carmack Amendment

The Municipal Zone Exemption

In *Apex Compounding Pharmacy LLC v. Best Transportation Services*, 2018 U.S. Dist. LEXIS 140595 (N.D. Ind.), Apex had retained defendant Best Transportation Services to deliver various pharmaceuticals from its location in Dyer, Indiana to customers in Lansing, Oak On, Park Forest, and Create, Illinois – all suburbs of Chicago. Apex sued the delivery driver for gross negligence, fraud, and conversion and brought a breach-of-contract action against Best, as well as a cause of action based on respondeat superior. Best sought to dismiss the complaint, arguing that the state law causes of action were preempted by the Carmack Amendment.

The Carmack Amendment, 49 U.S.C. §13506(b)(1), contains an exemption for "transportation provided entirely in the municipality, in continuous business a polities, or in a zone that is adjacent to, and commercially a part of, the municipality or municipalities." Apex argued that, although moved between states, the pharmaceutical shipment that was the subject of the action was to have been moved within the municipal zone that included Chicago and its suburbs. The court held that the municipal zone for Chicago, as defined by federal regulations, 49 C.F.R. § 372.233, included the city of Chicago itself, all points within a line drawn 20 miles beyond the municipal limits of Chicago, and all points in Lake County, Illinois. Because the shipments were all supposed to travel within that zone as defined by federal regulation, the shipments were exempt from the Carmack Amendment and the plaintiff was free to seek relief under state law.

Waiver

The issue in *Sanofi-Aventis U.S., LLC v. Great American Lines, Inc.*, 718 Fed. Appx. 110 (3d Cir.), was whether the shipper was bound by a waiver of the Carmack Amendment contained in a transportation agreement between the freight broker and the carrier. The plaintiff had arranged with a freight broker for the transportation of a shipment of pharmaceuticals from Georgia to Tennessee that was stolen while in route. The freight broker had entered into a transportation contract with the carrier that contained a waiver of any and all provisions of the Carmack Amendment. The carrier argued that the shipper was bound by that waiver and could not recover under the Carmack Amendment. The shipper argued that it was not a party to the transportation contract itself and that it could not be bound by that waiver. The court first found that an agreement like the transportation contract would be governed by the Carmack Amendment, under which a "motor carrier" providing interstate transportation of goods for hire is "liable to the person entitled to recover under the receipt or bill of lading" for the "actual loss or injury to the property."

The court then held that, although the reach of the Carmack Amendment was expansive, Congress has permitted carriers and shippers to opt out of the Amendment's default rules, citing 49 U.S.C. §14101(b)(1). The effect of the waiver is that the exclusive remedy for any alleged breach of a contract entered into under the subsection shall be an action in an appropriate state court or United States District Court, unless the parties agree otherwise. The court also found that nothing in the waiver section required a shipper to agree to the waiver in order for the waiver to be effective, because the language of the statute applied the waiver to the transportation of the shipment itself. The Carmack Amendment claim was foreclosed by the waiver in the transportation contract.

Towing Exception

The Carmack Amendment contains an exemption for "the emergency towing of an accidentally wrecked or disabled motor vehicle." In *Acuity Insurance Co. v. McDonald's Towing & Rescue, Inc.*, 2018 Fed. App. 0444N (6th Cir.),

the plaintiff's insured owned a concrete pump truck that broke down on an interstate highway in Michigan. The truck's owner called the defendant to tow the disabled vehicle to the defendant's yard in Indiana. When the defendant's tow truck arrived at the scene, it was determined that a larger total truck was needed and that the tow would have to wait until the next morning because it was getting dark. The larger tow truck did, in fact, arrive at the scene the next morning. The concrete truck was towed off the interstate to a gas station, where the driver checked the security of the tow. That check notwithstanding, the concrete-pump truck broke loose from the tow on the way to Indiana and was destroyed in the resulting accident.

On appeal, the US Court of Appeals for the Sixth Circuit found that the statute did not define the term "emergency" and that the court below had properly looked to the everyday meaning of the term to interpret the statute, holding that an "emergency tow" was one that happened in response to unforeseen circumstances and requiring immediate attention.

The court held that the truck had not been left on the side of the road due to a lack of urgency, but because of the insufficient size of the tow truck and the lateness of the hour. Given the fact that a large truck parked on the side of an interstate is a serious condition and increased the risk of accidents, the situation was, in fact, an "emergency." The plaintiff also argued that any emergency had ceased when the tow truck operator had stopped at the gas station and checked to make sure the tow was properly secured. The court refused to divide the tow into such discrete steps, holding that doing so would penalize the tow-truck driver for taking steps to make sure that the tow was properly secured. The decision of the court below that granted summary judgment to the tow-truck driver was affirmed.

Carrier or Broker?

The Carmack Amendment defines a broker as "a person other than a motor carrier, that as a principal or agent, sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation." On the other hand, a motor carrier is "a person providing motor vehicle transportation for compensation." The operative distinction between a broker and a motor carrier is whether a party provides transportation with regard to a given shipment, or whether it sells, negotiates, or holds itself out as providing transportation of that shipment.

A Department of Transportation regulation, 49 C.F.R. § 371.2(a), distinguishes brokers from motor carriers and states that "motor carriers... are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport."

In *Richwell Group, Inc. v. Seneca Logistics Group, LLC*, 2018 U.S. Dist. LEXIS 26436 (D. Mass.), the plaintiff contacted the defendant to pick up a load of lobster meat in Boston. Unbeknownst to the plaintiff, the defendant then hired a third party to handle the shipment. After the third party picked up the lobster in Boston, the shipment was apparently stolen. The plaintiff sued the defendant under the Carmack Amendment to recover the value of the shipment plus lost profits, alleging that the defendant had acted as a carrier in the transaction, citing to bills of lading that listed the defendant as the carrier. The defendant moved to dismiss the Carmack Amendment claim, arguing that it had acted as a broker in the transaction, citing to the contract that it had with the plaintiff.

One of the provisions in the contract was that, to the extent that shipping documents appear to conflict with the provisions of the contract, the provisions of the contract would control. The court held that, notwithstanding the terms of the contract, nothing prevented the defendant from acting as the carrier rather than the broker with respect to the shipment (in which case defendant could held liable for the damage under the Carmack Amendment). Since there was a question of fact as to whether the defendant was acting as a broker or carrier, the court denied the defendant's motion to dismiss the Carmack Amendment claim.

Similarly, in *Essex Insurance Co. v. Barrett Moving and Storage, Inc.*, 855 F.3d 1292 (11th Cir.), the plaintiff's insured hired Barrett to transport an MRI machine from Illinois to Texas. The shipment had two components, one that was transported by Barrett, and a second component that Barrett contracted with Landstar to transport. The equipment transported by Landstar arrived damaged; the plaintiff paid the damage claim and then sued both Barrett and Landstar.

Barrett argued that, with respect to the shipment that was damaged, it had acted as a broker and not a carrier, and Landstar was solely responsible for the damage. The court, however, found a genuine issue of material fact as to whether Barrett had accepted legal responsibility for the shipment of the cargo handled by Landstar.

Notice of Claim

The statute of limitations for bringing an action under the Carmack Amendment is two years. In *Whatley v. Canadian Pacific Railway*, 904 F.3d 614 (8th Cir.), the claim arose when a train carrying crude oil, and that had been parked on a siding, rolled down a hill into a town in Quebec and exploded, killing 47 people and destroying almost the entire town. By letter dated November 5, 2013, Western Petroleum Company (WFE), the shipper, filed a claim against the railroad, premised expressly under Canadian law and not under the Carmack Amendment. The railroad denied WFE's claim under Canadian law by letter dated November 27, 2013. WFE then submitted a claim under the Carmack Amendment on April 4, 2014. Defendant denied the claim by letter dated April 24, 2014, and WFE then brought suit in US District Court for North Dakota on April 12, 2016.

The district court held that that the action was untimely because it was filed more than two years after the November 27, 2013 denial. On appeal, however, the Eighth Circuit found that the district court's reliance on the November 27, 2013 denial of claim was improper, because that claim was filed under Canadian law and not the Carmack Amendment and, therefore, did not trigger the two-year period within which WFE had to file a civil action based on that claim. An effective claim under the Carmack Amendment must, at a minimum, (1) contain facts sufficient to identify the baggage or shipment of property; (2) assert liability for alleged loss, damage, injury, or delay; and (3) make a claim for payment of a specified or determinable amount of money.

In *New York Marine & General Insurance Co. v. Estes Express Lines, Inc.*, 719 Fed Appx. 691 (9th Cir.), the notice of claim did not specify the actual amount of damages but did state that the amount of the claim would become known upon inspection of the cargo and indicated that the total value of the shipment was $148,055.30. The district court agreed with the defendant that the plaintiff had not complied with the requirements for filing a notice of claim under the Carmack Amendment. As it happened, the plaintiff had arranged for an inspection of the cargo but had never notified the defendant of the results of that inspection or the actual amount of damage claimed, notwithstanding the fact that the defendant had notified the plaintiff that its notice of claim was deficient and had to be updated to include an actual claim amount. The Ninth Circuit agreed with the defendant and the district court that the mere indication of the total value of the shipment was not sufficient to put the carrier on notice of the actual amount of damages claimed.

Limitations of Liability

Under the Carmack Amendment, a carrier may demonstrate that its liability for damage to cargo is limited pursuant to an agreement between the shipper and the carrier. To demonstrate effective limitations of liability: (1) a motor carrier must, at the shipper's request, provide the shipper with a written or electronic copy of the rate, classification, rules, and practices upon which any rate applicable to a shipment or agreed to between the shipper and the carrier is based; (2) the carrier must obtain the shipper's agreement as to his choice of liability; (3) the carrier must give the shipper a reasonable opportunity to choose between two or more levels of liability; and (4) the carrier must issue a receipt or bill of lading prior to moving the shipment.

In *Diezelski v. All My Sons Moving & Storage of Baton Rouge, Inc.*, 2018 U.S. Dist. LEXIS 105698 (M.D. La.), the motor-carrier defendant based its limitation-of-liability argument on language contained in the Uniform Bill of Lading that required the shipper to declare the value of its shipment in excess of 60 cents per pound in writing on the bill of lading. Although the bill of lading was signed, there was no declaration signed as to the value of the shipment. The shipper-plaintiffs argued that the defendant did not provide them with a "reasonable opportunity" to choose between levels of liability or to obtain insurance from a third party.

The court agreed that language in the Uniform Bill of Lading could satisfy the second and third prongs of the test, but there were questions of fact as to whether the shipper had ever been presented with the Uniform Bill of Lading, whether the Uniform Bill of Lading had been issued prior to the carrier moving the shipment, and consequently whether the shipper had been given reasonable notice of the liability limitation.

As discussed above, the defendant in *Essex Insurance v. Barrett Moving & Storage, Inc.*, 855 F.3d 1292 (11th Cir.), accepted a load for shipment, and then brokered (or subcontracted) a portion of the load to Landstar. Landstar argued that its liability for damages was limited by a provision contained in the agreement between the defendant and Landstar. The plaintiff argued that its insured, the shipper, was not a party to that agreement and, in fact had not even known that Landstar was going to be handling the shipment.

The district court found that the limitation of liability contained in the contract between the defendant and Landstar did not act to limit Landstar's liability to the shipper, because the shipper never expressly agreed to that limitation. The Eleventh Circuit reversed, citing the decision of the US Supreme Court in *Norfolk Southern Railway Co. v. Kirby*, 453 U.S. 14 (2004), and held that when an intermediary contracted with the carrier to transport a shipper's goods, the shipper's recovery against the carrier was subject to the limitation to which the intermediary and carrier agreed. If the shipper suffers damages in excess of the limited liability assumed by the carrier, the shipper must look to the intermediary to recover those damages.

The bills of lading at issue in *Exel, Inc. v. Southern Refrigerated Transport*, 905 F.3d 455 (6th Cir.), described the goods being shipped, and indicated that the shipper was familiar with the tariffs governing the shipment and agreed to be bound by the terms and conditions of the tariffs. The bills of lading also contained a "declared value box" that had to be filled in with the value of the shipment if the shipping rate was dependent on that value, but nothing was entered in that box. When that shipment was stolen, the plaintiff paid its insured shipper's claim and then sued the carrier to recover the value of the cargo that had been stolen.

The carrier argued that there was, in fact, an effective choice of levels of liability, in that if the shipper had declared the actual value of the shipment, which it had failed to do, the defendant would have had the opportunity to decline the shipment because of its excessive value. The appellate court held, however, that if the carrier had wished to exclude high-value cargo from its agreement with the plaintiff, it could have done so. Instead, the defendant had agreed with the plaintiff to ship goods at a rate not dependent on their value without inquiring as to what that value was. Notably, the court held further that, although it was the shipper and not the carrier that drafted the bills of lading in this case, this factor was not dispositive on the question of whether an effective choice for limits of liability was offered by the carrier. Because the defendant failed to satisfy the opportunity-to-choose requirement, the shipper was entitled to recover the full replacement value of the shipment.

Alan Peterman

6. Violation of Safety Regulations as Evidence of Negligence

The defendant in *Le v. Total Quality Logistics, LLC*, 431 P.3d 366 (Okla. Ct. Civ. App.), was, purportedly, a broker which, at the request of the shipper, arranged for transportation of a load of strawberries by motor carrier Arora. When the motor carrier's driver rear-ended the vehicle in which plaintiff Le was a passenger, Le argued that Total Quality Logistics ("TQL") could be liable for the driver's negligence because (1) TQL, and not Arora, was the actual motor carrier, or because TQL's control over the driver was sufficient to establish vicarious liability; (2) TQL breached a duty to investigate the safety and driving record of the driver and Arora; or (3) TQL was responsible for the driver because it was in a joint venture with Arora.

On the first point, the appellate court found that even if TQL qualified as a motor carrier under the Carmack Amendment (and the court did not find that TQL so qualified), the Carmack Amendment had no relevance to a motor carrier's vicarious liability for a driver's negligence (particularly where the loss occurred while a load was being transported by a different motor carrier). (As an aside, it is not clear why Carmack was mentioned, if it was, by the claimant.) Moreover, since TQL did not lease the vehicle involved in the loss, TQL was not a statutory employer of the driver. Finally, the court found that the mere fact that the driver was required to follow certain guidelines for the preservation of the perishable cargo, passed along by TQL but required by the shipper, did not establish such control over the driver as to qualify him as TQL's agent.

With respect to the claim of negligent hiring, the court rejected the argument that the broker, TQL, had a duty to investigate the specific driver who would be utilized by

the motor carrier (and, in so holding, declined to follow *Schramm v. Foster*, 341 F. Supp.2d 536 (D. Md. 2004), which the court seemed to think required the broker to investigate individual drivers. *Schramm*, in fact, held no such thing). As to the question of joint venture, the court noted that the consignee rejected 65 cases of strawberries due to damaged packaging and the shipper deducted $1,106 from the original contract price of $7,550. That deduction, however, was charged only to the motor carrier; TQL's $1,000 cut of the total contract price was not reduced. Since TQL and the motor carrier were not sharing both profits and losses, the court found that they were not engaged in a joint venture.

In *Amalu v. Stevens Transport, Inc.*, 2018 U.S. Dist. LEXIS 67853 (W.D. Tenn.), the magistrate-judge determined that plaintiffs' experts were qualified to offer opinions regarding freight brokers and motor-carrier selection and to render opinions on the reliability and usefulness of BASIC scores. On appeal, the district court ruled that – as Congress had enacted the Fixing America's Surface Transportation Act of 2015, which called for the FMCSA to remove BASIC scores from the public website – BASIC scores were still in use at the time of the accident (2014), and the plaintiff's experts could use the scores for evaluation. Again, the court noted that the evidentiary value of the BASIC scores could be raised on cross-examination. As we have noticed over the years, use of BASIC scores is highly problematic and prejudicial to motor carriers.

The husband of the plaintiff in *Ferrell v. BGF Global, LLC*, 2018 U.S. Dist. LEXIS 23341 (W.D. Okla.), was killed in a motor-vehicle accident, where his car collided with a semi-truck driven by an employee of BGF Global. The court held that Ferrell's expert could testify that BGF had a duty to comply with Federal Motor Carrier Safety Regulations regarding hours of service at the time of the accident, and that BGF's employee exceeded the cap. However, the opinion was subject to the following limitations: (1) the expert could not offer a blanket statement that truck drivers falsify their records, as it would be unfairly prejudicial to BGF's employee; and (2) the expert could offer testimony as to the standards, practices, and customs in the commercial truck-driving industry, but could not offer an ultimate opinion that BGF's employee violated such regulations and was thereby culpable or negligent.

Stacy Marris

7. Punitive Damages

In *Langan v. Rasmussen*, 2018 U.S. Dist. LEXIS 147637 (C.D. Ill. 2018), defendant Kottke Trucking moved for reconsideration of the denial of its motion for summary judgment dismissing the plaintiff's punitive-damages claim. The plaintiff alleged willful and wanton conduct on the part of Kottke and sought punitive damages against it.

Relying on Illinois' "corporate complicity" doctrine, the court concluded that a genuine dispute of material fact existed on the question of whether Kottke "ratified or approved the act" of its employee-driver for allegedly falsifying logs and violating hours-of-service regulations. The court noted that mere negligence is not enough to establish that an employer has ratified or approved the acts of its agent, but also pointed out that an employer's actual knowledge of an agent's misconduct is required before corporate complicity can be found under Illinois law. In denying dismissal of the punitive-damages claim, the court held, "To be clear, there is evidence in this record which would allow a jury to conclude that Kottke's actions did not constitute approval or ratification of Rasmussen's misconduct; it could conclude that Kottke's system of monitoring and auditing was perfectly adequate with an acceptable margin of error. A jury could also conclude that although Kottke's methods were flawed, Kottke was only negligent in how it monitored its drivers. Finally, and most importantly for purposes of considering this motion, a jury could also credit the testimony of Langan's expert and infer from all the facts that Kottke's failure to use the PC Miller software as part of its log auditing process constituted a deliberate decision to remain ignorant, such that it was complicit in [the driver's] conduct."

In *Miller v. Lawson*, 2018, U.S. Dist. LEXIS 177267 (E.D. Ky. 2018), the plaintiff alleged that the defendant-driver, Lawson, operated his tractor-trailer in a negligent or grossly negligent manner by running a red light and colliding with a tractor-trailer operated by the plaintiff.

Lawson and his employer moved to dismiss the plaintiff's punitive-damages claim against them. The defendants argued that Lawson's alleged running of a red light alone fails to entitle the plaintiff to punitive damages from Lawson. Kentucky law permits the recovery of punitive damages for conduct that exceeds ordinary negligence that may be termed gross negligence,

recklessness, or wantonness. The court pointed out that Kentucky motor-vehicle accident cases in which there is a finding of gross negligence typically involve some sort of extraordinary culpable conduct, such as drunk driving. In dismissing the punitive damages claim, the court held that the mere running of a red light does not align with the sort of malignant behavior described in Kentucky cases where punitive damages were permitted. The *Miller* court's view is one many of our readers would sympathize with; we suspect there would be some outrage with respect to the decision in *Hyder v. Womack*, 2018 U.S. Dist. LEXIS 164486 (M.D. Pa. 2018). The plaintiff had slowed her vehicle and come to a stop due to traffic ahead of her. After she was stopped, defendant Womack, who was operating a tractor-trailer owned by defendant Contract Freighters, Inc., rear-ended her vehicle.

The court noted that Pennsylvania has adopted the Restatement of Torts (Second), which contemplates that punitive damages may be awarded based upon the defendant's reckless indifference to the rights of others. The plaintiff alleged that Womack was driving at an excessive speed and was following the plaintiff's vehicle too closely, and the court found that a reasonable juror could infer "reckless indifference" on the defendant driver's part if either of these allegations were proven. (Notably, while recognizing that Pennsylvania does not impose a higher standard of care on "professional drivers," the court suggested that the jury would be allowed to take the defendant's professional status into account while deciding whether to award punitive damages.)

In *Bonner v. Reliable Transportation Specialists, Inc.*, 2018 U.S. Dist. LEXIS 164208 (W.D. Ohio), defendants moved to dismiss the plaintiff's punitive damages claim. In response, the plaintiff argued that: (1) Wollet failed to maintain a safe distance and operate his tractor-trailer in a safe manner; (2) Wollet was poorly trained, inexperienced, unqualified, and posed an unacceptable danger to other motorists; (3) Wollet had been out of work for over a year prior to the incident; (4) the instructions, training, and supervision Wollet received by Reliable were haphazard and substandard; and (5) drivers, including Wollet, made and received cell-phone calls and text messages while en route, including those from Reliable. The court noted that punitive damages in Ohio may be awarded only when there is actual malice, which is present when the defendant displays either (1) a state of mind characterized by hatred, ill will, or a spirit of revenge, or (2) a "conscious disregard for the rights and safety" of others and a great likelihood of causing significant harm. More than mere negligence is required to establish actual malice.

In dismissing the punitive damages claim, the court noted that the plaintiff's allegations were conclusory. In addition, the allegations that Wollet received substandard training and that Reliable and its drivers at times communicated by phone calls and text messages while the drivers were on the road were not sufficient to show malice, because the plaintiff does not allege how training or cell-phone usage caused the accident. The plaintiff alleged only that Wollet failed to stop in time, not that Wollet was using his cell phone when the accident occurred or that the training he may or may not have received contributed to his failure to stop. The court also held that allegations restating the elements required for punitive damages – alleging that Wollet acted with "conscious disregard" for the rights and safety of others, without offering factual allegations in support – are mere legal conclusions "masquerading" as factual allegations.

In *Poole v. Dealers Warehouse Corp.*, 2018 Tenn. App. LEXIS 629 (Tenn. Ct. App.), the truck driver supplied by a staffing agency to a warehouse was involved in a motor-vehicle accident while operating the warehouse's truck. The injured plaintiff argued that the warehouse should be jointly and severally liable for the punitive-damages award against the driver. The court found that the warehouse could not be held vicariously liable for punitive damages, since the driver was not employed in a management capacity; there was no evidence that the warehouse was reckless in hiring, retaining, supervising, or training the driver; and the warehouse did not authorize, ratify, or approve the driver's acts that gave rise to the punitive damages award (factors which, under Tennessee Code § 29-39-104(a)(9), would allow imposition of vicarious liability for punitive damages).

The plaintiff argued that the Federal Motor Carrier Safety Regulations preempt the Tennessee Code's limitations, to the extent that they contemplate joint and several liability between truck drivers and their employers. The court rejected the argument, noting the majority view that the FMCSRs do not create any private right of action and finding, in any event, that the Tennessee Code does not

prohibit the imposition of vicarious liability for punitive damages, but merely defines the conditions under which such liability may be imposed.

While most of the opinion in *Nail v. Blue Donkey Transport, LLC*, 2018 U.S. Dist. LEXIS 171765 (E.D. Okla.), concerned jurisdictional issues, the court did note that, under federal regulations, a liability-insurance policy certified as proof of a motor carrier's financial responsibility must be issued by an insurer "legally authorized to issue such policies in the State in which the motor carrier has its principal place of business or domicile..." 49 C.F.R. § 387.11(b). The law of Colorado, where the defendant motor carrier was headquartered, prohibits an insurance carrier from providing insurance coverage for punitive damages. Since the defendant was in bankruptcy and the automatic stay was lifted only to allow the plaintiff to proceed against any liability insurance available to the motor carrier, the court dismissed the plaintiff's claims for punitive damages.

Vince Saccomando

8. Transportation Network Companies

The trend of litigation against transportation network companies (TNCs) by jealous traditional taxi operators continued in 2018. The plaintiff taxi companies in *Nassau & Suffolk County Taxi Owners Association v. New York*, 2018 U.S. Dist. LEXIS 171144 (E.D.N.Y.), challenged the constitutionality of recently enacted legislation authorizing the New York Department of Motor Vehicles (DMV) to license and regulate TNCs. The legislative scheme, claimed the plaintiffs, created a two-tiered system that violates the taxi companies' rights to equal protection by creating an arbitrary distinction between TNCs and other for-hire vehicles.

After wading through and mostly rejecting a number of defendants' arguments for dismissal on procedural and standing grounds, the court found that taxis and TNCs are not, in fact, so similar that a legislative distinction between them is arbitrary as a matter of law. Taxis operate through the dispatching of vehicles while TNCs do not, and taxis are ordered by a voice call on a phone while TNCs are not. Taxis and other non-TNC for-hire vehicles are company owned; TNCs, on the other hand, are owned, leased, or otherwise authorized for use by the TNC drivers. Similarly, at least some taxi companies maintain physical locations at cabstands and public locations for on-the-spot rides, and often have contracted for exclusive access to those locations; TNC drivers, by contrast, have no discrete physical location to solicit or offer on-the-spot rides, and may not solicit on-the-spot rides at locations where certain for-hire companies have exclusive rights to provide transportation. On the other hand, traditional taxi operators do not surge-price or pay for any traffic delays, but TNCs often do.

Accordingly, the court found that the plaintiffs' failure to allege an extremely high degree of similarity between traditional taxis and TNCs necessarily precluded them from alleging that there was no rational basis for New York's legislative treatment of TNCs vis-à-vis traditional taxis.

Similarly, the plaintiff taxi operators in *Gunasekara v. City of New Orleans*, 243 So.3d 623 (La. Ct. App.) argued that they were denied equal protection because the City of New Orleans Department of Safety and Permits requires taxicab drivers and owners to submit their vehicles for inspection, requiring an application and payment of a fee, while the department does not enforce these requirements for TNCs. The court found that the two plaintiffs had not shown the "special interest" that would give them standing to compel the city to require inspections of TNC vehicles; any competitive disadvantage they suffered was shared by all taxi companies, and to the extent lack of TNC-vehicle inspection caused a health risk, it was a risk shared by the general public. The appellate court, however, did remand the case to allow the plaintiffs a chance to amend their petition.

In a case involving *amicus curiae* appearances by numerous state attorneys general, *Chamber of Commerce of the United States v. City of Seattle*, 890 F.3d 769 (9th Cir.), addressed a Seattle ordinance that permitted independent-contractor drivers to engage in collective bargaining with TNCs and other ride-referral services over pay. The ordinance permits independent-contractor drivers, represented by an entity denominated an "exclusive driver representative," and the ride-referral companies (described as "driver coordinators") to agree on the "nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers." Seattle, Wash., Municipal Code § 6.310.735(H)(1). The Ninth Circuit Court of Appeals rejected the

argument that the state-action immunity doctrine exempted the city's ordinance from preemption by the Sherman Antitrust Act, 15 U.S.C. § 1, because Washington State had not clearly articulated and affirmatively expressed a state policy that justified the ordinance's anti-competitive effect. The case was remanded to the Western District of Washington, presumably for a determination on the merits of whether the Seattle ordinance actually violates the Sherman Act.

Newark, New Jersey Revised General Ordinances §§ 34:1-1 to 34:2-24 require taxi and limousine drivers to meet certain job qualifications, pass a background check conducted by the Newark Police Department, pay application fees, and obtain special commercial licenses. Taxi and limousine vehicles must be serviced and inspected every six months by the Division of Taxicabs, taxi fares must be measured and imposed by meters in accordance with city-mandated rates, and all taxi and limousine operators must carry primary commercial-liability insurance. Taxi operators must purchase and possess a taxi medallion to provide taxi services. Taxi drivers are likewise prohibited from working at Newark airport until one year after the issuance of their taxi drivers' licenses.

In April 2016, Newark entered an agreement with Uber, under which Uber agreed to pay the city $1 million per year for 10 years and provide $1.5 million in liability insurance for each of its drivers in exchange for permission to operate in Newark. Under the agreement, Uber and its drivers are not required to possess taxi medallions, Uber is permitted to set its own rates and fares, and Uber drivers are not required to obtain commercial drivers' licenses.

Predictably, Newark taxi companies brought *Newark Cab Association v. City of Newark*, 901 F.3d 146 (3d Cir.), arguing that the agreement amounted to an unconstitutional taking of private property for public use (violating the Fifth Amendment's "takings clause"), and violated their Fourteenth Amendment rights to equal protection under the law. The Third Circuit rejected the argument that diminishment in the value of the plaintiffs' taxi medallions constituted a "takings" claim, since the city's actions have not deprived the plaintiffs of the possession or use of their taxi medallions. The court noted that the city already had the power to control the number, and therefore the market value, of taxi medallions granted, even in the absence of the agreement with Uber.

As to equal protection, the court noted significant differences in taxi and TNC operations, which provided a rational basis for the city to determine that customers require greater protections before accepting a ride from a taxi that they hail on the street than before accepting a ride from a TNC. A customer can immediately obtain a fare estimate from various TNC companies through the digital applications on his or her phone and comparison shop among those companies before requesting a ride to ensure that he or she receives a fair price. In contrast, customers do not have this same level of information available to them before hailing a taxi ride.

In the absence of city regulation setting the fare rate, it would not be practical for a customer hailing a ride on the street to comparison shop among several taxi companies, as that would entail hailing multiple taxis and inquiring about the price. The court found further that the city's regulations setting more stringent driver-qualification standards and requiring certain vehicle-safety features for taxis also function to provide greater protections to customers hailing a taxi on the street than when accepting a pre-arranged ride with a TNC.

The fight in *Green v. Garcia-Victor*, 248 So.3d 449 (La. Ct. App.) was brought down to the level of a number of taxi drivers suing a number of Uber drivers directly for violations of Louisiana's Unfair Trade Practices and Consumer Protection Law, La. R.S. 51:1405(A) and 51:1409(A). The court rejected the attempt by Uber drivers to have the complaint dismissed. The taxi drivers had alleged (and would be given a chance to prove) that some Uber drivers accepted street hails and used cab stands, thus effectively operating as cab drivers while avoiding the regulations that cab drivers must comply with.

Further, the court found that the cab drivers adequately pled ascertainable losses (loss of income, relevant market share, business reputation, goodwill, and attorneys' fees and costs) arising from the Uber drivers' allegedly unfair trade practices. Under the circumstances, the court rejected the Uber drivers' motion to dismiss and allowed the action to go forward.

The plaintiff taxi companies in *Checker Cab Philadelphia v. Philadelphia Parking Authority*, 306 F. Supp.3d 710 (E.D. Pa.) also complained that favorable treatment extended to TNCs diminished the value of their medallions (violating their Fifth Amendment "takings clause" rights) and constituted a violation of their Fourteenth Amendment rights to equal protection under the law. Instead of suing TNCs or their drivers, however, the taxi companies sought damages from the governmental agency responsible for regulating taxicabs in Philadelphia, the Philadelphia Parking Authority (PPA), arguing that the PPA should have done more to combat TNCs before TNCs were legalized in Philadelphia.

The district court did not dismiss the complaints initially, but when the matter came to motions for summary judgment, the court agreed with the majority view that taxi companies and TNCs are not similarly situated so as to support an equal-protection claim. The court noted particularly that the Pennsylvania legislature enacted substantially new legislation specifically governing TNCs, rather than simply amending the existing law to authorize PPA to regulate TNCs in the same manner PPA was regulating taxicabs, reflecting the legislature's view that TNCs are a new form of for-hire transportation, separate and distinct from taxicabs.

The plaintiffs in *Overton v. Uber Technologies, Inc.*, 2018 U.S. Dist. LEXIS 139119 (N.D. Cal.), claimed to have a "thriving Black Car Livery business" until Uber came along, at which point they began to accept fares through Uber as well. They sued the California Public Utilities Commission and the individual commissioners, claiming that they had created a regulatory scheme that unfairly favored Uber and other TNCs.

The court rejected completely the plaintiff's argument that the CPUC's regulations were preempted by federal motor-carrier regulations, or that the CPUC was failing to prosecute TNCs for supposed violations of those regulations. By the same token, the court rejected the plaintiff's claims against Uber itself that they, as sometimes-Uber drivers, had somehow been injured by Uber's failure to register as a federal motor carrier.

Phil Bramson

9. *Overtime Pay and Other Conditions of Employment*

The African-American truck-driver plaintiff in *Johnson v. Humphreys*, 2018 U.S. Dist. LEXIS 187918 (E.D. Ark.) was employed by United Parcel Service (UPS) under the terms of a collective-bargaining agreement (CBA) that prohibited discrimination based on race. He alleged that he was unlawfully fired by UPS after he dropped pallets that he had transported from the back of his trailer directly onto the ground ("free fall" unloading), even though his supervisor gave him permission to do so (which she denied), while a white driver was not sanctioned for worse misconduct.

Since Johnson's action against UPS stated only claims under the Arkansas Civil Rights Act, and since those claims were preempted by section 301 of the federal Labor Management and Relations Act, 29 U.S.C. § 185 (which governs lawsuits enforcing CBAs), the federal court dismissed the claims against UPS.

The federal Fair Credit Reporting Act, 15 U.S.C. § 1681b, requires employers to provide applicants with a stand-alone, clear, and conspicuous written disclosure that the employer may obtain a consumer report on the applicant. The statute, however, does not require a stand-alone disclosure for an online application for a job subject to the jurisdiction of the Secretary of Transportation. Since the plaintiff in *Luna v. Wal-Mart Transportation, LLC*, 2018 U.S. Dist. LEXIS 188345 (W.D. Ark.) was applying online for a truck-driver position, the court dismissed his complaint that he was not provided a stand-alone disclosure, after Wal-Mart denied him employment after reviewing his driving record.

The truck-driver plaintiff in *Featherston v. Lazer Spot, Inc.*, 2018 U.S. Dist. LEXIS 145003 (D. Nev.), delivered pallets to warehouses in Nevada. After the pallets were loaded, other drivers would transport the loaded pallets to destinations outside of Nevada. The local driver argued that since he was not involved in interstate commerce, his claims for overtime pay under the federal Fair Labor Standards Act and Nevada law were not preempted by the Motor Carrier Act of 1935. The evidence showed clearly, though, that Featherston's activities were part of a continuous movement in interstate commerce and that his transportation of even empty pallets qualified him as a "driver" within the purview of the MCA.

The defendants in *Nolasco v. AKS Cartage Corp.*, 2018 U.S. Dist. LEXIS 85541 (S.D. Fla.), failed to raise the MCA exemption in their answer to the plaintiff's claims for unpaid overtime under the FLSA, but argued on their motion for summary judgment that the MCA exemption is jurisdictional in nature and that they have not waived it by failing to amend their answer.

The court rejected the argument since the FLSA, on its face, gives the district court jurisdiction over cases arising under the FLSA. Nevertheless, the plaintiffs had been aware for some time of the defendants' contentions regarding the applicability of the MCA exemption, and the court found that the plaintiffs would not be prejudiced by permitting the defendants to raise the issue at the summary judgment stage. Once past these procedural questions, the court held that the driver's activities brought him within the MCA exemption, even though he may have spent only 20 percent of his time driving a vehicle heavy enough (over 10,000 pounds) to qualify as a commercial motor vehicle under the MCA.

Phil Bramson

10. Coverage

Regular readers of this review are aware of the ongoing debate over whether the definition of "employee" found in the FMCSA's motor-carrier regulations (49 C.F.R. § 390.5) should be read into the "employers' liability" and "fellow employee" exclusions in motor-vehicle liability policies issued to motor carriers. In *National Continental Insurance Co. v. Singh*, 2018 U.S. Dist. LEXIS 136941 (N.D. Ill.), Harpreet Singh sustained fatal injuries when a vehicle – jointly owned by DLL and AG Express and operated by his co-driver, Sumeet Singh – pinned him against a neighboring semi-truck, crushing him. National Continental sought to deny liability coverage under its liability policy issued to DLL, on the grounds that Harpreet was a DLL employee and that Sumeet was a fellow employee, and thus the loss fell within two express-policy exclusions.

The National Continental policy had been certified to the USDOT as proof of DLL's financial responsibility, and the policy included the MCS-90. In arguing that the exclusions applied, National Continental argued that the definition of "employee" set out in the Federal Motor Carrier Safety Regulations (FMCSR) should apply. The court, however, found that the policy contained its own definition ("'Employee' includes a 'leased worker.' 'Employee' does not include a 'temporary worker.'") and did not contain any language suggesting that the federal regulatory definition should be incorporated. Accordingly, the court determined that Harpreet and Sumeet were independent contractors, not employees, and the policy exclusions did not apply to bar coverage.

Zurich American Insurance Co. v. ACE American Insurance Co., 2018 N.Y. App. Div. LEXIS 7029 (N.Y. App. Div.), was a coverage action that arose out of a tort claim; the plaintiff in the underlying action was injured when rebar steel cages that he was unloading from a tractor-trailer fell on him as he was untying the straps that secured them. The appellate court, reversing the decision of the trial judge, found that the loss arose out of the use of the tractor-trailer, even if antecedent negligence in loading the steel may have been the proximate cause of the loss. Accordingly, the auto exclusion in the general-liability policy issued by ACE American applied.

Although the van in *Wilshire Insurance Co. v. Yager*, 2018 U.S. Dist. LEXIS 192588 (D. Ariz.), was a scheduled covered auto under the policy issued to Yager, Lopez – the person seeking liability coverage – was not the named insured. As the owner, Lopez could not, held the court, be using the rig with Yager's permission. (We think the court may have gotten that one wrong.) Nor did the complaint allege that he was liable for someone else's negligent conduct. Lopez, therefore, did not qualify as an insured for the loss in question and Wilshire's denial of coverage was upheld.

The cargo policy at issue in *Medical Imaging Solutions Group, Inc. v. Hanover Insurance Co.*, 2018 U.S. Dist. LEXIS 163151 (S.D. Fla.), limited the definition of "covered property" to those categories listed on the Schedule of Coverages: in this case, paper goods, canned goods, dry goods, groceries, and produce. The court had little trouble deciding that the shipment of medical equipment that was damaged did not fall into any of these categories.

In *Jones v. IDS Property Casualty Insurance Co.*, 2018 Cal. App. LEXIS 858 (Cal. Ct. App.), the question was whether the policy's "per person" limit applied separately to both the plaintiff, who incurred bodily injury, and to his wife's claim for loss of consortium. The policy provided

that "[t]he bodily injury liability limits for each person is the maximum we will pay as damages for bodily injury, including damages for care and loss of services, to one person per occurrence." The court found that the loss-of-consortium claim fell within the damages incurred by the husband and that the two claims combined were, therefore, subject to a single limit.

United insured the defendant driver in *United Financial Casualty Co. v. Princeton Excess and Surplus Lines Insurance Co.*, 2018 U.S. App. LEXIS 24743 (3d Cir.), but defended and ultimately settled all claims against the driver, his motor-carrier employer, and the shipper. United then turned to the motor carrier's insurer, Princeton, seeking contribution. The court agreed that Princeton had primary coverage for the direct claims against the motor carrier (negligent hiring, entrustment, supervision), as well as for the claims against the shipper, which were assumed by the motor carrier under an "insured contract."

In *Great West Casualty Co. v. Merchants Metals, LLC*, 2018 Mich. App. LEXIS 1681, the shipper sought indemnification from the motor carrier for its own payment to the driver, who was injured during unloading because the load had not been properly secured. The motor carrier sought coverage under Great West's "insured contract" clause, which provided coverage where the named insured contracted to indemnify another party against tort liability. The contract between the motor carrier and the broker that arranged the shipment provided that the carrier would fully indemnify the broker and "its customer's agent from any claim or damage to the extent caused by the negligent or willful act of the motor carrier, its employees or agents."

The court agreed that the motor carrier was entitled to "insured contract" coverage against the claims of the shipper, which sought indemnification against the tort claims brought by the injured driver. The claims of the broker against the motor carrier, though, arose solely out of the contract between the broker and the shipper, and did not trigger "insured contract" coverage under the policy issued to the motor carrier.

While the Hartford policy at issue in *Bennett v. Hartford Insurance Co. of the Midwest*, 890 F.3d 597 (5th Cir.), covered "any auto," the policy's "Composite Rating Basis Endorsement" provided the mechanism for calculating premiums based on "[o]wned 'autos' for liability composite rating premium adjustment purposes," and the schedule on the endorsement listed 86 types of covered autos but did not list "heavy-extra heavy trucks." Hartford argued, therefore, that "any auto" did not include the heavy truck involved in the loss. The court was not swayed. The policy's "Premium Audit" provision made it clear that the initial premium was estimated based on information received from the insured, and that the premium could be increased based on later exposures arising from vehicles not listed on the CRB endorsement. Moreover, the court refused to look at extrinsic evidence, which Hartford argued would show that neither the insurer or the insured contemplated that heavy trucks would be covered.

In *Sunday v. Berkshire Hathaway Homestate Insurance Co.*, 2018 U.S. Dist. LEXIS 127329 (M.D. Pa.), Homestate sought to cancel the motor carrier's policy on the grounds of untimely payment of premium. The cancellation notice, however, stated only that the sole reason for termination was that "a condition, factor or loss experience material to insurability ha[d] changed substantially or become known during the policy term." The court found that the notice was insufficient to comply with Pennsylvania law, which mandates that cancellation notices "shall [s]tate the specific reason or reasons of the insurer for cancellation or refusal to renew."

Motor-truck cargo policies often provide that the insurer will pay those amounts that the insured motor carrier "legally must pay" for loss to a customer's property, and courts must often resolve whether this requires an actual judgment against the motor carrier or can be satisfied by some other type of legal obligation. The consignee in *Dark Horse Express, LLC v. Lancer Insurance Co.*, 2018 U.S. App. LEXIS 21696 (6th Cir.) rejected a shipment of meat because the trailer seal was broken and made a claim against the motor carrier, which turned to its cargo insurer, Lancer, to resolve the claim. The court found that, to the extent the contract between the consignee and the motor carrier obligated the carrier to pay for the rejected cargo, the cargo insurer provided coverage. Whether the contract in this case actually obligated the motor carrier to pay, though, was remanded to the trial court for further review.

In *Occidental Fire & Casualty Co. of North Carolina v. Interstate Risk Placement, Inc.*, 329 F. Supp. 3d 711 (D. Minn.), the general agent, Interstate, placed a non-trucking policy for the trucker, Hipp, with Occidental. Hipp sought $500,000 in liability-coverage limits. That coverage limit was identified correctly in the declarations page, in the certificate of insurance issued to Hipp and in every other document related to the policy except for one endorsement, which identified the coverage limit as $1 million as a result of a typographical error. Hipp was involved in a collision in which the other driver was killed. In subsequent coverage litigation, Hipp's policy was found to be ambiguous because of the typographical error. The ambiguity was resolved against Occidental, and Occidental was ordered to pay $1 million to the estate of Hipp's victim. Occidental, in turn, sued its agent, Interstate, for full indemnification. Interstate admitted responsibility for the typographical error but argued that Occidental had failed to reasonably mitigate its damages, because the lawyer who represented Occidental in the coverage litigation failed to competently argue that coverage was limited to $500,000 under the reasonable-expectations doctrine.

The district court agreed that the evidence would have shown that Hipp's reasonable expectations were for $500,000 in coverage: Hipp had purchased bobtail insurance from Occidental for many years, he always sought $500,000 in coverage, and he always paid for $500,000 in coverage (both before and after the accident). Moreover, the declarations page of Hipp's policy correctly identified the coverage limits as $500,000, as did every other document issued in connection with the policy, save for the one endorsement with the typographical error. Accordingly, Occidental had a duty to act reasonably in mitigating its damages by competently litigating the declaratory-judgment action, at the very least obtaining sworn testimony from Hipp about his expectations.

The standard commercial auto policies exclude coverage for those engaged in loading or unloading a covered auto, although the exclusion does not apply to the named insured's employees, or the lessee or borrower of the auto. The primary targets of the exclusion are employees of the shipper alleged to have negligently loaded the rig, or employees of the consignee involved in the unloading. The scenario in *Velocity Express, LLC v. Progressive Paloverde Insurance Co.*, 2018 La. App. Unpub. LEXIS 390, was a bit different. The named insured was an owner-operator under lease to Velocity Express, an authorized motor carrier. Velocity was listed as an additional insured on the owner-operator's policy, which meant that it would have qualified for defense and coverage under most scenarios. Here, though, employees of Velocity were alleged to have negligently loaded the insured's rig and the cargo fell on the owner-operator at the destination when he attempted to unload. He sued Velocity for negligence, and Velocity, which presumably had its own insurance, sought coverage as an additional insured under the owner-operator's policy. Notably, the separate underlying action against Velocity had been dismissed, so there was no issue as to the insurer's duty to indemnify Velocity. As to the duty to defend, however, the court found that the allegations in the underlying complaint did not unambiguously set the claims outside the potential scope of coverage under the policy – it was silent on whether Velocity was a lessee or borrower of the rig, or whether the injured plaintiff was a Velocity employee. Accordingly, the court found that Velocity had been entitled to a defense.

The coverage dispute in *Liberty Surplus Insurance Corp. v. City of Vandalia*, 2018 U.S. Dist. LEXIS 95786 (C.D. Ill.), arose out of a lease for a section of railroad track running from the city of Vandalia – the owner of the tracks –to the Vandalia Railroad Company, and an accident in which a train struck a car, killing several passengers. The city sought coverage under the Liberty policy issued to the railroad company, pointing to several ACORD form certificates of insurance issued to Vandalia, identifying the city as an additional insured. The court, however, emphasized the form disclaimer on the certificates which provided, inter alia, that "THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER." Since there was no language in the policy itself qualifying Vandalia as an additional insured, its claim for coverage was denied. The court also rejected the city's argument that federal motor-carrier regulations required the railroad to maintain liability insurance, finding that railroads do not qualify as "motor carriers" within the applicable regulations. (We note that the court could have also found that federal regulations require a motor carrier to establish financial responsibility, but do not require that financial responsibility to be established

through liability insurance and, in any event, the regulations do not require the motor carrier to establish the financial responsibility of any person or entity besides the motor carrier.)

Georgia law permits a party injured by a motor carrier's vehicle to sue both the motor carrier and its liability insurer in the same action. OCGA § 40-1-112. In *Reis v. OOIDA Risk Retention Group, Inc.*, 303 Ga. 659, 814 S.E.2d 338 (Ga.), the Supreme Court of Georgia faced the question of whether the state's direct-action statutes are preempted by federal law, specifically the Liability Risk Retention Act of 1986, 15 U.S.C § 3901 et seq., with respect to suits against an out-of-state risk-retention group (RRG). The court held that RRG's are not subject to Georgia's direct-action statute.

In *RLI Insurance Co. v. Duncan*, 345 Ga. App. 876, 815 S.E.2d 558, the motor carrier maintained a $1 million surety bond with RLI, which was triggered only after the motor carrier had its "ultimate net loss" limit. The court found that even though the motor carrier had not been qualified by either the state or the federal government as a self-insurer, it was effectively self-insured for the "ultimate net loss," and RLI's position was equivalent to that of an excess insurer over the motor carrier's self-insured retention. The Georgia statute does not allow for direct actions against excess insurers, and the court dismissed RLI from the action. Where an auto-liability policy provides for a "per accident" liability limit, the determination of how many accidents have occurred is critical to the insurer's exposure. In *National Casualty Co. v. Western Express*, 2018 U.S. Dist. LEXIS 196820 (W.D. Okla.), Schneider, an employee of Western Express, collided with Ori's BMW, and the two of them pulled into the center median of the highway. Shortly thereafter, Crittenden struck Schneider's truck and pushed it into the roadway, leading to a chain reaction of impacts with other vehicles (not all involving Schneider's truck). Under the circumstances, the court found that two accidents had occurred – the initial collision between Schneider and Ori, and the chain reaction set off by Crittenden striking Schneider. Accordingly, Schneider and Western Express were entitled to $2,000,000 of liability coverage from National Casualty.

A "chameleon carrier" situation arises when the owner of a motor carrier reconstitutes that entity as a new entity, complete with a new FMCSA registration, often to escape violations or liability that were imposed on the prior entity. The injured defendants in *ONB Insurance Group, Inc. v Estate of Megel*, 107 N.E.3d 484 (Ind. Ct. App.), argued that an insurance agent that aids and abets the motor carrier in obtaining new authority should be held liable when that reincarnated carrier negligently causes an accident. The intermediate appellate court, however, held that an insurance agency, which has no role whatsoever in the decision to put a vehicle on the road, but merely answered questions regarding whether its client had insurance coverage, could not foresee that its actions would result in injury to a third-party motorist. (News reports of this case indicate that the claimants plan to appeal the decision to the Supreme Court of Indiana.)

Phil Bramson and Larry Rabinovich

11. Non-Trucking Coverage

In *Great West Casualty Co. v. Progressive Casualty Insurance Co.*, 2018 Mich. App. LEXIS 3690 (Mich. Ct. App.), owner-operators Ron and Pamela Barkley, while under lease to motor carrier Express-1, delivered a loaded trailer to a location in Woodhaven, Michigan. Ron Barkley then drove the empty trailer to a local Walmart, detached it, and bobtailed to a nearby laundromat, where he dropped Pamela off. While bobtailing back to the laundromat to pick Pamela up, Ron was involved in an accident. In the underlying bodily injury action that followed, the court determined – for purposes of liability – that Express-1 was not responsible, because Ron was not operating his tractor in the business of Express-1 at the time of the accident.

While finding that this ruling was not dispositive of the question of insurance coverage – particularly since neither insurer was a party in the underlying action – the appellate court held in the present declaratory judgment action that Ron's use of the leased tractor at the time of the loss provided little commercial value to Express-1, and that Progressive therefore had a duty to defend under its non-trucking policy. On the other hand, the court also recognized that Great West had a duty to defend under its truckers' policy issued to Express-1 and remanded the matter to the trial court for apportionment of defense costs incurred.

Phil Bramson

12. Bad Faith

In *Morris v. Zurich American Insurance Co.*, 2018 U.S. Dist. LEXIS 100661 (W.D. Ky.), the insurer argued that it could not be held liable on a theory of bad-faith failure to settle, since the plaintiff's varying demands were all well within the policy's $3 million deductible (i.e., the insured's responsibility, not the insurer's).

The court, however, observed that the motor carrier insured had never taken any steps to qualify as self-insured under either federal or Kentucky law, and the insured did not (and was not contractually obligated to) perform its own claims handling. More importantly, the court rejected the insurer's argument, premised on the plaintiff's claim for $1.9 million in her interrogatory answers, that the value of the case was always disputed, since (1) plaintiff made a $175,000 demand before suit, (2) plaintiff made a $125,000 demand after suit, and (3) the case settled for $116,432. The court was also unimpressed by the insurer offering $25,000 when it had already received documentation showing medical expenses of nearly twice that amount. Accordingly, the insurer's motion to dismiss the bad-faith claim was denied, and the issue of whether the insurer had acted outrageously was sent to the jury.

The plaintiff in *Veilleux v. Northwestern Insurance Co.*, 2018 U.S. Dist. LEXIS 7979 (D. Conn.), was helping to unload an aerial lift from a tractor trailer when he sustained serious injury. Veilleux entered into a stipulation with the trucking company as to liability and damages and took an assignment of any bad-faith claim the trucking company might have against its insurer. (The MCS-90 aspects of *Veilleux* are discussed in Section 4. The court's bizarre view that Connecticut had incorporated the MCS-90, plus its mistaken understanding that the MCS-90 is "coverage," contributed to its view with respect to the bad-faith issues.)

In denying the insurer's initial motion to dismiss the bad-faith claim, the court noted that a claims adjuster had (allegedly) attempted to convince the principal of its named insured that there was no coverage for the loss. In a subsequent decision (2018 U.S. Dist. LEXIS 155861), the court reiterated that, though most of Veilleux's allegations sound in negligence, the allegation that the adjuster had tried to convince the named insured that there was no coverage created a genuine issue of material fact concerning bad faith. The court observed that a note in the claim file, saying that the adjuster "had gotten [named insured] ...to understand and agree that there is no coverage" suggested that the insurer was attempting to pressure the named insured into dropping the coverage claim. (Notably, the court also gave credence to the plaintiff's contention that the Motor Carrier Act mandated that an insurer provide coverage to its motor-carrier insured. This is incorrect, however – the financial responsibility requirements of the MCA are triggered only when the policy provides no coverage, and the insurer has no contractual obligations to the insured but only a potential legal obligation to compensate an injured party.)

Sunday v. Berkshire Hathaway Homestate Insurance Co., 2018 U.S. Dist. LEXIS 127329 (M.D. Pa.), involved a question of bad-faith denial of a first-party claim for fire damage to an insured vehicle. Prior to the loss, Homestate had cancelled its policy on the grounds that the insured was operating an unscheduled power unit, thereby substantially affecting his insurability. Homestate reached that conclusion based on a review of FMCSA's Safety and Fitness Electronic Records ("SAFER") system; Sunday argued that the unscheduled power unit had been identified in the SAFER system in error, but the insurer declined to reconsider its cancellation. After the Homestate policy was cancelled, Sunday sought coverage from National Liability, which offered coverage conditioned on the down payment of premium. However, Sunday's bank did not honor his down payment and the check bounced, so National Liability cancelled the policy.

Sunday brought an action against both insurers, alleging that they breached their contractual duties when they cancelled his policies and that they acted in bad faith. The court dismissed the breach-of-contract claim against National Liability, reasoning that because Sunday's initial premium payment was not honored by his bank, the policy was void from inception and so there was no notice required to be provided to Sunday that this had occurred. On the other hand, the court denied Homestate's motion for summary judgment, finding a genuine dispute of material fact concerning whether Sunday was operating unscheduled equipment and whether the SAFER system was corrected prior to cancellation. (Other coverage aspects of this case are discussed in Section 10.)

Stacy Marris

13. *UM and UIM*

In *Boudreaux v. Commerce & Industry Insurance Co.*, 2018 La. App. LEXIS 2196 (La. Ct. App.), the claimant sought UM coverage after being involved in an accident while driving his son's company car. The court found that the son's employer did not allow him to let anyone else drive the vehicle while he was using it for business purposes but imposed no such restrictions on his use of the vehicle for personal reasons. As someone using the company car with the implied permission of the employer, the father was entitled to UM coverage under the policy issued to the employer.

The plaintiff in *Procter-Fleece v. Personett*, 2018 Ind. App. Unpub. LEXIS 1373 (Ind. Ct. App.), was driving her own vehicle in the course of her employment when another vehicle collided with hers. She sought underinsured motorist coverage under the Sentry policy issued to her employer. The Sentry policy on its face provided UIM coverage only for two specifically described autos, neither of which was the vehicle being driven by Procter-Fleece at the time of the accident. Procter-Fleece argued that, notwithstanding the lack of specific UIM coverage, she was entitled to such coverage because Sentry never obtained a written rejection of such coverage from the employer. The Indiana UIM statute, Indiana Code section 27-7-5-2, expressly exempts insurers from a requirement to provide UIM coverage for automobiles that are not owned by the insured but are used for purposes authorized by the insured. Since the statute unambiguously exempted Sentry from providing UIM coverage for an employee (like Procter-Fleece) while using her own vehicle on an errand for the named insured employer, the court found that there was no statutory requirement that the employer reject such coverage in writing.

Morrison v. GEICO General Insurance Co., 2018 U.S. Dist. LEXIS 178347 (D. Kan.), involved a one-vehicle accident in which the insured alleged that he struck a large tire that (presumably) fell off an unidentified vehicle or its load. There was no evidence as to where the alleged tire tread came from, how it got in the road, or how long it had been there. The GEICO policy provided coverage for damages caused by a "hit-and-run motor vehicle," defined as one that causes an accident without hitting the insured, a vehicle the insured is occupying, or the insured's auto. Viewing the hit-and-run provision in its entirety, the court found that it contemplated situations where there is some kind of physical contact with the hit-and-run motor vehicle, but no hitting, and held that the policy language was broad enough to encompass the unusual circumstances of the loss in question.

Levine v. Employers Insurance Co., 887 F.3d 623 (4th Cir.), also denied UM coverage to the injured employees (arguably independent contractors) under the motor-carrier policy issued to the employer, where the policy provided UM coverage only for vehicles owned by the employer (symbol "62") and the employees were occupying a vehicle under lease to the carrier but owned by the owner-operator. (Liability coverage extended to "any auto," symbol "61.")*Roehl Transport, Inc. v. Morrison*, 2018 U.S. Dist. LEXIS 190963 (W.D. Wis.), involved a variation where the motor carrier was self-insured, and the court noted that Wisconsin law does not require a self-insured entity to maintain UM/UIM coverage. The injured owner-operator, a Florida resident, argued that Florida law, which does not include a similar self-insured exemption, should control. The Florida statute, however, put the onus of obtaining UM/UIM coverage on the lessor owner-operator, not on the lessee motor carrier.

The court in *Harner v. Westfield Insurance Co.*, 2018 Del. Super. LEXIS 1938 (Del. Super. Ct.), rejected the plaintiff's argument that there was no legal distinction between the limited liability company insured under a Westfield commercial policy and himself as the sole member of the LLC, and accordingly found that he was not entitled to UIM benefits under the company policy for injuries incurred while riding his personal motorcycle on personal business.

Phil Bramson

14. *FMCSA Watch*

The Federal Motor Carrier Safety Administration (FMCSA) did not conduct much significant regulatory activity in 2018, with one dramatically notable exception. Regular readers of this review will be aware of the steady drumbeat of litigation over the last few years in California, over the extent to which the state's employee-benefit laws apply to truck drivers.

On December 28 (83 Fed. Reg. 67470), FMCSA waded into the debate, declaring that the Motor Carrier Safety Act of 1984 preempts California's Meal and Rest Break (MRB) rules as apply to commercial motor-vehicle drivers covered by FMCSA's hours-of-service regulations. 49 U.S.C. §31141(a) ("Review and preemption of State laws and regulations") provides expressly that "[a] State may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this section may not be enforced."

In 2008, FMCSA had concluded that the MRB rules were not regulations "on commercial motor vehicle safety" within the meaning of the statute, because they applied broadly to all employers and not just motor carriers and were therefore not within the scope of the Secretary's statutory authority to declare unenforceable a state motor-vehicle safety regulation that is inconsistent with federal safety requirements. 73 Fed. Reg. 79204.

Ten years later, however, FMCSA reconsidered this conclusion and found nothing in the statutory language or legislative history that supports such a limitation. To the contrary, the statutory language refers only to a ''State law or regulation on commercial motor vehicle safety,'' and FMCSA noted that the legislative history of the 1984 Act clearly expresses Congress's intent that ''there be as much uniformity as practicable whenever a Federal standard and a State requirement cover the same subject matter.'' *See* S. Rep. No. 98–424, at 14 (1984). Since the MRB rules govern the same subject matter as the federal HOS regulations, the FMCSA considers them to be rules "on commercial motor vehicle safety" as applied to property-carrying CMV drivers that are within the agency's HOS jurisdiction and, thus, subject to preemption review under section 31141.

The MRB rules require employers to provide CMV drivers with more rest breaks than the federal HOS regulations and they allow a smaller window of driving time before a break is required. As such, the MRB rules are additional to and more stringent than the federal HOS regulations. Finding that its own HOS regulations were carefully designed to address the problem of driver fatigue, FMCSA concluded that the MRB rules do not provide a safety benefit not already realized under the Federal Motor Carrier Safety Regulations.

FMCSA's rulemaking over the years had determined that eight hours was an appropriate window to require a driver to take a 30-minute rest, while providing great flexibility to do so. The MRB rule's requirement – that drivers be provided a 30-minute break every five hours, as well as an additional 10-minute rest break every four hours – significantly reduces the flexibilities FMCSA built into the federal HOS regulations, and they graft onto the federal HOS rules additional required rest breaks that FMCSA did not see fit to include. Accordingly, FMCSA has now held that the MRB rules are not compatible with the federal HOS regulations and are preempted.

A summary of other notable regulations and actions by the FMCSA is provided below:

83 Fed. Reg. 164, 42,631 (Aug. 23). The FMCSA announced that it was seeking public comment on revising certain areas of current hours-of-service (HOS) regulations, which limit the operating hours of commercial truck drivers, to determine if HOS revisions may alleviate unnecessary burdens placed on drivers while maintaining safety on our nation's highways and roads. The areas of consideration for revision are as follows: Expanding the current 100 air-mile "short-haul" exemption from 12 hours on-duty to 14 hours on-duty, to be consistent with the rules for long-haul truck drivers; Extending the current 14-hour on-duty limitation by up to two hours when a truck driver encounters adverse driving conditions; Revising the current mandatory 30-minute break for truck drivers after eight hours of continuous driving; and Reinstating the option for splitting up the required 10-hour off-duty rest break for drivers operating trucks that are equipped with a sleeper-berth compartment.

83 Fed. Reg. 182, 47,486 (Sep. 19). The FMCSA announced a final rule revising federal regulations permitting individuals with a stable insulin regimen and properly controlled insulin-treated diabetes mellitus (ITDM) to be qualified to operate commercial motor vehicles (CMVs) in interstate commerce. Previously, individuals with ITDM were prohibited from driving CMVs in interstate commerce unless they obtained an exemption from FMCSA. The action removes major administrative and financial burdens for this population of CMV operators while maintaining a high level of safety by enabling a certified medical examiner to grant an individual with ITDM a Medical Examiner's Certificate, MCSA-5876, for up to 12 months.

According to the FMCSA, this rule will eliminate the exemption program that currently requires individuals with ITDM to incur recurring costs to renew and maintain their exemptions. FMCSA estimates this will save the nearly 5,000 individuals with ITDM that currently have exemptions more than $5 million per year more than what they would endure under the exemption program. The final rule will also save new ITDM exemption applicants and their associated motor carriers approximately $215,000 annually in opportunity and compliance costs related with the exemption program's waiting period.

Sanjeev Devabhakthuni

15. Spoliation

One of the key issues that motor carriers face in the wake of an accident involving a vehicle operated under their authority or otherwise in their business is what evidence exists to determine who was at fault. Whether an employer takes reasonable steps to preserve accident-related evidence can have a significant impact on their ability to defend against a subsequent lawsuit. There may be slight differences in the doctrine of spoliation (or failure to preserve important evidence) depending on whether the lawsuit is brought in state or federal court, *even in the same state*.

In *Lee v. Rodney Horton & Kroger Dedicated Logistics Co.*, 2018 U.S. Dist. LEXIS 164567 (W.D. Tenn.), the plaintiff's vehicle collided with a truck driven by the defendant's employee on October 25, 2016. The attorney for the plaintiff sent the defendants letters in June and July of 2017 to preserve evidence relating to the accident. One of the requests related to the daily logs produced by the truck's electronic-data recorder for the day of the accident and for the six months prior. The employer had a policy of overwriting the data on the recorders after six months, and thus all the accident data had been overwritten more than seven weeks before receipt of the preservation letter. Defendants instead produced the driver's file for the day of and month preceding the accident.

The district court noted that, under the governing federal standards, an obligation to preserve evidence arises when a party should have known that the information would be relevant to future litigation. When a party has notice of pending litigation, the destruction of evidence points to recognition of a weak case, thus warranting sanctions. Nevertheless, a party seeking sanctions must demonstrate not merely that he or she was prejudiced by the destruction of evidence, but that the other party acted with intent to deprive them of the information's use, and proof of mere negligence or even gross negligence is not sufficient.

In this case, the defendants claimed they had no reason to believe the plaintiff would file a lawsuit until the first preservation letter was received on June 14, 2017 – after the daily electronic logs had already been overwritten in late April – since neither driver received a traffic ticket as a result of the collision, the plaintiff did not seek medical attention at the scene of the accident, damage to the plaintiff's vehicle appeared minimal, and the defendants believed the plaintiff was responsible for the accident. Under the circumstances, the court ruled that the defendants did not have a duty to preserve the electronic logs until June 14, 2017 (the day the first preservation letter was received), and thus denied the plaintiff's motion for sanctions. (Interestingly, the court agreed with the plaintiff that the presence of police does tend to weigh in favor of the finding of a duty to preserve, but when the police do not issue citations at the scene, "a party is altogether less likely to be on notice that litigation may arise.")

By contrast, in *Gardner v. R&J Express*, 2018 Tenn. App. LEXIS 248, a Tennessee state court found that the question of prejudice (even without a showing of intentional misconduct) was a central focus of the decision. In that case, the plaintiffs (the driver and his wife) were driving an over-the-road tractor owned by the driver and hauling a trailer owned by the defendant on May 29, 2015, when (allegedly) the tandem axle on the trailer came loose, causing the tractor-trailer to overturn and injuring the plaintiffs.

On June 24, 2015, the plaintiffs' counsel sent the defendant an evidence-preservation letter. Shortly thereafter, the driver signed over title to the tractor to his insurance company, which sent it to be "scrapped out." In November 2015, plaintiffs filed suit against the defendant, who answered the complaint in January 2016, and sent the plaintiffs' counsel its own evidence-preservation letter on January 25, 2016 (242 days after the accident but just over two months after the complaint was filed).

In Tennessee, the imposition of sanctions for spoliation depends on four factors: (1) the culpability of the spoliating party in causing the destruction of the evidence; (2) the degree of prejudice suffered by the non-spoliating party from the lack of the evidence; (3) whether the spoliating party knew or should have known that the evidence was relevant to pending or reasonably foreseeable litigation; and (4) the least severe sanction available to remedy any prejudice to the non-spoliating party.

In *Gardner*, the plaintiffs' theory of the case was that the trailer caused the accident and that the defendant had been negligent in its inspection and maintenance of the trailer. The defendant's theory of the case was that the driver was negligent in his operation of the tractor. Because the defendant's expert was not able to inspect the tractor to determine whether a mechanical problem caused the accident, the defendant claimed, and the trial court agreed that it was unduly prejudiced by the plaintiffs' spoliation of evidence and that the only appropriate sanction was dismissal of the plaintiffs' claims.

On appeal, the Tennessee intermediate appellate court affirmed the trial court's decision that dismissal was an appropriate sanction for spoliation. The court noted that the plaintiffs knew on June 17, 2015, when they retained counsel, and on June 24, 2015, when the plaintiffs' counsel sent the defendant an evidence-preservation letter, that they would be filing a lawsuit. The plaintiffs thus had a responsibility to preserve the tractor as evidence before it was signed over to the insurer, notwithstanding the fact that the defendant's evidence-preservation letter was not sent until after the tractor had been destroyed.

While there was no evidence of intentional misconduct or fraudulent intent, the court found that the defendant was prejudiced because its theory of the case was dependent upon having an opportunity to inspect the tractor, which could not occur because of the spoliation. Accordingly, the dismissal of the complaint, although a severe sanction, was appropriate because no lesser sanction could sufficiently overcome the prejudicial effect of the spoliation.

While, of course, the issue of spoliation of evidence and whether sanctions are appropriate involves a case-by-case analysis of the facts unique to each case, it is interesting to note the subtle differences in the way spoliation is treated in the same state by the state and federal courts. Whereas the Tennessee state court in *Gardner* dismissed the complaint without evidence of intentional misconduct where the spoliation severely prejudiced the other party and the spoliating party had reason to know that litigation was likely, the Tennessee federal court in *Lee* held that federal law requires some showing of intent before more severe sanctions could be imposed and a finding of prejudice alone will not automatically result in the imposition of sanctions. This is not to say that the federal court would necessarily have come to a different conclusion in *Gardner* had the defendant been able to remove the case, nor that the state court would certainly have imposed sanctions in *Lee* if the case had been brought there.

The most important takeaway is that motor carriers should regularly review their business practices for preservation of evidence in motor-vehicle accident situations and be aware that the duty to preserve evidence may be triggered even before the trucker receives an evidence-preservation letter from a plaintiff's counsel.

Ortiz v. Adams, 2018 U.S. Dist. LEXIS 117191 (D.N.J.), presents another example of the different way federal courts weigh spoliation claims. In that case, which was filed in state court but removed to federal court in New Jersey, there was a collision between the plaintiff's automobile and the defendants' commercial rig. The driver of the tractor-trailer, in compliance with the employer-owner's internal protocols, took photographs of the crash after the accident and prepared a collision report with a diagram showing the accident. However, the employer was not able to locate the photographs and reports and did not produce them in discovery, even though the driver testified that his reports were different than the ones prepared by police at the accident. The plaintiff moved for an adverse inference from the defendants' failure to produce the photographs and the report.

The district court noted that the law in the Third Circuit supported a finding of spoliation where: (1) the evidence was in the party's control; (2) the evidence is relevant to the claims or defenses in the case; (3) there was actual suppression or withholding of evidence; and (4) the duty to preserve evidence was reasonably foreseeable.

Even though the court found that the plaintiff had satisfied the first, second, and fourth factors, no sanction was warranted because there was no evidence that the records were withheld in bad faith (rather than inadvertently misplaced). The court also faulted the plaintiff for not bringing the issue of spoliation to the court's attention sooner and not moving to compel production of the records from the defendants. Given the facts as presented in *Ortiz*, it is indeed possible (if not probable) that the state court in Tennessee would have imposed the requested adverse inference sanction had the case been brought in that court.

John Canoni

16. Miscellaneous

In *Williams v. Brooks Trucking Co.* 2018 U.S. App. LEXIS 32089 (11th Cir.), the plaintiff, allegedly injured in a 2004 accident involving a Brooks Trucking driver, first brought a bodily injury action against Brooks in 2006. He dismissed that action without prejudice, but then renewed it in 2011. In 2012, the jury rendered a defense verdict. Williams sought a new trial, arguing that defense counsel had improperly influenced the jury; the motion was denied, and the Georgia Court of Appeals dismissed plaintiff's appeal. Finally, the plaintiff sued Brooks, the defense counsel, the insurer which hired the defense counsel (Canal), and the state trial judge. His claims were rejected as baseless, first by the district court and, in November 2018, by the Eleventh Circuit.

The case of *Rodriquez v. Panther Expedited Services, Inc.*, 2018 Tex. App. LEXIS 5857 (Tex. Ct. App.), offers a noteworthy variation on the statutory employee/vicarious-liability theme. The court agreed, generally, that the statutory employer-motor carrier can be held vicariously liable for the negligence of statutory employee-drivers. In this case, however, Panther, the authorized motor carrier that accepted the load initially, subcontracted the actual transportation to another trucking company and its drivers. The court held that vicarious liability could not be assessed against Panther, since it was acting as a shipper, rather than as a motor carrier, with respect to the shipment in question.

In *Hoosier Air Transport, Inc. v. Schofield*, 2018 U.S. Dist. LEXIS 97417 (S.D. Ind.), the driver leased her commercial tractor from the motor carrier for which she was driving. In addition to lease payments, the driver was obligated to cover expenses for insurance, maintenance and repair, licensing, and registration. When her employment was terminated, she still owed $25,459.76 for amounts advanced by the motor carrier to cover these costs and the motor carrier sued to recover. The driver sought to remove the action to federal court, arguing that federal law preempted any dispute arising out of a motor-carrier lease. The district court disagreed, however, and remanded the matter to state court, finding that the case presented only a garden-variety breach-of-contract dispute which did not present a federal question.

In *Soto v. Shealey*, 2018 U.S. Dist. LEXIS 129798 (D. Minn.), the owner-operator, Shealey, overturned his tractor-trailer while attempting to avoid deer on the highway, and the plaintiff, Soto, ran into the overturned rig. With regard to Soto's claims against Shealey's lessee, motor carrier Swift Transportation Company of Arizona ("STC"), the court initially determined that Shealey was an employee, rather than an independent contractor, since STC prohibited him from hauling for other companies, required him to comply with the company's speed restrictions, and required him to maintain an on-board electronic monitoring system. The plaintiff's claims of negligent hiring and negligent retention were dismissed because the plaintiff had failed to allege or provide evidence of any intentional tort by Shealey, a prerequisite to those claims under Minnesota law.

On the other hand, the federal court predicted that Minnesota would recognize a claim of negligent selection and found the evidence of STC's knowledge of prior speed and hours violations by Shealey was sufficient to defeat a motion to dismiss this claim. That knowledge was also found sufficient to allow claims of negligent supervision and negligent entrustment to go forward. As a matter of public policy, many states have passed anti-indemnification statutes which find unenforceable provisions in shipper/carrier contracts that mandate indemnification without regard to who was at fault.

In *Ruan Transport Corp. v. Sentry Insurance*, 2018 U.S. Dist. LEXIS 137812 (N.D. Ill.), the original transportation contract between the motor carrier, Ruan, and the shipper, Central Steel, called for Ruan to defend and indemnify Central Steel against any liability arising out of Ruan's performance under the contract. After a Ruan

employee died in a fall from a vehicle on Central Steel's property and a lawsuit ensued, however, Ruan and Central Steel entered into a separate settlement under which Ruan agreed to undertake Central Steel's defense and to pay any settlement or judgment against Central Steel.

The court found that the indemnification provision of the original transportation contract was void under Illinois law (625 Ill. Comp. Stat. 5/18c-4105(a)). On the other hand, the settlement agreement was not an "agreement contained in, collateral to, or affecting a motor carrier transportation contract," and, accordingly, its indemnification provisions were valid and enforceable.

In *Matzke v. I-Transport, LLC*, 2018 Ohio Misc. LEXIS 2834 (Ohio Ct. Common Pleas), the defendant tractor-trailer driver took his eyes off the road ahead for a moment to glance at a state trooper involved in a traffic stop and was unable to avoid rear-ending a stopped vehicle ahead of him. The court found that there were material questions of fact as to whether the owner-operator (which employed the driver) and/or the motor carrier (which leased the vehicle) had breached a duty to train the driver; whether the owner-operator and/or the motor carrier breached a duty to properly inspect, maintain, and repair the driver's equipment; whether the driver was an agent of the motor carrier; and whether the owner-operator and the motor carrier were joint venturers. On the other hand, the mere fact that the driver was distracted for "one second too long" was insufficient, as a matter of law, to show the "actual malice" required under Ohio law for an award of punitive damages.

The plaintiff driver in *Hernandez v. Grando's LLC*, 2018 N.M. App. LEXIS 49 (N. M. Ct. App.), was injured while exiting a truck leased by his employer from Grando's. While agreeing with plaintiff that the lessor could owe him a common-law duty of care if it had reason to know of a defect in the truck, the appellate court accepted defendant's argument that Grando's was only a lessor, not a motor carrier, and was therefore under no federal and state statutory obligation to maintain and repair the vehicle. (Indeed, as the court noted, the duty to maintain the leased vehicle falls under federal law on the lessee motor carrier.)

Transport Financial Services, LLC v. Solaris Transport, LLC, 2018 U.S. Dist. LEXIS 16526 (D. Ore.), is less interesting for the substantive outcome (since one group of claimants clearly demonstrated their right to recover, while the other claimants failed utterly to do so), than for the legal premise and procedural posture. The plaintiff, Financial Services, had entered a surety agreement to establish financial responsibility for the motor carrier, Solaris, and had filed a "Form BMC-35 Broker's or Freight Forwarder's Trust Fund Agreement" with the FMCSA as evidence of that surety agreement. When claims were brought against Solaris, Financial Services initiated an interpleader action, paying the proceeds of the surety trust into court and asking the court to resolve the competing claims as to those proceeds.

The defendant in *Ford v. Barnas*, 2018 U.S. Dist. LEXIS 183947 (D. Ariz.), rear-ended plaintiff's vehicle while driving a truck for motor carrier LIV. The plaintiff failed to show that the vehicle owner, Gina, which leased the truck to LIV, was Barnas' employer; or that, having leased the vehicle to LIV, Gina was in any position to permit LIV's employee, Barnas, to drive the vehicle.

Accordingly, Ford's claims against Gina for negligent hiring and negligent entrustment were dismissed. As to the claims against LIV, however, the court allowed Ford's claims of negligent hiring, training, supervision, retention, and entrustment to go forward, notwithstanding the fact that LIV had conceded that it was vicariously liable for any negligence charged to Barnas while he was operating LIV's vehicle in the course and scope of his employment. (The court recognized that this is a minority approach but analyzed various Arizona cases and predicted that the Supreme Court of Arizona would allow a plaintiff to assert claims of both direct negligence and vicarious liability arising out of the same accident.)

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