BARCLAY DAMON LLP

Transportation Annual Year in Review

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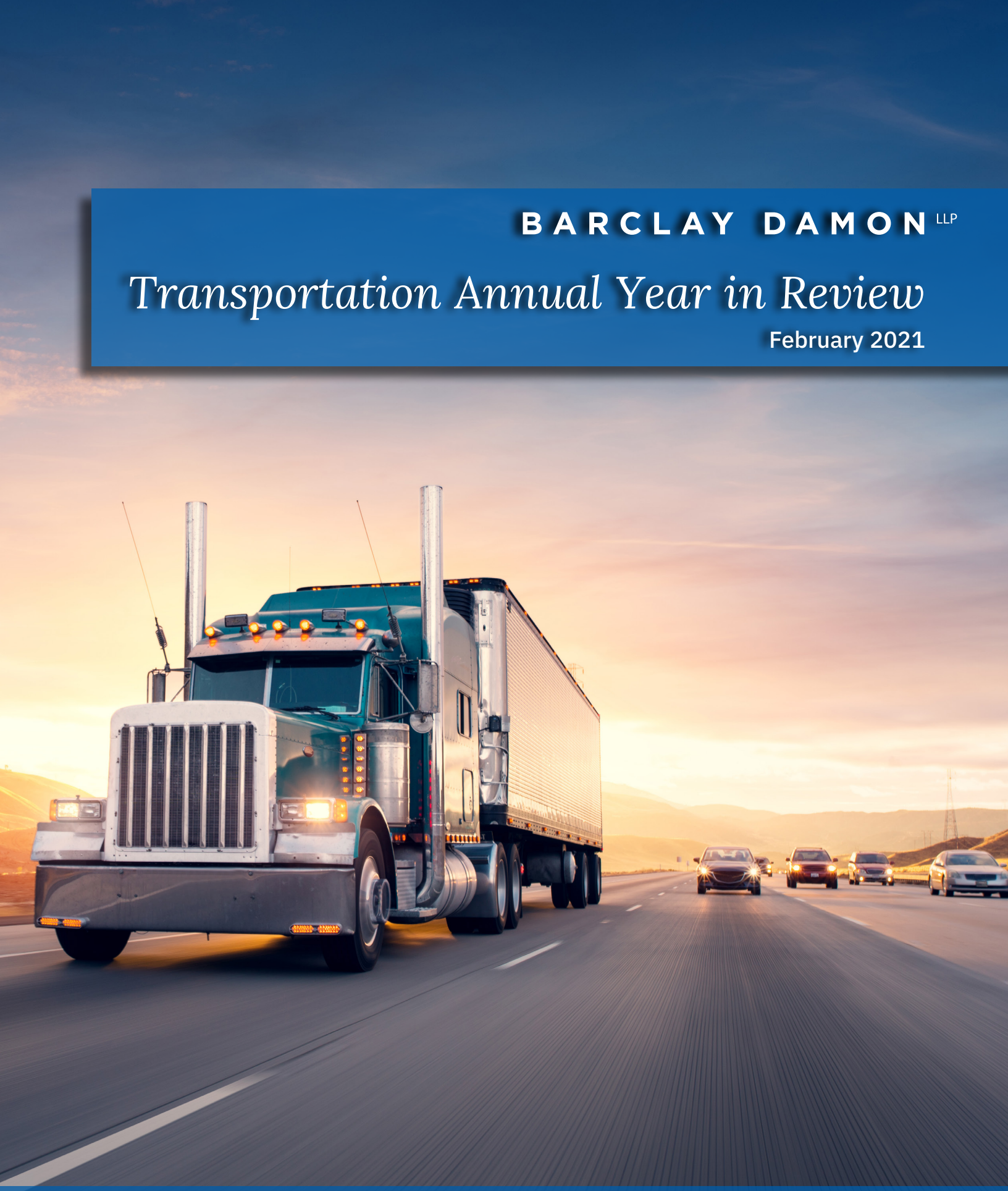

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2021 Transportation Law Update

Truck drivers are concerned about the possibility of a future in which their services are increasingly not needed—and they have been for some time. There were predictions that, by now, large percentages of commercial and other vehicles would be operating automatically.

What sounds like a nightmare for some may be nirvana for others: there have been reports suggesting that transportation network companies' long-range profitability will depend on advances in autonomous vehicle technology. The change, though, may not be around the corner. A November 2020 report by the *MIT Task Force on the Work of the Future* concludes that the dystopian vision for workers of a jobless future is not upon us. The report suggests that the process of automation will move slowly over the next decade and beyond, allowing time for current drivers to work until retirement and offering the opportunity to train younger drivers to handle new positions that will open up—including the monitoring of mobile fleets. So the future is coming, just not right away. The report does highlight the "great divergence," in which wages for working class Americans have stagnated. Truck drivers are among those struggling, but as has been described elsewhere, trucking companies, which generally operate on the thinnest of margins, are not the ones pocketing the large gains of productivity. Those gains are going to a relatively small number of society's most affluent, abetting the growing inequality which has been stirring social unrest and political antagonism.

A major stress point for both trucking companies and drivers is the employment status of owner-operators. This issue is highly contentious—it's in a literal legal muddle as the US Department of Labor, the California legislature, and federal and state courts engage in an ongoing battle of wits and wills.

California Governor Gavin Newsom signed Assembly Bill 5 (AB-5) into law in late 2019; the bill was initially intended to create employment status for drivers of Uber, Lyft and other app-based transportation entities. It immediately created a great deal of angst among business owners, though, and, in a suit filed by the California Truckers Association in federal court, was subject to serious litigation even before its effective date.

The federal court suspended the enforcement of AB-5 with respect to truck drivers, and the matter is now with the Ninth Circuit Court of Appeals. In the meantime, a state court action on the same basic issue was recently resolved in favor of enforcement. *People v. Superior Court*, 57 Cal. App. 5th 619. That line dividing federal and state precedent is likely to extend the uncertainty surrounding this issue. In response to the initial backlash regarding AB-5 the legislature, in AB 2257, set out a long list of businesses exempt from AB-5 (not truckers, to be sure), which was signed into law effective September 4, 2020. Two months later, on election day, California voters approved Proposition 22, a ballot initiative sponsored by app-based transportation and delivery companies, essentially overriding AB-5 with respect to drivers for those companies.

In other words, AB-5—and its "ABC test," which is viewed as worker-friendly—no longer applies to precisely the drivers it was intended to protect. AB-5, once viewed as the vanguard of a national movement; is currently a giant question mark. And that's not all; in the final weeks of the Trump administration, the Department of Labor announced a final rule articulating the difference between employees and independent contractors for purposes of The Fair Labor Standards Act. The new rule, centered on the economic reality test (also referred to in Section 7 of this review), looks primarily to the measure of control exercised by the employer over the work, and the worker's opportunity for profit or loss based on initiative and investment. Many observers, though, expect the Biden administration to review and possibly revise or reverse the new rule. In short, the issue of driver classification (or misclassification) will continue to receive much legislative and judicial attention.

Barclay Damon's Transportation Team is pleased to present its annual summary of cases and statutory and regulatory developments relating to trucking and other transportation industries. A few general observations occur to us: First, most of the new decisions that we discuss are "unreported, " meaning that the judge deciding the case opted not to have it published in the official reporter volumes. This reduces—and in some states eliminates—the case's usefulness as precedent.

Another trend in certain parts of the country—district courts in the Fourth Circuit Court of Appeals come to mind, in light of the *Transguard* decision discussed last year and updated in this year's edition—is that courts are using their discretion to dismiss declaratory judgment actions filed by

insurers. It is undeniably important that the declaratory action be pleaded in such a way as to avoid having the court rule on issues better handled in the tort action. A blanket rule, though, pushing declaratory judgment actions off until the jury has resolved the tort action takes away one of the tactics by which insurers can bring pressure to bear on plaintiffs; many plaintiff attorneys also prefer to try the declaratory action in order to confirm coverage before putting on their tort case.

We will continue to monitor that trend and the others noted in the sections that follow. As always, we look forward to hearing back from you.

Larry Rabinovich

1. *Leased Vehicles and Borrowed Employees*

While the traditional model many truckers operate under involves the lease of vehicles with drivers, there is a growing reliance on professional employer organizations (PEOs) to provide drivers while also taking care of payroll, compliance issues and benefits. Needless to say, there is a connection between this development and the struggle over how to classify drivers.

Bacon v. Pape Truck Leasing, Inc. 2020 Dist. LEXIS 27421 (E.D. Cal.) involved such an agreement between Estenson Logistics, a large motor carrier, and Quality Driver Solutions; the latter agreed to provide worker's compensation for the drivers it provided to Estenson. Separately, Estenson leased a semi-tractor from Pape Leasing. Estenson assigned Bacon to drive the Pape vehicle; on the date of the loss. Bacon did a quick pre-trip but, at Estenson's direction did not do his full daily inspection. The tractor hydroplaned on a wet road and Bacon suffered serious bodily injury possibly because the brakes were faulty.

Bacon recovered worker's compensation, then sued Pape and Estenson for failing to keep the rig in safe condition. Estenson moved for summary judgment on the basis that Bacon was its employee. Under California law a borrowed employee—one whose employer lends him or her to another entity and relinquishes to the borrowing employer all right of control over the employee's activities—is deemed to be the employee of both entities. Accordingly, so long as the loss happened while Bacon was in the course and scope of his employment by Estenson—and he was—his exclusive remedy against Estenson was worker's compensation. The tort action was dismissed. Pape, the vehicle lessor, also moved for summary judgment. The court agreed that there was no valid negligence claim against Pape and granted its motion as well.

In *McKeown v. Rahim*, 446 F. Supp. 3d 69 (W.D. Va.), the decedent was killed in a crash with a rig driven by Rahim operating a truck owned by co-defendant Livingston. The estate sued Rahim and Livingston, as well as V. Jones Trucking, a regulated motor carrier whose operating authority the rig was allegedly moving under, and the shipper James Hardie Industries, a major manufacturer which also has private carrier status with USDOT. A wide variety of claims were filed against the four defendants. The facts, particularly as developed in the subsequent decision (2020 US Dist. LEXIS 142124), show that Jones' USDOT number was set out on a placard attached to the Livingston tractor, and that the money trail went from Hardie to Jones to Livingston (and then presumably to Rahim).

Relying on the roadmap set out in recent case law, the estate made two different arguments that Jones was Rahim's statutory employer and therefore responsible for his negligence; the court rejected both. The first focused on Section 390.5 of Title 49 of the Code of Federal Regulations which sets out the definition of "employee." The court found this irrelevant on the question of whether Jones has vicarious liability for Rahim.

The main argument was based upon the USDOT leasing regulations set out at 49 C.F.R. § 376.11 and .12. The federal court adopted the view found in much recent case law—which would have been shocking to judges and lawyers twenty years ago—to the effect that the federal leasing regulations do not impact the lessee motor carrier's vicarious responsibility for the negligence of the operator of the leased vehicle. The court held that the leasing regulations do not change state law with respect to vicarious liability and, therefore, that even though the load was being carried under Jones' authority, Jones has no exposure for the driver's negligence.

We suggest that decisions such as this are based on what we suspect is a misunderstanding of the 1992 I.C.C. amendments to the leasing regulations (57 Fed. Reg. 32905, July 24, 1992), but there is no denying that this is a clear trend of the case law. In the subsequent proceeding, the estate attempted to argue that the various players were engaged in a joint venture. The court granted Jones'

motion for summary judgment on this theory as well since there was no basis to establish that the defendants had "equal right to direct and govern" the venture's operations. Claims against the shipper were also, quite properly, dismissed.

The Fourth Circuit Court of Appeals reviewed the impact of the leasing regulations on the motor carrier's exposure for the negligence of an owner-operator in *Edwards v. Cardinal Transport, Inc.*, 821 Fed. Appx. 167. The court observed that three views have emerged in the case law since the 1992 I.C.C. amendment to the leasing regulations referred to above. Some courts continue to hold that the I.C.C. (now USDOT) leasing regulations create an irrebuttable presumption that the lessee motor carrier is vicariously liable; others (like the *McKeown* case discussed above) find that in light of the amendment, the leasing regulations are completely irrelevant in determining the motor carrier's liability, and make their rulings based solely on state agency law; while others take an intermediary position and find that the leasing regulations create a rebuttable presumption. The court ultimately opted not to express a view on the topic, affirming the decision on other grounds.

The facts *were* a bit unusual: the owner-operator McGowan had entered into an "Independent Contractor Agreement" with the regulated motor carrier Cardinal under which Cardinal assumed exclusive possession and control over the leased equipment and complete responsibility for its operation, the language mandated by the leasing regulations.

The arrangement permitted McGowan to pick up less than truckload shipments from Cardinal customers and hold them in his own truck yard until he was able to fill the truck with shipments from his own customers with no input from Cardinal. One such private shipment, consisting of metal rods, was being loaded onto the leased vehicle by McGowan and his assistant Edwards when one fell from the forklift McGowan was operating and crushed Edwards's foot. Edwards sued Cardinal, which argued that it was not exposed.

Before the case went to the jury, the court denied Cardinal's motion for summary judgment, opting to adopt the third interpretation—that the regulations create a rebuttable presumption. In its instruction to the jury, the court said that the jury could find for the plaintiff either based on the rebuttable presumption under the regulations, or it could establish (based on common law [i.e., state law principles]) that there was an employer-employee relationship between Cardinal and McGowan and that the latter was acting in the course of his employment. The jury found against Cardinal and awarded Edwards $5 million.

On appeal, Cardinal argued that the district court had erred by concluding that the regulations create an irrebuttable presumption. Of course, we don't know what happened in conference when the 4th Circuit judges met to consider the case. The dissenter wanted the court to reverse and order a new trial and direct the court to dismiss the claims relating to the leasing regulations which should not be a factor in determining the liability of a motor carrier. The majority opted to pass on the opportunity to weigh in on this important issue and instead held that even if the district court was wrong on the rebuttable presumption, the error was harmless because the jury had the option to make its findings based on the common law allegations.

The Seventh Circuit Court of Appeals considered the leasing regulations from the perspective of a dispute between the motor carrier and owner-operator (the Truth in Leasing context) in *Stampley v. Altom Transport, Inc.*, 958 F. 3d 580.

The owner-operator Stampley argued that he had been shortchanged and moved to set up a class of similarly situated drivers. The agreement used by Altom with its drivers permitted them to access records showing how much income had been derived from the use of the leased equipment; Stampley was to receive 70% of the gross receipts. However, all claims for additional compensation had to be made within 30 days from receipt. Since he had not challenged the carrier's failure to include certain income as part of gross receipts within 30 days, he had lost the chance to do so. And, since the record showed that Stampley had focused on protecting his own claim rather than on the class, the circuit court affirmed the decertification of the class by the district court.

Larry Rabinovich

2. Motor Carrier Liability

According to *Joseph v. Hood*, 2020 US Dist. LEXIS 39438 (E.D. Tex.), claims for direct negligence against a motor carrier must be based on more than (1) the fact that a collision occurred; and (2) the likelihood that the motor carrier's employee was negligent. This matter involved

an accident between two tractor-trailers. Plaintiff argued that the defendant-motor carrier was directly negligent for the incident as its driver failed to comply with numerous Texas laws, ordinances, and regulations; this implied, the complaint alleged, that the driver's training as to such laws, ordinances, and regulations must have been deficient. The court disagreed and granted the defendant-motor carrier's motion to dismiss those direct negligence claims. Plaintiff had failed to present any factual allegations, relying instead on "sheer possibility" and "naked assertions."

Along the same lines was the decision in *Acuna v. Covenant Transport, Inc.*, 2020 US Dist. LEXIS 189829 (W.D. Tex.), in which the court noted that the mere fact that an accident occurred as a result of a driver's negligence does not give rise to a claim for independent employer liability (as distinct from *respondeat superior* liability). Plaintiff claimed that her vehicle was struck by a tractor-trailer attempting to complete a left turn. Plaintiff alleged that the tractor-trailer driver's employer was independently liable for: negligent entrustment; negligent driver qualifications; negligent hiring; negligent training and supervision; negligent retention; negligent contracting; negligent maintenance; providing unsafe equipment; and gross negligence. Plaintiff set forth these causes of action without any supporting facts demonstrating, for instance: that the employer knew or should have known, at the time of hiring or any time thereafter, that its driver was unlicensed, incompetent, reckless, unqualified, or otherwise unfit to drive a truck; that the driver's training or supervision was lacking in some respect; that the employer knew or should have known the driver was a danger to others or otherwise accident-prone; or that the employer consciously disregarded a risk. The defendant-employer was thus entitled to judgment dismissing those non–*respondeat superior* causes of action against it.

Likewise, in *Conway v. Lone Star Transportation*, 2020 US Dist. LEXIS 21401 (N.D. Okla.), the court dismissed plaintiff's negligent entrustment and negligent hiring and retention claims against the defendant-employer, finding that plaintiff had failed to set forth any factual basis for those claims; there was no evidence that the defendant-employer knew or should have known of its employee's propensity to attempt an improper lane change and U-turn in front of plaintiff's truck. The court further dismissed plaintiff's negligence per se claims against the defendant-employer, noting that none of the cited statutes or regulations were applicable. In so holding, the court reiterated the requirements of a negligence per se claim: (1) that the claimed injury was the type of injury intended to be prevented by the statute; and (2) that the injured party was a member of the class intended to be protected by the statute. (*Editor's note: There is nothing particularly surprising about these decisions, which reflect common sense and a reasonable recounting of existing precedent. When one combines them, though, with the increasing reluctance of courts around the country to apply respondeat superior principles with respect to owner-operators [see Section 2]), the system may be developing a gap in protection for the public*).

Plaintiff in *Shows v. Redline Trucking, LLC*, 2020 US Dist. LEXIS 86377 (N.D. Ala.), had also failed to present any specific facts which would have allowed a reasonable jury to conclude that the defendant-employer knew or should have known of any incompetency on its employee's part to operate a truck safely. This was the case even where the employee had made the questionable decision to park his truck in an active lane of travel on a two-lane highway, without the use of any of the truck's lights or emergency road markers.

And, in *Crechale v. Carroll Fulmer Logistics Corp.*, 2020 US Dist. LEXIS 152091 (S.D. Miss.), the court dismissed plaintiff's claims against the defendant-employer for negligent supervision, negligent entrustment, and negligent hiring arising out of a rear-end collision between a motor vehicle and defendants' tractor-trailer. Yet, unique to Mississippi law, the court determined that these independent, non–*respondeat superior* claims were properly dismissed as duplicative of the claims for vicarious liability, which the defendant-employer had already conceded. Of note, the court also dismissed plaintiff's claim for punitive damages, stating that there was no evidence of any heightened misconduct on the part of the defendant-truck driver and reiterating that this was a matter involving simple negligence.

On the other hand, in *Gordon v. Great West Casualty Co.*, 2020 US Dist. LEXIS 112281 (W.D. La.), the court reconsidered its precedent that direct negligence claims against a defendant-employer are subsumed by that defendant-employer's stipulation as to vicarious liability. In so doing, the court examined recent Louisiana Supreme Court decisions that permitted simultaneous claims of direct employer negligence and claims for which an

employer could be deemed vicariously liable. The court also noted that Louisiana's comparative fault scheme was designed to ensure that each tortfeasor is only responsible for his share of fault. The court further found that, where an employer and employee's potential fault is merged, it may be difficult for the jury to obtain a true picture of either party's wrongful conduct. Plaintiff was accordingly permitted to proceed with both his direct negligence claims and vicarious liability claim against the defendant-employer.

In light of the above ruling in *Gordon*, plaintiffs in *Fox v. Nu Line Transp.*, 2020 US Dist. LEXIS 136738 (W.D. La.), moved for reconsideration of the summary judgment decision dismissing their causes of action for direct negligence against the defendant-employer. In addition to citing *Gordon*, plaintiffs also cited the testimony of the defendant-truck driver, which outlined the lack of safety meetings, training materials, and training sessions specific to the icy conditions presented at the time of this accident. Given its ruling in *Gordon* and the supporting evidence highlighted by plaintiffs, the court granted the motion for reconsideration of plaintiff's claims and found that plaintiffs had raised a genuine issue of material fact and permitted the matter to proceed to trial.

Hanan v. Crete Carrier Corp., 2020 US Dist. LEXIS 671 (N.D. Tex.), also outlined circumstances in which a plaintiff's claims for negligent entrustment, hiring, training, retention, supervision, and monitoring were permitted to proceed to trial. Plaintiff's vehicle was struck by the defendant-truck driver when he merged into her lane of travel in an unsafe manner, colliding with her vehicle at a high rate of speed. The court assessed plaintiff's direct negligence claims against the defendant-employer on defendants' motion for summary judgment, determining that plaintiff had raised triable issues of fact as to each of these claims. With respect to the negligent entrustment and hiring claims, plaintiff presented evidence that the defendant-truck driver had been involved in five prior accidents involving a similar unsafe lane change, that his employment application listed a few of these accidents, and that the defendant-employer had notice that he had falsified an employment application. As for the negligent training, retention, supervision, and monitoring claims, plaintiff presented evidence that the defendant-employer did not teach the defendant-truck driver the "lane of least resistance" rule, an industry standard that strongly encourages commercial drivers to travel in the third lane from the left.

Is an employer-motor carrier independently liable for its employee's tortious conduct where that employee used a controlled substance in order to help him to meet the employer's directives? No, according to *Kieffer v. Marten Transport*, 2020 US Dist. LEXIS 181357 (E.D. Ark.). This accident occurred when said employee failed to stop at a four-way intersection, colliding with plaintiff's vehicle. Prior to the collision, the employee had informed the employer-motor carrier that he was tired and that he would soon exceed his allowable driving hours. The employer instructed the employee to press on and complete one more pick up. Following the crash, the employee was charged with driving while intoxicated and possessing a controlled substance, methamphetamine. Plaintiff brought claims under the Crime Victim Act (Ark. Code Ann. § 16-118-107(a)(1)) and for punitive damages and drug-based negligent hiring and supervision. The court ultimately dismissed those claims, finding that the employer-motor carrier did not direct or encourage its employee to use methamphetamine to complete his job; this was an unexpected personal choice by the employee under the circumstances.

In *Bacon v. Pape Truck Leasing*, 2020 US Dist. LEXIS 27421 (E.D. Cal.), plaintiff was injured in the course of his temporary employment while operating a tractor-trailer owned by a separate entity. Plaintiff claimed the tractor-trailer's brakes were faulty and caused him to hydroplane during a rain storm. The court applied the basic principles of negligence, negligence per se, and special employment status in granting both the defendant-special employer's and the defendant-owner's motions for summary judgment. With respect to the defendant-special employer, the undisputed evidence supported the existence of a special employment relationship, which barred plaintiff's instant claims per the Workers' Compensation Act's exclusive remedy rule. As for the defendant-owner, the court reiterated how negligence claims without evidence of supporting negligent conduct and a negligence per se claim without a statue or regulation supporting that claim cannot stand. (Other aspects of this case are discussed in Section 1.)

French v. XPO Logistics Freight, 2020 US Dist. LEXIS 66202 (S.D. W. Va.), addressed the viability of third-party contribution and indemnity claims in West Virginia in the absence of any contract or agreement. Plaintiff's decedent had been involved in a two-impact accident, the first occurring when he collided with the defendant-trucking company's overturned trailer, and the second

occurring when the third-party defendant-truck driver collided with both plaintiff's vehicle and the overturned trailer. Defendant's subsequent third-party complaint asserted claims for indemnity and contribution, both of which the court ultimately dismissed on a Federal Rule of Civil Procedure 12(b)(6) motion. The court reasoned that, under West Virginia law, implied indemnity was only available to parties who were entirely without fault. If the defendant-trucking company was without fault, then there would be no need for indemnity from the third-party defendant. Alternatively, if the defendant-trucking company was at fault, then indemnity was not available. As for the contribution claim, the court reasoned that the West Virginia Legislature nearly completely abolished claims for contribution with the enactment of W. Va. Code § 55-7-13c(a). Joint and several liability was only available to the extent that two defendants had a common plan, or one defendant drove under the influence, illegally disposed of hazardous waste, or committed a criminal act.

In *Kolchinsky v. Western Dairy Transport, LLC*, 949 F. 3d 1010 (7th Cir.), the defendant-truck driver had entered into a Carrier/Broker Agreement with defendant WD Logistics, under which he agreed to provide freight-transportation services for deliveries arranged by WD Logistics. During the course of one such delivery, the defendant-truck driver rear-ended plaintiff's vehicle. In the ensuing suit, plaintiff claimed that WD Logistics and Western Dairy (an LLC with the same members as WD Logistics) were vicariously liable for the defendant-truck driver's negligence. Yet, the evidence showed that the parties' Agreement classified defendant as an independent contractor, and WD Logistics did not direct the defendant as to the route to take, did not negotiate the rates for jobs, did not withhold any payroll-related taxes or insurance, and did not otherwise control how the defendant performed his work. The court thus affirmed the lower court's dismissal of plaintiff's vicarious liability claims on the basis that, per Illinois law, no agency relationship exists where the broker does not have power to control the manner of delivery.

Can anticipated Reptile Theory-based deposition questioning by a plaintiff's attorney be protected from disclosure under Federal Rule of Civil Procedure 26(c)? Yes, according to *Estate of Richard McNamara v. Jose Navar & RTR Farming Corp.*, 2020 US Dist. LEXIS 70813 (N.D. Ind.). In moving for a protective order under Rule 26(c), defense counsel outlined how plaintiff's counsel had previously utilized "Reptile Theory" deposition questioning in similar cases involving trucking-related personal injuries. Counsel further set forth how such tactics muddle the applicable duty of care by focusing on general safety concerns and lack any connection to the scope of permissible discovery. The court agreed, finding that depositions of lay witnesses are for the purpose of discovering facts, not eliciting opinions through hypothetical questions.

The court in *Parker v. Auto-Owners Insurance Co.*, 2020 US Dist. LEXIS 16534 (W.D. Wis.), was required to assess two differing interpretations of the Graves Amendment, which provides that an owner of a vehicle who rents that vehicle to another cannot be held liable for injury or damage arising out of the use of that vehicle where (1) the owner is in the business of renting or leasing vehicles; and (2) there is no negligence or criminal wrongdoing on his part. Plaintiff had been involved in an accident with a semi-truck, which had been leased to the defendant-employer by defendant Flexi-Van. Plaintiff claimed that Flexi-Van was vicariously liable for the negligence of the driver and directly liable for leasing a trailer with inoperable brakes. Flexi-Van moved to dismiss based on the Graves Amendment, arguing that it imposed an absolute bar on vicarious liability claims against leasing companies. Plaintiff argued that a claim for vicarious liability may stand if the leasing company acted negligently or engaged in criminal wrongdoing. The court agreed with plaintiff's interpretation, finding that Flexi-Van's interpretation would render the law's second condition superfluous; plaintiff's vicarious liability claims against Flexi-Van were not preempted at this pleading stage.

Collins v. Dodson, 2020 US Dist. LEXIS 103977 (W.D. Tenn.), demonstrates that proof of causation, a necessary element of the negligence equation, cannot be based on mere speculation or conjecture. Plaintiff was travelling on an on-ramp when he was struck by the defendant-driver, who had lost control of her vehicle. The defendant-driver claimed to have lost control of her vehicle after she changed lanes directly in front of a tractor-trailer, resulting in contact between the vehicle and the truck. There was no evidence that this truck driver was driving at an unsafe speed or otherwise operating the truck without reasonable care. Rather, the defendant-driver was responsible for only changing lanes when that movement could be made safely, and evidence as to "who hit who" was not dispositive on the issue of causation. The defendant-truck driver and trucking company were thus entitled to summary

judgment as no action on their part was shown to have contributed to the accident.

Similarly, in *Dansby v. Heaslet Equipment & Trucking*, 2020 US Dist. LEXIS 103752 (E.D. Tex.), the court found that the mere presence of a tractor-trailer on a highway does not confer negligence or establish an extreme degree of risk to other drivers; a party bringing suit must prove negligence through admissible factual evidence. In this matter, the evidence established that plaintiff had failed to act reasonably under the circumstances when a portion of the lane in which she was travelling was blocked by orange traffic cones. Plaintiff drove through the cones, slammed on her brakes, and then, without warning, merged into the lane in which the defendant-truck driver was travelling, directly in front of his vehicle. The defendant-truck driver had no opportunity to avoid this accident, which was caused entirely by the careless actions of plaintiff.

Hammick v. Matthew Scott Jacobs & Franklin United, 2020 US Dist. LEXIS 193301 (D. Or.), reinforced the proposition that violation of a statute, when proven, is *prima facie* evidence of negligence, which can then be rebutted by a defendant showing that he acted reasonably under the circumstances. Plaintiff was involved in a collision with the defendant-truck driver when the truck's driveline failed. A non-party entity had been responsible for inspecting and maintaining the truck. On a motion for summary judgment, plaintiff argued that Oregon Rev. Stat. § 815.020, proscribing operation of a vehicle which is in an unsafe condition, imposed strict liability and necessitated a finding of judgment in her favor. The court disagreed, noting that a violation of this statute is, at most, *prima facie* evidence of negligence. Further, the defendant-truck driver had presented evidence demonstrating that he had acted with reasonable care under the circumstances of the driveline failure; such evidence foreclosed a finding of negligence as a matter of law.

Even where a statute has been violated, it is only *prima facie* evidence of negligence when it is a proximate cause of the accident. In *Kinzer v. Service Trucking*, 2020 US Dist. LEXIS 28009 (S.D. Ohio), plaintiff was travelling behind the defendant-truck driver. Having missed his exit, defendant pulled over to the right lane and applied his four-way flashers and prepared to make a U-turn when traffic permitted. While the defendant-truck driver was still completely stopped in the right lane, though, plaintiff slumped over his steering wheel and his vehicle drifted from the left-most lane into the right lane, ultimately colliding with the defendants' tractor-trailer. On defendants' motion for summary judgment, the court found that, while the defendant-truck driver had unlawfully stopped his vehicle on the highway, plaintiff's actions of drifting across several lanes of travel broke the causal chain and absolved the defendant-truck driver of any liability. The fact that plaintiff suffered a sudden medical emergency did not shift any liability onto the defendants.

In a different medical emergency context, the court in *Price v. Samuel Oneal Austin & L&B Cartage*, 2020 Mich. App. LEXIS 3152 (Mich. Ct. App.), found that a defendant-truck driver who experienced sudden, incapacitating medical symptoms, crossing over a highway median and striking plaintiff's vehicle head on, was entitled to summary judgment dismissing the claims against him. Plaintiff attempted to argue that inconsistencies in defendant's reported symptoms—chest pain followed by a blackout versus a coughing fit followed by a blackout—did not entitle him to relief under the sudden emergency doctrine. The court, though, concluded that the dispositive issue was whether the defendant's symptoms had come on suddenly, not whether he provided the same description of those symptoms in each account. Further, the court noted that the physical evidence supported a finding of no liability based on sudden emergency, including the facts that the defendant never applied the brakes and there were no pre-collision skid marks on scene.

Roy Rotenberg and Jessica Tariq

3. *Carmack/Cargo*

STANDING

The issue in *Tokio Marine American Insurance Co. v. Jan Packaging*, 2020 US Dist. LEXIS 240798 (D.N.J.), was whether one carrier had standing to bring a Carmack Amendment claim against another. Defendant Jan was hired to transport computer equipment from Massachusetts to New Jersey and, once the equipment was in New Jersey, repackage the equipment for shipment to China. Jan, in turn, hired McCollister's Transportation Systems, Inc. (MTS), to perform some of the transport. When some of the equipment arrived in New Jersey damaged, plaintiff paid the claim and then sued defendant and other parties for damages under the Carmack Amendment. Defendant filed a third-party complaint against MTS seeking indemnification under Carmack. MTS

moved to dismiss the complaint, arguing that defendant did not have standing under Carmack to assert the claim.

In addressing the standing argument, the court held that, under the Carmack Amendment, a carrier is liable to the person entitled to recover under the receipt or bill of lading for any loss or injury to the property caused by the carrier during the shipment. Standing is limited to shippers, consignors, holders of the bill of lading issued by the carrier or persons beneficially interested in the bill of lading although not in actual possession of the actual bill of lading, buyers or consignees or assignees thereof.

Defendant argued that it had standing because there were "contracts of carriage" purportedly issued by MTS that identified defendant as both consignee and consignor. MTS argued that standing had to be determine by the actual facts of the case, not labels, and that defendant had identified itself as a motor carrier since the onset of the case and never claimed to be the owner, shipper, consignor, or consignee of the damaged equipment. The court agreed with MTS's argument, holding that defendant had not submitted any documentation that demonstrated that it had any beneficial interest in the goods that were allegedly damaged. Therefore, it was not a party entitled to recover under a receipt or bill of lading. The motion to dismiss was granted. (Barclay Damon represents plaintiff in the ongoing action.)

FEDERAL PREEMPTION

In *Fergin v. Westrock*, 955 F.3d 725 (8th Cir.), the issue was whether the Carmack Amendment preempted a state law claim for personal injury arising out of the transportation of goods in interstate commerce. As detailed in our 2019 year-in-review, the United States District Court for the District of Nebraska, in two related cases, held that the Carmack Amendment preempted a state law personal injury claim of an employee of a third-party who was injured while unloading a shipment that had moved in interstate commerce. The district court had held that the plaintiff's personal injury claim was preempted by federal law because the injury arose out the interstate transportation of goods. The court granted the carrier's motion for summary judgment dismissing the complaint, and then granted the warehouseman's motion for summary judgment. Plaintiff appealed, and the Eighth Circuit Court of Appeals, restoring sanity to the matter, reversed.

The court of appeals found that textually, the Carmack Amendment did not preempt plaintiff's personal injury claim. The text of the Carmack Amendment limited claims to those persons entitled to recover under a bill of lading or receipt, and only applied to the actual loss or injury to the property. Because plaintiff was seeking to recover damages for his own personal injury, and not for damages to the shipper's property, his claim was not covered by the express language of the Carmack Amendment.

The court distinguished the United States Supreme Court's comment in *Adams Express v. Croninger*, 226 US 491 (1913) that the Carmack Amendment "superseded all the regulations and policies of a particular state upon the subject" of transportation of goods in interstate commerce. 226 US at 505-06. The Eighth Circuit noted that the Supreme Court's holding dealt only with the liability of a carrier under a bill of lading and said nothing about the liability of carriers to third parties physically injured during the execution of the bill of lading. The Carmack Amendment deals only with the shipment of property.

The plaintiff in *Shamoun v. Old Dominion Freight Line*, 2020 US Dist. LEXIS 18656 (N.D. Tex.), contracted with defendant for the transportation of certain medallions from Arizona to Texas. The medallions were picked up in Arizona and delivered to defendant's facility in Texas. Sometime after the medallions were delivered to the Texas facility, one of defendant's employees placed them in a dumpster and they were disposed of. Plaintiff sued in state court alleging negligence and conversion. Defendant removed to federal court alleging federal jurisdiction under the Carmack Amendment, and then moved to dismiss the action. Plaintiff cross-moved to remand the action back to state court.

The court addressed the issue of jurisdiction first and whether the action had been properly removed to federal court. The court found that district courts have original jurisdiction over civil cases arising under the Constitution, laws, or treaties of the United States. In determining whether a claim arose under federal law, the well-pleaded complaint rule dictates that "the plaintiff [is] master of the claim; he or she may avoid federal jurisdiction and by exclusive reliance on state law." However, where federal law so preoccupies the field, a plaintiff cannot avoid federal jurisdiction by merely relying on parallel state law claims.

Defendant, in its motion to dismiss plaintiff's complaint, argued that the Carmack Amendment, 49 U.S.C. § 14706 *et. seq.*, completely preempted plaintiff's claims for negligence and conversion. The court acknowledged that the Carmack Amendment provided the exclusive cause of action for loss or damage to goods arising from the interstate transportation of goods by common carrier. Plaintiff did not dispute that argument but argued that he did not have standing to bring a claim under the Carmack Amendment because he was not a "shipper" entitled to bring such a claim and, therefore, his state law cause of action were not preempted.

The court found that there were two ways to determine whether a party had standing under the Carmack Amendment. By its terms, the Carmack Amendment gives standing to any party entitled to recover under a receipt or bill of lading. Courts, however, have interpreted that language in two different ways: (1) particular classes of persons are entitled to recover under the receipt or bill of lading; or (2) looking to the specific text of a bill of lading, rather than an abstract system, to determine whether a party is entitled to sue under the Carmack Amendment.

In the instant case, the bill of lading identified the plaintiff as the consignee. The court noted that the Carmack Amendment centralizes liability in one carrier so shippers and consignees can look to one source for damages. Plaintiff, as a consignee, had standing under the Carmack Amendment. The court also found that plaintiff, an owner of the medallions, had standing to sue under the Carmack Amendment because, as the owner of the shipment, he was beneficially interested in the shipment. Because plaintiff had standing to sue under the Carmack Amendment, removal was proper and plaintiff's state law claims were completely preempted by the Carmack Amendment. The court dismissed plaintiff's complaint but gave plaintiff leave to file and serve an Amended Complaint stating a claim under Carmack.

The issue in *Razipour v. Joule Yacht Transport, Inc.*, 2020 US Dist. LEXIS 151023 (M.D. Fla.), was whether the Carmack Amendment preempted state law cross-claims between two defendants arising out of the botched shipment of a boat from Florida to California. Plaintiff wanted to ship a newly purchased boat from Florida to his home in California. He contracted with defendant to perform the actual shipping and with a co-defendant to prepare the boat to be shipped. Defendant did not pick up the boat when scheduled because it did not have the correct truck to transport the boat. When it did finally pick up the boat from the codefendant's yard, it then stored it at its own yard for a couple of weeks exposing the boat to the weather and heavy rains. As a result, when the boat arrived in California it had over 150 gallons of water in the bilge and engine room, and significant damage to its interior and several of its operating systems.

Plaintiff filed an action in Florida state court alleging breach of contract, negligence and violations of the Carmack Amendment against the defendant, and breach of contract and negligence against the codefendant. Defendant removed the action to federal court and successfully moved to dismiss the state law claims against it based on Carmack preemption. Defendant then moved to dismiss the cross-claim that the codefendant had pled against it.

The court reviewed the general preemptive effect of the Carmack Amendment, noting that there was no such thing as a state law claim against a common carrier for damage to goods in interstate transportation, and that the crux of the Carmack Amendment preemption was whether the relief requested affects the carrier's liability for losses arising from the delivery, loss of or damage of goods. Only claims based on conduct separate and distinct from the delivery, loss of or damage to goods escape preemption under the Carmack Amendment. The court also found that the Carmack Amendment provides for some state law cross-claims, specifically between carriers concerning the apportionment of damages to involving a single shipment. Damages in such cases are to be apportioned pursuant to common law negligence principles.

In *Razipour*, allowing the codefendant's cross-claims based on defendant's delay in picking up the boat for shipment and failing to provide the proper truck for transportation of the boat would expand defendant's potential liability for damage to the boat. In addition, codefendant was a marine servicer, not a carrier and there was no exception in the Carmack Amendment for cross-claims by marine servicers. Because the codefendant's cross-claim arose out of the transportation of goods in interstate commerce, it was preempted by the Carmack Amendment.

The issue in *Williams v. Quality Services Moving*, 2020 US Dist. LEXIS 178831 (E.D. Wash.), was whether the Carmack Amendment preempted plaintiff's claims of

intentional infliction of emotional distress and violation of the Washington Consumer Protection Act (CPA). Plaintiff contracted with defendant for the transportation of his household goods from Virginia to Richland, Washington, for delivery in Washington on August 9 or 10. The shipment actually arrived on September 12—and defendant failed to hire a moving crew to unload the shipment.

The truck driver was not able to unload the complete shipment, and left the house without unloading all of plaintiff's belongings. The next day, plaintiff spoke to a representative of defendant about his undelivered belongings. Defendant eventually told plaintiff to provide it with the costs that plaintiff had incurred because of the late delivery. Plaintiff sent documentation of $4,117 in expenses and authorized defendant to charge his credit card for the amount of the move less the $4,117. That same day, plaintiff's wife made a complaint to the Better Business bureau concerning the unfinished delivery.

After defendant learned about the complaint to the BBB, it refused to return plaintiff's belongings unless the plaintiff signed a settlement agreement that required withdrawal of the BBB complaint. Plaintiff refused to sign the settlement agreement or to withdraw the complaint. Plaintiff did authorize defendant to charge the full amount of the move to his credit card. Defendant removed the remainder of plaintiff's belongings to an unknown location, hiding them in retaliation for plaintiff not signing the settlement agreement or withdrawing the complaint. Defendant then created a fake invoice in the amount of $7,000 to justify withholding of the delivery. Plaintiff filed a complaint with the Washington State Attorney General's Office. Defendant responded that plaintiff still owed $4,756.66. Plaintiff sent defendant a certified check in that amount, and defendant refused to cash or return the check. Defendant eventually sent plaintiff a key to a storage unit that contain some, but not all, of plaintiff's belongings.

Plaintiff filed the action alleging violation of the Carmack Amendment and the WCPA and a claim for intentional infliction of emotional distress. Defendant filed a motion for partial summary judgment arguing that the Carmack Amendment preempted the plaintiff's state law claims.

The court first set forth the law of preemption under the Carmack Amendment. The court then held that the only claims that escaped preemption are those claims based on conduct separate and distinct from the delivery, loss of, or damage to goods. If plaintiff's claim for intentional infliction of emotional distress arose from the same conduct as the claims for delay, loss, or damage to the shipped property, then the claim would be preempted by the Carmack Amendment. Here, though, the carrier took separate actions unrelated to its contractual duty to transport goods, so the claim for intentional infliction of emotional distress is not preempted.

CARRIER V. BROKER

The issue in *Cortrans Logistics v. Landstar Ligon*, 2020 US Dist. LEXIS 176910 (S.D. Ind.), was whether the defendant was acting as a carrier or a broker when a shipment of cell phones it had agreed to transport was stolen. Plaintiff and defendant were parties to a Transportation Services Agreement that contained a clause that limited defendant's liability for cargo loss to $100,000. The parties subsequently amended the contract to allow plaintiff to purchase additional insurance coverage for an additional charge. Plaintiff contacted defendant requesting additional coverage for a series of cell phone shipments. When plaintiff sent defendant a Rate Confirmation, however, there was no mention of the additional coverage. Plaintiff tendered a shipment of cell phones to defendant for transportation. Defendant, in turn, brokered the shipment to another carrier. The shipment was stolen when that carrier's driver stopped at a truck stop. Plaintiff filed a complaint alleging breach of contract, negligence, breach of bailment, and conversion. Defendant removed the action to federal court arguing that the Carmack Amendment applied, and moved for partial summary judgment seeking a declaration that its liability was limited to $100,000. Plaintiff argued that the Carmack Amendment did not apply because the defendant was acting as a broker with respect to the shipment, not a carrier.

The court acknowledged that the Carmack Amendment provided shippers with the statutory right to recover for actual losses or injuries to their property caused by carriers involved in their shipment, but then noted that the uniform liability for carriers did not extend to brokers. Whether a person is considered a broker or a carrier depends on the nature and context of the specific transaction. The court also cited the CFR's definition of "broker" that states that "motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the

transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport." 49 C.F.R. § 371.2(a).

The court found that defendant was acting as a carrier, not a broker, because it assumed responsibility for the transportation of the shipment. The agreement between plaintiff and defendant identified defendant as a carrier; the plaintiff did not contract with the carrier hired by defendant, and plaintiff did not know that defendant had used the carrier until after the shipment was stolen. Because defendant was acting as a carrier, plaintiff's state law claims were preempted by the Carmack Amendment.

WAIVER

The issue in *IKON Transportation Services v. Texas Made Trucking*, 2020 US Dist. LEXIS 112813 (W.D. Wis.), was whether a broker waived its claim under the Carmack Amendment by failing to adequately plead the claim. Plaintiff was a transportation broker that arranged for a shipment of goods from Texas to Kentucky. When the shipper required the carrier to move its truck before the load was properly secured, the goods were damaged before even leaving the shipper's yard. The shipper filed a claim that was eventually paid by the plaintiff.

Plaintiff then sued the shipper and carrier in Wisconsin state court pleading indemnification, negligent misrepresentation, unjust enrichment, and two counts of negligent breach of contract. The shipper removed the case to federal court and made a motion to dismiss based on personal jurisdiction grounds, which was granted. Plaintiff then moved for summary judgment, arguing that, under the Carmack Amendment, the defendant carrier was liable for the damage to the shipment. Plaintiff also moved for summary judgment on its claims under the broker agreement it had with defendant.

The court discussed the Carmack Amendment and admitted that it provided a nationally uniform scheme of carrier liability for goods lost or damaged in transit, and established a default rule that made carriers liable to the person entitled to recover under a bill of lading. The court then held, however, that plaintiff had waived any claim under the Carmack Amendment because it did not plead such a claim in its complaint and had not raised the claim until its motion for summary judgment. The court found that the plaintiff had taken steps in the litigation—such as voluntarily dismissing a defendant whose presence raised jurisdictional concerns—that demonstrated that it was relying on its breach of contract claim rather than federal jurisdiction under the Carmack Amendment. The court found that plaintiff's request for leave to amend its complaint to include a Carmack Amendment claim came far too late to allow the amendment.

LIMITATIONS ON LIABILITY

Is a limitation of liability in an agreement between plaintiff and the broker who arranged for the transport of used equipment on behalf of the defendant, enforceable as against the defendant which had no knowledge of the limitation? In *Central Transport, LLC v. Global Aeroleasing, LLC*, 2020 US Dist. LEXIS 90862 (S.D. Fla.), defendant sought the transport of used aircraft landing gear from Arizona to Florida. Defendant retained a broker to handle the shipment. That broker hired another and that one hired yet another—in the end, the shipment went through four brokers before plaintiff, a carrier, was retained to handle the shipment. That broker had an ongoing arrangement with plaintiff which provided among other things, for a release rate for all used equipment of $1.00 per pound in the event of damage or loss. The final broker issued a bill of lading that referred to and adopted the terms of its arrangement with plaintiff. The shipment arrived at its destination damaged, due, in part, to repacking by plaintiff. Plaintiff filed an action seeking a declaration that its liability was limited to the release rate. Defendant filed a counterclaim seeking damages under the Carmack Amendment arguing that it, and not the limitation on liability in the broker carrier contract, should apply.

The court held that the default rule is that, in the absence of a contrary agreement between the parties, an intermediary is deemed to have the authority as the shipper's agent to negotiate a liability limitation with a downstream carrier in exchange for a lower shipping rate. The rule gives the carrier the confidence to know that its liability will be capped by its agreement with the intermediary. Because defendant did not dispute the last broker's authority to arrange for the shipment, the limitation on liability was enforceable. The court also rejected defendant's argument that the Carmack Amendment should apply since it itself allows the parties to contract for the express waiver of remedies.

The issue in *Coyote Logistics, LLC v. Mera Trucking, LLC*, 2020 US Dist. LEXIS 149975 (N.D. Ga.), was whether provisions in a carrier/broker agreement concerning the

carrier's liability for a shipment would override arguably inconsistent limitations contained in the bill of lading under which the shipment moved. Plaintiff was a property broker that arranged for the transportation of freight by motor carriers in interstate commerce. The agreement between plaintiff (broker) and defendant (carrier) contained a provision that allowed the customer, Proctor & Gamble (P&G), to reject all of a load if the load was delivered without the seals intact—and that defendant would be liable for the full value of the load. Plaintiff arranged for the transportation of a load of goods from Pennsylvania to Massachusetts for P&G. P&G tendered the cargo to defendant with a bill of lading covering the shipment. When defendant's truck broke down in Rhode Island, the driver abandoned the shipment at a rest stop and the cargo was vandalized. P&G requested payment from plaintiff for the items lost and damaged. Plaintiff then requested defendant to pay P&G for the value of the lost and damaged items. When defendant failed to pay for the loss, plaintiff paid P&G, took an assignment of the claim for those damages and sued defendant asserting P&G's claims under the Carmack Amendment. Following discovery, plaintiff moved for summary judgment on its Carmack Amendment claim.

The court held that plaintiff had established a *prima facie* case under the Carmack Amendment: P&G delivered the shipment to the defendant in good condition, some of the cargo was stolen while in defendant's possession; and the rest was delivered with a broken seal. The only issue was the amount of the recovery. Plaintiff claimed that it should be able to recover the full value of the shipment while defendant, based on language in the bill of lading, claimed that it was entitled to an offset for the salvage value of the shipment against the full value of that shipment.

The court held that the general rule on damages under the Carmack Amendment was "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." The Carmack Amendment also permits a carrier to limit its liability for damages in a written agreement between the carrier and the shipper if the value would be deemed reasonable under the circumstances surrounding the transportation. A carrier must also provide to the shipper, on the request of the shipper, a written or electronic copy of the rate, classification, rules, and practices upon which any rate applicable to the shipment is based.

The court then laid out the four-step test for limiting liability. The carrier must:

(1) maintain a tariff within the prescribed guidelines of the Interstate Commerce Commission;

(2) give the shipper a reasonable opportunity to choose between two or more levels of liability;

(3) obtain the shipper's written agreement as to the choice of liability; and

(4) issue a receipt or bill of lading prior to moving the shipment.

Defendant conceded that it did not comply with the four-part test in that, among other things, it did not offer the shipper a choice of rates. Defendant, however, argued that provisions in the bill of lading for the shipment limited damages recoverable to the value of shipment less salvage value, and that the broker/carrier agreement allowed special instructions in the bill of lading to override that agreement. The court found that the provisions of bill of lading relied upon by defendant were not special instructions, but limitations on liability not subject to the exception permitted in the broker/carrier agreement, and which precluded defendant from enforcing the salvage provisions of the bill of lading. The court also noted that plaintiff had issued a rate load confirmation to defendant for the load, which contained the rate to be charged and reaffirmed the provisions of the agreement, including the right of P&G to reject the whole load if it was delivered with a broken seal. The court found that if defendant was allowed to enforce the damage limitations found in the bill of lading it would result in a windfall, because defendant had already agreed to handle the shipment under the provision of the agreement before it even received the bill of lading.

Cook v. New York Moving & Storage, Inc., 2020 US Dist. LEXIS 179954 (D. Utah), looked at whether the defendant effectively limited its liability in the transportation of household goods from New York City to Utah. Prior to the move, defendant sent plaintiff a binding estimate for the move that contained two options for insurance coverage, basic and enhanced. The enhanced option cost more. Plaintiff elected the basic option. On the day that plaintiff's goods were picked up, defendant presented her with a bill of lading that, once again, contained two options for

insurance coverage and informed plaintiff that the basic coverage was often insufficient to cover the full value of the goods being transported. Plaintiff signed that portion of the bill of lading calling for basic coverage. Finally, when the goods were scheduled to be transported from New York to Utah after being placed in storage, defendant once again offered plaintiff the opportunity to purchase enhanced insurance coverage. Once again, plaintiff declined, telling the defendant that she could not afford the increased cost. When the shipment arrived in Utah, some items were damaged and other items were missing. Plaintiff filed an action in Utah to recover damages. Defendant argued that it had effectively limited its liability for such damages. The court agreed that defendant had met the heightened requirements for limiting its liability in the household goods context.

NOTICE OF CLAIM

In *Thompson Tractor Co. v. Daily Express*, 2020 US Dist. LEXIS 191664 (C.D. Ill.), plaintiff agreed to deliver an industry-grade generator manufactured by Caterpillar to a purchaser in Alabama. Plaintiff hired defendant to handle the shipment. The generator was picked up by an employee of defendant in Peoria, Illinois in good condition but was damaged when it reached the purchaser in Alabama. Plaintiff sued defendant in the Central District of Illinois alleging claims under the Carmack Amendment and various state law claims. Defendant move to dismiss the complaint based on, among other things, plaintiff's failure to allege that it had filed a written notice of claim for the damage. The standard bill of lading, of course, requires notice to the carrier within 90 days.

The court denied the motion, finding that the Carmack Amendment itself neither requires a written notice of claim nor imposes any other restrictions on the form of notice required. The court held that any such notice requirement had to be set forth in the bill of lading for the shipment, and that enforcement of any such notice requirement was an issue of contract law. The bill of lading in this case though, contained a different requirement—"all damage MUST be noted on BOL prior to truck leaving…Damage not noted on BOL is assumed to have happened after delivery and will not be the responsibility of Caterpillar or its transportation company." The court went on to hold that, absent any clear requirement that a written notice of claim be presented, satisfaction of that prerequisite did not have to be pled in the Complaint.

The issue in *Secura Insurance v. Old Dominion Freight Line*, 2020 US Dist. LEXIS 49737 (W.D. Ky.), was whether the carrier received timely notice of damage to a shipment. Plaintiff's insured retained defendant to transport windows from Brooklyn, New York to Louisville, Kentucky. Damage to the windows was discovered the day they were delivered. That same date, the plaintiff's insured sent an email to defendant informing the defendant that the shipment had arrived with some damage and that the damage would be documented by pictures. Defendant responded that it was not liable for damage on the shipment because it was a shipper load and off-load. Plaintiff's insured then made a claim to plaintiff which paid for the damage. Thirteen months after the delivery, plaintiff sent a letter to defendant requesting payment of the claim. Defendant denied the claim as untimely because its tariff that covered the shipment required any such claim to be filed within nine months of the delivery date. Plaintiff sued. Defendant moved for summary judgment on the basis of untimely notice.

The court noted that regulations promulgated pursuant to the authority of the Secretary of Transportation provide the minimum filing requirements for a claim of loss or damage to cargo. Those requirements require that a notice of claim be filed within the time limit specified in the bill of lading, and that a notice of claim must contain facts sufficient to identify the baggage or shipment, assert liability for the alleged loss, damage, injury or delay, and make a claim for a specified or determinable amount of money. If the claim does not comply with the regulatory requirements, it is precluded. Applying the regulatory requirements to plaintiff's insured's email on the date of delivery, the court found the email to be insufficient to constitute a notice of claim because it did not contain any estimate of the damages incurred. Plaintiff argued that the email was sufficient to constitute notice of the claim and that its subsequent communication was sufficient to satisfy the requirements of the regulation. The court held that there was no support in the regulations that an insufficient notice of claim could act as a placeholder subject to subsequent supplementation, and granted defendant's motion for summary judgment.

ACT OF THE SHIPPER DEFENSE

J&N Agency LLC v. National Superior Express, Ltd., 2020 US Dist. LEXIS 210080 (D. Ariz.), addressed the frequently asked question of whether a carrier can avoid liability for a

damaged shipment because the shipper improperly loaded the shipment. Plaintiff leased an industrial printer from a company in New Jersey and arranged, through a broker, for one company to package the printer for shipping, and for defendant to handle the shipment. The printer was loaded on defendant's truck in New Jersey but was damaged when it reached Arizona.

Plaintiff sued defendant to recover damages resulting from the damage to the printer. The court held that to state a *prima facie* case under the Carmack Amendment, a shipper had to show that (1) the goods were delivered to the carrier in good condition, (2) the goods arrived damaged and (3) the amount of damages incurred. The court found that plaintiff had proved a *prima facie* case and held that the burden was then on the defendant carrier to prove that it was free from negligence in the transport of the shipment and to prove the elements of one of the available defenses under the Carmack Amendment.

In the instant case, defendant relied on the "Act of the Shipper Defense," which alleges that the act of the shipper, rather than the carrier, was the cause of the damage, specifically, in this case, the shipper had not properly loaded the goods into defendant's truck. The court held that when improper loading is alleged, the inquiry collapsed from two steps into one: which party is responsible for avoiding negligence? When a shipper loads property onto the carrier's motor vehicle, a shipper is liable for latent and concealed defects, while the carrier, such as defendant, remains liable for any apparent defect. In maintaining carrier liability for apparent defects, carriers retain responsibility when the carrier "had the last clear chance to avoid the accident." Defendant argued that plaintiff had failed to adequately secure the shipment in the trailer and should be responsible for the damage to the shipment. The court, however, found that if that was the case, any defect in loading would have been apparent to the defendant and should have been corrected by the defendant. The court granted plaintiff summary judgment on its Carmack Amendment claim.

The issue in *Seinfeld v. Allied Van Lines, Inc.*, 2020 US Dist. LEXIS 54017 (N.D. Tex.), was whether the plaintiff had sufficiently alleged the damages allegedly suffered in the move of household goods in interstate commerce so as to avoid dismissal of his claims. Plaintiff contracted with defendant for the transportation of household goods from Texas to Florida. After the move, plaintiff filed a claim with defendant claiming that the furniture for the entire house was, damaged, missing, or destroyed. In subsequent mailings to defendant, plaintiff provided the original cost of 53 items allegedly damaged or destroyed, totaling $449,500. The list did not give the original price of 17 additional items or the cost to repair the 53 original items. After defendant refused to pay for the damage to the items, plaintiffs filed an action in Texas state court. Defendant removed the action to federal court and moved to dismiss the complaint.

The court found that the list of damaged property that plaintiffs submitted to defendant as part of its claim was sufficiently specific to meet the intent of the Carmack Amendment: (1) the list specifically identified lost or damaged property; (2) the amount claimed closely paralleled the amount sought in the complaint; and (3) the plaintiffs were not "hiding the ball," but were properly advising the defendant of their claim. The court rejected the defendant's argument that the lists were insufficient to constitute valid notice.

INTERMODAL

The seller in *Progressive Rail v. CSX Transportation*, 2020 US App. LEXIS 37639 (6th Cir.), retained an international freight forwarder to handle all necessary transportation arrangements to move two transformers from Germany to Kentucky. The ocean carrier issued a bill of lading, pursuant to which the shipper agreed not to sue downstream subcontractors of the ocean carrier for any problems arising out of the transport from Germany to Kentucky. The shipment was delivered to the Port of Baltimore, but was damaged during rail transportation from Baltimore to Kentucky by the defendant.

The court set out the conditions under which a maritime contract may set the liability rules for an entire trip, including any land-leg part of the trip, and may exempt downstream subcontractors: (1) the contract must amount to a "through bill of lading," which covers "both the ocean and inland portions of the transport in a single document" (citing *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 US 89 [2010]); and (2) the contract must include a "Himalaya Clause," which extends liability protection to all subcontractors along the way. In the court's analysis, the ocean carrier's bill of lading was through bill: In the contract's top-right corner, it refers to the "Multimodal Transport" covered by the bill, hence contemplating sea

and land legs. The contract defined multimodal transport to happen when "the Carrier has indicated a place of receipt and/or a place of delivery on the front hereof in the relevant spaces." The bill of lading indicated that Bremerhaven, Germany would be the port of loading, Baltimore, Maryland the port of discharge, and Ghent, Kentucky the "Place of Delivery." By its terms, then, the contract gave the parties reason to anticipate that a land carrier's services would be necessary for the contract's performance.

The court found further that the ocean carrier's bill of lading did contain a "Himalaya Clause," exempting the downstream rail carrier from liability. On its face, the bill of lading allowed the ocean carrier to "sub-contract" any part of the carriage, including by "rail...transport operators" as well as by "any independent contractors, servants or agents employed by the Carrier in performance of the Carriage and any direct or indirect sub-contractors, servants or agents thereof, whether in direct contractual privity with the Carrier or not." The bill of lading provided further that every subcontractor was entitled to the "benefit of all provisions...benefiting the Carrier," including the covenant not to sue. The bill of lading provided expressly that the "merchants," including the shipper and the consignee, agreed that "no claim or allegation shall be made against any Sub-Contractor whatsoever, whether directly or indirectly, in connection with the Goods or the Carriage of the Goods." Accordingly, summary judgment was granted in favor of CSX.

We also reported previously on *Atlantic Specialty Insurance Co. v. Digit Dirt Worx, Inc.*, 2018 US Dist. LEXIS 207066 (S.D. Fla.), in which the cargo was damaged, and the shipper's insurer paid the claim and then pursued a subrogation claim against the motor carrier. The district court held that the plaintiff had established a *prima facie* case of liability under the Carmack Amendment. The defendant attempted to avoid liability by arguing that it was not negligent and that the damage was caused by the act of the shipper. The court held, however, that the defendant had not introduced evidence in admissible form demonstrating either defense. Because the defendant had the burden of proof on its affirmative defense, the court granted summary judgment to the plaintiff.

On appeal, the Eleventh Circuit held on November 5, 2019 (793 Fed. Appx. 896) that the district court abused its discretion on summary judgment by considering new evidence raised by the insurer in its reply brief and denying the carrier an opportunity to respond. The circuit court also found that the broker retained by the shipper to hire the motor carrier had provided the terms of shipment through a document titled "Rate Confirmation," which was signed by Digit, and which listed, among other things, an "insurance value" of $100,000. Accordingly, there was a material issue of fact as to whether the broker, as the shipper's agent, intended to limit the carrier's liability in order to obtain a reduced shipping rate. The court vacated the trial court's grant of summary judgment and remanded.

Alan Peterman

4. Insurance Coverage Disputes

The line separating coverage provided under a general liability policy and that provided under an auto liability policy is clear enough in theory, but is not always easy to trace. In *Carolina Casualty Insurance Co. v. Burlington Ins. Co.*, 951 F.3d 1199, the Tenth Circuit Court of Appeals began its analysis with the assertion that in any given scenario only one of the two policies would apply. To be sure, there are cases in which both policies could apply—at least to the extent of each insurer having a duty to defend—but the assertion that only one policy applies works pretty well most of the time. And yet, some scenarios lead to head-scratching uncertainty.

The insured trucker, R.W. Trucking, headquartered in Wyoming, pumps and transports fracking water away from oil well sites. A company driver, Jason Metz, lit a cigarette at one such site in New Mexico as fracking water was being pumped into his vehicle, causing oil fumes to ignite. The explosion injured one of the well's employees who sued Metz, R.W., and Devon Energy, the well-operator, for damages.

The initial complaint alleged that Metz had been negligent and that R.W. had negligently hired, trained and supervised Metz. An amended complaint added a count of vicarious liability against R.W. Burlington, R.W.'s GL carrier, assumed the defense under reservation, and tendered to Carolina, the auto carrier. Before the coverage issue was resolved, the two insurers settled the tort claim, reserving the right to seek indemnification from one another. In the action between the insurers that followed, the district court ruled that the loss was covered under the GL policy; however, since Carolina had voluntarily paid a share of the

settlement, it was not entitled to reimbursement under Wyoming law. On reargument, it also required Carolina to pay for a portion of the defense fees.

Taking on the duty to defend first, the Tenth Circuit observed that unlike Wyoming courts, New Mexico courts will consider extrinsic facts (known but unpleaded) when weighing an insurer's duty to defend. The court concluded that in this case, Carolina had no duty to defend under either view. It further concluded that the allegations in the complaint did not rationally fall within the Carolina policy's coverage, even though an auto was tangentially involved. "In determining whether an injury arose out of use [of an auto], the evidence must demonstrate that it was the natural and reasonable incident or consequence of the use of an insured vehicle, the causal connection being reasonably apparent." (The "natural consequences" test.) The factual allegations, in the court's view, did not support such a reading. There was undeniably an auto at the scene, but the complaint did not connect the auto to the accident.

The court went on to hold that even under the New Mexico approach—which would permit consideration of external evidence—it was the lighting of the cigarette, not the use of the auto which triggered the accident. The outside evidence was three communications that established that Metz was pumping fracking water into his trailer at the time of the explosion. The loss, though, resulted from the lighting of the cigarette and was not a natural and reasonable consequence of any use of the auto. Moreover, Carolina's policy excluded losses arising out of the use of mobile equipment and the pump for the definition of "mobile equipment." There was, therefore, no proper basis for the district court to require Carolina to pay defense costs. And, since the duty to defend is broader than the duty to indemnify, the district court was correct that Carolina had no duty to indemnify the insured. Burlington, in the court's view, clearly did have an obligation to defend and indemnify the insured, and its auto exclusion was not relevant precisely for the same reason—the loss was not the natural and reasonable incident or consequence of the use of the vehicle.

Finally, the court held that the district court was wrong in concluding that Carolina had paid as a volunteer. Wyoming has a strong public policy favoring settlement, and here the insurers protected their rights to seek reimbursement. Also, Wyoming courts have made clear that one is not a volunteer if payment was made in good faith that it is necessary for his protection. Accordingly, Carolina was entitled to reimbursement of its share of the settlement.

The insured defendant in *North Star Mutual Insurance v. Ackerman*, 2020 ND 73, was driving his rig when a wheelbarrow fell out of his truck and onto the interstate. Another vehicle swerved to avoid the wheelbarrow, crossed the median, and struck a third vehicle coming in the opposite direction, severely injuring the driver. North Star, which issued a general liability policy to Ackerman, argued that the loss arose from the use of an auto, and was therefore excluded.

The Supreme Court of North Dakota, however, agreed with the lower court that the loss was also caused by the fact that the wheelbarrow was left on the road for some time before the loss and Ackerman had failed to remove it or warn other drivers of its presence. These were concurrent, non-vehicle related causes of the accident, bringing it within the coverage of the general liability policy. The decision makes no reference to any auto coverage, and we are unaware of whether there was auto coverage, but this case presents a scenario in which both auto coverage and GL (with its auto exclusion) apply to the same loss, in contrast to the either/or, purely binary approach that the Tenth Circuit had suggested in *Carolina v. Burlington*.

The appellate court in *Farm Family Casualty Insurance Co. v. Henderson*, 179 A.D.3d 1193, 116 N.Y.S.3d 771 (3d Dep't), made two unremarkable holdings—(1) that the unloading of an auto constituted a "use" of that auto, and (2) that the named insured was entitled to a defense when his son was injured while the two of them were unloading a covered trailer. The court, however, added that the employment status of the son, and of a third individual who was also unloading the trailer, was "not germane," since they were unloading the trailer with the named insured's permission, and coverage for the named insured was mandated under the ownership liability statute, New York Vehicle and Traffic Law § 388 (4). Significantly, the court dropped in a footnote that Farm Family waived its right to deny coverage on the basis of the policy's employer's liability or fellow employee exclusion because it failed to rely upon those exclusions in its disclaimer letters or to mention those exclusions in its declaratory judgment complaint.

The subject loss in *Penn-Star Insurance Co. v. Zenith Insurance Co.*, 436 F. Supp. 3d 1367 (E.D. Cal.), involved the collision of a farm tractor owned by the insured and

a passenger automobile. The general liability policy at issue excluded coverage for bodily injury "arising out of the ownership, maintenance, or use by any person or entrustment to others, of any…'auto.'" The definition of "auto" excluded "mobile equipment," including "farm equipment," but with an exception for "any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged." The court was clearly frustrated by the fact that an ordinary lay insured would need to sift through the 50-page policy to cross-reference the exclusion and the definitions of "auto" and "mobile equipment," and that they would then need to research the relevant statutes to determine whether the tractor at issue was subject to some financial responsibility law. (It clearly did not help Penn-Star's cause that the consultant it hired concluded that the tractor was not subject to such law.) Overall, the court found that Penn-Star's auto exclusion was not sufficiently conspicuous and clear, and was therefore unenforceable under California law.

In *Allied Premier Insurance v. United Financial Casualty Co.*, 2019 US Dist. LEXIS 226772 (C.D. Cal. Dec. 30, 2019), Allied settled a bodily injury lawsuit against its insured and then sought reimbursement from UFCC. The UFCC policy had lapsed prior to the date of loss. The policy, though, had been certified to the State of California as proof of the insured motor carrier's financial responsibility, and, although UFCC submitted a Notice of Cancellation of Insurance to the California DMV when the policy lapsed, the DMV returned the Notice of Cancellation to UFCC with a Notice of Incomplete Filing, indicating that the policy number or effective date on the Notice of Cancellation was not on file with the DMV. On the date of loss, the Allied policy and Allied's DMV filing were both in effect.

The court found that UFCC's Notice of Cancellation was not "actually received" by the DMV, since it lacked either a policy number or an effective date, and accordingly, UFCC's certificate of insurance was still in effect at the time of the loss. The court went further, however, and (based on little precedent beyond an unpublished opinion of the California court of appeals) held that the invalidity of the Notice of Cancellation meant that UFCC's policy itself remained in full force on the date of loss. Accordingly, the court rejected UFCC's argument that its exposure was only that of a surety which could be triggered only (1) if there was a judgment against the insured, and (2) if there was not sufficient coverage from another source. Since both policies described the accident vehicle as an owned auto, the court found that coverage was co-primary and that Allied was entitled to reimbursement of half the amount paid in the settlement.

The policy at issue in *American Hallmark Insurance Co. v. Bohren Logistics*, 2020 US Dist. LEXIS 37358 (N.D. Ind.), included the standard provision that the insurer's duty to defend exists until the coverage limit "has been exhausted by payment of judgments or settlements." The insurer argued that its duty to defend should terminate once it was permitted to pay its policy limits into court through an interpleader action, even though the liability of the insured and the respective damages of multiple claimants would not have been decided by then and the lawsuit would continue. The court, predicting Indiana law, held that an unconditional tender of the policy limits, which would preclude the insurer from recovering any leftover funds if the result for the insured was more favorable than expected, would relieve the insurer of any further duty to defend.

The issue in *American Inter-Fidelity Corp. v. Hodge*, 2020 US Dist. LEXIS 50508 (N.D. Ill.), which arises in many cases, was whether the injured occupant of a truck was an "employee" of the named insured motor carrier, thus precluding liability coverage for the insured. The opinion is notable for the court's view that, absent express language, the policy would not be read as incorporating the definition of "employee" in the state's motor carrier safety act. Rather, the court would analyze the issue using common law criteria.

The cargo policy at issue in *Haymore v. Shelter General Insurance Co.*, 2020 US Dist. LEXIS 54887 (S.D. Miss.), listed nine covered perils and six excluded perils. Theft was not on either list; accordingly, the court held that the policy was ambiguous and the insured was entitled to coverage when his cargo was stolen. (Notably, the insurer failed to provide evidence that the insured had rejected theft coverage in his application; the court indicated that it would have considered such evidence in attempting to resolve the policy's ambiguity.) The court did conclude, though, that the insurer had a legitimate or arguable reason to deny the claim, and was therefore entitled to summary judgment on plaintiff's claim for punitive damages.

In *United Financial Casualty Co. v. Milton Hardware*, 2020 US Dist. LEXIS 56156 (S.D. W. Va.), employees

of UFCC's named insured Milton Hardware, LLC, were doing a construction job at Rodney Perry's home. At one point, the insured's owner gave Perry, the homeowner, permission to move a company truck which was in his way: as Perry maneuvered the truck he struck a Milton Hardware employee. The Fourth Circuit had previously held that UFCC could not deny coverage to Perry on the grounds of the policy's employer's liability or workers' compensation exclusions, since West Virginia Code § 33-6-31(a) mandated coverage for a permissive user of the named insured's truck. On remand, UFCC argued that its exposure should be limited to West Virginia's $25,000 statutory minimum insurance amounts. The district court agreed that UFCC's exclusions could be enforced above the statutory minimums.

The sole owner and operator of the plaintiff trucking company in *Ram Express, LLC v. Progressive Commercial Casualty Co.*, 303 Ore. App. 211 (Ore. Ct. App.), also owned and operated an auto dealership. The auto dealership won a truck at a salvage auction on February 6 and paid for it on March 24. On June 17, though, it was the trucking company, not the dealership, which completed a "purchase order" for the truck. When the truck was destroyed by fire the next day, Progressive, which insured the trucking company but not the dealership, denied physical damage coverage, arguing that Ram Express had not notified Progressive to add the vehicle to the policy within 30 days of acquisition. The court, however, noted that the corporate entity Ram Express, and not its owner, was the named insured on the Progressive policy, and found that Ram Express had not acquired any legal rights in the vehicle prior to June 17. Accordingly, the loss took place within thirty days of acquisition.

In *Markel Insurance Co. v. Rau*, 954 F.3d 1012 (7th Cir.), a United Emergency Medical Services ambulance crashed into a passenger vehicle. The ambulance was not listed as a covered auto on the Markel policy issued to United. The insured argued that it was nevertheless entitled to coverage under the policy because before the crash United had sent Markel's agent an email requesting that the vehicle be added to the policy. The district court and the court of appeals agreed with Markel that even if United had sent an email, and the agent had received it, Markel never endorsed the change, which the policy required, and that Markel therefore had no duty to defend or indemnify United or its driver with respect to the claimant's suit.

The defendant truck driver in the declaratory judgment action *Great West Casualty Co. v. Decker*, 957 F.3d 910 (8th Cir.), had been injured when, while standing on the ground, he was struck by two falling bales of hay which had been loaded onto his truck by the customer, Michael Selle. The district court had found that Great West properly denied no-fault benefits because its policy limitation mirrored Minnesota Statute § 656.43, subd. 3, which expressly permits insurers to deny no-fault benefits for loading/unloading accidents unless the person injured was "occupying, entering into or alighting from [the vehicle]." Decker then switched gears and argued that the customer, Selle, was an insured under the liability coverage of the Great West policy; Great West declined coverage and Decker and Selle responded with a Miller-Shugart agreement in which the customer agreed that it was liable and assigned its rights to Decker. Great West sought a declaration that it had no coverage, and the district court agreed, finding that Great West was permitted to exclude from coverage non-employees engaged in loading a covered auto (a standard ISO exclusion, as well).

On appeal, Decker argued that exclusion for non-employees moving property to or from a covered auto was contrary to Minnesota's public policy. The Eighth Circuit acknowledged that Minnesota law requires certain insureds to be entitled to liability coverage. However, the Minnesota statutes do not prevent an insurer from limiting the scope of the coverage with respect to entities other than the named insured or family members. Contrast this decision with *UFCC v. Milton* discussed earlier.

In *Westfield Insurance Co. v. Advance Auto Transport*, 457 F. Supp.3d 715 (D. Minn.), a driveaway service was involved in an accident while transporting a vehicle to the purchaser; the driveaway service sought liability coverage under the Westfield garage policy issued to one of the companies in the chain of sellers. The policy excluded coverage for a permissive user of a covered auto while "working in" the "automobile business." Westfield argued that the driveaway service was, at the time of the loss, working in the automobile business of the specific entity (not Westfield's insured) which installed the packing unit onto the chassis and then hired the driveaway service to deliver the now-finished vehicle. The court agreed that "working in" an automobile business includes activities that are an integral and necessary part of the automobile business, which in turn include transporting a vehicle to the buyer.

The rental agreement at issue in *Penske Truck Leasing Co. v. Safeco Insurance Co.*, 457 F. Supp. 3d 148 (D. Conn.), provided, in relevant part:

> If Customer elects Penske Liability Coverage, Penske agrees to provide liability protection for Customer and any Authorized Operator, and no others, subject to any limitations herein, *in accordance with the standard provisions of a basic automobile liability insurance policy as required in the jurisdiction in which the Vehicle is operated*, against liability for bodily injury, including death, and property damage arising from use of Vehicle as permitted by the Rental Agreement, with limits as required by the state financial responsibility law or other applicable statute. (Emphasis added.)

Penske argued that the rental agreement required it to provide liability coverage up to $20,000 for bodily injury to one person, in accordance with Connecticut Statutes Section 14-112 and Connecticut Agencies Regulations § 38a-334-5(e). Safeco, which issued an underinsured motorist policy to the person injured by a rented Penske truck, argued that the applicable limits were those found in the FMCSRs, 49 C.F.R. Part 387, as incorporated by the State of Connecticut. The court, however, focused on the language in the Penske rental agreement which limited its insurance obligation to "standard provisions of a basic automobile liability insurance policy…" Notably, the court refused to impose on Penske the burden of determining whether its customer was a motor carrier operating a commercial motor vehicle, who might come within the federal financial responsibility regulations as incorporated by Connecticut. This case should be read in conjunction with the *Rafanello* decision below—which reached the opposite conclusion—and *New York Marine v. Penske*, also discussed below, which apparently would have found Penske liable for the higher limits if the lessee had been a motor carrier.

Connecticut's adoption of FMCSRs was up for discussion again in *Veilleux v. Progressive Northwestern Insurance Co.*, 2020 US Dist. LEXIS 111016 (D. Conn.). (This firm worked on the case with counsel for Progressive.) As a condition of settlement between the parties, the district court agreed to vacate its earlier ruling on that issue which we criticized in an earlier update.

New Jersey's own adoption of FMCSRs was a decisive factor in *Rafanello v. Taylor-Esquivel*, 2020 N.J. Super. LEXIS 232 (App. Div.). In that case, American Millennium argued that its coverage, which ordinarily provided liability coverage up to $1 million, was limited to $35,000 under a step-down provision which reduced coverage where a loss involved a driver who was not listed on the policy issued to a motor carrier. The court, however, found that New Jersey's incorporation of the FMCSRs, including the financial responsibility regulations, mandated at least $750,000 of liability insurance coverage for commercial motor vehicles operated in intrastate commerce. (Note: *Rafanello* and *Penske* are also discussed in Section 5.)

The Penske rental agreement provisions were also at issue in *New York Marine & General Insurance Co. v. Penske Truck Leasing Co., L.P.*, 457 F. Supp. 3d 912 (D. Nev.). The District of Nevada found that Penske's intent to limit its insurance obligation to the limits of the "standard provisions of a basic automobile liability insurance policy" was clear, unambiguous, and binding on the renter. Notably, though, the Nevada court took pains to point out that the renter itself was not a motor carrier, and was therefore not subject to the financial responsibility regulations governing motor carriers under either Nevada or federal law.

The bar is often set high for an insurer which seeks to deny coverage because of the insured's lack of cooperation. Under Illinois law, as explicated in *National Continental Insurance Co. v. Aiazbekov*, 818 Fed. Appx. 468 (6th Cir.), the insurer must demonstrate that it exercised due diligence in attempting to secure the insured's cooperation, and that the non-cooperation prejudiced the insurer's ability to defend claims against the insured.

In that case, retained defense counsel began his representation of the insured driver in September 2017, but the driver stopped responding to counsel's communications in January 2018. Over the next several months, counsel made continued efforts to contact the driver through US mail, certified mail, telephone, and text message. He asked for assistance tracking the driver down from an acquaintance who had been helping the driver during the suit, but that acquaintance reported that the driver had not returned his phone calls, that other members of the community had not heard from him, and that the driver was "out of reach." Counsel then hired a private investigator, who conducted a computer search for property records, court records, marriage records, prison records, bankruptcy records, and social media accounts associated with the driver. The search returned

two possible residences, and an investigator went to those addresses. At one, the current resident had moved in six months before and did not know the driver, although he did occasionally receive mail addressed to him; the property manager also did not recognize the driver's name. At the other residence, a "former friend" of the driver said that he had never lived at the address and that he had "moved back to Asia or Russia" months before. Based on the totality of the facts, the court held that defense counsel employed every available means to contact the driver and exhausted every lead that was generated through the investigation into his whereabouts, and accordingly National Continental had satisfied the diligence element as a matter of law.

The court of appeals held further that National Continental's defense "was plainly and substantially prejudiced" by a key witness's absence. Defense counsel moved to withdraw under the rules of professional conduct (a motion the state court granted) precisely because the driver's complete absence had made counsel's representation "unreasonably difficult." The driver's absence led to a default judgment without any defense either on comparative fault or on damages; the driver might have been able to provide favorable testimony, at least on the injuries that the claimant appeared to suffer at the time of the accident. (A contemporaneous police report stated that the claimant "reported no injuries" after the accident.) The Eighth Circuit held that, by hindering his attorney's ability to defend him to the point where the state court granted counsel's request to withdraw, the driver had "handicapped" National Continental's defense to the point where it was entitled to enforce the cooperation provision.

Finally, the majority of the court found that National Continental had commenced its declaratory judgment action within a reasonable time. The driver disappeared around January 2018; defense counsel investigated for months to confirm that the driver had abandoned the case, moved to withdraw on May 22, and withdrew on June 11; National Continental filed the declaratory judgment action on June 29, and the state court granted its final judgment in the underlying case on October 1. The dissent did not dispute that National Continental had made proper efforts to locate the driver, and that his absence had prejudiced the defense, but would have estopped National Continental from denying coverage because it did not bring its declaratory judgment action until after defense counsel had withdrawn, rather than before.

The policy at issue in *Jeansonne v. Ohio Security Insurance Co.*, 2020 La. App. LEXIS 1188 (La. Ct. App.) provided, by endorsement, that liability coverage was available for losses arising out of the use of a "rental vehicle." The court found that the pickup truck involved in the subject accident was not a "rental vehicle," but rather a "loaner vehicle," defined in La.R.S. 22:1291(B)(1) as "any vehicle which is provided to an insured driver by a vehicle service or sales dealer for the purpose of allowing the driver to demonstrate or test-drive the vehicle."

The policy also included as an insured a permissive user of "any auto" owned, hired, or borrowed by the named insured. Since the pickup truck had been borrowed from the dealer by the 51% owner/managing member of the corporate named insured, and since there was evidence that he had provided the dealer with a copy of an Ohio Security insurance card issued to the corporate named insured, the court found a material question of fact as to whether the corporate named insured itself had borrowed the vehicle.

In *TeamOne Contract Services v. American Guarantee & Liability Insurance Co.*, 2020 US Dist. LEXIS 149359 (N.D. Ga.), the insurer for United Parcel Service picked up the defense for the staffing service which provided the UPS driver involved in the subject auto accident. The staffing service's own insurer denied coverage, resulting in a breach of contract action by the staffing service against its insurer. The insurer argued that the staffing service could not prove damages, because it was already being defended by UPS's insurer. Analyzing the limitations of the policy and the staffing agreement, though, the court found uncertainty as to whether UPS's insurer would cover all of the staffing services defense costs going forward. This uncertainty was enough for the breach of contract complaint to survive a motion to dismiss.

Thomas v. Auto-Owners Insurance Co., 2020 US Dist. LEXIS 148861 (M.D. Ala.), once again visited the scenario in which a liability insurer rejected an offer to settle within its policy limits and the insured ended up on the short end of an excess judgment ($3,800,000). The district court, following its own precedent in *Franklin v. National General Assurance Co.*, No. 2:13-CV-103-WKW, 2015 WL 350633 (M.D. Ala. Jan. 23, 2015), rejected the insurer's argument that it could avoid a claim of bad faith failure to settle if it had an arguable or debatable reason to refuse the settlement. Rather, under a "totality of circumstances" approach, the

court found a material question of fact as to whether the insurer had acted in bad faith.

A member of the named insured limited liability company in *Acuity v. Extreme Lawns*, 2020 US Dist. LEXIS 149485 (D. Minn.), purchased a vehicle in which he was involved in an accident while on company business. The policy provided coverage for a "nonowned auto," defined as follows:

> "Nonowned Auto" means only those autos you do not own, lease, hire, rent, or borrow that are used in connection with your business. This includes autos owned by your employees,...members (if you are a limited liability company) or members of their households but only while used in your business.

Acuity argued that the vehicle did not qualify as a covered nonowned auto, on the theory that the named insured LLC had borrowed the vehicle. The court, however, found that the second sentence of the definition informed the first sentence, and that an auto owned by a member of the LLC while used in the LLC's business should not be regarded as having been borrowed by the LLC.

The defendant in *Milford Casualty Insurance Co. v. Meeks*, 2020 US Dist. LEXIS 162692 (S.D. Ga.), was the first to collide with the tractor-trailer insured by Milford which had overturned on the highway. Meeks introduced evidence that six minutes and twelve seconds passed between his initial 911 call and a second collision, and that another one minute and twenty-five seconds passed between the second collision and a third collision. Given that the policy definition of an "accident" included "continuous or repeated exposure to the same conditions," and the policy's "Limit of Insurance" provision that "repeated exposure" to the same conditions "will be considered as resulting from one 'accident,'" the court found that only one "accident" had occurred and that Milford was exposed only for one $1 million limit. Since Milford had paid its limit to settle the claims of one or more parties other than Meeks, Meeks was out of luck.

In *Canal Indemnity Co. v. Caljet*, 2020 US Dist. LEXIS 178107 (S.D. Tex.), Canal issued both a motor vehicle liability policy and a general liability policy to Coastal, which was engaged in transporting gasoline to various customers including Conoco, which later became ConocoPhillips. Both policies provided additional insured coverage for any entity promised such coverage by Coastal (which included ConocoPhillips), but both policies also excluded coverage for bodily injury arising from a release of pollutants. A Coastal driver, who became ill and later died from inhaling gasoline fumes, sued ConocoPhillips. The complaint alleged that the driver was "exposed to benzene through inhalation and dermal absorption of... gasoline." Accordingly, the court found that, even were benzene was deemed to be a pollutant in this situation, the bodily injury was allegedly caused by direct exposure to gasoline, not by the discharge, dispersal, seepage, migration, release, or escape of benzene—as required by the pollution exclusions.

Section 11580.9(h) of the California Insurance Code provides that, when two or more automobile liability policies apply to a power unit and an attached trailer, and one policy affords coverage to a named insured in the business of a trucker, then that policy is primary when the rig is operated in the business of that trucker. In *Hallmark Specialty Insurance Co. v. Continental Insurance Co.*, 2020 US Dist. LEXIS 202076 (N.D. Cal.), Hallmark issued a true excess policy over a primary policy issued by Northland to a trucker which owned the tractor, while Continental issued a primary-type policy (with an excess "other insurance" clause) to the owner of the trailer which was not a trucker. The court held that the priority established by Section 11580.9(h) was unaffected by whether the policy issued to the trucker was a primary or true excess policy. Accordingly, Hallmark's coverage had to be exhausted before Continental's coverage was triggered.

Towing services which remove wrecked vehicles from accident sites often attempt to recover their (sometimes outrageous) fees from the insurers which provide liability coverage for the disabled vehicles. In *Ferra Automotive Services v. Certain Underwriters at Lloyd's London Syndicate #2001 Aml*, 2020 US Dist. LEXIS 208623 (W.D. Pa.), Lloyd's insured B&T, the operator of a tractor-trailer involved in an accident. The rig was involved in an accident, and Ferra was assigned by the Pennsylvania State Police to tow away the wreck.

Ferra claimed that it was a third-party beneficiary of the Lloyd's policy and was entitled to payment from Lloyd's of the balance owed for the towing, recovery, removal, and cleanup of the accident scene, together with storage costs. The court rejected this argument, as there was no evidence in the policy of a clear intent on the part of Lloyd's or B&T to make Ferra a beneficiary. Moreover,

although Pennsylvania law gives the towing company the right to compensation from the owner of a towed vehicle, the court found that Lloyd's was not the "owner" under the statutory definition: "A person, other than a lienholder, having the property right in or title to a vehicle. The term includes a person entitled to the use and possession of a vehicle subject to a security interest in another person, but excludes a lessee under a lease not intended as security."

An auger conveyor is a mechanism that uses a rotating helical screw blade, usually within a tube, to move liquid or granular materials. In *State Farm Mutual Automobile Insurance Co. v. Elmore*, 2020 IL 125441 (Ill.), an auger was being used to transfer grain from a grain truck to a transport truck. The claimant was injured when he got too close to the auger blade, and sued his father, who owned the grain truck. State Farm, which insured the grain truck, denied coverage based on an exclusion for damages caused by "the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the [described covered auto]..." The Supreme Court of Illinois, overruling the intermediate appellate court, found that the exclusion was unambiguous, and applied to the auger which was not attached to the covered truck, even though it was not self-powered or motorized. (Power was supplied by connection to a nearby tractor.) The high court also agreed with the trial court that the exclusion was not contrary to Illinois' mandatory coverage requirements, since it applied regardless of whether coverage was sought by a named insured or a permissive user of a covered auto.

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5. MCS-90 *Endorsement*

In most cases a court will not address the MCS-90 endorsement unless it has already concluded that the base policy does not apply. At that point the court might consider whether the MCS-90, nonetheless, requires the insurer to pay any underlying judgment.

Sometimes, though, the MCS-90 issue is resolved while coverage under the policy remains at issue. For example, in *Cutrer v. TWT Transport LLC*, 2020 US Dist. LEXIS 164808 (M.D. La.), claimant was a member of the state DOT's sign crew working on the shoulder of I-90 in Louisiana. A semi-tractor operated by Rodney Dillion approached, pulling a large box structure attached to a four wheel trailer frame. Terry Reed, the Mississippi-based owner of TWT Transport, had repurposed a "communications hut" into a portable, handicapped, mobile bathroom for use by his son, who lived in Texas. TWT carries mobile homes and other large objects; on this day a truck owned personally by Reed was pulling the mobile bathroom through Louisiana on the way to Texas. As the rig approached the exit near where the sign crew was working, the mobile bathroom disconnected from the semi-tractor and headed toward the crew. Cutrer was injured when he dived out of the way.

Cutrer sued various entities—including TWT's insurer, Northland, since Louisiana is a direct action state. Northland denied coverage on the basis that no covered auto was involved in the loss; Cutrer denied that, and argued that, in any event he would be entitled to recover under the filing and MCS-90. The court noted that under controlling precedent, the MCS-90 can apply only if, at the time of the loss, the motor carrier's vehicle is being used in for-hire coverage under the motor carrier's USDOT authority. Here the facts suggested a dual purpose for the trip from Mississippi to Texas: Reed wanted the mobile bathroom brought to his son, but once they arrived in Texas they would be moving mobile homes. The event happened shortly after Hurricane Harvey caused massive destruction in Texas, and Reed was expecting to be very busy moving mobile homes to affected areas.

The court concluded that since TWT was not being paid by anyone to move freight at the time of the loss, its rig was not being operated in for-hire interstate commerce and the MCS-90 could not apply. Northland was granted judgment on the MCS-90 issue. Its summary judgment motion relating to actual policy coverage rig, though, was denied, meaning that the issues relating to actual policy coverage remained to be decided in future proceedings.

Artisan & Truckers Casualty Co. v. Miller, 2020 US Dist. LEXIS 159001 (N.D. Ohio) is the latest decision to follow the USDOT 2005 guidance and rule that an MCS-90 is triggered only by judgment against the named insured motor carrier. The MCS-90 could never apply to a judgment against the broker, Kirsch, even though Kirsch had been identified as an additional insured under the base policy.

The Seventh Circuit Court of Appeals, in *Markel Insurance Co. v. Rau*, 954 F. 3d 1012, rejected claimant's argument that, in the absence of coverage under Markel's fleet policy issued to an ambulance service, the insurer should still have an MCS-90 exposure. The argument, in context, was preposterous as there was no evidence that the ambulance

service was authorized as a carrier by USDOT, nor that it carried any passengers across state lines; plaintiff had not even presented the claim when the case was before the district court.

The court rejected plaintiff's argument, but on a rather narrow basis. The court pointed out that the definition of "commercial vehicle" referred to vehicles weighing 10,001 pounds or more; United's ambulances all weighed under 10,000 pounds. That is all fine and correct, but the court's presentation, and the headnotes in Westlaw and Lexis, may leave a misleading impression. The reader may get the incorrect sense that all commercial vehicles weighing 10,000 pounds *are* subject to USDOT financial security requirements regardless of whether they are used in interstate for-hire commerce. Moreover, as we have pointed out over the years, even when there are USDOT–mandated requirements, it is the motor carrier and not the insurer which must ensure compliance; if the insurer has made no filing and issued no MCS-90 it ought to have no exposure beyond that set out in its base policy.

That brings us to the decision in *Rafanello v. Taylor-Esquivel*, 2020 N.J. Super. LEXIS 232 (App. Div.). Dump truck driver Taylor-Esquivel rear-ended Rafanello's auto, causing him and others bodily injury. The dump truck weighed more than 26,001 pounds; it was a scheduled vehicle on a policy NAB which the employer had secured from American Millennium Insurance. That policy had liability limits of $1 million; it also contained a step-down clause providing that if a non-scheduled driver was operating the vehicle, the limits dropped to $35,000.

Before the policy was bound, the underwriter asked the insured a series of questions with respect to interstate commerce, and NAB responded. In response to the question of whether filings were required, Y/N?, the insured responded "N." The insured provided its USDOT number, and indicated that it had no MC number. It also indicated that company vehicles travel outside New Jersey into Pennsylvania. (There was no indication at that point or later that cargo was actually moved across state lines, but we suppose that was something the insurer could have clarified.) The underwriter testified that the company leaves it up to the motor carrier to know whether they are engaged in interstate commerce. Since there was no MC number and the insured claimed that it did not require a filing, no filing was issued and no MCS-90 was attached to the policy.

Unsatisfied with a $35,000 recovery, plaintiff sought recovery under his uninsured motorist coverage; the UM carrier then challenged the step-down clause, arguing that American Millennium was responsible for the minimum limits required by motor carriers as though there were an MCS-90.

The trial court upheld the step-down clause but the appellate court reversed, pointing to New Jersey's financial responsibility mandate incorporating the federally required limits of $750,000. The court carefully cited various provisions of the statutes and regulations requiring motor carriers operating commercial vehicles to comply with the law and secure limits of $750,000. With no explanation, the court than concluded that NAB's insurer was obligated to provide $750,000 in coverage, and that the step-down clause was invalid.

We point out that the statutes are not directed at insurers but at motor carriers. Most courts reviewing this type of claim have held that it is the motor carrier's obligation to secure insurance, and failure to comply is between the regulator and the motor carrier. The court here tacitly assumed that if the motor carrier needed to be in compliance, its policy, too, needed to be adjusted to be in compliance.

It was precisely because it rejected that principle that the court in *Penske Truck Leasing Co. LP v. Safeco Insurance Co.* 457 F.Supp. 3d 148 (D. Conn.) found that it was AA Metro which had rented a truck from Penske. So, the court found, it was AA Metro which needed to comply with USDOT financial responsibility regulations, not Penske. In renting the vehicle, AA Metro had selected the option to purchase liability coverage from Penske rather than adding the rented vehicle to its own liability policy. Where the customer elects to have Penske provide coverage, Penske agrees to provide coverage for the renter and driver "in accordance with the standard provisions of a basic automobile liability insurance policy...with limits as required by the state financial responsibility law or other applicable statute." The court agreed with Penske that this meant limits of $20,000 as required for cars and other small non-commercial autos. Safeco, the claimant's UM insurer, argued that under Connecticut law, the truck required coverage of at least $750,000 and that was what Penske had promised to provide. The court concluded, though, that it was the insured that had the obligation to make certain that vehicles used in its business and under its authority had coverage in the mandated amounts.

It seems to us that the insurer in *Rafanello* may have had the better of the argument since the insured explicitly denied requiring a filing and none was made—on what basis, then, was the court able to fashion an MCS-90 *ex nihilo* (out of thin air)? We also question the decision in Penske; Penske, after all, had promised to provide the limits that the commercial truck required under any applicable law. That contractual promise was left open, to be determined on a rental-by-rental basis; there is nothing unfair about finding that Penske had agreed to arrange for $750,000 for its motor carrier customers—which is almost certainly what most such customers would expect.

Larry Rabinovich

6. *Employment*

FAIR LABOR STANDARDS ACT (FLSA)

In late-breaking news, the United States Department of Labor has issued a final rule revising its interpretation of independent contractor status under the Fair Labor Standards Act. Fed. Reg., Vol. 86, No. 4 at 1168 (Jan. 7, 2021). The final rule explains that independent contractors are workers who, as a matter of economic reality, are in business for themselves as opposed to being economically dependent on the potential employer for work. The final rule also explains that the inquiry into economic dependence is conducted by applying several factors, with no one factor being dispositive, and that actual practices are entitled to greater weight than what may be contractually or theoretically possible.

The economic reality factors (set out in 29 C.F.R. 795.105(c)) include:

(1) **The nature and degree of control over the work.** This factor weighs towards the individual being an independent contractor to the extent the individual, as opposed to the potential employer, exercises substantial control over key aspects of the performance of the work, such as by setting his or her own schedule, by selecting his or her projects, and/or through the ability to work for others, which might include the potential employer's competitors. Requiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) does not constitute control that makes the individual more or less likely to be an employee under the Act.

(2) **The individual's opportunity for profit or loss.** This factor weighs towards the individual being an independent contractor to the extent the individual has an opportunity to earn profits or incur losses based on his or her exercise of initiative (such as managerial skill, business acumen, or judgment) or management of his or her investment in or capital expenditure on, for example, helpers, equipment, or material to further his or her work. This factor weighs towards the individual being an employee to the extent the individual is unable to affect his or her earnings or is only able to do so by working more hours or faster.

(3) **The amount of skill required for the work.** This factor weighs in favor of the individual being an independent contractor to the extent the work at issue requires specialized training or skill that the potential employer does not provide. This factor weighs in favor of the individual being an employee to the extent the work at issue requires no specialized training or skill and/or the individual is dependent upon the potential employer to equip him or her with any skills or training necessary to perform the job.

(4) **The degree of permanence of the working relationship between the individual and the potential employer.** This factor weighs in favor of the individual being an independent contractor to the extent the work relationship is by design definite in duration or sporadic, which may include regularly occurring fixed periods of work, although the seasonal nature of work by itself would not necessarily indicate independent contractor classification. This factor weighs in favor of the individual being an employee to the extent the work relationship is instead by design indefinite in duration or continuous.

(5) **Whether the work is part of an integrated unit of production.** This factor weighs in favor of the individual being an employee to the extent his or her work is a component of the potential employer's integrated production process for a good or service. This factor weighs in favor of an individual being an independent contractor to the extent his or her work is segregable from the potential employer's production process.

The final rule contemplates that additional factors may be relevant in determining whether an individual is an employee or independent contractor for purposes of

the FLSA, but only if the factors in some way indicate whether the individual is in business for him- or herself, as opposed to being economically dependent on the potential employer for work.

We will watch with interest going forward as courts seek to apply these regulatory factors in the context of lawsuits brought by drivers against motor carriers for "employee" benefits. It will also be interesting to see whether the incoming administration attempts to modify these principles (as the Trump administration did with respect to the rulemaking of Obama's DOL).

Meanwhile, in cases raised under the FLSA in 2020:

The misclassification action in *Blodgett v. Faf, Inc.*, 2020 US Dist. LEXIS 51249 (E.D. Tenn.), turned on the number of hours worked by the plaintiff truck driver. Plaintiff considered all time spent away from home, including time spent in the sleeper berth, as compensable under the FLSA. In support of this argument, plaintiff relied on 29 C.F.R. § 785.22 under which the full 24 hours constitute hours worked, absent an agreement to exclude up to eight hours for meals and sleeping.

In response, the court noted that 29 C.F.R. § 785.16(b) provides that idle time during which a truck driver is waiting to be engaged is not compensable. The court then cited 29 C.F.R. § 785.41, which specifically excludes time that a truck driver spends sleeping. The court concluded that this created a presumption that the time plaintiff spent sleeping and resting was not compensable. Because plaintiff presented no evidence to rebut this presumption, and because there was evidence that plaintiff used this rest time to perform personal tasks such as paying bills, calling home, and sleeping, the court concluded that the plaintiffs did not work 24-hour days. Accordingly, plaintiff received more than minimum wage and there was no FLSA violation.

Plaintiffs brought suit in *Burlaka v. Contract Transportation Services, LLC*, 971 F.3d 718 (7th Cir.), alleging violation of the FLSA for the defendant's failure to pay overtime wages. Defendant asserted the Motor Carrier Act ("MCA") exemption, claiming that the scope of the plaintiffs' duties included over-the-road driving. Plaintiffs claimed that they had asked only to be assigned spotting duties and that defendant had respected that request and had never reprimanded them for turning down over-the-road assignments.

Upon reviewing the record, the court found that at least some spotters drove trailers carrying goods destined for out-of-state delivery. Under well-established rules, this driving, even if purely intrastate, would constitute "driving in interstate commerce." This, combined with the fact that the plaintiffs were assigned spotting duties indiscriminately, was sufficient for the court to conclude that the MCA exemption applied, even if some of the plaintiffs' runs were local. Additionally, the court rejected the plaintiffs' argument that their chances of being assigned driving duties were remote. The question was whether the plaintiffs' spotting duties were part of the interstate journey of the goods and, because they were, the MCA exemption applied.

Koch v. Jerry W. Bailey Trucking, 2020 US Dist. LEXIS 155772 (N.D. Ind.), involved claims of violations of the FLSA and Indiana wage laws. Specifically, the plaintiff truck drivers claimed that the time they spent conducting pre- and post-trip inspections of their trucks and related activities was compensable. The court agreed, and held additionally that the time spent on these tasks, which averaged 30 minutes, was not de minimis. The court did not credit the defendant's testimony that the time was actually two to four minutes but noted, significantly, that even if it was, the court still would not have considered that time de minimis. Finally, the court rejected the defendant's argument that it could use the rounding regulation (29 C.F.R. § 785.48(a)) in a manner that would "shave off" the time spent by the drivers on these tasks. The court noted that the purpose of the regulation is to smooth out the difference that results from clocking in early or late, not to reduce time for work the employer requires to be performed before or after hours.

The issue before the Colorado Court of Appeals in *Gomez v. JP Trucking, Inc.*, 2020 COA 153, Colo. App. LEXIS 1854, was whether Colorado's Minimum Wage Order (CMWO) exempted drivers transporting goods in interstate commerce in like manner to the Motor Carrier Act ("MCA"). Specifically, the CMWO does not define the term "interstate drivers," and the court had to decide whether the term carries the same meaning as an employee covered under the MCA. Notably, another division of the Colorado Court of Appeals had already concluded that the CMWO exemption is narrower and only applies to drivers who cross state lines.

This court, however, decided that the CMWO and MCA carried an identical scope of application. Particularly, the court relied on a Tenth Circuit decision that had also construed both provisions and concluded that they were sufficiently similar to be read in harmony. The court also noted that although the CMWO could be read to provide greater protection than the MCA, it was not necessary that it did. Additionally, the court observed that the Colorado Department of Labor and Employment was aware of the scope of the MCA exemption and thus it could expressly have narrowed the CMWO if it chose to.

As a result, there is now a split of appellate authority in Colorado over the scope of its wage order, until such time as the Colorado Supreme Court resolves this issue.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION (FMCSA) PREEMPTION

On December 28, 2018, the FMCSA issued an order declaring that California's Meal and Rest Break laws, as applied to property-carrying commercial motor vehicles subject to the FMCSA's hours of service regulations, are preempted. Subsequently, the FMCSA issued a clarification that this Order applies retroactively. The primary issue in *Connell v. Heartland Express*, 2020 US Dist. LEXIS 29235 (C.D. Cal.), was whether the FMCSA order applied to the plaintiff's claims of violation of California meal and rest break laws by the defendant company. In concluding that it did, the court (i) declined plaintiff's invitation to conclude that the FMCSA Order was not binding; (ii) declined to invoke the *Dilts* exception (see *Ridgeway* below); and (iii) declined to issue a stay pending review of the FMCSA order by the Ninth Circuit. Finally, although the court acknowledged that at least one District Court had refused to uphold the retroactivity of the FMCSA order (see *Alvarez v. XPO Logistics Cartage*, 2020 US Dist. LEXIS 50276 (C.D. Cal.)), it nonetheless concurred with the line of cases that had concluded the opposite and applied the order retroactively. The court also held that the plaintiff's claims under Washington rest break laws were preempted for the same reasons.

Nash v. Horizon Freight Systems, 2020 US Dist. LEXIS 132718 (N.D. Cal.), involved a claim that California meal and rest break rules were preempted by the FMCSA. The primary issue was whether plaintiff operated in interstate commerce. In like manner to other courts who have considered this issue, this court concluded that it was not necessary for plaintiff to drive across state boundaries to operate in interstate commerce. Instead, what was required was a "practical continuity of movement" in intrastate transportation of goods that previously or subsequently crossed state lines. Significantly, the court rejected plaintiff's evidence that showed substantial intrastate work. The court noted that the question was whether plaintiff's "trips were *entirely* interstate in nature." Accordingly, plaintiff could not prevail on summary judgment if he could not show that almost all of his work was intrastate, and California laws were preempted.

FEDERAL ARBITRATION ACT (FAA)

The plaintiff in *Arango v. R.J. Noble Co.*, 2020 Cal. App. Unpub. LEXIS 994 (Cal. Dist. Ct. App.), a truck driver, brought an action against his employer for, *inter alia*, failure to pay minimum and overtime wages, provide proper meal and rest periods, and failure to provide itemized wage statements. Defendant moved to compel arbitration pursuant to the collective bargaining agreement and the Federal Arbitration Act ("FAA"). Plaintiff claimed he was a transportation worker and thus exempt under the FAA (9 USC. § 1). The court therefore had to decide whether the FAA exemption applied to the collective bargaining agreement.

In resolving this inquiry, the California Court of Appeals relied on the 8th Circuit case of *Lenz v. Yellow Transportation, Inc.*, 431 F.3d 348 (8th Cir. 2005), which, in turn, had based its decision on eight "non-exclusive" factors from other cases. These factors are whether: (1) the employee works in the transportation industry; (2) the employee is directly responsible for transporting the goods in interstate commerce; (3) the employee handles goods that travel interstate; (4) the employee supervises employees who are themselves transportation workers; (5) the employee is within a class of workers for which special arbitration already existed when Congress enacted the FAA; (6) the vehicle itself is vital to the employer's commercial enterprise; (7) a strike by the employee would disrupt interstate commerce; and (8) the nexus between the employee's job duties and the vehicle the employee uses in carrying out those duties.

There was no dispute that the plaintiff met the sixth and the eighth factors. The court concluded that the plaintiff also met factors one, three, and seven. For factor one, the court noted that the defendant was a licensed motor carrier providing commercial motor vehicle transportation services to different customers for compensation.

Additionally, the defendant transported construction materials purchased from other states in trucks that were manufactured in other states. The court concluded that these factors were enough to conclude that the plaintiff, by virtue of his employment for the defendant, worked in the construction industry. The court noted specifically that it is not necessary for an employee engaged in the transportation of goods in interstate commerce to show that their employer is involved in the "transportation industry."

Similarly, the court concluded that factor three was satisfied because the plaintiff drove trucks manufactured in other states containing construction materials that were created using materials from out-of-state suppliers. Finally, the court concluded that if the plaintiff were to go on strike, he would disrupt interstate commerce, and that the seventh factor was therefore satisfied. Based on the weight of the factors that the plaintiff was able to meet, the court concluded that the FAA exemption applied to the arbitration provision of the collective bargaining agreement.

Plaintiffs' companies in *Bissonette v. Lepage Bakeries Park St.*, 460 F. Supp. 3d 191 (D. Conn.), were franchisees that had entered into distribution agreements ("DAs") with the defendant through which they acquired certain distribution rights in exchange for payment. Although the DAs classified the plaintiffs as independent contractors, plaintiffs alleged that they were, in fact, employees, given the degree of supervision and control defendants retained over them. The plaintiffs therefore commenced an action alleging, *inter alia*, misclassification under the FLSA and Connecticut law, as well as claims for violation of wage and overtime laws. Defendants moved to dismiss on the grounds that the DAs provided for mandatory arbitration. In response, the plaintiffs claimed that they were transportation workers within the meaning of the FAA, which, according to plaintiffs, preempted Connecticut law.

In resolving this issue, the court accepted that the plaintiffs were engaged in the movement of goods in interstate commerce as the products they distributed were manufactured out of state. The court, however, declined to accept that the plaintiffs were principally truck drivers. Instead, the court noted that the plaintiffs' DAs "evidenced a much broader scope of responsibility," namely, purchasing the territories that comprised their routes and hiring employees at their discretion to run their businesses. The court held that "even if the movement of physical goods is the sine qua non of the FAA exemption," it was not "aware of any case holding that a worker's responsibility for delivering physical goods will defeat compelling evidence that the worker performed myriad other non-transportation related functions that fundamentally transform the nature of the job description." Considering one of the *Lenz* factors (see *Arango* above), the court also held that the plaintiffs had presented no evidence that if they were to go on strike, its effects would be felt outside of their own territories within Connecticut, as opposed to disrupting interstate commerce.

Based on these reasons, the court concluded that the FAA exemption would not apply. Notably, the court, in a footnote, also expressed doubt that the application of the FAA exemption could be different based on whether the employer contracted with an independent contractor or the independent contractor's employer. Because the parties had not briefed this nuance, however, the court did not address it.

Plaintiff, who was a last-mile driver, brought suit against Amazon in *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10 (1st Cir.), for misclassification, and violation of the Massachusetts Wage Act and Massachusetts Minimum Wage Law. Amazon sought to compel arbitration and the plaintiff claimed the FAA exemption. After a thorough review of the statute, the court concluded that the FAA exemption applied to last-mile drivers, who hauled goods on the final legs of interstate journeys as they were engaged in interstate commerce. Specifically, the court rejected Amazon's argument that FAA exemption should be construed narrowly to only apply to workers who actually cross state lines. In the parallel case of *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, the Ninth Circuit reached the same conclusion by way of a similar analysis.

CALIFORNIA LABOR LAWS

Ridgeway v. Walmart, Inc., 946 F.3d 1066 (9th Cir.), involved an action against Walmart by several of its drivers alleging violations of California meal and rest break laws. Following trial, Walmart appealed the District Court's decision on several grounds and the plaintiffs cross-appealed seeking liquidated damages under Cal. Lab. Code § 1194.2.

Walmart first argued that layovers or rest breaks were not compensable as a matter of law and even if they

were, Walmart did not exercise sufficient control over its drivers during layovers that would call for compensation. The court noted that there is no reason to assume that an employer could not control a driver during a legally mandated break/layover. The court therefore held that as a matter of California law (8 Cal. Code Regs. § 11090), an employer must compensate drivers for layover time if the employer exercises sufficient control over them during that time.

In this case, although Walmart could not be said to exercise sufficient control merely by requiring its drivers to take legally mandated breaks, its policy also required drivers to seek preapproval before spending those breaks at home, and to record the amount of time spent at home as well as the name of the manager who approved it. Drivers were also subject to disciplinary action for taking unauthorized breaks at home, up to and including "immediate termination." The court concluded that these features of Walmart's policy showed that it exercised sufficient control over its drivers for layover time to be compensable. Specifically, the court reasoned that Walmart's policy "restricted drivers' freedom of movement and prevented [them] from making a unilateral decision to spend layovers at home without preapproval" and "foreclosed [them] from numerous activities in which they might otherwise engage while on layovers."

Walmart also argued that the Federal Aviation Administration Authorization Act (FAAAA) preempted California law because it preempted state laws "related to a price, route, or service of any motor carrier." The court rejected this argument and noted that under *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), a seminal case on this issue, the FAAAA did not preempt California meal and rest break laws. The court further rejected Walmart's attempts to distinguish this case from *Dilts*, noting that California and federal laws did not conflict because federal law does not pronounce upon states requiring employers to pay drivers who are under the employer's control during breaks/layovers.

Finally, the court concluded that Walmart violated California minimum wage laws by impermissibly averaging its employee's pay within a single hour, when it should have provided separate compensation for rest periods. Although the court acknowledged that sometimes several tasks, like rest breaks and inspections, could fall under a general provision in the pay plan, it held that California law required Walmart to pay drivers for certain activity codes that included those tasks. Because Walmart's policy was silent in this respect, it violated California minimum wage laws.

As to the plaintiffs' cross-claim for liquidated damages, the court concluded that there was sufficient evidence to suggest that Walmart had acted in good faith and reasonable belief that it was in compliance with California law. The court therefore declined to reverse the District Court and award liquidated damages under Cal. Lab. Code § 1194.2.

The truck driver plaintiff in *Ayala v. US Xpress Enterprises*, 2020 US Dist. LEXIS 102991 (C.D. Cal.), alleged that the defendant's piece-rate compensation system violated California wage and hour laws by failing to pay drivers for time spent on certain work tasks. Defendant provided transporting services, including truckload, and used a piece-rate system that calculated compensation for its drivers based on the number of miles driven, rather than on the number of hours worked. Plaintiff argued that this method of payment violated California Labor Code § 226.2, as it essentially meant a flat rate of pay for all tasks.

In analyzing this claim, the court first declined to interpret § 226.2 so restrictively that it would remove all room for negotiation between employers and employees for a piece-rate system. The court then noted that the compensability of tasks performed during non-duty time turned on whether the defendant exercised control over its drivers during that time. Specifically with respect to the reachability of drivers during rest periods, the court held that the question was whether the drivers were required to respond to messages during that time.

Plaintiff argued that the defendant issued its drivers a tip sheet for regular cargo loads that constituted a policy requiring drivers not to leave their trucks unattended without advance permission. The court held that the tip sheets on their own could not be read as policy, especially when the defendant's official policy did not require drivers to get preapproval before leaving a truck unattended. With respect to high-value cargo loads, however, the court stated that the defendant's policy of limiting breaks to no more than an hour tethered drivers to their trucks. Finally, plaintiff claimed that when drivers drove in teams of two, the non-driving partner was effectively tethered to the truck. Because defendant had sufficient control over the non-driving driver, plaintiff argued that time should be

compensable. The court rejected this argument, noting that drivers had the option to drive solo and that defendant did not mandate team driving.

The class action plaintiffs in *Bachanov v. Fedex Ground Package System*, 2020 US Dist. LEXIS 226838 (D. Colo.), alleged that FedEx Ground failed to pay its drivers overtime wages required by the Colorado Wage Claim Act and the Colorado Minimum Wage Act ("CMWA"). Colorado's Wage Orders 32-34 exempted drivers who transport goods in interstate commerce from the minimum wage and overtime pay requirements. Finding itself bound by the interpretation of the Wage Order in *Deherrera v. Decker Truck Line, Inc.*, 820 F.3d 1147 (10th Cir. 2016), the district court held that Bachanov, as a driver who did not cross state lines but nevertheless transported goods which had moved in interstate commerce, was an interstate driver subject to the Wage Order's exemption. (The court noted that the Supreme Court of Colorado had never discussed the parameters of "interstate commerce" in the Wage Order.)

Shaleem Yaqoob

7. *Transportation Brokers*

It's not every day that one encounters a situation in which the shipper, the broker, and the trucker all have motor carrier authority. That, though, was the scenario in *Dixon v. Stone Truck Line* 2020 US Dist. LEXIS 2281668 (D.N.M.), and plaintiff alleged that all three were responsible for the injuries he suffered in a New Mexico accident.

Russell Stover, purveyors of chocolate candies, contracted with Ryan Transportation for the transportation of chocolates it manufactured in Texas to be shipped to customers in California. In this relationship, Russell Stover (technically, its corporate parent) was the shipper and Ryan was originally listed on the agreement as "carrier"—however, that notation was crossed out and replaced by "broker." There was also an addendum to the contract asserting that Ryan was acting exclusively as broker, regardless of what the contract may have said about it being a carrier. (Lazy drafting, we suggest). It was unclear whether Ryan had mentioned any of its hesitations about being a carrier to Stover; the bill of lading, which we suspect was prepared by the chocolatier, listed Ryan as carrier, after all. Ryan, then, executed a broker/carrier agreement with Stone Truck Line which, obviously, had its own motor carrier authority.

With all of the double- and triple-brokering, etc., going on, it is often difficult for the courts to assess who the motor carrier was. Here, the court aggressively culled most of the causes of action, leaving only Stone Line and the driver as defendants, the facts being that owner-operator Ismail Tawil failed to yield the right of way to a motorcycle operated by Dixon before turning and striking the motorcycle.

Dixon, who was seriously injured, sued Tawil, Stone Truck, Ryan and Russell Stover. Ryan moved for summary judgment, arguing that it was located in Kansas and had no connection to New Mexico. The court found that, with the timing constraints on delivery, it was foreseeable that Tawil would take the shortest path to California—which meant passing through New Mexico. Weighing the equities, the court held that plaintiff was entitled to have his case heard in his own state and that it was not unfair to Ryan to be subject to the jurisdiction of a state through which it had, essentially, dispatched the truck.

Turning to the claim against Ryan, the court held that freight brokers are not vicariously liable for the negligence of the truck driver. Was Ryan, though, the broker or the carrier? The regulations provide that an entity with carrier authority which has legally bound itself to carry the load is not acting as a broker even if it (also) has broker authority. The court concluded that the complaint had not alleged sufficient basis for concluding that Ryan had acted as a carrier; thus, vicarious liability was off the table. Nor were there sufficient factual allegations to make a case that Ryan had been actually negligent in any way, or that it had negligently hired the motor carrier. Accordingly, the court dismissed all claims against Ryan—even though in our opinion there was a way to draft a complaint that would have passed muster.

For other reasons, the claims against Stover also failed. The complaint alleged that Stover, as shipper, had vicarious exposure for the negligence of the driver. In fact, as the court noted, shippers have no such exposure, and the fact that Stover separately had carrier authority was not relevant in this context. Nor were there sufficient allegations for establishing negligent hiring of the trucker by Stover.

Not surprisingly, given the thrashing the court administered to its complaint, plaintiff sought permission to amend its pleading. Studying the proposed amended complaint, the court concluded that it, too, made no claim against Stover

that could lead to a recovery. The amended claim against Ryan was also futile since it lacked any allegation of broker control over the motor carrier required under the seminal decision in *Schramm v. Foster*, 341 F. Supp. 2d 536 (D. Md. 2004). Defending trucking (and broker) cases would be much easier if other judges were equally willing to dismiss non-specific or vaguely drafted complaints.

Total Quality Logistics, LLC v. Balance Transportation LLC, 2020 Ohio App. LEXIS 574 (Ohio Ct. App.), involved an intrastate Texas shipment of granite which TQL had brokered to Balance. Balance's driver arrived at the consignee's site with the load and consignee's employees immediately signed off on the bill of lading. The consignee's employees then began unloading the granite; at a certain point, slabs of granite slid off the trailer and were damaged as they hit the ground. The consignee requested that the driver return the bill of lading and made a notation regarding the damage; the driver made his own subsequent notation that he had delivered the goods and that the consignee had added the reference to damage after initially acknowledging delivery in good condition. TQL paid the claim—a practice that brokers will sometimes engage in to keep their customers happy—then demanded reimbursement from Balance under the Carmack Amendment. Both the trial court and the appellate court found that Balance had delivered and tendered the cargo before any damage occurred. Damage occurred during unloading by the consignee, at which point the cargo was not the motor carrier's responsibility. Balance, thus, owed nothing to TQL.

Marson v. Alliance Shippers, Inc., 438 F. Supp. 3d 326 (E.D. Pa.) involved a shipment of plaintiff's mushrooms destined for a customer in Georgia; Alliance was chosen by plaintiff to arrange for pickup of the mushrooms at Marson's Pennsylvania headquarters. Fresh produce, of course, has a limited shelf life. Alliance hired KG's South East Trucking to move the load; the truck assigned by KG's, though, broke down en route to Georgia and the driver abandoned the load. A second driver was dispatched to complete the delivery but the consignees rejected the load, which was beginning to spoil.

Defendant Alliance pointed out that brokers are not subject to Carmack claims and moved for summary judgment in response to Marson's lawsuit. Marson claimed, though, that Alliance had agreed to transport the load and had the status of a carrier which, of course, is subject to the Carmack Amendment. The court found that plaintiff had submitted sufficient evidence that Alliance had presented itself as a carrier so as to create a question of fact, precluding a grant of summary judgment in favor of Alliance. The court did not mention that Alliance had only broker authority; but, of course, if a broker accepts responsibility to move the load it could indeed face Carmack exposure. Ultimately a jury would need to decide if Alliance was responsible to the shipper.

Amark Logistics, an authorized broker, entered into a broker/carrier contract with UPS in *Amark Logistics v. UPS Ground Freight*, 2020 US Dist. LEXIS 7659 (N.D. Ohio). After a customer's goods were damaged while in UPS's custody, Amark presented a claim. When UPS acknowledged responsibility for only a small portion of the claim, Amark filed suit. The court dismissed Amark's Carmack claim—as a broker Amark was not entitled to make a claim under Carmack. The court remanded Amark's state law claims for breach of contract and negligence to state court.

In *AMG Resources Corp. v. Wooster Motor Ways, Inc.* 796 Fed. Appx. 96 (3d Cir.), the appellate court affirmed the holding of the district court. Shipper planned to send a shipment of copper from its Newark scrap metal facility to customers in Pennsylvania, and asked broker WMW to arrange the move. A driver arrived at the Newark facility, picked up the copper and was never seen again. AMG sued WMW and Wooster Motor Ways (a trucker affiliated with WMW) under the Carmack Amendment and other grounds. After a bench trial, the district court entered judgment for the defendants.

WMW was AMG's regular broker in 92 prior transactions; in only one of those cases had WMW assigned Wooster to actually carry the load. Wooster shared an address and common ownership with WMW. In this case, WMW advertised on various online sites to locate a carrier for the copper. Ramon Theodore Knight, a registered carrier, responded. He and WMW then entered into a broker/carrier agreement. As it turned out, the driver who arrived picked up the copper signed the bill of lading illegibly and was not able to be identified. In addition, there was no finding as to whether that driver was sent by Knight, or had learned about the load by some other means and planned to steal it.

The court concluded that neither of the WMW entities was liable under Carmack, since neither could be proved to have picked up the load. Oddly, the Third Circuit mentioned that Carmack was the sole remedy available, though failing to note that this was so for the motor carrier but not the broker.

The issue in *Vantage Logistics v. Dewar Nurseries*, 2020 US Dist. LEXIS 205538 (S.D. Ohio), was whether the scope of a broker's surety bond, as contemplated under 49 U.S.C. § 13906, extends to the broker's liability (if any) for a shipment damaged while being transported by the motor carrier selected by the broker. The statute defines the scope of financial responsibility for brokers: surety bonds obtained to meet the requirements of the statute "shall be available to pay any claim against a broker arising from its failure to pay freight charges under its contracts, agreements, or arrangements for transportation." 49 U.S.C. § 13906(b)(2)(A). Accordingly, the court held that surety bonds obtained to satisfy the requirements of the statute are limited by the statute mandating their existence to claims relating to a broker's failure to pay freight charges.

Larry Rabinovich

8. Transportation Network Companies

Overton v. Uber Technologies, 805 Fed. Appx. 485 (9th Cir.) is significant as a federal appellate determination that Uber is not a "motor carrier" required to register under the Federal Motor Carrier Act because it does not own, rent, or lease vehicles. See 49 U.S.C. § 13102(14), 13902(a). The court held further that, even assuming Uber is a "broker" under the Act, registration is required only for brokers for transportation of property, as opposed to transportation of passengers. See 49 U.S.C. § 13102(2) (defining broker), 13904(a) (registration requirement applies to "a broker for transportation of property"). Query: What does that mean, say, for UberEats—or for apps which arrange "last mile" deliveries?

While TNCs may be in the clear as far as FMCSA status is concerned, they still need to worry about at least some state regulators. The taxi company plaintiffs in *Albuquerque Cab Co. v. Lyft, Inc.*, 460 F. Supp. 3d 1215 (D.N.M.), complained that Lyft and Uber are not subject to New Mexico's Motor Carrier Act, as they are. Lyft settled out; Uber sought to dismiss the complaint on the grounds that it was never a "motor carrier" within the meaning of the New Mexico statute. The district court, though, found that the plaintiff's amended complaint alleged sufficient facts showing that Uber's involvement in the Albuquerque transportation for-hire market, including its extensive involvement with and control over Uber drivers, and the money it made from providing transportation services for hire, exceeded the simple act of "providing or developing software to drivers and the public." The court went further and held that the Motor Carrier Act created a cause of action for business competitors damaged by another's unauthorized transportation for-hire operations. Accordingly, the court held that the taxi companies would be allowed to show (if they could) that that Uber, operating without authority, increased the supply of drivers for hire, which in turn, decreased plaintiffs' market share and decreased plaintiff's revenue; and that this market saturation had a greater negative effect on plaintiff's revenue because of Uber's unfair ability to provide rides at a lower cost.

Jonathan Gaurano, driving a vehicle rented through Lyft's "Express Drive program," struck plaintiffs Sabrina Marez's and Marissa Cruz's (plaintiffs) vehicles and caused significant injuries. The plaintiffs filed suit in *Marez v. Lyft, Inc.*, 48 Cal. App. 5th 569, 261 Cal. Rptr. 3d 805, 807 (Cal. Ct. App.), arguing that Lyft was liable under the doctrine of *respondeat superior* because Gaurano had been acting within the scope of his employment with Lyft at the time of the accident.

The undisputed facts, however, showed that Gaurano had not worked for Lyft on the day of the accident and had no intention of doing so. In the morning, Gaurano parked his rented vehicle, then travelled away from his vehicle and spent the day working for another employer. Lyft did not dictate how Gaurano should commute to this alternative job, require Gaurano drive the rental vehicle or otherwise control his movements on the day in question. His commute home from the other job was unrelated to his driving for Lyft, and his sole intent at the time of the accident was to go home to eat and sleep. Finding in favor of Lyft, the court concluded that Gaurano was engaged in a purely personal activity at the time of the accident, and that, absent a nexus between the employee's tort and the employment, vicarious liability should not be placed upon the employer.

The class action plaintiffs in *Capriole v. Uber Technologies*, 460 F. Supp. 3d 919 (N.D. Cal.), sought to compel Uber to comply with Massachusetts labor laws and to classify

Uber drivers as employees. As a result of their alleged misclassification, they claimed to have been forced to bear the expenses of their employment, been denied Massachusetts minimum wage for hours worked, been deprived of overtime pay, and been denied paid sick leave. Uber moved to compel arbitration of the drivers' claims, citing two arbitration agreements contained in Uber's 2015 Technology Services Agreement ("2015 Agreement") and 2020 Platform Services Agreement ("2020 Agreement").

With regard to whether these agreements fell within an interstate commerce exception to the Federal Arbitration Act, Uber provided evidence that only 2.5% of "all trips fulfilled using the Uber Rides marketplace in the United States between 2015 and 2019...started and ended in different states." In Massachusetts, 99.7% of trips using the Uber Rides marketplace between 2015 and 2019 began and ended in Massachusetts. The court found that the statistics cited by Uber demonstrated that Uber drivers do not perform an integral role in a chain of interstate transportation. Accordingly, the plaintiff Uber drivers did not fall within the Section 1 exemption to the FAA because they were not "engaged in interstate commerce" within the meaning of that Section.

Phil Bramson

9. *Punitive Damages*

UNLOADING ACCIDENTS

In *Jenkins v. XPO Logistics Supply Chain Inc.*, 2020 US Dist. LEXIS 66273 (N.D. Ala.), plaintiff trucker sought to assert a punitive damages claim for negligent/wanton hiring, training, and supervision in connection with an unloading accident. Plaintiff was hired by defendant, XPO, to haul cargo from XPO's warehouse in Illinois to a distribution center in Alabama. Plaintiff's trailer was loaded by XPO's employees without plaintiff's assistance. When he arrived at the distribution center, plaintiff was unaware the pallets had shifted during the trip, and when he opened the hatch he was struck with the shifted load. The court notes that the load was not strapped or locked but that it was plaintiff's obligation to provide the necessary straps or locks and he had failed to do so.

In evaluating the punitive damages claim, the court noted that under Alabama law, a plaintiff must establish wantonness, which is defined by the Alabama Supreme Court "as the conscious doing of some act or the omission of some duty, while knowing of the existing conditions and being conscious that, from doing or omitting to do an act, injury will likely or probably result." The court found that there was no evidence the cargo was loaded negligently, much less with knowledge that the likely result would be injury. The court explained that allegations that XPO's employees "chose" not to seek out plaintiff and ask for straps or locks may raise an issue of negligence but it is not sufficient to create a genuine issue of fact concerning wantonness, noting that "mere inattention, without something more" is insufficient to establish anything beyond negligence.

In *Shipman v. Aquatherm L.P.*, 2020 US Dist. LEXIS 73220 (E.D. Pa.), plaintiff's decedent died when a load of pipes, which he was delivering from defendant Aquatherm's facility in Utah to defendant Yates' facility in Pennsylvania, fell onto him from the flatbed trailer he was operating. Plaintiff alleged, *inter alia*, that Aquatherm failed to properly secure the load and that such failure was willful, wanton, reckless, and/or grossly negligent, so as to establish a basis for punitive damages. Aquatherm moved to dismiss the punitive damages claim.

Relying on the testimony of Yates' warehouse manager—who said that after the accident, he asked Aquatherm's salesman whether "anything happened like this before," to which Aquatherm's salesman said he'd "heard of people losing limbs from unloading pipe, but never death"—plaintiff argued that Aquatherm was aware that its bundles of pipe and the bands it was utilizing to bundle the pipes were extremely dangerous and prone to break.

The court found that the Yates warehouse manager's testimony was too vague to support an inference that Aquatherm was aware that the bands securing the bundles of pipe were prone to breaking and could lead to injury. In its finding, it noted that the testimony was unclear regarding what "people" the salesman was referring to, when and where these unidentified instances that he "heard of" might have occurred, with what kind of pipe, under what circumstances the unloading may have led to any injury, and the cause of any such injuries.

In dismissing the punitive damages claim, the court explained that a party opposing summary judgment must do more than just rest upon mere allegations, general denials, or vague statements, and that in Pennsylvania, "punitive damages are not justified when the defendant's mental state rises to no more than gross negligence, and

there is only a jury question on this issue if the defendant's conduct was reckless because it knew, or had reason to know, of facts creating a high degree of risk of physical harm to another and then deliberately acted or failed to act in conscious disregard of, or with deliberate indifference to, that risk." While a jury might find that Aquatherm failed to reasonably perform the duty it undertook in bundling and loading the pipes on the truck, the evidence was insufficient to support a finding that it acted with the state of mind necessary to impose punitive damages.

HOURS OF SERVICE VIOLATIONS/DRIVING HISTORY

In *Gonzalez v. Seashore Fruit & Produce*, 2020 US Dist. LEXIS 89783 (E.D. Pa.), the court granted plaintiff's motion to amend the complaint to assert punitive damages in connection with an accident in which defendant Seashore's box truck, being operated by its employee Matthews, rear-ended plaintiff's vehicle, which was stopped at a red light.

During discovery, plaintiff learned that on the date of the accident, Matthews was operating the truck in violation of the Federal Motor Carrier Safety Administration's hours of service rules, having driven in excess of 14 hours. Matthews had violated the 14-hour limit approximately 76 times in the preceding 11 months, as Seashore well knew.

Plaintiff asserted that the purpose of the FMSCA hours of service regulations is to eliminate the type of drowsiness that can lead to crashes such as the one at issue and that, based on the evidence, both Matthews and Seashore acted recklessly, thus entitling plaintiff to punitive damages. As explained by the court, punitive damages are penal in nature and are proper only in cases where the defendant's actions are so outrageous as to demonstrate willful, wanton, or reckless conduct, including in automobile negligence cases where the plaintiff has alleged that either the driver or the driver's employer displayed reckless indifference.

The court held that, if Matthews was indeed knowingly violating the hours of service limitations on the day of the accident, and if Seashore knew of that violation and let Matthews continue driving, plaintiff could plausibly establish that defendants had acted with reckless indifference, and the question of whether the violations contributed to the accident is for the jury. Thus, plaintiff was permitted to assert a punitive damages claim.

Tighe v. Castillo, 2020 Del. Super. LEXIS 2891 (Del. Super. Ct.) involved a multi-vehicle accident in which plaintiff's disabled vehicle was struck by a tractor-trailer operated by defendant Castillo, who was driving for Baldor Express. The court noted that Castillo was cited for speeding at least eight times between 2007 and 2016 and exceeded the maximum hours of service at least 41 times to the point that Baldor flagged the issue as something it needed to address. He was also involved in multiple alleged prior at-fault accidents, including striking an overpass because he was driving down a ramp too fast, two collisions with wildlife and driving into a ditch.

Plaintiff alleged Baldor "did nothing" to correct Castillo's driving. Baldor responded that it took action in the form of daily driving logs and regular face-to-face performance reviews but plaintiff offered expert testimony to the effect that Baldor's response to Castillo's driving history did not meet minimum industry safety standards. Castillo and Baldor moved to dismiss the punitive damages claim.

In denying the motion, the court found that jury members could award punitive damages against Baldor if they concluded Baldor's conduct reflected a "conscious indifference to [the] foreseeable result" that Castillo would drive in a way that endangered others' physical safety and that Castillo's past accidents and violations were sufficiently severe to put Baldor on notice that an accident of this magnitude might occur. Castillo's conduct went beyond minor damage from "bumping property in tight quarters."

EMPLOYER'S VICARIOUS LIABILITY

Yazzie v. Seth Fezatte & Werner Enterprises, Inc., 2020 US Dist. LEXIS 186949 (D.N.M) involved an accident in which Fezatte, driving for Werner, struck a pedestrian walking on Interstate 40 in New Mexico. Fezatte testified that as he approached the area of the accident, it was sleeting and that he felt an impact but, believing he struck a deer, continued to drive. He later pulled over, assessed the damage to the tractor-trailer, and returned to what he believed was the location of the impact to determine whether there was anything in the road. Finding nothing, he continued on I-40 for approximately 20 miles before he stopped at a rest stop to contact Werner dispatch to discuss the accident.

In response to Werner's motion to dismiss the punitive damages claim, the court noted that New Mexico has a "general rule that punitive damages are not imposed on an employer for the acts of an employee as a matter of simple *respondeat superior*. Rather, there must be proof in

some form of the employer's own culpable state of mind and conduct." Werner has a fleet of 7,300 commercial trucks operated by approximately 9,500 commercial truck drivers. All prospective drivers must graduate from truck driving school, submit to a drug screening, pass a prior employment verification process, and attend a two-day orientation, which includes but is not limited to pre-trip inspection training, driver's hours of service training Federal Motor Carrier Safety Administration Compliance, and accident prevention.

Additionally, Werner requires newly licensed drivers like Fezatte to complete two months of over-the-road training with one of its professional driver trainers and that all drivers undergo quarterly safety trainings. Prior to the incident, Werner investigated Fezatte for a speeding infraction and complaint that he smoked marijuana. In response, Werner required that he complete speed management training and submit to a drug test, which he passed. In dismissing the punitive damages claim against Werner, the court found that plaintiff had failed to proffer sufficient evidence to demonstrate that Werner had a "cavalier attitude toward safety regulation."

The court permitted plaintiff to pursue a punitive damages claim against Fezatte, however, based upon an affidavit from a coworker stating that Fezatte saw plaintiff before the collision and struck him on purpose; credibility determinations, the court noted, are for the jury.

NEGLIGENCE VERSUS RECKLESSNESS

Cardenas v. Schneider, 2020 US Dist. LEXIS 185569 (W.D. Okla.) involved a multi-vehicle accident on Interstate 40 during foggy weather which occurred when defendant Crittenden, driving a tractor-trailer for defendant YRC, struck a Western Express tractor-trailer which had previously struck a car and was stopped while still partially within the left lane of the highway. Prior to the accident, Crittenden was driving behind a Con-way tractor-trailer which was traveling under the minimum highway speed; Crittenden had moved to the right lane to pass it. Crittenden then saw the Western Express trailer, which had no lights or flashers on, occupying half of the inside westbound lane; Crittenden could not discern whether it was stationary or moving slowly. Crittenden was unable to swerve to the right because of the Con-way truck's proximity. He applied his brakes and swerved to the right as soon as he could, but still clipped the Western Express trailer, pulling it into the roadway. That resulted in an obstruction of the right lane, which then caused collisions with plaintiffs' vehicles.

Crittenden and YRC moved for summary judgment dismissing plaintiffs' punitive damages claim. The court pointed out that under Oklahoma law, punitive damages may be awarded only if, at a minimum, a plaintiff shows by clear and convincing evidence that the defendant was "guilty of reckless disregard for the rights of others." "Reckless disregard" is established by showing that the defendant was either aware, or did not care, that there was a substantial and unnecessary risk that his conduct would cause serious injury to others. Construing the evidence in the light most favorable to plaintiffs, the court found that they had not presented clear and convincing evidence that Crittenden or YRC acted with reckless disregard.

At most, Crittenden may have been negligent in operating the YRC truck which caused him to strike the portion of the Western Express truck that was protruding into the left lane of Interstate 40. There was no evidence, however, that defendant Crittenden was aware of the presence of the Western Express trailer on any portion of the roadway or that he was aware that continuing in the left lane would result in the obstruction of the entire lane for persons traveling behind him. The court noted that, "the mere happening of an accident as a result of inadvertence on the part of the [allegedly] responsible party is insufficient to constitute gross negligence."

In *Carson v. Tucker*, 2020 US Dist. LEXIS 125243 (E.D. Pa.), plaintiff Carson was operating a tractor-trailer when Tucker, operating a tractor-trailer owned by Western Express, struck Carson's tractor-trailer, forcing it off the road and causing it to flip on its side.

In response to defendants' motion to preclude the punitive damages claim, the court noted that in Pennsylvania, to establish punitive damages, a plaintiff is required to show reckless indifference on the part of a defendant which must be supported by evidence sufficient to establish that: (1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed, and that (2) he acted, or failed to act in conscious disregard of that risk.

An employer may be held vicariously liable for punitive damages if the actions of its employee: (1) were clearly outrageous, (2) were committed during and within the scope of the employee's duties, and (3) were done with the intent to further the employer's interests. In dismissing

the punitive damages claim, the court explained that, even in construing the allegations in a light most favorable to plaintiff, he did not plead sufficient facts to show that Tucker's actions were outrageous enough to warrant punitive damages. The court held that plaintiff's claims were conclusory and did not satisfy the requirement of establishing something more than mere negligence to claim punitive damages. Plaintiff also failed to address the court's previously raised concerns, such as the number of hours Tucker had driven, and the contradictory phrasing about the cause of the collision. Particularly, the court found that the complaint did not sufficiently illustrate that Tucker had the necessary mental state of either intent or reckless indifference to justify punitive damages. (See *Gonzalez v. Seashore*, above, where there was a violation of the 14-hour driving limit *26 times* before the accident.)

There were also no factors that suggested driving above the speed limit would be an outrageous disregard of other's rights—such as carrying any dangerous materials, which would heighten the risk. The court dismissed the punitive damages claim against Western Express as well since the allegations did not mention any previous incidents that may have put Tucker's driving capabilities into question. Similar to the claims against Tucker, plaintiff's claims against Western Express were a laundry list of insufficient conclusory allegations, such as: failing to adequately instruct Tucker on the safe operation of the tractor-trailer, negligently entrusting him with the vehicle, and failing to adequately train and oversee him.

The first named defendant in *Shelton v. Gure*, 2020 US Dist. LEXIS 225502 (M.D. Pa.), was operating a tractor-trailer rig in which the trailer driven was owned by Young Stars and was on lease to YaYa. The plaintiff, who rear-ended Gure's rig, asserted that the rig was operating in the right lane with its lights off. On Gure's motion for summary judgment with respect to plaintiff's claims for punitive damages, the court noted that, for punitive damages to arise from recklessness (as alleged by the plaintiff) under Pennsylvania law, evidence must be sufficient to establish that (1) the defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted, or failed to act in conscious disregard of that risk.

The evidence in this case showed that Gure had attended trucking school for four weeks and went through a month-long training on the road before getting a job, and had been driving trucks for approximately five years at the time of the collision. In the court's view, this training and experience were sufficient to allow a finder of fact to conclude that Gure consciously appreciated the risk of harm which would arise from him driving 25 miles per hour below the speed limit, before sunrise, without any lights on.

With regard to the contention that Gure acted in conscious disregard of the risk of harm arising from his conduct, the court noted that a vehicle's rate of speed is monitored on the dashboard, thus the driver is easily capable of learning how fast he or she is traveling. The presence of illuminated lights on the exterior of a vehicle, too, is also indicated at the driver's controls, and Gure would have had available access to the status of his vehicle's exterior lights. The court, therefore, found a jury question as to whether Gure was reckless in his conduct, and denied Gure's motion for summary judgment on the issue of punitive damages.

On the other hand, it was undisputed that Gure had performed a pre-trip inspection of the tractor trailer, which indicated that the lights on the trailer were properly functioning. Additionally, it was undisputed that a witness to the collision testified to Gure's four-way flashers functioning following the collision. Accordingly, the court granted summary judgment to the trailer owner and lessee on any claim arising from defective lights on the trailer.

ALLEGING JUDICIAL BIAS

Although motions to disqualify judges due to bias are rare, a judge's heightened emotional response to a particular law—such as cell phone use while driving—may form a basis for disqualification motion.

In *Publix Super Markets, Inc. v. Olivares*, 2020 Fla. App. LEXIS 125243 (Fla. Ct. App.), defendants in a trucking accident case sought to disqualify the trial judge, claiming that the judge was biased against them in connection with plaintiff's motion to add a punitive damages claim. At hearings on the motion to amend, the trial judge stated that the Florida Legislature has not banned cell phone use while driving only because legislators like to talk on their phones while they drive to Tallahassee. The judge repeatedly analogized cell phone use with drunk driving and stated, "without evidentiary support from the plaintiffs," that "some say" cell phone use while driving has been "found to be four times more dangerous than driving while drunk."

Additionally, the trial judge asked defense counsel, "Publix doesn't have a policy about talking and driving?" When counsel responded that Publix permits hands-free cell phone use while driving, the trial judge pressed: "Are you going to change that policy, at some point?" The defendants argued that the judge was biased against their position that the hands-free use of a cell phone, or a policy permitting it, does not justify punitive damages because cell phone use in a vehicle is not prohibited by law.

The appellate court initially decided that disqualification was not warranted, as the judge was simply asking hypotheticals to defense counsel and did not cut off or disparage the defense argument, although it was apparent he did not agree with the argument. Upon rehearing, however, the appellate court vacated its prior decision, determining that the facts alleged would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial. It noted that the judge's comments tended to show a disdain both for Publix's legal position and for the company's lack of a policy prohibiting cell phone use while driving. The appellate court did not address the substantive issue as to whether a punitive damages claim should be permitted.

PUNITIVE DAMAGES EXCLUSIONS

In *Dickerson v. Hapl*, 2020 US Dist. LEXIS 203442 (E.D. La.), plaintiff claimed she was driving on Interstate 10 in Louisiana when a "phantom vehicle" merged into her lane and forced her to apply her brakes; thereafter she was rear-ended by defendant Hapl, a driver for defendant, Swanson Trucking. Swanson's insurance carrier moved for summary judgment for a determination that punitive damages were not recoverable under its commercial automobile insurance policy which included a "Punitive Damages Exclusion" expressly excluding coverage for "[a] ny punitive or exemplary damages" and stated that "[i] n the event that a suit is brought against you involving punitive or exemplary damages, we will provide a defense to such action without liability, however, for such punitive or exemplary damages." In granting the insurer's motion, the judge noted that Louisiana courts have held punitive damage exclusions in insurance policies are enforceable when expressed in terms that are clear and unambiguous and that the punitive damages exclusion in Swanson's policy met those criteria.

Vince Saccomando

10. *Bad Faith*

In *Eres v. Progressive American Insurance Co.*, 2020 US Dist. LEXIS 26604 (M.D. Fla.), a vehicle insured by the defendant rear-ended another vehicle, pushing that vehicle into a passing train. The accident seriously injured the plaintiff and killed the plaintiff's infant son. Within five days of the accident, the insurer tendered its limited policy of $10,000 per occurrence and $20,000 per accident to the plaintiff's then-attorney. The tendered policy was not accepted for over two years for a variety of reasons, including issues of representation of plaintiff and the Estate. During this time, defendant made continued overtures and attempts to tender the policy to plaintiff and the Estate.

After two years, defendant received letter from plaintiff's new attorney, accepting the tender conditioned on the general release being restricted and not containing either "indemnification" or "hold harmless" language. Defendant thereafter timely forwarded two proposed releases that did not contain the terms "indemnification" or "hold harmless," inviting plaintiff's attorney to advise if changes were necessary. Plaintiff's attorney rejected the release and tender, arguing that the release contained the offending "indemnification" and "hold harmless" language, all of which defendant disputed. Plaintiff then filed suit for the accident, and after trial received a judgement against defendant's insured in the amount of $10,203,909.73.

The issue before the court on appeal was whether the proposed releases included the "indemnification" and "hold harmless" language and thus constituted a rejection of plaintiff's settlement offer. The court, in reviewing Florida bad faith law, noted that whether an insurer acted in bad faith is determined under a "totality of the circumstance" standard. The court found that that the undisputed facts showed that no reasonable jury could find that defendant acted in bad faith considering that there was an initial tender of the policy within five days of the accident, multiple attempts over two years by defendant to finalize settlement, and timely submission of settlement papers and release which did not use "indemnification" or "hold harmless" language.

In *Travelers Indemnity Co. v. Johnson*, 2020 US Dist. LEXIS 27417 (N.D. Ill.), the federal court was called upon to decide whether an insurer, under Indiana law, had breached its obligation of good faith and fair dealing in adjusting a claim or had merely acted negligently.

Brittany Johnson suffered severe injuries in a collision with a semi-truck which was owned by Sandberg Trucking and operated by Kimiel Horn, both insured by Travelers Indemnity Company. In a state court lawsuit filed by Johnson against Sandberg and Horn, proof of plaintiff's severe injuries was adduced as well as an opinion by an expert in truck safety who opined that the accident was caused by Horn. Travelers was noted as having taken exclusive control of the defense and had rejected on numerous occasions Johnson's request for tender of the $1,000,000 policy limit in exchange for general releases. Each time it rejected the demand, the court noted, Travelers exposed its insured, Horn, to an excess verdict. The case proceeded to trial; a verdict of $7,100,000 was rendered in Johnson's favor. Horn was responsible for $2,130.000 of the verdict. Horn then assigned his right to sue Travelers to Johnson.

In reviewing controlling Indiana law, the district court concluded that that an insurance provider does not breach the obligation of good faith and fair dealing that it owes to its insured when it merely acts negligently. In essence, poor judgment or negligence does not amount to bad faith; an additional element of conscious wrongdoing must also be present.

In *Hebert v. Prime Insurance Co.*, 2020 US Dist. LEXIS 73992, the US District Court for the Western District of Louisiana granted a motion to strike allegations made by plaintiffs in pretrial filings after the close of discovery, which referenced a bad faith claim against insurer USIC.

The lawsuit suit arose from a motor vehicle accident in which plaintiff Jeremy Hebert, driving an 18-wheeler owned by his employer, alleged that he had stopped due to traffic congestion when he was rear-ended by another 18-wheeler.

After completion of discovery and expiration of applicable scheduling orders, plaintiff filed pretrial statements and proposed jury instructions, verdict sheet, and voir dire, referencing a bad faith claim against USIC, based on its alleged failure to tender a reasonable amount. USIC made a motion to strike the references, arguing that plaintiffs had not properly raised such a claim, that the deadline for amendment of pleadings had passed, and that allowing a new claim to be asserted at that point would unduly prejudice the defendants.

Plaintiff's alleged support for the bad faith claim were *Louisiana Revised Statutes 22:1892* and *1973*, which deal with an insurer's bad faith refusal to pay on a claim. The district court noted that bad faith claims under these statutes were to be strictly construed, since they are "penal in nature." The court analyzed whether, under the facts of the case, plaintiff would be allowed to amend the complaint to raise bad faith. In deciding to grant USIC's motion to strike, the court found that plaintiff had failed to show bad faith in USIC's position that plaintiff's damages fell within the $1,000,000 policy limit.

In last year's review, we discussed *Wright v. State Farm Mutual Automobile Insurance Co.*, 2019 US Dist. LEXIS 163871 (W.D. Ky.), in which the insured sued both the insurance agent and the insurer, arguing they conspired to fraudulently deny underinsured motorist benefits under multiple policies. In each case, the presence of the agent, a Kentucky resident, thwarted the insurer's attempt to remove the case to federal court, so the insurer argued the bad-faith claim against the agent should be dismissed since it was the insurer alone, not the agent, that entered into the insurance contract with the insured. In *Wright*, the district court disagreed, finding the bad-faith claim against the agent could arise out of the contract between the insured and State Farm. Accordingly, the agent stayed in the case, and the matter was remanded to state court. On November 15, 2019, the *Wright* court revisited its decision, 2019 US Dist. LEXIS 198523, and found that it was bound by Sixth Circuit jurisprudence holding that a contractual obligation must exist in order to find a party liable under the Kentucky Unfair Claims Settlement and Practices Act or the common law duty to act in good faith. The court vacated its prior decision, and indicated that it would reconsider whether remand was proper.

Bill Foster

11. *Spoliation*

The defendant truck driver in *Gunderson v. Franks*, 2020 Wisc. App. LEXIS 175 (Wis. Ct. App.), was involved in an accident. Immediately following the crash, the truck was taken in for repairs at a shop that could have quickly and easily downloaded data from the electronic control module (ECM)—the truck's "black box." Franks never requested such a download, though, and the black box was not accessed until more than three years after the crash. By that time, the accident data had long since been overwritten by subsequent hard braking events.

The trial court sanctioned Franks for her failure to preserve the accident data from the ECM in her truck. The court of appeals affirmed the sanctions based on several factors, concluding that, (1) if the black box's speed-on-impact data had been preserved, it would have been relevant to determining the extent of the plaintiff's injuries, and (2) comparable speed-on-impact evidence could not be obtained merely from the eyewitness testimony.

Franks argued that her failure to preserve the black box data did not justify sanctions because (1) she did not "intentionally" destroy the black box data; (2) she did not receive explicit notice from the plaintiffs that litigation was imminent until after the data was likely already overwritten; (3) contemporaneous federal regulations did not require her to preserve the black box data; and (4) she was unaware of the need to preserve the black box data. Both the trial court and the appellate court were unimpressed, the latter noting that when a commercial semi-truck broadsides a passenger vehicle at high speed, all parties involved know or should know that litigation is, at least, a "distinct possibility."

The plaintiff in *Legacy Five Leasing, LLC v. Busforsale.com, LLC, 2020 Tenn. App. LEXIS 240, (Tenn. Ct. App.)* leased a parking space for its bus from the defendant. While parked in the space, the bus was allegedly damaged by flood. The plaintiff transferred the bus, its trailer and equipment to third parties without affording the defendant the opportunity to inspect same, and then brought suit against the defendant for damages. The court found irrelevant plaintiff's claim that its failure to make the bus available for inspection was not intentional, and held that it was prejudicial to the defendant to be denied the opportunity to independently assess the claims damage. As a sanction for the spoliation, plaintiff's claim was dismissed.

Having sued a motor carrier for negligently training and supervising its driver who was involved in an accident, the plaintiffs in *Parker v. Oliva*, 2020 US Dist. LEXIS 191202 (N.D. Ala.), argued that the defendants' motion for summary judgment should be denied because they failed to produce documents relevant to the driver's hiring, training, and employment, as well as the motor carrier's internal investigation of the accident. (Id. at 8-9). The plaintiff argued that the defendants knew they were required to preserve these documents because: (1) the Federal Motor Carrier Safety Act required it; and (2) they received a letter from the plaintiffs' attorney nine days after the accident asking them to preserve the documents in anticipation of potential litigation. The motor carrier did not deny that it had failed to produce the documents, or even that it possessed the documents at one time, but maintained that (1) it searched for the documents but failed to find them; (2) its former safety director, who had been responsible for maintaining the documents, would not answer phone calls; (3) it did not know where the safety director currently worked; and (4) the documents may have been lost during one of its moves. With this evidence uncontroverted, the court found that plaintiff had failed to demonstrate the "bad faith" on the part of the defendants which would justify spoliation sanctions.

See also *Harden v. Russell Stangle & Seward Motor Freight, 2020 US Dist. LEXIS 211624 (M.D. Tenn.)*, in which the court found that the defendant motor carrier had not acted in bad faith in failing to recover and preserve the pieces of a tire which had blown up and lay scattered all over the highway.

Phil Bramson

12. UM/UIM

Jennifer Hunter was involved in an automobile accident and recovered the policy limit of the other driver's insurance policy. When that amount was insufficient to cover Hunter's medical bills, the Hunters filed an action against Progressive Mountain Insurance, seeking to recover the remaining balance as UM benefits. The Hunters had increased their auto liability coverage in September 2012, but did not request additional UM coverage. Nevertheless, the Hunters argued that their change in standard coverage in September 2012 triggered Progressive's duty to offer them the statutory minimum UM coverage.

In the case, *Hunter v. Progressive Mountain Insurance Co., 2020 Ga. App. LEXIS 17 (Ga. Ct. App.)*, the court held that Progressive did not have a statutory duty to secure from the insured a new rejection of the statutory minimum UM coverage in spite of a September 2012 change in standard automotive coverage, nor did Progressive have a statutory duty to reoffer the Hunters the statutory minimum UM coverage at that time. Further, it found that the relevant statutory subsection required only that the insurer offer UM coverage when the policy was "issued or delivered," which relates to the creation of the contract of insurance, which, in this case, happened in 2010 and does not apply to renewals.

The plaintiff in *Ayler v. Liberty Mutual Insurance Co.*, 2020 Mich. App. LEXIS 2971 (Mich. Ct. App.), was injured while driving an automobile which he had purchased. He sought no-fault benefits under an Auto-Owners policy, which listed the vehicle as a covered auto but was issued to the corporation of which he was sole owner and resident agent. (Liberty Mutual, which issued a policy covering a different vehicle to his grandmother who lived with him, was granted a summary judgment at trial level which was not appealed.) The appellate court, following *Dye v. Esurance Property & Casualty Insurance Co.*, 504 Mich. 167, 934 N.W.2d 674 (2019), held that Ayler was entitled to no-fault coverage under the Auto-Owners policy because he owned the vehicle involved in the loss and he "maintained" the Auto-Owners policy, even though he was not the named insured.

The plaintiff in *Smith v. Union Insurance Co.*, 2020 US App. LEXIS 38029 (6th Cir.), was standing in the roadway to stop traffic while his coworker moved a bucket truck from one side of the road to another. A hit-and-run driver failed to stop after plowing into Smith, who sought coverage under UM in the absence of an identifiable defendant. At the time he was struck, Smith was about twenty feet from the truck being moved.

Applying Kentucky law, the Sixth Circuit determined that Smith was "occupying" the bucket truck, although he was neither a driver nor a passenger, within the meaning of the Union policy issued to his employer. The court found that Smith's injury was connected to the use of the insured vehicle: he was injured while flagging traffic to allow the truck to cross the road, and but for the use of the truck, which was an insured vehicle, Smith would not have been injured. At a distance of twenty feet, Smith was in reasonably close geographic proximity to the bucket truck. Since he was flagging traffic to protect and secure the insured vehicle, Smith was "vehicle-oriented" at the time of the accident. Finally, the court found that flagging traffic to help the bucket truck safely cross from the left side of the road to the right was essential to the operation of the insured truck.

Mounier v. RLI Corp., 2020 US Dist. LEXIS 8288 (D. Ariz.), looked at the recurring issue of whether the claimant was "occupying" a vehicle for purposes of UIM coverage. The court held that plaintiffs were not "occupying" the tour bus under either Arizona or California law for purposes of being "insured[s]" under a business auto policy that included a California underinsured motorist coverage endorsement ("Policy"). To be insureds under the policy, the individuals had to be "occupying" a covered auto, which, under the laws of both states, required the insureds to be near the insured vehicle and to be engaged in some activity closely related to the use of the vehicle.

Plaintiffs were French residents who had signed up for a tour of the Western United States through Geo Tours USA, which hired an entity named Four Season to provide the tour bus and the bus driver for the tour. On November 10, 2015, the tour bus arrived in Arizona and dropped the passengers, including the plaintiffs, at their hotel. The passengers deboarded and the bus driver parked and locked the tour bus in the hotel parking lot. Plaintiffs explored the shopping district and, upon their return to the hotel, Mounier was hit in the crosswalk by Albert Henry's automobile, breaking her wrist. The accident was .3 miles from the hotel and occurred about two hours after plaintiffs had exited the tour bus. Plaintiffs recovered the limits of Henry's insurance policy and notified Geo Tours and Four Season of their claims. Four Season turned the claim over to its insurer, who denied plaintiffs' claims on the ground that they did not qualify as "insured[s]" under the Policy.

The court agreed that the plaintiffs were not insureds under the Policy because they were neither near the tour bus nor engaged in an activity related to the use of the tour bus at the time of the accident. Plaintiffs had left the bus two hours prior to the accident and were merely walking back to their hotel after visiting the shopping district. The court rejected plaintiffs' breach of contract claim.

Fagg v. Progressive Gulf Insurance Co., 2020 US Dist. LEXIS 3430 (W.D Va.), addressed an automobile purchaser's attempt to collect UM benefits under the seller's insurance policy. The inquiry turned on whether legal ownership of the vehicle had been transferred prior to the accident. On April 29, 2016, Scott Fagg paid Joseph Lee Horton $6,000 for an automobile. The parties intended that Fagg purchase the vehicle, and that Horton would have no further financial responsibility regarding it. Horton endorsed the certificate of title and delivered that signed certificate to Fagg. Fagg took physical possession of the vehicle the same day. Horton had an auto insurance policy issued by Progressive, which was in effect at the relevant times and provided for UM coverage of up to $100,000 per person. The day after Fagg bought the vehicle, he collided with an uninsured motorist, sustaining serious injuries.

The court held that Horton had transferred ownership of the automobile to Fagg before the accident by endorsing and delivering the certificate of title to Fagg, and by the latter taking physical possession of the vehicle. The court found that Horton had no insurable interest in the vehicle and no authority to grant Fagg use of the vehicle, having transferred title to the vehicle. The policy did not apply to the vehicle at the time of the accident and the court granted Progressive's motion for summary judgment.

In *DOT v. National Interstate Insurance Co.*, 2019 Mich. App. 8374 (Nov. 26, 2019), the Michigan Court of Appeals interpreted an element of Michigan's no-fault act, MCL 500.3101 et seq. in connection with a coverage dispute between insurers as to whether a vehicle is "involved in the accident" such that a no-fault insurer is liable for paying property protection benefits. The court ultimately held that a vehicle is "involved in the accident" if it is being actively used to perpetuate the motion of another vehicle that causes property damage. Plaintiff Michigan Department of Transportation (MDOT) had issued to Pahoa Express a single trip permit for the movement of an oversized load from Toledo, Ohio to Sanilac, Michigan and specified the route in Michigan. The permit required, among other things, that the Pahoa semi be accompanied by two escort vehicles, one in the front and one to follow in the rear, to assure clearance of the load under bridges. National Interstate Insurance Company insured Pahoa Express, and Frankenmuth Mutual Insurance Company insured the lead pilot vehicle. In spite of the precautions taken, the load struck and caused damage to a bridge.

MDOT sued National and Frankenmuth for property protection insurance benefits pursuant to Michigan's no-fault statute, alleging that both insurers provided coverage. National moved for summary judgment, seeking a declaration that Frankenmuth had partial liability for the damage to the bridge and was "involved in the accident" pursuant to MCL 500.3125—but the trial court disagreed. The appellate court reversed, finding that the lead pilot vehicle, as part of a "caravan" having the role of guiding the Pahoa semi along the route, constituted a vehicle "involved in the accident" under MCL 500.3125. The lead vehicle was equipped with a height measuring device and the driver needed to communicate with the Pahoa semi driver regarding whether adequate clearance existed for all overpasses to ensure that the Pahoa semi could safely pass underneath.

Truman Medical Center v. Progressive Casualty Insurance Co., 2020 Mo. App. LEXIS 231 (Mo. Ct. App.), held that a hospital lien does not extend to uninsured motorist benefits provided by a Progressive commercial auto policy to an injured truck driver under Missouri law, which, in relevant part, created a lien against "any and all claims... which such injured person may have...against the person or persons causing such injury." The court recognized that the statute made no reference to a lien on insurance benefits. The court further noted that, even if the Missouri hospital lien statute applied to insurance benefits, the statute could not be read to extend to uninsured motorist benefits provided by policies which insure the injured party as opposed to the tortfeasor. The uninsured motorist coverage on which Progressive paid to the injured party is plainly first-party coverage, to which the hospital lien created under statutory law does not extend. The court noted that the relevant statute is worded more narrowly than similar out-of-state statutes which permit hospital liens to attach to uninsured motorist benefits.

At the time of the automobile accident at issue in *Sessions v. State Farm Mutual Automobile Insurance Co.*, 2020 US Dist. LEXIS 36956 (D.S.C.), Sessions was occupying a tractor owned by his employer. Sessions was a named insured or a resident relative with respect to seven insurance policies issued by State Farm. State Farm paid Sessions underinsured motorist coverage on the policy with the highest limit. Sessions then made a claim for underinsured motorist coverage under the other six policies. The court concluded that unambiguous language in the policies denied Sessions the right to recover under all the policies—if Sessions sustained bodily injury "while occupying a motor vehicle not owned by [him] or any resident relative[,]" and more than one State Farm policy would otherwise provide coverage. "...The maximum amount that may be paid from all such policies" would be equal to the highest limit provided by any one of the policies.

Nevertheless, Sessions argued that the policy limitation was void as offensive to South Carolina's public policy that UIM coverage is personal and portable. The court found that the relevant policy provisions limit stacking, not portability, which refers to coverage that follows the individual insured and not the insured vehicle. Furthermore, state law prohibits stacking in this case because Sessions was not occupying his own vehicle or that of any resident relative at the time of the accident.

In *Hoffman v. Progressive Express Insurance Co.*, 2020 Fla. App. LEXIS 5576 (Fla. Ct. App.). Michael and Ginnie Hoffman were injured while Michael Hoffman was driving a Volvo truck that was struck by another vehicle driven by an uninsured motorist. Plaintiffs had three insurance policies that provided UM coverage—one each with GEICO, Allstate, and Progressive Express. Plaintiffs recovered under their policies with GEICO for $600,000 and Allstate for $100,000, but Progressive Express denied coverage because plaintiffs had selected non-stacked coverage in their policy. The court agreed with Progressive Express, citing the relevant policy provision and state statute.

Matthew Paris

13. Jurisdiction

The federal Motor Carrier Act requires motor carriers to designate agents for service of process in all states in which it operates. In *Stehle v. Venture Logistics LLC*, 2020 US Dist. LEXIS 4320 (S.D. Ohio), the United States District Court concluded that designating an agent for service of process is not, by itself, sufficient to subject a motor carrier to personal jurisdiction for lawsuits occurring in other states. The claim arose out of an accident that occurred in Indiana involving an Indiana resident and a tractor trailer owned by an Indiana company and operated by an Indiana resident; however, suit was filed in Ohio where the plaintiffs (the beneficiaries of the decedent killed in the accident) resided.

Following Sixth Circuit precedent, the court held that merely designating an agent to comply with the service-of-process statute does not automatically eliminate the requirement of minimum contacts to establish personal jurisdiction. Thus, the court concluded that the Indiana company was not subject to personal jurisdiction in Ohio merely because they designated an agent to accept service. The court further concluded that Ohio's long-arm statute and federal due process considerations did not support subjecting the Indiana company to suit in Ohio. The court did, however, grant plaintiffs' request to transfer venue to an Indiana district court, rather than dismissing the complaint in its entirety.

Similarly, in *Slaton v. Climax Molybdenum Co.*, 2020 US Dist. LEXIS 109432 (E.D. Mo.), the court dismissed the plaintiff's action against the defendant for lack of personal jurisdiction. *(Note: For clarity, please note that a word in the court's case title contains a typographical error, and was spelled incorrectly as "Molydbenum." It has been corrected in our usage.)* Plaintiff, a resident of Arkansas, was injured while driving a tractor trailer in Missouri, which had been loaded at defendant's facility in Iowa for delivery to Louisiana. The court acknowledged that the claim clearly fell within Missouri's long-arm statute, since the statute covers tortious acts that occur outside of Missouri that have consequences in Missouri. However, the court held that the defendant still must have sufficient "minimum contacts" in Missouri to be subjected to personal jurisdiction, which were lacking here. Among the factors considered, the court rejected plaintiff's argument that defendant controlled the route of travel through Missouri by utilizing the "Rand McNally MileMaker" software for reimbursing plaintiff's employer for fluctuating fuel costs, since that program did not control or limit the route chosen by the driver.

In *American Millennium Insurance Co. v. United State Freight Solutions*, 2020 US Dist. LEXIS 25119 (M.D.N.C.), a North Carolina district court adopted the rather restrictive view enunciated in recent years by the Fourth Circuit Court of Appeals, that an insurer cannot secure a declaration that it has no duty to defend or indemnify its insured if there is no underlying action pending. The insurer commenced a declaratory judgment seeking a ruling that it was not obligated to provide coverage with respect to an accident that occurred in Florida in September 2018. However, the Court noted that it was undisputed that there was no underlying lawsuit pending against anyone as a result of the accident. Consequently, the Court ruled that the insurer lacked standing to seek a ruling because there was no underlying action to defend, nor any underlying judgment for which the insurer was being asked to indemnify. The declaratory judgment, therefore, was dismissed without prejudice. This sort of approach conflicts with those cases that suggest or mandate that an insurer file a declaratory judgment action when a coverage dispute is apparent.

Although the lack of an underlying action may preclude an insurer—at least in certain jurisdictions—from commencing a declaratory judgment, so too may an insurer be precluded from commencing a declaratory judgment in federal court if there is a concurrent underlying state action pending. In *State Farm Fire & Casualty Company v. Hardy*, 2020 US Dist. LEXIS 21407, the Southern District of Alabama dismissed a coverage action brought by State Farm seeking a declaration concerning its coverage obligations for two underlying actions arising out of a

trucking accident. The court went through several of the nine factors cited by the Eleventh Circuit in *Ameritas Variable Life Insurance Co. v. Roach*, 411 F.3d 1328 (11th Cir. 2005), including: that there were parallel state court litigations involving similar issues and parties; the lack of any federal or statutory law at issue (the suit was brought in federal court purely on diversity grounds); and, the potential overlap of factual issues that could result in inconsistent rulings between the courts. Consequently, the insurer's declaratory judgment action was dismissed.

An insurer's declaratory judgment action may also be dismissed where it seeks a ruling on indemnification before the underlying action is resolved. The Eastern District of North Carolina ruled in *Old Republic Insurance Co. v. C&G Express Trucking*, 2020 US Dist. LEXIS 94364, that seeking a ruling on indemnity in the coverage action while the underlying action is still pending "raises significant questions about Article III jurisdiction and the wise use of judicial resources." The court noted that such an action is conditional upon a finding of liability in the underlying action, which may prejudice the insured's interests while that action is still pending.

Campos v. Benny Whitehead Logistics, 2020 US Dist. LEXIS 54173 (C.D. Cal.), agreed with a majority of courts that have refused to find that traditional tort claims arising out of a motor vehicle accident are preempted by the Interstate Commerce Commission Termination Act (ICCTA). After a severe bus accident in which multiple passengers and the driver were killed, and many others sustained significant injuries, a number of civil actions were filed against the tractor trailer company, whose driver fell asleep while his truck was parked on a closed freeway. The tractor trailer company removed the action to federal court, claiming that the state court tort claims were preempted by the ICCTA. The ICCTA provides, among other things, that states may not enact any laws relating to intrastate rates, intrastate routes, or intrastate services of any freight forwarder or broker. Significantly, however, the ICCTA does not preempt any state laws governing safety issues. Consequently, the district court agreed with the "vast majority of courts" that concluded that personal injury claims are not preempted by the ICCTA.

In *Certain Underwriters at Lloyd's v. CSX Transportation Inc.*, 2020 US Dist. LEXIS 149582, the District Court for the Western District of North Carolina proved that not all cases involving jurisdiction are complicated. The court granted defendant's motion to dismiss for improper venue because the Carmack Amendment expressly provided that an action against the originating rail carrier may only be brought "in the judicial district in which the point of origin is located." 49 U.S.C. § 11706(d)(2)(A)(i). Here, that required the suit to be filed in the Southern District of Illinois—the North Carolina court promptly transferred the action to that court.

Finally, in *Charlot v. Transportation Consultants*, 2020 US Dist. LEXIS 157412 (E.D. La.), the court remanded a case to state court, concluding that the plaintiff's allegations that he was underpaid by the defendant in violation of 49 C.F.R. § 376.12(d) (the Truth in Leasing regulations) were not sufficient to trigger federal question jurisdiction. The court noted that plaintiff, who was representing himself *pro se*, was essentially asserting a state law unfair pay/breach of contract claim, and the suit did not become completely preempted by the plaintiff's passing references to the federal regulations. Ultimately, plaintiff's state law claims could be resolved without relying upon any federal law. As such, the case was remanded to state court for further proceedings.

Mark Whitford

14. Non-Trucking Coverage

Stanton v. Donaldson, 2020 US Dist. LEXIS 46460 (W.D. La.), involved a driver heading home to Mississippi after completing a delivery in Texas; the accident occurred while he was in Louisiana. The motor carrier was insured by Prime Insurance, while Great American had issued a non-trucking policy to the driver.

Great American uses a detailed, multi-part exclusion, setting out a list of scenarios in which coverage does not apply, rather than the ISO simpler exclusion (referring only to vehicles actually hauling freight or otherwise operating in the lessee/motor carrier's business). It seems to us that this case could have gone the other way, at least under the ISO formulation; after all, the only reason that the driver was in Louisiana was that the trucker had dispatched him to Texas. He was far from home at the time of the loss. Not all trips home are identical. The court, in any event, had no trouble concluding that the Great American exclusion applied; it specifically excludes coverage when the covered auto is travelling from a delivery point back to the location where it is regularly garaged.

Great American was also successful in avoiding any exposure in *Horace Mann Insurance Co. v. Acuity*, 447 F. Supp. 3d 594 (E.D. Mich.), an interesting decision concerning responsibility to pay PIP benefits to an injured truck driver under Michigan's No-Fault Act. Reva Kaysar owned a tractor, which he registered in his own name. Acting in his capacity as principal of E&E Freight (which he owned with his wife), Kaysar leased the tractor to Moon Star Express, an authorized for-hire motor carrier. Moon Star was insured for liability by Acuity; Moon Star had arranged non-trucking coverage for its owner-operators with Great American, while Kaysar was insured by Horace Mann for his personal automobile. He was injured while driving his tractor with a Moon Star trailer attached and while operating in Moon Star's business. The issue was: which of the three insurers was responsible for paying PIP benefits to Kaysar?

The Great American non-trucking policy specifically excluded PIP coverage alongside liability coverage when the covered truck was used in the business of any lessee. This adjustment in the language of the non-trucking policy (which ISO has also made on its forms) distinguished this matter from earlier cases in which the exclusionary language referred only to liability coverage. The court had little trouble concluding that Great American had no PIP coverage for the loss.

The owner-operator in *Great West Casualty v. Fast Haul, Inc.* 2020 US Dist. LEXIS 62635 (W.D. Okla.) was en route to pick up a load pursuant to dispatch instruction given to him by the lessee motor carrier. The court rejected the insured's suggestion (perhaps at the urging of its insurer) that because the load had not yet been picked up, the owner-operator was not yet in the business of the motor carrier. It seems to us that on these facts, the non-trucking carrier wins every time and, in fact, the court ruled in favor of Great West.

While the decision was plainly correct, we wonder whether Great West's argument—or the court's understanding of the argument—was overly broad. As reported in the decision, Great West utilized the standard ISO-type exclusion, and pointed out that the vehicle had been leased to the motor carrier for its exclusive use. (That is in fact required by the USDOT leasing regulations.) Accordingly, went the argument, by definition, the vehicle was either being used for a business purpose or being used in the lessee's business. The court concluded that "[u]nder these undisputed facts there was never a time when the vehicle was being used that it was not being used in the business of [the lessee]." This seems to us a serious overstatement; if it were true it would appear that the non-trucking policy would never apply and that non-trucking coverage is illusory.

In this case, the vehicle was being used in the lessee's business, but there needs to be at least some scenarios—a small number—in which use of the vehicle does not fall within the exclusion. (We also note that many NTL policies do not apply at all if no lease with a motor carrier is in effect. We do not know if the Great West policy had that prerequisite.) Courts over the years have, from time to time, stumbled over this interplay between the language of non-trucking policies and the requirements of the leasing regulations.

In some cases, the question of whether the non-trucking policy or the motor carrier's policy applies is much tougher to decide. In *Great West Casualty Co. v. Burns*, 2020 US Dist. LEXIS 92911 (M.D. Ga.), the owner-operator had driven his tractor back to his home in Macon, Georgia for the weekend. He was told that he was next scheduled to pick up a load at the motor carrier's Savannah terminal for delivery on Monday. Instead, he decided to pick it up on Sunday and head to the destination from home the next day.

On Sunday morning he filled his tank and then, according to his story, intended to drive to Savannah. Before doing so , though, he stopped for breakfast. The loss happened as he maneuvered in town toward a breakfast spot. He thought of himself as being "under dispatch" (a term that we always insist is not a term of art). The terminal manager, though, claims the driver told him that he was running personal errands that morning. The record showed that, for the previous year, the driver had been driving from his home in Macon to the Savannah terminal most days to pick up loads, although the precise details of pickup depended on both where the load was going, and any time requirements that the customers imposed. There was a dispute about just how Sunday pickups had been handled.

In this case, Great West was the insurer for the motor carrier, while Atlantic Specialty had issued a non-trucking policy to the owner-operator. (The court reported that the non-trucking policy had been issued to the motor carrier but that is almost certainly wrong. All non-trucking policies we are familiar with cover only the lessor/owner-operator

and exclude coverage for the motor carrier.) Great West's policy covered lessors (such as the owner-operator) so long as the vehicle was being used in the lessee-motor carrier's business. (Great West, of course, would cover its named insured regardless of what the driver was up to.) Conversely, Atlantic would provide coverage to the owner-operator only if he was not acting in the carrier's business at the time of the loss.

The court opted not to answer the question on summary judgment, finding that there was a material question of fact as to whether the driver was acting "within his normal work pattern or operational routine." The case will need to be resolved by findings of fact by the jury. We observe that many bobtail disputes do not involve a simply binary choice between insurer A and insurer B. First, the motor carrier's insurer will almost always need to defend its own named insured even if the NTL insurer defends the owner-operator. (As noted above, NTL policies do not cover the motor carrier.) So long as each policy insures a separate defendant, the case does not present a primary/excess question at all: each insurer is the primary insurer of its own named insured. Moreover, it is possible, depending upon the language of the motor carrier's policy, that some owner-operators might be entitled to coverage under both policies. In that case, there would be a primary/excess question. Generally under that scenario, the non-trucking policy ought to pay from dollar one, with the motor carrier policy available as excess coverage.

Larry Rabinovich

15. *FMCSA Watch*

A few of the agency's notable actions are summarized below.

85 Fed. Reg. 88, 27017 (May 6)

The FMCSA issued a Notice regarding the Crash Preventability Program, which was developed with the help of carriers to evaluate the preventability of certain categories of crashes. Significantly, the Notice states that the FMCSA will remove crashes that were not preventable by the motor carrier or driver from the program's algorithm, something that industry spokesmen have been pushing for.

85 Fed. Reg. 105, 33396 (June 1)

The FMCSA issued a final rule revising the hours of service regulations to provide greater flexibility for commercial drivers, effective as of September 29, 2020. The final rule provides the following key changes without changing the maximum allowable driving time: (1) extending maximum duty period allowed under short-haul exception from 12 to 14 hours; (2) extending the maximum radius for short-haul exception from 100 to 150 miles. Numerous comments and responses to questions by the FMCSA regarding this final rule can be found in the Federal Register.

85 Fed. Reg. 160 (Aug. 18)

The FMCSA issued a final rule rescinding the requirement that drivers of passenger-carrying commercial vehicles submit and retain inspection reports when the driver has neither found nor been made aware of any vehicle defects or deficiencies. The purpose of the final rule is to reduce the burden of information collection for drivers and carriers without adversely impacting safety.

85 Fed. Reg. 240 (Dec. 14)

A proposed rulemaking would rescind 49 CFR 391.27, thereby eliminating the requirement that drivers operating commercial motor vehicles (CMVs) in interstate commerce prepare and submit a list of their convictions for traffic violations to their employers annually. FMCSA would retain the requirement in § 391.25(a), which is largely duplicative of the requirement in § 391.27, and which requires each motor carrier to make an annual inquiry to obtain the MVR for each driver it employs from every State in which the driver holds or has held a CMV operator's license or permit in the past year. Comments on this notice of proposed rulemaking (NPRM) must be received on or before February 12, 2021.

85 Fed. Reg. 249 (Dec. 29)

Proposal to amend the Federal Motor Carrier Safety Regulations to include rear impact guards (required by the FMCSRs since 1952) on the list of items that must be examined as part of the annual inspection of commercial motor vehicles; to amend the labeling requirements for rear impact guards; and to exempt road construction controlled horizontal discharge trailers from the rear impact guard requirements.

Sanjeev Devabhakthuni

16. *Miscellaneous*

New York Insurance Law § 5105 provides that an insurer, having paid no-fault benefits to its insured, may seek to recover those expenses through intercompany arbitration against the tortfeasor's liability insurer. The court held in *Matter of Old Republic Insurance Co. v. Geico Indemnity Inc.*, 2020 N.Y. Misc. LEXIS 1113 (Kings Cnty.) that, as long as the no-fault beneficiary and the tortfeasor are "covered persons" under Insurance Law § 5105(a)) (i.e., "any owner, operator, or occupant of, a motor vehicle which has in effect the financial security required by Article Six...of the vehicle and traffic law"), arbitration between insurers pursuant to the statute is mandatory and does not depend on the existence of an agreement to arbitrate.

Farm Bureau Mutual Insurance Company sought to intervene in *Auto-Owners Insurance Co. v. Cook County Land Ventures*, 2020 US Dist. LEXIS 80399 (M.D. Ga.), to contest Auto-Owners' efforts to secure declaratory judgment of its non-coverage (which would leave Farm Bureau "holding the bag"). The court, however, found that Farm Bureau's potential exposure did not give it sufficient legal (as opposed to economic) interest in the outcome to justify intervention.

The insured in *Jackson v. Berkshire Hathaway Global Insurance Services*, 2020 US Dist. LEXIS 93764 (W.D. La.), made a claim for physical damage coverage for a truck damaged in an accident. There was some confusion as to whether the truck was covered, as there was a clerical error in the vehicle identification number ("VIN") recorded on the policy. Even after the error was discovered, and the appraiser's report had been submitted, however, the insurer delayed payment of the claim for another 30 days. The court found that this additional delay was arbitrary, capricious, or without probable cause, and ordered Berkshire to pay a statutory penalty of $19,876.42.

A driver for the named insured trucking company in *AmGUARD Insurance Co. v. Ortiz*, 2020 US Dist. LEXIS 122999 (D. Md.), was involved in an accident resulting in injuries to multiple claimants. AmGUARD brought an interpleader action seeking to pay its $1 million per accident limit into court. Other putative insureds (the trailer owner, the shipper) objected on several grounds. The district court, however, found that the interpleader was appropriate, even though (1) not all of the bodily injury claims had been reduced to judgment, (2) the claimants had reached a tentative agreement on dividing the insurance proceeds, and (3) AmGUARD had not secured releases for all of its (putative) insureds. Finding that AmGUARD's alleged obligations to its insureds were unrelated to its obligations to the claimants (and AmGUARD represented that it was still providing a defense), the court held that AmGUARD was released and discharged from all liability with respect to its indemnity obligation.

The federal Surface Transport and Assistance Act (STAA), 49 U.S.C. § 31114, Subsection (a), provides that a state "may not enact or enforce a law denying to a commercial motor vehicle subject to this subchapter or subchapter I of this chapter reasonable access between" the interstate highway system as described in § 31114(a)(1) and certain locations described in § 31114(a)(2), including "terminals."

Many municipalities in Wisconsin, including the Town of Delafield, impose weight limitations on certain roads especially vulnerable to deterioration during the spring when roadways begin to thaw from the long winter. Central Transport was cited and fined $1,532.50, for violating the Town's seasonal weight limitation when one of its drivers operating a tractor-trailer was on his way to deliver art supplies to a terminal. Central Transport argued that the STAA preempted the Town's ordinance since it was not based on safety concerns. The Supreme Court of Wisconsin held in *Town of Delafield v. Central Transport Kriewaldt*, 2020 WI 61, 944 N.W.2d 819, that the STAA did not preempt local ordinances, safety-based or not, so long as commercial vehicles were still afforded "reasonable access" between the interstate highway system and a terminal. The court found that the Town's weight limitation was also based on a reasonably tailored and well-founded police power consideration—damage to roads that were especially vulnerable during the spring thaw. In this case, Central Transport's driver could have checked the Town's website or called ahead to determine whether any restrictions were in effect. Alternatively, upon seeing the seasonal weight limitation was posted, the driver could have driven to the municipal government offices and obtained a permit that would have allowed the tractor-trailer to lawfully traverse necessary roads. Accordingly, while such a system did not provide Central Transport unfettered access to its delivery point, it also did not prohibit all access. Taken together, the court concluded the specific facts of this case demonstrated that Central Transport had reasonable access to its destination.

The plaintiff in *Wayne's Automotive Center v. South Carolina Department of Public Safety*, 848 S.E. 2d 56 (S.C. Ct. App.), operated a wrecker service authorized by the defendant. After towing a wrecked tractor-trailer and its cargo of dog food, the plaintiff's authority was suspended for 120 days by the defendant for overcharging for certain laborers, double billing in some instances, and refusal to release the cargo when so directed by the Department. The administrative law court upheld the suspension generally, finding that the bill compiled by the wrecker service failed to include the costs for renting additional equipment and/or additional labor charges from another entity to perform "special operations" (clean-up, transportation of cargo, repositioning the vehicle, and/or controlling traffic on the accident scene). Nevertheless, given some uncertainty about whether the cargo of dog food was the kind of "personal property" contemplated under the regulations governing its release by the wrecker service, as well as the plaintiff's contentions that it could not immediately identify the owner of the cargo, the administrative law court (affirmed by the court of appeals) reduced the suspension to 60 days.

The defendant in *Vargas v. Lava Transport*, 2020 US Dist. LEXIS 165614 (N.D. Ill.), was a federally authorized motor carrier, which did not dispute that it employed the driver involved in an accident with the plaintiff. The plaintiff, though, sought to implead the company which had signed an "independent contractor agreement" with Lava, pursuant to which it provided the driver to Lava. The court agreed that the second company could potentially be liable to the plaintiff, even though Lava held operating authority and the second company did not, and permitted the amendment of the complaint (even though doing so destroyed the court's diversity jurisdiction and required remand to the state court).

Two potentially conflicting statutory imperatives were at issue in *Botlagudur v. Botlagudur*, 2020 N.J. Super. Unpub. LEXIS 1736 (App. Div.). New Jersey's "deemer statute," N.J.S.A. 17:28-1.4., requires the insurance policy issued on an out-of-state vehicle to provide the same liability coverage mandated for all resident vehicles under New Jersey law. The Automobile Insurance Cost Reduction Act (AICRA), N.J.S.A. 39:6A-3.1, however, gives the insured the option of purchasing either a "basic" policy, which provides no bodily injury liability coverage unless an optional $10,000 amount is selected, or a "standard" policy, which provides such coverage with minimum limits of $15,000 per person. Relying on *Felix v. Richards*, 241 N.J. 169, the appellate division held that the deemer statute required an out-of-state policy to provide a minimum of $15,000 in bodily injury coverage, notwithstanding the options provided under the AICRA.

The defendant in *Murray v. UPS Capital Insurance Agency*, 54 Cal. App. 5th 628 (Cal. Ct. App.), was an insurance broker, which was also a subsidiary of a motor carrier. When the plaintiff retained the motor carrier to transport used computer equipment worth nearly $40,000 from California to Texas, the motor carrier advised the plaintiff not to declare a specific value (which would have negated the $100 liability limitation in the bill of lading), but rather to contact the broker and obtain insurance. When the equipment was damaged during shipment, however, the insurer refused to pay, since the policy did not cover losses in transit (other than a catastrophic destruction of the vehicle carrying the cargo).

The plaintiff argued for a per se rule that brokers/agents, specializing in a specific field of insurance, hold themselves out as experts, and are subject to a heightened duty of care towards clients seeking that particular kind of insurance. The court of appeals declined the invitation to create a per se rule. Nevertheless, the plaintiff produced evidence that, while UPS Capital was a licensed insurance broker in 50 states, UPS Capital acted as the agent for one insurance company, Tokio Marine, offering only that insurer's versions of inland marine insurance policy. Moreover, the policy, which was the only one offered to one-time shippers with the parent motor carrier, had to be endorsed to cover domestic inland shipments by truck, and the policy was anything but understandable, especially to a one-time customer unfamiliar with marine transport insurance. Under the circumstances, the court of appeals found triable issues of fact as to whether UPS Capital undertook a special duty by holding itself out as having expertise in inland marine insurance, and Murray reasonably relied on its expertise.

Where in-house counsel, rather than a claims handler, prepares a coverage denial letter, is the attorney subject to deposition to discuss the preparation of that letter? The Supreme Court of Mississippi answered that question in the affirmative in *Travelers Property Casualty Co. of America v. 100 Renaissance, LLC*, 2020 Miss. LEXIS 409. In this case, the claims handler's deposition testimony offered no information or explanation as to why the claim

was denied. She failed to explain Travelers' decision, its rationale, or how the claim would not be covered under the Mississippi UM statute. Her testimony also demonstrated a lack of knowledge of Mississippi UM law. She could not explain the origin or intended purpose of her citation of a nonexistent Mississippi statute in the denial letter. She also repeatedly testified that she was unable to answer coverage questions because she was not an attorney.

Under the circumstances, it was clear to the court that the denial letter was signed by the claims handler but was prepared by someone else, most likely in-house counsel. If so, counsel was not providing legal advice to the claims handler as to what to include in the denial letter. Instead, the denial letter contained counsel's reasons to deny the claim, and the claims handler's signature was simply an effort to hide the fact that in-house counsel had the personal knowledge of Travelers' reasons to deny the claim. Accordingly, the court held that the insured defendant was entitled to depose the in-house counsel to discover his knowledge about Travelers' arguable and legitimate basis to deny the claim, and ordered Travelers to produce the written communications between the claims handler and in-house counsel regarding the insurance claim at issue.

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