HISCOCK & BARCLAY

ALERT

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Transportation: Annual Year in Review

Hiscock & Barclay's Transportation Team

Employment issues are often embedded in transportation cases and, we are told, issues such as employee benefits, and driver status have become central concerns of management of trucking companies who are looking for ways to control costs. Accordingly we have chosen to highlight (in Sections 1 & 2) a range of employee-related issues in this year's review including the ISO employee and worker's compensation exclusions, the eligibility of drivers for worker's compensation coverage, collective bargaining and overtime rights, use by truckers of Professional Employer Organizations (PEO's) as a source of labor, and other issues. Hiscock & Barclay's Transportation Group is planning a series of programs for clients (with the participation of the firm's Labor & Employment group) on these topics – please let us know if you are interested in attending or hosting such a program.

This year's update includes Alan Peterman's comprehensive review of cargo cases (Section 3) focusing on the Carmack Amendment and its preemptive effect (with a few interesting exceptions) on related state claims, and on carriers' attempts to limit their liability. We welcome Jonathan Bard, an associate in our Albany office, who has contributed a detailed review of 2014 cases dealing with punitive damages (Section 7) and a piece on spoliation (Section 8).

My thanks in particular to the co-editor Phil Bramson who every year selects, gathers and categorizes cases for inclusion in this update, and writes up many of the sections in addition to his editing duties. And thanks, as well, to Robert Lazzaro who ably assisted with the production process, and librarian Elaine Knecht who provided links to the various cases discussed.

As always we welcome your comments and questions.

Larry Rabinovich

January 30, 2015

Hiscock & Barclay is a full service, 210-attorney law firm, with offices throughout the major cities of New York State, as well as in Boston, Newark, Washington, D.C. and Toronto. We provide comprehensive legal and business counsel to a diverse client base in 30 specialized practice areas with statewide and regional expertise as well as with national and international capabilities.

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Transportation Annual Year in Review

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1. Truck Drivers – Employees or Independent Contractors?

In an oral argument held in November, 2008, a creative young lawyer named Ted Cruz, who has since gone on to bigger things, helped convince the U.S. Court of Appeals for the D.C. Circuit that the drivers for his client Federal Express were not employees but rather independent contractors with no rights to collective bargaining. The primary basis for the court's ultimate holding was the entrepreneurial possibilities open to the drivers – they were permitted to operate multiple routes by hiring additional drivers and helpers. 563 F.3d 492 (2009).

FedEx has since tried to duplicate its success in courts around the country but those efforts have met with opposition from drivers and unions, and they received a thumbs down from courts around the country in 2014.

FedEx requires its drivers to pick up and deliver packages within their assigned geographic area every day that the company is open for business. Managers arrange the driver's schedule so that he or she has about 9.5 to 11 hours of work a day, and all assigned packages must be delivered that day. Deliveries must be completed within the window of time that FedEx has negotiated with its customer and the driver is required to scan details about each delivery to the company. While drivers are not obligated to follow specific routes, managers design and recommend routes to reduce travel time and maximize earnings and service. Drivers wear FedEx uniforms and must comply with company regulations related to appearance. The courts were, apparently, struck by the level of detail that FedEx looks into. Managers ride along with the drivers several times a year and report back on such details as whether the driver uses a dolly or cart to move packages, demonstrates a sense of urgency, and places his or her keys "on the pinky finger of (the) non-writing hand" after locking the vehicle.

FedEx requires its drivers to own their own vehicles – a factor pointing to an independent contractor type relationship – but the vehicle was required to be painted "FedEx white" (there is, now, such a color manufactured by Sherwin Williams), and marked with the FedEx logo. The vehicles must be a specific size and be fitted with shelving in precisely laid out dimensions. You get the idea.

FedEx focused on the entrepreneurial opportunities that the company offers its drivers and some of the lower courts had accepted this approach and granted judgment to FedEx validating the company's decision to ignore the union and to treat its drivers as independent contractors. However, the Ninth Circuit in *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 and in *Slayman v. FedEx*, 765 F.3d 1033; and the Supreme Court of Kansas in *Craig v. FedEx*, 335 P.3d 66 (on a certified question from the federal Seventh Circuit), all rejected FedEx's argument that its drivers were independent contractors.

The Ninth Circuit relied on California law in *Alexander* and Oregon law in *Slayman*. Both states utilize a "right to control" test to determine whether workers are employees or not. (California's test is a bit more complex and nuanced.) In both cases the court had little trouble concluding that FedEx maintains significant control of the manner and means of accomplishing the

desired result. FedEx pointed to the fact that it does not set its drivers' routes – this is a factor commonly mentioned in the case law but in an age of GPS and Waze this factor would seem to be almost an irrelevancy, and the courts here brushed it away.

California and Oregon had precedent rejecting the entrepreneurial argument and the Ninth Circuit found that the case law did not support FedEx's position on these facts. In the *Slayman* case the court observed that FedEx drivers need to get permission to take over an additional route – FedEx must decide if the terminal needs another vehicle and driver and vets all new drivers. Oregon case law indicated that so long as the company needed to approve any hires, the existing drivers were subject to the company's control and were employees. *Alexander*, citing to California precedent, found that California courts have generally found that delivery drivers are employees, including in cases in which the companies exercise rather less control over their drivers than FedEx does. FedEx is a meticulous, well-run company. The very careful monitoring through which it maintains quality control weigh against its effort to classify its drivers as independent contractors.

Both Ninth Circuit decisions treated the 2009 D.C. Circuit's decision as an outlier, with the court observing that neither California nor Oregon has replaced its "right to control" test with a new "entrepreneurial-opportunities" test. To the contrary, the court found that in both Oregon and California, entrepreneurial opportunities do not undermine employee status. In addition, the Ninth Circuit apparently preferred the approach of Judge Garland, the dissenter in the 2009 D.C. Circuit decision, who observed that even under FedEx's theory only a small number of drivers could be entrepreneurial and the vast majority would remain simply drivers.

The *Craig* case was a Kansas class action filed by drivers against FedEx which was designated as the lead case for all of the class actions filed against FedEx around the country by drivers who insisted that they are employees, not contractors, and was assigned to the federal district court in Indiana. The drivers argued that as employees they were entitled to reimbursement from FedEx for the various disbursements that they are required to make.

The district court in Indiana had granted summary judgment to FedEx in 2010 finding that the drivers were independent contractors. The drivers appealed to the Seventh Circuit Court of Appeals, which oversees the federal courts in Indiana, though not in Kansas. The Seventh Circuit opted to certify the key questions to the Kansas Supreme Court (Craig was a Kansas resident) as follows:

1. Under the undisputed facts of the case are Craig and his fellow drivers employees of FedEx as a matter of law?
2. Even if most FedEx drivers are employees, are those who have acquired more than one service area independent contractors?

Unlike the Ninth Circuit, which seemed to have little angst about reversing the decisions of the district courts, both the Seventh Circuit and the Kansas Supreme Court found the matter to present a complex dilemma. The Supreme Court pointed out that the case was close because FedEx had carefully structured its operating agreement with its drivers so that they would be considered independent contractors and not employees, in order for the company to cut costs and gain a competitive advantage.

In resolving the dispute the court analyzed twenty different factors set out in an IRS ruling on employee status which Kansas courts have adopted. However, the "right to control" test, separate from the twenty factors, has been emphasized by Kansas courts and played a significant role here as well.

Pointing to many of the same facts that the Ninth Circuit highlighted, the Kansas Supreme Court held that FedEx had established an employment relationship with its drivers which they dressed in "independent contractor clothing." Responding indirectly to the D.C. Circuit's decision, the court zeroed in on FedEx's micromanagement even of the potential for entrepreneurship by its drivers: "For instance, the ability to make more than a delivery driver who is an employee is diminished, if not destroyed, by FedEx's control over the number of deliveries a driver can make, as well as essentially dictating the driver's required expenditures for vehicles, tools, equipment, and clothing. Moreover, one would reasonably expect that independent businesspersons could decide for themselves the amount of work they 'reasonably can handle on any given day' . . . yet FedEx makes that decision for them and sets a maximum number of stops for each driver."

In response to the second certified question, the Kansas Supreme Court held that even a driver who had secured additional routes and hired additional drivers,

would maintain employee status.

Depending on the precise issue under discussion, the positions of the parties on the employee/independent contractor divide sometimes flip. In *Miller v. Northland Insurance Co.*, 2014 Tenn. App. LEXIS 248 (Ct. of App. Tenn.), the co-driver April Miller, was grievously injured when the truck in which she was riding overturned while being driven by Lewis Watley. Both Miller and Watley worked for Refa Watley Trucking, a Tennessee trucker insured by Northland. Miller was asleep in the passenger seat at the time of the accident which took place in New York State. The issue was whether Northland's coverage for Watley was avoidable to pay any judgment awarded to Miller.

The trial court found that Miller was an independent contractor of Refa Watley Trucking under the test for distinguishing employees from contractors. Nonetheless, the court found that Northland's employee and fellow employee exclusions applied, and that if Miller were to win a judgment against Refa Watley Trucking or Lewis Watley she would not be entitled to collect under the Northland policy. Miller appealed.

The Court of Appeals affirmed, finding that the applicability of the Northland exclusions is unconnected to the question of whether Miller was an employee under Tennessee common law. But just what criteria are to be used in interpreting the employee exclusions? And does it matter whether the injured party is actually driving at the time of the loss?

These are recurring questions and courts around the country have not been completely consistent. The first question is what criteria to use in order to determine whether or not the claimant is an employee for purposes of the exclusion. As noted, the Miller court concluded that Tennessee common law was irrelevant and instead, following the lead of cases such as *Consumers County Mutual Insurance. Co. v. P.W. & Sons Trucking, Inc.*, 307 F.3d 362 (5th Cir. 2002), relied on the definition of "employee" found in the federal motor carrier regulations at 49 C.F.R. § 390.5 ("[A]ny individual, other than an employer, who is employed by an employer and who, in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial vehicle), a mechanic and a freight handler"). On that basis, the court found that the Northland employee exclusions controlled. Other courts have questioned why a definition found in the federal regulations should be utilized to interpret a word that the ISO forms and the policies of other insurers leave undefined. It seems to us that insurers who want to be secure on this point might consider a policy endorsement adopting the definition of § 390.5 by reference or creating their own definition.

The *Miller* court also accepted Northland's argument that Miller did not change from an employee to an independent contractor when she moved from the driver's seat to the passenger seat. This seems eminently sensible to us, but there are courts that have found that a driver who was outside the vehicle at the time of the loss had lost his or her employee status. (*See, e.g. Great West Casualty v. National Casualty*, discussed in the "Non-Trucking" section of this Review.) We prefer the approach taken by the *Miller* court.

A rather different approach, though, was taken by the federal Sixth Circuit in *Gramercy Ins. Co. v. Expeditor's Express*, in a short unpublished opinion. 2014 U.S. App. LEXIS 15262. Donald Underwood was killed when the rig he was driving overturned and burned. The rig had been leased to Expeditor's, a motor carrier insured by Gramercy. Gramercy filed a declaratory judgment action, and relying on the definition of employee in the regulations, convinced the district court to award it summary judgment on the basis of the employee exclusion. The Sixth Circuit, however, reversed.

The appellate decision is unreported, which may be just as well, but it could still seriously undercut the precedential value of *P.W. & Sons* going forward. ISO does not have a comprehensive definition of "employee" in its commercial auto policies; instead the "definition" simply includes leased workers and excludes temporary wokers. The Fifth Circuit in *P.W. & Sons* had observed that ISO did not define "employee" presumably because it did not consider the existing definition to be helpful. The Sixth Circuit, though, made the incorrect assumption that the policy the Fifth Circuit looked at in *P.W. & Sons* had no definition of "employee" at all. In fact, it would have had the same definition as the one the Sixth Circuit was looking at. If the Sixth Circuit approach is followed, the eminently sensible view of the Fifth Circuit in *P.W. & Sons* may be relegated to the dust bin of history.

Dart Transit Co. v. Frasier, 2014 U.S. Dist. LEXIS 111915 (E.D. Mich.) involves a driver changing his tune from one proceeding to the next even though both

proceedings arose out of the same claim. Mathue Frasier was one of Dart's drivers and, in accordance with company policy purchased his own occupational accident policy and a no-fault commercial liability policy. He was injured in an accident by a hit and run driver and recovered under his policies by asserting that he was an independent contractor of Dart's. Subsequently, though, Frasier applied for worker's compensation coverage asserting that he was a Dart employee.

Dart, in pointing out that Frasier was making a claim which contradicted his earlier position, sought to restrain Frasier from commencing a worker's compensation proceeding but failed to establish that it would be unable to get justice at the proceeding. Dart thought that the worker's compensation magistrate has no authority to apply equitable remedies. The court disagreed and reassured Dart that it will be entitled to argue and establish in the worker's compensation proceeding that since Frasier had recovered for his injuries as an independent contractor, he had lost the right to demand recovery as an employee.

Dart has also tried to short circuit the process by arguing that Frasier could not be an employee since his contract referred to him as an independent contractor. The court held that this was not dispositive – the worker's compensation magistrate would decide on Frasier's status based upon an examination of all of the relevant factors.

We find direct conflict between a motor carrier and its worker's compensation insurer in *Max Trucking, LLC v. Liberty Mutual Insurance Co.*, 2014 U.S. Dist. LEXIS 104509 (W.D. Mich.). Max Trucking was headquartered in Kentwood, MI where it employs six dispatchers. The company enters into written agreements with its drivers who are located all around the country; some of them live in Michigan, and the decision focused on the status of the 18 Michigan drivers who lease their trucks through Max Trucking.

The contracts assert that the drivers are independent contractors, and they are to use trucks that they own or that they lease from Max. Worker's compensation is not provided by Max, according to the contract – the drivers are to secure their own coverage if they want to be protected. In fact the court found that none of the drivers had purchased worker's compensation coverage. Max's dispatchers monitor load boards and find loads which they offer to their drivers. The drivers are free to turn down loads. When a load is accepted, Max bills the shipper or broker, keeps 10-12% for itself and passes on the remainder to the driver. This is about as far from the FedEx model as one can imagine.

Nonetheless, the court found that the drivers who lease their vehicles through Max are employees under Michigan law, as none of them maintain a separate business, hold themselves out as motor carriers or themselves qualify as employers. Max's general manager insisted that Max had structured its program in such a way that it would not have to pay for worker's compensation coverage. The court found that it was that intention that was itself the problem as it left Max's drivers unprotected.

The court that heard the *Max Trucking* case was focused on worker's compensation issues, but the plan formulated by Max Trucking presents serious structural problems from the perspective of the federal and state trucking statutes and regulations. Does each driver place a Max Trucking identification placard on the side of his or her tractor? Whose name is listed on the bill of lading as the motor carrier? Who is responsible for the shipper for damage to the cargo, or to the general public for bodily injury or property damage? The Max Trucking model raises many serious questions.

Some other cases of interest: *Wecso Insurance Co. v. Don Bell, Inc.*, 2014 U.S. App. LEXIS 14532 (11th Cir.) – Policy definitions of "employee" irrelevant to the applicability of the worker's compensation exclusion of a truckers policy: *Tichacek v. Jones Motor Group*, 2014 U.S. Dist. LEXIS 156590 (S.D. Tex) – Court found that driver who purchased his own liability insurance from Zurich as an "independent contractor", and recovered under that policy, was not entitled to sue motor carrier he hauled for in attempt to collect for the carrier's alleged negligence; *UPS Ground Freight, Inc. v. Farran*, 2014 U.S. Dist. LEXIS 1473 (S.D. Ohio) – the federal court concluded that the Ohio Supreme Court's 1991 decision in *Wyckoff Trucking*, which makes a lessee motor carrier responsible for any use of leased rig during pendency of lease, no longer reflects the state of the law, relying on *Bays v. Summitt Trucking*, 691 F.Supp.2d 725. The plaintiff bar should be (but is not) up in arms.

- Larry Rabinovich

2. Employment Issues

Arbitration

Chambers v. Groome Transportation of Alabama, 2014 U.S. Dist. LEXIS 118705 (M.D. Ala.), involved a detailed discussion of an arbitration agreement,

including an analysis of whether a judge or an arbitrator should decide whether the provision should apply to the plaintiff's claims in the first instance, and, once that decision has been made, whether the arbitration provision should be enforced.

The case was brought by 45 former shuttle bus drivers against their former employer for unpaid overtime wages under the Fair Labor Standards Act ("FLSA") and for statutory damages under the Worker Adjustment and Retraining Notification Act ("WARN"). The defendant moved to dismiss the claims and instead compel arbitration based on a 1-page arbitration agreement that the company had presented to the drivers and added to the employee handbook. The company had prepared an acknowledgment form for the drivers to consent to arbitration, but only one of the drivers actually signed the form.

The *Chambers* court recognized that, in certain situations, parties can delegate authority to rule on gateway arbitrability issues to the arbitrator without running afoul of the Federal Arbitration Act ("FAA") or case law. That said, there must be "clear and unmistakable evidence" the parties intended the arbitrator would determine the validity of the arbitration itself. If not, "the arbitrator would lack authority to invalidate the very contract from which he derives he authority to begin with." The *Chambers* court found the arbitration provision at issue did not indicate any intent to reserve issues of arbitrability to the arbitrator. Accordingly, the court held it would determine the issue.

Turning, then, to the FAA, the court described a two-part test to determine enforceability of the arbitration provision: (a) existence of a written agreement to arbitrate; and (b) whether the agreement is part of a transaction involving interstate commerce. The court found that the "written" requirement does not mean the agreement has to be signed. That said, in the absence of a writing, there must be some other indication that the employee intended to be bound by the arbitration provision. No such facts were present in *Chambers*. Accordingly, the court held there was a question of fact as to whether the plaintiffs who had not signed the agreement had entered into a "written" agreement with the employer.

The court found sufficient evidence at the pleading stage that the arbitration agreement involved interstate commerce. In that regard, the court focused on the activities of the employer, and not the specific activities of the employees. Moreover, the court did not find the agreement itself was unconscionable even though it was signed by one employee under threat of termination.

In view of the above, the Court held that: (a) the agreement signed by the one plaintiff was enforceable, and that her claim had to proceed to arbitration (although the court stayed its order pending resolution of the remaining claims); and (b) a bench trial would be held for the remaining employees to determine whether there was a written agreement, and if so, whether the plaintiffs gave mutual assent to the agreement under state law.

In *Flinn v. CEVA Logistics*, 2014 U.S. Dist. LEXIS 118297 (S.D. Cal.), the court declined to enforce an arbitration and choice of law provision set forth in a 51 page document provided to a driver 12 years after he first started working for the defendant, as a condition of continued work. The driver was unaware of the arbitration and choice-of-law provisions when he signed the document. The defendant was attempting to use those provisions to dismiss the driver's federal court claim for unpaid straight time and overtime wages, among other state and federal wage claims.

Flinn argued the agreement he had signed was unconscionable and therefore unenforceable as a matter of law. The court agreed. Applying California law, the court found that the defendant refused to answer Flinn's questions about the agreement, told him that he would be terminated if he did not sign the agreement, and that the arbitration and choice of law provisions were "buried" in the 51 page document. Under these circumstances, the court declined to enforce those provisions of the agreement.

The takeaway from *Flinn* is that California employers seeking to enforce contracts with employees (or even contractors for that matter) need to make sure the contract contains bilateral obligations, an opportunity for the employee to ask questions and bargain for provisions, and that the contract avoids "oppression and surprise."

<u>FLSA/MCA Exemption/State Law Wage Claims</u>

In *Wade v. Werner Trucking Co.*, 2014 U.S. Dist. LEXIS 35653 (S.D. Ohio), the court looked beyond job titles ("fleet managers" and "fleet coordinators") to determine whether employees were exempt from overtime payments under the FLSA and analogous Ohio wage and hour laws, and instead reviewed specific tasks the employees performed on a daily

basis. Only those fleet managers and fleet coordinators whose primary duties involved discretion and independent judgment were found to be exempt. The court found that where issues of fact existed concerning the exercise of discretion and independent judgment with respect to other fleet managers and fleet coordinators, summary judgment dismissing overtime claims was not appropriate.

The court also determined the Motor Carrier Act ("MCA") exemption, which exempts employers from having to pay overtime to covered employees, did not apply to fleet managers and fleet coordinators because they were not "involved in work as a driver, drivers' helper, loader, or mechanic, nor did any of their duties directly affect the safety of the trucks they oversee."

Barlow v. Logos Logistics, 2014 U.S. Dist. LEXIS 98231 (E.D. Mich.), held that a staff leasing agency was not required to pay overtime wages to drivers it leased to a motor carrier and whose work directly affects the safety of vehicles in interstate commerce. The leasing agency and the motor carrier argued the drivers were covered by the MCA and therefore exempt from overtime payments. There was no dispute in that regard with respect to the logistics company. The threshold issue for the leasing agency, however, was whether it could be considered an "employer" under the MCA, because it was clearly not a motor carrier.

Determining that the leasing agency was indeed an employer under the MCA, the Court recognized but discounted the "economic reality" test typically used by Courts to determine whether an employment relationship exists under the FLSA. The economic reality test looks at factors such as hiring, firing, training, control and operations. The Court distinguished between the FLSA and the MCA, noting that the Department of Labor's jurisdiction over FLSA claims "yields" to the Department of Transportation's jurisdiction over MCA claims. The Court held that the economic reality test is a broader test than the "economic dependence" test (which looks at the effect of an employee's work on interstate commerce) used in MCA cases, and that the drivers at issue would be covered by the MCA.

The Court also noted the MCA regulations apply to all "persons who drive commercial vehicles as, for, or on behalf of motor carriers." 49 CFR §391.1(a). Under this regulation, the Court held that even leased drivers are subject to the regulation. Accordingly, the MCA exemption applied to the leasing company as well.

This case stands for the proposition that regulations and interpretations under the MCA – and not the FLSA – provide the appropriate analytical framework for courts to use when determining the existence of an employment relationship in response to any defendant's claim the MCA exemption bars claims for unpaid overtime.

In *Collado v. J&G Transport, Inc.*, 2014 U.S. Dist. LEXIS 169388 (S.D. Fla.), the plaintiffs filed an FLSA wage and hour claim based on misclassification and asked for conditional class certification. The court granted plaintiffs' motion and ordered the defendant to provide a list of putative class members. The defendant refused, and instead filed a Rule 68 offer of judgment and motion to dismiss based on the offer. The court was not pleased with the defendant's refusal to comply with the order. It denied the motion to dismiss, and again ordered defendants to provide a list of putative class members, along with counsel fees.

In its decision, the court distinguished between collective actions under the FLSA, which become moot when the named plaintiff's claim is resolved – because the plaintiff has no right to bring or prosecute an action on behalf of others – and class actions under FRCP 23, which allows a plaintiff to maintain an action as a "private attorney general" for others. The court also denied the motion to dismiss because, even though an offer of judgment was made in the full amount of damages sought, the Judge had to approve the settlement, and he could decline to do so. In addition, a recent Eleventh Circuit case held that an offer of judgment does not extinguish a claim. Note that the Second Circuit has held to the contrary.

The court held in *Bule v. Garda CL Southeast, Inc.*, 2014 U.S. Dist. LEXIS 97225 (S.D. Fla.), that the driver of an armored car was exempt from the FLSA overtime requirements even though he worked exclusively within one state. The "interstate commerce" requirement was satisfied because plaintiff's activities, which included "transporting currency, coin, checks, and other valuables between banks, the Federal Reserve Bank, bank processing centers, check cashing facilities and other locations" involved transportation of property in interstate commerce as defined by the MCA.

In *Reis v. Knight's Airport Limousine Service, Inc.*, 2014 Mass. Super. LEXIS 175, a Massachusetts superior court was asked to construe a state law analogous to the MCA (M.G.L. c. 151, sec. 1A[11]) and determine whether the law exempted employers from

paying overtime wages to the plaintiff and a putative class of limousine drivers under Massachusetts wage and hour laws. The court held that the exemption did not apply.

There was no dispute that the limousine service company fell within the definition of "common carrier," under state law. However, the *Reis* court held that employees who did not work in the area of the company's transportation business may not be covered by the c. 151 sec 1A exemption. Indeed, the court identified the "core question" as whether the common carrier exemption extends to all employees of the carrier on a blanket basis, or whether the exemption applies only to those particular employees who perform services of the type which require a common carrier license. The court noted that the statute could be read either way, and there are no appellate decisions deciding the issue.

The *Reis* court, in its own discretion, determined the exemption applies only to those employees performing services of the type requiring a common carrier license. Since the plaintiffs' primary duties were to operate commercial vehicles carrying fewer than eight passengers, and to shuttle passengers to and from pre-designated locations per individual customer agreements, the drivers at issue did not fall under the exemption, and their overtime wage and hour claims survived.

The *Gordilis v. Ocean Drive Limousines*, 2014 U.S. Dist. LEXIS 110157 (S.D. Fla.), court dismissed state law minimum wage claims because the plaintiffs failed to send the employer a pre-suit notice. Under Florida law, an employee claiming violations of the Florida Minimum Wage Act cannot file suit unless he/she first sends a notice to the employer including the minimum wage demanded, an estimate of hours worked, and the total amount of unpaid wages. If the employer does not resolve the claim within 15 days after receiving the notice, the employee can file suit.

The defendant employer sought to dismiss a Florida wage claim, arguing the notice was defective because it purportedly demanded liquidated damages and counsel fees even if the full amount of the wage claim was paid. The court denied the motion, finding the notice made no mention of liquidated damages or attorney's fees, but merely included potential FLSA claims. The court also denied defendant's motion to dismiss the claim under the MCA Exemption to the FLSA, without discussion.

In *Allen v. Coil Tubing Servs., LLC*, 2014 U.S. Dist. LEXIS 11069 (5th Cir.), the court held the MCA exempted certain employees from overtime payments under the FLSA. The plaintiffs worked for an oil well service company in four geographic districts operated by the defendant; three in Texas, and one in Louisiana. Their positions included Equipment Operator, Service Technician I, Service Technician II, Service Supervisor Trainee, Service Supervisor, Service Coordinator, and Field Engineer. Their duties varied by position. Service Coordinators coordinated projects. Field Engineers recorded the pressure of coil tubing units at well sites. The remaining employees helped transport materials to project sites.

The court analyzed the requirements employers must satisfy to take advantage of the MCA exemption, i.e.,: (a) that the employer is subject to the Department of Transportation's jurisdiction by being engaged in interstate commerce; and (b) that the employees engage in activities of a character directly affecting the safety of operation of motor vehicles in interstate commerce. Only the second requirement was at issue in *Allen*.

Titles are not important in determining the second requirement; what is controlling is the character of the actual activities involved in performance of the employee's duties. If the employee's continuing duties have no substantial direct effect on safety of operation or where safety-affecting activities are so "trivial, casual, and insignificant as to be de minimis," the exemption will not apply.

The main issue in *Allen* was whether the employees' duties regularly involved "safety affecting activities" that are interstate in nature. To address the issue, the court looked at whether the employees "could reasonably have been expected to [engage] in interstate commerce consistent with their job duties." The court held a "company-wide" analysis was appropriate to assessing the employees' interstate duties, and found that each of the employees had a reasonable expectation of engaging in safety-affecting activities across state lines – even if they never actually engaged in those activities. Accordingly, the MCA exemption did not apply.

FAAA Pre-emption

In *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir.), the court held the Federal Aviation Administration Authorization Act ("FAAA") did not pre-empt California meal and rest break laws because those state laws were not "related to" prices, routes, or services. A certified class of drivers employed by Penske filed

claims under California law, asserting that they did not receive mandated meal and rest breaks. The lower court dismissed those claims, finding the claims were pre-empted by the FAAA. The Ninth Circuit reversed. The drivers claimed.

The FAAA provides that states may not enact or enforce 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) (emphasis added). The court noted there is a presumption that Congress does not intend to supplant state law and that wage and hour laws constitute areas of traditional state regulation. The drivers in this case worked exclusively on routes within the state of California, and typically in pairs with one driver and one installer per truck. Finding the FAAA did not pre-empt the plaintiff's state law claims, the *Dilts* court held that a state law governing hours is not related to prices, routes, or services, even though enforcement of the law may have an indirect effect on prices, routes, or services.

The court held in *Robles v. Comtrak Logistics, Inc.*, 2014 U.S. Dist. LEXIS 175696 (E.D. Cal.), that the FAAA did not pre-empt state law claims for misclassification of employees as independent contractors. The plaintiff truck driver alleged the defendant intentionally misclassified himself and others as contractors to avoid various obligations owed to employees under California law, including minimum wage payments. The defendant moved to dismiss the complaint upon the grounds the state law claims were pre-empted by the FAAA. The court denied the motion, holding that, in general, laws regarding classification of employees are not the type of regulation Congress intended to target in passing the FAAA, as they do not seek to regulate "intrastate prices, routes, and services of motor carriers." See H.R. Conf. Rep. 103-677 at 86. Accordingly, since the plaintiffs claims were for wages and other benefits under state law wholly unrelated to prices, routes and services of motor carriers, the FAAA did not pre-empt those claims.

In *People ex rel. Harris v. PAC Anchor Transportation, Inc.*, 2014 Cal. LEXIS 5181, the Supreme Court of California held the FAAA did not pre-empt state law claims for unfair competition based on a trucking company's alleged violation of state labor and insurance laws. The State of California brought a claim against the defendant trucking company for misclassifying drivers as independent contractors and other violations of California labor and unemployment insurance laws. The defendant moved to dismiss the complaint, arguing the state law claims were pre-empted by the FAAA. The court disagreed.

To establish grounds for FAAA pre-emption, the defendant was required to show that the plaintiff's claim: (a) derives from the enactment or enforcement of state law; and (b) relates to the defendant's prices, routes or services with respect to transportation of property. There was no dispute concerning (a) above. However, the court found that none of the state's causes of action (including the labor and employment law claims) concerned regulation of motor carriers with respect to transportation of property. To the contrary, each claim was wholly independent of defendant's prices, routes or services with respect to the transportation of property. Pre-emption was therefore inappropriate.

Discrimination

In *Connelly v. Lane Construction Corp.*, 2014 U.S. Dist. LEXIS 30913 (W.D. Pa.), the Court declined to invoke the "continuation violation" doctrine in a Title VII discrimination claim brought by a female trucker who was not called back to work following a layoff. The Court found that the facts forming plaintiff's hostile work environment, harassment, and retaliation claims took place more than 300 days before she filed an EEOC charge. Accordingly, those claims were time-barred.

Pleadings

In *Shorts v. Primeco Auto Towing, LLC*, 2014 U.S. Dist. LEXIS 99033 (S.D. Tex.), the court granted a defendant's motion to dismiss FLSA claims for unpaid overtime wages because the complaint failed to allege facts sufficient to state a cause of action. More particularly, the court held the plaintiff was required to plead facts sufficient to show that the defendants were engaged in interstate commerce or constituted an enterprise engaged in commerce as defined by the FLSA. Plaintiff's complaint merely recited statutory language. It did not contain facts to support the FLSA applied to defendants. Accordingly, the motion to dismiss was denied.

The defendant trucking company in *Sanchez v. Truse Trucking, Inc.*, 2014 U.S. Dist. LEXIS 104342 (M.D.N.C.) filed a motion to dismiss the plaintiffs' FLSA overtime claims on the grounds that the complaint did not allege specific hours worked and unpaid and that the MCA exemption bars overtime claims. The court disagreed and denied the motion, holding that the plaintiffs did not have to set forth the exact amount of unpaid hours and wages to sustain their overtime claim.

Rather, the plaintiffs were required only to set forth facts of the type of work they performed and the range of hours they worked – which they did (i.e., the complaint alleged plaintiffs "arrived at work between 3 a.m. and 4 a.m. each day from Monday through Saturday and worked until 7 p.m. to 8 p.m. each day, an average of 15 hours per day, six days a week loading and unloading trucks for Defendant").

In what the *Sanchez* court acknowledged was a "close call," it held that the complaint did not "conclusively" establish plaintiffs were "loaders" or "helpers" under the MCA. Frankly, it is difficult to reconcile the court's finding that plaintiffs pled sufficient facts to state they were engaged in "loading and unloading trucks," for purposes of the FLSA claim, with the court's finding that the complaint did not conclusively establish the plaintiffs were "loaders" under the MCA. All the court stated was that whether the plaintiffs' duties were consistent with the definition of "loader" under the MCA required an individualized determination of the actual work performed by the employee. This case seems to be at odds with *Shorts*, above, where the court specifically stated specific facts must be pled to support an FLSA claim, and that merely reciting statutory language is not sufficient.

Class Actions

In *Fox v. Transam Leasing, Inc.*, 2014 U.S. Dist. LEXIS 79428 (D. Kan.), the court denied class certification for state law deceptive practices claims under the Kansas Consumer Protection Act because liability and damages under that statute require inquiries concerning each individual plaintiff. Plaintiff owner-operators in that case alleged Independent Contractor Agreements they were required to sign with the defendant contained false claims concerning income the owner-operators could expect to receive under the Agreements.

The court accepted, however, class certification of federal Truth-In-Leasing Law claims for owner-operators alleging a "satellite fee" provision contained in the Independent Contractor Agreements violated CFR §376.12(i) by requiring the contractors to pay a satellite communications fee of $15 each week. Without deciding whether the fee violated the truth-in-leasing law, the court held that class certification was proper because – unlike the individual inquiries which would be required in connection with the state law deceptive practices claim – either the satellite fee was a lawful chargeback under federal law, or it was not.

The court denied class certification in *Hamilton v. Genesis Logistics, Inc.*, 2014 U.S. Dist. LEXIS 117607 (C.D. Cal.), on overtime and meal period claims brought by transportation supervisors. The plaintiffs claimed they were misclassified as exempt employees under the FLSA, but class certification was denied because the moving parties could not demonstrate commonality of facts and issues or that a class claim is the superior method of redress. The defendants produced affidavits from other transportation supervisors with facts showing duties that were much different from the plaintiffs' and would tend to show that they properly classified as exempt – including that the supervisors exhibited discretion and independent judgment in carrying out their duties. In denying class certification, the court also noted the relatively small number of putative class members (30) and that two of the putative class members had already filed individual claims.

- Scott Rogoff

3. Cargo/Carmack

Two issues continued to dominate cases discussing the Carmack Amendment in 2014 – the preemptive effect of the Carmack Amendment and limitation of a carrier's liability under the Carmack Amendment.

I. Preemption

A. Complete Preemption and the Well-Pleaded Complaint Rule.

In *Morris v. Mayflower Transit, LLC*, 18 F. Supp. 3d 1342 (M.D. Ala.), the plaintiff filed a state court action for the replacement cost of household goods that were allegedly damaged or lost during her move from Dupont, Washington to Montgomery, Alabama. Defendant removed the action to federal court claiming that the state law claims were preempted by the Carmack Amendment. Plaintiff made a motion to remand the action to state court arguing that removal was not proper because there was no federal cause of action was alleged in the complaint.

The court acknowledged that there was no federal cause of action alleged in plaintiff's complaint and, under the "well-pleaded complaint" rule, federal jurisdiction would be lacking. The well-pleaded complaint rule provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. The court

then stated that there existed an “independent corollary” to the well pleaded complaint rule: the complete preemption doctrine. Under that doctrine “the pre-emptive force of a statute can be found to be so extraordinary, that it converts an ordinary state common-law complaint into one stating a federal claim for the purposes of the well-pleaded complaint rule.”

The court then stated that the proper inquiry on complete preemption was “whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended the cause of action to be removable.” The court reviewed several court of appeals cases that held that the Carmack Amendment completely preempted any cause of action for claims arising out of the interstate transportation of goods: “actions ‘for loss or damages to goods arising from interstate transportation of those goods by a common carrier’ are completely preempted by the Carmack Amendment, and a complaint alleging such an action would be removable under the court’s federal question jurisdiction.” 18 F. Supp. 3d at 1345 citing *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 778 (5th Cir. 2003). Because the allegations in plaintiff’s state court complaint related only to the loss or damage to goods arising from the interstate transportation of those goods by a common carrier, plaintiff’s state law complaint was completely preempted by the Carmack Amendment. Plaintiff’s motion to remand was denied.

B. <u>The “true conversion” exception</u>.

In *Certain Underwriters at Interest at Lloyds of London v. United Parcel Service*, 762 F.3d 332, the Court of Appeals for the Third Circuit was asked to determine the preemptive scope of the Carmack Amendment. The court also had to clarify the judicially created “true conversion” exception. The Underwriters insured, First State Depository, arranged for shipment of various coins and precious metals with the defendant, United Parcel Service. Twenty-seven of those shipments, valued at a total of $150,000, were either lost or stolen during a eight week period in early 2012. Underwriters paid First State for the loss, and, invoking its subrogation rights, brought state law claims for breach of contract, negligence, negligent supervision of employees and “true and fraudulent conversion” against UPS in the United States District Court for the Eastern District of Pennsylvania, basing jurisdiction solely on diversity of citizenship.

The district court dismissed Underwriters’ complaint for failure to state a cause of action upon which relief could be granted, finding that the state law claims were preempted by the Carmack Amendment. The court recognized that some courts had found that the Carmack Amendment’s limitation on liability provisions did not apply when a carrier had committed a true conversion of the goods, but held that the exception did not permit a cause of action based on state law, but only arrogated any limitation of liability. The exception, therefore, did not save the plaintiff’s complaint. Underwriters appealed.

After reviewing the history of the Carmack Amendment, the Court of Appeals observed that “[f]or over one hundred years, the Supreme Court has consistently held that the Carmack Amendment has completely occupied the field of interstate shipment.” The court also recognized that “[t]he Courts of Appeals have also unanimously held that the Carmack amendment ‘preempts all state or common law remedies available to a shipper against a carrier for loss or damage to interstate shipments.’” The court then held that the Carmack Amendment preempted plaintiff’s state law claims for breach of contract and negligence. The court also found that the Carmack Amendment preempted plaintiff’s state law claim for conversion finding that “[t]his is the only result that is consistent with the Amendment’s goal of uniformity and its ‘broad preemptive effect.’”

The court also affirmed the district court’s holding that any “true conversion” by a carrier did not limit the preemptive effect of the Carmack Amendment. The court recognized that it would be unfair for a carrier to limit its liability when the carrier’s actions involved “intentional destruction or conduct in the nature of theft,” but then held that viewing the exception as an exception to Carmack preemption would be contrary to Supreme Court precedent which explicitly indicated that conversion actions are preempted. The court also held that “[h]olding that the true conversion exception vitiates the liability limiting provisions of the Carmack Amendment furthers the exception’s goals while maintaining the Amendment’s uniform liability scheme.” The court then held that the “true conversion” exception did not apply in this case because the plaintiffs had brought only state law claims and not a claim under the Carmack Amendment and affirmed dismissal of the plaintiffs’ complaint (Query – why did not the plaintiffs move for leave to amend to plead a Carmack Amendment claim?).

C. Breach of Warranty/Unfair Trade Practices.

A claimant's attempt to avoid the broad preemptive effect of the Carmack Amendment also failed in *Irene J. Kendrick Revocable Living Trust v. South Hills Movers, Inc.*, 2014 U.S. Dist. LEXIS 155847 (W.D. Pa.) Plaintiff had entered into a contract with defendant to pack, load, transport, store and unload household goods and personal possessions. When several of the items arrived damaged, plaintiff submitted a claim to defendant for $11,924. Defendant did not pay the claim, whereupon plaintiff filed an action in state court. Defendant removed the action to federal court arguing that federal law preempted the field. Plaintiff then filed an amended complaint alleging a cause of action under the Carmack Amendment, a state law cause of action for breach of warranty and a cause of action under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL").

Defendant moved to dismiss plaintiff's second and third causes of action arguing that the Carmack Amendment preempted the state law claims. Plaintiff creatively argued that the contract provision that called for full replacement value for damaged goods was, in effect, a warranty, the breach of which gave rise to a claim separate and distinct from the delivery of the goods itself. As such defendant's failure to honor the "Full Replacement Value Protection" provided for in the contract and for which an additional sum of money was paid, violated the UTPCPL and gave rise to another claim independent of the delivery of goods. The court, citing *Certain Underwriters at Interest at Lloyd's of London, supra*, rejected plaintiff's arguments finding that the only harm suffered by the Plaintiff was damage or destruction of goods, claims that lie "at the heart" of the Carmack Amendment. The court granted defendant's motion to dismiss plaintiff's second and third causes of action.

D. Broker-Carrier Contracts of Indemnification.

The Carmack Amendment controls claims by shippers against motor carriers, but claims by transportation brokers are a different story. Haulmark, a transportation broker, entered into a series of agreements with Solid Group Trucking ("SGT") to transport a series of shipments. The Agreement provided that SGT would be liable for full actual loss resulting from loss, damage, injury or delay. The Agreement also provided that SGT would indemnify and save harmless Haulmark from any and all claims of any nature whatsoever arising out of SGT's operations.

Pursuant to the Agreement, Haulmark arranged for SGT to pick up a load from Del Monte in Galveston, Texas for delivery to a Wal-Mart in North Platte, Nebraska. The Bill of Lading for the load required that the load be maintained at a temperature of 46 degrees Fahrenheit. When the driver arrived at the Wal-Mart, Wal-Mart rejected the load because the load had not been maintained at the required temperature. Del Monte submitted a claim for $17,388 to the broker Haulmark for the loss of the load. Haulmark forward the claim to SGT and its insurer. When SGT refused to indemnify Haulmark for the loss, Haulmark sued SGT in Texas state court seeking damages for the loss, plus interest and attorneys' fees. SGT removed the action to federal court arguing that Haulmark's claims were preempted by the Carmack Amendment. Haulmark moved to remand the action back to state court arguing that the action was not preempted by the Carmack Amendment because the claim was based not on a bill of lading, but on a contract between freight broker and carrier.

The court first reviewed the "well-pleaded complaint" rule which holds that a federal cause of action must appear on the face of a state court complaint in order for the complaint to be removable to federal court. The court then recited the "artful pleading" rule which holds that a state court plaintiff cannot avoid removal of a claim that is completely preempted by federal law by merely avoiding mention of the federal law in the state court complaint. The court held that the Carmack Amendment completely preempted the field related to claims for damage to goods being transported in interstate commerce. It noted that "consignors, holders of bills of lading issued by the carrier, and persons beneficially interested in the shipment though not in possession of the actual bill of lading, in addition to shippers, had standing to sue under the Carmack Amendment."

The court held that SGT had failed to demonstrate that in what capacity Haulmark, as a broker, would be entitled to recover damages from the carrier under the Carmack Amendment. Haulmark's state court complaint was based solely on the indemnification provisions contained in the agreement between Haulmark and SGT. There was no showing that Haulmark was acting as the subrogee for Del Monte, the shipper, or that Haulmark would be entitled to sue under the bill of lading for the shipment. Haulmark's state law breach of contract claim was outside the scope of the Carmack amendment. The action was

remanded to state court.

Along the same lines was the decision in *Keystone Logistics, Inc. v. Struble Trucking LLC*, 2014 U.S. Dist. LEXIS 166006 (N.D. Ind.). Keystone, the broker, paid a claim for spoiled ice cream, then looked to Struble, the motor carrier, to indemnify it for the claim. When Struble refused to indemnify Keystone, Keystone filed a breach of contract action in state court. Struble removed the action to federal court. Keystone moved to remand the action to state court.

The court held that the Carmack Amendment did not preempt a claim by a broker against a carrier based on a broker-carrier contract. In such an action, the broker was not seeking to recover as a shipper for lost or damaged cargo but instead as a broker for a breach of contractual indemnity. The court held that "the Carmack Amendment preempts claims on bills of lading, but not claims on other agreements. Because Keystone is seeking to recover on a contract that is not a bill of lading, the Carmack Amendment does not apply and there is no preemption." The plaintiff's motion to remand was granted.

In *Mason Dixon Lines, Inc. v. Walters Metal Fabrication, Inc.*, 2014 U.S. Dist. LEXIS 129285 (S.D. Ill.), defendant had contracted with plaintiff, a motor carrier and a broker, for the shipment of an load of oversized pipe spools from Granite City, Illinois to Mont Belvieu, Texas. The shipment was damaged when the load struck the underside of a bridge even though the driver was following the route prescribed by the Illinois DOT. Plaintiff filed an action for a declaration that, among others things, that any claims by the defendant were governed by plaintiff's tariffs and the bill of lading. Defendant interposed a counterclaim for negligence. Plaintiff moved to dismiss the counterclaim on the ground that it was preempted by the Carmack Amendment. Defendant argued that there was a question of fact as to whether plaintiff was acting as a freight broker with respect to the move, in which case the Carmack Amendment would not have preempted the counterclaim, or as a carrier, in which case the Carmack Amendment would have preempted the counterclaim.

The court contrasted the definition of a broker in the Interstate Commerce Act: "a person, other than a motor carrier of an employee or agent of a motor carrier, that as a principal or agents, sells offer 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" with the definition of a motor carrier: "a person providing motor vehicle transportation for compensation," with the definition of a freight forwarder: "a person holding itself out to the general public (other than as a pipeline, rail, motor of water carrier) to provide transportation for compensation and in the ordinary course of business – (A) assembles and consolidates, or provides for the assembling and consolidating, shipments and performs or provides for break-bulk and distribution operations of the shipments (B) assumes responsibility for the transportation from the place of receipt to the place of destination, and (C) uses for any part of the transportation a carrier subject to jurisdiction under this subtitle." The court went on to hold that whether a company is a broker, carrier or freight forwarder is not determined by how it labels itself, but by how it holds itself out to the world and, in particular, its relationship with the shipper.

The court found that the plaintiff's actions showed that it was acting as a motor carrier. Defendant had alleged that plaintiff had agreed to transport to haul the cargo from defendant's facility to the defendant's customer's facility. That type of an agreement is made by a carrier, not a broker. Defendant's counterclaim also alleged that plaintiff had obtained the necessary oversize permits from the Illinois DOT, once again an activity typical of a carrier, not a broker. The court held that based on the allegations in its own counterclaim, defendant had "pled itself out of court with respect to its negligence claim." Plaintiff's motion to dismiss defendant's counterclaim was granted.

In contrast to the two previous cases where a broker sought to recover under a contract of indemnification with a carrier, *Total Quality Logistics, LLC v. Macktoon, Inc.*, 2014 U.S. Dist. LEXIS 20484 (S.D. Ohio) involved a case where the broker sought to recover damages from the carrier based on an assignment of a shipper's claims. Plaintiff arranged with defendant for the shipment of some frozen products from Pennsylvania to Utah. The load was rejected when it reached the warehouse in Utah because the temperature of the load was above freezing. The shipper made a claim to the broker for the amount of the loss. The broker paid the claim and sued defendant. By virtue of the assignment the court found that the broker's claim was governed by the Carmack Amendment.

In the final installment of a well litigated claim (earlier decisions in Exel were discussed in our 2012 and 2013

updates), the court was asked to determine whether the Carmack Amendment preempted a claim by a freight broker against a carrier. Plaintiff arranged for defendant to transport a load of pharmaceuticals for a client pursuant to a Master Transportation Services Agreement ("MTSA"). When the load was stolen, the plaintiff paid the client's claim and sued the carrier for damages.

The court had originally held that the Carmack Amendment had preempted certain of plaintiff's claims. When the parties then cross moved for summary judgment, the court found that the MTSA between the plaintiff and defendant contained language that may have created contractual obligations independent of the shipper-carrier relationship and, on its own initiative, found that the Carmack Amendment may not preempt certain contractual cause of action based on the MTSA. After additional discovery, the parties cross-moved for summary judgment.

The court rejected defendant's argument that the Carmack Amendment preempted plaintiff's breach of contract claim finding that the court had previously ruled that the claim was not preempted. Citing the doctrine of "law of the case" the court found that defendant had not presented any new evidence on the issue and, therefore, was bound by the prior ruling. The court also held that, given the fact that the MTSA was enforceable, the bill of lading did not control the outcome of the case. The court granted plaintiff's motion for summary judgment for the value of the stolen shipment.

E. <u>Interstate v. Intrastate Shipment</u>.

The issue in *Open Systems Technologies DE, Inc. v. Transguard Insurance Co.*, 2014 U.S. Dist. LEXIS 99022 (W.D. Mich.), was whether the storage of shipment at the consignee's location severed the interstate nature of a shipment. Plaintiff contracted with a motor freight carrier to deliver two high-capacity storage arrays to one of its customers. One of the arrays was to be installed at one of the customer's locations. The second array was to be installed at a second, not yet finished, location. The second array was delivered to the first location pending completion of the second location. A couple of months later, plaintiff contracted with a second carrier to move the array from the first location to the now completed second location. Plaintiff also contracted with defendant to insure the full value of the array during transport. The array was damaged during transport. The customer filed a claim with the defendant that was denied. The customer ordered a new array from plaintiff, assigning all its rights to the plaintiff.

Plaintiff then sued defendant in state court alleging breach of contract, equitable subrogation, breach of contract against the carrier that handled the shipment and breach of bailment against the carrier that handled the shipment. Defendants removed the action to federal court on the ground that the Carmack Amendment preempted plaintiff's claims because the transportation of the arrays to the second location was one continuous act of shipping in interstate commerce. Plaintiff moved to remand the action arguing that the interstate shipment terminated when the array was delivered to the first location and the movement of the array from the first location to the second location was an intrastate shipment not subject to preemption.

The court examined the nature of the transactions to determine whether the relocation of the array from the first location to the second location was merely a continuation of the interstate shipment or whether it was a movement in intrastate commerce. The court held that:

> It is well-settled that, in determining whether a particular movement of freight is interstate or intrastate or foreign commerce, the intention existing at the time the movement starts governs and fixes the character of the shipment . . . [T]emporary stoppage within the state, made necessary in furtherance of the interstate carriage, does not change its character.

The court found that the plaintiff's customer had agreed to accept the shipment at its first location because the second location was not completed. The shipping contract did not contemplate the shipper storing the array pending ultimate delivery. Because the customer took actual possession of the array when it was delivered to the first location, the interstate nature of the shipment terminated when the array was delivered to the first location. The court found that the parties dealing with the shipment separated the movement into distinct portions. There was no privity between the two carriers. There was no through bill of lading. The Carmack Amendment did not apply to the second shipment and plaintiff's motion to remand was granted.

The issue in *Brody v. Liffey Van Lines, Inc.*, 2014 U.S. Dist. LEXIS 74128 (S.D.N.Y.) was whether claims involving an intrastate shipment were preempted by the

Carmack Amendment because a portion of the shipment also moved in interstate commerce. Plaintiffs contracted with defendant to pack, store, ship and deliver household goods from New York City to Florida. A portion of the goods was to be delivered to a second home in New York City. Defendant packed and stored the furniture in its warehouse in New York City for some months. When plaintiffs contacted defendant about moving certain of the goods to Florida, they signed a second contract with defendant's parent corporation. When the goods arrived in Florida, they were damaged. Plaintiffs then decided to pick up their remaining belongings from defendant's warehouse. When the plaintiffs eventually obtained possession of the goods, they too were damaged.

Plaintiffs filed a complaint in state court seeking to recover for the damage to their goods under various state law causes of action. A portion of the complaint sought to recover damages for the goods delivered in Florida. Another portion of the complaint sought to recover for the damage to goods retained in the New York City warehouse. Defendants removed the action to federal court alleging that the claims were preempted by the Carmack Amendment and moved for judgment on the pleadings.

The Court differentiated between those claims based on the damage to the goods delivered to Florida and the goods stored in New York City. The court held that plaintiffs first cause of action against defendant's parent corporation based on the damage to the goods delivered to Florida was cognizable under the Carmack Amendment. The defendant's parent corporation picked the goods up at the New York City warehouse and delivered them to Florida. Because it was an interstate transportation of goods, the Carmack Amendment provided the only source of relief to plaintiffs. The court dismissed the remaining causes of action as against the defendant's parent corporation.

The court also found that, to the extent that plaintiffs' claims against defendant were based on damages to goods that eventually ended up in Florida, those state law claims were also preempted by the Carmack Amendment. The court, however, distinguished those claims based on defendant's handling of those goods that remained in storage in New York City. Defendant argued that because it was a interstate carrier of goods, any claims related to its activities were preempted by the Carmack Amendment. The court disagreed holding that the "statute applies to transportation by a motor carrier from one place in a state to another only when that transportation goes through other states." Because, on the face of the complaint, it appeared that the goods in question were to be picked up in New York City, delivered to a warehouse in New York City and then delivered to another location in New York City, the Carmack Amendment did not apply. Plaintiff's state law causes of action related to those goods were not preempted by the Carmack Amendment.

F. Contracted Warehouse Storage.

In *Starr Indemnity & Liability Co. v. Atlantic Drayage & Transport, Inc.*, 2014 U.S. Dist. LEXIS 164070 (D.N.J.), the issue was whether the Carmack Amendment preempted various state law claims based on the theft of a portion of a shipment being transported from Newark, New Jersey to Hicksville, Long Island. The carrier contracted with PKS, the owner of a storage lot, to store the shipment overnight. A portion of the shipment was missing when it arrived at its destination. The shipper filed a claim with the plaintiff for the missing portion of the shipment. Plaintiff paid the shipper's claim for the loss and then sued defendant and PKS for the loss.

Defendant argued that the plaintiff's state law claims for breach of contract, breach of fiduciary duty, breach of implied covenant of good faith and fair dealing and indemnification and contribution were preempted by the Carmack Amendment. The court disagreed, finding that the relationship between the defendant and PKS was not governed by a bill of lading but by a separate agreement. Because neither the defendant nor PKS had any rights based on a bill of lading, the Carmack Amendment did not preempt plaintiff's state law claims.

G. Post-Movement Claims.

The issue in *Anderson v. Mandana Pour*, 2014 U.S. Dist. LEXIS 156703 (N.D. Cal.), was whether the Carmack Amendment preempted state law claims based on the alleged improper handling of a shipper's claim. Plaintiff contracted with a auto relocation business to transport a classic car from New York to California. The car arrived late and significantly damaged. The auto relocation business made an offer to settle the claim that was rejected by the plaintiff who then sued the auto relocation business and the carriers used by the business. According to the allegations in the complaint, the auto relocation business agreed to facilitate any claim for damage to the property caused in transit and to act as a liaison between the plaintiff

and the motor carrier. Plaintiff alleged that the auto relocation business had breached the implied duty of good faith and fair dealing by representing to Plaintiff that he was entitled to recover only a small fraction of what he was owed and by delaying or manipulating the handling of his claim.

The auto relocation business moved to dismiss plaintiff's state law claims arguing that the claims were preempted by the Carmack Amendment. The court rejected that argument finding that "[t]o avoid liability under state law based on preemption under Section 14501(c)(1), a defendant must establish that a plaintiff's claim "relates to . . . service of any motor carrier . . . with respect to the transportation of property." The court found that plaintiff's claims against the auto relocation business related to the business's action after the shipment was complete, specifically on the auto relocation business's processing of plaintiff's claim after the car was no longer in transit.

The auto relocation business also argued that, as a broker, its activities were "inextricably intertwined" with the transportation of the car. The court noted that brokers do not enjoy a blanket exemption under the Carmack Amendment and that plaintiff's focus on the auto relocation business's activities after the shipment was complete took those claims outside of the Carmack Amendment.

II Damages

A. Limitations of Liability.

The issue in *UPS Supply Chain Solutions, Inc. v. Megatrux Transportation, Inc.*, 750 F.3d 1282 (11th Cir.), was whether a carrier could avail itself of a limitation of liability contained in a contract between the shipper and a broker that arranged for the transportation. Seagate Technology, LLC contracted with UPS Supply Chain Solutions to provide logistics services pursuant a Global Logistics Service Provider Agreement ("GLSPA"). The GLSPA limited the liability of UPS and its subcontractors to $100,000 except where the loss was due to gross negligence. UPS, in turn, had a non-exclusive contract for transportation services with Megatrux Transportation, Inc. That agreement assigned all liability for damage to cargo to the carrier and required the carrier to defend, indemnify and hold UPS harmless from any claims resulting from damage to the cargo. The agreement also prohibited Megatrux from subcontracting transportation services without UPS's consent.

Seagate contracted with UPS to ship new and refurbished disk drives from Los Angeles California to McAllen, Texas. UPS gave the shipment to Megatrux. Megatrux, without UPS's knowledge or consent, contracted the shipment to Stallion, a company it had not previously used. The shipment was apparently stolen by someone posing as a Stallion driver. Seagate submitted a claim for the disk drives to UPS. UPS settled the claim for $246,022, which UPS paid. Seagate, in exchange, assigned all its rights against Megatrux to UPS. UPS then sued Megatrux for the payment. After a bench trail, the district court found that UPS was entitled to recover the full value of the disk drives, $461,489.82. Megatrux appealed the district court decision arguing that its liability to UPS was limited to the $100,000 contained in the GLSPA between Seagate and UPS or, in the alternative, was limited to $32,213.68 pursuant to the bills of lading.

The Court of Appeals first questioned whether the Carmack Amendment applied at all because the waybills for the shipment indicated that the cargo was shipped from Singapore, Thailand and China, to Los Angeles and then onto McAllen Texas. The parties, however, had accepted the district court's application of the Carmack Amendment to the dispute and the only issue before the Court of Appeals was not whether the defendant was liable for damages, but the amount of damages.

The Court of Appeals stated that "a carrier of property in interstate commerce that loses a shipment is generally liable 'for the actual loss or injury caused to the property by' the carrier." 750 F.3d at 1286. An exception to that rule of full liability is when the shipper agrees with the carrier to limit the carrier's liability in order to obtain a reduced shipping rate.

The court held that Megatrux, as the carrier, could not rely on the limitation of liability contained in the agreement between UPS and Seagate, an agreement that Megatrux had no knowledge of or participation in. The rate charged by Megatrux was presumably based on full liability for any loss. Megatrux also failed to show that the shipper had been given a reasonable opportunity to choose between two or more levels of liability or that it had obtained agreement to any level below the Carmack Amendment's default measure of liability. Megatrux bore full liability for Seagate's $61,849.42 loss.

The issue in *United Van Lines, LLC v. Lohr Printing*, 2014 U.S. Dist. LEXIS 97557 (D.N.J.), was whether the

carrier properly limited its liability for damage to a shipment. Defendant needed to ship a printer from Kentucky to New Jersey. Defendant arranged for the shipment through an agent who was able to negotiate a discounted freight charge for the shipment. Plaintiff's truck arrived to pick up the printer. Defendant's president signed a Bill of Lading in two places, one of which was the "Carrier Liability" section of the Bill of Lading. That section stated that the defendant agreed to limit the carrier's liability for damage to the shipment to $5.00 per pound. The Bill of Lading also adopted Section 305-B of the plaintiff's tariffs. That section of the tariff stated that shipments were offered transportation at a released values not exceeding $5.00 per pound per article. Section 305-B also stated that a shipper could declare a liability in excess of the $5.00 default liability for an additional charge.

The printer was damaged during transit to New Jersey. Plaintiff moved for summary judgment seeking a determination that its liability was limited to the amount set forth in the tariff.

The principal issue in the case was the claim of defendant's president that he had not read the bill of lading when he signed it and that he thought that it was a receipt. The court rejected defendant's argument holding that where a party affixes his signature to a bill of lading, the presumption is that the party had read and understood the bill of lading and assented to its terms. "A shipper who signs a valid bill is 'conclusively presumed' to know the terms set out in the bill of lading and any incorporated tariff." 2014 U.S. Dist. LEXIS 97557, *15, *citing Am. Railway Exp. Co. v Daniel*, 269 U.S. 40, 46 S. Ct. 15 (1925). The court found that no reasonable jury could find that the defendant was not bound by the terms of the bill of lading and tariff and granted summary judgment to the plaintiff.

The issue in *Medvend, Inc. v. YRC, Inc.*, 2014 U.S. Dist. LEXIS 73518 (E.D. Mich.), was whether the carrier provided the shipper with an adequate opportunity to choose between various levels of limitation on liability. The defendant's bill of lading for the shipment referred the shipper to the carrier's terms and conditions which could be found on a website. Those terms and conditions stated that the maximum cargo liability for new goods for less than truckload ("LTL") shipments would be limited to the greater of $100,000 or $10 per pound. The Court, relying on *Toledo Ticket Co. v. Roadway Express, Inc.* 133 F.3d 439 (6th Cir. 1998), held that the inclusion of a limitation on liability in a bill of lading, without more, did not give a shipper a reasonable opportunity to choose between levels of liability. The court held that a carrier had to provide both reasonable notice of the options that would limit liability and the opportunity to obtain information about the options that "will enable a shipper to make a deliberate and well informed choice." The carrier's motion for summary judgment to limit liability to those contained in its tariff was denied. The court's decision in *Medvend* would appear to be at odds with the decision of the *United Van Lines* court.

B. <u>Proof Issues for Carmack Claims</u>

i. <u>Ambiguous Bills of Lading</u>.

In *Farmers Seafood Co., Inc. v. FFE Transportation Services, Inc.*, 2014 U.S. Dist. LEXIS 24686 (W.D. La.), the plaintiff contracted with the defendant for the transportation of a pallet of frozen seafood from Shreveport, Louisiana to the Ipswitch Seafood Company in Ipswitch, Massachusetts. The bill of lading noted that the seafood was to be kept between thirty-three and thirty-eight degrees. Plaintiff claimed that Ipswitch required proof that the load had been maintained between thirty three degrees and thirty eight degrees by having a temperature control recorder ("TCR") attached to the pallet during transit. Plaintiff attached a TCR to the load in question and noted the TCR number on the bill of lading. When the load was delivered without the TCR, Ipswitch rejected the load and refused to pay plaintiff for the shipment. Defendant then tried to return the load to plaintiff, which rejected the load because defendant could not prove that the required temperature had been maintained.

Plaintiff filed the action against defendant in state court. Defendant removed the action to federal court. Plaintiff then moved for summary judgment seeking to hold defendant liable for the loss. The parties agreed that the Carmack Amendment governed the dispute. The court found that the evidence showed that plaintiff had delivered the shipment to defendant in good condition. The issue was whether the evidence showed that the goods were damaged when delivery was attempted. Plaintiff argued that the goods were damaged because the TCR was not on the pallet thereby making it impossible to determine whether the temperature requirements for the shipment had been met. Defendant argued that the loss of the TCR was irrelevant because the TCR was not a condition of the bill of lading and that oral statements to the driver about

the TCR were not admissible under the parole evidence rule, which prohibits the introduction of evidence that seeks to vary or alter the terms of a written agreement.

The court acknowledged that bills of lading are subject to the parole evidence rule but that if the terms of a written agreement are ambiguous, parole evidence can be admitted to determine the parties' intent. The court found that the bill of lading for the seafood shipment was ambiguous because of the handwritten notation of the TCR number, since a reasonable fact finder could find that the notation made delivery of the TCR a condition of the bill of lading or that use of the TCR was mandated in connection with the temperature maintenance requirement. The ambiguity in the bill of lading also created a question of fact as to whether delivery of the TCR was required by the bill of lading. Plaintiff's motion for summary judgment was denied.

ii. Damage to Shipment.

The issue in *Oshkosh Storage Co. v. Kraze Trucking LLC*, 2014 U.S. Dist. LEXIS 174601 (E.D. Wis.), was whether the shipment was actually damaged so as to create a cause of action under the Carmack Amendment. Defendant agreed to transport a load of kosher cheese from Litchfield, Minnesota to Oshkosh, Wisconsin for plaintiff. The load was transported in a sealed trailer. When the defendant's driver arrived at the plaintiff's warehouse he was provided with unloading instructions that included the warning that a load could be rejected if the seal on the trailer was broken by someone other than plaintiff's employee. He was also told that he should pull around to a stairway and that plaintiff's employee would take his paperwork and break the seal on the trailer. Those instructions notwithstanding, defendant's driver broke the trailer seal, open the trailer doors and back into the loading dock. Plaintiff rejected the load on behalf of its customer because the seal had been broken by someone on other than the plaintiff's employee.

The court recited the elements of a cause of action under the Carmack Amendment: (1) delivery of the shipment to the carrier in good condition; (2) loss or damage to the shipment; and the amount of damages, and then found that the central dispute between the parties was whether the premature removal of the seal on the trailer caused "actual loss or injury" or "damage" to the delivered product. Plaintiff argued that the premature breaking of the seal decreased the value of the shipment because of the product integrity requirements of its customer. Defendant argued that a broken seal was not prima facie evidence of loss because it did not indicate whether the delivered goods were actually tampered with or harmed in any way.

The court held that plaintiff had demonstrated that the premature breaking of the seal had decreased the value of the shipment to its customer. That diminution in value was sufficient to prove "damage" under the Carmack Amendment even though there was no actual damage to the product involved. The court stressed the fact that they were dealing with food, that "[f]ood distributors have a duty to ensure that the food they provide to the public is safe, and the requirement that the shipment be unsealed only by authorized personnel is intended to provide assurance that the shipment has not been contaminated." Because the plaintiff had established a prime facie case under the Carmack Amendment, the burden shifted to the defendant to demonstrate that it was free from negligence and that the damage to the cargo had been caused by one of the accepted reasons. Because the driver admitted that he broke the seal in order to open the doors to unload, defendant could not establish that it was free from negligence.

The court also rejected defendant's argument that the Carmack Amendment did not cover the broken seal because the requirement that the seal be broken only by authorized personnel was not contained in the bill of lading. The court found that the Carmack Amendment did not require that the bill of lading list all driver requirements and all foreseeable events that may cause damage to the cargo. The court granted judgment in plaintiff's favor.

C. Damages under the Carmack Amendment.

The issue in *Maass Flanges Corp. v. Totran Transportation Services, Inc.*, 2014 U.S. Dist. LEXIS 145 (S.D. Tex.), was the appropriate measure of damages to a shipment. Plaintiff had purchased a boring mill at an auction for $14,500 and contracted with defendant to transport the mill from Alberta, Canada to Houston, Texas. The mill was damaged when it struck an overpass in Denton, Texas and plaintiff refused to accept delivery of the mill. The mill was moved to defendant's storage yard and was later sold as unclaimed freight for $5,600.

Plaintiff filed suit against defendant seeking to recover the value of the damaged mill. Defendant moved for summary judgment seeking a determination that its damages were limited to $8,600, representing the price

that plaintiff paid for the mill and the money received at the auction for unclaimed freight. Plaintiff argued that the appropriate measure of damages would be to take into account the fair market value of the mill, not the actual purchase price. The court held that:

> The general damages measure under the Carmack Amendment is the actual loss, which represents "the difference between the market value of the property in the condition in which it should have arrived at its destination and its market value in the condition in which it did arrive," minus salvage value.

Although the parties agreed that damages should be measured by "fair market value," the question was whether that value was limited to the purchase price. Plaintiff submitted evidence to the court, in the form of certified appraisals, demonstrating that the fair market value of the mill was greater than the price that plaintiff had paid for the mill. That evidence was sufficient to the court to reject the purchase price as a control on the fair market value of the mill.

Defendant also moved for summary judgment dismissing plaintiff's claims for lost profits and other consequential damages. The court held that such damages were recoverable under the Carmack Amendment, but that a carrier had to be on notice of special circumstances giving rise to those damages when it issued the bill of lading. The court found that there were no such special circumstances noted on the bill of lading nor the freight broker documents. Plaintiff argued that the carriers knowledge that plaintiff was transporting the mill to its facility in Houston to be used in production was sufficient to put the carrier on notice of the special circumstances. The court held that if that proof was sufficient, almost every shipment would involve special circumstances and held, to the contrary that "the cases require notice of special damages to allow the carrier to protect itself from exposure by "negotiating special contractual terms, declining the shipment, or taking special precautions to avoid the loss." Plaintiff was not entitled to consequential damages.

- Alan Peterman

4. Kawasaki-Kisen

In *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 130 S. Ct. 2433, 177 L. Ed.2d 424 (2010), the Supreme Court held that the Carmack Amendment does not apply to losses during ground transportation of international shipments traveling under through bills of lading governing both the ocean and land portions of the transport. In *Sompo Japan Insurance Co. of America v. Norfolk Southern Railway Co.*, 762 F.3d 165 (2d Cir.), the case went through the Southern District of New York and up to the Second Circuit before *Kawasaki Kisen* changed the landscape, eliminating the strict liability claims under the Carmack Amendment and placing the inquiry back on the limitation of liability contained in the through bill of lading.

The through bill of lading issued to the shippers in Asia contained an "Exoneration Clause" which provided that, other than the ocean carrier, no one else (including rail or motor carriers utilized by the ocean carrier to any part of the transportation), would be deemed liable with respect to the goods. After crossing the ocean safely, the cargo was destroyed in a train derailment. The court held that the "Exoneration Clause" was enforceable, but noted that the clause only prevented the shippers (or their insurers) from suing anyone other than the ocean carrier. The clause, however, did not actually "exonerate" the railroad from potential liability to the ocean carrier for the loss.

See also the comments of the Eleventh Circuit in UPS *Supply v. Megatrax* in 3(II)(A) above.

- Phil Bramson

5. Liability

David v. Hernandez, 226 Cal. App.4th 578, 172 Cal. Rptr.3d 204 (2d App. Dist.) arose out of a collision between a car driven by the plaintiff, Joshua David, and a truck operated by David Hernandez. A jury found that Hernandez was negligent but that his negligence was not a substantial factor in causing the accident. The truck driver violated Section 22502 of the California Vehicle Code by parking his truck on the left side of the highway facing oncoming traffic. Despite this finding, the trial court denied the Plaintiff's post trial motion for a new trial.

The appellate court reversed the denial and ordered a new trial, holding that the trial court committed an error of law by denying the motion for a new trial because "in expressly finding that Hernandez violated Section 22502 by parking his truck on the left side of the highway facing oncoming traffic," the trial court necessarily found that Hernandez had been negligent per se. In further finding that "the tail end of the truck

would not have been in the southbound lane but for its having entered from the right, a position in which it had no legal right to be," the trial court necessarily found that "Hernandez's negligence per se was a substantial factor in causing the collision with David's vehicle."

The appellate court went on to explain that the standard for reversing a trial court's denial of an application for a new trial is "abuse of discretion" by the trial court. The appellate court determined that in this case the trial court abused its discretion because it misapplied the law. The trial court stated that because the tail end of Hernandez's truck would not have been in the southbound lane at the time of collision, and therefore the collision would not have occurred if Hernandez had not parked in violation of Section 22502, the trial court was "legally compelled … to conclude that Hernandez's negligent conduct was a substantial factor in causing the collision." Further, the Appellate Court explained that the new trial would be for the purpose of assessing the comparative fault of Hernandez and the plaintiff. Hernandez's comparative fault should be taken into account in apportioning liability.

The Supreme Court of California declined to review the appellate court's decision. 2014 Cal. LEXIS 7499. Ultimately, this case stands for the proposition that a truck driver who violates vehicle and traffic laws can be liable for accidents even if the truck was not moving and another vehicle was the primary cause of the accident.

In *Allen v. Schneider Logistics, Inc.*, 2014 U.S. Dist. LEXIS 64705 (N.D. Ill.), plaintiff William Allen was injured when he unloaded a Schneider truck at a Wal Mart dock. He had been removing boxes from the truck, stepping over a gap between the loading dock and the truck container. Unfortunately, on one of his trips he grabbed a box with both hands, rested his chin on top of the box, and turned to his left to step off the container. Even though he knew the gap existed, he accidentally stepped into the gap resulting in injuries.

Normally, there is a metal plate that bridges the gap between the back of the container and the loading dock. However, when the container is too full, the dock plate cannot be deployed. Schneider contended that Wal Mart's trucks were usually filled to capacity, and therefore plaintiff regularly encountered the gap. Schneider argued that "Plaintiff did not exercise the reasonable level of care for his own safety" and that plaintiff "failed to protect himself from an open and obvious condition." The court rejected these arguments, noting instead that, for purposes of summary judgment, "The inquiry is whether the defendant should reasonably anticipate injury to those entrants on his premises who are generally exercising reasonable care for their own safety, but who may reasonably be expected to be distracted, as when carrying large bundles, or forgetful of the condition after having momentarily encountered it. If in fact the entrant was also guilty of negligence contributing to his injury, then that is a proper consideration under comparative negligence principles." [citing *Ward v. K Mart Corp.*, 554 N.E.2d223, 226 (Ill. 1990)].

Even though the court acknowledged that the plaintiff made a "deliberate choice" to encounter a hazard (the gap), the court held that defendant knew that the containers were packed in such a way that the dock plate could not be deployed and that it was reasonably foreseeable that the plaintiff would choose to walk across the gap to unload the boxes. Therefore, the court concluded that it was reasonably foreseeable that the plaintiff would injure himself in the gap "based on the sheer frequency and proximity with which plaintiff would have encountered it as an unloader at the Elwood facility."

In denying the summary judgment motion, the court noted that, at the trial, the plaintiff's own negligence can be considered by the jury as comparative fault. The lesson of this case is that even where workers should do a better job of avoiding hazards of which they are well aware, the company can still be at fault if it caused the hazardous condition and it was reasonably foreseeable that the worker could be injured by it.

The plaintiff in *Stone v. Marten Transport, LLC*, 2014 U.S. Dist. LEXIS 57875 (M.D. Tenn.) was an employee of DLS Trucking. While at a facility owned by Americold MFL2010, LLC, he was seriously injured when a truck owned by Marten Transport slid backwards and struck him.

DLS was named a defendant along with Marten and Americold. However, the plaintiff stipulated with DLS that DLS had no liability in the case. The stipulation was not entered into by defendants Americold or Marten.

DLS moved for summary judgment, and plaintiff declined to oppose the summary judgment motion. However, Marten and Americold did oppose it. DLS Trucking argued that Marten and Americold's opposition to DLS Trucking's summary judgment motion should not

be considered by the Court. The court disagreed, finding that the stipulation between DLS Trucking and the plaintiff was not an "unassailable determination of DLS Trucking's potential culpability for Stone's injuries." Rather, the court held that DLS Trucking's comparative fault could be considered by a jury even if DLS Trucking was not a party.

However, the court ultimately granted DLS Trucking's summary judgment motion because it held that "no reasonable person could conclude that DLS Trucking's conduct was a substantial factor in causing Stone's injuries … therefore, a jury could not find that DLS Trucking proximately caused the incident and summary judgment for DLS Trucking is warranted on that basis alone."

The takeaway from this case is that a named defendant which did not contribute to the accident should not be held responsible.

In *Wheeler v. Estes Express Lines*, 2014 U.S. Dist. LEXIS 148250 (N.D. Ohio), plaintiff Willard Wheeler's truck ran out of gas on a highway; he pulled over into the right shoulder, completely out of the right hand lane. However, he did not have reflective triangles to put behind his truck. Eventually, a truck driven by defendant, Kendall Ray, which earlier had been weaving in and out of the right hand driving lane, swerved out of the driving lane and hit Wheeler's truck, causing injuries to Wheeler.

Wheeler violated a regulation that required operators of commercial motor vehicles to place reflective triangles behind the vehicle. Although Ray testified that he would have been able to avoid hitting Wheeler's truck had there been reflective triangles behind the truck, the court found that "no reasonable jury could find it was at all impractical for Ray to remain in his own lane. Plaintiffs have, therefore, established Ray was negligent per se."

The court resolved the next issue, which was whether Ray could be the proximate cause of the accident given that Wheeler was negligent himself in failing to have carried triangle reflectors. The court found that "even if Plaintiffs breached a duty of care, a reasonable jury could only find Ray's negligent driving was an intervening cause — and thus the sole proximate cause of the crash."

The court further found that: "A jury could not rationally find the collision between Ray's and Wheeler's trucks was a foreseeable result of the lack of triangles.…" In other words, the judge concluded that the intervening act by Ray of weaving into the shoulder was the sole reason for the accident and could not have been foreseen by Wheeler's employer.

- Michael Ferdman

6. Shipper's Duty to Load

Haile v. Hickory Springs Manufacturing Co., 2014 U.S. Dist. LEXIS 160317 (D. Ore.). When a truck driver was struck by falling cargo as he began unloading, he did not sue the shipper which had loaded the trailer, but rather the consignee on the theory that the consignee knew or should have known that the cargo was not secured properly and failed to warn him or implement protective measures to avoid injury to delivering drivers. On the consignee's motion for summary judgment, the court rejected the argument that federal law placed the burden on the motor carrier to secure the load, noting that the driver had picked up a sealed container and had no opportunity or authority to inspect the load. The court did agree with the consignee, however, that the premises liability claim should fail, because the unsecured cargo in the container did not translate to an actionable defect in the consignee's premises.

- Phil Bramson

7. Punitive Damages

Riffey v. CRST Expedited, Inc., 2013 U.S. Dist. LEXIS 179594 (E.D. Ar.), arose out of a collision between two tractor trailers near Sheareville, Arkansas. The defendant driver, Mario Becerra, and his co-driver had been operating their rig in a steady snow storm for several hours prior to the accident, during which they observed various vehicles involved in accidents because of the weather conditions. There were snow-chains available that Becerra could have installed to give the rig additional traction, but he had not felt this was necessary. Although traveling at 20 mph below the posted speed limit, he suddenly found himself too close to plaintiff's rig which was moving at a much slower speed. Becerra took evasive measures to avoid the plaintiffs' vehicle, "but an ice-patch kept his tires from getting traction," thus resulting in the collision. The plaintiffs commenced an action against Becerra, and sought to hold Becerra's employer CRST vicariously liable. In addition to compensatory relief, the plaintiffs asserted a claim for punitive damages against the defendants.

The plaintiffs alleged that they were entitled to punitive damages against Becerra on the grounds that he "was driving too fast and following [their] tractor-trailer too closely on the icy road." As for Becerra's employers, the plaintiffs asserted that they were "negligent in hiring, training, retaining, and supervising [him], and in entrusting him with a tractor-trailer." Specifically, they argued that Becerra's employers were reckless for hiring him since he had no previous experience driving a commercial tractor-trailer; was not familiar with the FMCSA regulations; had been convicted of DWI before he was hired; had been cited for speeding twice (and failed to report one citation within 24 hours as required by company policy); previously struck a fixed object with his rig; and submitted 55 inaccurate driving logs during the month preceding the collision. Plaintiffs also relied upon CRST's BASIC scores from FMCSA which indicated that the company's drivers had poor safety histories. Use of BASIC scores is, of course, a hot button issue in trucking accident litigations.

Under Arkansas law, punitive damages are not favored and are therefore "warranted only when malicious conduct, or reckless conduct from which malice can be inferred, causes another's injury." Thus, punitive damages may only be awarded "when the party who caused the injury knew her or his actions were about to cause another's injury, but ignored that knowledge and took the action anyway." The "knowledge" component "may be actual or implied (i.e., inferred from the facts and circumstances)." In order to move past summary judgment and "get a claim for punitive damages to the jury, the injured party must set forth substantial evidence that the party who caused the injury knew her or his conduct was about to cause another's injury, but ignored that knowledge and took action anyway."

In this case, the court found that the plaintiffs "failed to produce sufficient evidence from which a jury could award punitive damages." With respect to Becerra, the evidence demonstrated that he had a valid commercial driver's license, completed entry-level driving training, and was "qualified" under the regulations to drive a tractor-trailer. *Id.* Furthermore, his employers hiring practices "squared with the mandatory hiring practices imposed by the FMCS (*sic*) Regulations."

Moreover, there was no evidence in the record to show that the defendants failed to train Becerra as required by the regulations. He had completed a driving test administered by his employers before he was hired, and defendants produced a signed statement by Becerra acknowledging that he was provided with a copy of the regulations. Becerra's driving record was an insufficient predicate to hold his employers accountable for punitive damages inasmuch as he had never been cited for reckless driving, his driving had never caused personal injury to others, and he had never been declared "out of service" within the meaning of the regulations. Becerra's DWI conviction was likewise insufficient to hold his employers liable for punitive damages, inasmuch as this conviction was entered six years before the collision and nine years before he was hired.

With respect to the BASIC scores, the court found that they were not an adequate basis upon which to impose punitive damages insofar as plaintiffs failed to show that Becerra was among the class of persons referenced in the report as having an unsafe driving record. Furthermore, the defendants produced evidence that their vehicles are governed to 65mph; that their drivers are required to report moving violations within 24 hours; that drivers cited for speeding are either terminated or required to attend a driver safety course; and that their drivers' speed is monitored by the company using various electronic systems. Moreover, the defendants had equipped their vehicles with an on-board communication system to notify drivers of adverse weather conditions. Thus, this was further evidence that defendants were not reckless in their hiring, supervision and retention of their drivers.

Ixtepan v. Beelman Truck Co., 2014 U.S. Dist. LEXIS 163009 (E.D. Mo.), was brought by the parents of a motorist who was struck and killed in a collision with a tractor-trailer owned by defendant Beelman Truck Company and operated by its employee, Kenneth Weaver. The plaintiffs sought punitive damages alleging that Beelman's driver had ignored a stop sign and made an improper left turn into the path of the decedent's vehicle. The defendants moved to dismiss the punitive damages claim, arguing that the plaintiffs asserted "only conclusory allegations and conclusions of law" and that such an award "would violate their due process rights and equal protection rights under the federal and state constitutions."

In dismissing the trucking company's arguments the court observed that Missouri allows evidence of a failure to follow motor carrier regulations and statutes to support a claim for punitive damages, and held that the plaintiffs' allegations were sufficient to state a claim under Missouri law for punitive damages. The court

quickly disposed of the defendants' constitutional arguments, explaining that punitive relief may be awarded in wrongful death cases without violating the United States or Missouri Constitutions.

Cobb v. Nye, 2014 U.S. Dist. LEXIS 172087 (M.D. Pa.), arose from a collision between the plaintiffs' vehicle and Charles Nye's tractor-trailer in Wolf Township, Pennsylvania. As the plaintiffs were slowing down to enter the center lane of traffic to make a left turn, Nye, who was directly behind them, "violently struck" the plaintiffs' vehicle with the left front of his truck.

The court, applying Pennsylvania law, observed that "punitive damages are only available to compensate for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." Because punitive damages are penal in nature and awarded to deter others from similar conduct in the future, such claims must be supported by sufficient evidence to establish: (1) that the defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed; and (2) that he acted or failed to act in conscious disregard of that risk. After applying the aforementioned principles to the facts alleged, the court held that the plaintiffs had sufficiently pled their request for punitive damages, and that discovery was necessary to determine whether the defendants' "actions were merely negligent or whether they were outrageous."

Pace v. National Union Fire Insurance Co. of Pittsburgh, PA, 2014 U.S. Dist. LEXIS 141908 (N.D. Ga.). On December 28, 2010, defendant William Outlaw, Jr. was driving his tractor-trailer during the course of his employment with defendant Robbie D. Wood, Inc., when he crashed into the back of another tractor-trailer driven by the plaintiff. The plaintiff commenced an action seeking compensatory and punitive damages against Outlaw and against Wood for negligently hiring, retaining and supervising Outlaw. The defendants moved for partial summary judgment seeking dismissal of the plaintiff's punitive damages claim.

With regard to the negligent hiring claim, the plaintiff asserted that Wood did not conduct a background check on Outlaw before hiring him. Nevertheless, the evidence showed that Wood did obtain a DAC Report (that is a report prepared by DAC Services, LLC) for Outlaw approximately one year before the collision. The DAC report included certain background check information, including a driving history, relevant licenses and endorsements, driving record information, and criminal convictions. The DAC report showed only one traffic violation – a speeding citation for going 10 miles per hour or less above the speed limit. Wood did not seek to verify Outlaw's criminal history in his home state, which was quite extensive and included several alcohol- and drug-related offenses, as well as assault and battery. Outlaw was less than candid when asked to explain his criminal past during his deposition. Furthermore, Wood admitted that a rap sheet as extensive as Outlaw's "would have disqualified a driver from employment," but maintained that none of this information appeared in the DAC report.

As to whether Wood adequately investigated Outlaw's employment history before hiring him, the evidence showed that Wood, in fact, requested information from Outlaw's previous employer, NuWay. However, in a section asking the reason why the applicant left his employment, NuWay checked "Discharged," rather than "Resignation," "Lay Off," or "Military Duty." Wood never followed up with NuWay for more information. Had Wood followed up, it might have learned that Outlaw had been discharged not only for tardiness and customer complaints, but also for unsafe work practices in handling HAZMAT materials. Again, Wood admitted that it would not have hired an applicant who had previously been fired for unsafe work practices.

Additionally, the plaintiff took issue with Outlaw's pre-employment and on-going medical screening. Although Outlaw had reported no health conditions – in sworn medical questionnaires – besides hypertension, he was "quite open about his previous heart attack and stent replacement." Nevertheless, Wood's examining physician found him to be physically fit to drive a commercial motor vehicle.

The facts, as they related to the Outlaw's condition at the time of the accident, were far worse. For four days prior to the collision, Outlaw spent significant time with his friend, Michelle Wingard, partying "heavily." The two "drank 'Crown Royal' and took 'Xanax' and other pills" during this period. Wingard testified in her deposition that by partying "heavily," she meant "all day long." The day before the collision, the two went to Wood's office to obtain approval for Wingard to ride in Outlaw's truck as a passenger. Wingard testified that they were "both high at the time." Indeed, Wingard was so high she could not "remember how she got to the office." Wingard, however, admitted that she "smelled of alcohol" and recalled that they were standing "just a few

feet from the Wood employee" as they signed the necessary forms for her to ride as a passenger. After approval was granted, they went back to partying into the evening hours.

A witness to the accident testified that Outlaw's vehicle was "going about 60 to 65 miles per hour" at the time of the accident, and showed no signs of slowing down or taking evasive action as it approached plaintiff's rig. The responding officers found marijuana inside the vehicle, multiple benzodiazepines and opiates were found in Outlaw's pockets, and his urine testified positive for the presence of such narcotics, despite the fact that he did not have a prescription for the same. An expert retained by the plaintiff explained that the side effects of these drugs include "drowsiness and decreased executive function." During a subsequent medical examination, Outlaw informed the examining physician that "he had fallen asleep behind the wheel" and caused the collision.

As an initial matter, the court rejected Wood's argument that, because Outlaw died prior to the motion for summary judgment, thereby rendering his estate immune from punitive damages liability under Georgia law, Wood – as Outlaw's employer – should likewise be immune from such damages. Ultimately, the court held that, while the facts here might be "suggestive of gross negligence," they were insufficient to support a claim for punitive damages. Although Wood had a duty by law to inquire into Outlaw's past, including his criminal past and prior employment history, the evidence showed that it had satisfied the minimum criteria, and the failure to dig deeper into Outlaw's criminal past when faced with evidence that an applicant was previously discharged did not amount "to a conscious indifference to the consequences." Moreover, the plaintiff "fail[ed] to direct the Court to a regulatory duty for motor carriers to search and uncover anything more than driving violations."

Courtney v. Ivanov, 2014 U.S. Dist. LEXIS 114166 (W.D. Pa.), resulted from a collision between two tractor trailers – one operated by the plaintiff Eddie Courtney, Jr. and the other operated by defendant Yuriy Ivanov and owned by Victor Motryuk, both defendants being agents or employees of Freightlion. The foundation of plaintiff's punitive damages claim against Ivanov rested on the fact he "stopp[ed] in the lane of traffic of an interstate without warning, constituting outrageous conduct which created a risk of physical harm to other drivers." As to Freightlion, the plaintiff alleged that the company "failed to properly train their agents, failed to ensure that the tractor-trailers were in proper working condition, and permitted their agents to drive in an unsafe and improper manner." Notwithstanding its observation that these "claims sound in negligence," the court held that plaintiff had sufficiently alleged facts to state a plausible claim for punitive damages to survive Freightlion's motion to dismiss.

In *Little v. McClure*, 2014 U.S. Dist. LEXIS 120681 (M.D. Ga.), the accident occurred when defendant Alonzo McClure collided with plaintiff Lindsey Little's vehicle after he moved his tractor-trailer from the center lane of I-16 West to the right lane in an attempt to merge onto I-75. McClure testified that he checked his mirrors before changing lanes but did not see Little's vehicle.

Little sought the imposition of punitive damages against McClure, alleging that he was on his cell phone at the time of the accident. The evidence demonstrated that McClure made several lengthy calls prior to the accident, but he testified to using a hands-free device during these conversations. McClure also testified that his last call ended approximately one-and-a-half minutes prior to the accidents, but his cell phone records appeared to "show he was talking on his phone during the time of the wreck."

Little also sought punitive damages against McClure's employer, MDI, as well as the owner of the tractor-trailer (MTH) and the parent company of the aforementioned defendants, Alex Lee, Inc. These companies had a cell phone policy strictly prohibiting their drivers from using such devices without a hands-free device while driving the vehicle on company business.

The court observed that, in actions based on vehicle collisions, punitive damages are not recoverable where the driver at fault simply violated a rule of the road, but are recoverable where there is a pattern or policy of dangerous driving, such as driving while intoxicated or speeding excessively. As to McClure, the court held that, while it was "a close question," it could not "find as a matter of law that the Plaintiffs' cannot prove aggravating circumstances that would warrant an award of punitive damages."

With respect to the corporate defendants, the court noted that federal law permits commercial truckers to use cell phones with hands-free devices. 49 § C.F.R. 392.82. The plaintiff asserted that, had McClure's employer checked, it would have discovered he was violating the company's cell phone policy (as well as the

regulation). Absent evidence that the corporate defendants actually knew about the nature of McClure's cell phone use, however, the court held that mere failure to ensure that an employee does not engage in conduct that is otherwise lawful and which does not demonstrate a conscious disregard for safety is not a basis for punitive damages against an employer.

- Jonathan Bard

8. Spoliation

In *Griffin v. New Prime Inc.*, 2014 U.S. Dist. LEXIS 3482 (N.D. Ga.), commercial drivers of defendant New Prime Inc. were involved in an accident when their tractor-trailer struck a prison van on a Georgia highway. One of the plaintiffs sought a spoliation charge alleging that New Prime intentionally destroyed certain information from the tractor-trailer's Electronic Control Module (ECM), otherwise known as the "black box," by knowingly moving the tractor-trailer forward after the collision. Plaintiff's attorneys confronted New Prime's director of safety, Donald Lacy, with his deposition in an unrelated case where he testified that the failure to download and preserve the ECM data constitutes spoliation of evidence. When confronted with his prior testimony, Lacy denied that he had ever given an opinion on spoliation, and refused to answer any additional questions related to spoliation.

New Prime countered that the tow-truck operator, with the Georgia State Patrol's consent, had moved the tractor-trailer forward shortly after the collision to separate the rig from the prison van, and that New Prime's representatives did not arrive at the scene until after this had occurred. New Prime's attorneys also asserted that Lacy's testimony in another case was irrelevant to the issues in the case at bar.

The court defined "spoliation" as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." In the Eleventh Circuit, the courts consider five factors in determining whether to impose sanctions for spoliation: "(1) whether the plaintiff was prejudiced as a result of the destruction of evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the party accused of spoliation acted in bad faith; and (5) the potential abuse if the evidence is not excluded."

The court observed that there was no evidence in the record to suggest that the defendants knowingly moved the tractor-trailer forward after the collision. Accordingly, there was no proof that New Prime purposely lost or destroyed relevant evidence, and no basis for a spoliation charge. The court also agreed with New Prime that Lacy's opinion given in an unrelated case was irrelevant.

In *Universal Underwriters Insurance Co. v. Dedicated Logistics, Inc.*, 2014 U.S. Dist. LEXIS 177249 (W.D. Pa.), Dedicated's employee, Earnell Harris, made a delivery to King's car dealership. Upon exiting the dealership parking lot using the same alleyway from which he had entered, he struck overhead power lines with his tractor-trailer. Penn Power's utility pole and transformers broke and fell, igniting a fire in King's body shop.

Dedicated and Penn Power disputed the point on the utility equipment that Dedicated's tractor-trailer first made contact with and the manner in which the contact occurred. Dedicated asserted that the wire struck by the rig had been hanging below the required clearance of 16 feet. Penn Power, on the other hand, claimed that the first point of contact was with the guy wire anchoring system (not the power line), which caused the pole to tilt, causing the power lines to hang below the required minimum clearance.

Following the accident, Penn Power sent its local supervisor, William Glenn, Jr., to oversee the repairs. Although Glenn preserved the guy wire and anchor, he "made no arrangements to preserve the pole, the service wire which had been snagged on the tractor-trailer, or the remaining guy wires and anchors."

Meanwhile, Dedicated's insurance carrier, CNA, sent adjuster Chris McDermott to the scene. He was able to take photographs of the damage, but he could not inspect the pole up close as he Penn Power was working to restore power and he did not consider the situation safe. McDermott did not ask Penn Power's crew to preserve the pole, nor did he make efforts to inspect it after the power was restored.

Five days later, Dedicated's safety director, James Haberkorn e-mailed CNA stating that he had spoken with the driver (Harris) again and that Harris "believes he hit the wires NOT the guide wire coming off the pole." The following day, Haberkorn forwarded an image of the utility pole to CAN that he obtained from a local news report, and explained: "this pole in question appears rotted out on the bottom. Is the pole still available? If not, do we have a spoliation issue here."

McDermott returned the scene but he found no trace of the pole. CNA contacted Penn Power to request that they preserve the pole, but several days later, its adjusters were advised that "the damaged pole had been sawed into 5-foot sections, placed into the company's scrap bin, and hauled away by Waste Management." The undamaged guy wires "had similarly been scrapped."

At his deposition, Glenn claimed that he preserved the one anchor and guy wire "because they were damaged," but "did not preserve any of the other utility equipment because, in his opinion, '[n]othing else there was relevant to anything.'" He did not feel the need to preserve the pole "because it was '[j]ust another broken pole.'"

Dedicated sought a spoliation charge against Penn Power on grounds that the company failed to preserve the broken pole and remaining wires, which Dedicated's experts testified would have aided their analyses of the accident. Penn Power responded that the decision to save only the damaged guy wire and anchor was based its belief following the fire that the accident had been caused by Dedicated's tractor-trailer running over the guy wire securing the utility pole. Penn Power maintained that it discarded the pole in accordance with normal practice, that there was no evidence that the condition of the pole was unsafe.

Penn Power also filed a motion for sanctions against Dedicated based on the latter's failure to quarantine the subject tractor-trailer or, at the very least, photograph the vehicle so as to document its condition immediately after the incident. Penn Power asserted that preservation of such evidence might have revealed the vehicle's first point of contact with the utility – the guy wire or the power lines.

The court agreed with Penn Power that the evidentiary relevance of the pole and the foreseeability of the need to preserve it for subsequent litigation purposes would not necessarily have been obvious to Penn Power's employee because, initially, the focus was on whether the tractor-trailer had made contact with the guy wire. Furthermore, the Court found no evidence of a "fraudulent intent" by Penn Power to suppress the subject evidence. Although Penn Power limited access to the pole during the repair process, it was strictly for safety purposes. After power was restored that day, McDermott did not request permission to inspect the pole. Indeed, it was two weeks after power was restored that Dedicated made its first formal request for preservation of the pole, and once that request was made, Penn Power conducted a timely investigation into the pole's whereabouts.

On the other hand, the court also denied Penn Power's motion to impose sanctions. The court found that, while Dedicated's handling of its tractor-trailer following the accident might have been negligent, it did not rise to the level of bad faith on the part of Dedicated so as to establish the intentional suppression of relevant evidence. The court also observed that, since the vehicle was returned to the fleet prior to any investigation or inspection by Dedicated itself, it too had lost any evidence that would otherwise have supported its defense. Although the court declined to find that spoliation had occurred, Penn Power would be permitted to argue at trial that such evidence may have existed but for Dedicated's failure to preserve it, "so as to account for the lack of physical evidence on the truck."

- Jonathan Bard

9. Negligent Hiring/Training/Supervision/ Entrustment

In *Meyer v. A&R Logistics*, 2014 U.S. Dist. LEXIS 100625 (N.D. Ill.) a tractor-trailer driver pulling a leased semi-trailer pulled out into traffic on an interstate causing a collision with the plaintiff. The accident occurred while the defendant driver of the tractor-trailer was acting within the scope of his employment with A&A Logistics ("A&A"). The amended complaint alleged three causes of action, including a claim that A&A was negligent in its hiring, training, retention, and supervision of the defendant. Specifically, the plaintiff alleged that the defendant was unqualified, negligent, and careless in operating the semi tractor-trailer and A&A should not have entrusted the vehicle to the defendant. A&A moved to dismiss pursuant to Rule 12(b)(6) for failure to state a cause under which relief can be granted. A&A argued that under Illinois law, once an employer admits responsibility under respondeat superior, a plaintiff may not proceed against the employer on a separate theory of imputed liability such as negligent entrustment or negligent hiring. During the course of paper discovery, A&A admitted its responsibility for the defendant under a theory of respondeat superior. The court agreed with A&A's analysis of state law under the present facts and dismissed the plaintiffs' cause of action for negligent hiring.

In *Harris v. FedEx National LTL*, 2014 U.S. App. LEXIS 14064 (8th Cir.), a commercial truck driver lost control and rolled his tractor-trailer causing a collision that killed a driver and seriously injured a passenger in another vehicle. At the time of the accident, the truck driver was employed by Fresh Start, Inc. ("Fresh Start") and was driving a tractor-trailer leased by Mickey's Trucking Express, Inc. to Fresh Start. Moreover, the tractor was pulling two trailers owned by FedEx National LTL, Inc. (FedEx") from Cincinnati, Ohio to Salt Lake City, Utah. FedEx moved for summary judgment and its motion was granted. The plaintiffs subsequently appealed. The ultimate issue on appeal was whether FedEx was liable for the admitted negligence of the defendant truck driver. The court concluded that FedEx did not possess the requisite control needed to establish an employee-employer relationship under Nebraska law and Fresh Start was an independent contractor of FedEx. Plaintiff alleged that FedEx negligently hired and trained the defendant to operate the tractor-trailer; however, this claim was moot given the district court's determination that the defendant was an employee of an independent contractor, Fresh Start. The court affirmed the decision of the district court.

In *CGL Facility Mgmt. v. Wiley*, 2014 Ga. App. LEXIS 567, the driver of an automobile was struck and killed by a pickup truck belonging to the driver's employer. The driver of the pickup truck tested positive for methamphetamine following the accident. The plaintiff commenced an action against the driver's employer, GCL Facility Management, LLC ("GCL") based on theories of respondeat superior and negligent hiring, retention, entrustment, and maintenance. GCL moved for summary judgment and argued that its driver was not on the job at the time the collision occurred. The trial court denied CGL's motion and CGL appealed. With respect to the cause of action for respondeat superior, the court found that CGL rebutted the presumption that the driver was acting within the scope of his employment at the time of the collision, and thus, summary judgment was appropriate. Moreover, the court determined that CGL was also entitled to summary judgment on the negligent hiring and retention claim since, despite the allegation that he had a poor driving record and criminal history, the driver of the pickup truck was not acting within the scope of his employment at the time of the accident.

In *M.T. v. Saum*, 2014 U.S. Dist. LEXIS 31674 (W.D. Ky.), the plaintiffs were among fifty-five passengers on a commercial charter bus traveling from Kentucky to Washington, D.C. The bus, which was owned by Southwestern Illinois Bus Company, LLC d/b/a New Image Travel ("Travel"), and operated by Timothy Saum, a New Image employee, overturned on a highway in Kentucky. The plaintiffs alleged that the accident occurred because Saum rounded a corner at a high rate of speed, while driving one-handed, and lost control of the bus. In addition to raising negligence and negligence per se claims against Saum, the plaintiffs also alleged that New Image negligently hired, trained and supervised Saum and requested punitive damages. The defendants moved for summary judgment and argued that Saum's actions did not rise to gross negligence and did not "have the character of outrage" required under Kentucky law. The defendants also moved on the negligent hiring cause of action and argued that the evidence showed that Saum was well-trained and experienced, had a satisfactory driving record, and was qualified to operate a bus. The court found no proximate "nexus" between Saum's employment and driving history and the plaintiffs' harm. It ultimately held that the circumstances of the accident failed to satisfy the test for punitive damages under Kentucky law.

- Michelle DeKay

10. Legislative Action on Negligent Hiring

On May 22, 2014, H.R.4727 was introduced in the House of Representatives by Congressman John Duncan (R-Tenn.) along with Erik Paulsen (R-Minn.) and Rodney Davis (R-Ill.). The bill was titled "To enhance interstate commerce by creating a National Hiring Standard for Motor Carriers."

The supporters of H.R.4727 hoped to create the rule that brokers, freight-forwarders and receivers that satisfy three conditions cannot be sued for negligently hiring a motor carrier. Specifically, these entities would need to check to make sure that the motor carrier they hire 1) is licensed and registered by the Federal Motor Carrier Safety Administration (FMCSA), 2) maintains the minimum amounts of insurance required, and 3) is not "unsatisfactory" in terms of safety rating.

So long as the entity was in compliance with these three requirements, the legislation would prohibit states from imposing liability where the transportation is "of property or household goods" and liability "arises from a claim or cause of action related to the negligent selection of such motor carrier…for personal injury,

death, or damage caused to cargo or other property by such motor carrier."

The proposed legislation was referred to the Committee on Transportation and Infrastructure and the Committee on the Judiciary, and it did not advance past that stage in the 113th Congress. Nevertheless, our research suggests reveals wide industry support for passage of this bill, and we will be watching closely to see if and when Congress takes up the issue again.

- Gabriel L. Bouvet-Boisclair

11. Duty to Defend

Meyers Warehouse, Inc. v. Canal Insurance Co., 2014 U.S. Dist. LEXIS 108270 (E.D. La.). When a claim was asserted against the insured for damage to cargo, the insured retained counsel and notified Canal of the loss. After nine months (during which no suit was filed), the insured settled the claim and sought reimbursement of its legal fees. The policy provided that Canal had a duty to defend the insured against a "suit," and defined "suit" as a "civil proceeding," including arbitration or other alternative dispute resolution proceedings endorsed by the insurer. Since no "suit" had been filed, no duty to defend arose.

Canal Insurance Co. v. XMEX Transport, LLC, 2014 U.S. Dist. LEXIS 123605 (W.D. Tex.), is interesting for the court's observation that, having named the bodily injury claimants as defendants in its declaratory judgment action on both its duty to defend and its duty to indemnify, Canal could not prevent the claimants from arguing its duty to defend even though they were not insureds under the policy. Beyond this, the court found that Canal could have a duty to defend even though the complaint alleged a vehicle identification number ("VIN") for the accident vehicle which was not scheduled on the Canal policy, since the complaint did not negate the possibility that the vehicle would qualify for coverage as a replacement or temporary auto. Finally, since the various complaints alleged that the two drivers killed in the one-vehicle accident were or, in the alternative, were not employees of Canal's insured, the allegations did not fall unambiguously within Canal's employers liability or fellow employee exclusions, and Canal still had a duty to defend.

- Phil Bramson

12. Jurisdiction

The facts in *Ferrell v. J&W Recycling, Inc.*, 2014 U.S. Dist. LEXIS 59922 (E.D. Ky.) arose out of a truck accident that occurred in Greenup County, Kentucky. A tractor-trailer collided with an automobile and both drivers died as a result of injuries sustained in the accident. At the time of the collision, the driver of the tractor-trailer was employed by J&W Recycling and operating the tractor-trailer within the course and scope of his employment. J&W Recycling held a Commercial General Liability insurance policy with Burlington Insurance and made a claim for coverage; however, the insurer denied coverage and refused to defend or indemnify J&W Recycling. The estate of the automobile driver commenced a wrongful death action against J&W Recycling and the case was litigated in Greenup Circuit Court. J&W Recycling eventually admitted liability and the estate accepted assignment of its right against Burlington Insurance. The estate filed a Third-Party Petition for Declaration of Rights against Burlington to "adjudge the existence of coverage under the Policy." Burlington subsequently filed a Notice of Removal, asserting jurisdiction on the basis of diversity of citizenship pursuant to 28 U.S.C. §1332.

The Court began its analysis by discussing the Declaratory Judgment Act which "confers on federal courts unique and substantial discretion in deciding whether to declare the rights of litigations," *citing Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). The federal court declined to hear the case after analyzing a number of factors. In reaching its holding, the court noted that the Greenup Circuit Court was in a better position to preside over the case as it possessed the necessary factual background to determine the parties' rights. Moreover, the subject controversy required a ruling on previously undecided issues of Kentucky law and there was no federal issue. All of these factors weighed in favor of the Greenup Circuit Court hearing the case.

Lexington Insurance Co. v. Silva Trucking, Inc., 2014 U.S. Dist. LEXIS 63317 (E.D. Cal.), also involved the Declaratory Judgment Act. In that case, Silva Trucking, Inc. ("Silva") held a primary commercial automobile insurance policy with Carolina Casualty Insurance Company ("CCIC"). Lexington Insurance Co. ("Lexington") issued a commercial automobile insurance policy with an indemnity limit of $4 million in excess of the $1 million per accident limit under the primary policy issued by CCIC. In 2010, one of Silva's employees

was involved in an accident while driving for Silva, causing injuries to two individuals. The underlying case went to trial and a jury returned a verdict against Silva and its driver for $34.9 million. Following the verdict, Lexington filed this action under the Declaratory Judgment Act seeking a judgment declaring that its policy limits applicable to any judgment in the underlying action were $4 million. Silva and its driver subsequently filed suit in Sacramento County Superior Court against, among others, Lexington and CCIC. Thereafter, CCIC removed that case to federal court, claiming that the court had supplemental jurisdiction because of the pendency of Lexington's case. The judge assigned to the removal action remanded Silva's action to the Superior Court.

The defendants filed motions to dismiss under Rule 12(b)(1) arguing that the court should decline to exercise jurisdiction. The federal court examined whether there were state law issues to be decided; whether forum shopping was a factor; and whether the issues in the state and federal cases were duplicative. The federal court granted the defendants' motions to dismiss and noted that dismissal was appropriate in order to avoid "needless resolution of state law issues and duplicative litigation."

- Michelle DeKay

13. Graves Amendment

In *Stratton v. Wallace*, 2014 U.S. Dist. LEXIS 105816 (W.D.N.Y.), a wrongful death action involving a tractor-trailer owned by a leasing company and leased to an affiliate of the owner, the Graves Amendment did not preclude holding the leasing company vicariously liable for the alleged negligence of its affiliate because the parenthetical clause "or an affiliate of the owner" in the Graves Amendment was meant to be read in addition to the word "owner," such that, to immunize the owner from vicarious liability, the clause required that both the owner *and* the affiliate of the owner be free from negligence.

In *Klaybor v. Flowers Baking Co. of Batesville, LLC*, 2014 U.S. Dist. LEXIS 143530 (S.D. Ill.), the dismissal of the complaint without prejudice was warranted where the plaintiff did not allege any independent negligence or unlawfulness by the defendant, a lessor of the subject vehicle.

Layton v. Russell, 2014 U.S. Dist. LEXIS 88340 (W.D. Mich.). Graves Amendment preempted Michigan state law imposing vicarious liability on certain lessors of motor vehicles where the vehicle was involved in an accident through no fault of the lessor. Graves Amendment precluded vicarious liability claim against defendant lessors for alleged negligent operation of subject vehicle by lessee.

In *Nelson v. Artley*, 13 N.E.3d 139 (Ill. Ct. App.), *lv to appeal granted* 2014 Ill. LEXIS 1349, an auto accident case involving a rental vehicle, the rental car company was liable for the default judgment obtained against the driver, and its liability was not limited to $100,000 per occurrence or any other amount because it assumed the risk of paying such judgments by filing a certificate of self insurance under Illinois state law instead of a bond or insurance policy. Graves Amendment did not supersede state law imposing financial responsibility or insurance standards on the owner of a motor vehicle and was thus inapplicable and did not preclude liability against rental company.

Bravo v. Vargas, 113 A.D.3d 579, 978 N.Y.S.2d 307 (2d Dep't). Trial court properly granted rental car company summary judgment dismissing complaint pursuant to Graves Amendment where company established it was engaged in the business of renting vehicles; it was not negligent in entrusting the vehicle to driver or in maintaining the vehicle; and accident was not caused by brake failure.

Clarke v. Hirt, 2014 N.Y. Misc. LEXIS 4738 (Supreme Ct., Queens). Although claim of negligent maintenance against rental or leasing company of vehicle involved in accident can survive the Graves Amendment, defendant established that under the lease agreement, lessee was solely responsible for the maintenance of the vehicle during the term of the lease. Furthermore, dismissal of claims against leasing company prior to discovery was warranted because plaintiff failed to offer an evidentiary basis to suggest that further discovery might lead to relevant evidence.

Davis v. JMA Taxi, Inc., 2014 N.Y. Misc. LEXIS 4626 (Supreme Ct., N.Y.). Lessor of vehicle involved in accident was not entitled to summary judgment dismissing claims against it pursuant to Graves Amendment where affidavit submitted in support of motion was not in admissible form and, in any event, did not establish that lessor was free of any negligence.

Ramos v. Brown, 2014 N.Y. Misc. LEXIS 4484 (Supreme Ct., Bronx). Leasing company was not entitled to dismissal pursuant to Graves Amendment where it failed to establish that the subject vehicle had

been leased at the time of the accident.

Fernandez v. EAN Holdings, LLC, 2014 N.Y. Misc. LEXIS 5202 (Supreme Ct., Queens). Defendant lessor's motion to dismiss for failure to state a claim pursuant to Graves Amendment was denied where plaintiff alleged claim of independent negligence, which, if proven, would render the Graves Amendment inapplicable.

Moreau v. Josaphat, 2014 N.Y. Misc. LEXIS 2332 (Supreme Ct., Kings). Defendants were entitled to immunity under Graves Amendment where they demonstrated they were engaged in the business of renting motor vehicles; the subject vehicle was leased pursuant to a commercial lease agreement; the driver operated the vehicle pursuant to a membership contract, which constituted a rental agreement for purposes of the Amendment since it was an exchange of the use of a car for a fee; and there had been no negligence on defendants' part in maintaining the vehicle.

37 South Fifth Ave Corp. v. Dimensional Stone & Tile, 43 Misc.3d 1216(A), 990 N.Y.S.2d 440 (NY City Ct., Mt. Vernon). Although rental car company could not be held vicariously liable under the Graves Amendment, it was nevertheless liable for plaintiff's damages under New York Vehicle and Traffic Law §§ 370(1) and (3), which requires rental companies to maintain minimum liability insurance coverage of $10,000 for property damage.

Lynch v. Baker, 2014 N.Y. Misc. LEXIS 2052 (Supreme Ct., Suffolk). Rental car company was entitled to summary judgment dismissal where it established that it was engaged in the business of renting vehicles and that the accident was not caused by its violation of one of the sections of the New York Vehicle and Traffic Law, as alleged in the complaint and bill of particulars.

Marble v. Faelle, 89 A.3d 830 (R.I.). Rental car company was not entitled to summary judgment on the basis of the company's lack of consent to the driver due to issue of fact. The company likewise was not entitled to summary judgment pursuant to Graves Amendment because the subject car rental record did not establish the period of the car rental because it did not identify the vehicle involved in the accident.

- Sanjeev Devabhakthuni

14. Transportation Brokers and F4A Preemption

The Interstate Commerce Commission Termination Act, 49 U.S.C. § 14501 ("Federal authority over intrastate transportation") generally preempts the power of the States to enforce a law (whether by statute or through common law) relating to a price, route or service of a motor carrier, broker or freight forwarder, with respect to transportation of property.

In *AIG Europe Ltd. v. General System, Inc.*, 2014 U.S. Dist. LEXIS 99152 (D. Md.), a load of pharmaceuticals was stolen. The shipper's insurer AIG paid for the loss and then sought to subrogate against the transportation broker, claiming that the broker had negligently selected a motor carrier with insufficient cargo insurance, failed to advise the selected motor carrier that the value of the cargo exceeded its insurance coverage, and failed to inform the motor carrier that two drivers were to be assigned to the load. The court held that the claim clearly related to the "service" provided by the broker, and as such was preempted by the ICCTA.

Citing *AIG Europe Ltd v. General System, Inc.*, among other cases, the District of Arizona in *ASARCO, LLC v. England Logistics Inc.*, 2014 U.S. Dist. LEXIS 176784 (D. Ariz.), came to the same conclusion that a state common law claim against a broker for negligently selecting an unsuitable motor carrier is preempted by the ICCTA. The ASARCO court noted that the Central District of California took a contrary view in *Works v. Landstar Ranger, Inc.*, 2011 U.S. Dist. LEXIS 156417, but disagreed with that decision, finding that "[a] fair and common-sense construction of the term 'services', whether read broadly or narrowly with regard to a 'broker' reasonably leads to no other conclusion than that a broker must find a reliable carrier to deliver the shipment."

By contrast, the court never reached the preemption issue in *Hayward v. C.H. Robinson Co.*, 2014 Ill. App. LEXIS 854 (3d Dist.). In defending against a claim of negligently hiring an unsuitable motor carrier, broker C.H. Robinson presented evidence that it obtained proof of the motor carrier's federal operating authority and liability insurance, and confirmed that his had an acceptable safety rating on USDOT's website, prior to contracting with him originally, and that it rechecked his operating authority and safety rating annually through the time of the subject accident. Based on this evidence, the court found that C.H. Robinson had met the applicable standard of care for a transportation

broker selecting an independent contractor motor carrier, and affirmed the trial court's grant of summary judgment.

- Phil Bramson

15. Additional Insured

In *Ramara, Inc. v. Westfield Insurance Co.*, 298 F.R.D. 219 (E.D. Pa.), a project owner sufficiently pleaded that it qualified as an additional insured under a named insured's CGL policy, and the insurer had a duty to defend in an underlying negligence action brought by the named insured's employee, wherein the employee did not sue the named insured, because the employee's complaint explicitly alleged the owner and the general contractor, acting by and through their agents, caused his injuries and averred the named insured was a subcontractor. Furthermore, the employee's claims did not fall within the policy's employer liability exclusion because under the policy's separation of insureds provision, the court considered solely the coverage of each insured as if no other insured existed, and, as such, the exclusion applied only to the named insured employer, and not an additional insured for whom the employee did not directly work.

In *Blasing v. Zurich American Insurance Co.*, 2014 Wisc. LEXIS 489 (Wis.), an insured's employee was a permissive user and as such was an insured under the insured's automobile liability insurance policy. Furthermore, the employee's act of loading an insured pickup truck with lumber was reasonably contemplated by the insured and insurer because it was consistent with the ordinary transportation of persons and goods inherent in the purpose of the pickup truck. Thus, insured was entitled to coverage under the policy.

- Sanjeev Devabhakthuni

16. Primary/Excess

Old Republic Insurance Co. v. Stratford Insurance Co., 2014 U.S. Dist. LEXIS 10229 (D.N.H.), *aff'd in part* 2015 U.S. App. LEXIS 1148 (1st Cir.), considered several issues of interest. Stratford issued a truckers policy with hired car coverage to D.A.M. Express which described itself in the Stratford application as a small package delivery company which performed its deliveries with two vans which the company owned; as seasonal demand required it would rent additional vans. The company estimated a $5,000 annual cost of hire for those additional vans. Unbeknownst to Stratford, D.A.M. also operated several semi-tractors which it leased from Ryder. It secured insurance for the tractors from Old Republic through Ryder.

A loss involving one of the Ryder tractors resulted in a lawsuit against D.A.M., the driver and others which Old Republic defended. Old Republic filed a declaratory judgment against Stratford, arguing that Stratford provided co-primary coverage since the tractor was a covered hired auto under the Stratford policy.

The Stratford policy had been non-renewed months before Stratford first heard about the loss, but the insurer thereafter entered into a retroactive endorsement with its insured whereby its coverage for any loss involving a Ryder tractor would be deemed to be excess over the Old Republic policy.

The district court found that even without the endorsement, which it did not reach, Stratford was not a primary insurer. Old Republic appealed to the First Circuit which upheld the district court's ruling on this point. The majority opinion found that where an ambiguity existed, New Hampshire law permitted the court to examine external evidence. The external evidence clearly showed that neither D.A.M. nor Stratford intended the Stratford policy to provide primary coverage for the Ryder trucks. The concurring judge agreed that Stratford was the excess insurer, but would have relied upon the retroactive endorsement.

The district court had also held that Stratford as the excess insurer had a duty to share equally in the defense of the case.

That portion of the decision was appealed by Stratford and the Court of Appeals agreed with Stratford that the ruling by the Supreme Court of New Hampshire that the district court relied upon was contrary to the generally accepted approach to defense obligations and that the case was subject to alternate interpretations. In its decision, hot off the press, the First Circuit has asked the New Hampshire Supreme Court to explain how defense costs are to be apportioned. Larry Rabinovich and Phil Bramson represented Stratford in the litigation.

With the stated aim of simplifying primary/excess disputes, California enacted Insurance Code §11580.9 in 1970, which overrides any contrary policy language and establishes priority between competing policies in a variety of scenarios. The statute has been updated several times, but the order of priority is still often notoriously difficult to nail down. Subsection (d) provides that, as between two policies that both provide

coverage for the same vehicle and the same accident, the policy which specifically describes or rates the vehicle is primary. Subsection (h), a relatively new section, provides that, if the power unit of a tractor-trailer rig is being operated by a person in the business of a trucker, the policy issued to that person is primary for both the tractor and the trailer. We have pointed out in the past that subsection (h) has introduced an additional layer of uncertainty into the statutory scheme.

In *Scottsdale Indemnity Co. v. National Continental Insurance Co.*, 2014 Cal. App. Unpub. LEXIS 5853, both Scottsdale's policy and National Continental's policy were issued to truckers. Scottsdale's policy (issued to the tractor owner-operator) specifically described the tractor, however, while National Continental's policy (issued to the motor carrier) did not describe or rate either the tractor or the trailer. The trial and appellate courts agreed that Scottsdale's coverage was primary pursuant to subsection (d), rejecting Scottsdale's argument that subsection (h) rendered the policies co-primary since both insureds were truckers.

- Phil Bramson

17. MCS-90

The MCS-90 was designed to protect injured members of the public, but are there scenarios in which an insurance company may be required to pay money under its MCS-90 to a second insurance company? Building on *Global Hawk v. Century-National Insurance Co.*, 203 Cal. App. 4th 1458 (2012), a case we discussed two years ago, two district courts concluded that there are scenarios under which an insurer may recover from an MCS-90 issued by another insurer.

Tri-National, Inc. v. Yelder, 2014 U.S. Dist. LEXIS 15526 (E.D. Mo.), involved damage to Tri-National's rig in a collision with Yelder's rig. Tri-National filed a claim for damage to its vehicles under its physical damage coverage with Harco Insurance Company which paid the claim. Under Missouri law the legal title to a subrogation claim remains with the insured, so the suit against Yelder was filed not in Harco's name but in Tri-National's. Yelder defaulted and judgment was entered in favor of Tri-National/Harco. (All proceeds would go to Harco.) At that point Tri-National filed a garnishment action against Yelder and Canal Insurance Company, as Yelder's insurer.

Separately, Canal filed a declaratory judgment action in Alabama arguing that it had no coverage since the Yelder vehicle involved in the collision had not been scheduled under its policy, and also for failure to provide prompt notice and to cooperate. The court agreed that Canal had no duty to defend Yelder, but made no ruling on Canal's claim that the MCS-90 did not apply.

Instead, the MCS-90 issue was briefed and decided in the Missouri garnishment action. Canal argued that Tri-National had been made whole (which was true) and that the MCS-90 was, therefore, not applicable. Harco was the real party in interest and, Canal argued that Harco was precluded, as the result of the Alabama action, from seeking recovery. The court found that no such preclusion existed. More to the point, Canal argued that MCS-90 was not intended to benefit another insurer. Citing to *Global Hawk*, the court disagreed. The MCS-90 is a purely excess exposure when there is another insurer insuring the tortfeasor. Where the other insurer insures the victim, though, that other insurer may subrogate against the MCS-90.

Along with same lines was the decision in *Southern County Mutual Insurance Co. v. Great West Casualty Co.*, 436 S.W. 3d 348 (Tex. Ct. App.) in which Southern Mutual paid a worker's compensation claim to one of the drivers of the insured motor carrier injured in a collision with a rig operated by Great West's insured. Even though Great West did not schedule the vehicle involved in the accident, it was required to reimburse Southern County under its MCS-90.

The "trip specific" approach to the applicability of the MCS-90 has become increasingly popular; this represents a change from an earlier tendency for courts to enforce the MCS-90 so long as the rig involved was sometimes used in interstate commerce or was at least available to be used interstate. The court in *Martinez v. Empire Fire & Marine Insurance Co.*, 151 Conn. App. 213, 94 A.3d 711, selected the "trip specific" approach in a case involving a Ford Wrecker. At the time of the loss the tow company's employee was using the wrecker to carry auto parts from one company facility to another. For reasons unexplained, the company had removed the wrecker from its auto liability policy with Empire, but plaintiff argued that it should be able to recover under Empire's MCS-90 endorsement. Citing to recent cases which follow the trip specific approach, the court concluded that the MCS-90 did not apply since no for-hire carriage was involved on this particular occasion.

In *Canal Insurance Co. v. Dupont*, 2014 U.S. Dist.

LEXIS 127178 (S.D. W.Va.) the court denied that the Canal MCS-90 applied, but did not utilize the trip-specific approach. Canal insured Williams Transport, a motor carrier whose primary business was transporting CSX Transportation employees to an from job sites. He was operating a minivan, not a tractor or truck, and so far as one can tell from reading the decision, it does not appear that the Williams driver Michael Dupont was operating interstate. For all of these reasons, the MCS 90 arguably did not apply. The court found a different reason not to enforce the MCS 90 – plaintiff had sued only Dupont, not Williams.

The *Herrod v. Wilshire Insurance Co.* litigation, which we have discussed in previous editions, at last appears to be drawing to a close after many years. 2014 U.S. Dist. LEXIS 169024 (D. Utah). This case, too, highlights that MCS 90 exposure is not unlimited. Wilshire insured Espenschied Transport, which was an authorized motor carrier but which, in this case, had been only the lessor of the rig. Here Espenschied, while not formally cancelling its authority as a motor carrier, was no longer actively engaged as a carrier. The case had bounced up and down between the district court and the appellate court; under a "trip specific" approach the case should not have presented such a difficult riddle for the courts.

Plaintiff in *Hobbs v. Zhao*, 2014 U.S. Dist. LEXIS 110452 (N.D. Okla.) attempted to include Northland Insurance as a direct defendant in his bodily injury lawsuit against Northland's insured motor carrier. Oklahoma law permits direct actions against insurers which have filed certificates of insurance with the Oklahoma Corporate Commission. Zhao was an interstate carrier with a federal filing but no Oklahoma filing. Plaintiff argued that Zhao's policy should have been deemed to have been filed with Oklahoma as a result of the Uniform Carrier Registration program but, citing to recent case law the federal court rejected the argument under state law. Federal law, as the court noted, did not permit a direct action, even if an MCS-90 is attached to the policy. Before suing an insurer, the plaintiff must successfully recover against the motor carrier insured.

In *Skinner v. Progressive Insurance Co.*, Index No. 12600/2013 (N.Y. Supreme Ct., Queens) (which Larry Rabinovich and Phil Bramson litigated on behalf of the insurer), the bodily injury plaintiff argued that the liability limits of the Progressive policy issued to a motor carrier should be raised from $25,000 per person, the limits requested by the insured, to $750,000, the minimum financial responsibility required under federal law. The court avoided the issue of whether an insurer could be compelled to raise its liability limits as a matter of federal law, by finding insufficient evidence that the insured was in fact operating as a regulated interstate motor carrier at all. In particular, the court noted an absence of evidence that the insured motor carrier was operating outside the New York/New Jersey "commercial zone" (which is not subject to federal regulations).

The court went on, though, to observe that the MCS-90 endorsement would have been inapplicable in this case, even if its inclusion in the Progressive policy was implied. Before commencing this declaratory judgment action, the plaintiff had settled with the insured, and received an assignment of any rights the insured might have against the insurer, and released him from any liability beyond the available insurance. Since the MCS-90 endorsement is not "insurance," and creates no rights in the insured, but rather serves as a surety in the event the motor carrier's insurance is not available, the court found that the plaintiff's recovery was limited to the policy's actual $25,000 per person limit.

- Larry Rabinovich

18. Non-Trucking/Business Use Exclusion

National American Insurance Co. v. Progressive Corp., 2014 U.S. Dist. LEXIS 67180 (N.D. Ill.). When the owner-operator's non-trucking insurer Artisan refused to defend, the motor carrier's liability insurer National American defended its named insured as well as the owner-operator and its driver, and settled the claims asserted against all of them arising out of a rear-end collision. The court found that, since some of the allegations in the complaint claimed that the truck driver was operating the vehicle in the motor carrier's business, while other allegations claim that he was operating the vehicle in the owner-operator's business, the non-trucking insurer had a duty to defend. Moreover, having failed to either defend under a reservation of rights or bring a declaratory judgment action on coverage, Artisan was liable for indemnifying its insureds as well. Since the plain language of the respective policies made Artisan's coverage primary for a scheduled auto, Artisan was ordered to reimburse National American for the costs of defending and indemnifying the insureds.

Occidental Fire & Casualty Co. v. Soczynski, 765 F.3d

931 (8th Cir.). In a bodily injury against both the motor carrier lessee and the owner-operator lessor, the plaintiff argued in the alternative that the subject tractor-trailer was being operated in the business of either the motor carrier or the owner-operator. An judgment (following an arbitrator's recommendation) of $2.75 million was awarded to the plaintiff, and the motor carrier's liability carrier paid $1 million in settlement, with the plaintiff reserving his right to pursue recovery from the non-trucking insurer. In the ensuing declaratory judgment action, the court held that the plaintiff was not estopped from arguing that the tractor-trailer was being operated in the owner-operator's personal business, despite having raised a contrary argument in the underlying bodily injury action and accepting a settlement from the motor carrier's insurer. Since the facts demonstrated clearly that the owner-operator was using the tractor-trailer for personal reasons at the time of the loss, the plaintiff was entitled to recover from the non-trucking insurer.

Great West Casualty Co. v. National Casualty Co., 2014 U.S. Dist. LEXIS 143966 (D.N.D.). National Casualty issued the motor carrier liability policy to the lessee, which provided coverage for a trailer lessee when the trailer was not connected to a covered tractor only when it was being used exclusively in the lessee's business. Great West issued a non-trucking policy to the owner-operator lessor, which provided no coverage when the leased tractor and/or trailer was being used in the business of the lessor. The loss occurred when the leased tanker-trailer exploded as an employee of the motor carrier lessee was welding a leak and set off residual oil fumes. (There was a dispute about whether the trailer was connected to the leased tractor at the time of the loss.)

Having no specific North Dakota non-trucking precedent, the district court adopted the widely accepted formulation that "in the business" refers to a use of the leased vehicle which furthers the commercial interests of the lessee. The court rejected National Casualty's argument that the mere fact that the leased vehicle was not "under dispatch" at the time of the loss established conclusively that it was not being used in the motor carrier's business. Several facts, most notably that the lease required the owner-operator to keep the leased trailer in "good working condition," persuaded the court that repairing the leak further the lessee's commercial interests and was therefore "in the business" of the motor carrier.

The opinion is also noteworthy for discussions of legal issues beyond non-trucking insurance. The court, adopting the majority view, held that the employers liability exclusion, when paired with the severability clause, did not bar coverage for the owner-operator since he was not the employer of the injured party. The court also found that they were not "fellow employees," holding that the owner-operator was not a statutory employee of the motor carrier under 49 C.F.R. § 390.5 while he was merely standing by while the tanker-trailer was repaired. Alternatively, the court predicted that North Dakota would not incorporate the federal regulatory definition of "employee" into National Casualty's motor carrier policy simply because an MCS-90 endorsement was attached to the policy.

- Phil Bramson

19. Scope of Permission

Canal Insurance Co. v. Dupont, 2014 U.S. Dist. LEXIS 127178 (S.D. W.Va.) (also discussed in Section 17). The driver Dupont was involved in an accident while using a vehicle owned by his employer for personal use, despite the company's prohibition on such use. The injured other driver argued that Dupont was still using the vehicle within the scope of the employer's original permission, and that he had implied permission because the employer allowed him to garage the company vehicle at home. (The company had also rehired Dupont after firing him previously due his personal use of company vehicles.) The court rejected the arguments, persuaded by Dupont's own uncontroverted affidavits that he was not allowed to drive the company vehicle for personal uses.

State Farm Mutual Automobile Insurance Co. v. Simonelli, 2014 U.S. Dist. LEXIS 102807 (D. Conn.). This case also involved a question of whether an employee was entitled to coverage under his employer's policy when he drove a company truck into several vehicles and various stationary property while under the influence of drugs and alcohol. The employer's president provided State Farm with an affidavit that the driver's shift did not begin until 4 P.M., and he in fact took the truck at 2:30 P.M. Since the affidavit provided no other details on the scope of permission (such as whether the employer prohibited employees from using company vehiciles outside scheduled hours), and the president apparently told the police that the driver was working on the date of loss, the court found a question of fact.

- Phil Bramson

20. UM/UIM

The general rule under the Pennsylvania Motor Vehicle Financial Responsibility Law is that the insured is entitled to the sum total of UM/UIM coverage for each car on the policy (i.e., stacking). However, an insured may sign a stacking waiver, as was done in *Powell v. Allstate Property and Casualty Insurance Co.*, 2014 U.S. Dist. LEXIS 98454 (E.D. Pa.). The district court held that the stacking waiver the insured signed when the policy was first issued remained in effect over the course of the policy renewals, even though different vehicles were added to and deleted from the policy at various times. The application of the original waiver is only continuous with respect to newly-acquired vehicles which are covered automatically because the insurer already covers all of the insured's other vehicles and the insured notifies the insurer within 30 days of the acquisition. If the new vehicle does not qualify for automatic coverage, and is added to the policy by endorsement, a new waiver of UM/UIM stacking must be executed or else the insured would be allowed to stack coverage for the new vehicle.

The Pennsylvania MVFRL, however, applies only to vehicles registered and principally garaged in Pennsylvania; and not, for example, in Ohio, as learned by the unsuccessful UIM claimants in *Peters v. National Interstate Insurance Co.*, 2014 Pa. Super. LEXIS 4557 (Pa. Super. Ct.).

In *Protective Insurance Co. v. Plasse*, 2014 U.S. Dist. LEXIS 110440 (S.D. Ala.), the owner-operator lessor was a resident of Florida, where the named insured motor carrier lessee conducted business; the owner-operator was allegedly involved in an accident caused by a phantom vehicle in Alabama. The named insured motor carrier had expressly rejected UM coverage for every state where it could be rejected, including Florida and Alabama, while purchased only statutory minimum coverage for states where it could not be rejected. The court held that the owner-operator, although covered under the motor carrier's policy for liability purposes, was not entitled to UM benefits, rejecting the argument that he was somehow entitled to claim coverage because of the fact that in a few *other* states, rejection was not possible.

Progressive Casualty Insurance Co. v. MMG Insurance Co., 2014 Vt. LEXIS 91. The passenger was one of several injured in a vehicle covered by Progressive. He received a share of Progressive's total liability coverage (by way of a claim against the driver), and then sought UIM coverage under the same policy, since his injuries exceeded the limits of the liability coverage. The court interpreted Vermont's statute, as amended in 2005, as defining a vehicle as "underinsured" where the amount of liability coverage actually available to the victim (in this case, an amount reduced by payments to other victims) was less than the limits of UIM coverage. The court, however, enforced Progressive's exclusion which barred UIM coverage where the loss occurred from the use of a vehicle owned by an insured's relative (in this case, the claimant's mother). The court noted that to do otherwise would effectively, and impermissibly, increase the policy's liability limits.

The policy at issue in *Bowers v. General Casualty Insurance Co.*, 2014 Ill. App. LEXIS 774 contained anti-stacking language, but the declarations listed a separate (although identical) UIM coverage limit and separate premium next to each of the three vehicles scheduled on the policy. The court determined that this created an ambiguity, to be construed against the insurer, and permitted the insured to stack UIM coverage notwithstanding the anti-stacking language.

The plaintiff in *Wright v. Turner*, 2014 Ore. LEXIS 94 (Ore.) was a passenger in a truck struck by one vehicle and then, shortly thereafter, a second vehicle. Since UM coverage was mandated by Oregon statute, the court endeavored to determine whether, as a matter of legislative intent, she had been injured in one "accident" (a term not defined in the statute) or two. After a wide-ranging examination of legislative history and analogous case law from other jurisdictions, the Supreme Court of Oregon could only find that the legislature "intended that a factfinder consider the particular facts of each case and determine whether a person's injuries were incurred in one uninterrupted event, happening, or occurrence or whether an initial event, happening, or occurrence ws interrupted in some way – such as by time or different causal act – permitting a factfinder to conclude that there was more than one distinct event, happening, or occurrence and therefore more than one 'accident.'" As to the determination in the case before it, however, the court found that there was a question of fact as to whether one or two accidents had occurred (unlike the intermediate appellate court, which treated the issue as a question of law), and remanded to the lower court for further proceedings.

- Phil Bramson

21. No Fault

State Farm Insurance Co. v. Rollins, 2014 Wash. App. LEXIS 1803. When the insured was injured while a passenger in a commuter pool van, she sought personal injury protection ("PIP") benefits under her own State farm policy. Her policy excluded PIP coverage for injury incurred while occupying a non-covered vehicle furnished for the named insured's regular use. The court rejected the insured's argument that the exclusion, when applied to a carpool, violated public policy favoring ride-sharing, particularly since the regular use exclusion was expressly authorized by statute.

Cody v. Progressive Michigan Insurance Co., 2014 Mich. App. LEXIS 1595 (Mich. Ct. App.). A truck driver sought PIP benefits under a policy issued to a motor carrier when he injured his back while attaching his truck to a trailer. The court found a question of fact as to whether the driver was touching the landing gear with his hand or foot, and therefore "occupying" a covered auto at the time of the loss. Notably, the court found that, absent an affidavit or deposition testimony, the insurer had provided insufficient evidence to show that the trailer was not a covered auto or that no premium had been paid for PIP coverage (or that a premium was required), notwithstanding the plain language of the policy or the declarations which were apparently in the record.

- Phil Bramson

22. Auto or General Liability

National American Insurance Co. v. Harleysville Lake State Insurance Co., 2014 U.S. Dist. LEXIS 160593 (S.D. Ind.). In a dispute between a commercial liability insurer (Harleysville Lake State Insurance Company ("Harleysville")) and a trucking liability insurer (State National Insurance Company ("State National")), over insurance coverage for liability arising out of a forklift accident, each insurer attempted to deny coverage based upon an exclusion in its policy. State National relied upon the "Movement Of Property by Mechanical Device" exclusion in the policy, and Harleysville denied coverage for the accident pursuant to the "Aircraft, Auto or Watercraft" exclusion in its policy. The case turned on whether the injuries occurred due to the use of a forklift to load and/or unload materials from a tractor-trailer (which would trigger the exclusion in the State National Policy and make Harleysville liable), or if the injuries arose from the subject driver's use of the tractor-trailer (which would trigger the exclusion in the Harleysville policy and make State National liable). The Court ruled in favor of Harleysville, concluding "that what set in motion the chain of circumstances leading up to" the injury was the use of the tractor-trailer, specifically, when it was prematurely pulled away.

Southern-Owners Insurance Co. v. Wall 2 Wall Construction, LLC, 2014 U.S. App. LEXIS 21648 (11th Cir.). In a dispute between a general liability insurer, Southern-Owners Insurance Co. ("Southern-Owners"), and its insured, Wall 2 Wall Construction, LLC ("Wall 2 Wall"), over coverage for liability arising out of a motor vehicle accident, the Court ruled in favor of the insured. Two insurance policies covered the subject vehicle: a $100,000 commercial automobile insurance policy through Progressive Express Insurance Company and a commercial general liability ("CGL") policy issued by Southern-Owners with a $1 million endorsement for "Hired Auto and Non-Owned Auto Liability." Following the subject accident, Progressive quickly agreed to pay its $100,000 policy limit. Southern-Owners denied Wall 2 Walls' request for coverage under the CGL policy because the endorsement stated that it applied "only if [Wall 2 Walls did] not have any other insurance [i.e., the Progressive policy] available to [it] which affor[ded] the same or similar coverage." The Court granted the insured summary judgment, holding that it would be reasonable to argue that that the two policies' coverages were "the same or similar" generally, in that they both cover bodily injury and property damage, but also reasonable to argue that the Progressive policy's coverage of those risks across a scope of three vehicles is not "the same or similar" as the much broader coverage of the Southern-Owners endorsement, which was not limited to a definite number of vehicles.

- Sanjeev Devabhakthuni

23. Use of an Auto

In *Steelfab, Inc. v. Lancer Insurance Co.*, 2014 N.Y. Misc. LEXIS 2878 (Sup. Ct. Bronx), Steelfab loaded its steel products onto a trailer owned by Rock Equipment (a sister company) in preparation for a construction project at a Bronx School. Steelfab hired Lancer's insured, motor carrier Speedway Transportation, to haul the cargo to the work site. At the site an employee of one of the subcontractors, who was assisting in unloading the steel, was injured, allegedly as a result of

the poor condition of the flatbed floor. The injured worker sued Speedway, Steelfab and Rock, and Steelfab and Rock sought coverage under the Lancer policy with Speedway.

The court agreed with Lancer that Steelfab and Rock were not covered. Speedway had not hired or borrowed the Speedway trailer – it had simply attached it to its tractor – so Rock did not qualify as an insured as the trailer owner. As for Steelfab, it was the shipper, and shippers are not considered "users" of the vehicles of the motor carriers that they hire. (Larry Rabinovich and Phil Bramson represented Lancer.)

In other cases looking at whether a loss fell within the basic insuring agreement of an auto liability policy:

Imperium Insurance Co. v. Unigard Insurance Co., 16 F. Supp.3d 1104 (E.D. Cal.). A truck driver opened a gate at a farm in order to drive his truck through the gate, after which the claimant was impaled by a pole of the gate. The court held that the loss did not arise from the use of the truck since the opening of the gate did not require the presence of the truck, even though the driver benefitted from the gate being opened. (The court cited its own decision in *Travelers Property Casualty Co. of America v. LK Transport, Inc.*, 3 F. Supp.3d 799, in which it held that the accident did not arise from the use of a trailer simply because the truck involved in the accident was on route to pick up the trailer.)

Michigan Millers Mutual Insurance Co. v. Lancer Insurance Co., 2014 U.S. Dist. LEXIS 73513 (E.D. Mich.) arose from a fire (of undetermined cause) which broke out in the engine compartment of a limousine parked in a commercial garage. The garage sustained smoke and water damage from the firefighter response. The court found that parking is a necessary corollary of motoring and, accordingly, closely related to the transportational function of a vehicle. Therefore, the damage to the garage arose from the "use" of the parked limousine.

On the other side of the coin, the court in *Landmark American Insurance Co. v. VO Remarketing Corp.*, 2014 U.S. Dist. LEXIS 80800 (D. Colo.) found that a general liability policy's exclusion for loss arising out of the use (including loading and unloading) of an auto applied when the plaintiff was struck by an exercise machine dropped by two deliverymen as they carried it up the stairs of her residence. The policy defined "unloading" as being moved from an auto "to the place where it is finally delivered." Following the "complete operations" doctrine adopted by Colorado courts, the district court found that the exercise equipment being maneuvered by the deliverymen at the top of the stairs had not reached the place designated by the parties and was not yet in the possession of the receiver. Accordingly, the loss occurred in the course of unloading, and was excluded from liability coverage under the CGL policy issued to the delivery company.

In *Carolina Casualty Insurance Co. v. Travelers Property Casualty Co.*, 2014 U.S. Dist. LEXIS 150002 (D.N.J.), the court held that loading a trailer connected to a covered tractor constitutes a "use" of the tractor for purposes of omnibus liability coverage. Accordingly, the shipper which loaded the motor carrier's trailer was entitled to additional insured coverage under the motor carrier's policy when the motor carrier's driver was injured during loading. (Given New Jersey's statutory requirement of liability coverage for all omnibus insureds, the court went on to invalidate the loading/unloading exclusion, workers compensation exclusion, employers liability exclusion, and movement of property by mechanical device exclusion.

- Phil Bramson

24. Miscellaneous

Sompo Japan Insurance Co. of America v. Action Express, LLC, 2014 U.S. Dist. LEXIS 66487 (C.D. Cal.). When its cargo was stolen, the shipper Kenwood collected a portion of its damages from the contract motor carrier Daylight (due to the limitation of liability of liability in the contract), and collected the rest of its damages from its own insurer Sompo. Sompo sought reimbursement from Action, the subcontractor motor carrier which was actually transporting the cargo at the time of the theft. Invoking the doctrine of "superior equities," the court found no evidence that Action had acted negligently, and that Action was as much an innocent victim of the theft as Sompo. Accordingly, Sompo had no rights in subrogation against Action.

In *Midwest Trading Group, Inc. v. GlobalTranz Enterprises, Inc.*, 2014 U.S. Dist. LEXIS 100019 (N.D. Ill.), the shipper asserted a common-law claim that the transportation broker had fraudulently induced the shipper into entering a transportation contract with a false representation that the broker would provide cargo insurance for the load. The court held that this state law claim was not preempted by the Interstate Commerce Commission Termination Act, because a

common-law prohibition on fraud is not the equivalent of a state statute regulating motor carrier price, route or services, which could be preempted under the Act.

Hunte v. Schneider National Carriers, Inc., 2014 U.S. Dist. LEXIS 111886 (N.D. Ga.). Insurer INS, a direct defendant in the injured plaintiff's damages action against the insured motor carrier Schneider, retained adjuster Custard to investigate the cause of the subject motor vehicle accident. Custard photographed the accident scene and interviewed witnesses. When the bodily injury plaintiff subpoenaed Custard's investigation materials, defendant objected on grounds of attorney-work product doctrine, arguing that Custard's materials were prepared in anticipation of litigation. Since Custard was retained approximately forty minutes after the subject accident occurred, however, the court determined that its materials were created in the ordinary course of the insurer's usual business of investigating losses, and were not privileged.

In contrast, the report of the adjuster retained by the motor carrier defendant in *Johnson v. Predator Trucking, LLC*, 2014 U.S. Dist. LEXIS 15972 (M.D. Pa.) was prepared two months after the accident, and after the defendant was made aware that the plaintiff had retained counsel. Under the circumstances, the court found that the adjuster's report was prepared in anticipation of litigation (although the defendant was required to produce copies of photographs taken by the police which had been included in the report).

The court found that a claims file prepared by TCS-ONE, the third-party claims administrator for the defendant's liability insurer, was generally discoverable, since it was produced slightly more than a month following the accident and before defendant became aware that the plaintiff had retained counsel. The court, however, found that TCS-ONE's work product in the nature of valuations, reserves, opinions, and mental impressions was not discoverable.

Smith v. MHI Injection Molding Machinery, Inc., 2014 U.S. Dist. LEXIS 21334 (N.D. Ill.). When a truck driver was injured in a fall while trying to tarp a load, the defendant shipper and warehouse sought contribution from the motor carrier. Although the court expressed doubts that the contribution claims would succeed (particularly since the driver had clearly violated the motor carrier's safety protocols which arguably would have prevented the accident), the court did not dismiss the possibility that the motor carrier had a duty to provide the driver with fall arrest equipment, sliding or rolling tarps, or a trailer with soft or curtain sides.

In examining the reach of Oklahoma's direct action statute (permitting the injured plaintiff to name the motor carrier's liability insurer in a damages action against the motor carrier), the court in *White v. Lewis*, 2014 U.S. Dist. LEXIS 174783 (W.D. Okla.), dismissed the action against insurer National Specialty because (1) the insured motor carrier's principal place of business was Texas, not Oklahoma; and (2) the motor carrier was a participant in the Unified Carrier Registration ("UCR") system, and was therefore not required to register and file a certificate with the state of Oklahoma. As to the last point, the court was satisfied for purposes of summary judgment by information available from the Federal Motor Carrier Safety Administration's Safety and Fitness and Electronic Record ("SAFER") website (notwithstanding that such evidence might not have been admissible at the trial stage).

Anderson v. Viking Insurance Co. of Wisconsin, 2014 Wisc. App. LEXIS 778. The insured's truck fell through the ice as he was driving on a frozen lake. He sought to recover the costs of towing the vehicle out of the lake under his liability policy, arguing that he could have been held liable for "property damage" to the lake under various environmental protection statutes. The court denied coverage, since the insured was not under any governmental order to remove his truck from the lake, and the possible threat of possible government action because of possible contamination of the lake was not sufficient to trigger his liability coverage.

The underlying Liberty Mutual primary policy in *Hernandez v. Liberty Mutual Insurance Co.*, 2013 Wisc. App. LEXIS 1005, satisfied the Wisconsin statutory minimum. On its face, the Wisconsin Endorsement to the Liberty Mutual excess policy provided that no insured – either the owner rental company or the permissive user renter - was entitled to coverage if the underlying primary policy provided at least statutory minimum coverage. The majority of the court found that the endorsement rendered the excess coverage illusory, and that the permissive user renter was entitled to coverage. The dissent would have restored excess coverage only to the named insureds and denied coverage to the permissive user, since the insurer was statutorily permitted to exclude the renter if other insurance sufficient to meet the statutory minimum was otherwise available.

In *Lucero v. Northland Insurance Co.*, 2014 N.M. App. LEXIS 16, the Northland trucker's policy provided

coverage for specifically described autos (symbol "46"), and included a form showing separate premiums for each of eleven covered tractors and trailers. The policy also included standard language to the effect that the limit of liability would be that shown in the Declarations (in this case, $1 million per accident), regardless of the number of vehicles involved in the accident. The court found that the promise of $1 million in coverage for each covered auto was in conflict with the "anti-stacking" language, that the policy was therefore ambiguous, and that the insured was therefore entitled to $2 million in liability coverage for the accident since it involved a covered tractor and a covered trailer operated in tandem.

If a vehicle is listed on a policy's "Schedule of Covered Autos You Own," should it be deemed as "owned" by the named insured, even if the named insured is not the registered owner of the vehicle? That question was answered in the affirmative by the court in *Carolina Casualty Insurance Co v. Canal Insurance Co.*, 555 Fed. Appx 474 (6th Cir.), which supported the conclusion that the vehicle's driver was entitled to additional insured coverage as a permissive user of a vehicle owned by the named insured.

- Phil Bramson

25. Food Safety Modernization Act

According to the Centers for Disease Control and Prevention, approximately 48 million people become sick (and 3,000 die) annually as a result of various foodborne diseases. In order to combat this public health burden, the Food Safety Modernization Act (FSMA), which was signed into law on January 4, 2014, enables the Food and Drug Administration (FDA) to strengthen the food safety system by focusing more on *prevention* rather than *reaction* to problems.

In connection with the FSMA, the FDA has proposed certain rules to prevent contamination during the transportation of foods. One goal of the FDA's proposed rules in this regard is to prevent practices that create food safety risks, such as the failure to properly refrigerate food, the failure to clean vehicles, and the failure to properly protect food during transportation. Although the risk of contamination from transportation is relatively low, the FDA's website states that it continues to receive reports of food transported under unsanitary conditions.

Examples of the proposed rules include certain standards for vehicles and transportation equipment, operations, training, and recordkeeping. Shippers would be required to inspect vehicles for cleanliness prior to loading food and to maintain written procedures and record keeping requirements for cleaning vehicles and transportation equipment. The FDA would be authorized to review these procedures and records. The new rules would also require, for the transportation of foods requiring time/temperature control for safety, proper maintenance of the transportation cold chain during operations. Finally, a proposed rule would establish procedures for the exchange of information between all appropriate parties regarding prior cargos, cleaning of transportation equipment, and temperature control, which information is vital to ensure the sanitary transportation of foods.

Guidance and other information about regulations and guidance applicable to food transportation are available on FDA's Sanitation & Transportation Guidance Documents & Regulatory Information web page at:

http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/SanitationTransportation/ucm203420.htm

The FDA's web site notes that although it currently has resources to issue the rules required by FSMA, it will require additional funding to fully implement the modernized food safety system envisioned by Congress. At present, in order to enforce the new rules, the FDA will carry out inspections, and the Department of Transportation (DOT) will also establish procedures for transportation safety inspections to be conducted by DOT or state agencies. The FDA will also continue to work with state, local, territorial, and tribal authorities to achieve industry compliance. Eventually, following full implementation of the rule, additional enforcement tools may include administrative or legal actions such as injunction and/or criminal prosecution.

- Sanjeev Devabhakthuni

26. FMCSA Watch

"Hours of Service of Drivers," 79 Fed. Reg. 76241. FMCSA suspended enforcement of regulations regarding the restart of a driver's 60 or 70 hour limit, which had been in effect since July 1, 2013. The suspension was a consequence of the enactment of the Consolidated and Further Continuing Appropriations Act, 2015, which nullified the regulations until the later of September, 2015, or the submission of a final report by USDOT after performing a "naturalistic study of the operational, safety, health and fatigue impacts" of the restart provisions.

The regulation in effect since July 1, 2013 allowed drivers to restart the calculation of their 60- or 70-hour limit by taking an off-duty period of at least 34 consecutive hours, including two periods from 1:00 a.m. to 5:00 a.m. Only one restart was allowed per week (168 hours), measured from the beginning of the previous restart period.

Going back to the old regulations as in effect on June 30, 2013, drivers are allowed to restart their 60- or 70-hour calculation by taking at least 34 consecutive hours off duty, without any additional limitations. Drivers are therefore authorized, as of 12:01 a.m. on December 16, 2014, to resume use of the previous, unlimited restart provision.

"Inspection, Repair, and Maintenance; Driver-Vehicle Inspection Report (DVIR)," 79 Fed. Reg. 75437. Since 1952, drivers of commercial motor vehicles in interstate commerce have been required to complete a 20-point inspection report at the end of a day's work or tour of duty, whether or not any defect or deficiency in the equipment was discovered. Going forward, drivers will still be required to perform pre-trip evaluations of equipment condition and complete DVIRs if any defects or deficiencies are discovered. Effective December 18, 2014, however, drivers (except drivers of passenger-carrying CMVs) will not be required to submit, and motor carriers will not be required to maintain, DVIRs when the driver has neither found nor been made aware of any vehicle defects or deficiencies.

"Minimum Training Requirements for Entry-Level Driver Commercial Motor Vehicles Operators; Establishment of a Negotiated Rulemaking Committee," 79 Fed. Reg. 73273. FMCSA announced that it will accept nominations for a negotiated rulemaking committee to negotiate and develop proposed regulations for entry-level driver training for commercial vehicles. It is intended that the committee will include representatives of groups with a significant interest in the subject matter, such as driver organization, CMV training organizations, motor carriers, State licensing agencies, State enforcement agencies, labor unions, safety advocacy groups, and insurance companies. Topics for discussion will include minimum training requirements for first-time CDL applicants or applicants upgrading from one CDL class to another, amounts of behind-the-wheel training and classroom instruction, collecting data for a cost/benefit analysis of training, accreditation vs. certification of training schools and programs, training curricula, instructor qualifications and requirements, and the relative merits of performance-based vs. minimum hours of training approaches. (Nominations were open until January 9, 2015.)

"Financial Responsibility for Motor Carriers, Freight Forwarders, and Brokers," 79 Fed. Reg. 70839. FMCSA announced that it is considering a rulemaking that would increase the minimum levels of financial responsibility for motor carriers, establish financial responsibility requirements for passenger carrier brokers, implement financial responsibility requirements for brokers and freight forwarders, and revise existing rules concerning self-insurance and trip insurance (primarily as used by Mexican carriers transporting in the border commercial zone). Public comments must be submitted by February 26, 2015. The announcement notes that, through a separate rulemaking initiative, FMCSA intends to propose extending those minimum financial responsibility requirements to all private motor carriers of property and passengers. FMCSA is particularly looking for input on such topics as the current state of insurance premiums for motor carriers, statistics on how often the current minimum financial responsibility is insufficient to meet the actual costs associated with a crash, how increasing minimum levels would affect the ability of motor carriers to secure insurance, and whether there are other mechanisms besides increasing the minimum levels to insure adequate compensation to accident victims. (In May, 2014, the Agency also tasked its Motor Carrier Safety Advisory Committee with examining the financial responsibility requirements; a report was expected after the committee's October, 2014 meeting.)

"Motor Carrier Management Information System (MCMIS) Changes to Improve Uniformity in the Treatment of Inspection Violation Data," 79 Fed. Reg. 32491. While state law enforcement agencies are

already expected to file a notice with FMCSA when a roadside vehicle inspection results in a citation being issued, the announced changes allow drivers, motor carriers, and/or members of the public to inform the FMCSA record-keeping system as to the disposition of an adjudicated citation (conviction, acquittal, dismissal). Acceptable documentation includes scanned copies of certified court documents, including a docket entry, order of dismissal, or entry of "not guilty" determination; which should be uploaded into FMCSA's national data correction system ("DataQs") for verification by a State official. Alternatively, the documentation may include a link to an official court website showing adjudication results. FMCSA is amending its recordkeeping to reflect the new adjudication information.

(Although the announcement does not refer to the case, the Court of Appeals for the District of Columbia faced a situation in *Weaver v. FMCSA*, 2014 U.S. App. LEXIS 3810, in which a driver received a misdemeanor citation for failing to stop his truck at a weigh station as required by Montana law. The driver challenged the citation in court and it was dismissed (without prejudice, for reasons not clear to the appeals court). The State of Montana, which provided data to the MCMIS, refused to delete the record of the citation, and Weaver (represented by an industry group, the Owner-Operator Independent Drivers Association), asked the Court of Appeals to rule that FMCSA should not maintain a record of the citation in the MCMIS, since the court had dismissed it. The court dismissed the action on jurisdictional grounds without reaching the merits of Weaver's complaint.)

"Coercion of Commercial Motor Vehicle Drivers; Prohibition," 79 Fed. Reg. 27265. FMCSA announced a proposed rulemaking that would prohibit motor carriers, shipper, receivers or transportation intermediaries from coercing drivers (by threatening loss of work or other economic opportunities) to operate commercial motor vehicles in ways which violate federal regulations, including hours of service limits, CDL regulations, drug and alcohol testing rules, and hazmat regulations. The proposed rules would establish procedures for drivers to report incidents of coercion to FMCSA, and penalties for violators. (FMCSA noted in the announcement that a driver is still responsible for complying with safety regulations, notwithstanding any coercion, and that a threat would not rise to the level of "coercion" unless the driver objects or attempts to object to operation of the vehicle for reasons related to regulations.)

"Gross Combination Weight Rating; Definition," 79 Fed. Reg. 15245. FMCSA issued a final rule, effective April 18, 2014, amending the definition of "gross combination weight rating" as it appears in two regulations: 49 C.F.R. §§ 383.5 and 390.5.

Various regulations come into play when a "commercial motor vehicle" ("CMV") is being used in interstate commerce. An operator of a CMV must hold a federally-approved commercial driver's license ("CDL"). A CMV must bear certain markings, showing the name and USDOT census number of the operating motor carrier. A putative "independent contractor" will be deemed an "employee" of the motor carrier while driving a CMV in the motor carrier's business.

The definition of a CMV includes, among other types of vehicles, combination vehicles (generally, tractor-trailer rigs) which have a "gross combination weight rating" ("GCWR") (not the actual weight, but a weight-bearing capacity) of 26,001 pounds or more.

Under the new regulation, GCWR will be calculated as the greatest of "[a] value specified by the manufacturer of the power unit, if such value is displayed on the Federal Motor Vehicle Safety Standard (FMVSS) certification label required by the National Highway Traffic Safety Administration" or "[t]he sum of the gross vehicle weight ratings (GVWRs) or the gross vehicle weights (GVWs) (i.e., the actual weight) of the power unit and the towed units, or any combination thereof, that produces the highest value." Accordingly, the vehicle can be classified as a CMV (and subject to numerous safety regulations) if the actual weight of the combination vehicle and its load is 26,001 pounds or more, even if the recommended capacity is less.

"Electronic Logging Devices and Hours of Service Support Documents," 79 Fed. Reg. 17656. FMCSA supplemented its February 1, 2011 notice of proposed rulemaking, in light of the Seventh Circuit's 2011 decision in *Owner-Operator Independent Drivers Association v. FMCSA*, 656 F.3d 580, which vacated the agency's April 5, 2010 rule concerning electronic logging devices ("ELDs"). The agency's primary concern is the use of ELDs to track a driver's hours of service with an eye on safety, but curbing their use to harass drivers (a concern which had not been addressed in the original rulemaking, leading the Seventh Circuit to vacate the regulation). 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 also proposed a new regulation expressly prohibiting a motor carrier from harassing a driver.)

"State Inspection Programs for Passenger-Carrying Vehicles; Listening Sessions," 79 Fed. Reg. 76295. FMCSA announced that it is moving forward to solicit comments, specifically at two listening sessions on January 13 and 18, 2015, regarding future regulations requiring States to establish a program for annual inspections of commercial motor vehicles designed or used to transport passengers.

- Phil Bramson