BARCLAY DAMON LLP

Transportation Annual Year in Review

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Transportation Annual Year in Review

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2024 Transportation Law Update

As we were editing this year's update, the new wage and hour regulations from the US Department of Labor were released; these constituted its latest analysis for determining whether a worker is an employee or independent contractor and will certainly impact the trucking industry. The new regulations replace the test promulgated by the DOL just three years ago during the Trump administration; those, in turn, reversed the test set out by the administration previous to that. One can only wonder how long the current test will remain in effect; in any event, it is described in Lee Jacob's report in Section 3 below. On a related note, the California court case (*California Trucking Association v. Bonta*) involving AB-5 (California's version of the ABC test) is back before the federal judge who initially heard the case.

The same day, news spread that the United States Supreme Court had declined to hear an appeal in the *Ye* case, described in the broker section below (Section 2) on the disputed issue of whether a freight broker can be found liable for negligently selecting a motor carrier. The existing disagreement between the federal circuits will remain unresolved for now.

We have also received word that some in Congress are planning to push legislation to increase the mandatory insurance limits for motor carriers. The limits have not been raised in 40 years, and in a time of nuclear verdicts and ubiquitous policy limits demands in cases in which injury seems to be limited, such an initiative is to be expected. But other recent attempts have foundered on industry opposition.

With this edition, we mark the full retirement of our colleague Phil Bramson, who has continued to work on the annual update in his semi-retirement. His exemplary work on this report over decades will guide us going forward.

Larry Rabinovich

1. Cargo Claims and the Carmack Amendment

As readers of this review know, federal law, specifically 49 USC § 14706 (the Carmack Amendment), imposes liability on motor carriers for damage or loss of cargo once the motor carrier agrees to transport that cargo in interstate commerce. The injured party makes out a *prima facie* case by showing that (i) the cargo was in good condition when it was delivered to the carrier, (ii) the freight was in damaged condition when it arrived at its destination, and (iii) the amount of damages. The burden then shifts to the motor carrier to show that it was free from negligence and that the damage was caused by an act of God; a public enemy, the shipper itself, or a public authority; or by the inherent vice or nature of the goods.

The motor carrier is also permitted to limit its liability if it (i) provides the shipper a reasonable opportunity to choose between two or more levels of carrier liability; (ii) obtains the shipper's agreement concerning the selected liability limit; and (iii) issues a receipt or bill of lading before moving the shipment. In *Icicle Seafoods, Inc. v. BNSF Railway Co.*, 2023 US Dist. LEXIS 222986 (W.D. Wash.), the defendant rail carrier argued that these factors no longer applied since motor carriers seeking to limit their liability were required previously to maintain a tariff that complies with ICC regulations, and the ICC was terminated in 1995. The court disagreed and found that the remaining factors were still applicable. In this case, the bill of lading was prepared by the shipper's agent, which left blank the space where the value of the cargo could have been stated. Moreover, the prior course of dealing between the rail carrier and the shipper demonstrated that the shipper was well aware that it could choose between limited liability and full liability for its goods. Accordingly, summary judgment granting the rail carrier's motion for limited liability was granted.

Notably, the shipper in *Lloyd's v. CSX Transportation, Inc.*, 2023 US Dist. LEXIS 28721 (S.D. Ill.), conceded that it had accepted the rail carrier's limitation of liability, and indeed had done so previously as a matter of course, so the court did not find the absence of a written acceptance dispositive. The court was also not moved by the fact that the limitation language was not included express in the bill of lading itself.

Ever Better Eating, Inc. v. Jama's Express LLC, 2022 US Dist. LEXIS 227934 (M.D. Fla. Dec. 19, 2022), reminds us that a state law of action will be preempted by the Carmack Amendment if, regardless of how it is styled, the claim is not separate and distinct from the delivery, loss of, or damage to a shipment of goods. The court noted particularly that each purported claim under state law sought the same measure of damages, namely the total value of the damaged shipment. On the other hand, the plaintiff asserted an alternative claim against Jama's in the event that Jama's was found to be a broker in the transaction rather than a motor carrier. Since claims against brokers are not preempted by the Carmack Amendment, the court did not dismiss that claim.

The motor carrier in *AGCS Marine Insurance Co. v. Chillicothe Metal Co.*, 2023 US Dist. LEXIS 9288 (C.D. Ill.), provided quotes to the shipper which stated, in effect, that the motor carrier's liability would be limited unless a higher level of liability and appropriate rates were agreed upon by the parties in writing. Since, however, the quotes did not set out any guidance on how the shipper could choose between two levels of coverage, the court was willing to let the jury decide whether the shipper had been given a reasonable opportunity to do so.

The plaintiff shipper in *Azzil Granite Materials, LLC v. Canadian Pacific Railway Corp.*, 2023 US Dist. 82034 (E.D.N.Y.), asserted that the defendant rail carrier had failed to return the plaintiff shipper's empty railcars in a timely fashion after delivering the shipper's stone product, resulting in economic damages because the shipper was unable to make further shipments. The court found that claims of failure to deliver are covered by the Carmack Amendment. Since the rail carrier's failure to return the railcars affected the shipper's ability to continue delivering product to market, the shipper's breach of contract claim was preempted by the Carmack Amendment. Moreover, since the shipper clearly knew that it was losing money because of the unreturned railcars, even though the exact extent of its damages could not be calculated, it was not relieved of its obligation under the Carmack Amendment to make a timely partial claim to the rail carrier.

The subject shipment in *AMRO Fabricating Corp. v. Aslan Express, LLC*, 2023 US Dist. LEXIS 105981 (S.D. Tex.), when an oversized load struck an overpass. The defendant motor carrier sought to bring a third-party action against a broker which allegedly provided incorrect measurements. The court ruled that, to the extent the broker acted as the shipper's agent, the broker's negligence might provide a Carmack Amendment defense for the motor carrier (act of the shipper), but did not support an action for contribution. On the other hand, since the broker's negligence was clearly related to the route the shipment would take, the motor carrier's third-party claim was also preempted by the Federal Aviation Administration Authorization Act (FAAAA).

The transportation contract in *England Logistics, Inc. v. GV Champlines*, 2023 US Dist. LEXIS 201209 (D. Utah), provided expressly that claims for damage to the shipper's goods would be governed by the Carmack Amendment. At the same time, the contract waived any rights or remedies under the Carmack Amendment which were inconsistent with the terms of the contract. Finding that specific contract terms govern general terms, the court held that the Carmack Amendment's two-year statute of limitations, and not the contract's 18-month statute of limitation, applied to the shipper's lawsuit against the motor carrier.

It is worth remembering that a shipper bringing a successful action under the Carmack Amendment may also be entitled to an award of attorney's fee. In *Angelo v. Nation Relocation, Inc.*, 2023 US Dist. LEXIS 224986 (N.D. Cal.), the court awarded legal fees (as part of a default judgment) to a shipper whose household goods were damaged in transit, citing 49 U.S.C. § 14708(d), which allows for such an award if:

1. the shipper submits a claim to the carrier within 120 days after the date the shipment is delivered or the date the delivery is scheduled, whichever is later
2. the shipper prevails in such court action
3. (A) the shipper was not advised by the carrier during the claim settlement process that a dispute settlement program was available to resolve the dispute
   (B) a decision resolving the dispute was not rendered through arbitration under this section within the period provided under subsection (b)(8) of this section or an extension of such period under such subsection

   (C) the court proceeding is to enforce a decision rendered through arbitration under this section and is instituted after the period for performance under such decision has elapsed

Turizm A.S. v. MTS Logistics, Inc., 2023 US Dist. LEXIS 141857 (S.D.N.Y.), involved a dispute governed by the United States Carriage of Goods by Sea Act (COGSA). In that case, the shipper engaged a non-vessel operating common carrier (NVOCC), which in turn engaged an ocean carrier to transport a shipment of resin from Houston to Istanbul, Turkey. There was no direct shipping route, so the shipment needed to make an intermediary stop in Portugal. While in Portugal, US Customs directed that the shipment be returned to Houston for further inspection. The ocean carrier complied with the order; in the process, it incurred substantial additional freight charges, as well as storage charges for the cargo while in Houston. The defendant NVOCC ultimately paid these costs and then, upon the shipper's refusal to reimburse, sold the cargo to recoup its losses. The court held that the NVOCC was not liable to the shipper for failure to deliver the resin to Istanbul because any responsibility the NVOCC had for the cargo ceased, under COGSA, once it was redelivered to Houston pursuant to the order of US Customs. Moreover, the terms of the original bills of lading entitled the NVOCC to compensation for all charges incurred through disposition of the goods as ordered by a governmental entity.

Philip Bramson

2. Freight Brokers

As we have described in previous years, there are two opposite trends in the case law, with respect to claims against freight brokers by bodily injury or property damage claimants. There have been a number of multimillion dollar judgments against brokers, part of the trend of nuclear verdicts roiling the industry as a whole. At the same time, some, though not all, federal courts, including some appellate (circuit) courts have found that federal law preempts state law in this context and precludes the possibility of a judgment—at least on certain counts—against freight brokers. The Supreme Court may find itself under

increasing pressure to resolve the existing conflict among the circuit courts regarding preemption. But we are not there yet; on January 8, 2024, the Court denied certiorari on the Ye decision described below.

The preemption statute is codified at 49 USC § 14501, passed as part of the Interstate Commerce Commission Termination Act (1995) (ICCTA) whose focus was to eliminate federal economic regulation and prevent state legislatures from inserting their own economic regulation in the vacuum created by the federal deregulation. Thus the statute, known for short, as FAAAA, precludes states (with certain safety, and other exceptions) 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 carriers… or any motor private carrier, broker, or freight forwarder with respect to the transportation of property." In a series of decisions over the past decade or so, courts have considered whether tort claims against transportation brokers, or at least certain kinds of claims, are preempted by the statute.

In 2020, the Ninth Circuit held that a claim against a broker for negligently selecting a motor carrier did indeed fall within the scope of the preemption statute because it was related to the broker's "services"; however, Congress, in an exception to the mandated deregulation, permits states broad power over safety issues, and therefore a common law negligence claim against the broker for selecting an incompetent carrier could proceed (*Miller v. C.H. Robinson*, 976 F.3d. 1016).

Two federal circuits in 2023 came to a different conclusion regarding the safety exception. *Aspen American Insurance Co. v. Landstar Ranger, Inc.*, 65 F.4th 1261 (11th Cir.) involved the theft of a shipment which the shipper had asked Landstar to broker. Landstar mistakenly permitted a thief to access its freight rather than the carrier it intended to haul the load. Landstar allegedly failed to follow its usual carrier verification procedures, and the cargo was stolen by an impostor.

The state of Florida has not passed any laws that impose economic limitations or requirements on brokers. Rather, the issue was whether a negligence claim against the broker for its verification failures leading to the theft was related to the broker's "service" (and thus preempted under the statute). The Eleventh Circuit had little trouble concluding that the negligence claim was related to Landstar's "service" as a broker with respect to the transportation of property. Since "transportation" was defined to include arranging for transportation by a motor carrier, and since arranging for transportation by a motor carrier is pretty much all brokers do, the statute clearly applied according to the court's reasoning (which the Ninth Circuit had also agreed with in *Miller*).

The tougher question was the safety exception ("[Preemption] shall not restrict the safety regulatory authority of a state with respect to motor vehicles …"). The court found that there are two conditions necessary for the safety exception to apply: 1) the law (here the negligence standard) must constitute an exercise of the state's "safety regulatory authority"; and 2) the authority must be exercised with respect to motor vehicles. The court found that the first condition had been satisfied. Landstar pointed out that this was a claim for property damage, not bodily injury, but the court denied that this made any difference, and the claim was still subject to Florida's safety concerns.

However, the court agreed with Landstar that the negligence standard was not created with "respect to motor vehicles," since brokers do not operate motor vehicles. Also, the particular claim here related to Landstar ignoring its protocols for confirming the identity of the motor carrier. Thus the safety exception did not apply and the negligence allegations against Landstar were dismissed. By this standard could any claim for negligent selection fall within the safety exception? And does this standard justify a different result with respect to vicarious liability claims against brokers?

The federal Seventh Circuit took up the same issue in the context of a bodily injury claim in *Ye v. GlobalTranz Enterprises*, 74 F.4th 453. Shawn Lin, operating a motorcycle, was struck and killed by a rig being driven under the authority of Global Sunrise. Lin's widow sued the motor carrier and also added two counts against GlobalTranz, the freight broker: 1) for negligent selection of Global Sunrise; and 2) for vicarious liability for the negligence acts of Global Sunrise and its driver because GlobalTranz exercised control over them.

GlobalTranz was able to convince the trial court early on to dismiss the claim for negligent hiring on the basis of FAAAA. Later, GlobalTranz convinced the court that it lacked the necessary measure of control to be vicariously liable.

Only the negligent hiring claim was appealed. Like its sister circuits, the Seventh Circuit had no difficulty concluding that "common law tort claims 'fall comfortably within the language of the preemption provision.'" A claim for negligent selection of a motor carrier "strikes at the core of [the] broker services," and the imposition of liability, would have a "significant economic effect on broker services." [Query: Is this the sort of "economic regulation" that the FAAAA was enacted to prevent? Was the court correct in dismissing the plaintiff's attempt to distinguish between laws regulating the broker's market relationships (i.e., with its customers) and laws regulating his relationship with the public at large?]

The court then conducted a close reading of the safety exception in the context of the statute as a whole (which we can agree is hardly a model of clarity in drafting). The claim

against the broker was for the negligent hiring of a motor carrier, which in turn was alleged to be negligent in hiring the driver. The Seventh Circuit, like the Eleventh, felt that this was too far removed from operation of motor vehicles for which the safety exception was created. Accordingly, the broker was not subject to suit, and the decision in favor of GlobalTranz was affirmed.

By November of 2023, when a Pennsylvania federal district court decided *Lee v. Golf Transportation, Inc.*, 2023 US Dist. LEXIS 200143, it was no surprise that the judge would find that the claim for negligent selection of a motor carrier was preempted. What is striking about the *Lee* decision is that it held that the preemption doctrine is to be applied not both to the negligent selection count, and to the vicarious liability count, as well as to a claim that the broker and carrier were engaged in a joint venture. Similarly in *Tischauser v. Donnelly Transportation Inc.*, 2023 US Dist. LEXIS 215815 (E.D. Wis.), the court dismissed even vicarious liability claims under FAAAA. Previous decisions utilizing FAAAA preemption had dismissed claims for negligent selection but had permitted claims for vicarious liability to proceed. This is potentially a game changer as it would leave third parties little or no basis on which to sue brokers.

The decision in *Cornejo v. Dakota Lines, Inc.*, 2023 Ill. App. LEXIS 343 (Ill Ct. App.), reached the same conclusion as Lee, but in the old-fashioned way. The plaintiff had alleged, and the jury had agreed, that the motor carrier (Dakota) was the agent of the broker Alliance Shippers. (This, of course, is the danger of putting the fate of brokers into the hands of a jury.) The appellate court dissected the evidence carefully, and found insufficient evidence to rule that the motor carrier was the agent of the broker. Key factors were these: the carrier/broker contract identified Dakota as an independent contractor; there was no direct communication between Alliance and Dakota's drivers; Alliance owned no tractors, trailers or any other equipment or tools used by Dakota's drivers; Alliance could not hire or fire Dakota's drivers, although it could request that a particular driver would be removed from a route; Dakota worked with other brokers and Alliance worked with other motor carriers; and, Dakota was free to reject assignments from Alliance. There were some elements that pointed in the opposite direction.; According to the plaintiff's expert, "Alliance laid out exactly what they wanted Dakota to do and if Dakota didn't do it, Alliance had the option of not using them in the future." The appellate court, understandably, was not impressed with this testimony and held that the trial judge committed reversible error by not granting judgment to Alliance, notwithstanding the jury verdict. The evidence so overwhelmingly supported Alliance that the jury's verdict could not stand.

Certain Interested Underwriters at Lloyd's v. Total Quality Logistics, LLC, 2023 Ohio App. LEXIS 4287 (Ohio Ct. App.), considered a broker's exposure under a shipper/broker contract. Outlook Acquisition, a shipper, utilized TQL's broker services; Lloyd's insured the shipper, had paid a claim, and attempted to subrogate against TQL on the theory of breach of contract.

At Outlook's request, TQL had arranged for Safe Connection, a Florida-based motor carrier, to haul a load of electronics interstate; the load was stolen. The shipper and Lloyd's apparently secured judgment against Safe Connection but were unable to collect on it. The primary claim was that TQL was obligated to locate a motor carrier legally authorized to haul the load which had the requisite insurance. Interpreting the broker/shipper contract, drafted we can assume by TQL's attorneys, the court found no such duty, concluding that the plaintiff's claims (including that TQL should have paid the claim) were simply not duties imposed upon the broker under the contract. (The USDOT website shows that Safe Connection was an authorized carrier.)

Larry Rabinovich

3. *Employment*

The United States Court of Appeals, First Circuit, ruled in *Montoya v. CRST Expedited, Inc*, ___ F.4th ____, 2023 U.S. App. LEXIS 32811, that under certain circumstances, time spent in a sleeper berth may be compensable—even if the driver is asleep—resulting in a potential wages shortfall. Crucially this opinion makes clear that strict adherence to Department of Transportation (DOT) regulations may conflict with the Fair Labor Standards Act (FLSA). When both sets of rules, designed to protect drivers from overwork and underpayment come into conflict, as was found in Montoya, the driver will most likely win.

The First Circuit examined CRST's unique training system, where a trainee and an experienced driver are paired together, swapping shifts of driving. When one drives, the other is in the berth, free to do as they please. This accomplishes two goals, an accelerated training program for the newer driver, and the ability for CRST to keep its trucks in almost continuous motion.

Under previous interpretations, sleeper berth time was often not considered compensable, because it was assumed to be a period of rest or inactivity. However, in *Montoya*, the drivers successfully argued that this time was in fact compensable. In agreeing with this conclusion, the First Circuit considered a variety of factors: regulatory requirements, federal wage and hour statutes, company practices, Department of Labor Opinion letters, and CRST's internal policies and practices.

Specifically, the court examined how to reconcile two regulations: one concerning travel time and the other capping non-compensable sleeping time at eight hours. CRST's interpretation, which would have allowed unlimited non-compensable sleeper berth time, was deemed inconsistent with the protective principles of the FLSA. For taking CRST's logic to its extreme, the law would allow employers to avoid compensating drivers by confining them to their sleeper berths with no obligation to pay them simply because they were free to do whatever they wanted during that time of unlimited confinement. The court instead favored a reading that harmonized these regulations, applying the "predominant benefit test" to ascertain which party, the employer or the employee, predominantly benefits from this time.

Here, in finding that time spent in the sleeper berth, unique to CRST's model, was for the predominant benefit of CRST and not its employees, and therefore compensable and not off-duty time, the First Circuit noted the following: (1) relying on DOT "off-duty" guidance as the sole guide to issues of compensability is misplaced and conflicts with the FLSA's requirement; (2) the driver's actual physical confinement to the small berth for up to 16 hours at a time; (3) they could be called on to assist in an emergency; and (4) that the truck remained in almost constant physical motion, benefiting the company's bottom line.

Ultimately, the court found that because the resting driver was "in constant proximity to the noise of the truck's engine, further reducing . . . [the] ability to sleep, relax, or engage in leisure activities of their choice" and given the critical role of CRST's team driving model, sleeper berth time in excess of eight hours per day was deemed compensable— exposing CRST and others who follow similar models— to claims for unpaid wages, overtime, and, in certain circumstances, minimum wage violations.

While *Montoya* highlights the complexities of compensable work hours in the trucking industry, another critical aspect at the intersection of employment law continues to be the classification of workers. *Muniz v. RXO Last Mile Inc.*, 2023 U.S. Dist. LEXIS 146054 (D. Mass.), delves into the contentious (and continuous) issue of misclassifying drivers as independent contractors. Like *Montoya*, *Muniz* underscores the nuances and implications of employment law within the trucking sector, particularly in how classification affects drivers' rights and remuneration.

The drivers in *Muniz* were, according to RXO, contracted, and critically not "employed" by the company, which is authorized as a freight forwarder. The drivers were assigned to deliver appliances and other large consumer goods to RXO's retail clients as part of a "last mile" service. Employees, as opposed to independent contractors, must be paid applicable minimum wages and overtime rates and benefit from various protections, like disability, workers' compensation, and unemployment insurance. Conversely, employers do not have to shoulder those benefits if their workers are independent contractors. Many companies operating in the last mile space (as in trucking in general) view their drivers as independent contractors.

In determining that the drivers at issue were in fact employees and not independent contractors, the court looked past the form contract RXO required its drivers to sign and examined the actual relationship between the drivers and RXO. In doing so, it relied on Massachusetts General Laws 149:148B's "control test" to ascertain whether the individual is an independent contractor or traditional employee. Notably, while this matter concerned Massachusetts law, the same standards of scrutinizing control are commonly utilized in other jurisdictions throughout the country.

To rebut the claim that its drivers are employees, RXO had to show that (1) its drivers were free from control and direction in connection with the performance of services; (2) the services were performed outside the usual course of RXO's business; and (3) the drivers were customarily engaged in an independently established trade, occupation, profession, or business. Crucially, this is an all-or-nothing test. If all prongs are not established, a worker will be deemed an employee and not an independent contractor. (Compare this test to AB-5 in California or the ABC test.)

In examining the amount of control exerted over the drivers, and in favor of an independent contractor relationship, the court noted the drivers may own, park and maintain their trucks, use their own tools, can load and unload their trucks as they please, choose their own routes between delivery points. Yet, every other factor considered ameliorated toward the notion that RXO controlled their drivers to the degree that they were employees. The court highlighted that RXO performs background checks on the drivers, issues them photo identifications, and mandates the types and amounts of insurances they must maintain. Drivers cannot use unapproved helpers and must inform RXO of who will be driving the truck in advance of any given delivery. Further, RXO regularly meets with its drivers to give them feedback and criticism. Drivers are also expected to arrive at the RXO loading dock by a certain time every morning, meet their established time windows, and log into an app that RXO uses to monitor driver progress. Drivers must wear an RXO badge and company issued uniform when entering a customer's home. If drivers do not comply with these requirements, they risk reassignment.

Despite some ambiguities regarding overlap with federal law, the court found that it was clear that drivers had little autonomy.

They were required to use specific vehicles, adhere to a dress code, and had no control over their customer base. Helpers were prescreened, and RXO closely monitored all aspects of their work. If they failed to comply with any of the rules, they risked reassignment or said differently, termination. The court emphasized that under the law, RXO could not evade its statutory obligations (e.g., taxes and contributions to state benefit programs), and gain an unfair market advantage by offloading certain responsibilities (e.g., training, equipment, and maintenance costs), while maintaining tight control over every other aspect of the employment relationship.

Steering from employment classification to the realm of vicarious liability, *Babineaux v. Hudson Ins. Co.*, 2023 U.S. Dist. LEXIS 55783 (W.D. La. 2023), shifts the discussion from employment status and wage concerns to borrowed employees and joint and vicarious liability. This case demonstrates how legal interpretations of employer liability have far-reaching consequences for both drivers and trucking companies' operational frameworks. Notably, the main issue here, again, hinges on control.

Vicarious liability holds an employer legally responsible for the actions of its employee, if such actions occur within the scope of employment. A borrowed employee is concept that applies when an employee of one company (the lending employer) is under the temporary control and direction of another company (the borrowing employer), making the borrowing employer liable for the employee's actions during that period. Taking this concept one step further, joint employer liability occurs when two separate entities share control over an employee's terms and conditions of employment, making both entities responsible for compliance with employment laws.

In examining vicarious liability, the Western District of Louisiana scrutinized TransMaquila Inc.'s (the borrowing employer) responsibility for an accident involving a truck driven by an employee of TransMaquila S.A. (the lending employer), a separate entity. The central question addressed by the court was whether the employee at issue was in fact borrowed, thereby exposing the borrowing employer to vicarious liability.

Using a totality of the circumstances approach under Louisiana law, the court evaluated factors such as control, wage payment, and dismissal power. Here, the driver was deemed a borrowed employee because TransMaquila Inc. considered the drivers as their own, were supervised by their personnel, and were required to follow TransMaquila Inc.'s rules. The drivers completed TransMaquila Inc.'s employment forms, orientations, and road tests. TransMaquila even maintained personnel files for the drivers. The lending company paid the driver's salary, but it did not profit from the driver's work. Given these factors, the court concluded that TransMaquila Inc. had sufficient control, classifying the driver as a borrowed employee, and holding TransMaquila Inc. vicariously liable for the accident.

While not reached in this case, because the court was not asked to address it, the implications of joint employer liability are clear. In *Babineaux* the plaintiff was the passenger in an automobile accident, seeking the deeper pockets of both companies. But if that plaintiff had been a driver making a claim for unpaid wages or overtime, that driver would have most likely succeeded in holding both the lending and borrowing employer jointly liable.

These cases—*Montoya*, *Muniz*, and *Babineaux*—collectively navigate the multifaceted landscape of trucking industry law. *Montoya* opens the road on sleeper berth time compensability, *Muniz* drives through the nuances of worker classification, while *Babineaux* maneuvers the turns of vicarious liability. Together, they underscore a critical shift towards more comprehensive scrutiny of employment practices and liability in the trucking sector, illuminating the need for an industry-wide balance between operational efficiency and adherence to fair labor standards.

In the dawning months of 2024, the US Department of Labor (USDOL) crafted a new rule, poised to take effect on March 11, 2024, which would eclipse the existing federal guidance on worker classification. Contrasting the Massachusetts all-or-nothing standard as applied in *Muniz*, the federal guideline provides a broader spectrum for analysis utilizing a "totality of the circumstances" approach, tactically designed to accommodate the variances inherent in different industries. Applying this new rule retrospectively to the *Muniz* scenario, suggests (at least here) a total alignment with the eventual determination that the drivers were, in fact, employees.

The new federal rule delves into the economic reality of the worker's position, canvassing a range of considerations from managerial autonomy and fiscal risk to the permanence of the professional relationship and the relative investment of both parties. Crucially, the new rule evaluates the extent to which the worker's role is woven into the fabric of the company's operations and the individual's autonomy in navigating the marketplace, signaling a more textured approach to a simple control test as exists under Massachusetts law.

Despite the drivers owning their trucks and having the liberty to choose their routes—suggesting a degree of independence—the predominant elements signaled an employment relationship. RXO's imposition of uniform requirements and the monitoring of drivers through an application indicated a level of control characteristic of an employer-employee dynamic. This control extended to meticulous aspects of the job, such as mandating specific insurances and conducting background checks, which, under Massachusetts law, pointed decidedly toward employee status.

However, under the broader lens of the federal economic reality test, these same factors—especially the operational control exerted by RXO—would similarly lead to an employee classification. This federal approach, while sharing commonalities with the Massachusetts framework, expands the analysis to consider the permanence of the relationship and the worker's investment in their equipment and skills. The federal rule's nuanced assessment would likely concur with the Massachusetts outcome, emphasizing the drivers' limited operational independence and RXO's pervasive oversight, from mandated attire to strict compliance with delivery protocols.

Lee Jacobs

4. Negligence

Arcides v. Raul Angel Rojas & Deepwell, 677 S.W.3d 154 (Tex. Ct. App.) involved an accident between a tractor-trailer and two other vehicles on a two-way, one-lane highway during a sandstorm. The tractor-trailer was traveling southbound behind one of the vehicles and the third vehicle was traveling northbound. The sandstorm created zero visibility and winds of 60 to 70 miles per hour. All three vehicles drove into the sandstorm despite the lack of visibility. The driver of the tractor-trailer collided with the vehicle ahead of it, causing that vehicle to cross into the opposite lane and collide into the third vehicle, driven by plaintiff Arcides. At trial, the jury found Arcides to be 10% negligent. He appealed the decision on the grounds (i) that because he did not owe a legal duty, the trial court erred in its inclusion of him in the percentage allocation of proportional liability on the jury instruction, and (ii) that the jury's findings were legally and factually insufficient. The appellate court ruled that Arcides, at a minimum, had a duty to maintain a proper lookout for his own safety, and his decision to continue driving through the sandstorm with zero visibility constituted a breach of that duty. The court reasoned that contributory negligence contemplates an injured person's failure to use ordinary care regarding his own safety. *Kroger Co. v. Keng*, 23 S.W.3d 347, 351 (Tex. 2000). Thus, Arcides, as a driver on a public highway, had a duty to exercise ordinary care with respect to his own safety. Regarding proximate cause, the court ruled that Arcides' injuries were a foreseeable result of his conduct. The court reasoned that Arcides presence on the highway, traveling with zero visibility despite the approaching wall of dust, and his failure to maintain a proper lookout and take sufficient precautions regarding his own safety, constituted a substantial factor. The court also reasoned that a person of ordinary intelligence would have anticipated the danger in driving through a sandstorm with zero visibility on a two-way, one-lane highway.

In *Intres v. Ace American Insurance Co.*, 2023 US Dist. LEXIS 76951 (M.D. La.), the plaintiff alleged she was rear-ended by a "semi-truck" driven by defendant. She asserted that the defendant-driver was at fault for the crash because he followed too closely, failed to keep a lookout, and operated his truck while exhausted, in excess of daily hours limits set by federal trucking regulations. Defendant-driver's employer was also sued for *respondeat superior* liability and negligence in qualifying, training, and supervising defendant-driver. Prior to discovery, the employer had moved to dismiss the negligence claim only, asserting that plaintiff pled "nothing more than conclusory allegations" that the employer was negligent in qualifying, training, and supervising defendant driver. The Louisiana Supreme Court expressly affirmed that a plaintiff may pursue a direct negligence claim for faulty hiring, training, and supervision against an employer trucking company based on a collision involving an employee driver, provided that the facts support a determination that the driver was at fault in the crash. The court ruled that absent any argument to the contrary, the plaintiff had plausibly alleged that the employer owed a duty to qualify, train, and supervise the defendant and that the accident was foreseeable as a result of defendant's duty.

In *Martinez v. ITF, LLC*, 216 A.D.3d 429 (1st Dept.), the New York plaintiffs were injured when the defendant collided with their stopped vehicle which had broken down on the side of the highway. The trial court granted the plaintiff's motion for summary judgment on liability and dismissed the defendant's affirmative defense alleging the plaintiff's comparative negligence. The defendant appealed the decision and the appellate court affirmed the trial court's ruling, holding that the plaintiff was entitled to summary judgment on liability because a rear-end collision with a stopped vehicle establishes a *prima facie* case of negligence on the part of the rear-ending driver vehicle. The appellate court dismissed the affirmative defense of comparative fault because of the evidence from the dash cam, which showed that defendant was speeding, had an unobstructed view of the cars parked on the side of the highway, and was on the phone, and there was no comparative fault on the part of the plaintiffs.

Bridget Daley Atkinson

5. Vicarious Liability

In *Phipps v. Brunkhorst Trucking, Inc.*, 2023 US Dist. LEXIS 80234 (D. Colo.), the plaintiff was the conductor of a train which collided with a semi-truck owned by Brunkhorst Trucking at a railroad crossing. The Brunkhorst vehicle was leased to Jensen Trucking Company, a regulated motor carrier. The lease agreement identified Brunkhorst as an independent contractor and limited Jensen's right to control the manner or prescribe the method by which Brunkhorst and its drivers performed their obligations under the contract. (This is arguably in tension

with the leasing regulations requirement that the lessee assume control of the rig during the term of the lease.) It was undisputed that the Brunkhorst driver caused the accident. The plaintiff asserted substantially similar claims against both Jensen and Brunkhorst sounding in agency, negligence, *respondeat superior*/vicarious liability, negligent entrustment, and negligent hiring, supervision, and retention.

Brunkhorst moved for summary judgment on the basis that the agency and *respondeat superior* claims failed as a matter of law. Brunkhorst argued that, at the time of the accident, the driver was driving the truck for his own convenience to his home, which was not on his normal route, to take a 36-hour rest. Brunkhorst further argued that the driver was not paid for trips to and from his home and that he was not on duty when the accident occurred. The record, however, showed that the driver was driving the truck to and from his home with the express permission of Brunkhorst and on a schedule to deliver a load that was developed by Brunkhorst. The court, accordingly, denied the motion to dismiss the claims of agency and *respondeat superior*, finding there was an issue of fact regarding whether the driver was acting within the scope of his employment.

Jensen also argued that it was entitled to summary judgment on the plaintiff's agency and *respondeat superior* claims, asserting that the driver was not a Jensen employee. The plaintiff was unable to proffer any evidence that showed Jensen controlled Brunkhorst drivers in a way that would create an agency or *respondeat superior* relationship. While Jensen was able to monitor drivers' locations, hire and fire drivers, and monitor drivers to confirm they complied with federal regulations, this was insufficient to create an agency or *respondeat superior* relationship. Jensen did not assign drivers to specific routes, nor did it determine what routes drivers would take. (There is no indication in the decision that the plaintiff raised the federal leasing regulations, although the safety regulations were discussed. In light of recent trends it is far from clear that citation of the leasing regulations would have changed the judge's mind. See Section XX). Accordingly the court found no special relationship was created. The court also dismissed the negligent entrustment claim, finding that the plaintiff failed to show that Jensen permitted the driver to use the truck, that the truck was under Jensen's control or that there was reason for Jensen to believe that the driver posed an unreasonable risk of harm to the public.

The court further determined that the negligent hiring, supervision, training, and retention claims against Jensen failed, as plaintiff was not able to prove that the driver was a Jensen employee and offered no authority for the proposition that a negligent hiring claim could survive in absence of an employment relationship. Therefore Jensen did not owe him any legal duty. Further, even if such a duty did exist, there was no evidence that Jensen breached any duty, as it was not responsible for anything more than checking the driver's motor vehicle report, contacting his prior employers, and confirming that the driver completed a pre-employment drug screening.

In *Graham v. Lewis*, 2023 US Dist. LEXIS 2303 (N.D. Tex.), the plaintiff brought suit against a driver, Lewis, and a carrier, KLLM Transport Services, LLC, for injuries sustained in a motor vehicle accident. At the time of the accident, Lewis was operating as an agent of KLLM in the course and scope of his employment. The plaintiff alleged that Lewis was negligent in the operation of the tractor-trailer, that KLLM was vicariously liable for Lewis' negligence, and that KLLM was negligent in hiring, retaining, and entrusting operation of the tractor-trailer to Lewis. KLLM moved for summary judgment asserting that, pursuant to Texas law, the plaintiff could not recover against KLLM under both her direct negligence claim and a vicarious liability theory. The court agreed, finding that, since KLLM had stipulated to agency, course, and scope of employment, the plaintiff could not proceed with a separate ground of recovery, i.e., negligence, where KLLM's derivative liability had already been established.

In *Valenzuela v. H-Mart L.A.*, 2023 Cal. App. LEXIS 2375 (Cal. Ct. App.), the plaintiffs, parents of an individual who died in a motor vehicle accident, filed a complaint against various defendants including H-Mart Los Angeles LLC and Grand Supercenter, Inc. (GSI), alleging causes of action sounding in negligence/reckless conduct and a survival action against H-Mart and causes of action sounding in negligence and a survival action against GSI, as well as product liability claims, which were ultimately dismissed. The complaint alleged that the driver of a tractor-trailer, Abarca, negligently turned left on the highway and caused the accident. It also alleged that the well-known logistics giant C.H. Robinson hired and contracted Abarca, and regularly monitored and controlled the manner in which Abarca drove the truck. H-Mart and GSI retained C.H. Robinson as their agent and, therefore, Abarca was the employee, and under the control of, H-Mart and GSI. Under California law, a pleading alleges facts sufficient to state a cause of action if it alleges ultimate facts constituting a cause of action. Allegations that a tortfeasor is an employee of a defendant and committed the tort in the scope of his employment are ultimate facts. The court found that the plaintiffs' pleadings met this standard as it was alleged that Abarca was employed by H-Mart and GSI, Abarca was in a joint venture with H-Mart and GSI, and H-Mart and GSI retained control over Abarca through C.H. Robinson.

Babineaux v. Hudson Insurance Co., 2023 US Dist. LEXIS 55783 (W.D. La.), reviewed a scenario in which a tractor-trailer driven by Elizalde crashed into the plaintiffs' vehicle while attempting to make a lane change. Elizalde was an employee of TransMaquila, S.A., a separate company from TransMaquila,

Inc. which owned the tractor-trailer. Elizalde was hauling for TransMaquila, Inc. and had permission to use the tractor-trailer at the time of the accident. TransMaquila, Inc. had a contract with TransMaquila, S.A. to use drivers hired by TransMaquila, S.A. (Here is yet another variation of an attempt by a motor carrier to shield itself from liability by separating the operating entity from asset ownership and from its drivers.) The issue confronting the court was whether TransMaquila, Inc., the owner of the tractor-trailer, could be held vicariously liable for Elizalde's negligence. The court held that it could, and that Elizalde was a borrowed employee of TransMaquila, Inc. The factors in determining if an individual is a borrowed employee are: (1) right of control; (2) selection of employees; (3) payment of wages; (4) power of dismissal; (5) relinquishment of control by the general employer; (6) which employer's work was being performed at the time in question; (7) agreement, either implicit or explicit between the borrowing and lending employer; (8) furnishing of necessary instruments and the place for performance of the work in question; (9) length of time in employment; and (10) acquiescence by the employee in new work situation. Elizalde was a borrowed employee due to the fact that he was supervised by TransMaquila, Inc., signed a TransMaquila, Inc. application for employment, employee agreement, consent for drug/alcohol testing, statement of safety policies and truck cleanliness notice. Since Elizalde was a borrowed employee of TransMaquila, Inc., TransMaquila, Inc. could be held vicariously liable for Elizdale's negligence. (We point out that, once again, no reference was made in the decision to the USDOT leasing regulations which ostensibly are relevant whenever a vehicle not owned by the motor carrier is used under its authority. See, also, the discussion of this case in Section 3.

Orozco v. Edgar, 2023 Ill. App. Unpub. LEXIS 76 (Ill. Ct. App.) involved an accident in which a Ford F-350 commercial service truck with attached crane driven by Edgar collided with a Nissan Pathfinder driven by Orozco after Edgar failed to observe a stop sign at an intersection. Edgar was en route to perform an inspection of the crane at a facility of defendant GKN, a manufacturer of vehicle components. As a result of the collision, one passenger in Orozco's vehicle was killed and another was rendered quadriplegic. The plaintiffs appealed the trial court's decision granting defendant GKN summary judgment and dismissing plaintiff's' claims of vicarious liability and direct negligence against GKN, arguing that Edgar was acting as the agent of GKN.

In their summary judgment motions, the plaintiffs argued that Edgar was acting as an agent of GKN and, therefore, GKN was vicariously liable for Edgar's negligence. The trial court found that Edgar was not acting as an agent of GKN because GKN did not have control over the manner the inspection was to be completed. Any alleged control only surrounded facility-related general safety guidelines. Also, GKN had no control of the driver when he was driving to the facility and the business of GKN and the driver's employer were "completely separate types of businesses." The court also noted that GKN made no direct payments to Edgar and did not withhold taxes, social security, insurance, or any other deduction from the Edgar's paycheck. The appellate court affirmed and added that the very nature of the inspection reflected an inherent lack of GKN control over the manner in which the technicians performed the inspection; GKN did not train the technicians how to perform the inspections. GKN also had no authority to discharge Edgar from his employment. The court also rejected the plaintiff's argument that GKN owed the plaintiff a duty of care and breached that duty, and that the collision was foreseeable, given GKN's time requirements and other constraints put on the technicians. The court noted that there was no deadline for the completion of the inspection, and the collision was not reasonably foreseeable. The court agreed with GKN's argument that "it would be manifestly against public policy for this court to declare that businesses owe a legal duty to all commuters simply because they ask their workers to start and stop working at certain times each day."

In *Koganti v. PODS Enterprises*, 2023 Cal. App. Unpub. LEXIS 2414 (Cal. Ct. App.), a collision occurred between the plaintiff's automobile and a semi-truck carrying containers owned by the defendant PODS. In the containers were goods belonging to PODS's customers which were being shipped interstate. Plaintiff maintained that PODS was acting as a motor carrier at the time of the accident, had illegally brokered the load to the transporting motor carrier, and, as such, should be found vicariously liable for the loss. The court noted that a motor carrier remains vicariously liable for the negligence of all drivers or subcarriers in the chain of privity under it. PODS argued that its registration as a motor carrier was used for only trips between customers' homes and PODS' storage centers, which were considered local deliveries, while the accident at issue involved interstate delivery between storage centers in New York and North Carolina, which PODS did not perform. PODS also contended that all involved parties understood it did not act as a motor carrier for shipments between storage centers, nor as a broker, but acted exclusively as a shipper which hired third-party carriers. The plaintiffs, though, responded that PODS could not be acting as the shipper because it did not own the goods being shipped, nor did it assume the responsibility of paying tariffs or transportation charges. 49 CFR § 390.5 defines "shipper" as a person who tenders property to a motor carrier or driver of a commercial motor vehicle for transportation in interstate commerce. 49 CFR § 375.103 defines a "commercial shipper" as a person who is named as the consignor or

consignee in a bill of lading who is not the owner of the goods being transported but who assumes the responsibility for payment of the transportation and other tariff charges for the account of the beneficial owner of the goods. The trial court ruled that PODS was acting as a commercial shipper, not a motor carrier, and therefore did not owe plaintiffs a duty. The appellate court reversed and remanded the case back to the lower court, reasoning that an issue of fact existed as to whether PODS was acting as a motor carrier and was, therefore, vicariously liable.

CJ Englert

6. USDOT *Leasing Regulations and Motor Carrier Liability*

The owner-operator model, under legal pressure as we describe elsewhere in this report, is subject to the USDOT leasing regulations 49 CFR § 376. Those regulations control the relationship between the equipment owner/lessor and the interstate motor carrier.

Hill v. Cargo Runner Co., 2023 US Dist. LEXIS 169807 (N.D. Ill.) involved a motor carrier with both employee-drivers and independent contractors. Independent drivers were required to form corporate entities and lease a truck from the motor carrier, then lease the vehicle back *to* the carrier under an independent contractor lease agreement, which authorized the motor carrier to make various deductions from the amounts due to the drivers. The drivers claimed that the deductions violated the leasing regulations (also known as the Truth-in-Licensing Act). They also alleged Illinois violations including misclassification of employee status. In order to succeed on the federal claim they needed to establish violation by the carrier and damage to the drivers. Issues such as this, which are fairly technical, have been litigated in recent years against some of the most prominent carriers in the country.

Here the court found that some of the claims were not proven; for instance, the fact that the non-trucking (bobtail) coverage involved a markup was not a violation. Other claims, including alleged delays in payments to drivers and fuel charges did, in fact, raise plausible questions of violations.

With respect to the Illinois regulatory provisions, the court noted that Illinois state and federal courts have disapproved various attempts to circumvent employee classification by requiring workers to create their own third-party corporate entities. Accordingly the driver would be permitted to present their case for employee status. The defendant's summary judgment motion was denied.

Florexil v. General Freight Experts, 2023 US Dist. LEXIS 159667 (S.D. Fla.), also involved some atypical facts. The plaintiff, acting through his Logistics LLC, entered into a lease agreement with General Freight (a broker, not a carrier), which permitted Florexil to operate the *broker's* vehicle. General Freight argued that the leasing regulations applied when an owner-operator leases his/her vehicle to the carrier (broker?), not when the transaction moves in the opposite direction. The plaintiff argued that under the regulatory definition he, too, was an owner. The court found such an interpretation plausible if not compelling. The regulations are in place to protect individuals in a weak bargaining position such as the plaintiff. The court did not grant defendant's motion to dismiss.

Lee v. AAA Freight, Inc., 2023 US Dist. LEXIS 76178 (N.D. Ill.) involved yet another complex relationship which the driver claimed was set up to take advantage of them. The driver entered into an oral arrangement with AAA but was then instructed to enter into a written lease with another entity whose sole role seems to have been to take a percentage of the plaintiff's earnings. The driver sued AAA for violating the leasing regulations; the court permitted the case to proceed even though the only agreement with AAA was oral.

While the provisions of the leasing regulations, in particular 49 CFR § 376.2 (c), were once understood to create a virtually irrebuttable presumption that the motor carrier was vicariously liable for the negligence of the owner-operator, some recent cases have downgraded that to a rebuttable presumption or no presumption at all. *Wolff v. Maybach Int'l Group*, 2022 US Dist. LEXIS 163796 (E.D. Ky.).

Roehl Transport Inc. v. Alexis, 2023 Cal. Super. LEXIS 71328 (Cal. Super. Ct.), involved a familiar scenario in which Roehl had separated the ownership of its equipment (owned by Roehl Leasing) from its carrier operations. Leasing had leased to Transportation a rig which the claimant Brugger was driving on the night of the accident. The vehicle stalled: Brugger stepped out of the vehicle, was struck by a passing U-Haul, and died in the hospital.

The estate sued various defendants including Leasing which pointed out that it was not a motor carrier. The court held that Transportation, as the motor carrier, was liable if the loss could be attributable to negligent maintenance. (Apparently Brugger did not qualify as an employee.) Possibly because Leasing had assets, the estate sought to recover from Leasing, as well, arguing that Transportation and Leasing were engaged in a joint venture. As our readers are aware, claims of joint venture are quite prevalent these days. There was, however, no evidence of a joint venture—members must have joint control of the venture; they must share profits and each must have ownership interest.

Larry Rabinovich

7. Punitive Damages

In *Landry v. National Union Fire Insurance Co. of Pittsburgh*, 2023 La. App. LEXIS 2132 (La. Ct. App.), plaintiff Landry was the driver of one of three vehicles struck by an 18-wheeler driven by Rodney, an employee of CEVA Logistics which was insured by National Union Fire Insurance Company of Pittsburgh. Landry filed a petition for damages against Rodney, CEVA, and National Union alleging that Rodney was under the influence of Xanax, cocaine, and/or other drugs at the time of the accident. CEVA moved for partial summary judgment asserting it could not be held vicariously liable for exemplary damages. The trial court granted its motion; however, it was reversed on appeal. Landry's claims went to trial where she was awarded compensatory damages as well as $10 million in exemplary damages. Rodney and CEVA moved for judgment notwithstanding the verdict with respect to the damages awarded and CEVA's liability for the exemplary damages. The trial court denied the motions and an appeal followed.

Both CEVA and Rodney challenged the exemplary damage award. Rodney asserted that Landry failed to establish that he had acted with wanton or reckless disregard for the safety of others. CEVA challenged the trial court's ruling that it could be vicariously liable for exemplary damages awarded against its employee under La. C.C. art. 2315.4 and the jury's finding that CEVA could have prevented Rodney from driving while intoxicated. The appellate court concluded that there was sufficient evidence to prove Rodney acted with wanton and reckless disregard for the safety of others and, thus, exemplary damages were appropriate as to him. The record showed that other drivers saw Rodney driving erratically, he was driving while significantly impaired, and the results of a blood test showed that he had excessively misused Xanax at the time of the accident.

However, the court also found that Landry's counsel had used inflammatory language with respect to CEVA at trial and that the jury instructions were legally erroneous and confusing as to CEVA's vicarious liability for exemplary damages. The court then reviewed *de novo* the issue of CEVA's vicarious liability for exemplary damages and the amount of exemplary damages. The court found that CEVA could not be held vicariously liable for exemplary damages since CEVA had complied with the FMCSA regulations when hiring Rodney and there was insufficient evidence to prove CEVA knew or should have known about Rodney's drug use. Therefore, CEVA could not have prevented Rodney from driving while intoxicated and exemplary damages were not appropriate as against CEVA. With respect to the exemplary damage award against Rodney, the court found the amount to be excessive and grossly disproportionate to Rodney's financial status, reducing the $10 million award to $1.5 million.

In *Stelzer v. Stewart Logistics, Inc.*, 2023 U.S. LEXIS 41215 (M.D. Pa.), the defendant truck driver crossed into the opposite lane of travel and struck the plaintiff's vehicle. The plaintiff moved to amend his complaint beyond the 21 days after the initial serving of the complaint. Defendants argued this would cause undue prejudice because it would require defendants to defend an unwarranted punitive damages claim and would expose them to damages not covered by insurance. The court rejected the argument, allowing the plaintiff to amend his complaint to add a punitive damages claim, reasoning that he had discovered new information as part of ongoing discovery, and that the punitive damages assertion would not unduly prejudice the defendants. The court also noted that Pennsylvania has a longstanding rule that "a tortfeasor who is personally guilty of outrageous and wanton misconduct is excluded from insurance coverage as a matter of law." *Wolfe v. Allstate Property & Cas. Ins. Co.*, 790 F.3d 487, 493 (3d Cir. 2015).

In *Brooks v. AK Creation, LLC*, 2023 US Dist. LEXIS 177353 (M.D. Ga.), a tractor-trailer, driven by employee Bethea, and owned by AK Creation, collided with a car driven by the plaintiff. The plaintiff alleged that the collision occurred due to faulty brakes on the tractor-trailer. Bethea claimed that he had previously alerted AK Creation that there was an issue with the brakes. AK Creations had credited the driver's concern and had the tractor-trailer inspected; it somehow passed inspection. After the collision, the Georgia Department of Public Safety determined that four brakes on the tractor-trailer were inoperative. The plaintiff sought punitive damages under the Official Codes of Georgia Annotated (OCGA) § 51-12-5 and attorney's fees under OCGA § 13-6-11. AK Creations moved for summary judgment on the plaintiff's claims for punitive damages and attorney's fees. In Georgia, an employer may be liable for punitive damages arising from the acts or omissions of its employee if the employee's tortious conduct is committed in the course of the employer's business, within the scope of the employment, and is sufficient to authorize a recovery for punitive damages. *Atlantic Star Foods, LLC v. Burwell*, 889 S.E.2d 202, 207 (Ga. Ct. App.). The Brooks court ruled that a jury could not conclude that Bethea's actions showed wantonness or conscious indifference to the consequences. Therefore, AK Creations could not be vicariously liable for punitive damages arising from Bethea's actions. For the same reason, a jury could not award litigation expenses under OCGA § 13-6-1. This statute allows a plaintiff to recover litigation expenses if the defendant acted in bad faith. Because AK Creations had the tractor-trailer inspected, and it had passed inspection, there was no bad faith.

In *Davidson v. Buschert*, 2023 US Dist. LEXIS 143239 (N.D. Ind.), plaintiff was injured when a tractor-trailer driven by Buschert, while in the scope and course of his employment with AJ Pallet, LLC, crested a hill and rear-ended plaintiff's

vehicle which was stopped in the roadway waiting to make a left turn. The plaintiff's accident reconstructionist determined that Buschert was traveling at 62 mph prior to applying his brakes, and failed to apply his brakes until he was 31 feet from the plaintiff. Buschert and AJ Pallet moved to dismiss the plaintiff's claim for punitive damages. As to Buschert, the court, applying Indiana substantive law, found that there was no basis for allowing exemplary damages. Under Indiana law, punitive damages are only appropriate upon a showing of willful and wanton misconduct, where the defendant subjected other persons to probable injury, with an awareness of such impending danger and with heedless indifference to the consequences. The plaintiff contended that the evidence showing that Buschert failed to apply his brakes, or otherwise act to avoid an accident, for nearly 20 seconds after seeing the plaintiff's car, met this standard. The court disagreed, holding that this momentary lapse in attention was mere negligence.

The court then dismissed the claim against AJ Pallet for punitive damages based on vicarious liability as moot. The plaintiff argued, though, that she was entitled to punitive damages based on AJ Pallets' negligent hiring and retention. The court found that, while Buschert had minor driving violations and an accident on his record prior to being hired by AJ Pallet, none of the violations involved an accident. Further, the third-party agency retained by AJ Pallet to conduct investigations into potential drivers approved of Buschert. Thus, the court found that there was no basis for punitive damages against AJ Pallet because there was no evidence that the hiring of Buschert showed a conscious disregard for the safety of others.

Vince Saccomando

8. *Transportation Network Companies*

Castellanos v. California, 2023 Cal. App. LEXIS 183 (Ct. App. 1st Dist.) was probably the highest-profile TNC case of the year, given the intense efforts over the last few years in California to determine the employment status of TNC drivers. In this case, a California appellate court entered an order affecting the fate of Proposition 22, a 2020 electorate-approved initiative, which carved out an exception for app-based drivers from the law passed in 2019 by the California Legislature. That law, AB-5, made it harder for corporations to classify workers as independent contractors. California voters opted to exempt transportation network companies from the law. Ironically, the law as originally passed was specifically intended to apply to drivers for companies like Uber and Lyft.

AB-5 designates as employees a broad swath of workers under what other states refer to as the ABC law (discussed elsewhere in this update).This law hit California's ridesharing and trucking industries hard. The facilitators of Proposition 22, a group called Protect App-Based Drivers and Services, were apparently funded and directed by the TNC companies themselves which believed that the law would cut into business and profits. They were able to get the issue on the ballot. And in November 2020, almost 59 percent of California's voters approved Proposition 22, which sought to: (1) "protect the basic legal right of Californians to choose to work as independent contractors with rideshare and delivery network companies"; (2) "protect the individual right of every app-based rideshare and delivery driver to have the flexibility to set their own hours for when, where, and how they work"; (3) "require rideshare and delivery network companies to offer new protections and benefits for app-based rideshare and delivery drivers";and (4) "improve public safety by requiring criminal background checks, driver safety training, and other safety provisions to help ensure app-based rideshare and delivery drivers do not pose a threat to customers or the public."

The plaintiffs in *Castellanos* sought to invalidate Proposition 22 in its entirety. As we reported two years ago, the trial court agreed with the plaintiffs and found the law unconstitutional and thus unenforceable. Over a scathing dissent, the California Court of Appeal in *Castellanos* reversed the trial court and upheld the proposition's substantive provisions. Although the court agreed with the plaintiffs that the proposition's amendment provision ran afoul of the California Constitution, it nevertheless reversed much of the trial court's decision and remanded the case to the trial court to enter judgment in accordance with the appellate court's decision.

Several other cases in 2023 considered various issues regarding transportation network companies. In *Da Silva v. Lyft Inc.*, 2023 US Dist. LEXIS 194814 (D. Ariz.), arising out of a car accident resulting in the death of a Lyft driver, the court granted in part Lyft's motion to dismiss plaintiff's complaint. The plaintiffs, who were the deceased driver's wrongful death beneficiaries, alleged four causes of action stemming from Lyft's alleged failure to maintain sufficient levels of auto insurance, specifically underinsured motorist coverage, for the deceased Lyft driver. First, they alleged Lyft's failure to maintain insurance was negligent, even though Arizona law governing TNCs does not require the companies carry such underinsured motorist coverage. In the alternative, they alleged that Lyft's failure to maintain such insurance was a breach of the covenant of good faith and fair dealing implied in Arizona contracts. The plaintiffs alleged there was a "general ongoing contract" between the company and the driver. Second, they alleged negligent misrepresentation. Third, they alleged unjust enrichment. And fourth, the plaintiffs alleged a misrepresentation in violation of Arizona insurance law.

The court granted Lyft's motion to dismiss the first cause of action because Lyft owed no duty to the driver, the cornerstone of any negligence action, and because plaintiffs failed to allege a "special relationship" between the driver and Lyft, a prerequisite to a claim for breaching the covenant of good faith and fair dealing. However, the court denied the motion to dismiss the negligent misrepresentation cause of action on the ground that the screenshot plaintiffs attached to their complaint showed that Lyft provided false information to the deceased driver regarding the existence of underinsured motorist coverage. The court granted the motion to dismiss the unjust enrichment claim because the complaint failed to allege that Lyft's decision not to purchase underinsured motorist coverage for the driver enriched Lyft improperly. And finally, the court granted the motion to dismiss the misrepresentation under Arizona insurance law on the ground that the law only applies to insurance companies or agents.

Two other cases concerned an automobile policy's ridesharing app exclusion. In *Scott v. Esurance Prop. & Cas. Ins. Co.*, 2023 Mich. App. LEXIS 5507 (Ct. App.), the plaintiff driver was injured when she was broadsided in her car while waiting to make a turn. At the time of the accident, the plaintiff admitted she was driving for Lyft. The defendant moved for summary disposition (=summary judgment) on the grounds that the insurance policy at issue contained an exclusion barring personal injury protection coverage for losses occurring while the plaintiff was ridesharing, i.e., driving for TNCs, such as, Lyft or Uber. The plaintiff acknowledged during claim intake that she was driving for Lyft when the accident occurred. The court determined the policy language was unambiguous and found the ridesharing exclusion was enforceable under Michigan law and affirmed the trial court's decision to grant the defendant's motion.

And in *Spann v. Empire Fire & Marine Ins. Co.*, 2023 U.S. Dist. LEXIS 136314 (E.D. Mich.), the court considered a similar exclusion in the context of a car accident. The plaintiff Uber driver had his personal auto insurance through Empire Fire. The Empire Fire policy, like the Esurance policy in *Scott*, discussed above, excluded from coverage vehicles while "operated by a person logged into a 'digital transportation network.'" Because the plaintiff was logged into Uber's ridesharing application when the accident occurred, Empire Fire argued its policy barred coverage. Allstate, on the other hand, maintained no-fault automobile insurance for Uber's Michigan drivers. However, Allstate argued that the claims against it were time-barred under Michigan's applicable one-year limitations period. The two insurers moved for summary judgment. The court granted Empire Fire's motion on the ground that the evidence showed that plaintiff was logged into Uber's ridesharing platform at the time of the accident; thus, the policy excluded coverage thereunder. Further, the court granted Allstate's motion because the plaintiff had failed to file suit for more than two years after the accident.

In a separate matter, on November 2, 2023, New York's attorney general announced a $328 million settlement with Uber and Lyft following a years-long investigation into whether the two TNCs improperly withheld pay from New York's more than 100,000 drivers. Under the settlement, Uber's and Lyft's NY drivers will receive back pay, an "earnings floor," sick pay in the amount of 1 hour for every 30 hours of work up to 56 hours per year, proper notifications regarding hiring and earnings, and other benefits.

The NY attorney general found that between 2014 and 2017, Uber improperly deducted sales tax and fees from drivers' pay, which passengers should have paid. And between 2015 and 2017, Lyft did essentially the same thing, charging drivers an administrative fee covering sales tax and fees, even though passengers should have paid such taxes and fees. The "earnings floor" drivers will also receive guarantees they are paid a minimum rate from dispatch to rider completion.

Ian Linker

9. *Insurance Coverage*

Standard liability policies commonly provide coverage for various costs (Supplementary Payments) beyond defense of and damages awarded against an insured. The policy at issue in *Prime Property & Casualty Insurance, Inc. v. O. Mendoza Trucking, Inc. Amirali I. Bhanwadia*, 2023 US Dist. LEXIS 29467 (M.D. Fla.), purported to cover reasonable costs incurred by the insured at the request of the insurer, while excluding "court costs" taxed against the insured. In that case, the insurer, having assumed the insured's defense in a bodily injury action, rejected a settlement offer. There was a judgment in favor of the plaintiff in excess of the settlement offer, and the court charged the defendant for the plaintiff's attorney fees as well. In the subsequent coverage action, the court held that the award of attorney fees fell within covered "reasonable costs," rather than excluded "court costs."

It is not uncommon for a liability policy to provide both a liability limit and a lower limit matching those amounts mandated by law, the latter to be triggered under specific circumstances. (This is known as a "step-down" clause. Enforceability of such clauses is not uniform across the country.) In *White Pine Insurance Co. v. Interstate Towing, LLC*, 2023 US Dist. LEXIS 19415 (S.D. W. Va.), the policy had a $1 million limit but reduced coverage to the statutory minimum (in that case, $25,000) where the insured vehicle was operated by a non-listed driver. The applicable mandatory coverage statute, West Virginia Code 33-6-31(a), stated that every permissive user of a covered auto is protected "within the coverage of the

policy," unless the driver is excluded by name in a restrictive endorsement. Given that language, the court found that the policy's attempt to generally reduce coverage for a class of unlisted drivers was unenforceable. We note that courts in other states have enforced provisions reducing or even excluding coverage for non-listed drivers. We anticipate that this issue will be the focus of increased judicial attention in the coming years.

The provision we refer to as the "reciprocity clause" found in the ISO motor carrier coverage form, stated simply, provides as follows: if named insured trucker A leases a vehicle from trucker B, B is an insured under A's policy only if B is also insured under a policy which would cover A had A leased a vehicle to B instead (the reciprocal scenario). The somewhat convoluted language of the provision has challenged attorneys and judges, but our summary above has always seemed to us the intended meaning. The existing case law has involved the lease of a tractor (the power unit. In *American Sentinel Insurance Co. v. National Fire & Marine Insurance Co.*, 2023 US Dist. LEXIS 16039 (C.D. Cal.) the lease involved a trailer. American Sentinel insured Big Brother, which leased a trailer to Tengfei, a motor carrier, which was insured by National Fire. The American Sentinel policy covered scheduled vehicles only. Under certain circumstances, leased trailers could be covered but likely on an excess basis only. National Fire argued, therefore, that the American Sentinel policy did not satisfy National Fire's reciprocity clause, and that Big Brother did not qualify as an additional insured under the National Fire policy.

The court rejected American Sentinel's argument that the reciprocity clause was inapplicable because Big Brother was not acting as a "trucker" when it leased the trailer to Tengfei, finding that it was sufficient that Big Brother acted as a trucker on other occasions. Nevertheless, the court went on to find that the National Fire reciprocity clause did not, on its face, require the reciprocal policy to provide primary coverage at all times without restriction. Accordingly, since at least sometimes primary coverage could apply to leased trailers, the American Sentinel policy satisfied National Fire's reciprocity clause, and Big Brother qualified as an additional insured under the National Fire policy.

In *GEICO Indemnity Co. v. Order on Umialik Insurance Co.*, 2023 US Dist. LEXIS 14737 (D. Alaska), the driver involved in the loss was insured under a personal policy issued by GEICO and was a member of a limited liability company insured by Umialik. The vehicle involved in the loss was leased by the LLC but not scheduled on the Umialik policy; on the other hand, it was scheduled on the GEICO policy. Umialik argued that, since the vehicle was scheduled on the GEICO policy, it was a "de facto" owned auto, and therefore could not qualify as either a covered hired auto or a covered non-owned auto under the Umialik policy. The court was unmoved and found that the insureds had a reasonable expectation of coverage for the leased vehicle under the Umialik policy.

We appeared on behalf of co-plaintiff Progressive Preferred Insurance in *Adrien Logistics LLC v. Certain Underwriters at Lloyd's London Subscribing to Policy No. Z178311-007NTL*, 2023 US Dist. LEXIS 33442 (S.D.N.Y.). Adrien, which was insured under a non-trucking policy issued by Lloyd's, had leased a truck to Knight. Progressive insured the truck under a policy issued to Knight. When the truck was involved in a multi-vehicle collision, the injured parties sued Adrien but not Knight. Progressive defended Adrien but brought a declaratory judgment action seeking coverage under the Lloyd's policy. Lloyd's brought a third-party action against Knight, asserting that Knight was responsible for defending and indemnifying Adrien under the terms of the lease. The court agreed with Progressive that Lloyd's was not a third-party beneficiary of the vehicle lease, and accordingly dismissed the third-party complaint. The court found further that the relationship between Lloyd's and Knight did not give rise to an implied right of indemnification for any costs Lloyd's might incur in defending or indemnifying Adrien.

In *Colony Insurance Co. v. Progressive Casualty Insurance Co.*, 2023 US Dist. LEXIS 55063 (D. Md.), Progressive argued that a cement mixer was "mobile equipment," rather than an "auto." The court, however, found that the primary purpose of the vehicle was to transport concrete to the location where it would be mixed and used, and that accordingly the cement mixer was a covered "auto."

By contrast, in *In re Roderick Crumedy*, 2023 US Dist. LEXIS 202047 (E.D. La.), the equipment at issue was a tree removal truck with a mounted loader device. The plaintiff was injured when the vehicle's stabilizing leg was lowered onto his foot. The court found that the primary purpose of the vehicle was to transport the loader device to the sites where it could be used. The court was further influenced by the fact that the accident occurred while the stabilizing leg was being lowered to allow the equipment to function in a stationary position, and not while the vehicle was in its transport mode. Under the circumstances, the court found that the loss occurred from the use of "mobile equipment," and that coverage was available under the CGL policy in question.

Indiana Code § 27-8-9-9(b) provides that a lease for a vehicle used in the business of transporting property may control the primacy of insurance coverage for that vehicle where a claim arises out of the "operation" of that vehicle. In *United Fire & Casualty Co. v. Progressive Southeastern Insurance Co.*, 2023 US Dist. LEXIS 52664 (N.D. Ind.), debris fell out of the back of a leased dump truck onto the victim while the truck was being

loaded. United asserted that the terms of the lease (which are not recited in the court's opinion) placed the burden of primary coverage on Progressive. The underlying complaint, however, asserted that the loss arose from the defective condition of the truck. The court held, therefore, that the loss did not arise from the negligent "operation" of the vehicle and the statute was inapplicable.

The plaintiff in *Furnishare Inc. v. Travelers Property Casualty Co. of America*, 2023 US Dist. LEXIS 73983 (S.D.N.Y.), was a furniture sales and moving company. As Furnishare personnel were carrying a couch down a stairwell, it struck a sprinkler head, resulting in extensive damage both to the couch and to the building. Both the commercial general liability policy and the auto policy in question defined "loading" as beginning when an object is "moved from the place where it is accepted for movement into or onto…an auto." Travelers, the CGL insurer, argued that loading began as soon as the couch was moved out of the apartment where it was first located. The court, however, found that "the place" was an ambiguous term, and could also refer to the entire building. Under established New York case law, coverage for an accident involving "loading" must have been the result of some act or omission related to the use of the vehicle. In this case, the subject accident occurred while the Furnishare vehicle was parked outside the building; indeed, the accident could have occurred even if there had been no vehicle outside at all. Under the circumstances, the court determined that "loading" had not yet begun at the time of the accident, and that coverage was provided by the CGL policy and not the auto policy.

We note *First Specialty Insurance Corp. v. Alltrade Property Management*, 2023 Ky. App. LEXIS 30 (Ky. Ct. App.), because the Kentucky Court of Appeals has taken an approach to policy interpretation that we find somewhat curious. The "other insurance" clause in question provided that coverage would be excess over "any of the other insurance, whether primary, excess, contingent or any other basis…." The court found this to be a "nonstandard escape clause," which "disclaimed liability" where any other insurance was available. In doing so, the Court of Appeals followed its own precedent in *Empire Fire & Marine Insurance Co. v. Haddix*, 927 S.W.2d 843 (1996). Our reading of the policy language, however, does not reveal a purpose of disclaiming all coverage where other coverage is available, but merely an intent to make coverage excess to any other available coverage.

The opinion is also interesting for one other ruling. In this case, property owner Whispering Brook entered into an agreement under which Alltrade would manage its apartment complex. An Alltrade employee, driving his own vehicle on the property in the business of Alltrade, struck and killed a resident child. In determining liability insurance coverage for the loss, the court found that, under the terms of their agreement, Whispering Brook could have objected to Alltrade allowing the employee to use his own vehicle in Alltrade's business, but did not do so. The court reasoned therefore that the employee was using the vehicle with Whispering Brook's permission. The First Specialty CGL policy included a non-owned auto endorsement which provided coverage for a permissive user of an auto not owned by Whispering Brook but used in connection with Whispering Brook's business. (In this regard, the court was notably unmoved by the fact that the wrongful death plaintiffs stipulated as to no agency relationship or vicarious liability between Whispering Brook and Alltrade or its employee.) Accordingly, the court found that the driver was an insured under the First Specialty policy. As noted above, though, the court held that the "nonstandard escape clause" of the First Specialty policy took precedence over the excess other insurance clause in the auto policy issued to Alltrade.

"Cancellation by replacement" occurs where an existing policy, technically in force according to its effective dates, is deemed terminated when the insured obtains a different policy covering the same risk. In *Nodak Insurance Co. v. Farm Family Casualty Insurance Co.*, 2023 ND 84, the loss occurred within the effective dates of the Farm Family policy, but Farm Family argued that its coverage terminated before the date of loss, when the insureds obtained a policy from Mountain West covering the same vehicle that was involved in the loss. On its face, the Farm Family policy provided for cancellation by replacement if the succeeding policy was "similar." The court held that "similar" required similarity in both type and amount. Since the liability limits of the Mountain West policy were $100,00 per person/$300,000 per accident, the Supreme Court of North Dakota found that the policy was not sufficiently "similar" to the Farm Family policy which provided liability limits of $250,000 per person/$500,000 per accident. Therefore, the Farm Family policy was deemed not to have terminated when the insureds obtained the Mountain West policy, and both policies were in effect on the date of loss. (The dissent would have found that the prior policy remained in force only for the difference between the respective liability limits.)

The insured motor carrier in *Constructural Dynamics v. Arch Insurance Co.*, 2023 NJ Super. Unpub. LEXIS 934 (App. Div.), failed to clean its trucks thoroughly after delivering a load of salt, and the remaining salt residue contaminated a subsequent load of concrete aggregate which showed defects after it was mixed into cement and laid into a warehouse floor. In analyzing the applicability of several policy exclusions, the Appellate Division was careful to distinguish between damage to the aggregate (for which no recovery was sought) and damage to the concrete and to the floor (for which recovery was sought). As the motor carrier had no possessory dominion over the floor or the warehouse, the

court declined to apply the Arch policy exclusion for damage to property in the care, custody or control of the insured. On the other hand, the aggregate was delivered completely before the concrete was mixed, and the court agreed with Arch that the exclusion for damage to property after it is moved from the covered auto to the place where it is finally delivered was applicable. By the same token, the motor carrier's work was completed when it delivered the aggregate, and coverage for any subsequent damage to the concrete or the floor was barred under the completed operations exclusion.

A recurring question is whether an insurer can be compelled to provide coverage equal to the minimum amounts of financial responsibility required of its insured as a matter of law, even if the stated policy limits are lower. The trial court in *Infinity Select Insurance Co. v. Superior Court*, 2023 Cal. App. LEXIS 603 (Cal. Ct. App.), had reformed the Infinity Select $25,000/$50,000 policy limits upwards to $750,000, the minimum financial responsibility required of its motor carrier insured under the Motor Carriers of Property Permit Act (California Vehicle Code § 34600 *et seq*.). The Court of Appeals reversed, however, holding that it is the insured motor carrier, and not the insurer, which is bound to meet the requirements of the MCPPA. The court noted that, even where a policy is obtained in order to help the motor carrier meet the financial responsibility requirements of the MCPPA (which was not the case here), those requirements can be met by multiple policies, and the requirements can be met through other means (surety bond or self-insurance). Accordingly, no one insurer is obligated to provide the total amount of mandated coverage.

In *Murphy-Brown, LLC v. Ace American Insurance Co.*, 2023 NCBC LEXIS 94 (N.C. Super. Ct.), 89 owners of property near Smithfield, the largest hog and pork producer in the world, complained that Smithfield's trucks caused excessive noise, dust, traffic, and odor (along with more general complaints that its operations created a nuisance). The court found that all of the plaintiffs' alleged injuries stemmed from Smithfield's policies and implementation of those policies in the operation of its farm, including its trucking operations. The court ruled that those injuries all arose from a single accident, thereby triggering only a single policy limit in any applicable policy.

In *State Auto Property v. Clark*, 2023 US Dist. LEXIS 198259 (S.D. Miss.), the court rejected the argument of the named insured employer that he was "using" a non-owned auto, within the meaning of the State Auto personal auto policy issued to the employer, simply because his employee was operating it in the employer's business. The court went on to find no coverage under two other policies issued by Alfa to the insured, since they defined "use" as "the actual manual and physical driving of a car." Moreover, since the insured employer was not in control of the vehicle itself, even if he might have been "in control" of the employee, the vehicle did not qualify as a covered non-owned auto under the Alfa policies.

The defendant insured argued in *United Specialty Insurance Co. v. Century Waste Services, LLC*, 2023 N.J. Super. Unpub. LEXIS 2097 (App. Div.), that plaintiff United Specialty was estopped from disclaiming coverage, even though the loss did not involve a covered auto, because its reservation of rights letter did not inform Century Waste that it could reject or accept United Specialty's assigned defense counsel. The ROR, however, did state that the insurer would assume that the insured consented to assigned counsel "if we do not hear from you," and both the trial court and the Appellate Division found this language sufficient. Notably, although the ROR was sent after United Specialty had been defending for 20 months, Century Waste was unable to show that the defense would have been handled differently had it selected its own counsel.

Philip Bramson

10. Bad Faith

In a relatively sedate year for major developments in bad faith jurisprudence, *Integon Preferred Insurance Company v. Wilcox et al.*, 2023 US Dist. LEXIS 135240 (W.D. WA) reminds us of a basic truth: insurers are not mind readers.

In 2017, Daniel Wilcox was operating an auto when it struck a pedestrian in an intersection. The victim filed suit against Wilcox and his wife. Critically, they never notified their insurer, Integon, of the accident or the lawsuit. The Wilcoxes failed to appear ,and a default judgment of $1.6 million was entered against them. At that point, Daniel Wilcox belatedly made the call he should have in 2017 and notified Integon, which hired counsel to little effect.

In a bind, the Wilcoxes turned to a tried-and-true approach: they sued their insurance carrier for bad faith! The US District Court for the Western District of Washington granted judgment as a matter of law to Integon on the bad faith claims. The court held that insurers do not have an independent duty to check court records or filings for ongoing litigation against their insureds, and that it was the Wilcoxes' obligation under their policy to promptly notify Integon that they had been sued. Left undiscussed, however, was the fact that this $1.6 million demand exceeded their policy limits—underlining how fundamental and obligatory policyholder notifications are for all involved. The case, which is going up on appeal , has generated multiple motions by various parties and court orders.

A Florida case, *Ellison v. Willoughby*, 2023 FL LEXIS 1648 (Fla. Supreme) should remind insurers to carefully consider all of the claims against multiple insureds before settling any of the claims against any of the policyholders. The case precludes insurers from offsetting an excess award with any other damages plaintiff won in another proceeding.

Randy Willoughby lived with his parents when he was involved in a catastrophic auto accident. His parents' insurer, 21st Century Centennial Insurance, denied his claim under their $10,000 policy because it questioned whether he resided full time with his parents. Willoughby sued for bad faith and 21st ultimately settled for $4,000,000—some 400 times the policy limits. But that was just the beginning.

Willoughby also sued Eddie and Alberta Ellison, co-owners of the truck with which he collided. GEICO, the Ellisons' insurer, agreed to pay its $100,000 policy limits *to settle the claims against Eddie only*. Willoughby's counsel repeatedly offered settlement for policy limits plus a small amount of "taxable costs" that were allowed by the policy (arguably leaving the demand within policy limits). GEICO refused. Whether sensing opportunity or seeking justice, Willoughby's lawyer brought suit against Alberta, winning a jury verdict of about $30,100,000.

Alberta Ellison, on the business end of a $30,100,000 verdict after her husband's settlement exhausted their entire policy, filed a post-trial motion seeking to offset some of the $30,100,000 judgment with the $4,000,000 Willoughby recovered from 21st Century. On appeal, the 2nd District Court of Appeal and the Florida Supreme Court each refused to permit the $4,000,000 offset. Florida's Supreme Court held in a November 2023 ruling that Florida's collateral source rule does not allow such an offset because payouts in bad faith claims are more akin to "penalties" than "insurance benefits," thus do not constitute a "double recovery."

Willoughby's lawsuit against GEICO is ongoing—and thus a case that could've been resolved for policy limits plus *de minimis*, permitted "taxable costs," to symbolically cover both of GEICO's insureds under the same policy, now looks to burn a $30,100,000 hole in GEICO's coffers.

The issue of multiple claimants making demands which exceed policy limits, or multiple insureds—each of which receives a demand—presents insurers with complex problems. Different states impose variant tests as to whether insurers have committed bad faith by paying one claimant over another, or settling for one insured over another. Each case must be carefully studied before action is taken— and if the wrong response is selected, it could lead to a finding that the insurer is responsible for far more than its policy limits.

Benjamin Zakarin

11. Non-Trucking ("Bobtail") Coverage

In this section we focus on the applicability of policies that typically provide supplemental liability coverage to owner-operators (see 49 CFR § 376.12[j]) when they are using their rig other than in the lessee/motor carrier's business. Most such policies operate with an exclusion that precludes coverage in most cases since the pricing of such policies reflects an understanding that most of the time that a commercial vehicle is being operated it is for business-related reasons. And in the universe of NTL policies there are some that seem never to apply.

In *Argonaut Ins. Co. v. Atl. Specialty Ins. Co.*, 2023 US App. LEXIS 2692, the US Court of Appeals for the Fifth Circuit granted Atlantic Specialty Insurance Company's (ASIC) summary judgment arguing that its NTL policy was inapplicable because at the time of the accident, the truck driver was not driving the truck "solely" for personal use.

Here, the driver operated a commercial truck that was garaged at his home. After making his final delivery at a railroad terminal in February 2022, the driver began driving the truck to a nearby store to buy groceries. The driver then saw a friend on the way, stopped and chatted for a few minutes and continued on. Before arriving at the store, however, the driver returned home to get more money. He left again to buy goods at a nearby gas station. En route, the driver made a u-turn and collided with another car, approximately 22 minutes after he left the railroad terminal. The truck was "bobtailing" (trailer was no longer attached) when it left the terminal.

Argonaut and ASIC each separately insured the truck. Argonaut's policy was a general commercial auto policy and ASIC's policy was an NTL policy. ASIC's NTL policy stated that it provides coverage only for "[l]osses that occur . . . when a covered truck is non-trucking." The term "non-trucking" is defined in relevant part to mean when the truck is "operating solely for personal use unrelated to the business of the motor carrier." The policy further explains when a truck is "not non-trucking," including when the truck is "returning to the truck's primary garage location subsequent to delivering a load." *Id. at *3.*

ASIC argued that at the time of the accident, the driver was not driving the truck "solely" for personal use and was returning the truck to the primary garage; therefore, ASIC precluded coverage. The court agreed and determined that the truck was simultaneously put to use as *both* business and personal, as ultimately the driver was returning the truck to its primary garage location—the driver's home.

In another recent "non-trucking" coverage case, a Michigan Appeals Court determined that a claimant was not covered

under the "non-trucking" bobtail policy and that insurers are *not* required to verify that that every insured who has purchased policies from more than one carrier has procured all the insurance it needed to satisfy the no-fault act. In *Al-Gahmi v. Al-Jahmi*, 2023 Mich. App. LEXIS 6653, the plaintiff was injured in an out-of-state trucking accident while a passenger in a truck he owned but had leased to another company. He filed suit against the driver as well as the insurance companies that provided both the truck's "bobtail" policy purchased through Great American Insurance Company (GAAC) and the commercial policy, purchased through Amerisure Mutual Insurance Company (AMIC).

With respect to the bobtail issue, it was undisputed that at the time of the accident, the truck was being used for business purposes to transport cargo, accordingly, the court determined that GAAC's policy plainly and unambiguously precluded coverage for "[b]odily injury or property damage arising out of any accident which occurs while the covered auto is being *used in the business of any lessee or . . . is being used to transport cargo* of any type." *Id. at *6* (Emphasis added)

The plaintiff argued that this business-use exclusion is unenforceable because it is contrary to the purpose of the no-fault act. MCL 500.2118(2) however, "specifically permits insurers to limit insurance coverage on the basis of business use" and Michigan law puts the onus on the insured to obtain the coverages necessary to meet the requirements of the no-fault act.

Gillian Woolf

12. The MCS-90 Endorsement

Last year we reported on the important decision by Judge Frank Easterbrook in *Prime Insurance Company v. Wright*, 57 F. 4th 597 (7th Cir.), released on January 13, 2023, which nimbly tweaked the existing precedent and formulated a clear rule to determine whether or not a motor carrier's vehicle is being used in interstate commerce (and thus whether, in the event of a judgment against the motor carrier, the MCS-90 attached to the motor carrier's policy could be triggered.)

The Seventh Circuit's decision was relied upon a few months later in *Artisan & Truckers Cas. Co. v. Dollar Tree Stores*, 2023 US Dist. LEXIS 90263 (N.D. Ill.) Artisan & Truckers insured Ljupka Logistics, a motor carrier. Ljupka had executed a broker/carrier contract with freight broker US Xpress; some of its business was secured through USX as well. In this case, USX brokered a load from Dollar Tree to Ljupka; instead of either assigning it to one of its drivers or declining the load (if it lacked capacity), Ljupka accepted the assignment but then "double brokered" it to GLS Group. Not by coincidence, the principals of GLS and Lujpka were married to one another.

A GLS driver, operating a GLS tractor, picked up the load from a warehouse and carried it toward his destinations (three Dollar Tree stores). At the first stop, as the consignee's employees opened the rear doors of the trailer, a portion of the shipment fell onto the driver, allegedly causing him serious bodily injury, and he filed suit against Dollar, Ljupka, and GLS.

GLS appears to have been insured against bodily injury and property claims at the time of loss, which may have made the court's decision easier to reach. But the plaintiff sought recovery under the Artisan & Truckers policy as well. The Artisan policy did not schedule the vehicle, nor was it a replacement or substitute auto as the court found. That left the MCS-90 and the Illinois Form F endorsement for the court to consider. The route that the GLS driver drove that day was entirely within the state of Illinois. For that reason, at least, Artisan argued that even if judgment were entered against Ljupka, the MCS-90 could not apply. The court noted that there is a split of authority as to whether one uses a "trip specific" approach or some other approach in determining whether an MCS-90 has been triggered. In *Wright* the Seventh Circuit adopted a modified "trip specific" approach. It held that (all else being equal) an MCS-90 applies only when an accident occurs "during an interstate journey to deliver freight," or during an ancillary step related to an interstate haul such as arranging for receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking and interchange of property. *Wright*, though, did insist that any such ancillary activities be related to a particular interstate move. Here, the driver's activities that day were all related to an intrastate move so the MCS-90 could not apply.

Artisan had not filed a Form E certificate or added the Form F to the policy as of the time of the loss. Ljupka was out of compliance as a result. However, without the state filing there was no claim against Artisan under the Form E or F.

A number of cases involving the MCS-90 in 2023 focused on procedural issues. *Dabeck v. Wesco International*, 2023 US Dist. LEXIS 205494 (D.S.C.) involved a collision between a Wesco truck operated by Larry Ashford, and a vehicle operated by the plaintiff Dabeck. Dabeck sued Ashford and Wesco; Ashford defaulted, and a judgment of $1 million was entered against him. Dabeck then filed a declaratory judgment action arguing that the policy that Liberty Mutual issued to Wesco covered the loss. Liberty declined to pay, as did Wesco. Liberty pointed out that the entry of default was its first notice of the underlying lawsuit. Late notice can be a complete defense against policy coverage but not with respect to an MCS-90.

Liberty asked the court to realign the parties and convert Ashford into a plaintiff since he was essentially in accord with Dabeck's position that coverage existed. That would have resulted in full diversity between plaintiffs and defendants, and

created jurisdiction for the federal court. Realignment, though, and the court's diversity jurisdiction, is determined by a multi-part test the court must apply. Here, Ashford's position—that Liberty provided coverage—was set out only in its cross-claim, and was not established at the time the complaint was filed. Accordingly, there was no basis for realignment and thus no diversity.

Dabeck did argue, in addition, that Liberty was obligated to pay under its MCS-90 (an argument that was flatly wrong, although that is not mentioned in the decision; a judgment against the driver can never trigger the MCS-90). That raised the possibility that the federal court could hear the case under "federal question" jurisdiction. MCS-90 interpretation turns on federal law, but the court pointed out that this does not always lead to federal question jurisdiction for the federal court. Four questions need to be answered affirmatively in order to justify a finding of a federal question where plaintiff has filed a state declaratory judgment action containing a federal issue: 1) does the state law claim necessarily raise a federal issue; 2) is it actually disputed; 3) is it a substantial issue; and 4) is it one which the federal court can resolve without disturbing the proper balance of federal and state judicial responsibilities. The court held that the tests were not met since the MCS-90 issue may not come up at all; also the questions before the court were questions of fact (questions of law are more likely to be deemed substantial). Nor was it clear that any decision would constitute precedent for future cases. Accordingly, the district court remanded that matter to state court.

Brooklyn Specialty Ins. Co. v. Risk Retention Grp. v. Bison Advisors, LLC, 2023 US Dist. LEXIS 163694 (M.D. Ga.), involved a consent judgment against a motor carrier, its driver and Paper Imex, the owner/lessor of a rig leased to the motor carrier. Paper Imex was insured by Brooklyn Specialty but the leased truck was not a covered auto. The policy issued to the motor carrier made Paper Imex an additional insured—but the decision does not indicate whether that was via a specific endorsement naming Paper Imex, or merely as a result of the basic terms of the policy as the lessor of a covered auto.

We spoke with one of the attorneys involved in the case and he explained that it was the latter —there was no special endorsement naming Paper Imex. As we have pointed out in previous years, some courts have suggested that if the defendant is specifically covered by an endorsement to another party's policy and the endorsement was in effect before the date of loss, then the defendant's insurer is freed from any MCS-90 exposure.

The motor carrier's insurer paid its remaining policy limits ($900,000) to the estate, and the estate administrator collected more than an additional $1 million from other insurers. The administrator had made conflicting statements about whether it was demanding that Brooklyn Specialty pay under its MCS-90. Significantly, as part of the settlement agreement, Paper Imex was released. That should have been reason enough to deny any payment under the Brooklyn Specialty MCS-90.

The court added to this the questionable argument that public policy had been satisfied by the other payments; as we have pointed out in previous editions, that is not a valid rationale in the view of the majority of courts that have weighed in. If any additional reason were needed, the court should have relied on a different principle: the Brooklyn MCS-90 could not be triggered because Paper Imex was not the motor carrier of record in the underlying transaction.

The court in *Labrew v. A&K Truckline, Inc.*, 2023 US District LEXIS 201420 (N.D. Tex.), permitted A&K's insurers to intervene in the lawsuit. A&K had not appeared and plaintiff had moved for a default judgment. Since the insurer A-One would have been on the hook in the event default was entered, and its interests were not being represented, the court permitted A-One to intervene. The court correctly identified A-One's exposure as that of a surety. A-One could, we suppose, have hired counsel to represent the motor carrier even though no defense is owed under the MCS-90. Doing so, though, can be fraught with problems if the insured is uncooperative or in the wind. By intervening, the insurer can present argue liability and damages without putting a defense attorney in the difficult and, in some states, unethical, position of trying to defend a party with which it has no contact.

United Specialty Ins. Co. v. Barriga, 2023 Cal. Unpub. LEXIS 2195 (Cal. Ct. App.) held that neither the motor carrier's policy, nor its MCS-90, applied to a loss which occurred in Mexico.

Kim Kool v. Cobra Trucking, 2023 US Dist. LEXIS 15626 (W. D. La.) held that MCS-90 did not apply to a cargo loss.

United Specialty Ins. Co. v. Sweeney, 2023 US Dist. LEXIS 64903 (N.D. Ind.) held that the MCS-90 did not apply to a judgment entered against someone other than the named insured.

Larry Rabinovich

13. FMCSA *Watch*

It was another busy year in 2023 for the Federal Motor Carrier Safety Administration (FMCSA) on the regulatory front. Highlights of actions taken by the agency are summarized below.

On June 22, FMCSA and The National Highway Traffic Safety Administration announced a joint proposed rule that would require heavy trucks to have automatic emergency braking (AEB) systems aimed at mitigating the frequency and severity

of rear-end crashes. The proposal was issued in response to petitions granted in 2015 to several safety groups and a congressional mandate under the Bipartisan Infrastructure Law. It would also require that vehicles weighing more than 10,000 pounds have an electronic stability control system to work in unison with the AEB system. The proposal would be effective either three or four years after the rulemaking becomes final, depending on the stability control system deployment timeline. The agency opened the proposed rule for public comment and is expected to take further action in 2024.

In July, FMCSA announced an extensive program to investigate and take action against movers and brokers aiming to defraud consumers relocating from one state to another. This program, titled "Operation: Protect Your Move," was started in response to the significant uptick in complaints of movers holding household goods hostage and extorting exorbitant additional charges from consumers. As part of a three-week enforcement sweep to curtail household goods moving scams, dozens of agency personnel conducted more than 100 investigations across 16 states, which resulted in over 60 enforcement actions that may lead to the revocation of operating authority for some movers and brokers.

Eleven state agencies have signed on to the program, including the attorneys general offices for Arizona, Arkansas, Florida, and Texas. Additional state partners are expected. Additionally, FMCSA formed an internal technical advisory group to help guide future efforts. The agency is improving training programs for investigators, hiring additional personnel, and expanding its consumer education and outreach footprint, including a digital toolkit with updated videos, checklists, and other useful information to help individuals prepare for an interstate move and spot red flags before it's too late.

On August 23, the agency announced a proposed rule regarding driver safety fitness determination. More particularly, FMCSA is interested in developing a new methodology to determine when a motor carrier is not fit to operate commercial motor vehicles in or affecting interstate commerce. FMCSA requested public comment on the need for a rulemaking to revise the regulations prescribing the safety fitness determination process; the available science or technical information to analyze regulatory alternatives for determining the safety fitness of motor carriers; feedback on the agency's current safety fitness determination regulations, including the process and impacts; and the available data and costs for regulatory alternatives reasonably likely to be considered as part of this rulemaking. In October, the administration stated that it had received comments from several transportation organizations regarding the proposed rule and thus extended the time period for public comment. It is expected that FMCSA will take further action on this proposed rule in 2024, which could have a significant impact across the industry.

On November 15, FMCSA announced a final rule that brokers, surety providers, and financial institutions must comply with new provisions regarding immediate suspension, financial failure or insolvency, and enforcement authority, effective as of January 16, 2025. This rule, which was passed to stem financial fraud in the broker industry, will require brokers, surety providers, and financial institutions to comply with provisions regarding assets readily available and entities eligible to provide trust funds for FMCSA Form BMC-85, Broker's or Freight Forwarder's Trust Fund Agreement.

Below are a few key takeaways:

1. The final rule sets out a list of the acceptable asset types a BMC-85 trust may contain. FMCSA has determined that these asset types are readily available because they are stable in value and can be easily liquidated within seven calendar days of an event that triggers a payment from the trust.
2. Importantly, when a broker or freight forwarder's available financial security falls below $75,000, FMCSA may suspend its operating authority registration.
3. The rule requires that if the surety/trustee becomes aware that a broker or freight forwarder is experiencing financial failure or insolvency, it must notify FMCSA and initiate cancellation of the financial responsibility. However, if the broker or freight forwarder subsequently cures the default, and the surety company or financial institution reinstates the bond or trust, or the broker or freight forwarder obtains a new bond or trust, FMCSA will lift the suspension notice and update the FMCSA Register, the administration said.
4. The administration will first provide notice of the suspension to the surety/trust fund provider, followed by 30 calendar days for the surety or trust fund provider to respond before a final decision is issued.
5. The rule removes loan and finance companies from the list of providers eligible to serve as BMC-85 trustees because this type of institution is not subject to the rigorous federal regulations applicable to chartered depository institutions or to the state regulations.

In other developments:

88 Fed. Reg. 3, 830 (Jan. 5) – FMCSA proposed a rulemaking that would set guidelines for suspending the authority of brokers and freight forwarders whose readily available financial responsibility fall below the mandated minimum $75,000. Those entities (such as sureties) maintaining financial responsibility funds for brokers or freight forwarders must notify FMCSA whenever a payment is made out of those funds.

88 Fed. Reg. 21, 6691 (Feb. 1) – a proposed rulemaking for the safe integration of commercial motor vehicles with automated driving systems into the stream of commerce on the nation's highways. The new rules would address only those advanced levels of automation where all of the driving tasks would be controlled without the intervention of a human driver. FMCSA is considering requirements that motor carriers operating automated vehicles notify the administration, that safety regulations applicable to human drivers on the road, such as hours of service limitations and drug/alcohol testing, also extend to those operating automated vehicles from a remote location. The administration is also seeking comments on ways to address the unique problem posed by conducting roadside inspections of automated vehicles with no driver available.

88 Fed. Reg. 51, 16207 (Mar. 16) – a proposed ~9% overall reduction of the annual registration fees that states charge for participation in the Unified Carrier Registration (UCR) Plan.

88 Fed. 197, 70897 (Oct. 13) – FMCSA issued a final rule narrowing the circumstances under which a government-declared emergency can justify an automatic exemption from full compliance with safety regulations for motor carriers providing services to aid in governmental relief efforts. The automatic regulatory relief period is 30 days for a national emergency declared by the president, in which case the exemption applies to all regulations within 49 C.F.R. §§ 390-399, and 14 days for a regional emergency declared by a governor or FMCSA, in which the exemption applies to hours of service only.

Finally, on December 28, FMCSA (as well as the Federal Aviation Administration, Great Lakes St. Lawrence Seaway Development Corporation, Maritime Administration, Pipeline and Hazardous Materials Administration, Federal Railroad Administration, and National Highway Traffic Safety Administration) published final rules adjusting civil penalties that can be imposed for violations of their regulations. 88 Fed. Reg. 248, 89551. The annual update of penalties (without notice and comment) was mandated by Congress, 28 U.S.C. § 2461, in order to preserve their deterrent effect. The formula for adjusting the FMCSA penalties is the amount of the existing penalty times 1.03241, resulting in relatively modest increases across the board.

Sanjeev Devabhakthuni

14. Predatory Towing

Several years ago we litigated a case in which the entity which had cleaned up an accident site and towed and stored the rig involved submitted a bill to the motor carrier and its insurer which, with interest charges piling up, exceeded $600,000 by the time the case was (successfully) mediated. This issue has been of great concern to some in the industry for years; lobbying has been successful in some cases to restrict some of the most outrageous practices. But there is still a long way to go.

The American Transportation Research Institute (ATRI) recently published the results of a study regarding predatory towing practices and how trucking companies can mitigate the costly effects of such tactics. The study, entitled, "Causes and Countermeasures of Predatory Towing," November 2023, defined the practice and presented the problem as follows:

Predatory towing is, generally, any incident in which a [towing and recovery] company egregiously overcharges, illegally seizes assets, damages assets by use of improper equipment, or illegitimately withholds release of a truck, trailer, and/or cargo. Overcharges can occur in two primary ways, through either excessive costs (whether hourly, per mile, or per pound) or charges for unnecessary additional equipment. If there is insurance that covers the [towing and recovery] services, insurers typically pay a large portion of these excessive costs or the costs of fighting them, which in turn is passed on to motor carriers in the form of higher premiums. Even when insurance covers [towing and recovery] charges, excessive invoices often exceed the applicable limits, leaving motor carriers and/or drivers responsible for [the] difference.

The impetus for the study was increased public awareness of these predatory practices due to media coverage of several significant incidents since 2020. For example, in 2020 a motor carrier in Virginia received an invoice for more than $200,000 for recovering and towing a truck involved in a single vehicle incident. In Chicago, unsolicited and illegal tows have been on the rise over the past five years.

In 2023, another noteworthy example occurred when a carrier received a $6,000 invoice for a 16-mile tow. The consequences to a motor carrier for questioning a towing and recovery company's practices can be debilitating, particularly to a small carrier or owner-operator. It can also adversely affect supply chains, because the towing companies will often retain equipment and cargo until they receive final payment. The study, which surveyed 350 motor carriers, found that motor carriers' frequent inability to make their own choice of a towing and recovery company can be a big part of the problem. Interested groups in multiple states have lobbyied for more regulation over the towing and recovery industry.
This increased legislative activity has also caught the public's attention.

Many motor carriers confirmed to ATRI that they have experienced serious overcharging by towing companies as well as hostage-taking of equipment.

States have implemented a variety of rules and regulations intended to combat predatory towing practices, including mandating maximum towing rates, ensuring prompt release of cargo, giving motor carriers a choice of towing and recovery company, regulating vehicle seizure, requiring invoice itemization, and creating processes for motor carriers to file complaints about predatory practices. ATRI also made some suggestions for motor carriers going forward. The full report is available on the ATRI website.

The report dealt briefly with insurance issues, as insurers are generally the ones who end up paying the towing companies or litigating with them. We have discussed some of those here in recent years.

Among the coverage issues which need to be addressed in any given case are:

1. Has there been damage (a trigger for the auto liability coverage)?
2. Who suffered the damage (arguably not the towing company)?
3. Did anyone whose property was damaged assign rights to the entity making the claim?
4. Is the claim contractual in nature? What is the basis for coverage, if any, under an auto liability policy?
5. Does the MCS-90 need to respond? Is there (or will there be) a final judgment? How is environmental restoration to be defined?
6. Are storage charges covered by the policy? Do they trigger the MCS-90?

The ATRI report is a good way to get a serious conversation going.

Ian Linker

15. Spoliation

In *Manson v. B&S Trucking of Jackson, LLC*, 2023 US Dist. LEXIS 75558 (W.D. Tex), the plaintiff alleged that he was injured when his vehicle was struck by a truck driven by an employee of B&S Trucking of Jackson, LLC. The plaintiff argued that his attorneys sent B&S a letter of representation and asked B&S to preserve any and all evidence related to the incident in question. The plaintiff thereafter moved for sanctions under Federal Rule of Civil Procedure 37(e), claiming that B&S had failed to preserve the relevant electronically stored driver logs and truck inspection reports. FRCP 37(e) allows the court to impose sanctions against a party when it determines that the party failed to take reasonable steps to preserve electronically stored information (ESI) and the information sought cannot be replaced or restored through reasonable means.

With respect to the claim that B&S failed to preserve any electronic inspection logs, the court found that the plaintiff relied on speculation and conjecture that the vehicle inspection reports may contain relevant information. The plaintiff made no allegations in his complaint that the vehicle was malfunctioning or that any equipment on the B&S vehicle was broken. Thus, the court found discovery of the inspection reports was not justified because they were not relevant. With respect to the driver logs, the court found the duty to preserve the logs was triggered when B&S received the letter of representation. While the court found the request to preserve evidence was overly broad, it noted that driver logs are regularly sought through discovery in trucking cases. Further, B&S acknowledged that there was no effort made to preserve these logs. However, there was evidence that a former B&S employee had access to the program where these logs were kept, though no efforts had been made to contact the former employee to determine if the logs were accessible. The court found sanctions to be premature until such efforts were made.

In *H. Le Doux v. Western Express, Inc.*, 2023 WL 2842777 (W.D. Va.), the defendant, Worthy, was driving a tractor-trailer involved in an accident. The plaintiff sought sanctions for spoliation with respect to Worthy's "personal tablet." Defendants initially denied the existence of the tablet but the plaintiff's counsel provided a photograph of the tablet mounted to defendants' windshield, after which Worthy testified that he wiped the data from the tablet and gave it to his girlfriend. In considering the plaintiff's spoliation motion, the court noted "Worthy's act of deleting the data on his personal tablet further supports that he acted to intentionally deprive plaintiff of this information. In December 2020, Worthy was put on notice that plaintiff's counsel was seeking the tablet because defense counsel showed him a picture sent by plaintiff's counsel, which depicted a silver tablet in his windshield... After being on notice that plaintiff's counsel was seeking the tablet mounted in his windshield, he deleted the data on his personal tablet and gave it to his girlfriend in early 2021... Thus, he deleted his personal tablet's data after—and within several months of—learning that plaintiff's counsel was attempting to collect data [from] the tablet mounted on his windshield."

Accordingly, the court held that "a permissive adverse inference instruction against Worthy is proportionate to the prejudice and harm experienced by plaintiff. The Court will thus instruct the jury that it is permitted, although not required, to presume that the lost data on Worthy's personal tablet was unfavorable to Worthy."

Bridget Daley Atkinson

16. Jurisdiction

Mechlin v. Progressive Cas. Ins. Co., 2023 US Dist. LEXIS 19361 (E.D. Mo)

The plaintiff, a Missouri citizen, filed a lawsuit in state court seeking damages for the defendant's refusal to pay for injuries sustained in a car accident. The defendant, an Ohio corporation, removed the action based on diversity jurisdiction. In response, the plaintiff filed a motion to remand, with the defendant filing a motion to dismiss pursuant to F.C.R.P. § 12(b)(6).

The plaintiff's motion to remand argued that diversity jurisdiction was not established pursuant to the "direct action" clause in 28 U.S.C. § 1332(c)(1). Under the clause, when a foreign insurer is a named party to a lawsuit and the insured party is not, the insurer is deemed to share the citizenship of the insured party, thus spoiling diversity to gain into federal court. However, the Eastern Division rejected this argument, holding that 28 U.S.C. § 1332(c)(1), does not apply to suits "against the insurer based on its independent wrongs." Because the plaintiff sued the insurance company directly, § 1332(c)(1) did not apply and Missouri citizenship was not applicable to the defendant. The court denied the plaintiff's motion to remand.

The defendant's §12(b)(6) motion, asserted that dismissal was warranted because the plaintiff cannot proceed in a direct action against an insurer providing coverage for an insured who allegedly caused the harm, and the plaintiff did not have a viable breach of contract claim because defendant did not deny liability coverage to the insured party, Bruce Bote.

The defendant also argued that the plaintiff has no uninsured motorist coverage breach of contract action against it for the alleged liability of Bote because coverage was not denied for the plaintiff's claims against Bote. The defendant relied on a single email between itself and the plaintiff's counsel (asserting that Bote was uninsured on the date of the accident) to support this theory. The email was disregarded by the court, as it was outside of the pleadings and not a part of the public record.

The court denied the 12(b)(6) motion, holding that the defendant did not establish a basis for ruling that the plaintiff failed to state a claim for breach of contract.

Hurtado v. Am. Transp. Servs., Inc. 2023 US Dist. LEXIS 157526 (DNM)

A complaint was filed in state court and was removed based on diversity jurisdiction and fraudulent joinder. The action sought damages for injuries related to a traffic accident occurring on New Mexico Interstate 40 with a tractor trailer. The tractor trailer—owned by defendant AM Logistics—allegedly contained a haul brokered by Lange Logistics. Defendants Tom Lange, Lange Company International d/b/a Seven Seas Fruit, and Lange Logistics (collectively "Lange Defendants") filed motions to dismiss pursuant to F.R.C.P. § 12(b)(2) and F.R.C.P. § 12(b)(6).

The Lange Defendants presented similar 12(b)(2) arguments: 1) defendants were not subject to specific and general personal jurisdiction in New Mexico because the constitutional standards are not satisfied; and 2) the requirements of the New Mexico long-arm statute were not met. Lange Defendants argued that they are not subject to general personal jurisdiction because they are incorporated under the laws of Missouri and their principal offices are located in St. Louis. Furthermore, specific personal jurisdiction did not because defendants did not have the required "minimum contacts" with New Mexico.

Notably, the Lange Defendants asserted that there was no evidence regarding an agreement with AM Logistics (the owner of the tractor trailer) that established any "minimum contacts" with New Mexico.

Ultimately, the court found no basis for general personal jurisdiction because the Lange Defendants were not "at home" in New Mexico by virtue of its single "place of incorporation" or "principal place of business." The court also concluded that specific jurisdiction failed because the crash did not arise out of business activities specifically directed at New Mexico by the Lange Defendants.

The 12(b)(6) motion was granted because the plaintiff did not present evidence supporting the existence of a joint agreement between the Lange Defendants and the other defendants, nor provide specific factual allegations, that if proven, would demonstrate the existence of an agreement. Additionally, the court reasoned that without the existence of an agreement, the plaintiff attempted to hold the Lange Defendants responsible for the activities of other entities.

White v. Protective Ins. Co. 2023 US Dist. LEXIS 24416 (W.D. La.)

The plaintiff, a Louisiana citizen, filed a lawsuit against the defendants seeking to recover damages related to a vehicle accident occurring on a Louisiana road, including two Louisiana defendants, Brown Claims Management and LA State Farm. Despite the presence of the Louisiana defendants, defendants filed a Notice of Removal pursuant to 28 U.S.C. § 1332. The defendants asserted that Brown and LA State Farm were improperly joined to defeat subject matter and removal jurisdiction because plaintiff had "no reasonable possibility of recovery." The plaintiff filed a motion to remand for improper subject matter jurisdiction, and Brown filed a motion to dismiss pursuant to F.R.C.P. § 12(b)(6).

The plaintiff claimed Brown had acted in bad faith under Louisiana law when it purportedly misrepresented a liability determination with respect to insurance coverage. Brown contended that it is not an insurance company subject to

Louisiana's bad faith laws against insurance companies.

The plaintiff pushed back, asserting that her claim was a misrepresentation claim, not a bad faith claim.

Brown's argument against the plaintiff's motion to remand was derivative of its 12(b)(6) motion. In support of Brown, co-defendants argued that plaintiff had no reasonable possibility of recovery against it or LA State Farm for failure to pay a property damage claim because it had already been paid by Brown.

Brown's 12(b)(6) motion was granted. The court reasoned that plaintiff did not establish the elements of a misrepresentation claim, noting that plaintiff did not allege any facts demonstrating she reasonably relied on the misrepresentation to her detriment and there was no indication that the alleged misrepresentation was brought to plaintiff's attention. Because there was not a likelihood of recovery against Brown, the court held that its presence in the action may be disregarded for purposes of diversity jurisdiction.

However, the court found that the plaintiff established a plausible claim of recovery against LA State Farm for medical payments and uninsured motorist coverage, by establishing that she incurred $428,000 in medical expenses. Because the plaintiff had a viable cause of action, defeating defendant's 12(b)(6) motion to dismiss, LA State Farm was not improperly joined, and diversity jurisdiction was not established.

Thus, plaintiff's motion to remand was granted due to the Western District's lack of subject matter jurisdiction.

O'Hara v Ace Prop. & Cas. Ins. Co., 2023 US Dist. LEXIS 137642 (W.D. La)

The plaintiffs filed a lawsuit in Louisiana's 9th Judicial District Court, asserting wrongful death and survival actions against defendants, and sought damages for the related motor vehicle accident. The action was removed to the Western District of Louisiana by the defendants on the basis of diversity jurisdiction. The plaintiffs filed a motion to remand, asserting that a parallel state action filed by defendant Cassandra Arnold against Maximillian Reppel and his insurer, should result in the Western District's abstention of its jurisdiction pursuant to the Colorado River-Moses H. Cone Abstention Doctrine.

The court set out three bases for abstention from the exercise of federal jurisdiction which it needed to consider. Abstention is appropriate: (1) in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law; (2) where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; and (3) where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings.

Because the court determined that the above circumstances were not applicable, it evaluated whether abstention may be granted upon the finding of exceptional circumstances.

The court evaluated the following factors to determine if exceptional circumstances existed:

1. assumption by either court of jurisdiction over a res;
2. relative inconvenience of the forums;
3. avoidance of piecemeal litigation;
4. the order in which jurisdiction was obtained by the concurrent forums;
5. to what extent federal law provides the rules of decision on the merits; and
6. the adequacy of the state proceedings in protecting the rights of the party invoking federal jurisdiction.

The court determined that one the fourth factor (primarily due to the lack of proceedings) was applicable and in the plaintiff's favor, holding that the action did not meet the exceptional circumstances necessary to establish abstention. The court denied the plaintiff's motion to remand.

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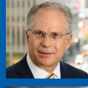

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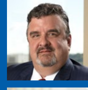

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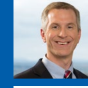

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