BARCLAY DAMON LLP

Transportation: Annual Year in Review

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Barclay Damon's transportation team is pleased to present our annual survey of developments in the field of transportation law. We have summarized the key facts and holdings in significant decisions from around the country and, in some cases, offered editorial comment on the strengths or weaknesses of the legal analysis and the potential impacts of the decisions on future litigation.

One issue underlying many of the decisions is the continuing practice of what some refer to as "double brokering," despite attempts by the USDOT to crack down on the practice. As dispatchers struggle to find drivers to haul the cargo they have promised to move, the involvement of various players who end up not actually touching the freight presents targets of opportunity for plaintiffs' counsel and keeps coverage counsel busy.

This year, our lead article focuses on issues arising in litigation over insurance coverage for transportation losses. As in past reviews, this year's edition features an extensive discussion of cargo-loss litigations arising under the federal Carmack Amendment. And in several states, this has been a particularly active year for the highest courts wrestling with issues of uninsured and underinsured motorist coverage in the context of commercial, auto, and truckers policies.

We look forward to your comments and feedback. Our transportation team is backed by our colleagues in the firm's many practice areas and stands ready to help on a range of issues, from drafting documents and policies to defense, and from coverage litigation to appeals.

Larry Rabinovich

1. *Insurance Coverage Litigation*

Always looking for additional deep pockets, plaintiffs' lawyers sometimes look to the owners and insurers of trailers to contribute to judgments secured against the motor carriers that have possession of those trailers. *Sentry Select Insurance Co. v. Lopez*, 241 F. Supp. 3d 777 (W.D. Tex.) is among the latest in a series of decisions relating to trailer coverage, stemming from a one-vehicle accident that resulted in the death of the two men who had shared driving duties for the rig. The accident has led to many litigations, some of which we have described in past years. Goal Transports, insured by Sentry, had leased the trailer at issue and had hired Trans Front to move its freight on an ongoing basis between Texas and Mexico. At the end of the day, though, it was Moore Transportation, with drivers Munoz and Franceware, who were hauling the Goal trailer with cargo unrelated to Goal's business and far from the international border. The two men were injured in a one-vehicle collision. Goal was unfamiliar with Moore and had not been in touch directly with Moore or the drivers. Could the Moore drivers, nonetheless, be deemed permissive users of the Goal trailer?

Sentry argued that Franceware and Munoz did not qualify as permissive users of the trailer. There was certainly no explicit permission, as Goal did not specifically authorize them to "use" the trailer—Goal did not even know they were going to be using its trailer. That left only the question of whether the men had implied permission to use the trailer. The evidence indicated that Goal, working through a transportation broker, had entrusted trailers over an extended period to Trans Front which operated between Texas and Mexico. Apparently, the arrangement did not include keeping a close record of where each trailer was because one of those trailers ended up attached to a Moore trailer en route to North Carolina. Goal did not explicitly authorize that use, but the claimants argued that it gave implied permission or, at least, there was a question of fact for the jury, since Goal did not keep close control over its trailers or specify that only Trans Front move them. Essentially, the argument was that Goal didn't really care who used its trailers and that this was the same as implied permission. The court found that this did not qualify as implied permission, because there had been no communication of any kind between Goal and Moore or its drivers. In any event, Moore's drivers were pulling the trailer hundreds of miles away from Goal's routes, so even had there been implied permission, the drivers would have long since deviated from that permission, vitiating any coverage. This was a relatively easy call for the court. Often, though, trailer coverage is a much closer question.

Permissive use was one of the issues that New York's highest court ruled on in *Carlson v. American International Group, Inc.*, 2017 N.Y. LEXIS 3280. MVP Delivery & Logistics and its driver, William Porter, had been found liable to the estate of Claudia Carlson for over $7 million for negligence that led to a fatal two-vehicle collision. The MVP truck bore a painted DHL Worldwide Express logo, and although DHL had been found not to be vicariously liable, the estate sued DHL's insurers on the theory that their policies, which covered hired autos, provided coverage to MVP and Porter. MVP worked pursuant to a cartage agreement with DHL. At the time of the loss, though, Porter was on a personal errand. Arguing that their policies provided no coverage for MVP and Porter, the insurers moved for summary judgment on various grounds. After several appeals, the case eventually made it on to the docket of the Court of Appeals.

One of the disputed issues was whether the MVP vehicle was a "hired auto" within the meaning of the policies. As the USDOT leasing regulations were not implicated (apparently the contract was limited to local deliveries), the MVP truck was not deemed hired by DHL as a matter of law. The court noted that the status of "hired auto" would turn on the level of control given to DHL under the contract, as well as the actual degree of control maintained by DHL. Those issues will need to be resolved at trial; the court rejected the appellate court's argument that calling MVP an "independent contractor" resolved the issue.

For coverage to attach, the vehicle would not only need to be hired, but DHL would have needed to give MVP permission to use the vehicle. MVP and Porter sought coverage as permissive users of a covered auto. One must acknowledge that this question is artificial, to a large degree, since the vehicle was owned by MVP and one might think that MVP does not need anyone

else's permission to use its own vehicle. The question of permissive use, when we deal with an owner-operator under lease to a motor carrier, must mean something—but what, precisely? The estate claimed that in this context, permissive use means that the user is not a thief. As long as Porter and MVP were legally using the vehicle—and they were—they were permissive users. Jumping on the fact that Porter was on a private errand, the insurers responded that he could not have been a permissive user. The court, quite properly, rejected that argument, noting that the doctrine of respondent superior is unrelated to the question of permissive use. The majority seemed satisfied that if the jury were to conclude that the MVP vehicle qualified as a hired auto, MVP and Porter would indeed qualify as permissive users.

We are sympathetic to the views of the lone dissenter, who pointed to New York precedent that found, in similar circumstances, that no hiring had occurred. There is also precedent from around the country that requires a separate contract giving the lessee control over the auto as a prerequisite for a finding of "hired auto."
The majority drew factual distinctions to explain why it had not followed the earlier precedent, but it may well be that the bar for finding hired-auto coverage in New York has been lowered.

Had the Court of Appeals upheld the decision of the appellate division, below, it never would have reached the issue that led to the court's most surprising finding. Carlson's action was brought under New York Insurance Law § 3420(a)(2), which permits, under very specific circumstances, an action by a judgment creditor against an insurer with respect to policies "issued or delivered in the state." One of the policies before the court had been issued by the insurer at its New Jersey offices and was delivered to DHL at its Florida headquarters. The policy was, therefore, not issued or delivered in New York, argued the insurer—a position that the intermediate appellate court had accepted.

As DHL operates in New York and hired MVP to deliver shipments in New York, it certainly seems fair that its insurers be subject to a § 3420(a)(2) action in the state, which is what the Court of Appeals decided in this case. The court observed, for instance, that the language of the statute was "broadened" (in its view) in 2008, from "policies issued for delivery [in New York]" to policies "issued or delivered" (in New York). Even under the older statute, the court had held that the words "issued for delivery" included any scenario in which the insured was physically present and doing business in the state.

The dissent, though, insisted (and, again, we are sympathetic) that "issued or delivered" means what it says, that either the insurer must be located in the state or, if it is out of state, that the insured's address listed on the declarations be a New York address. This plain-language reading seems well-grounded, although the concern that insurers will get sued in New York in cases in which neither insured nor insurer is present seems a bit of a stretch.

The majority was quite aware of what we see as the main difficulty with the decision. The phrase "issued or delivered" is found elsewhere in the New York statutes and it is not hard to imagine that parties in future cases will attempt to use the decision to their advantage in different contexts, such as uninsured motorist coverage, or in assessing choice of law factors. The majority addressed this concern directly: "…We do not here purport to judge the meaning of the words 'issued or delivered' in any context other than section 3420. Identical words may be used in different contexts with different meanings and different legislative histories, and we do not foreclose any such interpretations by our decision here."

The issue of trailer coverage was front and center in *Great West Casualty Co. v. Selective Insurance Co. of America*, 2017 U.S. Dist. LEXIS 162274 (W.D. Pa.). Scott Rice had been killed in his car when the rear wheels of the trailer owned by Midwest Transport and pulled by a tractor owned by Veltri Trucking and operated by Reggie Sell, a Veltri driver, detached from the rig and struck the car. Both Veltri and Midwest had contracts with the postal service to deliver mail, although there was no contract between Veltri and Midwest. Nonetheless, at a terminal operated by Cargo Force, Sell was dispatched to haul the empty Midwest trailer to a post office facility. Midwest apparently knew of the poor condition of its trailer and had taken it out of service, but Cargo Force sent it out anyway. As Sell was en route, the rear trailer wheels detached. Selective insured Veltri under a policy

which covered Midwest, although the decision does not indicate whether the trailer was covered under that policy. The underlying case had not yet been tried, so the court declined to rule on questions relating to Selective's duty to indemnify, if any, but the court did address the duty to defend, finding that Selective ought to be defending Midwest, in addition to Veltri.

Selective's policy was written on the business auto form modified by the truckers endorsement. The policy defines "insured" to include the owner or lessor of a trailer hired or borrowed by Veltri while connected to a covered power unit. Selective's coverage was primary if a covered tractor owned by Veltri was being used. Did Veltri hire or borrow Midwest's trailer? If someone had asked us, we would have said no. The trailer was sent, essentially as cargo, from one facility to another. Veltri and its employees presumably had no right to use the trailer for their own purposes. Looking to the allegations of the complaint, though, the court felt that a liberal reading, as required to assess the duty to defend, could include the possibility that Veltri had borrowed the trailer from Midwest. That seems, to us, a significant stretch. In any event, because it is possible that the vehicle was borrowed, Midwest qualified as an insured under the Selective policy, as least for purposes of the defense obligation.

Selective argued next that even if Midwest was an insured, it held that status only while its trailer was attached to a covered tractor. The allegations against Midwest, though, were for negligent maintenance of its trailers—negligence that took place before the trailer was hooked up to the tractor. Great West argued that Selective covers Midwest because the loss arose out of Sell's use of the Midwest trailer. Selective disagreed, claiming that Midwest could not have been an insured at the time it was negligent.

If Selective were correct on this point, one must ask why the policy has a separate definition of "insured" that relates to trailer owners. If the intent was simply to provide coverage for the owner of a trailer when it is sued under a vicarious-liability theory, then the provision seems duplicative of another definition, the one that identifies as an insured anyone alleged to be vicariously liable for the acts of another insured. The court found precedent in federal case out of Florida involving negligent loading of a trailer, which was done prior to the time the trailer was hooked-up to the covered power unit. The court in *Keymark Corp. of Florida v. Empire Fire and Marine Ins. Co.*, 2008 U.S. Dist. LEXIS 127042 (M.D. Fla.) found that the shipper (and trailer owner) was an insured. Considering all of this, the court concluded that Selective had a duty to defend Midwest.

Houston Specialty Insurance Co. v. Chesapeake Operating, LLC, 2017 U.S. Dist. LEXIS 160258 (W.D. La.) involved the interpretations of both the general-liability coverage form and the motor carrier form. Houston issued a policy to DCW Transport, which had entered into a contract with Chesapeake to work at a site that Chesapeake was developing. Courtney Williams, one of DCW's drivers, was injured when the employee of another contractor (Fodale Energy) struck the DCW truck with a forklift. On the GL front, the issue was whether Chesapeake qualified as an insured under endorsement CG 2010 (Additional Insured—Owners, Lessees or Contractors), which covers the additional insured for vicarious liability arising out of the acts or omissions of the named insured or its agents. As the negligent acts were alleged by Williams to have been committed by Fodale's employee, the endorsement on its face was not relevant.

Chesapeake, though, made the following argument (one that we find is often presented in this context): namely that, as part of its defense, Fodale was likely to claim that Williams contributed to his own injuries and shares in the blame. Thus, because Williams was acting on behalf of DCW and his actions may have contributed to the injuries (that he himself suffered), the terms of endorsement CG 2010 are triggered, and Chesapeake is entitled to coverage. The court rejected Chesapeake's argument, citing a decision by the Fifth Circuit. The duty of an insurer to defend depends upon the allegations of the complaint, and Williams's complaint did not, of course, allege that he was responsible for his own injuries. Accordingly, Houston had no duty to defend Chesapeake under the GL form.

The court then turned to the motor carrier form, which covers an insured for bodily injury or property damage caused by an accident and arising out of the use of a covered auto. The only Houston-covered auto involved

was the DCW truck. Although the court did not use the terms, its conclusion that the motor coverage form did apply was based on the conclusion that the covered auto was the *situs* of the accident, but that there was no *legal nexus* between any use of the vehicle and the injury. The principle is that a loss arises out of the use of a vehicle only if the automobile is essential to the theory of liability—the alleged breach of duty must arise out of the use of the auto. Here, the victim was sitting in the covered auto, but the tortfeasor was operating a forklift, not the covered auto. There was, therefore, no duty to defend Chesapeake.

The scope of the employee exclusion in auto-liability policies has been a frequent issue in coverage litigations in recent years, and the question is complicated by the ongoing tendency of motor carriers to classify their drivers as independent contractors. (The standard ISO policies do not provide substantive definitions of the word “employee”; that “employee” includes leased workers but not temporary workers gets one only so far.) The insurer in *Cincinnati Specialty Underwriters Insurance Co. v. Chajon*, 2017 U.S. Dist. LEXIS 119989 (N.D. Tex.) successfully moved for summary judgment on the basis of an employee exclusion, largely because it had provided a fairly broad definition of “employee” in its policy. This case involved a GL policy but, in ruling for the insurer, the federal court relied on several decisions, including one involving a truckers policy, to hold that the insurer was entitled to judgment as a matter of law. The basis for the holding was that broad definition of the word “employee,” which applies without regard to how the individual was classified by the employer, or to the precise claims set out in the tort complaint.

May an insurer enforce a step-down clause in the event a non-reported driver is involved in a loss? *National Independent Truckers Insurance Co., RRG v. Mathieu*, 2017 U.S. Dist. LEXIS 174238 (M.D. Fla.) answered in the affirmative. The policy—providing commercial motor vehicle coverage—listed two drivers, neither of whom was behind the wheel when a company vehicle, operating intrastate in Florida, was involved in an accident. The policy contained an unreported-driver endorsement that reduced the policy limits (for all insureds including the named insured) when an unreported driver was operating a covered auto. Instead of the policy limits applying, the insurer would be responsible only for the minimum liability-insurance coverage required under the state’s financial responsibility law. There has been some uncertainty as to whether language of that sort is a reference to motor *vehicle* financial security limits or motor *carrier* financial security limits. The court here adopted the latter view, which may have played a role in its willingness to enforce the provision.

The evidence showed that the insured’s vehicle was operating intrastate (although on other occasions it operated interstate) and was hauling non-hazardous freight, which meant that under Florida law, $300,000 in coverage was required. Rejecting the argument that it was the federal limits, rather than Florida limits, that should be applied, the court found that the insurer owed only $300,000, even though the declarations page showed the limits as $750,000.

The classification of truck drivers (usually owner-operators) as employees or independent contractors is a contentious issue that is central to many of the legal disputes in transportation law. We have devoted an entire article to the topic, “Truck Drivers as Employees,” (section 6) but here we discuss the employee exclusion—a popular topic we return to every year in this review. *Spirit Commercial Auto Risk Retention Group v. Kailey*, 2017 WL 2935726, 2017 U.S. Dist. LEXIS 105626 (E.D. Mo.) involved a coverage action arising out of a collision, which led to the death of the co-driver sleeping in the sleeper berth at the time of the loss. Spirit insured Kailey Truck Line—not the most sophisticated of entities by the sound of things—which had not spent any effort explaining to its drivers whether they were employees or independent contractors. The estate sued the trucking company and the co-driver; Spirit moved for summary judgment on the ground that the loss was excluded because of the employee- and fellow-employee-exclusions in its policy.

Though the issue was not free of uncertainty, the court applied California law; this was significant because Spirit was primarily arguing its policy should be interpreted under federal law, namely the definition of “employee” found at 49 CFR § 390.5, which arguably includes owner-operators in the definition of “employee.” The Spirit policy, like most policies, did not specifically

incorporate the regulatory definition; this has been one of the issues courts consider when ruling on the scope of the employee exclusion. Some courts have found that the USDOT's declaration ought not to be read into the policy; others think it should be, because truckers and motor carrier policies are written with an understanding of the reality that both sides share, which includes the fact that drivers are, for various purposes, deemed statutory employees, even if they do not receive W-2 forms or meet the standard definition of "employee."

The *Spirit* court was aware of the decision in *Consumers v. P.W.*, 307 F.3d 362 (5th Cir. 2002), holding that the regulatory definition ought to be incorporated into the definition of "employee" for purposes of the exclusion. The court, though, found decisions in the Seventh and Tenth Circuits that it felt disagreed with *P.W.*, and on that basis, held that the employee exclusion did not apply. We think that the court's analysis is problematic: The decisions that the *Spirit* court cited dealt not with the USDOT regulations, but with the MCS-90 and, in particular, the question of whether the terms of the MCS-90 are read into the policy, or vice versa. That is an important issue, but it has nothing to do with the question before the court—of whether the terms of the regulatory definition illuminate the policy's use of the word "employee." The applicability of the exclusion depended not at all on the MCS-90. The court seemed to confuse the regulations generally with the MCS-90. In fact, one can argue that even the regulatory definition is not anything more than a guidepost: In a business where those responsible for trucks are deemed to have vicarious exposure for truck drivers, regardless of their formal classification, there is an argument for reading the employee exclusion somewhat broadly.

Larry Rabinovich

2. *Transportation Network Companies*

Prominent transportation network companies (TNCs) continue to attract lawsuits by unhappy competitors. The plaintiff in *Southern Transportation, Inc. v. Lyft, Inc.*, 2017 U.S. Dist. LEXIS 101752 (W.D. Tenn.), which sued both Lyft and Uber, operated a taxicab service in Memphis and complained that the TNCs unlawfully interfered with his business relationships with prospective customers. The court, however, found that it had failed to allege any facts to support the theory that the failure of the TNCs to obtain proper operating permits actually caused it harm. The court found further that the allegations that the TNCs intentionally competed for the plaintiff's business did not state a claim that the TNCs intentionally caused a breach or termination of the plaintiff's prospective business relationships with its customers. The defendants' motion to dismiss the complaint was granted.

By comparison, the plaintiff in *A White & Yellow Cab, Inc. v. Uber Technologies, Inc.*, 2017 U.S. Dist. LEXIS 49803 (N.D. Cal.) alleged violations of California's unfair competition law, unfair business practices law, and false advertising laws. Essentially, the plaintiff's complaint stated that Uber was operating a de facto taxi service, without complying with the laws and regulations governing taxi services. The court, however, refused to entertain the plaintiff's theory which would, effectively, require a finding that the Public Utilities Commission was improperly regulating Uber as a transportation network company. Moreover, the court found that the plaintiff's allegation--that it lost business because customers relied on Uber's (allegedly) false claims of a safer service--were inadequate to support a false advertising claim, because the plaintiff taxi company did not allege that it had relied on any false representations itself. Uber's motion to dismiss was granted, but without prejudice to the plaintiff's attempt to amend its complaint to state additional facts which would adequately support its case.

In *Rasier v. City of New Orleans*, 222 So.3d 806 (La. Ct. App.), a newspaper filed a public records request with the City of New Orleans seeking disclosure of the city's registries of all drivers for all of the TNCs operating in the city. Raiser (the parent company of Uber) filed an action seeking to block the request. The court found that while the TNCs might have a legitimate business interest in keeping their driver rosters secret, that interest did not trump Louisiana's open public records law. Nevertheless, the court also found that the individual drivers had a legitimate privacy interest which justified keeping their personal information confidential. Accordingly, the court enjoined the city from disclosing that information to the newspaper.

The federal false advertising (Lanham Act) claim by the plaintiff in *Delux Cab v. Uber Technologies, Inc.*,

2017 U.S. Dist. LEXIS 57494 (S.D. Cal.), on the other hand, survived Uber's motion to dismiss. The court rejected Uber's argument that its claims of providing better background checks and safer service than taxi companies was mere "puffery" or "aspirational," finding that they incorporated assertions that a reasonable consumer might rely on as based in fact. Moreover, the court found that the plaintiff was entitled to the benefit of the presumption of injury in Lanham Act false comparative-advertising cases, where a defendant compares its product to a competing product.

The plaintiff in *Kauders v. Uber Technologies, Inc.*, 2017 U.S. Dist. LEXIS 32304 (D. Mass.)—a blind customer who was not allowed to bring his service dog into Uber vehicles on three separate occasions—was determined to defeat Uber's efforts to have his claims heard in federal court. His first effort to have the case remanded to Massachusetts state court because of lack of diversity was denied, with the court finding that Uber was a citizen of both Delaware and California while the plaintiff was a Massachusetts resident. Subsequently, however (2017 U.S. Dist. LEXIS 65912), the plaintiff amended his complaint to include as a defendant a Massachusetts Uber driver who allegedly engaged in the discriminatory conduct. The court found that the driver was an indispensable party, since litigation of the plaintiff's claims in his absence would not completely resolve the issues, and accordingly remanded the matter to state court.

In another venue dispute, the plaintiff in *Doe v. Uber Technologies, Inc.*, 2017 U.S. Dist. LEXIS 83462 (N.D. Cal.) alleged that she had been sexually assaulted by an Uber driver in Minnesota. The plaintiff brought her action against Uber in California, arguing that Uber's corporate conduct and policies—including its marketing, advertising, hiring, and background checks—emanated from Uber's corporate headquarters in San Francisco. Since, however, the events underlying Doe's claims arose entirely in Minnesota, the plaintiff and the Uber driver both resided in Minnesota, and all potential witnesses to the alleged assault were located in Minnesota, the court agreed with Uber that the action should be transferred to the District of Minnesota.

The plaintiff in *Lathan v. Uber Technologies, Inc.*, 2017 U.S. Dist. LEXIS 117657 (E.D. Wis.), a driver alleging breach of contract, violation of minimum wage statutes, and a number of other claims, tried to go right to the top in naming Travis Kalanick, then Uber's chief executive officer, as a defendant. The court found that Kalanick's status as Uber's CEO, standing alone, did not subject him to personal jurisdiction in Wisconsin, absent any conduct relating specifically to Uber's operations in Wisconsin. The court also granted Uber's motion to compel arbitration, finding that the terms of the agreement to arbitrate were clear and that the plaintiff had the opportunity, but failed, to opt out of the mandatory arbitration.

See, also, the *McGillis* decision discussed in the article "Truck Driver as Employee," which discusses the classification status of Uber drivers.

Phil Bramson

3. *Carmack Amendment and Freight Claims*

Elements of Claim

The issue in *Sony Biotechnology, Inc. v. Chipman Logistics & Relocation*, 2017 U.S. Dist. LEXIS 134440 (S.D. Cal.) was whether the Carmack Amendment applied to the shipment of goods from Washington to California if the actual interstate portion of the shipment may have been not by motor carrier, but by air freight. Sony hired Chipman to arrange for the transportation of equipment from Seattle, Washington to San Diego, California; the shipment arrived damaged. Sony argued that there was a question as to whether the shipment had been transported from Washington to California by motor carrier or by air. Chipman argued that the claim was subject to the Carmack Amendment even if the shipment had moved by air because there was no question that the equipment was delivered by a motor carrier. The court agreed with Chipman, holding that whether transportation is interstate or intrastate is determined by the essential nature of the commerce manifested by the shipper's fixed and persisting transportation intent at the time of the shipment. In the instant case, because the actual shipment was interstate, the fact that the delivery by motor carrier may have been intrastate,
did not remove the claim from the jurisdiction of the Carmack Amendment.

The issue in *Starboard Holdings, Ltd. v. ABF Freight Systems*, 235 F. Supp.3d 1363 (S.D. Fla.) was whether the shipment had been delivered to the customer so as to take the claim outside the Carmack Amendment, 49 U.S.C. § 14706. Starboard arranged with ABF for the transportation of two shipments of jewelry to Miami, Florida. When the shipments arrived, ABF broke the shipments down to various deliveries for the stores in the area. Before the goods could be delivered, the merchandise was stolen from ABF's yard. Starboard argued that the goods were no longer traveling in interstate commerce, and the Carmack Amendment did not apply, because they had arrived at ABF's warehouse and ABF was acting as a warehouseman as opposed to a carrier. Absent any other contract between the parties, the court looked to the bills of lading, which indicated that the "ship to" address was the customer's warehouse, not the ABF warehouse. Since ABF had to secure an appointment to deliver the goods and, in fact, deliver the goods, delivery had not occurred. The court found that Starboard's claims were preempted by the Carmack Amendment and granted ABF's motion for summary judgment.

Preemption

Direct Action Against a Carrier's Insurer

In *Chisesu Brothers Meat Packing Co. v. Transco Logistics, Inc.*, 2017 U.S. Dist. LEXIS 91323 (E.D. La.), Chisesu arranged for a shipment of equipment from New Jersey to Louisiana. Transco was the carrier for the shipment. When the shipment arrived in Louisiana, the equipment was damaged and missing several of its component parts. Chisesu then sued the carrier and its insurer. The carrier's insurer argued that the plaintiff's claim under Louisiana Direct Action Statute (LDAS) was preempted by the Carmack Amendment. The court found that that the LDAS statute did not create an independent cause of action against the insurer, but merely granted a procedural right of action against the insurer where the plaintiff has a substantive cause of action against the insured. The court stated that holding that the Carmack Amendment preempted the LDAS would "run afoul to the efficient procedural safeguards Louisiana intended for its residents."

The plaintiff in *Western Express, Inc. v. Villanueva*, 2017 U.S. Dist. LEXIS 176227 (M.D. Tenn.) contracted with a freight broker to have a shipment delivered to a warehouse in California. The broker hired a carrier to handle the shipment, but the shipment was delivered to the wrong address. Western's customer filed a claim with Western, which obtained an assignment of its customer's rights under the bill of lading and sued the broker, the carrier, and their respective insurers for the loss. The insurers moved to dismiss the complaint against them, arguing that the Carmack Amendment did not allow for direct actions against them. The court agreed, finding that nothing in the federal law, or in Tennessee law (unlike the Louisiana statute cited in *Chisesu Bros, supra*), permitted a direct action against an insurer by anyone other than an insured.

Preemption of Other Federal Statutes

The issue in *Starr Indemnity & Liability Co. v. YRC, Inc.*, 2017 U.S. Dist. LEXIS 6260 (N.D. Ill.) was whether the Carmack Amendment preempted causes of action based on the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. §§ 13501 *et seq.* Starr's insured contracted with YRC for delivery of two airplane engines that were damaged in transit; Starr paid the shipper's claim and filed an action against the defendant carrier. Starr asserted claims under both the Carmack Amendment and the ICCTA, relying on certain regulations underlying the latter statute concerning improper loading. YRC moved to dismiss the causes of action under the ICCTA, arguing that they were preempted by the Carmack Amendment, that provided the sole and exclusive remedy for damage to cargo transported in interstate commerce. The court held that although the Amendment preempted all state law claims for compensation for the loss of, or damage to, goods shipped by ground carrier in interstate commerce, there was no case law holding that the Amendment preempted other federal causes of action, specifically the ICCTA.

State Law Negligence Claims

As the following two cases demonstrate, there are divergent theories as to whether the Carmack Amendment preempts personal injury claims arising out the shipment of goods in interstate commerce. In *Krauss v. IRIS USA, Inc.*, 2017 U.S. Dist. LEXIS 193008 (E.D. Pa.), Krauss was injured when he was struck by

a pallet of goods that was being unloaded. Krauss sued the seller of the product, the broker who arranged for the shipment, and the carrier. The complaint alleged that the carrier was negligent in loading the shipment by using substandard pallets and stacking the pallets—both actions in contravention of the directions received from the shipper. The court recognized that the Carmack Amendment preempted any state law causes of action related to damage to interstate cargo shipments, but the issue in this case was whether the Carmack Amendment preempted claims for personal injury to the plaintiff. The court adopted the "conduct" theory, under which the only claims that escaped Carmack Amendment preemption were claims based on conduct separate and distinct from the delivery, loss of, or damage to goods. In this case, because the injuries occurred while the shipment was being unloaded, the Carmack Amendment applied and preempted the plaintiff's personal injury claims.

Compare *Muzzarelli v. UPS*, 2017 U.S. Dist. LEXIS 99395 (C.D. Ill.), in which Muzzarelli was injured when she tripped over a package that had been placed on her front porch by the UPS delivery man. The court found that the Carmack Amendment did not preempt Muzzarelli's personal injury claims under state law because those claims arose out of a separate and distinct ground from the loss of, or the damage to, the good that were shipped.

State Law Consumer Protection Statutes

The plaintiffs in *Pickett v. Graebel Kansas City Movers, Inc.*, 2017 U.S. Dist. LEXIS 79885 (D. Kan.), asserted claims against the household-goods carrier under both the Carmack Amendment and the claim under the Kansas Consumer Protection Act (KCPA). The court recognized that the Carmack Amendment preempted state common law remedies for negligent loss of or damage to goods, but also that a plaintiff may be allowed recovery under a state statute that merely provides for incidental costs and does not allow for an additional remedy. The KCPA provided that a court shall award a consumer who prevails in an action under the statute twice the amount of pecuniary loss. The court found that allowing the Picketts to recover under the KCPA would expand the carrier's liability from the value set forth in the bill of lading, as allowed under the Carmack Amendment, to twice its pecuniary loss. Accordingly, the plaintiffs' cause of action under the KCPA was preempted.

Breach of Contract Claims

In *Mid-America Freight Logistics v. Walters Trucking*, 2017 U.S. Dist. LEXIS 174908 (E.D. Mo.), the plaintiff had a motor carrier agreement (MCA) with the defendant, pursuant to which it agreed to obtain shipping opportunities for Walters. In return, Walters agreed to defend and indemnify Mid-America from any claims arising out of shipments transported. Mid-America retained Walters to transport a shipment of frying oil from Missouri to Texas for a customer. During the shipment some of the containers of oil were stolen and the seals on others broken. The recipient of the shipment refused delivery of the entire shipment. Mid-America was contractually bound to pay damages to its customer. When Walters refused to pay the claim, Mid-America sued Walters in Missouri State court. Walters removed the case to federal court and Mid-America moved to remand the action back to state court. The court found that Walters was a carrier under the Carmack Amendment. Mid-America, however, was a broker, not a shipper, and was bringing an action to recover indemnification under the MCA, not on the bill of lading under the Carmack Amendment. Because Mid-America was not relying on the bill of lading, the state law breach of contract action was not preempted by the Carmack Amendment. The case was sent back to state court.

The claims against the defendant in *Heniff Transportation Systems, L.L.C. v. Trimac Transportation Services*, 847 F.3d 187 (5th Cir.) arose from Trimac's alleged negligence in cleaning Heniff's tank trucks, resulting in contamination of a Heniff customer's shipment of chemicals. Preemption of Heniff's state law claims against Trimac depended on whether Trimac could be considered a "carrier" under the Carmack Amendment. Under the Carmack Amendment, a "carrier" is defined as a "motor carrier, a water carrier, and a freight forwarder." A "motor carrier" is defined as a person providing motor vehicle transportation for compensation; the definition of "transportation" includes equipment of any kind related to the movement of passengers or property, as well as services related to that movement, including "arranging for, receipt, delivery, elevation, transfer in

transit, refrigeration, icing, ventilation, storage, handling, packing and unpacking." In the instant case, the service provided by Trimac—the cleaning of the tanker-trailer that was going to be used in the transportation of a load from Texas to Illinois—was a service related to the movement of passengers or property in interstate commerce. Accordingly, Trimac was providing transportation and acting as a "motor carrier," and Heniff's state law claims were preempted by the Carmack Amendment.

Jurisdictional Issues

The issue in *Dees v. Coleman American Moving Services*, 2017 U.S. Dist. LEXIS 177321 (S.D. Ala.) was whether the plaintiff's damages satisfied the $10,000 jurisdictional minimum requirements of the Carmack Amendment. Dees's amended complaint that was filed after removal incorporated a claim under the Carmack Amendment in the amount of $6,130. The carrier argued that the complaint met the jurisdictional requirements because the complaint sought punitive damages. Since the Carmack Amendment does not authorize punitive damages, however, punitive damages never count toward the jurisdictional amount. The court also rejected Coleman's arguments that the shipment was insured for $75,000 or, alternatively, because its previous offer of $22,500 to settle the action met the jurisdictional minimum. The court, however, found that the best evidence of the amount in controversy for Carmack Amendment preemption purposes was the plaintiff's cause of action in the amended complaint.

The issue in *Service First Logistics v. J. Rodriguez Trucking, Inc.*, 2017 U.S. Dist. LEXIS 57315 (E.D. Mich.) was whether a damage claim was covered by the Carmack Amendment, given the nature of the goods involved—bags of salad mix comprised of various types of lettuce, which were damaged because Rodriguez failed to maintain the required temperature during transit. Section 13506 of the Carmack Amendment contains exemptions for claims arising out of transportation of ordinary livestock, agricultural, or horticultural commodities (other than manufactured products thereof), and certain other listed exempt commodities. On the other hand, where processing of an exempt commodity converts it into a manufactured product, damage to the manufactured product is subject to the Carmack Amendment.

The court first cited a regulation that stated that placing an exempt commodity into a bag did not affect the exempt status of the commodity. The court also held that there must be a transformation in the product into a new and different article with a distinctive name, character or use citing a U.S. Supreme Court decision that held that "where the commodity retains a substantial identity through the processing stage we cannot say that it has been manufactured." *East Texas Motor Freight Lines, Inc. v. Frozen Food Express*, 351 U.S. 49 (1956).

Given that the processing in the instant case did not transform the product, the product was exempt from the Carmack Amendment and the court did not have subject-matter jurisdiction over the claim.

Venue and Forum Selection Clauses

The venue provisions of the Carmack Amendment state that an action may be brought against a delivering carrier in a judicial district through which the defendant carrier operates. In an action against a carrier alleged to be responsible for the loss, the action may be brought against the carrier in the district in which the damage is alleged to have occurred. In *Starr Indemnity & Liability Co. v. Luckey Logistics*, (C.D. Ill.), Starr's insured contracted with Luckey for the delivery of four shipments of chemicals. One shipment was from Kansas to Nebraska. The other three shipments were from Iowa to Nebraska. One of the loads was contaminated and ended up damaging the insured's property.

The court found that Starr failed to allege that Luckey operated in the Central District of Illinois, and the damages did not occur in the Central District of Illinois. Venue in the Central District of Illinois, then, was not supported under the Carmack Amendment. Under general federal venue provisions, an action may be brought: (1) in the district in which any defendant resides if all of the defendants are resident of the state; (2) in the district in which a substantial part of the events giving rise to the claim occurred; or (3) in any district in which any defendant is subject to the personal jurisdiction of the court. The court found that Starr failed to allege facts sufficient to meet any of the requirements of the general venue statute and, therefore, the court transferred the action to the District of Nebraska where the damage occurred.

The issue in *Celtic International, LLC v. J.B. Hunt Transport, Inc.*, 234 F. Supp. 1034 (E.D. Cal.) was whether a forum selection clause in the shipping contract required that the action be brought in the Western District of Arkansas, the venue specified in the contract. Celtic argued for venue in the Eastern District of California pursuant to the Carmack Amendment, which allows the shipper to be permitted to sue in any judicial district through which the delivering carrier operates, or in the judicial district in which the loss or damage is alleged to have occurred. Hunt argued that the public policy underlying the venue provisions of the Carmack Amendment should not apply because Celtic was a broker, not a shipper. The court rejected that argument, finding that the Carmack Amendment has been interpreted broadly and the definition of shipper may include an agent or an independent contractor, such as Celtic, who contracts with a carrier for the transportation of cargo. Given the fact that a shipper could bring an action against the carrier in any judicial district in which the carrier operates, Celtic's choice of venue was upheld.

Sufficiency of Notice of Claim

In *Wendy Kellogg v. Wheaton Van Lines*, 2017 U.S. Dist. LEXIS 141621 (D.N.M.), the court had to decide whether the plaintiff's notice of claim complied with the requirements of the Carmack Amendment. Citing 49 C.F.R. § 370.3, the court held that a claim must demand payment of a "specified or determinable amount of money." The court then recognized a split between the circuits as to the specificity required for a viable notice of claim. The First, Second, and Fifth Circuits are "strict compliance" circuits, in that the claim must specify an actual dollar amount of the claim. The Sixth, Ninth, and Third Circuits utilize a substantial compliance requirement, under which a claimant is not required to state a specific amount but must, instead, provide a reasonably accurate indication of the value of the claim. The court, in the instant case, found that the notice of claim did not comply with either standard as the plaintiff neither provided Wheaton with a reasonable estimate of damages nor supplied it with information sufficient to put it on notice of the nature and extent of its purported liability.

Limitations of Liability

Limited Agency Rule

In *Celtic International, LLC v. BSNY Railway Co.*, 2017 U.S. Dist. LEXIS 25726 (E.D. Cal.), Celtic retained J.B. Hunt to arrange for the transport a shipment of wine from California to Arkansas and Tennessee. Hunt in turned contracted with BNSY railroad pursuant to its custom-rate authority. The shipment was destroyed when the train derailed in Texas. Celtic then sued BNSY for the value of the shipment. BNSY raised a defense to the action based on a provision contained in the custom-rate authority (the Direct Suit Prohibition) that limited any action as against BNSY to a party to the authority, namely J.B. Hunt.

Celtic argued that the Direct Suit Prohibition was unenforceable because it conflicted with the terms of the Carmack Amendment. The court found, however, that nothing in the Carmack Amendment prevented rail carriers from offering alternative terms and that, in fact, courts routinely enforced such terms. Moreover, the court, applying the "limited agency" rule, held that an intermediary binds the cargo owner to the liability limitations it negotiates with downstream carriers—even when there are no indicia of a traditional agency relationship. Because J.B. Hunt was acting as Celtic's intermediary in arranging the shipment, BNSY was able to enforce the Direct Suit Prohibition as against Celtic.

The issue in *Eastern Air Express, Inc. v. Federal Express Freight, Inc.*, 2017 U.S. Dist. LEXIS 29010 (S.D. Fla.) was whether a limitation on liability found in the carrier's tariff was enforceable against the shipper, who did not have any knowledge of the limitation. Eastern retained a freight broker to arrange for the shipment of an aircraft engine from Indiana to Florida. The broker hired FedEx to handle the shipment, which arrived damaged. When Eastern filed a claim with the broker, FedEx paid $550.43 for the claim, arguing that a limitation in liability contained in its agreement with the broker limited the amount that the shipper could recover.

Eastern argued that it never saw the limitation of liability contained in the agreement between the broker and the carrier and never saw the carrier's tariff. The court then held that carriers do not need to investigate upstream contracts and were entitled to assume that the party

entrusted with goods may negotiate a limitation of liability. The limitation on liability between the broker and FedEx limited Eastern's recovery.

Requirements to Limit Liability

In *National Polymer International Corp. v. FedEx Freight Inc.*, 2017 U.S. Dist. LEXIS 131023 (E.D. Tex.), National Polymer purchased some machines from AZCO Corporation. AZCO contracted with FedEx to transport the machines from New Jersey to Texas and presented FedEx's driver with AZCO's standard bill of lading, which purported to incorporate the provisions of FedEx's tariffs, including a limitation on the carrier's liability to $30,000. The court found that unsigned documents may be incorporated into and become part of a contract, if the contract "plainly refers" to the unsigned document. In addition, the language of the document must show that the parties intended for the unsigned document to become part of the agreement. In this case, however, the reference to the outdated tariff was insufficient to incorporate the limitations on liability into the bill of lading. The court also rejected the carrier's argument that any ambiguity in the bill of lading should be construed against the shipper, as the drafter of the bill of lading. The court, rather, found that the Carmack Amendment imposed the risk of error in drafting a bill of lading on the carrier, to the exclusion of the shipper, and preempted the common law principle that any ambiguity in a contract should be construed against the drafter of the contract. The court granted National Polymer's motion for summary judgment.

In *United Van Lines LLC v. Deming*, 2017 U.S. Dist. LEXIS 116308 (N.D. Cal.), the defendant's employer entered into an agreement with a relocation service to handle a household goods move. The relocation service entered into a transportation services agreement (TSA) with United that limited the carrier's liability to the lessor of $5.00 per pound times the actual weight of the shipment or $100,000. The agreement also allowed the shipper to increase the level of maximum liability by declaring such additional amount on the bill of lading.

United also contracted with the Demings to move their household goods from Minnesota to California; the shipment suffered water and mold damage in transit. The Demings argued, and the court agreed, that the bill of lading tendered by United did not give the shippers a reasonable opportunity to choose between two or more levels of liability or obtain their agreement as to their choice of carrier liability limit. The court found, however, that the TSA between the Demings' employer and the carrier was effectively incorporated into the bill of lading pursuant to a reference to any applicable national carrier agreement. The court also found that the provisions of the TSA could comply with the requirements for an effective limitation on liability. Because United could be entitled to the requested declaratory relief, the motion to dismiss was denied.

Alan Peterman

4. The MCS-90 Endorsement/State & Federal Filings

In *Triton Indemnity Co. v. Gaitan Enterprises, Inc.*, 237 F.Supp. 3d 343, the federal district court in Maryland was presented with a question regarding the MCS-90 that has not received much judicial attention in the past. The insured principal, Morris Gaitan, runs Gaitan Enterprises, an interstate for-hire motor carrier in Landover, MD, and he parks his trucks in a parking lot in Landover and conducts his business from there. A loss took place in the District of Columbia involving a truck operated, and apparently owned, by one Santos Garcia, who was dispatched by Gaitan. Gaitan was insured under a policy issued by Triton that did not schedule or otherwise cover the Garcia vehicle. The federal court rejected the argument by the claimant's estate that the Garcia vehicle qualified as a temporary substitute for a covered Gaitan vehicle. The estate argued, though, that Gaitan faced the possibility of vicarious liability for Garcia's negligence; if Gaitan were indeed found to be liable, then the MCS-90 would be triggered. The court, relying on the 1991 decision in *Integral Insurance Co. v. Lawrence Fulbright Trucking, Inc.*, 930 F.2d 258 (2d Cir.), agreed that an insurer may indeed be exposed under the MCS-90, even if the named insured's exposure was purely vicarious.

The loss occurred while Garcia was waiting on line to be loaded at the Fort Meyer facility. (We gather that Garcia ran over a pedestrian.) Among the issues presented was whether a vehicle may be considered to be operating in interstate commerce even while it is idling or moving

up a line in fits and starts while waiting to be loaded. Triton pointed out that Garcia's assignment was to move the load of asphalt from one location in the District of Columbia to another; in other words, Garcia was not operating that day in interstate commerce but, rather, in intrastate (well, intradistrict) commerce. As such, Triton argued the MCS-90 ought not apply. Moreover, the truck was on private property at the time of the loss, not on a public road, and had not yet been loaded.

The court agreed with Triton on one point—the decision must be based on the assignment given to the truck driver for the specific trip. It does not matter that Garcia (or Gaitan) sometimes hauls goods from one state to another. For the MCS-90 to apply, the claimant's estate would need to establish that Garcia was engaged in interstate commerce at the time of the loss. The court, though, was unsympathetic to Triton's other arguments. The MCS-90 refers to Section 30 of the 1980 Motor Carrier Act, which speaks of the transportation of property for-hire by a motor carrier from one state to another. "Transportation," though, is given a broad definition in 47 U.S.C. §13102(23)(B) to include arranging for transportation, receipt of the cargo, and other preparatory activities. The court concluded that waiting on line to pick up freight would trigger the MCS-90, so long as the planned for-hire transportation was interstate in nature. That crucial holding was not grounded by the court in any existing case law, but it is eminently plausible.

The court went on, though, to hold that the planned trip was interstate even though the Garcia rig would not have taken the cargo out of the District. Since Gaitan's "headquarters" were in Maryland and his trucks were parked there (Garcia also shared the parking lot), and Garcia's truck needed to cross over into the District to pick up the load, the court found that the load was interstate in nature and that MCS-90 will apply so long as Gaitan is found to be liable. (But, see *Kolencik v. Progressive Preferred Ins. Co.*, 2006 U.S. Dist. LEXIS 24855 (N.D. Ga.), a case we litigated years back, in which the court found that the movement of a truck from outside the state for an intrastate shipment did not trigger the MCS-90.)

Misdelivered shipments do not usually lead to claims under the MCS-90, for good reason. After all, the endorsement specifically excludes cargo claims from the scope of the insurer's obligations. The insurers involved in *Western Express, Inc. v. Villanueva*, 2017 WL4785831, 2017 U.S. Dist. LEXIS 176227 (M.D. Tenn.) were able to get the case dismissed, but not quite for the substantive reason one might have expected.

The shipper had phoned Western Express, a carrier and broker, to pick up a load. Western then assigned another carrier, Oscar Villanueva (LMP) which, in turn, engaged a subcontractor who ended up delivering the cargo to the wrong location; it was never recovered. Western paid the shipper for the lost shipment, then sued LMP and its subcontractor and their various insurers. The decision deals primarily with various procedural matters. The substantive point of interest was Western's argument, not fleshed out in the decision, that the MCS-90 issued by one or more of the insurers ought to apply to the loss. The insurers responded, quite correctly, that the MCS-90 specifically excludes cargo losses. The court found for the insurers, but on procedural grounds—the MCS-90 requires the plaintiff to secure a judgment before he or she may file suit against the insurer. This is one of the differences between the MCS-90 and the BMC-32 (now required only for household goods carriers). The BMC-32 is a cargo filing and may be triggered without a judgement against the motor carrier.

To the same effect was *Cherkaoui v. Pinel*, 2017 U.S. Dist. LEXIS 3843 (E.D. La.). Louisiana is one of the few states that permits direct actions against insurers. The claimant Cherkaoui relied on the statute to sue Prime Property & Casualty together with the motor carrier, which, he alleged, had caused his bodily injury. The court found that Prime's policy did not apply. Cherkaoui, though, agreed that even if the policy did not apply, the MCS-90 did. The court acknowledged that if Cherkaoui were to win a judgment against the named insured, he would be entitled to bring an action against Prime under the MCS-90. The Louisiana statute, though, could not permit an action on the MCS-90 until such a judgment had been entered.

The Tenth Circuit 2009 *Yeates* decision, on which we have commented at length over the years, was relied on in one federal court decision and distinguished in another. *Trustgard Ins. Co. v. Brown*, 2017 U.S. Dist. LEXIS

198731 (D.S.C.) was a victory for the insurer, taking a broad reading of *Yeates* (which, as we have observed in the past, may no longer be the Tenth Circuit's own view) that once the claimant recovers $750,000 from someone, no MCS-90 can be triggered.

The claimant, Sharon Collins, was injured when the van in which she was a passenger was rear-ended by a rig operated by Jerome McWilliams, consisting of a tow truck hauling a car carrier. Collins sued McWilliams, as well as One Stop Trucking, the owner of the car trailer, and Michael Brown d/b/a Triple S Transport, whose motor carrier placard was attached to the side of the McWilliams vehicle.

Trustgard, which insured Brown, filed a declaratory judgment action seeking judgment that it provided no coverage under its Brown policy. By coincidence, Trustgard also insured McWilliams and that policy, with limits of $1 million, covered the tow truck. Trustgard acknowledged that it would provide $1 million in coverage in the event judgment was entered against McWilliams. The claimant, though, was also seeking to recover under the Brown policy on the theory that Brown, too, faced exposure. The court did not think so but, in any event, noted that the vehicle was not scheduled on the declarations of the Brown policy, so that there could be no policy coverage. That led the court to the MCS-90 and to the question of whether the endorsement could apply when actual coverage is available to pay plaintiff in the mandated limits from another source. Trustgard relied on *Yeates* to argue that since its own McWilliams policy was available, the MCS-90 on the Brown policy could not be triggered. The claimant relied on the *Herrod* decision—a subsequent 10th Circuit ruling which cut back on *Yeates* (and some might say limited *Yeates* to its own unusual facts)—and held that, at least theoretically, two insurers could pay under their filings. (The *Herrod* decision, it should be stressed, opens the door to another—and in our view, superior—defense to a claim for stacking filing expenses. That point would be to argue that since Brown's authority was not being used, the MCS-90 could not be triggered.)

The South Carolina court opted to distinguish *Herrod* and rely on a *Yeates* rationale. Here, Brown's placard was attached to the accident vehicle, but Brown had no lease agreement in effect with McWilliams and did not operate or use the vehicle. The court could have formulated its decision completely in consort with *Herrod*—there was no evidence that Brown's authority was in use, so its MCS-90 was not implicated. The court reached the same conclusion, but on the basis of *Yeates* that once claimant has received $750,000, no MCS-90 can apply.

A clever attempt to extend *Yeates* was made in *Environmental Cleanup, Inc. v. Ruiz Transport, LLC*, 2017 U.S. District LEXIS (W.D. Okl.). ECI, the claimant, had cleaned the scene of the accident at the request of Ruiz, the named insured. The MCS-90 extends the issuing insurers responsibility to at least certain aspects of a post-accident cleanup, since the issuing insurer agrees to pay for "environmental restoration." The scope of "environmental restoration," though, has not been delineated in the case law.

Here ECI, the cleanup company, sent a bill to Ruiz for $112,000, related to soil testing and remediation following an oil spill. Ruiz refused to pay, so ECI sued Ruiz's insurer, Global Hawk. The Global Hawk policy had a standard pollution exclusion, but contained an endorsement giving Ruiz $10,000 of pollution coverage that Global Hawk was prepared to pay. ECI, though, demanded $750,000 under the MCS-90.

Global Hawk cited language from *Yeates* to the effect that the MCS-90 only applies where the underlying insurance policy to which the endorsement is attached does not provide coverage of the motor carrier's accident. Global Hawk argued that under the reasoning of *Yeates*, the MCS-90 could not apply because Global Hawk's policy did provide coverage for the cleanup, albeit only up to $10,000.

The court rejected the argument and found that the MCS-90 applied; *Yeates* should not be read literally, as Global Hawk had proposed. What *Yeates* meant was that the MCS-90 does not apply if claimant has already recovered the mandated USDOT limits. It is hard to disagree with the court's conclusion, but Global Hawk's reading of *Yeates* was technically precise. We view it as another example of the problem inherent in how *Yeates* is formulated.

There have been repeated attempts over the years by plaintiffs' lawyers, who find that a defendant trucker has limits below those mandated by state or federal law, to reform the policy and increase the limits and/or retroactively create a filing. Most of these attempts have failed, although the infamous *Bovain* decision [383 SC 100 (2009)] in South Carolina is an unfortunate exception.

A recent unsuccessful attempt occurred in *Charter Oak Fire Ins. Co. v. Hovlik*, 2017 U.S. Dist. LEXIS 201329 (D.N.M.). The insured was Don Curry Housemoving; Travelers issued a general liability policy to Don Curry and its affiliate, Charter Oak, issued a $500,000 auto policy. Randolph Curry, one of the insured's drivers, was involved in an accident that led to the death of Salvador Garcia. Curry was driving his personal GMC pickup insured by GMAC, which paid its $50,000 limits to Garcia. The Charter Oak policy also covered the pickup. Plaintiff argued, though, that its $500,000 limits were too low for a motor carrier. In applying for its policy with Charter Oak, the insured responded "no" to the question of whether "ICC, PUC or other filings" were required. No filing with the New Mexico PRC was requested by the insured or made by Charter Oak. Charter Oak filed a declaratory judgment action seeking judgment that its exposure was limited to $500,000. Some of the defendants, though, argued that the limits should be reformed as a matter of law to match the limits required for New Mexico motor carriers.

The court observed that the New Mexico financial security statute places the burden on motor carriers—not their insurers—to comply with the financial responsibility requirements. Failure by the insured to comply cannot lead to reformation of the policy. It is only where the responsibility is placed on the insurer, and the insurer makes a mistake and fails to issue its policy in compliance, that reformation of this type is appropriate. (That was the court's understanding of what the *Bovain* decision held.) Since the insured has specifically denied that filings were required, the court found no evidence that the insurer knew or should have known that the insured needed to comply with motor carrier financial security.

Larry Rabinovich

5. *Negligent Hiring*

As noted elsewhere in this survey, the employment status of drivers is a point of some tension in the industry. In the context of a tort claim, though, there is a strong incentive in most jurisdictions for employers to acknowledge that the driver was an employee acting within the scope of employment. By so doing, the employer takes the issue of negligent hiring off the table, in the majority view.

In *Ferrer v. Okbamicael*, 2017 Colo. LEXIS 256, the employer taxi company chose to admit that the employee was acting within the scope of his employment at the time of the accident, thus acknowledging the employer's vicarious liability for the employee's negligence. The Colorado Supreme Court held, in an issue of first impression in that state, that such an admission acted to bar the plaintiff's direct-negligence claims against the employer. Thus, the court dismissed the claims of negligence as a common carrier, and negligent entrustment, hiring, supervision, and training. The court reviewed cases from other jurisdictions and adopted what it called the "majority view"—that once an employer admits vicarious liability for a driver's negligence (if any is proved), it is not proper to permit a plaintiff to proceed against the employer on other theories of liability that are dependent on and derivative of the employee's conduct.

Whereas direct negligence claims against the employer allow a plaintiff to recover against the employer when the employee was not acting within the scope of his or her duty, when the employer admits vicarious liability, the employer becomes strictly liable for the negligence of the employee and for the percentage of fault assigned by the jury to the employee. The court also reasoned that evidence necessary to prove direct negligence claims could be unfairly prejudicial to the employee. For example, evidence of an employee's history of accidents or traffic violations, which are relevant to a claim of negligent hiring against the employer, could lead a jury to improperly infer that because the employee was negligent before, he or she was negligent at the time of the accident. The court further reasoned that the jury would assess the employer's liability twice and award duplicative damages to the plaintiff, if both sets of claims were permitted. That was not compatible with the theory of vicarious liability, which fixes the employer's liability

as the same as its employee's liability, and the plaintiff's comparative fault in the accident does not differ based on the number of defendants.

Similarly, in *Sedam v. 2JR Pizza Enterprises, LLC*, 2017 Ind. LEXIS 799, the Indiana Supreme Court held that an employer's admission that its employee was acting in the scope of her employment precluded plaintiff's claims of negligent hiring, training, and supervision, thus limiting plaintiff to a vicarious-liability claim against the employer. The court distinguished the two types of claims, noting that *respondeat superior*, or vicarious liability, claims necessarily involve an act within the scope of employment, whereas negligent hiring and similar claims require an act outside the scope of employment. However, under each type of claim, the plaintiff seeks the same result—employer liability—based on the same negligent act of the employee. According to that court: "To allow both claims would serve only to prejudice the employer, confuse the jury, and waste judicial resources when ultimately the result – that the employer is liable – is the same and the employer has stipulated as much. Such an admission exposes an employer to liability for any and all fault assessed to the employee's negligence, and thus a negligent hiring claim becomes duplicative since a plaintiff may not recover twice for the same damage." (Along the same lines is the decision in *Steffey v. Beechmont Investments, Inc.*, 2017 U.S. Dist. LEXIS 138443 (E.D. Tenn.).)

However, in *Hunter v. New York Marine & General Insurance Co.*, 2017 U.S. Dist. LEXIS 160171 (W.D. Okla.), the court reached the opposite result. Even though the employer admitted that the driver was acting within the scope of his employment at the time of the loss, the court would not dismiss the negligent entrustment claim (although it did dismiss the claims of negligent hiring, training, supervision, and retention). The court relied on an Oklahoma Supreme Court case from 2013 that involved both types of claims, although close analysis of that case shows an important distinction, namely, that in that case the employer did not admit the employee was acting in the scope of his employment and, in fact, the lower court had found the employee was not acting in the scope of employment. On appeal in that case, the employer argued that it could not be liable for negligent entrustment unless the plaintiff could prove the employee was acting in the scope of employment (not a correct statement of the law, which the Oklahoma Supreme Court pointed out). A later federal court noted that the view of the Oklahoma Supreme Court was not clear as to whether a negligent entrustment claim is precluded where an employer admits vicarious liability for an employee's negligence. Faced with this apparent uncertainty, the court in *Hunter* denied the employer's motion for summary judgment on the negligent entrustment claim. There are conflicting federal decisions in Oklahoma on this point. The most recent, as we write, leaves open the possibility of asserting both vicarious liability and negligent hiring. *Annese v. U.S. Express, Inc.*, 2017 U.S. Dist. LEXIS 212545.

Further complicating the issue, in *CRST, Inc. v. Superior Court*, 11 Cal. App. 5th 1255, 218 Cal. Rptr. 3d 664, a California intermediate appellate court held that an employer's admission of vicarious liability barred direct negligence claims but did not bar a punitive-damages claim based on the same evidence that would be used to support direct-negligence claims, relying on a specific California statute. The statute in question, Civil Code section 3294(b), states that an employer may be liable for punitive damages when the employer had advance knowledge of the unfitness of the employee and employed him or her with conscious disregard of the rights or safety of others, and in the case of a corporate employer, when the person with the advance knowledge of unfitness is an officer, director, or managing agent of the corporation. The employer in that case cited to the *Ferrer* case discussed at the outset of this article (the *Ferrer* court held that punitive damages were also barred), but the California court distinguished that case, because the Colorado punitive damages statute contained no provision authorizing an award of punitive damages against an employer who is vicariously liable for its employee's negligence, whereas the court found that the California statute permitted punitive damages to be awarded if the required showing was made. Thus, the court held that while the employer's admission of vicarious liability for its employee's negligence precluded the plaintiff from recovering compensatory damages on claims such as negligent entrustment, hiring, and retention, the employer could be liable for punitive damages if the plaintiff could demonstrate that the employer had been aware of the employee's unfitness.

The court reasoned that public policy in California supported subjecting employers to punitive damages to incentivize employers to be vigilant in hiring and training employees. This puts California in the minority view, because it permits a plaintiff to introduce evidence of the employee's driving record, accident history, prior problems with drugs or alcohol, and other similar evidence that most courts recognize has nothing to do with the question of whether the employee was negligent at the time of the accident, and is likely to inflame the jury and improperly influence the jury to find the employee negligent, thus exposing the employer to punitive damages because the employer is vicariously liable if the employee is determined to be negligent.

There are obvious benefits, at least in most states, to admitting an employee was acting in the scope of his or her employment at the time of an accident in jurisdictions that follow the "majority view." If claims of negligent hiring, training, retention, supervision, and entrustment are not permitted, then discovery is not needed on those issues and an employer can keep out an employee's history and driving record, which could contain bad facts. In addition, the focus will be on the comparative negligence of the plaintiff and the employee at the time of the accident, which can benefit the employer if the jury finds the plaintiff to be more than fifty-percent liable and can limit the employer's vicarious liability in a multi-party accident if the employee is found to be less than fifty-percent liable. Thus, employers would be wise to ask their counsel if the applicable law provides any benefits for acknowledging their potential vicarious liability in employee accident cases.

John Canoni

6. *Truck Driver as Employee*

Liability for Employee Conduct

In *Elvir v. Brazos Paving, Inc.*, 2017 Tex. App. LEXIS 8348 (Tex. Ct. App.), a plaintiff was injured in an accident involving a dump truck that was being operated by an employee of a sub-subcontractor hired by Brazos's subcontractor. The court granted summary judgment to Brazos because the evidence showed that the paving company did not control the employee of the sub-subcontractor—instead the sub-subcontractor was an independent contractor. The court found that the paving company did not contractually, or actually, retain the right to control the means, methods, or details of how the sub-subcontractor performed its work. The court further found that the federal regulation governing statutory employees of motor carriers did not apply because the federal regulations only applied to transportation in interstate commerce and the defendants in the case only traveled within the state of Texas. Brazos also had no vicarious liability notwithstanding its status as a certified Texas intrastate motor carrier, since Brazos maintained no control over the trucker that it hired.

In *Fortner v. Specialty Contracting, LLC*, 217 So. 3d 736 (Miss. Ct. App.), the plaintiff was injured while working for defendant Specialty Contracting LLC (Specialty). A Specialty employee was backing up a tractor trailer to a loading platform when the tractor trailer struck Fortner, causing serious injuries. Fortner filed suit against Specialty, alleging that he was an independent contractor and Specialty was liable for his injuries caused by the negligence of its employees. The trial court dismissed the case on the ground that Fortner was an employee of Specialty, rendering workers' compensation his exclusive remedy. He appealed arguing that he was an independent contractor of Specialty, not an employee. (Not surprisingly, in cases such as this, the position of the parties is reversed—suddenly, the claimant insists that he or she is not an employee, and the company insists that he or she is.)

In determining whether the plaintiff was an independent contractor or an employee, the court looked at the familiar factors of whether the employer had the right to control the means, methods, or details of the work. Fortner admitted in his deposition that he never did any work or went anywhere on site except pursuant to instructions from a Specialty employee. Each time a delivery was made, a Specialty employee told him which building they would load, the Specialty employee drove to the location of the delivery, and Fortner helped the Specialty employee unload the building; he exercised no discretion. In addition, Specialty provided all of the Fortner's equipment, and Specialty had the right to fire him at will. His work with Specialty did not involve any particular skill or training; instead, he simply assisted in

loading and unloading prefabricated metal buildings, and plaintiff was hired to help Specialty in all of its normal work. In addition, he was not in the business of offering similar services to other entities as part of his own independent business. Accordingly, his sole remedy was under workers' compensation.

In *Fezzani v. Villagomez*, 2017 Mich. App. LEXIS 1543, an injured plaintiff sought to recover no-fault personal-injury protection (PIP) benefits under Michigan law. Defendant Cherokee Insurance Company (Cherokee) insured the truck that Fezzani was operating at the time of the loss and defendant Grange Insurance Company of Michigan (Grange) was the insurer of Fezzani's personal household vehicles. The court observed that, under Michigan law, an injured person generally is to seek no-fault PIP benefits from his personal no-fault insurer, but an exception to this general rule provides that an employee injured while occupying a motor vehicle owned or registered by his employer is to seek PIP benefits from the insurer of the furnished vehicle. The court then utilized an economic-reality test to determine whether the plaintiff was an independent contractor or an employee of the company for which plaintiff was providing truck-driving services. If he was an employee, the exception to the general priority rule would apply and Cherokee, the insurer of the furnished vehicle, would have been responsible for the payment of no-fault PIP benefits.

Grange and the plaintiff did not challenge the application of the factors of the economic-reality test as elucidated by the court, but instead contended that other case law required the conclusion that plaintiff was an employee. The plaintiffs in the cases relied upon by Grange and Fezzani were self-employed, so the plaintiffs were deemed employees for the purposes of the exception to the payment of no-fault PIP benefits. By contrast, Fezzani was functioning solely as an independent contractor, so the exception did not apply. Therefore, the court found that he was an independent contractor and not an employee, for the purpose of the no-fault act. As the plaintiff's personal no-fault insurer, Grange was, therefore, the primary insurer for plaintiff's no-fault PIP benefits.

Entitlement to Benefits and Need to Reimburse Expenses

In *Robles v. Schneider National Carriers, Inc.* 2017 U.S. Dist. LEXIS 132065 (C.D. Cal.), a truck driver for Schneider alleged that Schneider willfully misclassified him as an independent contractor, in violation of California state law and the Private Attorneys General Act (PAGA), to avoid paying him and other California truck drivers for all time worked, meal and rest periods missed, business expenses, and the employer's share of payroll taxes and mandatory insurance. The defendant moved to dismiss a second amended complaint and the court analyzed each cause of action separately.

Regarding the claim of unfair competition under state law, the plaintiff claimed that that the defendant had violated the unfair competition law by perpetuating an unfair practice—failing to provide meal and rest periods or provide premium pay for missed meal and rest-break periods in violation of the California labor code. In the amended complaint, the plaintiff alleged that the defendant forced the plaintiff to miss breaks and explained that the defendant instructed the plaintiff to make so many stops that he could not reasonably have taken a required meal break. The court found that the plaintiff's allegations were sufficient to survive a motion to dismiss by alleging that the defendant scheduled drivers to complete so many shifts within a certain period, they did not have time to take breaks. However, the court dismissed the portion of the claim seeking recovery of allegedly improperly paid income tax because the IRS has a comprehensive regulatory scheme for resolving disputes over proper classification of employees and independent contractors.

Regarding the plaintiff's second cause of action, which asserted that the defendant failed to compensate the truck drivers for all time worked by misclassifying them as independent contractors, the court found that the plaintiff had sufficiently pled enough facts to survive a pre-discovery motion to dismiss. The plaintiff claimed that the load-based, piece-rate compensation caused uncompensated time, which included time in which the plaintiff was required to wait on line to load his truck and was not paid for all of his hours waiting, and because the plaintiff was paid a flat amount per load, although

the plaintiff manually logged his time on log sheets. The plaintiff claimed that he was not paid for the actual number of hours he worked and was not compensated for any of his time spent working, other than the flat piece-rate, which resulted in his earning less than the legal minimum wage.

Similarly, the court found that the plaintiff had pled enough facts in support of his third cause of action—that the defendant violated the California labor code by failing to provide him with complete and accurate wage statements, because he worked more hours, which were recorded on his log sheets, and the extra time was not included on the wage statements. The court found that the plaintiff had pled enough facts in support of his fourth cause of action—that the defendant had failed to provide wages when due—based on the factual allegations that the defendant still owed the plaintiff minimum wages for work performed. The court also found that the plaintiff had sufficiently pled the PAGA claims by alleging that he was not compensated for time spent driving to assigned locations, or while waiting for and loading the pick-up loads, and that he was not reimbursed for any of the expenses that he incurred as part of the job. The court denied the defendant's pre-discovery motion to dismiss but did strike the plaintiff's restitution claims for overpayment of federal taxes.

In *Celadon Trucking Services, Inc. v. Wilmoth*, 70 N.E.3d 833 (Ind. Ct. App.), Celadon appealed a judgment in favor of plaintiffs in a class-action lawsuit regarding a claim that it overcharged them for fuel purchases made using a Celadon-issued gas card.

Celadon directly employed truck drivers who drove Celadon-owned trucks and also hired owner-operators who drove their own trucks. Employee drivers were not responsible for expenses, such as fuel, but did have to refuel at gas stations designated by Celadon. For refueling, employee drivers were given a gas card and were required to refuel at Pilot Flying J truck stops, which provide Celadon a fuel discount. The owner-operators, who were classified as independent contractors by Celadon, were responsible for expenses, including fuel costs. Celadon also provided the gas cards to its independent contractors and would deduct the fuel costs from the compensation of the independent contractors. When the independent contractors used the gas cards at Pilot Flying J truck stops, Celadon would still receive the discounted fuel price; however, Celadon would not pass along the reduced fuel price to the independent contractors when Celadon later deducted the fuel costs from the independent contractors.

The plaintiffs sought to recover the difference between the amount Celadon deducted from their compensation for fuel charges at Pilot Flying J truck stops and the lower amount Celadon actually paid Pilot Flying J for that fuel. The contract between Celadon and the independent contractors allowed Celadon to seek reimbursement for costs, but it did not permit Celadon to seek reimbursement for more than Celadon's costs. The court found that the sole question was what Celadon's actual costs were with respect to fuel purchased by the independent contractors at Pilot Flying J truck stops; the fact that those costs resulted from a contract between Celadon and Pilot Flying J was irrelevant. The court agreed with the owner-operators that when Celadon made deductions from their compensation for fuel purchases made at Pilot Flying J truck stops, Celadon was only permitted to deduct the lower discounted price that it actually paid, not the (higher) pump price.

In *McGillis v. Department of Economic Opportunity*, 210 So.3d 220 (Fla. Ct. App.), the plaintiff was an Uber driver who appealed the decision of the state regulator of unemployment or reemployment insurance, which found that Uber drivers were not entitled to reemployment assistance and denied McGillis's claim for reemployment. The court affirmed the decision finding that Uber and McGillis contractually agreed that his work did not make him an employee, and the parties' working relationship confirmed that understanding. The court noted that the act of being available to accept requests is entirely in the driver's hands; drivers supply their own vehicles, and drivers control whether, when, where, with whom, and how to accept and perform trip requests. Drivers are permitted to work at their own discretion and Uber provides no direct supervision. Further, Uber does not prohibit drivers from working for its direct competitors. Therefore, the court found that Uber drivers are independent contractors, not employees, because they decide whether, when, where, with whom, and how to provide rides with limited control or oversight by Uber.

In *Saleem v. Corporate Transportation Group*, Ltd., 854 F.3d 131 (2d Cir.), the plaintiffs were livery car drivers who owned or operated franchises and were affiliated with the defendants who owned a “base license,” which allowed them to operate a dispatch base in New York City and to sell franchises to individual drivers. The plaintiffs filed suit seeking to recover unpaid overtime and other wages under the federal Fair Labor Standards Act (FLSA) and state law. The federal district court held that the drivers were not employees.

The Second Circuit agreed, concluding that plaintiffs were not employees but instead were in business for themselves. They possessed considerable autonomy in their day-to-day affairs and could, for example, choose among three principal ways of securing fares for driving customers: (1) they could wait in a physical queue of cars outside certain high-volume businesses; (2) they could elect to drive under a contract with the New York City Metropolitan Transit Authority (MTA); or (3) drivers could access a proprietary black-car dispatch system that transmitted requests for service from servers in a dispatch room to an application on drivers’ smart phones. In all three cases, clients provided vouchers to the driver transporting them in lieu of cash payment, and these vouchers were thereafter processed by the defendant. The court also noted that many plaintiffs, in violation of company rules, also picked up passengers via street hail, despite a prohibition of this practice. Drivers also determined when and how often to drive, and they worked vastly different amounts of time without providing any notice to the defendants. The plaintiffs likewise chose which areas in which to work, and they were at liberty to accept or decline jobs that were offered. Significantly, the plaintiffs also could drive for other dispatch bases, and the fact that the plaintiffs operated business organizations that could shift from one car service to another suggested that the defendants did not exercise significant control over plaintiffs. Under this economic-reality test, the drivers did not qualify as employees.

In *Supershuttle L.A., Inc. v. Danker*, 2017 Cal. App. Unpub. LEXIS 5342, Danker filed a complaint asserting that the he performed his work as an employee—not as a franchisee or independent contractor—so, he should have been compensated as an employee. In response, Supershuttle moved to compel arbitration citing the contract—which called for arbitration of any controversy arising out of the agreement—and the motion was denied. Danker argued that the lawsuit did not arise out of that agreement but, instead, concerned his status as an employee instead of a franchisee. The arbitration provision in the agreement was broadly worded and required that any controversy arising out of the agreement be submitted to arbitration. The court, however, found that the complaint was not based upon the contract, because Danker asserted that an entirely different relationship existed between the parties—one that had not been formalized by an agreement and one that needed to be legally determined. The court concluded that the claims Danker presented existed independently of the contract. The questions were whether Danker performed work in the manner of an employee and, if so, did Supershuttle violate the labor code? The court affirmed the denial of the petition to compel arbitration.

In *Derolf v. Risinger Brothers Transfer*, 2017 U.S. Dist. LEXIS 60827 (C.D. Ill.), the plaintiffs—truck drivers for a trucking carrier—alleged that the defendant improperly designated them as independent contractors instead of employees, and unlawfully deducted from, and withheld portions of, the wages owed to them in violation of the Fair Labor Standards Act (FLSA). The defendant moved to dismiss the case, arguing that the plaintiffs were indeed independent contractors. The court, using the economic-reality test to evaluate whether claimants were employees or independent contractors, considered factors such as the employer’s control over the manner in which the alleged employees perform the work, the employees’ opportunity for profit or loss depending upon skill, the alleged employees’ investment in equipment or materials, whether the work requires a special skill, the permanency and duration of the relationship, and the extent to which the work is an integral part of the alleged employer’s business.

The court looked at the agreement between drivers and carrier and noted that the drivers did not have to engage in the work themselves but could hire their own drivers to drive. The plaintiffs alleged that the defendant assigned driver-managers, who acted as their supervisors throughout their employment, to the plaintiffs, and the defendant directed, provided, and supervised

the plaintiffs. The plaintiffs pointed to the need to attend an orientation required by the trucking carrier as proof of the carrier's control, but the court found that undergoing driving and skill tests at an orientation were not, in and of themselves, indicative of an employer-employee relationship. Although the plaintiff drivers needed prior permission before doing so, the court found it significant that the drivers could use trucks leased from the trucking carrier for work for a competitor. The court further relied on the fact that the plaintiffs' profits depended on how much hauling they accomplished, which was something completely within their own control, subject to limitations on driving contained in federal regulations. The court found that the allegations in the complaint did not show that the defendant exercised the requisite amount of control over the plaintiff drivers and concluded that the plaintiffs were independent contractors, not employees, so the court granted the defendant's motion to dismiss.

Venue and Jurisdiction

In *Henry v. Central Freight Lines, Inc.*, 2017 U.S. Dist. LEXIS 167235 (E.D. Cal.), defendant moved to transfer the case from California to Texas based on the forum-selection clause in the plaintiff's agreement with defendant. The agreement classified Henry as an independent contractor, not an employee, and Henry sued Central Freight for allegedly violating California laws by misclassifying him. The court found that the forum-selection clause did not apply to the statutory claims because the focus of the complaint was that the defendant misclassified the plaintiff to unlawfully avoid compliance with applicable federal and state laws. Given Henry's claims that Central Freight illegally classified him as an independent contractor to deny statutory benefits, the court denied the defendant's motion to change venue because the court would not tolerate contractual schemes to avoid the California laws.

In *Pondexter v. Oruzio* 2017 U.S. Dist. LEXIS 40556 (E.D.N.Y.), a plaintiff filed a personal injury lawsuit in state court and the defendant removed the case to federal court based upon diversity. Pondexter was in an automobile accident with a truck that was operated by defendant Orozco-Morras, who worked for DT Trucking, which was owned by Seepaul. DT Trucking had been hired by Jake's Cartage to carry out an order for Teal's Express.

Pondexter argued that the court should remand the case to state court because the parties were not completely diverse, as both Pondexter and Teal's Express were New York citizens. The court, however, found that Teal's Express was not a proper defendant: Teal's Express did not own the truck involved in the accident and the driver was not employed by Teal's Express. Teal's Express did not exercise any control over the manner and method of shipment used by the drivers selected by Jake's Cartage, nor was it involved in the process of selecting the driver or subcontracted trucking company. Although Teal's Express was able to track the shipment to determine whether it had been delivered, there was no evidence that Teal's Express had any control over Jake's Cartage or DT Trucking's actions concerning the shipment. Instead, Teal's Express hired Jake's Cartage as an independent contractor. Once Teal's Express was dismissed, complete diversity did exist among the plaintiff and the defendant.

In *Lubinski v. Hub Group Trucking, Inc.* 690 Fed. Appx. 377 (6th Cir.), a trucking company contracted with the plaintiff as a driver. Lubinski was an Illinois citizen and sued the trucking company in the United States District Court for the Northern District of Illinois, claiming that the company's drivers are actually employees, instead of independent contractors. Accordingly, he argued, the trucking company had violated Illinois wage laws by failing to pay him for all of the hours he worked and by taking illegal deductions from his pay. The contract between the plaintiff and defendant trucking company included a controlling-law provision that mandated that Tennessee law governed any dispute regarding the contract; the contract also included a forum-selection clause that provided the venue as the Western District of Tennessee.

The defendant trucking company moved to dismiss the case, arguing, that under Tennessee law the plaintiff could not state a claim for violations of an Illinois law, and that the contract's choice-of-law provision was not equivalent to an unenforceable waiver of the plaintiff's rights. The plaintiff argued on appeal that the contractual choice-of-law provision was invalid because it was a waiver of his rights under the Illinois law. The court held that choice of law involves the selection of governing rights, and choosing governing rights is different than

waiving all rights. In other words, the plaintiff did not waive his rights under the Illinois law but, rather, elected in the contract to have his rights be defined and governed by Tennessee law. The defendant's motion was granted, and the case was dismissed.

Matthew Rosno

7. FAAAA Preemption

Background

In 2017, there were several cases examining the extent of preemption by the Federal Aviation Administration and Authorization Act (FAAAA), sometimes known as F4A, of state laws relating to trucking operations. The FAAAA prohibits states from enacting or enforcing laws "related to a price, route, or service of any motor carrier…with respect to the transportation of property." 49 U.S.C. § 14501(c)(1).

Although "[t]he phrase 'related to,' . . . embraces state laws having a connection with or reference to carrier 'rates, routes, or services,' whether directly or indirectly," the Supreme Court has held that FAAAA "does not preempt state laws affecting carrier prices, routes, and services in only a tenuous, remote, or peripheral manner." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251 (2013). The FAAAA was inspired by the Airline Deregulation Act (ADA), whose purpose was "to ensure that States would not undo federal deregulation with regulation of their own." *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008). Like the ADA, the FAAAA was intended to help ensure transportation rates, routes, and services reflect maximum reliance on competitive market forces, thereby stimulating efficiency, innovation, and low prices, as well as variety and quality. That goal has often led to conflicts with unions and other organizations representing drivers.

The preemptive scope of the FAAAA is broad (see *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), although not unlimited. A state law is preempted if it has a direct connection with or specifically references a carrier's prices, routes, or services. More expansively, a state law may be preempted even if the law's effect on prices, routes, or services "is only indirect." This means "that pre-emption occurs at least where state laws have a 'significant impact' related to Congress's deregulatory and pre-emption-related objectives." The statute expressly provides for three exceptions to federal preemption: safety regulations (including insurance requirements); intrastate transportation of household goods; and tow truck operations. See §14501(c)(2). The statute also expressly reserves state authority to regulate such areas as uniform cargo rules.

Wage and Hour Laws

In *Valadez v. CSX Intermodal Terminals, Inc.*, 2017 U.S. Dist. LEXIS 66923 (N.D. Cal.), plaintiffs made a number of claims based on CSX's alleged misclassification of its plaintiff-drivers as independent contractors, seeking to recoup what they alleged were illegal deductions from wages and to require CSX to pay its drivers in accordance with protection provided under California law. CSX entered into contracts with drivers who were categorized as independent contractors and who leased their trucks to CSX pursuant to contractor operating lease agreements (COLAs). The COLAs provided for compensation per load (i.e., "linehaul"), as well as for other types of reimbursements and accessorial charges and surcharges, such as inside delivery, waiting time, fuel, and storage. Relying on *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2049 (2015), the court held that the FAAAA did not preempt plaintiffs' claims. The court noted that the FAAAA expressly does *not* regulate a state's authority to enact safety regulations with respect to motor vehicles; control trucking routes based on vehicle size, weight, and cargo; impose certain insurance, liability, or standard transportation rules; regulate the intrastate transport of household goods and certain aspects of tow-truck operations; or create certain uniform cargo or antitrust immunity rules. 49 U.S.C. § 14501(c)(2), (3). This list was "not intended to be all inclusive, but merely to specify some of the matters which are not 'prices, rates or services' and which are therefore not preempted." H.R. Conf. Rep. No. 103-677, at 84. CSX argued that the drivers' wage and hour claims would have required CSX to classify drivers as employees, in effect prohibiting CSX from using independent contractors. However, the court in *Dilts* had rejected that argument, pointing out that CSX "may use independent contractors or it may use employees; Plaintiffs simply seek to apply generally

applicable wage and hour laws based on the policy that [CSX] has chosen to apply with respect to its drivers. Thus, because Defendant may adopt any business model it wishes so long as it complies with California's wage and hour laws, Plaintiffs' claims are not preempted by the FAAAA." (Other aspects of this case are discussed in the "Truth in Leasing" article, section 13.)

In *Company v. Indiana Department of Workforce Development*, 86 N.E.3d 204 (Ind.), a trucking company appealed a regulatory determination that the claimant was an employee during the time she worked as a driver for a trucking company for purposes of Indiana's unemployment compensation system. The company classified its drivers as independent contractors and argued that the regulatory decision had been based on Indiana law, which was preempted by the FAAAA. The court, however, disagreed and found there was no preemption, relying on *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1054 (7th Cir. 2016), which explained that laws that "affect the way a carrier interacts with its customers fall squarely within the scope of FAAAA preemption. Laws that merely govern a carrier's relationship with its workforce, however, are often too tenuously connected to the carrier's relationship *with its consumers* to warrant preemption." In *Company v. Ind. Dep't*, the company claimed it would incur various significant expenses if its drivers were classified as employees for purposes of the Indiana law, including fuel reimbursement, toll reimbursement, employee benefits, tools and hardware, and driver-return expenses. However, the court found that "after the expenses unrelated to unemployment insurance premiums are taken out of the equation, Company has established, at most, that estimated labor costs would increase by $800,995 per year, or approximately $0.036 per mile. At Company's labor cost of $0.90 per mile, such an increase is a modest 4%. . . That leaves us with the question of whether a maximum 4% increase in the prices Company charges to customers has a 'significant' impact for purposes of FAAAA preemption."

After reviewing the language of the FAAAA and congressional intent, the court explained that "we have little trouble concluding that while even a 4% increase in labor costs may have *some* impact on the prices Company charges its customers, Company has failed to establish that the impact will be 'significant.' As mentioned, it seems to us that a maximum 4% increase in labor costs is modest." Additionally, the court found that the unemployment law was one of general applicability, as unemployment insurance benefits are funded by a tax contribution imposed upon Indiana employers, so that "companies in the transport business are not singled out by the Act; Indiana employers, no matter their business, are subject to its provisions." Finally, the court rejected the "Company's bare assertion that [under the ruling] its drivers must be classified as employees for all purposes" as "Claimant's only claim is that she is entitled to be classified as an employee with respect to unemployment benefits."

In *Lupian v. Joseph Cory Holdings, LLC*, 240 F. Supp. 3d 309 (D.N.J.), plaintiff-drivers alleged violations of Illinois and New Jersey wage laws against defendant motor carrier, asserting that the motor carrier had misclassified them as independent contractors rather than employees under state law. Reviewing the evidence, the court pointed to an apparent split among the federal circuit courts concerning the limit of federal preemption over state wage laws—the Third Circuit had yet to reach the issue. In finding no preemption, the court relied on the Seventh Circuit *Costello* decision, which found that the Illinois wage law's "effect on the cost of labor is too tenuous, remote or peripheral to have a significant impact on [the motor carrier's] setting of prices for its consumers."

In *DaSilva v. Border Transfer of MA, Inc.*, 227 F. Supp.3d 154 (D. Mass.), plaintiffs who had worked as drivers for Borden claimed that they had been misclassified as independent contractors, arguing that they ought to be classified as employees because Borden maintains substantial control over its drivers. As employees, the drivers would have been protected from various deductions that Borden imposed on payments due to independent contractors. The defendant moved to dismiss on the basis of FAAAA preemption, arguing that the FAAAA preempts the plaintiffs' unjust enrichment claim, the Massachusetts Wage Act claim, and the entirety of the independent contractor definition in the statute. In response, the plaintiffs argued for a categorical rule that the FAAAA does not preempt generally applicable state employment laws. The Massachusetts

Wage Law provides that an "employee" is "[A]n individual performing any service . . . unless: (1) the individual is free from control and direction in connection with the performance of the service . . . and (2) the service is performed outside the usual course of the business of the employer; and (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed." The court identified the preemption question as whether the Wage Law claim and Prongs 1 and 3 of the Independent Contractor Statute "actually have a significant impermissible effect on carriers' prices, routes and services," and found that with respect to the record on the motion, the defendant's arguments were conclusory, and the statutes were not preempted.

Meal and Rest Stay Requirements

In *Hill v. Garda CL Nw., Inc.*, 394 P.3d 390 (Wash. Ct. App.), the defendant argued that the trial court erred by concluding that the FAAAA did not preempt the plaintiffs' claims that it failed to comply with Washington's meal and rest period requirements. The court concluded that the meal and rest-period requirements would not have a significant impact on its prices, routes, and services. Moreover, the carrier had not requested a variance for good cause from Washington's Department of Labor and Industries. As stated by the court, "If Washington law creates a problem for [Defendant], it is logical to look to Washington law for a solution before finding federal preemption."

Claims Against Freight Brokers

In *Georgia Nut Co. v. C.H. Robinson Co.*, 2017 U.S. Dist. LEXIS 177269 (N.D. Ill.), plaintiff brought an action against the well-known logistics company, alleging negligent hiring and negligent supervision by the broker in hiring a carrier that had failed to make a delivery. Robinson moved to dismiss the claims as preempted under the FAAAA, asserting that the state laws relied upon by the plaintiff have an effect on the prices, routes, or services of freight brokers covered by the FAAAA. A court finding that the hiring and supervision of a trucking company is within the definition of transportation services covered by the FAAAA and enforcement of the state-law negligence claims relating to these services would have a significant effect on these services. The court explained that "this case turns on whether [the broker's] alleged negligent supervision and negligent hiring relates to its services as a freight broker by either expressly referring to them or by having a significant economic effect on those services. The purpose of the FAAAA preemption was to free interstate shipping from a patchwork of state laws and regulations and to replace those rules with 'competitive market forces'." Thus, the court determined that enforcing state negligence laws that would have a "direct and substantial impact on the way in which freight brokers hire and oversee transportation companies would hinder this objective of the FAAAA" and that "the FAAAA does not allow courts to impute state-law derived rights into transportation agreements, which would expand the bargained-for rights of the agreement."

In *Nature's One, Inc. v. Spring Hill Jersey Cheese, Inc.*, 2017 U.S. Dist. LEXIS 160888 (S.D. Ohio), the plaintiff brought claims against its supplier arising out of delivery of contaminated milk, and the defendant brought a third-party action against WD Logistics for negligent selection of a motor carrier. In dismissing the third-party complaint against WD Logistics, the court noted that the law is clear that negligence claims relating to cargo against brokers are preempted under the FAAAA and WD Logistics is a broker, which is defined as a "person, other than a motor carrier . . . that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation." 49 U.S.C. § 13102(2). The court went on to explain that "but even if WD Logistics held itself out to the public as a motor carrier. . . , the FAAAA preempts state-law claims 'related to a price, route, or service of any motor carrier' in addition to brokers." 49 U.S.C. § 14501(c)(1).

Mann v. C. H. Robinson Worldwide, Inc., 2017 U.S. Dist. LEXIS 117503 (W.D. Va.) dealt with a bodily injury loss. The police concluded that the accident was caused by the driver's fatigued driving, bad brakes, improper tires, and faulty suspension, and the motor carrier's insurer settled with the claimant. Since Robinson had hired the carrier, the claimant thereafter sued it as the broker for negligent hiring, and Robinson argued that the suit was preempted by FAAAA. The court disagreed, pointing out

that the law of Virginia relating to negligent hiring relates to any person in any business making a hiring decision, and so cannot be said to be the regulation of transportation. (Other elements of this decision are discussed in the Transportation Broker article, section 9 in this review.) What is significant here is the distinction the court is drawing between personal injury cases involving a broker which are not preempted, and cargo cases which are. (See also the following section on personal injury claims.)

Personal Injury Claims

In *Muzzarelli v. UPS*, 2017 U.S. Dist. LEXIS 99395 (C.D. Ill.), the plaintiff claimed she was injured when she when she tripped over a UPS package delivered to her residence, and filed a negligence suit against UPS. The court noted that whether a claim is preempted by the FAAAA depends on whether the claim is "related to" a price, route, or service of UPS, which means that the claim has a *significant effect* on rates, routes, or services. "Related to" is shown by either "expressly referring to them or by having a significant economic effect upon them." *Morales v. Trans World Airlines Inc.*, 504 U.S. 374, 390 (1992). However, the court explained that claims that might indirectly affect fares, routes, and services are not preempted because they are too tenuous, remote, or peripheral in manner. The court ultimately found that the plaintiff's personal injury claim is not preempted by the FAAAA, because the injury claim is "too tenuously related" to be preempted and because it is well-established that personal injury cases are not preempted.

Public Safety Regulations

In *New York v. UPS*, 253 F. Supp. 3d 583 (S.D.N.Y.), the State of New York brought an action against UPS, alleging violations of law regarding a taxation-and-collection scheme for cigarettes sold on Indian reservations. The court, in finding no preemption, noted that on its face and throughout the text, the law is designed and intended to address public health issues associated with smoking. The court explained that "these and other similar laws may have a peripheral impact on the business of carriage but are not preempted by the FAAAA because of Congress's intent to preserve state control over such items. In short, PHL § 1399-ll is first and foremost a public safety regulation—not a carriage regulation."

Vince Saccomando

8. UM/UIM

Oregon law ORS 742.061(1) generally provides for an award of attorney fees when an insured brings an action against his or her insurer and recovers more than the amount tendered by the insurer. ORS 742.061(3), though, provides that an insured is not entitled to attorney fees if, within six months of the filing of a proof of a UM loss, the insurer states in writing that it has accepted coverage, that it agrees to binding arbitration, and that the only remaining issues are the liability of the uninsured motorist and the "damages due the insured."

A similar "safe harbor" provision protects a no-fault PIP insurer from exposure for attorney fees, if has accepted coverage and the only issue is the amount of benefits due the insured. ORS 742.061(2). In *Grisby v. Progressive Preferred Insurance Co.*, 343 Ore. 175, 166 P3d 519, (2007), the Supreme Court of Oregon held that the "safe harbor" did not apply in PIP cases where the insurer raised issues that could have resulted in an award of zero "benefits." In *Spearman v. Progressive Classic Insurance Co.*, 361 Ore. 584, 396 P.3d 885, however, the court found that the *Grisby* reasoning did not apply if the UM insurer raises issues that could result in an award of zero "damages," particularly since the statute contemplated that the insurer could challenge the liability of the uninsured motorist, and the amount of "damages due to the insured" could indeed be zero if the uninsured motorist was not at fault for the loss.

The plaintiff in *Cramer v. National Casualty Co.*, 690 Fed. Appx. 135 (4th Cir.) was an emergency medical technician who was struck by a car while crossing a highway to get back to her ambulance from an accident site. At the time of the collision, she was about eight feet from the ambulance. The ambulance company carried an automobile insurance policy from National Casualty, which denied UM coverage to Cramer on the grounds that she was not "occupying" (i.e., "in, upon, getting in, on, out or off") the covered ambulance at the time of the loss. The court agreed with the insurer that Cramer was

not "occupying" the ambulance by any definition. (We observe that some courts have gone off the rails here by improperly focusing on whether the injured party was "using" her vehicle, which is not the correct question.)

Similarly, in [*Terryberry v. Liberty Mutual Fire Insurance Co.*, 688 Fed. Appx. 489 (9th Cir.)], Terryberry was performing maintenance on a road sign along a highway when an uninsured motorist struck the company truck he had driven to the site. Terryberry was standing at least 10 feet away from the truck when the crash occurred, but the impact caused the truck to strike Terryberry, causing injuries. The Ninth Circuit agreed with the district court that Terryberry was not in or upon the truck or undertaking the affirmative act of getting in or getting on the truck, nor even approaching it, when the accident occurred. The court also rejected Terryberry's argument that the occupancy requirement applies differently to employees using covered work vehicles.

As set out by the court in [*Meyers v. Protective Insurance Co.*, 2017 U.S. Dist. LEXIS 166955 (M.D. Pa.)], the insured's complaint alleged a textbook example of bad-faith UM claim handling. The last straw, which apparently drove the insured to sue the insurer for bad faith, was a letter from the insurer, a week after the insured agreed to settle for the UM limits, setting forth alleged falsities designed to devalue the claim, including that the claimant had delayed in reporting the accident, that he had a "significant medical history," that there was only "minor property damage," and alluding to various unidentified "other relevant factors."

Generally, to prevail on a bad-faith claim under Pennsylvania law, a plaintiff must establish that: (1) the insurer did not have a reasonable basis for denying coverage and (2) the insurer knew or recklessly disregarded its lack of a reasonable basis when it denied coverage. The insured's amended complaint set forth claims pertaining to the insurer's alleged refusal to promptly communicate with the insured, its repeated misrepresentations, and its failure to comply with various insurance regulations. The insured cited with specificity numerous instances where he contacted the insurer's adjuster regarding the status of his UM claim and his inquiries were either ignored or dealt with in a cursory, non-responsive manner. The insured alleged further that at the time the initial settlement offer was made, the insurer knew the insured was still unable to work and undergoing continued medical treatment nearly 30 months after the hit-in-run accident, and consequently his medical and wage loss liens were rapidly increasing. The amended complaint also called into question the sufficiency and timeliness of the insurer's investigation and evaluation of the motorist claim, asserting that, despite repeated requests to evaluate his claim and consider the claim for review, the insurer's adjuster seemingly ignored those requests and did not get the claim scheduled for review for over two months. Taken as a whole, the court found ample factual allegations sufficient to defeat the insurer's motion to dismiss.

In [*Osborne v. Benson*, 2017 U.S. Dist. LEXIS 162540 (W.D. La.)], the two claimants sought UM coverage from their employer's insurer, National Union, when their company car was rear-ended. National Union claimed that the UM/UIM form filled out and signed by the employer in December 2009 ("the 2009 UM waiver form") selecting "Economic-Only" losses was still valid and part of the renewed policy at the time of the accident in 2014.

> Louisiana Revised Statute 22:1295(1)(a)(ii) provides, in pertinent part:
>
> The form signed by the insured or his legal representative which initially rejects coverage, selects lower limits, or selects economic-only coverage shall remain valid for the life of the policy and shall not require the completion of a new selection form when a renewal, reinstatement, substitute, or amended policy is issued to same named insured by the same insurer or any of its affiliates. . . Any changes to an existing policy, regardless of whether these changes create new coverage, except changes in the limits of liability, do not create a new policy and do not require the completion of new uninsured motorist selection forms.

The 2009-2010 National Union policy, with a liability limit of $1,000,000, contained a section entitled "Louisiana Uninsured Motorists Coverage — Bodily Injury," and a form reflecting the named insured's selection of "economic-only" UM coverage with limits of $100,000. This section was missing from the 2011 and 2012 policies

but was added back in for the policy covering years 2013 and 2014. The insureds argued that, as a result of the hiatus and subsequent re-inclusion of the section, the 2009 UM waiver form was no longer valid in 2014, and that as a result, "Economic-Only" coverage was no longer applicable and that they were entitled to UM coverage in the general amount of liability, that is, $1,000,000.

The court, however, determined that in Louisiana, uninsured motorist coverage is read into an automobile-liability policy as a matter of law, unless it is specifically rejected or modified under state law provisions. Thus, whether UM policy section was present or not during the annual policy renewals was irrelevant, particularly since the statute allowed a one-time selection to continue forward in each annual renewal. It was undisputed that the general liability limits of the National Union policy did not change from 2010 to 2014. Accordingly, the non-existence of the "Louisiana Uninsured Motorists Coverage-Bodily Injury" sections in the 2011 and 2012 policies did not effect change in UM coverage.

The right to collect UM benefits where the uninsured tortfeasor is bankrupt was examined in *Easterling v. Progressive Specialty Insurance Co.*, 2017 Ala. LEXIS 93, in which Easterling was injured when his vehicle was rear-ended by McCartney. Easterling sued McCartney and also named Progressive, his insurer, seeking to recover UIM benefits.

When McCartney filed for bankruptcy, Progressive argued that, under Alabama law, a plaintiff may seek to recover UIM benefits from his insurer only if the plaintiff is "legally entitled to recover damages" from the tortfeasor. See § 32-7-23(a), Ala. Code 1975. Progressive contended that, because McCartney's bankruptcy filing foreclosed her legal obligation to pay debts—including any judgment recovered against her by Easterling—Easterling was not legally entitled to recover from McCartney in excess of McCartney's own liability-insurance policy limits and, thus, his claim for UIM benefits accordingly failed as a matter of law.

The basic debate came down to whether "legally entitled to recover" is equivalent to "able to collect." The dissenter felt that if damages could not be collected from the tortfeasor, the injured person should not be able to collect UIM benefits. The majority, however, noted that the Bankruptcy Code is not violated by the continuation of an action to permit an injured plaintiff to proceed against a discharged debtor to ultimately recover against an insurer. The court found that there is a clear distinction between a plaintiff's legal entitlement to recover based on a showing of a tortfeasor's liability and the plaintiff's ability to legally collect the demonstrated damages from the tortfeasor/debtor. There was nothing preventing Easterling from establishing that he was legally entitled to recover from McCartney on the merits of his claims; instead, Easterling was merely barred, by operation of McCartney's bankruptcy discharge, from actually collecting demonstrated damages from her. Since Easterling was "legally entitled to recover" damages, he was entitled to recover UIM benefits from Progressive.

In *Rylee v. Progressive Gulf Insurance Co.*, 224 So.3d 535 (Miss.), Rylee's motorcycle collided with Brashier's vehicle. Rylee collected the $25,000 limit of Brashier's liability policy with State Farm, and the stacked $50,000 limit of his UIM policy with United Services Automobile Association (USAA). Progressive, which issued a policy covering the motorcycle, claimed the right to offset completely its policy's $25,000 per-person UIM coverage because Brashier's insurer had paid $25,000 in liability coverage.

Rylee's wife filed a loss-of-consortium action against Brashier, Progressive, and USAA. Both Progressive and USAA filed for summary judgment, arguing that Rylee's wife's derivative loss-of-consortium claim fell under the $25,000 policy limit for "each person," which had been offset by the State Farm payment in Progressive's case and already tendered in USAA's case. The court found that the plain language of the two UIM policies mandated a finding of no coverage for Rylee's wife. The Progressive policy listed "loss of consortium" as a derivative claim that falls under the each-person policy limit for the person who was bodily injured. The USAA policy made clear the maximum limit for any one person's bodily injury included all "derivative or consequential damages recoverable by any person." In other words, the each-person limit in each policy was based on the number of persons who suffer bodily injury in the accident, not the number of insureds making claims.

In [*Owners Insurance Co. v. Craig*, 514 S.W.3d 614 (Mo.)], Owners issued to the Craigs a policy with UIM coverage. The policy's declarations list "$250,000 per person" as the UIM "limit," but the "Limit of Liability" section in the UIM endorsement stated:

> 4. LIMIT OF LIABILITY
>
> a. The Limits of Liability stated in the Declarations for Underinsured Motorist Coverage are for reference purposes only. Under no circumstances do we have a duty to pay you or any person entitled to Underinsured Motorist Coverage under this policy the entire Limits of Liability stated in the Declarations for this coverage.
>
> b. Subject to the Limits of Liability stated in the Declarations for Underinsured Motorist Coverage and paragraph 4.a. above, our payment for Underinsured Motorist Coverage shall not exceed the lowest of:
>
> (1) the amount by which the Underinsured Motorist Coverage Limits of Liability stated in the Declarations exceed the total limits of all bodily injury liability bonds and liability insurance policies available to the owner or operator of the underinsured automobile; or
>
> (2) the amount by which compensatory damages, including but not limited to loss of consortium, because of bodily injury exceed the total limits of all bodily injury liability bonds and liability insurance policies available to the owner or operator of the underinsured automobile.

These provisions effectively ensured that Owners would never be obligated to pay the full amount the declarations list as the UIM "limit."

Vicki Craig was injured in an accident when her vehicle was struck by one driven by another motorist, and incurred damages exceeding $300,000. After she collected the $50,000 limit of the other driver's liability policy, Owners paid her $200,000, citing the set-off provisions that allowed them to deduct the $50,000 paid on behalf of the at-fault motorist.

In a UIM context, the Supreme Court of Missouri had previously held that an ambiguity exists when the policy contains both: (1) express language indicating the insurer will indeed pay up to the declarations' listed limit amount; and (2) set-off provisions ensuring the insurer will never be obligated to pay such amount. In this case, however, the Owners policy contains no express language indicating the insurer would pay up to the declarations' listed limit amount, but rather stated the declarations' listed limit amount was "for reference purposes only" and "[u]nder no circumstances" would Owners have a duty to pay that entire amount. Under the court's precedent, a policy that plainly states it only will pay the difference between the amount recovered from the underinsured motorist and the declarations' listed limit amount is enforceable.

The Supreme Court of Missouri also found a lack of ambiguity in the set-off provisions of the UIM policy at issue in *Swadley v. Shelter Mutual Insurance Co.*, 513 S.W.3d 355 (Mo.). Shelter issued the Swadleys a policy which listed "$100,000 Per Person" as the UIM "limit" on the declarations. The definitions section of the policy defined "underinsured motor vehicle" as "a motor vehicle covered by a[n] … insurance policy, applicable to the occurrence; but the monetary limits of that … or policy, are less than the limits of underinsured motorist coverage shown in the Declarations." (Emphasis added). The clear and intentional effect of this definition is that UIM coverage will not apply when the underinsured motorist has liability coverage equal to or greater than $100,000.

Angela Swadley's vehicle was struck by a tractor-trailer unit driven by an employee of Silk Way Trans, LLC, causing her vehicle to overturn. Silk Way had liability insurance coverage of $1,000,000 and the Swadleys settled with the driver and Silk Way for $823,874.80. The Swadleys then made a claim to Shelter pursuant to their policy's UIM coverage. Shelter denied the claim, arguing the tractor-trailer unit was not an "underinsured motor vehicle," as defined by the policy, because Silk Way had liability coverage ($1,000,000,) which was greater than the UIM limit listed in the declarations ($100,000).

The court found that the policy expressly did not promise UIM coverage under every circumstance, nor did it promise UIM coverage when the underinsured motorist

has liability coverage equal to or greater than the UIM limit. Accordingly, the policy was not rendered ambiguous by the fact that the policy's definition of "underinsured motor vehicle" restricted UIM coverage to applying only when the underinsured motorist has liability coverage less than the UIM limit.

The Swadleys argued that, aside from the definition of "underinsured motor vehicle," the policy was ambiguous because it promised UIM coverage up to $100,000 but contained set-off provisions ensuring that Shelter will never be obligated to pay that full amount. The court held, however, that any ambiguity as to the amount of UIM coverage was irrelevant because such an ambiguity, if one existed, would not render the policy ambiguous as to when UIM coverage applies.

By a 4-3 decision, the Supreme Court of Oklahoma held in *Raymond v. Taylor*, 2017 OK 80, that the UIM carrier is not entitled to subrogation against the underinsured tortfeasor's assets, including excess insurance coverage, in the amount the uninsured motorist insurance carrier had previously paid to the injured party.

> Title 36 O.S. 2011 § 3636(C) defines the term "uninsured motor vehicle" and provides:
>
> C. For the purposes of this coverage the term "uninsured motor vehicle" shall include an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency. For the purposes of this coverage the term "uninsured motor vehicle" shall also include an insured motor vehicle, the liability limits of which are less than the amount of the claim of the person or persons making such claim, regardless of the amount of coverage of either of the parties in relation to each other.

Section 3636(F) provides in pertinent part:

> In the event of payment to any person under the coverage required by this section … the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer. Provided, however, with respect to payments made by reason of the coverage described in subsection C of this section, the insurer making such payment shall not be entitled to any right of recovery against such tortfeasor in excess of the proceeds recovered from the assets of the insolvent insurer of said tortfeasor….

The dissent read Section 3636(F) as permitting the UIM insurer to seek recovery of UIM payments made from the tortfeasor or any of its insurers other than an "insolvent insurer." The majority of the court, on the other hand, focused on the legal principle that, under Oklahoma's mandatory UM statute, any excess or umbrella policy is not included when determining the liability limits of a vehicle under Section 3636(C). The majority holding of the court, therefore, was that a UIM insurer is limited to subrogation from the tortfeasor's primary insurer but is not entitled to subrogation from any other assets of the tortfeasor, including any excess liability policy.

Pennsylvania's Motor Vehicle Financial Responsibility Law (MVFRL) requires insurers to inform named insureds that they may reject UIM coverage by signing a written rejection form contained in *Subsection 1731(c) of the MVFRL*. The form provided in the statute reads:

> REJECTION OF UNDERINSURED MOTORIST PROTECTION
>
> By signing this waiver, I am rejecting underinsured motorist coverage under this policy, for myself and all relatives residing in my household. Underinsured coverage protects me and relatives living in my household for losses and damages suffered if injury is caused by the negligence of a driver who does not have enough insurance to pay for all losses and damages. I knowingly and voluntarily reject this coverage.
>
> Subsection 1731((c.1) states that any UIM coverage rejection form that does not

> "specifically comply" with Section 1731 of the MVFRL is void and that, if an insurer fails to produce a valid UIM coverage rejection form, then UIM coverage shall be equal to the policy's bodily injury liability limits.

In *Ford v. American States Insurance Co.*, 154 A.3d 237 (Pa.), the form signed by the insured read:

> REJECTION OF UNDERINSURED MOTORISTS PROTECTION
>
> By signing this waiver I am rejecting underinsured motorists coverage under this policy, for myself and all relatives residing in my household. Underinsured motorists coverage protects me and relatives living in my household for losses and damages suffered if injury is caused by the negligence of a driver who does not have enough insurance to pay for all losses and damages. I knowingly and voluntarily reject this coverage.

When the named insured's daughter was injured by an underinsured motorist, she argued that the rejection form was invalid because it was not a "copy and paste" verbatim reproduction of the form set out in the statute. The Supreme Court of Pennsylvania disagreed, however, holding that a UIM coverage rejection form may contain *de minimis* deviations from the statutory rejection form and still be construed to specifically comply with Section 1731 of the MVFRL, as long as the form does not modify coverage or inject ambiguity into the statutory form, and an insured's signature on the slightly altered form demonstrates that the insurer offered UIM coverage to the insured and that the insured understood what she was doing when she declined that coverage.

At the time of the subject accident in *Progressive Casualty Insurance Co. v. Dias*, 151 A.3d 308 (R.I.), the defendant was insured for UIM coverage under both a Progressive Northern policy covering the motorcycle that defendant was operating when he was injured, and a second policy underwritten by Progressive Casualty which only covered defendants' automobiles. Progressive Casualty denied coverage based on the policy's "owned-but-not-insured" clause. The insured argued that the exclusion was overridden by Rhode Island stacking statute, G.L. 1956 § 27-7-2.1(i), which provides:

> Whenever an insured has paid two (2) or more separate premiums for uninsured motorists' coverage in a single policy of insurance or under several policies with the same insurance company, the insured shall be permitted to collect up to the aggregate amount of coverage for all of the vehicles insured, regardless of any language in the policy to the contrary.

The Supreme Court of Rhode Island, however, observed that, in crafting the statute, the Legislature chose the term "same insurance company," and that the plain and ordinary meaning of "same" is "identical; not different." The court concluded that the two wholly owned Progressive subsidiaries, each of which is a different corporate entity, are legally distinct from one another and from their parent corporation, The Progressive Corporation, for the purpose of § 27-7-2.1(i).

Utah Code section § 31A-22-305.3(2)(a) states (emphasis added) that "[u]nderinsured motorist coverage under *Subsection 31A-22-302(1)(c)* provides coverage for a covered person who is legally entitled to recover damages from an owner or operator of an underinsured motor vehicle because of bodily injury, sickness, disease, or death." "Covered person," in turn, is defined to include (emphasis added) "any person occupying or using a motor vehicle *referred to in the policy." § 31A-22-305(1)(d)*.

The Travelers policy at issue in *Dircks v. Travelers Indemnity Co. of America*, 2017 UT 73 (Utah) provided $1 million of liability coverage and $1 million of UIM coverage for vehicles owned by the named insured Mid-State Consultants, Inc. An endorsement to the policy added $1 million liability coverage for employee-owned vehicles, but Mid-State did not purchase UIM coverage for the employee-owned vehicles. There was, however, no written rejection of UIM coverage for the employee-owned vehicles.

Answering a certified question from the federal District of Utah, the Supreme Court of Utah held (in a contentious 3-2 decision) that the statute at issue requires that all vehicles covered under the liability provisions of an automobile insurance policy must also be covered under

the underinsured motorist provisions of that policy, and with equal coverage limits, unless a named insured waives the coverage by signing an acknowledgment form meeting certain statutory requirements. In the majority's view, the statute provided that any person occupying or using a motor vehicle "referred to" in the policy is a "covered person" for UIM purposes. Since the employee-owned vehicle involved in the loss was "referred to" in the Travelers policy, even though only in the liability coverage section, that reference was sufficient to trigger mandatory UIM coverage.

The dissent argued that the majority's position meant that Mid-State needed to affirmatively waive underinsured motorist coverage only because it purchased insurance for company-owned and employee-owned cars in a document labeled with a single policy number. Had Mid-State purchased the same exact insurance contracts, except with the "endorsement" for employee-owned cars relabeled a "policy," the majority would conclude that it did not need to affirmatively waive underinsured motorist coverage. Since Mid-State was not obligated by statute to purchase any coverage for employee-owned vehicles at all, the dissent felt that it was wrong to require Mid-State to affirmatively waive UIM coverage for those vehicles.

The Utah high court found unanimity in *Truck Insurance Exchange v. Rutherford*, 2017 UT 25, 395 P.3d 143 (Utah), however, holding that, where the insured has already received workers' compensation benefits, the UIM insurer must fully compensate the insured within its policy limits but only for damages in excess of what workers' compensation paid, so as to avoid an inappropriate double recovery. Utah's UIM motorist coverage statute, Utah Code section 31A-22-305.3(4)(c)(i), provides that UIM coverage "is secondary to the benefits provided by" workers' compensation, while and section 305.3(4)(c)(iii) provides that underinsured motorist coverage "may not be reduced by benefits provided by workers' compensation insurance."

The claimant, Rutherford, who was injured when his company van was hit by a vehicle that had run a red light, sought compensation from both his employer's workers' compensation insurer and Truck Insurance Exchange (TIE), which provided the employer with UIM coverage. The workers' compensation claim sought benefits for medical expenses, lost income, and permanent disability. Although Rutherford's medical expenses exceeded $250,000, the workers' compensation insurer paid only $183,628.81 for medical expenses (as well as paying benefits for lost wages and permanent disability). Rutherford argued, however, that he was entitled to recover full benefits under TIE's UIM policy for medical expenses, lost income, lost vocational capacity, future medical expenses, pre-and post-judgment interest, and general damages.

As framed by the court, the issue was not whether Rutherford could recover at all from TIE, but whether he could recover in excess of 100 percent of his damages by recovering under TIE's policy for the same benefits he received from workers' compensation. The court held that, under Utah Code section 31A-22-305.3, a UIM insurer may not reduce its policy limits by the benefits paid by workers' compensation, and after workers' compensation benefits are exhausted, the UIM insurer must pay the remainder of the insured's damages up to its policy limits or until the insured is fully compensated. To avoid an insured's double recovery, however, a UIM insurer need not duplicate benefits already paid by workers' compensation.

In *Manu v. GEICO Casualty Co.*, 293 Va. 371, 798 S.E.2d 598 (Va.), the Supreme Court of Virginia considered whether a UM insurance carrier violated its duty of good faith to its insured, by refusing to pay its UM policy limits prior to the insured obtaining a judgment against the uninsured tortfeasor. Virginia Code § 38.2-2206 ("Uninsured motorist insurance coverage") requires auto liability policies to contain "an endorsement or provisions undertaking to pay the insured all sums that he is *legally entitled to recover as damages* from the owner or operator of an uninsured motor vehicle. . ." (emphasis added). The court agreed with the insured that Virginia law exposes an insurer to penalties if a denial, refusal, or failure to pay a claim of more than $3,500 in excess of the deductible was not made in good faith. Va. Code § 8.01-66.1 ("Remedy for arbitrary refusal of motor vehicle insurance claim"). The court found, however, that the plain meaning of "legally entitled to recover as damages" in Va. Code § 38.2-2206 is that a UM carrier has a duty to pay, to an insured, damages which an uninsured motor vehicle owner or operator has been ordered by a court

to pay the insured for bodily injury or property damage caused by operation of an uninsured motor vehicle. Accordingly, the UM insurer has no obligation to settle a UM claim before the insured obtains a judgment against the uninsured tortfeasor.

As analyzed by the Supreme Court of West Virginia in *Government Employees Insurance Co. v. Sayre*, 800 S.E.2d 886 (W. Va.), West Virginia Code § 33-6-31 (1992) does not forbid an anti-stacking provision as to UM coverage where a single automobile insurance policy is issued by a single insurer, even though the policy covers two or more vehicles. Under the terms of such a policy, the insured is not entitled to stack the coverages of the multiple vehicles and may only recover up to the policy limits set forth in the single policy endorsement.

> The GEICO policy at issue provident, in pertinent part:
>
> Regardless of the number of autos or *trailers* to which this policy applies:
>
> 1. The Underinsured Motorists Bodily Injury Liability limit for "each person" less any liability coverage available to the *insured* from the tortfeasor or tortfeasors is the maximum we will pay for damages for *bodily injury*, including all derivative claims and any claim for damages for care and loss of services, to one person in one accident;
>
> . . .
>
> 4. When coverage is afforded to two or more autos, the limits of liability shall apply separately to each auto as stated in the Declarations.

The court construed the "separate application" language in Condition 4 as clarifying that, for each vehicle insured, there is a total amount of insurance available upon a policy occurrence or trigger. For example, if both of an insured's vehicles were contemporaneously involved in an accident, each of them would separately be subject to the $20,000/$40,000 per person/per occurrence amount of liability. The second vehicle would not be left uncovered by virtue of the policy limits having been met by the accident involving the first insured vehicle. (Of course, since neither of the vehicles involved in the subject case were the insured's vehicles, Condition 4 was wholly inapplicable to this case.) Condition 4, however, was not intended to trump the applicable single-liability limit, regardless of the number of autos to which the policy applied.

In *Hurst v. Metropolitan Property & Casualty Insurance Co.*, 2017 WY 104, 401 P.3d 891 (Wyo.), Larry Hurst was killed, and Sara Hurst was seriously injured, while riding their bicycles after a vehicle driven by the uninsured, Hannah Terry, negligently and consecutively struck each of their bicycles. The Hursts' UM insurance carrier, Metropolitan Property and Casualty Insurance Company (MetLife), contended that the injuries to the Hursts and caused by Terry were the result of one accident, resulting in a maximum of $300,000 in coverage. The Hursts argued that their injuries were the result of two accidents, warranting $600,000 in coverage.

In a case of first impression in Wyoming, the Supreme Court noted that there are three separate legal theories, or analytical approaches, that courts utilize to interpret the term "one accident" as it appears in standard insurance policy language: the cause theory, the effect theory, and the event theory. The court adopted the "cause theory," under which the number of accidents is determined by the number of causes of the injuries, with the court asking if there was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage. Pursuant to this legal theory, if one cause is interrupted and replaced by another intervening cause, then the chain of causation is broken, resulting in two or more occurrences depending on the number of intervening causes. When collisions between multiple vehicles are separated by a period of time or the insured maintains or regains control of the vehicle before a subsequent collision, there are multiple occurrences.

In this case, the two collisions occurred approximately thirty feet away from each other and approximately one second apart from each other. The Supreme Court acknowledged that an inference could be made that Terry maintained control over her vehicle throughout these consecutive events, resulting in a determination of multiple occurrences.

A court, however, is not permitted to make such inferences in a grant of summary judgment in favor of the

movant but must give the non-movant the benefit of all favorable inferences which may fairly be drawn from the materials. While the stipulated facts in this case provided no evidence that Terry lost control of her vehicle, and no indication that she lost control after hitting Larry Hurst and before hitting Sara Hurst, they also provided no evidence to allow this court to conclude that Terry maintained or regained control of her vehicle throughout this duration. Affording MetLife the benefit of all favorable inferences that might fairly be drawn from those limited facts and applying them to the elements of the cause theory, the court concluded that a factual question as to Terry's control of her vehicle needed to be resolved by a trier of fact at trial.

Phil Bramson

9. *Brokers*

A traditional transportation broker did not face vicarious exposure for the negligence of the motor carriers it hired. That principle has become a bit shaky in light of changes in the logistics business. These days, third-party logistics companies are susceptible to liability on the theory that a shift in the balance of power between brokers and carriers means that the logistics companies direct—and exercise at least some measure of control over—the carriers they engage.

Considering that, the decision in *Ciaravino v. Bulldog National Logistics, LLC*, 146 A.D.3d 928, 46 N.Y.S. 3d 140 (2d Dep't) was positively retro. The claimant, Ciaravino, was injured when metal decking fell off a truck operated in the business of GottaRun Trucking. Ciaravino sued GottaRun, but also sued the broker, Imperial Transport and Leasing. There was a broker/carrier contract in effect between GottaRun and Imperial which, among other things, contained a hold-harmless running from carrier to broker. The appellate court found that Imperial had established that it was not itself involved in operating the truck that caused the loss and that it did not exercise actual control over the activities of GottaRun. Moreover, there was no evidence that Imperial had been negligent in hiring GottaRun. Accordingly, the broker was entitled to summary judgment.

The broker in *Mann v. C.H. Robinson Worldwide Inc.*, 2017 U.S. Dist. LEXIS 117503 (W.D. Va.) did not fare as well. This case involved a far more complex set of arguments. The principal of Nova Express was hired to carry a load from Texas to New York City. At around 3:00 a.m., he fell asleep at the wheel, crashed into the guardrails on I-81, and the truck came to rest in the southbound lanes with its lighting system not operational. Two fatal collisions followed. The police investigation concluded that the loss was caused by a combination of the driver's fatigue and poor vehicle maintenance. Securing a settlement against Nova was not much of a challenge for plaintiff's counsel, who then turned their attention to C.H. Robinson, the logistics giant, which had assigned the load to Nova. The parties disagreed about a range of issues including factual ones (e.g., did Nova have operating authority?) and legal ones (such as, what are the obligations of a transportation broker in checking into the motor carriers it assigns to haul loads?).

C.H. Robinson had worked with Nova previously—and company employees and customers had repeatedly asked that Nova be put on the "do not use" list. Robinson's records showed that Nova, whose fleet consisted of only two rigs, had suffered 30 breakdowns in the three years leading up to the loss. Much controversy, though, stemmed from the claimants' reliance on BASIC scores collected, tabulated, and released publicly by USDOT beginning in 2010. The scores have been gobbled up by plaintiffs' firms, who use them to discredit motor carriers with middling or poor scores and, when appropriate, the brokers that hired them. A fierce reaction against the admissibility of the scores was mounted by the trucking industry. After a GAO report raised serious questions about the methodology used in creating the BASIC scores, and following new legislation in 2015, much of the data, including percentile scores, were removed from the USDOT website. The information was available publicly, though, in 2014, at the time Nova, whose scores were subpar, was assigned to pick up the load at issue.

In moving for summary judgment, C.H. Robinson argued, first, that federal law preempts and invalidates the tort of negligent hiring against brokers. There has been a group of decisions holding that the FAAAA, which bars state laws impacting on price, route, or service of a motor carrier, broker, or freight forwarder with respect

to the transportation of property, preempts suits against brokers for cargo losses. (See, the *Ameriswiss* decision, 888 F.Supp.2d 197 (2012), also involving C.H. Robinson, which we discussed in earlier editions.) (The *Mann* court confusingly and inaccurately refers to the *Ameriswiss* claim as being for "property damage.") Citing to several recent decisions, the *Mann* court concluded that a personal injury suit for negligent hiring is not an attempt to regulate the services of a freight broker. Accordingly, it is permissible to sue a broker for negligent selection of a motor carrier, if the loss involved personal injury (though not, under *Ameriswiss*, for cargo losses). (For a fuller discussion of this issue see our FAAAA Preemption article, section 7.)

C.H. Robinson's second theory was that the complaint should be dismissed because it relied upon BASIC scores that Congress had decided should not be used by the public to evaluate the safety record of individual motor carriers. The court rejected this argument for several reasons—among them, that the plaintiff had cited evidence beyond the BASIC scores and that, in 2014, the scores were publicly available. Accordingly, it was for the jury to decide whether a broker at that time ought to have considered them. In fact, since the scores remain available to the carriers themselves, the court suggested that, even today, it is possible to argue that brokers should inquire about BASIC scores prior to assigning a carrier.

The court did not establish a standard for what brokers must do to confirm that a carrier it wishes to hire is suitable, nor did it comment on C.H. Robinson's own policy for hiring brokers. C.H. Robinson explained that before engaging a broker: 1) it confirms that the carrier has "active licensure"; 2) that it has a satisfactory or "unrated" safety rating; 3) that it maintains insurance in the amount mandated by USDOT; 4) and that it is not on the terrorist watchlist. (Incidentally, there is case law that holds that it is not the broker's duty to check on the level of insurance maintained by the carrier.) The court in *Mann* was prepared to let the jury evaluate the steps that the broker took to check the carrier; under the circumstances, it is understandable that the case was subsequently settled.

The holding in *Sperl v. Henry*, 2017 Ill. App. LEXIS 748 was no cheerier for C.H. Robinson, or brokers in general. This is a matter, discussed in a previous edition, that resulted in judgments of over $23 million, which the broker settled. Thereafter, C.H. Robinson sued the motor carrier for contribution under Illinois law.

This was a case in which C.H. Robinson's liability was assessed not on the basis of negligent hiring (the basis of the dispute in *Mann*), but for vicarious liability, since the court found that C.H. Robinson controlled the motor carrier's actions and those of the owner-operator. The difficulty with the contribution claim was that the active tortfeasor was the owner-operator, but the motor carrier and broker both bore only vicarious liability. Under the circumstances, contribution was not available as between the carrier and broker.

An obvious tension between brokers and carriers—which a well-tailored broker-carrier agreement will address—is a tendency of many customers trying to save money by eliminating the middle man. The court in *Quality Transportation Services v. Mark Thompson Trucking*, 2017 Ill. App. 3d 160761 was asked to decide at what point a carrier (MTT) is guilty of soliciting the broker's (QTS) customers. The broker's claim was weakened by the fact that it, itself, was affiliated with a motor carrier (Lotz) and the customer at issue thought all along that MTT's owner was a Lotz driver. The customer happened to know MTT's principal and reached out to him to see if he could make trucks available. A business relationship developed and QTS sued for violation of the broker carrier contract by MTT, in soliciting QTS's customer. Reversing the trial court's ruling in favor of MTT, the court found that reasonable minds could differ on the question of whether an illegal solicitation had taken place. After the initial contact by the customer, there were several communications initiated by MTT and the court opted to let a jury decide whether, on the undisputed facts, a solicitation had occurred.

There were a number of decisions last year relating to a broker's failure to remit payments to motor carriers. To protect motor carriers, USDOT requires brokers to have in place a $75,000 bond, which the carriers can access to pay their bills. That amount, of course, may not go nearly far enough where a large broker, with a tendency to push off paying its truckers, goes out of business.

Transport Financial Services LLC v. ETL, Inc., (D. Or.) involved a claim by the carrier, ETL, which was owed money by Rail Logistics, a broker that went out of business. TFS had issued a $75,000 bond to enable Rail Logistics to keep its broker authority current. In reply to a claim by ETL, TFS paid $22,000 under the bond.

TFS, though, attempted to get the money back, arguing that the work that ETL had done for Rail Logistics was exempt "TOFC/COFC" transportation (rail trailer on flatcar/container on flatcar, exempt under 49 C.F.R. §1090.2). The court agreed that motor carriers are not entitled to recovery under the bond for services provided in exempt transportation but found that TFS had not established that the transportation in question had been exempt.

The sums involved in some of these cases can be considerable. In *Top Worldwide LLC v. Midwest Molding*, 2017 Mich. App. LEXIS 629, a shipper was found liable to pay the broker for 35 shipments that the broker (Top Worldwide) had arranged, even though the consignee was supposed to pay the freight charges. The consignee, though, went out of business; since the shipper had created the bill of lading (as many shippers do), the court found the shipper liable to pay for all of the unpaid shipments.

In *Direct Coast to Coast, LLC v. Peterson*, 2017 N.J. Super. Unpub. LEXIS 1263 (App. Div.), two carriers won judgments totaling over $500,000 against a broker that had failed to pay them, then went out of business. After securing a default, the truckers sued a former principal of the broker, who they tracked down and who apparently had significant assets. The court, though, found procedural irregularities and declined to find the ex-principal responsible.

Reveille Trucking, Inc. v. Lear Corp., 2017 U.S. Dist. LEXIS 22639 (S.D. Tex.) was yet another example of carriers scrambling to find someone else to haul freight that they agreed to move. The shipper was a major manufacturer that hired a Ryder logistics entity to manage its freight needs. Ryder assigned PBP, a motor carrier, to one of the standard routes. Instead of performing the transportation, though, PBP had its brokerage arm broker the load to yet another carrier, Reveille. It was not clear whether Lear was aware of all of these machinations. Reveille was not paid. Reveille was able to collect some $45,000 for PBP's affiliate's broker bond, then sued Lear to pay the rest (nearly $250,000). Lear argued that Reveille agreed, in a contract with the broker, to look only to the broker for payment. The decision focused on a wide range of legal issues and the court narrowed the issues for trial by dismissing certain arguments. This case and others suggest that a broker that engages in fraud (or serious mismanagement) can leave a wave of unpaid bills and bad feelings in its wake.

Larry Rabinovich

10. Spoliation

A court's determination of whether to impose sanctions for spoliation of evidence is generally a fact-intensive weighing of the value of the evidence lost and the culpability of the party that destroyed it.

In *Parker v. Bill Melton Trucking, Inc.*, 2017 U.S. Dist. LEXIS 25920 (N.D. Tex.), the plaintiff filed a motion for sanctions contending that the defendants had conspired to destroy evidence, including the tractor-trailer and the load of forklifts involved in the accident. After the accident, the tractor-trailer came into the possession of defendant Melton's liability insurer, Progressive. On June 18, 2013, after receiving the preservation of evidence letter from plaintiff's counsel, Progressive promptly forwarded it to the Hartford, the cargo insurer which had taken possession of the shipment of forklifts. In addition, Progressive's independent adjuster, Synergy, sent a July 8, 2013 letter to plaintiff's counsel stating, "We wish to advise that you are permitted to inspect the tractor and trailer; however…[a]s soon as the claim is settled for the first party physical damages aspect of the loss, salvage will be sold to the highest bidder." The plaintiff failed to take advantage of the opportunity to inspect and, under the circumstances, the court found that while the defendants had a duty to preserve evidence, the plaintiff had not met her burden of showing that the defendants destroyed or concealed evidence in bad faith.

In *Barry v. Big M Transportation, Inc.*, 2017 U.S. Dist. LEXIS 146691 (N.D. Ala.), a Big M tractor-trailer collided with the Barry passenger vehicle, which was stopped on the highway shoulder after a prior collision.

On April 27, 2015, just less than a month after the accident, Big M received a "letter of preservation" from counsel for the Barrys, requesting Big M to preserve, among other evidence, the tractor-trailer and the "Electronic Data/Electronic Control Module (ECM) Vehicle Data Recorder/Black Box and its data." By that date, however, the tractor had already undergone accident-related repairs. In addition, prior to the accident, the tractor had been selected for sale to Mack as part of a vehicle-swap program. Mack sent Big M a power-of-attorney on April 30, 2015, effectively completing the sale of the tractor, and then took possession of the vehicle. Big M did not download or otherwise preserve the tractor's ECM data prior to completing the sale of the tractor to Mack.

The court agreed with the plaintiffs that Big M's failure to preserve the truck's ECM data amounted to spoliation, as it was reasonably foreseeable, if not a near certainty, that the accident would lead to litigation. The court also found that Big M's failure to preserve the ECM data deprived the Barrys of the best and most accurate evidence of the truck's speed in the moments prior to the collision. However, the court was unwilling to either enter a default judgment on the defendant's negligence liability or, alternatively, to enter an order judicially establishing the speed at which the Big M driver was driving and the maneuvers he made prior to impact in the light most favorable to the Barrys. The court was not convinced that Big M acted with the intent to deprive the Barrys of the use of the ECM data in this litigation. The evidence suggested that it was Big M's impression that the Barrys were at fault for the accident, and that litigation was not likely. Moreover, the prejudice to the plaintiffs arising out of the absence of the ECM data did not prevent the plaintiffs' accident reconstruction expert from reconstructing the accident to a sufficient level of certainty to enable him to render an opinion on the speed of the Big M truck prior to impact. Under the circumstances, sanctions were limited to the court telling the jury that the ECM data was not preserved and allowing the parties to present evidence and argument at trial regarding Big M's failure to preserve the data.

American Power, LLC v. Speedco, Inc., 2017 U.S. Dist. LEXIS 6953 (M.D. Pa.). After the engine in the plaintiff's Freightliner tractor exploded, the plaintiff brought an action against the repair shop that had serviced the vehicle. The court granted summary judgment in favor of the repair shop, finding an utter lack of evidence of any negligent conduct on its part. Regarding the plaintiff's spoliation motion concerning surveillance video at the garage, the court found there simply was no evidence to support a contention that the video defendant had produced (showing nothing untoward in the servicing of the vehicle) was altered. The court rejected the plaintiff's argument that videos which would have captured events taking place elsewhere in the garage were not timely preserved, since there was no showing that there was a need to retain these other non-pertinent videos in the immediate wake of this incident, and no showing that there was any intentional withholding of relevant evidence on the defendant's part. Finally, the court found the plaintiff's argument that the video, while accurate, may be incomplete in that the preserved video stopped when the truck maintenance service ended, wholly speculative, and was directly contradicted by the testimony of plaintiff's truck driver himself. Given all of these failures of proof, plaintiff's spoliation sanction motion was denied.

In *Christoffersen v. Malhi*, 2017 U.S. Dist. LEXIS 94700 (D. Ariz.), defendant Malhi, owner of MD Trucking, rear-ended plaintiff's vehicle on November 2, 2013. On November 13 and 20, 2013, MD Trucking's insurance company, National Casualty, sent letters acknowledging plaintiff's injury claim to plaintiff's counsel. On November 16, 2013, plaintiff died. On January 14, 2014, National Casualty was informed of plaintiff's death and communicated that information to Malhi. On February 3, 2014, plaintiff's counsel sent Malhi and MD Trucking letters of preservation by certified and first-class mail, demanding they retain documents related to the impending litigation. Although plaintiff's counsel sent such letters to the correct address, they were returned unclaimed. In June or July 2014, Malhi dissolved MD Trucking and shredded and disposed of all of its records and files.

The court agreed with plaintiff that the destroyed records regarding compliance with regulations—such as those regarding daily driving limits, truck and brake maintenance, and any other personnel or equipment issues—were unequivocally relevant to plaintiff's claims.

On the other hand, Malhi, who was a party to the action and available for both deposition and evidentiary testimony, was the driver of MD Trucking's only truck, owner of MD Trucking, and one of only two MD Trucking employees. His personal knowledge regarding MD Trucking's compliance with applicable statutes and regulations, hiring practices, supervision duties, and general operations was available to at least partially replace the evidence sought by the plaintiff. Under the circumstances, the court opted for a lesser sanction than default or monetary penalties, in the form of an adverse inference instruction.

The plaintiff in *Basra v. Ecklund Logistics, Inc.*, 2017 U.S. Dist. LEXIS 49134 (D. Neb.) contended relevant evidence that was not preserved by defendant included driver's logs, Qualcomm data, PeopleNet server data (the system that replaced Qualcomm), accident report and accident register, the version of the defendant motor-carrier's handbook provided to its driver, and the driver's qualification file. The defendant's driver, however, was "computer illiterate" and did not enter his logs into either Qualcomm or PeopleNet, and physical driving logs for the period of time leading up to and including the accident were taken by law enforcement and were produced to plaintiff. His driver-qualification file was destroyed as permitted by DOT regulations after he was no longer an active driver or employee, and the defendant motor carrier produced its current driver's handbook, as it no longer had the 2012 version of the handbook that the driver would have had at the time of the accident. The court found that the plaintiff had obtained much of the information sought from defendant through other sources and depositions, and that the defendant had not engaged in conduct that would warrant the sanction of an adverse jury instruction for spoliation of evidence.

In *Albertson's, LLC v. HFC, Inc.*, 2017 U.S. Dist. LEXIS 150964 (W.D. Okla.), the defendant's driver struck a fire hydrant at the plaintiff's facility, damaging a main pipe and resulting in flooding. The defendant argued that plaintiff's failure to document (photograph) and retain key pieces of evidence—the hydrant and fittings, the 8-inch pipe and the security video—"severely prejudices any investigator attempting to evaluate the losses, recreate the accident and determine possible causes." The court, however, found that the plaintiff had no reason to think the damage had been caused by anything other than the negligence of the defendant's driver and, hence, had no duty to preserve evidence. The defendant also had ample evidence to substitute for the supposedly missing evidence, including maintenance records, photographs, a truck gate log, and witnesses who were present at the time of the incident. The defendant's motion for spoliation sanctions was denied.

The subject collision in *Wiedeman v. Canal Insurance Co.*, 2017 U.S. Dist. LEXIS 88728 (N.D. Ga.) involved the plaintiff and an employee driver for defendant H&F, operating a truck leased by H&F from Salem. The plaintiff alleged that H&F and Salem conspired to destroy, conceal, and falsify data from the electronic control module (ECM) of the truck involved in the collision. Three days after the collision, H&F had returned the truck to Salem, after which H&F did not have possession, custody, or control of the truck or the ECM data contained in it. Accordingly, there was no basis on which to sanction H&F for spoliation, which occurred when Salem performed what it claimed was an industry-standard preventive-maintenance check on the truck. That maintenance check resulted in a reset and deletion of non-maintenance data from the truck's ECM (a side effect that Salem claimed it did not expect). Because the police report had concluded that the plaintiff was at fault in the accident, the court found that Salem did not expect the accident to result in litigation. Thus, the court denied the motion for spoliation sanctions. In a later proceeding, as the case was ready for trial, defendant H&F moved to exclude evidence or testimony about the ECM data. *Wiedman*, 2017 U.S. Dist. LEXIS 191286 (N.D. Ga.). Although the court denied spoliation sanctions, including denying an adverse jury instruction, that did not foreclose the plaintiff from introducing evidence and arguing that the defendant had failed to retain certain information. The court found that the ECM data issue would only confuse or mislead the jury, and thus excluded it. The court was concerned that the jury would infer spoliation, which the court had already ruled did not occur.

In *Richard-Bey v. Idriss Cabdinaasir Adan*, 2017 U.S. Dist. LEXIS 8694 (N.D. Ill.), the plaintiff's estate sued Great Dane, the manufacturer of the trailer into which the decedent had crashed. The federal court noted that Illinois tort law did not impose any duty on Great Dane to manufacture a trailer that was safe to collide into. Accordingly, the trailer owner's destruction of the trailer

after the accident was irrelevant, and the plaintiff's action against both Great Dane and the trailer owner was dismissed.

John Canoni and *Phil Bramson*

11. Non-Trucking Coverage

In *Great West Casualty Co. v. Ross Wilson Trucking*, 2017 U.S. Dist. LEXIS 142418 (C.D. Ill.), Transport was the motor carrier/lessee and Ross Wilson the owner/operator/lessor. The Great West non-trucking policy issued to Ross Wilson excluded coverage for a covered auto while used to carry property in any business, or while used in the business of anyone to whom the auto is rented, leased, or loaned. The policy also provided "insured contract" coverage to Ross Wilson for any liability it might incur under its agreement to indemnify Transport. Following an accident, the injured claimant sued both Transport and Ross Wilson, alleging that the driver was an agent of Transport and Wilson, and that he was pulling a trailer owned by Transport. In assessing Great West's duty to defend, the court found that there was no allegation in the underlying complaint that the covered tractor was being used to transport property (the court apparently determining that the trailer itself did not qualify as property). The court found further that the complaint, read liberally, could be construed as alleging that the driver was using the covered rig in the business of Transport or Ross Wilson. Accordingly, the loss, as alleged, did not fall clearly within the Great West non-trucking exclusion, and Great West had a duty to defend. The court, though, arguably overstretched when it found that Transport could theoretically qualify as an "insured" by virtue of the "insured contract" clause; generally, "insured contract" coverage provides liability coverage to the named insured indemnitor but does not qualify the indemnitee as an additional insured under the policy.

In *Williams v. Great American Insurance Co.*, 240 F. Supp. 3d 523 (E.D. La.), the leased owner-operator delivered a loaded trailer at the direction of the motor carrier lessee MTC, and then parked nearby to sleep until the trailer was unloaded. MTC company policy required drivers to always transport an empty trailer back from the consignee's facility, but not any particular trailer. In this case, however, the driver opted to wait until the particular trailer he had delivered was unloaded, so that he could bring that trailer back. While he was sleeping in the sleeper compartment, another vehicle struck his parked tractor. The court reasoned that, since the driver was taking a USDOT-mandated rest period and the motor carrier's company policy required him to bring back an empty trailer (even if he was not obliged to wait for the trailer he had delivered), the driver was still in the business of the motor carrier lessee at the time of the accident, and the loss was excluded under the Great American non-trucking policy.

The insured plaintiffs in *Guidry v. USAgencies Casualty Insurance Co.*, 213 So.3d 406 (La. Ct. App.) brought an action against a number of insurers, including their non-trucking insurer, Hudson, for a declaration of liability and uninsured motorist coverage. Hudson argued that federal leasing regulations, specifically 49 C.F.R. §376.12, created a rebuttable presumption that a leased vehicle is being used in the business of the motor-carrier lessee. The court, however, found that this presumption was only intended to benefit injured plaintiffs suing the motor carrier on a theory of vicarious liability, and was inapplicable to an insured suing for coverage under a non-trucking policy.

While the most common inquiry in non-trucking cases is whether the insured vehicle was being operated "in the business" of the lessee, *Fruendly Auto Source, Inc. v. Chrostowski*, 514 S.W.3d 646 (Mo. Ct. App.) looked at a fundamental condition of non-trucking coverage—namely, that the insured vehicle actually be leased to a motor carrier under a long-term written lease. In that case, the lease agreement provided that either party could unilaterally terminate the lease by written notice, but such notice was not required when the parties agreed mutually to terminate the lease. The named, insured owner-operator had not sent written notice to the motor carrier terminating his lease prior to the subject accident. He had, however, made arrangements with the motor carrier to return the motor carrier's equipment, and there was testimony establishing that both parties considered the lease terminated. Under the circumstances, the court found that the lease had been terminated mutually prior to the loss, and accordingly the non-trucking policy provided no coverage.

Phil Bramson

12. *Punitive Damages*

In *Wiegand v. Fabrizi Trucking & Paving Co.*, 2017 Ohio 363 (Ct. App.), the plaintiffs were traveling to an auction when the subject collision ensued. Wiegand stopped his vehicle at an intersection and when the light turned green, he entered the intersection. As the Wiegands' vehicle was in the intersection, it was struck by a pick-up truck that had been pushed into the Wiegands' vehicle by a tool truck owned by Fabrizi and operated by Steiskal. Steiskal had run the red light, hit the pick-up truck, and then struck the Wiegands' vehicle.

Although Steiskal and Fabrizi were ultimately adjudged to be liable for compensatory damages, the jury declined to award punitive damages and the Wiegands appealed. The Wiegands asserted that the trial court erred in denying their motion for a directed verdict that Fabrizi was a private motor carrier for hire. The Wiegands "believe[d] that if Fabrizi was a private motor carrier for hire, then it and Mr. Steiskal would be subject to the Federal Motor Carrier Safety Regulations" such that a failure to comply with those regulations would amount to "actual malice." The court, however, "fail[ed] to see how whether Fabrizi was a private motor carrier for hire was a determinative issue in the punitive damages phase of the trial." More specifically, the court found that even if Fabrizi and Steiskal were subject to the regulations and violated them, "the jury could still nonetheless conclude that [they] did not act with actual malice depending on which regulations they found Fabrizi and Steiskal failed to comply with, and the jury's evaluation of the significance of the failure to comply with the regulations."

The Wiegands also argued that the jury should have been instructed such that "Fabrizi had a duty to systematically inspect, repair, and maintain" the vehicle in question, and that if the jury found Fabrizi had breached that duty, then its verdict would "be in favor of the plaintiffs and against Fabrizi." The court, however, concluded that such an instruction would have misstated the law as it relates to punitive damages.

Wiedeman v. Canal Insurance Co., 2017 U.S. Dist. LEXIS 95167 (N.D. Ga.), arose out of an August 8, 2014 collision between plaintiff Wiedeman, riding his motorcycle, and Dorn, an employee of H&F Transfer, Inc., driving his box truck. Wiedeman asserted that he was entitled to punitive damages because, "Dorn did not tell the truth about what he was doing on the day of the collision, first saying he helped load the truck then denying that; his driver's log [was] inaccurate; there [was] no indication whether he took a break during the drive to Atlanta; and there [was] a 'strong possibility that Dorn lied to the police officer about what happened prior to the accident.'" Wiedeman also cited Dorn's prior arrests and traffic violations.

The court rejected these arguments and held that "evidence that Dorn may have had inconsistent statements regarding the collision or his activities on the day of the collision does not show that he engaged in willful misconduct or had a 'pattern or policy of dangerous driving.'" In this regard, the court held that Wiedeman's assertions amounted to "pure speculation." There was no evidence that "Dorn had a pattern or policy of driving without adequate rest, or that Dorn was so fatigued as to exhibit that entire want of care which would raise the presumption of conscious indifference to the consequences." Furthermore, Dorn's prior arrests for drug-related offenses bore no nexus to "his driving any vehicle, and there [was] no evidence that Dorn was intoxicated at the time of the collision." Likewise, Dorn's prior convictions for speeding did not have any connection to the accident in question, as there was no evidence that he was speeding at the time of the collision "or that speed was a factor in the collision." Absent "clear and convincing evidence that Dorn had a pattern of dangerous driving that resulted in the collision," Wiedeman's claim for punitive damages was dismissed. (This case is also discussed in our article on Spoliation, section 10.)

In *Kyles v. Celadon*, 2017 U.S. Dist. LEXIS 157383 (W.D. Mo.), a tractor-trailer owned by Celadon and driven by Celadon employee Jones rear-ended a tractor-trailer driven by Kyles. Kyles asserted that he was entitled to punitive relief on the grounds that Jones "crashed" into him "without any visual obstructions"; suffered from sleep apnea and "other serious illnesses"; did not produce evidence of "any training received by [Celadon]"; and because Jones had a history of prior traffic violations. The court held that this evidence was insufficient to establish Kyles's entitlement to punitive damages.

Kyles asserted further that punitive damages were appropriate based on the defendant's alleged violation of FMCSR 392.3, in that "Jones' sleep apnea made him unfit to operate a commercial motor vehicle at the time of the collision." The court, however, found that sleep apnea did not disqualify Jones from operating a vehicle under the FMCRSs, and regardless, this condition was "treated and monitored in compliance with the FMCSRs." Furthermore, the defendant was in compliance with FMCRS 395.3, which governs the number of hours drivers can operate a commercial vehicle during an eight-hour period. Thus, the court rejected these arguments.

Kyles also argued that Jones's driving history made his operation of a commercial vehicle a danger to public safety. Citing FMCSR 391.15, the court found that Jones was, indeed, "fully qualified under the FMCRSs to operate the commercial motor vehicle that he was driving at the time of the collision." The court also found that Kyles "grossly mischaracterize[ed]" the purported "blemishes" on Jones's driving record, including his tickets and accident record. The prior accidents that Jones was involved in were not the result of speeding; the offenses for which tickets were issued were more than 12 years prior to the accident; and "furthermore, the speeding tickets were followed by over ten years of violation-free driving." The two accidents that Jones was involved in were "minor at most," did not result in tickets, and did not involve any other vehicles. Under these facts, the court could not "agree that there [was] evidence sufficient to satisfy the clear and convincing standard required for punitive damages."

By comparison, the court in [*Zawicki v. Armstrong*, 2017 U.S. Dist. LEXIS 65896 (M.D. Pa.)] at least found sufficient evidence supporting an award of punitive damages to send the question to the jury. The injured plaintiff, Zawicki, presented evidence that "at the time of the accident, weather conditions created a hazardous condition that affected visibility and/or traction and [that defendant driver Armstrong] drove too fast for these conditions." The plaintiff also submitted the opinion of a tractor trailer safety expert, who observed that the Pennsylvania Commercial Driver License Manual "recommends that a driver keep a 12-15-second lookout ahead at all times, if possible." The expert concluded that at 55 miles-per-hour, Armstrong had "only a 2.5-3.1 second travel time from the vehicle in front of him, which [was] certainly below 12-15 seconds." There was also evidence that Armstrong had been on his cell phone immediately prior to the accident and that he was "looking at his gauges to make sure that his truck did not overheat." This, the safety expert opined, amounted to conduct that "was grossly negligent and wanton." This evidence was deemed sufficient for a *prima facie* case of punitive damages against Armstrong.

Zawicki further asserted that Armstrong's employer, Barney, "allowed his truck to be operated in violation of applicable federal rules and regulations"; allowed Armstrong "to operate the truck when he knew or should have known that he was not capable and qualified to do so"; "failed to properly qualify" Armstrong as required by federal regulations; and "failed to properly supervise" Armstrong. In support of these allegations, the plaintiff pointed to Barney's deposition testimony and, in particular, his response to the question of whether he was "familiar with the federal rules and regulations and the requirements as far as an employer of a commercial driver's license truck driver." Barney's response was: "I have no idea." Evidence in the form of an expert report also showed that Barney "did not properly qualify" Armstrong as a commercial driver in violation of the Federal Motor Carrier Safety regulations, and that Barney "did not have a safety management system to make sure that its drivers [were] trained and experienced to safely operate commercial motor vehicles." The expert concluded that amounted to "grossly negligent and wanton" conduct on the part of Barney. On this evidence, the motion to dismiss the punitive damages claim against Barney was also denied.

Jonathan Bard

13. *Truth in Leasing: The USDOT Leasing Regulations*

The leasing regulations were originally promulgated by the Interstate Commerce Commission in the 1950s, in large part to preclude arguments by motor carriers that they bore no responsibility to third parties for bodily injury or property damage caused by owner-operators that had been dispatched by the carrier but that the carrier insisted were independent contractors. Skirmishing along

that front continues (with the regulations now found in the USDOT section of the Code of Federal Regulations), but a new front has been opened in interpreting the regulations pitting motor carriers against drivers.

As has been widely observed, trucking companies around the country have been focused in recent years on reducing labor costs to stay competitive. We have been repeatedly told that the carriers view this as an existential necessity; one way that this has manifested has been the tendency to classify their drivers as independent contractors, to avoid the need to pay various benefits and taxes that are associated with employees. This, in turn, has generated a backlash from state regulators (and, at least until the Trump Administration went to work, federal regulators) attempting to crack down on what some refer to as worker misclassification. Many issues arising out of this approach are discussed in the article "Truck Driver as Employee," Section 6 in this update. Here, we look at the issue in the context of the leasing regulations.

One of the methods that lawyers for the trucking companies have come up with is creating an intermediary company that stands between the trucking company and its drivers. For instance, the court in *Chirino v. Proud 2 Haul, Inc.*, 2017 N.J. Super. Unpub. LEXIS 2942 (N.J. App.) described an agreement between Proud 2 Haul (P2H) and Trucking Support Services d/b/a CRS, in which CRS took care of all paperwork relating to the owner-operators that P2H dispatched to move its loads. P2H's principal candidly testified that the arrangement was made so that the drivers would be considered independent contractors. The individual lease agreements were between CRS and the various owner-operators. CRS would then assign drivers to P2H when P2H had loads it needed to move for its customers (presumably under P2H's motor-carrier authority).

A certified class of owner-operators sued P2H for taking deductions from their payments without having a written lease in effect directly with the owner-operators. The trial court had found that P2H had violated the law in not entering into lease agreements directly with the drivers and was liable to the class of drivers for over $4 million.

On appeal, P2H argued that it was not obligated to enter into lease agreements with the owner-operators because the true owner of the tractors was CRS, not the owner-operators, in light of the agreements between CRS and the drivers. The argument was presented late in the litigation at the trial level and did not convince the trial judge; it fared no better on appeal.

The argument put forward by P2H was based on the research of an unnamed expert; P2H claimed that because the owner-operators had leased their trucks to CRS, CRS was to be deemed the owner, and there was no need for P2H to have a separate lease with the drivers. The court rejected the argument on the ground that the contract CRS signed with the owner-operators was not exclusive. The contract did not prohibit the owner-operators from leasing their tractors to another party (such as P2H). Accordingly, CRS failed to meet the definition of owner in 49 CFR §376.2(d), and the agreement between P2H and CRS did not free P2H from its regulatory obligation to lease the vehicles from their owners before dispatching them.

The court's key holding was this:

> The agreement with CRS was entered into solely for P2H's convenience, not either at the instigation of the plaintiffs or to their benefit… By employing plaintiff's equipment and services through contacts with CRS that essentially created a wall between the owner-operators and the motor carrier, as a matter of law, defendants violated 49 CFR §§376.11 and 376.12.

The motor carrier cited a 1961 decision by the I.C.C., which made it clear that the leasing regulations were adopted to protect the public, and that it could not be that the regulations were meant to protect drivers. It is not a question, though, of protecting only the public or only the owner-operator. A series of cases that followed the 1995 I.C.C. termination act has held that the leasing regulations, which were re-christened as the "Truth in Leasing" law, also protects owner-operators in their relationships with the motor carriers to which they lease their rigs.

Valdez v. CSX Intermodal Terminals, 2017 US Dist. LEXIS 66923 (N.D. Cal.) involved an attempt to use the leasing regulations to protect the interests of the motor carrier; it was partially successful. CSX Intermodal is

a motor carrier that engages in drayage operations for intermodal shipyards entering and leaving California. Its services were provided through owner-operators who leased their rigs to CSX. The claimants asserted that CSX had misclassified them and had failed to pay minimum wage, had made improper deductions from wages, and failed to provide meal breaks. CSX argued that these claims were explicitly preempted by federal law (a topic covered in the FAAAA preemption article in this update). The court was unimpressed.

CSX's alternative argument was that the leasing regulations effectively preempt the drivers' state claims (under a doctrine known as "conflict preemption"), because complying with the state law would force the parties to be in conflict with federal laws or aims. In CSX's view, the federal interest is to provide drivers and motor carriers absolute freedom to negotiate. Since the leasing regulations do not say anything about minimum wage, meal and rest breaks, that meant, according to CSX, that USDOT insists on complete freedom to contract and any attempt by the state to regulate wages or breaks was in conflict with this aim of the federal regulations.

This argument was also rejected: the court agreed that if the leasing regulations explicitly permit something, the state may not forbid it. Silence, though, by the federal regulators does not imply preemption. The court rejected the idea that the overarching purpose of the leasing regulations is to guarantee freedom to negotiate anything; to the contrary, one of the goals of the regulation is to prevent large carriers from taking advantage of individual owner-operators due to unequal bargaining power. The California regulations of minimum wage and meal breaks, in any event, do not interfere with the aims of the federal regulations.

However, the court agreed with CSX that California's law regarding reimbursement of drivers for fuel and maintenance, as well as for cargo and property damage, are indeed preempted by the leasing regulations. Also, the drivers' claims for insurance reimbursement were preempted. (We wonder whether these claims were for non-trucking coverage chargebacks or chargebacks for primary insurance coverage. We have always understood the regulation to refer to the former, but some carriers charge back even for the latter.) CSX, therefore, was able to win judgment, in part by appealing to the leasing regulations. In a sense, then, those regulations protect three sides: the motoring (or pedestrian) public, owner-operators, and motor carriers.

Larry Rabinovich

14. *FMCSA Watch*

It was another busy year for the Federal Motor Carrier Safety Administration (FMCSA). As of December 18, 2017, the rules requiring that most commercial vehicle operators and carriers use electronic logging devices (ELDs) to record drivers' hours of service finally went into effect. FMCSA first published its notice of proposed rulemaking in this area on February 1, 2011 and supplemented the notice in 2014 (79 Fed. Reg. 17656) to address concerns that the devices might be used by employers to harass drivers. Going forward, ELDs are required to be installed in all commercial motor vehicles operated by drivers who, until now, have filled out paper logbooks. To minimize the possibility of harassment, ELDs need only record date, time, CMV location, engine hours, vehicle miles, driver or authenticated user identification data, vehicle identification data, and motor carrier identification data. FMCSA is giving the industry some time to work out the bugs, though, and will hold off on declaring drivers out-of-service for hours-of-service violations until April 1, 2018.

Perhaps most significantly on the new regulations front, the FMCSA announced the trial period for a crash preventability demonstration program (CPDP). 82 Fed. Reg. 143, 35,045 (Jul. 27). It has been shown that crash involvement is a significant indicator of crash risk but, historically, any accident that involved a motor carrier and met certain qualifications, whether preventable or not, was used by the FMCSA to prioritize carriers for safety interventions. Recently, concerns have arisen that these numbers may not accurately reflect those carriers who are the riskiest. After the review of several studies and a public comment period, the FMCSA proposed a preventability demonstration program for certain types of crashes.

The CPDP includes the following types of crashes:

(1) When the motor vehicle is struck by a motorist driving under the influence or a related offense;

(2) When the motor vehicle is struck by a motorist driving the wrong direction;

(3) When the motor vehicle is struck in the rear;

(4) When the motor vehicle is struck while legally stopped or parked, including when the vehicle is unattended;

(5) When the motor vehicle is struck by an individual committing or attempting to commit suicide by stepping or driving in front of the motor vehicle;

(6) When the motor vehicle sustains disabling damage after striking an animal in the roadway;

(7) When the crash is a result of an infrastructure failure, failing trees, rocks, or other debris; or

(8) When the motor vehicle is struck by cargo or equipment from another vehicle.

There are three possible “preventability decisions,” all of which will be displayed on the FMCSA’s Safety Measurement System (SMS) website. These decisions are:

(1) Not Preventable: “FMCSA reviewed this crash and determined that it was not preventable” will appear on the SMS website.

(2) Preventable: “FMCSA reviewed this crash and determined that it was preventable” will appear on the SMS website.

(3) Undecided: “FMCSA reviewed this crash and could not make a preventability determination based on the evidence provided” will appear on the SMS website.

For non-preventable crashes, FMCSA will display the Crash Indicator Behavior Analysis Safety Improvement Category (BASIC) percentiles, with and without the crashes, to enforcement users and carriers logged into their own profiles. If, however, the submitter does not or cannot provide requested documents for the review, the following will appear on the DataQ’s site, but not on the public SMS website: “Closed Due to Non-Response.”

There are two stages of review in the DataQ’s system. In Stage 1, the reviewer will collect necessary documents related to the crash, and in Stage 2, an experienced crash-report reviewer will evaluate those documents. Based on the evidence, the reviewer will make a recommendation to FMCSA as to whether the evidence is compelling enough to warrant a preventable-crash demarcation or not. This burden of “compelling evidence” is on the submitter to show that the crash was not preventable.

It is important to note that if a submitter receives a determination that the crash was preventable or undecided, or the Request for Data Review is closed for failure to submit additional requested documents, the RDR may be re-opened once and the request reconsidered by FMCSA, if additional documentation is submitted. Also, the FMCSA has decided that if a vehicle or driver is operating with any out-of-service condition under the North American Standard Out-of-Service Criteria at the time of the crash, the review determination will automatically be preventable, as the vehicle or driver should not have been on the roadway because of such a condition in the first place. Finally, the CPDP is scheduled to last a minimum of 24 months.

Other notable regulatory activity by the FMCSA in 2017:

82 Fed. Reg. 10, 5,292 (Jan. 17). Suspending regulations requiring existing interstate motor carriers, freight forwarders, brokers, intermodal equipment providers, hazardous materials safety permit (HMSP) applicants, and cargo tank facilities under FMCSA jurisdiction to submit required registration and biennial update information to the agency via a new electronic on-line unified registration system. During this suspension, entities needing to file will follow the same procedures and forms used to submit information to FMCSA as they do today.

82 Fed. Reg. 20, 8903 (Feb. 1). Delaying until March 21, 2017, the effective date of the final rule titled “Minimum

Training Requirements for Entry-Level Commercial Motor Vehicle Operators," initially effective February 6, 2017 (further delayed to May 22, 2017, per 82 Fed. Reg. 53, 14,476 (Mar. 21).

82 Fed. Reg. 55, 14,848 (Mar. 23). Withdrawing January 2016 notice of proposed rulemaking, which had proposed a revised methodology for issuance of a safety-fitness determination for motor carriers, which would have determined when a motor carrier is not fit to operate commercial motor vehicles in or affecting interstate commerce based on the carrier's on-road safety data, an investigation, or a combination of on-road safety data and investigation information.

82 Fed. Reg. 69, 17,584 (Apr. 12). Amending civil penalties listed in regulations to ensure that the civil penalties assessed or enforced by the FMCSA reflect the statutorily mandated ranges as adjusted for inflation, per requirement of Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

82 Fed. Reg. 111, 26,888 (June 12). Proposing to amend the Federal Motor Carrier Safety Regulations to allow states to issue a commercial learner's permit (CLP) with an expiration date of up to one year from the date of initial issuance. CLPs issued for shorter periods may be renewed but the total period of time between the date of initial issuance and the expiration of the renewed CLP could not exceed one year (which would replace the current regulations requiring states to issue CLPs initially for no more than 180 days, with the possibility of renewal).

82 Fed. Reg. 148, 36,101 (Aug. 3). Announcing regulatory guidance clarifying that state driver licensing agencies (SDLAs) may agree to facilitate the commercial learner's permit (CLP) application process and to administer the commercial driver's license (CDL) general knowledge test to individuals who are not domiciled in the state to make clear that SDLAs may accept applications for CLPs and administer the general knowledge test to individuals taking commercial motor vehicle driver training in that state, but who are not domiciled there, provided that: the SDLA administering the general knowledge test transmits the test results directly, securely, and electronically to the applicant's state of domicile; and the state of domicile agrees to accept the test results and issue the CLP.

82 Fed. Reg. 207, 49,770 (Oct. 27). Announcing that the Western Equipment Dealers Association has requested an exemption on behalf of several other organizations and their membership from the requirement that, no later than December 18, 2017, a motor carrier require each of its drivers to use an electronic logging device to record the drivers' hours of service.

82 Fed. Reg. 242, 6,029 (Dec. 19). Proposal to revise the regulatory guidance concerning driving a commercial motor vehicle for personal use while off duty, referred to as ''personal conveyance,'' which has existed since 1996. This provision is available to all CMV drivers required to record their hours of service who are permitted by their employer to use the vehicle for personal use.

82 Fed. Reg. 243, 6,0360-61 (Dec. 20). Announcing regulatory guidance to clarify the applicability of the ''agricultural commodity'' exception to the ''hours of service of drivers'' regulations, and requests public comments. This regulatory guidance is being proposed to ensure consistent understanding and application of the exception by motor carriers and state officials, enforcing hours of service rules identical to or compatible with FMCSA's requirements.

82 Fed. Reg. 243, 6,0323 (Dec. 20). FMCSA grants a limited 90-day waiver from the federal hours-of-service regulations pertaining to electronic logging devices for the transportation of agricultural commodities as defined in the Federal Motor Carrier Safety Regulations.

82 Fed. Reg. 248, 6,1531 (Dec. 28). Announcing that the Agricultural Retailers Association (ARA) has requested an exemption on behalf of its members from the requirement that motor carriers and their drivers of commercial motor vehicles use an electronic logging device to record the drivers' hours of service.

Sanjeev Devabhakthuni