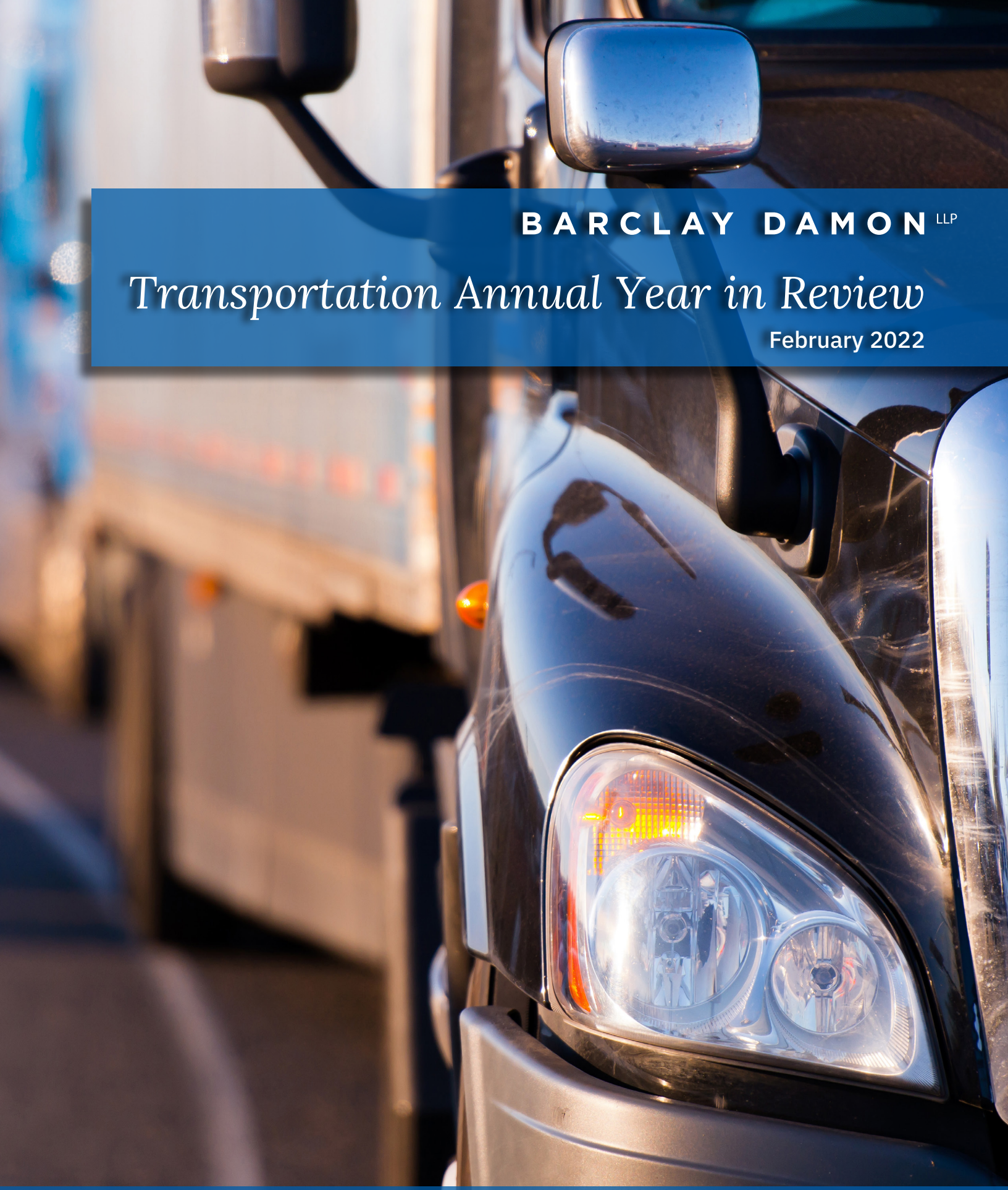

BARCLAY DAMON LLP

Transportation Annual Year in Review

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Transportation Annual Year in Review

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2022 Transportation Law Update

In his latest book *Noise* (written with Olivier Sibony and Cass Sunstein), Daniel Kahneman, the Professor of Psychology who won the Nobel Prize in Economics (!) describes two different categories of errors in judgment: bias and noise. Bias errors are systematic: examples would include an enthusiastic manager routinely predicting that projects will take half the time they end up taking or a timid executive unduly pessimistic about sales year after year. Noise refers to errors that are more random. The authors describe a real life example of error that displayed both varieties : the campaign by Judge Marvin Frankel to reform criminal sentencing in the 1970's since judges ordered a remarkably diverse range of jail times for what were essentially the same offenses. If a judge sentences African Americans more harshly than white Americans then we have bias; if the variability in sentencing is more random we are dealing with "noise." Frankel showed examples of incomprehensible variability-embezzlement resulting in a sentence of 117 days in one case and 20 years in another.

Kahneman and team briefly discuss noise in the insurance industry, in both the underwriting and claims sides of the house, and find significant noise in the form of inconsistent premium quotes on the one side and inconsistent offers to settle on the other. A good management system should reduce the problem. But claims folks and attorneys know that there is no shortage of noise in the form of inconsistent decisions from courts around the country. One way to reduce legal noise of this kind is to have the U.S. Supreme Court agree to hear appeals from lower courts . And, as 2021 ebbed, the High Court asked the Solicitor General to explain why the Court should or should not accept two cases that have made their way through the system, one involving the employment status of drivers under what is called the ABC test, and one questioning whether transportation brokers should face exposure for the tort of negligently hiring a motor carrier whose driver was involved in an accident. We discuss those two cases in detail in this year's summary along with the legal theory that many in the industry are touting, federal preemption of state law.

Our team, as always, has summarized many of the leading cases decided during the previous year. We also feature several special articles this year including Gillian Woolf's look at a new Texas statute which some think may reduce nuclear verdicts in the Lone Star state. We are also delighted to present an original analysis by Judith Branham, managing director of Stroz Friedberg, on the targeting of the trucking industry by cyber criminals.

As always we look forward to hearing your responses and reactions to our report.

Larry Rabinovich and Phil Bramson

1. FAAAA Preemption and the Employment Classification Problem

Among the most complex—and pressing—issues for trucking companies is the problem of classification (or misclassification depending on one's perspective) of owner-operators. This is seen by many industry players as an existential threat, particularly to trucking companies which operate exclusively with an owner-operator model. Employees, in the view of many executives are simply too expensive. The status of owner-operators also impacts on liability and coverage issues, in addition to costs and taxes associated with employees; smaller trucking companies operating on tight margins cannot easily afford such expenses.

With the transition from the Obama to the Trump Administration—and then from Trump to Biden—the respective secretaries of labor have gone from pushing employers to treat workers as employees, to dropping that push, and then to reengaging. It is quite maddening to those trying to comply with the law. (And no less frustrating for drivers struggling to make ends meet.)

The fight is ongoing both in the executive branch and the judicial branch. Actually, the legal battles are even more difficult to get one's head around: over the years, courts have employed different tests in order to determine whether a worker qualifies as an employee or as an independent contractor. Confusingly, as an appellate court recently noted, different tests might well apply even in the same state for different types of claims. See *Vazquez v. Jan-Pro Franchising Internat.*, 10 Cal 5th 944. Centered in California, bur radiating around the country, a dizzying series of cases in federal and state courts have ruled on a series of challenges to attempts to impose one test or another to the employment status of truck drivers. One of these approaches is the traditional common law test, which some states and agencies utilize (sometimes with minor variations.)

For instance, the Internal Revenue Service used to utilize a 20-factor test, which included elements like the amount of training, integration of the worker into the company's business operations, control of assistants, length of time of relationship—which was primarily focused on assessing the amount of control the company maintains over the worker. The current IRS test is somewhat simplified (11 components, divided into three categories: behavioral control, financial control and "type of relationship"). The test is set out on the IRS website.

These and other traditional types of tests focus to a large extent on the level of control exercised by the company. From a public policy perspective—speaking now of the impact on whether the company will be liable for the worker's negligence—one of the potential concerns about this type of test is that it incentivizes

the company to exercise as little control as possible, and to highlight that lack of control in contracts and other documents. That allows the company to argue that the worker is an independent contractor. But as a society do we really want companies to wash their hands of any responsibility for people they send out on our roads (particularly if they are operating rigs which weigh 80,000 pounds when fully loaded)? Is it right to penalize companies (by increasing their liability) that insist that their drivers comply with safety rules? Wage and hour issues also concern public policy: How do we navigate between the rights of workers to earn a livable wage without giving up a home and personal life, while at the same time permitting companies the flexibility they need to adjust to changing economic conditions and compete in this ever-changing economy? These are not easy questions to answer.

In contrast with the traditional control test, a broader approach has been announced by some courts and legislatures. Much of the buzz over the past few years surrounds a test announced by the California Supreme Court in 2018 in *Dynamex Ops. W., Inc. v. Superior Court*, 4 Cal 5th 903; it's now often referred to as the ABC test. Various other states and the District of Columbia have also adopted a variation of the ABC test, some of them for construction workers only. The California legislature codified the ABC test in 2019 in legislation known as California Assembly Bill 5 (AB-5), which we have described in previous editions. The test was initially meant to apply to most California wage and hour laws for a broad swath of workers. More recently a large number of exemptions from the statute have been added and transportation gig workers, who were specifically targeted by the drafters for employee status, were excluded by a proposition approved by California voters (but see below).

The basic AB-5 rule is that, in order to qualify as an independent contractor, a worker must meet three standards: (A) the work must be performed free from the control and direction of the hiring entity. (Even here, control plays an important role, but it is not the whole game. Examples of absence of control in an ABC context have been found to include: no set schedule, no company supervisor to report to, and no bonuses based on performance); (B) The work performed must be outside the usual course of the hiring entity's business; and (C) the worker must be customarily engaged in an independently established trade or business of the same nature that he provides for the hiring entity. Of course, in many cases, the worker has little interest in qualifying as an independent contractor—it is the employer that wishes its workers not to be considered employees. One more point—in other states which have adopted AB-5, standard B is a bit more flexible. The California version of standard B is particularly tough for trucking companies.

It is generally understood that the ABC test makes it more difficult for an employer to establish that its workers are independent contractors. If I hire a plumber or a contractor to do work in my home it will not be difficult to pass the AB-5 test; similarly, if our law firm were to hire a decorator to refurnish the entryway to our offices, it is quite apparent that the decorator is going to qualify as an independent contractor. How different does the situation look, though, when a trucking company engages an owner-operator? Isn't the driver—almost by definition—in the same business as the trucker? Part B of the test is likely to trip up a trucker trying to operate on an owner-operator model (more on this below); Part C will often be a problem as well. It is not difficult to see why the trucking industry from the first has opposed AB-5.

Ironically, a primary goal of the drafters of the California legislation was to ensure that drivers for Uber, Lyft, and other app-based ride services were classified as employees; however Proposition 22, sponsored by those very targets and passed by California voters in November, 2020, specifically exempted such drivers from AB-5. The status of Proposition 22, though, is itself unsettled. In *Castellanos v. State, 2021 Cal Super. LEXIS 7285*, a superior court judge ordered the state and its Department of Industrial Relations to cease enforcement of the exemption for app based ride sharing, calling it unconstitutional. The court focused on the fact that the law takes this important issue out of the hands of the legislature. So, at the moment, the enforceability of the Uber exception to AB-5 is up in the air. That is something that we will need to keep an eye on, particularly as Uber and Lyft have indicated that they will attempt similar propositions in other states utilizing the ABC test. The issue of driver classification is crucial to transportation network companies (TNCs), at least so long as they require human drivers.

Meanwhile, the saga of AB-5 and the trucking industry has taken the protagonists to the steps of the Supreme Court in Washington D.C. Interestingly, state and federal courts have taken different paths in analyzing AB-5. California state courts have had no problem upholding AB-5, even finding that it applies retroactively (the *Vazquez* case referred to earlier so held); California courts have also had no problem applying AB-5 to trucking companies.

For example, in *People v. Superior Court (Cal Cartage Transportation)*, 57 Cal. App. 5th 619 (Nov. 2020), the court applied AB-5 to trucking companies and their drivers that operate in and around the ports of Los Angeles and Long Beach. In response to the truckers' claim that AB-5 makes it impossible for a trucking company to use independent contractors, the court pointed to the business-to-business exception to AB-5 in Labor Code 2776. In other words, the court denied that the second leg of the ABC test, even in its

California formulation, automatically precludes a truck driver from qualifying as an independent contractor.

In challenging AB-5, the trucking industry had a bit more success, at least initially, in federal court. Even before AB-5 went into effect, on January 1, 2020, a federal district court had already barred the enforcement of its provisions as against trucking companies. The trial court clearly believed that the trucking industry had a good chance of defeating AB-5. That decision, and the hopes of the trucking industry, were overturned by the Ninth Circuit's opinion in *California Trucking Assn. v. Bonta*, 996 F.3d 644., decided in April. In a 2-1 decision, the appellate court held that the arguments against AB-5 were not likely to prevail and that the district court had abused its discretion by enjoining California from enforcing AB-5 against trucking companies. The saga does not end there, but let us pause to understand what the trucking industry is banking on to slay AB-5.

Historically, interstate trucking was closely regulated by the Interstate Commerce Commission (I.C.C.) beginning in 1935. This included economic regulation; carriers were required to get approval for their routes (it was almost unheard of for a motor carrier to be able to carry goods anywhere it wanted), and for the prices that they charged—which were published in tariffs. Price competition between motor carriers was simply not on the table. By the 1970s, this regime was out of favor with economists and the public; deregulation was on the agenda.

In 1980 issues of safety were removed from the I.C.C.'s jurisdiction and given to the Department of Transportation. While not obvious at the time, this was the beginning of the end for the I.C.C.. In line with the new economic thinking which had recently led to the deregulation of the airline industry, federal economic regulation of interstate trucking was reduced beginning with the 1980 Motor Carrier Act. Eventually, the elimination of most economic regulation meant that the I.C.C. itself was superfluous. In 1994, Congress tacked on a brief provision concerning trucking to the "Federal Aviation Administration Authorization Act of 1994." That provision in F4A (as the statute is known) has generated enormous interest. The central idea was that since politicians, like nature, hate a vacuum, the retreat of federal economic regulation would create momentum for states to insert their own regulations. This was contrary to Congress's intent. Accordingly Congress forbade states from enforcing economic regulations against motor carriers—this stricture was repeated the following year in the ICC Termination Act and may be found at 49 U.S.C. § 14501—even as to intrastate operations.

> *... [A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... or any motor private carrier, broker, or freight forwarder with respect to the transportation of property. §14501(c)(1)*

That is followed by a provision meant to reassure state authorities that it is only *economic* regulation that is forbidden. The state retains regulatory authority with respect to safety issues for intrastate operations, including enforcing controls based on the size of the vehicle or nature of the cargo and to insist on minimum insurance limits.

A massive disagreement has emerged in the courts as to how to interpret the provision of section 14501(c)(1) relating to "price, route, or service." The legislative history should have made it clear that the statute was referring to the type of economic regulation that the I.C.C. had formerly engaged in. Instead, industry players, lawyers, and judges have argued about a range of other types of regulation that, it is suggested, Congress had declared "hands off." This has gone as far as the argument (see below in section 9 where this argument was recently rejected) that freight brokers can never be held to have acted negligently in selecting a motor carrier on the basis of F4A preemption, and to other arguments which would fundamentally impact on traditional tort remedies in transportation related suits.

To return to the federal lawsuit, the Trucking Association sued the secretary of state (at the time Xavier Becerra) after the *Dynamex* decision was announced, even before the enactment of AB-5; with the passage of AB-5, the complaint was amended to reflect the new law. U.S. District Judge Roger Benitez of the Southern District of California had granted a temporary restraining order against enforcement of AB-5 as to trucking companies in late 2019, even before it went into effect; in January 2020, he converted that into a preliminary stay (the state was precluded from enforcing the statute while the case was being heard). He concluded that F4A "likely preempted AB-5," finding, in line with precedent from the Ninth Circuit that he felt concurred with his view, that the scope of FAAAA preemption was broad. He also cited to case law from the Ninth Circuit and elsewhere that suggested there was no way for a trucker to hire owner-operators under the second part of the ABC test. (*California Trucking Ass'n v. Su*, 903, F3d 953 (9th Cir. 2018); *Schwann v. Fedex Ground*, 813 F. 3d 429 (1st Cir. 2016).)

The Ninth Circuit's reversal in 2021 (the case was now known as *California Trucking Association v. Bonta*, 996 F. 3d 644) likely surprised Judge Benitez as much as it outraged the trucking industry. By a vote of 2-1, the court completely rejected the idea that issues between the trucking company and its workers (such as classification of drivers) could fall under the category of laws concerning "price, route, or service." It was that point that the dissenter focused on, and it is there that we might expect

the U.S. Supreme Court to weigh in if the case makes its way there.

The Supreme Court has previously addressed F4A and how it impacts on statutes and regulations. The standard set out in those earlier cases was flexible enough to be cited as support by both the majority and the dissent in the Ninth Circuit. (That is not particularly unusual in Supreme Court jurisprudence.) The ultimate textual question is how far one can stretch the phrase "related to" as in "related to a price, route, or service." The dissent would have held that since the enforcement of AB-5 will force certain carriers who use owner-operators to cut back on their operations and/or raise prices, the statute is obviously related to price, route, or service. That is the position the industry will certainly be taking .

For the majority of the court, however, that connection is too tenuous to justify preempting AB-5. In order for FAAAA to preempt a statute, the connection to price, route, or service must be significant which was understood to mean that the law at issue must bind the motor carrier to a particular price, route, or service. If so it will be preempted. The court observed that AB-5 is a general law; it is not directed against motor carriers specifically, but to all employers. Does it compel a particular result? Indeed, the court held that it did since it affects the way the trucker must classify its drivers. It thus compels a result with respect to the company's workforce, but not with respect to the company's customers. It does not freeze in place a particular route, service, or price. (We point out that both the majority and the dissent take a broader view of F4A—to differing degrees—than what a plain reading of the statute might have required: that only economic regulation, of the sort that the I.C.C. used to promulgate, is preempted.)

The California Trucking Association had argued that the connection between AB-5 and "price, route or service" is significant because classification of drivers as employees will inevitably raise prices as well as modify service. Increased labor costs are also likely to put many smaller companies out of business and cause others to leave the state (unlikely that). The court, in any event, found these to be insufficiently connected to prices, routes, or services, acknowledging that prices will rise but finding no interference with the service provided to clients. (We suspect, although we have not checked the legislative history, that the reference to rates in F4A was probably originally intended to refer to tariffs and other mandated charges that were taken out of the motor carrier's control.)

The court had a little more trouble with the argument that F4A will mandate that truckers use employee-drivers. The court was forced to back off some language it has used in previous cases, and the dissent scored some debating points here. The dissent also made a good point about the discrepancy between this decision and the *Miller* decision discussed in the Broker section below. (*Miller* held that broker liability is preempted initially by FAAAA, but is restored under the state's authority to ensure safety). The majority stuck to its guns, though. The liability of a broker was preempted because it directly impacts the relationship between the broker and its customers. Accordingly, F4A preempts that liability—although broker liability is saved by the safety exception. AB-5, though, in the court's opinion, does not trigger F4A at all because it primarily impacts the relationship between the motor carrier and its drivers.

The case is now in the Supreme Court's waiting room. The court has asked the solicitor general to give his thoughts as to whether the case should be granted certiorari. If it does make it to the court, we will see if the Ninth Circuit's attempt at a bright line distinction (company/drivers as opposed to company/customers) will stand up.

In short, one of the key issues roiling the industry, the classification question, is now deeply intertwined, for better or worse, with the question of FAAAA preemption. F4A is a growth industry though, and depending in part of how the circuit courts—and ultimately the Supreme Court—rule, we may well find F4A pleaded with respect to other statutes, regulations or exposures.

Larry Rabinovich

2. *The Carmack Amendment and Cargo Claims*

CARMACK PREEMPTION

The issue in *Radial Engines, Ltd. v. YRC Freight, Inc.*, 2021 US Dist. LEXIS 31192 (W.D. Okla.), was whether the preemptive effect of the Carmack Amendment mandated dismissal of an action for damage to cargo that was originally brought in state court as a breach of contract or negligence action and was subsequently removed to federal court. Plaintiff contracted with defendant motor carrier to transport an aircraft from Guthrie, Oklahoma to Pottstown, Pennsylvania. The load was shipped in a sealed container. When the load arrived at its destination, the seal on the container appeared to have been tampered with and the airplane inside was damaged.

After YRC declined to pay the claim, plaintiff brought an action in state court for the damage to the shipment but did not plead any specific cause of action. Defendant removed the action to federal court and moved to dismiss plaintiff's complaint as being preempted by the Carmack Amendment.

The court acknowledged that the Carmack Amendment preempts any state law cause of action for goods lost or damaged under a bill of lading. That preemption would preclude any claim for breach of contract or negligence under

state law. In the instant case, however, the complaint alleged the necessary elements of a Carmack Amendment claim: that plaintiff was a shipper, defendant was a carrier, that the cargo was damaged while in defendant's possession and control, and that the damages were in excess of the jurisdictional minimum. The fact that the complaint did not expressly state that it was asserting a claim under the Carmack Amendment did not require dismissal of the complaint.

Covenant Imaging, LLC v. Viking Rigging & Logistics, Inc., 2021 US Dist. LEXIS 49000 (D. Conn.), looked at whether the Carmack Amendment applied to an intermediate carrier that brokered the shipment to the ultimate carrier, and whether the Carmack Amendment preempted a claim that that carrier was negligent in selecting the ultimate carrier. Plaintiff purchased an MRI machine from a facility in Connecticut and contracted with Viking to have the machine delivered to North Carolina. Viking, without notifying plaintiff, then subcontracted the shipment to Pioneer Transport. Pioneer Transport, in turn subcontracted the shipment to Eagle Express. The machine arrived in North Carolina damaged and was a total loss. Plaintiff sued under the Carmack Amendment; when it found out about Pioneer and Eagle, it filed an amended complaint adding those two entities as defendants. Pioneer moved to dismiss the complaint arguing that it was acting as a broker in the transaction and, therefore was not subject to the Carmack Amendment. Pioneer also argued that plaintiff's negligence claim was barred by Interstate Commerce Commission Termination Act (ICCTA), the Federal Aviation Administration Authorization Act (FAAAA) (see section 1 above about F4A), and impliedly by the Carmack Amendment.

The court, noting that the Carmack Amendment does not apply to brokers, observed that the difference between a motor carrier and a broker is "often blurry," holding that motor carriers are not brokers 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. Whether one was acting as a broker or a motor carrier is a very fact-intensive inquiry and plaintiff had sufficiently alleged actions by Pioneer that would (if proven) identify it as a carrier. The court also rejected Pioneer's argument that plaintiff could not make the alternative allegations that Pioneer was a broker, finding that such alternate theories of liability were allowed under the Federal Rules of Civil Procedure. The court, importantly, also held that a claim of negligence in the selection of a party to transport a shipment did not affect rates, routes, or services so as to be preempted by the ICCTA and F4A (see discussion in Section 1).

Are a plaintiff's state law claims for damage to her property preempted by the Carmack Amendment when the plaintiff is not listed on the bill of lading? In *Handshoe v. Day Brothers Auto & RV Sales, LLC*, 2021 US Dist. LEXIS 128227 (E.D. Ky.), plaintiff and her husband purchased a recreational vehicle from defendant in Kentucky. The RV needed some warranty work. The defendant decided to send the RV back to the manufacturer in Indiana and arranged for the shipment of the RV. The bill of lading listed the defendant as the shipper and did not include plaintiff's name. The RV was damaged on the way to the manufacturer's facility when it struck an under-height overpass. Plaintiff filed a state court action alleging negligence and breach of contract claims. The action was removed to federal court.

Plaintiff moved to remand the action back to state court arguing that her claims were not preempted by the Carmack Amendment because she had no knowledge of the shipment, had not agreed to the shipment, and was not listed on the bill of lading for the shipment. The court found that the Carmack Amendment established that a carrier is only liable to the person entitled to recover under the bill of lading. In the instant case, there was no evidence that the plaintiff was a party to the bill of lading and it was questionable as to whether plaintiff could have brought a claim under the bill of lading. The court granted plaintiff's motion to remand the action back to state court.

The issue in *Eastern Express v. Pete Rahn Construction Co.*, 2021 US Dist. LEXIS 152544 (S.D. Ill.), was whether the parties had effectively waived application of the Carmack Amendment in their shipping agreement so as to avoid federal preemption of a freight damage claim. Plaintiff was a broker that arranged for the motor transportation of property across the country; defendant, in spite of its name, was (also) a motor carrier and they arranged for defendant to haul products from US Steel. They entered into a contract pursuant to 49 U.S.C. §14101, which expressly waived all the provisions of the Carmack Amendment. Defendant assumed liability for any cargo damage, loss, or theft. When a shipment tendered to defendant never arrived, plaintiff reimbursed US Steel for the lost shipment and sued defendant in Illinois state court for breach of contract and indemnity. Defendant removed the case to federal court based on preemption by the Carmack Amendment. Plaintiff moved to remand.

The court recognized that plaintiffs are able to avoid federal preemption in most cases under the "well-pleaded complaint" rule which holds that even if there was a federal statute governing a dispute, a plaintiff could avoid federal preemption by pleading only state law causes of action. The court also recognized, however, that there were a limited number of statutes that "completely preempted" any state law cause of action, thereby overriding the well-pleaded complaint rule. The Carmack Amendment was one of those statutes that normally preempted any state law claim related to damages to goods moving by motor carrier in interstate commerce.

The court also acknowledged that, although the Carmack Amendment completely preempted the field of damages to goods moving by motor carrier in interstate commerce, the federal statute (section 14101(b)(1)) allows parties (traditionally the shipper and motor carrier) to agree to waive its provisions. The fact that plaintiff was a broker, the court held, made no difference; the waiver was still effective. The defendant also argued that because the contract referred to other provisions of the Carmack Amendment, those references had the effect of reviving the applicability of the Amendment. The court also found that the fact that the parties chose to reincorporate certain provisions of the Carmack Amendment into their agreement did not require the court to read the whole Amendment back into the agreement.

The issue in *Maniaci v. Plycon Transportation Group*, 2021 U.S. Dist. LEXIS 177952 (N.D. Tex.), was whether the Carmack Amendment preempted plaintiff's state law claims for infliction of emotional distress and for attorney's fees. Plaintiff contracted with defendant for the shipment of household goods from California to Texas. The goods arrived late, in damaged condition and with some pieces missing. Plaintiff filed a claim with defendant, which rejected the claim. Plaintiff then sued to recover for the damage to her property under the Carmack Amendment and for emotional distress caused by the damage to her property and the claim process.

Defendant moved to dismiss plaintiff's state law claims for emotional distress and attorneys' fees on the ground that they were preempted by the Carmack Amendment. The court had little difficulty holding that both claims were, in fact, preempted by the Carmack Amendment; it granted defendant's motion and dismissed the state law claims.

PRIMA FACIE CASE AND LIMITATIONS ON DAMAGES

The district court in *Houston Granite & Marble v. DRT Transportation LLC.*, 2021 U.S. Dist. LEXIS 108296 (S.D. Tex.), was asked to determine whether the plaintiff had produced sufficient evidence that defendant had caused the damage to the cargo so as to survive a motion for summary judgment—and whether the defendant carrier had effectively limited its liability for damage to the cargo. Plaintiff contracted with defendant for the transportation of pre-cut marble and granite countertops from Texas to Oklahoma. Defendant, in turn, acting as a broker, subcontracted the load to another carrier. The subcontract classified the load as a "no-touch" load which meant that the carrier's driver was not responsible for loading or unloading the load. The driver dropped a trailer off at plaintiff's yard to be loaded. Plaintiff retained a contractor to construct the crates to be used to transport the countertops and to load the trailer. Once the crates were on the trailer, the carrier's driver strapped them down.

At some point during his trip to Oklahoma, the driver became aware that the load had shifted. When he pulled over to check, he found that two of the four crates had collapsed on their side. He contacted plaintiff, who sent people to repair the crates and reload the trailer. The driver did not assist in that process. Some of the countertops were deemed not salvageable, but the remainder were loaded back onto the trailer. When the load eventually arrived in Oklahoma, it was rejected by the customer.

Plaintiff filed an action in state court alleging state law causes of action and Carmack Amendment claims. The case was removed to federal court. The court granted defendant's motion for summary judgment seeking dismissal of plaintiff's state law claim of negligence, finding that the state law claim was preempted by the Carmack Amendment. The Carmack Amendment governs a motor carrier's liability for damage to an interstate shipment of goods.

The court then turned to defendant's motion for summary judgment seeking to dismiss plaintiff's Carmack Amendment claims. To recover under the Carmack Amendment a shipper must prove (1) delivery of the shipment to the carrier in good condition; (2) receipt by the consignee of less goods or damages goods; and (3) the amount of damages. Once the shipper establishes a prima facie case, there is a rebuttable presumption of negligence on the part of the carrier. The carrier can overcome that presumption by demonstrating that (1) it was free from negligence; (2) the damage to the cargo was caused by (a) an act of God; (b) the public enemy; (c) the act of the shipper itself; (d) public authority; or the inherent vice or nature of the goods.

The court held that, although a bill of lading was normally sufficient evidence of delivery of goods on good condition, such was not the case when the bill of lading contained an "apparent good order" clause that limited the presumption to only those portions of the shipment that were open and available for inspection. With respect to those goods that were not open and available for inspection, the shipper had the burden to submit other substantial and reliable evidence that the goods were delivered in good condition. Defendant argued that plaintiff could not carry its burden of proving that the countertops were, in fact, delivered in good condition. Plaintiff submitted an affidavit from the contractor who constructed the crates and loaded them onto the trailer, in which he said that the countertops were in good condition. The court held that affidavit was sufficient to create a question of fact as to whether the goods were delivered in good condition.

Defendant argued that plaintiff could not prove that the goods were damaged when they were delivered because, although the consignee rejected the load, there was no damage noted on the bill of lading. The court rejected that argument because, when

the load shifted and was reloaded, there were countertops that were not salvageable. That fact was sufficient to create a question of fact.

Defendant then argued that even if there was a question of fact with respect to the plaintiff's Carmack Amendment claim, it was still entitled to summary judgment because it could prove the elements of the affirmative defense. Defendant argued that there was no evidence that it was negligent, relying on the truck driver's assertion that he had properly secured the load prior to starting on the trip. Plaintiff submitted the affidavit of the contractor who built the crates for the countertops and who had followed the truck from Texas to Oklahoma. The contractor, in his affidavit, stated that the shipment was not properly secured for the trip. That was sufficient to create a question of fact.

Defendant's final argument was that it had effectively limited its liability for damage to the shipment by incorporating the limitation in its tariff which, in turn was incorporated into the bill of lading. The court held that to effectively limit liability for damage to a shipment, a carrier had to (1) maintain a tariff within the prescribed guidelines of the Interstate Commerce Commission: (2) obtain the shipper's agreement as to the choice of liability; (3) give the shipper a reasonable opportunity to choose between two or more levels of liability; and (4) issue a receipt or bill of lading prior to moving the shipment. Defendant argued that its bill of lading, issued before the shipment was moved, contained reference to the defendant's tariff that contained the limitation on liability. Defendant also produced copies of email correspondence between plaintiff and defendant that contained warnings, in red, that the $100,000 limitation on liability would apply unless the shipper elected different coverage. The email exchange occurred two weeks before the shipment, so the shipper had an adequate opportunity to elect a different level of coverage. The court found that the defendant had fulfilled the four requirements and limited the possible liability for the damaged goods to $100,000 (against estimated damages of $249,414).

PRIVATE CAUSE OF ACTION

The issue in *Nexus Alarm & Suppression, Inc. v. MG Logistics*, 2021 U.S. Dist. LEXIS 100730 (N.D. Ill.), was whether the USDOT regulation underlying the Carmack Amendment created a private cause of action for a shipper challenging the carrier's actions in salvaging damaged goods. Plaintiff had contracted with defendant to transport its rather expensive fire extinguishers from Massachusetts to customers in Illinois. The shipment was damaged in an accident in Indiana, and plaintiff filed a claim against defendant. Defendant's insurance carrier denied the claim. Sometime after the denial of the claim, defendant or its insurer, without notifying the plaintiff as required by the regulations, sold the damaged fire extinguishers for salvage value. Plaintiff filed a complaint in federal court alleging one cause of action under the Carmack Amendment and a second under the USDOT regulations, arguing that it was entitled to receive notice of any planned salvage of the damaged goods. Defendant moved to dismiss the plaintiff's second cause of action, arguing that the regulations did not create a private cause of action.

The court first discussed the general law concerning private causes of action under federal law finding that only Congress and not the executive branch or the judiciary could create causes of action under federal law. Congress could create private causes of action by either passing a statute creating a private cause of action based on a specific regulation, or by passing a statute that creates a private cause of action based on any of the regulations underlying the statute. Finally, a plaintiff seeking to enforce a particular regulation must point to the statute creating that private cause of action. The central inquiry remained whether Congress intended to create a private cause of action.

Plaintiff argued that Congress intended to create a private cause of action with respect to the regulations governing salvage, because Congress created a private cause of action under the Carmack Amendment. The court found that the fact that Congress created a private cause of action to enforce a statute did not automatically result in a private cause of action to enforce the regulations underlying that statute. The plaintiff needed to come forth with a textual basis in the statute to conclude that Congress intended the regulations themselves to offer a private cause of action—and plaintiff failed to do that.

Plaintiff also argued that the court should read a private cause of action into the regulation, otherwise the important purpose underlying the regulations of holding carriers accountable for disposing of cargo fairly would be eroded. The court rejected that argument holding that courts could not create private causes of action based on policy considerations. That was Congress's job. The regulation did not create a private cause of action, and plaintiff's second cause of action was dismissed.

LIMITATION OF LIABILITY

The shipper in *Siaci St. Honore v. UPS*, 2021 U.S. Dist. LEXIS 247754 (D.N.J.), contracted with UPS to transport high-end fashion items from New Jersey to Florida. UPS subcontracted with CSX to provide rail transportation, and over $200,000 worth of goods were stolen from a container while on a CSX rail car. The shipper sued both UPS and CSX, arguing (1) that CSX was not entitled to protection under any contractual limitation of liability between UPS and the shipper, and (2) the UPS limitation of liability was ineffective, because it did not provide the shipper with a clear choice of two rates, as required under the Carmack Amendment.

The court, however, found that the UPS tariff (which was clearly referenced in the contract and available online) provided that UPS could engage subcontractors and that those subcontractors would have the benefit of the tariff as well. Moreover, pursuant to the tariff and the UPS Rate and Service Guide, the shipper had the opportunity to increase UPS's limit of liability for loss or damage above $100 by declaring a higher value (up to $50,000) and paying an additional charge ($.90 per each $100 of total value). Accordingly, the court found that the contract language, by plainly stating the parameters of UPS's limitation of liability and explaining how the shipper could purchase additional protection, gave the shipper a reasonable opportunity to choose between two or more levels of liability.

Alan Peterman

3. *Liability*

STOPPING ON HIGHWAY

In *De La Rosa Martinez v. Harbor Express*, 2021 U.S. Dist. LEXIS 24923 (S.D.N.Y.), defendant Velez, driving a Harbor Express tractor-trailer, lost control and jackknifed, coming to a stop with the tractor in the median of the highway and the trailer in the left lane. Defendant Traylor, having observed the Harbor trailer jackknife, pulled over his Pat Salmon tractor-trailer onto the right shoulder of the highway and stopped. Traylor then crossed the highway on foot to see if the driver of the Harbor trailer was injured. A few minutes later, plaintiffs' vehicle collided with the stopped Salmon trailer. Salmon argued that it owed no duty of care to plaintiffs. The court, though, noted that 49 CFR § 392.22(b) provides that when a driver of a commercial vehicle stops on the shoulder of a highway, the driver must place warning devices out "as soon as possible, but in any event within 10 minutes." The court found that the regulation imposed a duty on the Salmon driver to place warning devices, although the question of whether it was reasonably possible to do so within 10 minutes of the time he stopped was a question for the jury. The court also denied Harbor's summary judgment motion based on questions as to whether its driver drove carelessly, conflicting eyewitness testimony as to whether plaintiff's vehicle was speeding, and conflicting experts' opinions as to whether the Harbor driver failed to take adequate measures to warn other motorists of the presence of his jackknifed tractor-trailer.

The defendant-truck driver in *Hester v. Walker*, 320 So.3d 362 (La.), preparing to turn left into a driveway, activated his left turn signal and stopped his tractor-trailer in the left lane, approximately 60 feet from a break in the median. As he waited for another vehicle to exit the driveway, and before he could make the turn, his tractor-trailer was struck from behind by a vehicle driven by Kunta Hester. Hester died as a result of the collision. Hester's survivors brought suit against the truck driver and his employer, alleging that the driver breached his duty to Hester because he negligently stopped his vehicle on a public roadway in violation of a Louisiana statute which provides that "no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or main traveled part of the highway when it is practicable to stop, park or so leave such vehicle off such part of said highway..."

The truck driver testified that 25 seconds before impact, he had activated his turn signal, slowed, and brought his tractor-trailer to a complete stop; waited for oncoming traffic to clear; and waited for one of the two tractor-trailers blocking the driveway to exit, so he could turn into the driveway. Following discovery, defendants moved for summary judgment. The court noted that the statute was designed to protect against the risk that a driver, whether cautious or inattentive, would collide with a stationary vehicle but that the statute does not delineate any temporal period for determining whether a vehicle has been stopped. Nonetheless, the court explained that the provision does not apply to vehicles which are stopped on a highway on a temporary or momentary basis while waiting to turn, which was the case here as the truck was stopped for only a very short period of time prior to the collision. Accordingly, the court granted defendants' motion for summary judgment.

EFFECT OF CRIMINAL PLEA

The subject accident in *Ortiz v. Ben Strong Trucking*, 2021 US Dist. LEXIS 45924 (D. Md.), occurred when the defendant's tractor-trailer driver rear-ended plaintiff's vehicle. Plaintiff sought summary judgment against defendant driver and his employer based solely on defendant driver's guilty plea to a charge of criminal negligence. She submitted no other evidence in support of her motion. In denying summary judgment to plaintiff, the court noted that, while defendant's guilty plea was evidence of negligence, defendants must be given an opportunity to explain the plea. They argued the plea was motivated by a desire to avoid the risk of even greater criminal penalties—since defendant driver was facing six criminal charges, four of which were felonies—and which were dropped when he pled guilty.

PROXIMATE CAUSE

In *Creel v. Loy*, 524 F. Supp. 3d 1090 (D. Mont.), the driver of a Chevrolet Impala operating in the rain lost control of the vehicle and slid through the 38-foot median into the opposing lane of the interstate highway, colliding with defendants' tractor-trailer. In a personal injury lawsuit, the passenger in the Impala argued that defendant driver was speeding and could have avoided the accident. In so arguing, plaintiff relied primarily on opinions from an expert. Defendants moved for summary judgment on the basis that, even assuming defendant driver exceeded the speed limit, the speed did not cause the accident but, rather,

the negligence of the driver of the Impala was the accident's sole proximate cause. The court noted that Montana courts have determined that drivers must anticipate hazards such as wildlife and black ice, but have been reluctant to extend their duty of care to anticipation of negligent acts of others. In granting summary judgment to defendants, the court found that the Impala driver's crossing the median was not a foreseeable result of defendant driver's negligence in allegedly traveling too fast for the conditions and, therefore, broke the chain of causation.

POST-REMEDIAL MEASURES

The New Jersey Appellate Division held in *Hassan v. Williams*, 467 N.J. Super. 190, that the defendant driver's discharge by his employer was a post-accident remedial measure, evidence of which the courts excluded in order to avoid discouraging such measures even if otherwise it could be relevant However, it found that the trial court had excluded too much evidence. Although courts have excluded evidence of subsequent remedial measures, they typically do not exclude elements of the investigation that preceded adoption of those measures. Thus, the appellate court held that the trial court had erroneously excluded post-accident statements by the employer of defendant driver that (1) its driver had driven recklessly and could have prevented the accident; and (2) had violated the employer's safety protocols; as "ultimate issue" evidence. Rather, the statements were admissible as statements of a party opponent, were not subsequent remedial measures, and had significant probative value.

DASH CAM AS BASIS FOR SUMMARY JUDGMENT

In *Flambures v. McClain*, 2021 US Dist. LEXIS 111570 (W.D. Tex.), defendants sought summary judgment in a case where plaintiff was driving in the right lane and defendants' tractor-trailer was driving two car lengths in front of him in the left lane. Plaintiff alleged that defendant truck driver made an unsafe lane change crossing lanes in front of him and causing him to rear-end the tractor-trailer. Plaintiff, though, acknowledged that he had "glanced" down at his cell phone and in fact did not see the truck change lanes. Dash cam footage from the truck showed the truck driving in the right lane for a full eight seconds prior to the collision. Based upon plaintiff's admission and the dash cam footage, the court granted summary judgment to the truck driver and the trucking company.

IMPROPER LOADING

The plaintiff-truck driver in *Murrah v. TDY Industries*, LLC, 2021 US Dist. LEXIS 112295 (W.D. Ky.), claimed he was injured in a one-vehicle accident due to defendant's negligent loading of plaintiff's truck, causing it to overturn as plaintiff rounded a curved interstate ramp. The court explained that when the shipper assumes the responsibility for loading the cargo, "the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper." *United States v. Savage Truck Line*, 209 F.2d 442 (4th Cir. 1953). In this case, the court noted that plaintiff failed to show any evidence that his alleged damages were the result of a latent defect in defendant's loading of cargo in the trailer. Although plaintiff never previously transported cargo for defendant, he described himself as an experienced driver who was familiar with loading techniques. He offered no evidence that defendant gave any assurances regarding the safety of the load. Thus, the court found that the placement of the cargo and the lack of securement was open and should have been obvious to plaintiff and, accordingly, granted summary judgment to defendant.

In *Slaton v. Climax Molybdenum Co.*, 2021 US Dist. LEXIS 170152 (S.D. Iowa), plaintiff truck driver arrived at defendant's facility to pick up a trailer loaded by defendant. Defendant's policies and procedures precluded drivers from observing or participating in the loading process and plaintiff relied upon defendant to safely load the trailer. There had been prior incidents related to the methodology used by defendant to tie down their loads, and the company was considering an alternative method. None of this was shared with the driver. Defendant, though, pointed out that the trailer had not been sealed. The driver was given the opportunity to examine the tie-down; he even signed a statement on the way out of the facility essentially acknowledging that the load was properly secured. Defendant sought summary judgment based on the oft-quoted rule in *United States v. Savage Truck Line*, 209 F.2d 442 (4th Cir. 1953), which frees the shipper from any exposure for defects visible to the driver. (See *Murrah* case discussed previously). The court, relying instead on *Smith v. HD Supply Water Works, Inc.*, 810 N.W.2d 25 (Iowa Ct. App. 2011), determining that the Iowa Supreme Court would find defendant to have a common law duty to plaintiff to load safely, since defendant exercised control over the loading process, selected the method of securement, carried out the physical act of loading the trailer, and because plaintiff was not given an opportunity to closely inspect the load prior to transport. Therefore, the court left it to the jury to decide the relative fault of defendant shipper and plaintiff driver. (We are not sure that *US v. Savage* would necessarily have led to a different result.)

The plaintiff-truck driver in *Cook v. Publix Super Markets*, 2021 US Dist. LEXIS 115377 (N.D. Ala.), was injured when he opened the doors of his trailer and unsecured pallets fell on him. The pallets had been loaded by defendant's employees. Plaintiff regularly drove the same route but never inspected the

preloaded cargo. Additionally, he was warned by his employer that defendant's employees were not properly securing the cargo before latching, sealing, and shipping the trailers. The court held that a reasonable jury might find that defendant's employees were negligent when they sealed and shipped a trailer full of unsecured pallets. The court noted that 49 CFR § 399 prohibits a driver from operating a commercial motor vehicle unless the cargo is properly distributed and adequately secured, but that the statute does not impose an exclusive duty on anyone. The court found that, while the regulation required plaintiff to inspect the cargo before driving, the regulation did not supersede or preempt defendant's duties. The case against defendant, then, would go forward. The court also found an issue of fact for trial as to whether defendant consciously disregarded a known risk when it failed to train its employees about the need to safely load and secure pallets.

In *Sanchez v. Maverick Express Carriers, LLC*, 2021 US Dist. LEXIS 155280 (W.D. Tex.), plaintiff driver's employer directed him to pick up a load of cargo at the yard of Cox Transportation. Cox employees loaded the trailer, and plaintiff hauled the load to defendant CTDI's shipping yard. Unbeknownst to him, the cargo had been negligently loaded and/or poorly secured, causing the load to become unstable. When he opened the door of his trailer, he was struck by several crates that had shifted in transit. In granting summary judgment to CTDI, the court found that it was nothing more than a consignee who had no knowledge of the condition of the cargo, and that no case law or statute imposed a duty upon it with respect to loading the cargo. Plaintiff was permitted to move for a default judgment against Cox.

The defendant shipper in *Forbes v. BB&S Acquisition Corp.*, 2021 US App. LEXIS 38375 (1st Cir.), retained Gregory Trucking to deliver its lumber. After the driver, Hooks, completed the delivery for BB&S, Gregory Trucking directed him to pick up a load of lumber for another company. En route to his pickup, Hooks was involved in an accident with plaintiff Forbes.

Forbes cited no case law, from Massachusetts or any other jurisdiction, to support the argument that BB&S could be held liable to Forbes for Hooks's conduct after he had completed the job for which BB&S had contracted with Gregory Trucking. The First Circuit saw no reason to predict that the Supreme Judicial Court of Massachusetts would so hold. The Court of Appeals further affirmed the trial court's ruling that BB&S was a shipper, not a motor carrier, and was therefore not Hooks's statutory employer under 49 C.F.R. § 390.5. (Even assuming, *arguendo*, that Hooks was the shipper's statutory employee, the court found that the shipper no longer had any control over him once his contractual duties for the shipper were completed.)

Vince Saccomando

4. Texas House Bill 19

House Bill 19 ("HB19")—signed into law by the governor of Texas in June of 2021, and effective as of September 1, 2021—has effectively changed civil practice and remedies pertaining to the liability of motor vehicles operators and owners under Title 4, Sec. 72, et seq. The bill was supported on a partially bi-partisan basis and is intended to protect trucking companies in Texas from increasingly frequent large verdicts around the country. The term "nuclear verdict" refers to cases that come in above $10 million—it's become industry shorthand for a worrying problem. Not surprisingly attorneys for plaintiffs complained bitterly about the new bill. Legislators and industry leaders around the country are watching to see how the statute impacts on verdicts, but it will take some time before useful data emerges.

The new provisions set forth a bifurcated procedure where, at defendant's request, a jury will likely have to find a motor carrier's employee-driver liable *before* vicarious liability and punitive issues are addressed. Importantly, the first phase focuses on the driver, not the trucking company, other than dealing with issues relating to the company's basic negligence.

In the first phase of the trial, the jury will determine whether the driver was negligent and, if so set the amount of the liability of the driver and the amount of compensatory damages. In the second phase, the jury can evaluate vicarious liability issues and determine the amount of exemplary damages, if any, as to the employer-defendant. Pursuant to Sec. 72.052 (e):

> ...a finding by the trier of fact in the first phase...that an employee defendant was negligent in operating an employer defendant's commercial motor vehicle *may* serve as a basis for the claimant to proceed in the second phase...on a claim against employer defendant, such as negligent entrustment, that requires a finding by the trier of fact that the employee was negligent in operating the vehicle **as a prerequisite to employer defendant being found negligent in relation to employee's operation of the vehicle.** (Emphasis added).

HB 19 also contemplates a myriad of evidentiary issues that may or may not be admissible in the trial's first or second phase. For example, evidence of a driver-defendant's failure to comply with certain regulations or standards are admissible in the first phase only if it tends to prove such failure to comply was a proximate cause of the injuries or death—and if the regulation or standard is specific and governs or is an element of a duty of care applicable to the defendant, applicable to the defendant's employee, or when the defendant's property or equipment are at issue.

The new Texas statute, however, does not prohibit claims

of ordinary negligence against an employer defendant, such as negligent maintenance; it does not require a finding of negligence by an employee as a prerequisite to an employer defendant being found negligent for its conduct or omission, or from presenting evidence on that claim in the first phase of a bifurcated trial; or a claim for exemplary damages for an employer defendant's conduct or omissions in relation to the accident that is the subject of the action, or from presenting evidence on that claim in the second phase of a bifurcated trial.

Furthermore, pursuant to HB 19, a court may not require expert testimony for admission into evidence of a photograph or video of a vehicle or object involved in an accident that is the subject of the action except as necessary to authenticate the photograph or video. However, if properly authenticated, a photograph or video of a vehicle or object involved in an accident is presumed admissible, even if the photograph or video tends to support or refute an assertion regarding the severity of damages or injury to an object or person involved in the accident.

This means that, based on the facts and circumstances of each claim, HB 19 may or may not prevent a jury from considering evidence about the defendant employer unless the trial advances to the second phase. If one believes that jurors are more likely to award damages to "punish" large companies, the bifurcation of these claims may reduce the number and size of "nuclear verdicts."

As we have described, HB 19, effective as September 1, 2021, is controversial. The transportation industry in Texas is applauding this new legislation as a giant step in limiting the use of reptile tactics to specifically target the motor carrier as opposed to the employee-driver. Proponents further expect that this bill will prevent punitive injustice against motor carriers, and limit the rising cost of insurance coverage. Critics—primarily but not solely from the plaintiff's bar—pan the new bill as a brokered corporate measure that will make Texas roads more dangerous, result in more injuries and deaths, and prevent victims of crashes from receiving damages. HB 19 incorporates reporting requirements for insurance companies, so that the authorities can assess the impact of the new law on insurance premiums, deductibles and coverage. Given the infancy of HB 19's existence, it remains to be seen how this new statutory scheme will play out in the courts—and in the court of public opinion.

Gillian Woolf

5. *Negligent Hiring*

In *James v. Dasilva Transport, Inc.*, 2021 US Dist. LEXIS 44509 (S.D. Tex.), the federal district court applied Texas state law to determine whether the plaintiff's claims for ordinary and gross negligence against the defendant transportation company and its employee-operator should be dismissed on summary judgment. The court granted the defendant's summary judgment in all respects, dismissing the plaintiff's claims for ordinary and gross negligence as to the defendant employer's entrustment, hiring, and training; gross negligence only as to the defendant employer's failure to maintenance, repair, and inspect; and gross negligence only as to the defendant operator's failure to inspect.

The case arose from a motor vehicle accident in which the plaintiff was allegedly injured when an improperly torqued wheel fell off of the defendants' tractor-trailer and impacted the plaintiff's vehicle. The plaintiff subsequently commenced an action for personal injuries against the truck operator and his employer, asserting various claims for ordinary and gross negligence. The defendants then moved for summary judgment on the plaintiff's claims for ordinary and gross negligence as it pertained to the defendant employer's hiring, entrustment, and training; gross negligence only as the defendant employer's failure to maintenance, repair, and inspect; and gross negligence only as to the defendant operator's failure to inspect. Under Texas law, "gross negligence" constitutes a heightened degree of negligence which justifies the imposition of exemplary damages. It requires a finding, by clear and convincing evidence, that the defendant's act or omission objectively constituted an extreme degree of risk of which the defendant was subjectively aware yet acted with conscious indifference to.

The court first determined that the plaintiff's claims for ordinary negligence regarding the defendant employer's hiring, entrustment, and training should be dismissed as a matter of law. It then determined that the plaintiff's claims for gross negligence regarding the same causes of action should be dismissed, as a claim for gross negligence cannot lay where there is no evidence of ordinary negligence.

In granting summary judgment regarding the plaintiff's claims for negligent hiring and entrustment, the court cited the operator's history of one speeding ticket and one single-vehicle accident resulting from hydroplaning, determining that such evidence was "grossly inadequate" to establish that the operator was known to be reckless or incompetent.

With regard to the plaintiff's claims for negligent training, the court cited uncontroverted testimony that the operator was highly experienced when hired, that the employer was aware of this experience, and that the employer had still provided some training for its employee. While the plaintiff argued that the absence of written training materials created a question of fact, the court concluded that the plaintiff had not sufficiently established that the failure to reduce safety training to written materials constituted a breach of a legal duty proximately resulting in the accident.

The court then turned to the plaintiff's claims for gross negligence regarding the operator's alleged failure to inspect. In dismissing the plaintiff's claims, the court pointed to the operator's uncontroverted testimony that he had inspected the vehicle the morning of the incident, that the only evidence submitted in support of the plaintiff's claim was the employer's testimony that he was directed by a maintenance provider to retorque the wheels "50 to 100 miles" after they were replaced, and the uncontroverted fact that the wheels had not been replaced since the operator was hired.

The court further dismissed the plaintiff's claims for gross negligence as to the employers' duty to maintain, repair, and inspect the vehicle it owned. In doing so, the court determined that the employer's testimony regarding the direction to retorque the wheels after they were replaced did not establish that the directions were not followed. It also found relevant the uncontroverted testimony that the defendant employer had regularly repaired, maintained, and inspected the subject vehicle. The plaintiff was thus unable to present clear and convincing evidence that the employer violated a duty to maintain, repair, or inspect the vehicle. Moreover, the employer could not be grossly negligent for ratifying the operator's conduct, as there was no evidence to establish that the operator was grossly negligent and, even if there was, the failure to discipline or terminate the defendant operator's employment was not sufficient evidence to establish ratification.

In *Pauna v. Swift Transportation Co.*, 2021 US Dist. LEXIS 45341 (D. Wyo.), the federal district court applied Wyoming state law to dismiss the plaintiff's claims for negligent hiring, supervision, and retention against the defendant transportation company in an assault and battery case. The case arose from an incident at a truck stop where the plaintiff—a tractor-trailer driver employed by a different company—was allegedly "cut off" in the refueling line by the defendant operator—an employee of the defendant transportation company. After exchanging words, the defendant operator exited his vehicle and allegedly assaulted the plaintiff in the truck-stop parking lot.

After the plaintiff commenced an action in federal court for personal injuries against the defendant transportation company and its employee-operator, the defendant transportation company moved for summary judgment on the plaintiff's claims for negligent hiring, supervision, and retention. It also moved for summary judgment on the plaintiff's claims for vicarious liability resulting from the employee's actions.

In granting the defendant transportation company's motion for summary judgment as it pertained to its vicarious liability, the court determined that the defendant employee's attempts to refuel his truck and his assault on the plaintiff were discrete acts. The employee exited his truck before committing the assault and his statements following the incident clearly indicated that he was motivated by personal anger rather than any sort of intent to aid his employer. While questions concerning the employee's state of mind are relevant and typically reserved for determination by the fact finder, the plaintiff was unable to point to any evidence supporting its argument that the employee was motivated by a misguided attempt to refuel the truck faster to aid his employer.

In assessing the defendant transportation company's motion for summary judgment as it pertained to the claims of negligent hiring, supervision, and retention, the court made clear that the only question it could determine as a matter of law was whether the defendant owed a legal duty to the plaintiff regarding the interest allegedly harmed. The court nonetheless dismissed each claim, determining that no such duties existed. In doing so, the court pointed to the fact that the employee made the company aware of his prior convictions for animal cruelty—in which he shot a BB gun at a neighbor's dog—and disorderly conduct—in which he became unruly with law enforcement following an altercation at a bar—and that the company had subsequently conducted an investigation regarding the incidents before making the hire. The court concluded that, with respect to each of these causes of action, no duty existed; the employee's prior conduct took place years ago, was sufficiently different in substance, so it was not reasonably foreseeable that he would harm a member of the public.

Additionally, with respect to the duty to supervise, the court noted that, where an employee is acting outside the scope of his employment, the duty only exists if the employee's tortious acts were committed on company property or with company chattel. Moreover, with respect to the company's allegedly negligent retention, the court noted that such a claim does not exist under Wyoming law and, even if it did, there was no evidence that the company became aware of any new information prior to the alleged assault which would give it cause to terminate the defendant operator's employment. The court thus dismissed the plaintiff's claims for negligent hiring, supervision, and retention.

The issue in *Singh v. ABF Freight Systems, Inc.*, 2021 US Dist. LEXIS 192861 (E.D. Okla.), was whether certain theories of liability against the defendant truck operator's alleged employers were barred as "unnecessary and superfluous" under Oklahoma state law. The case arose from a motor vehicle accident resulting in the death of the plaintiffs' decedent. As representatives of the decedent's estate, the plaintiffs asserted claims for wrongful death, survivorship, and negligence against the defendant operator. The plaintiffs also asserted claims for *respondeat superior*, negligent hiring, negligent training, negligent supervision, and negligent entrustment against the

defendant transportation company and its parent entity, each of which were alleged to employ the operator. The defendants subsequently moved for judgment on the pleadings, arguing, *inter alia*, that the defendant transportation company's admission that it employed the defendant operator, and that he was acting in the course of his employment, precluded liability under any other theory against both the transportation company and its parent entity.

In granting the defendants' motion in part, the court cited Oklahoma law which provides that an employer who admits that its employee was acting in the course of his or her employment essentially stipulates to liability under the theory of *respondeat superior*. Pursuant to said stipulation, Oklahoma deems any other theory of liability arising from the agency or employment relationship between the parties "unnecessary and superfluous." Accordingly, the court granted the defendants' motion to the extent it sought to dismiss the claims for negligent hiring, negligent supervision, and negligent training against the trucking company which admitted it employed the defendant operator.

The court held, though, that the plaintiffs' claim for negligent entrustment could still be maintained against the defendant transportation company, despite its admission that the defendant employee was operating in the course of employment during the alleged incident. The court reasoned that, pursuant to Oklahoma law, a claim for negligent entrustment does not arise from an agency or employment relationship and instead turns on the act of the alleged tortfeasor in an entrusting the instrumentality to another alleged tortfeasor. It therefore was not barred by virtue of the defendant employer's admission.

In *DeBower v. Spencer*, 2021 US Dist. LEXIS 201042 (N.D. Iowa), the federal district court considered whether the defendant transportation company's motion for summary judgment on the issues of negligent hiring, negligent training, negligent supervision, and negligent leasing should be granted. The case arose from a motor vehicle accident in which the defendant operator allegedly failed to yield the right-of-way. The defendant operator later underwent blood alcohol and drug testing at a local hospital, both of which were negative. The plaintiff subsequently commenced an action for personal injuries against both the defendant operator and her employer. After discovery, the defendant employer moved for summary judgment on the issues of negligent hiring, negligent training, negligent supervision, and negligent leasing.

The court granted the defendant employer's motion in all respects. With regard to the plaintiff's claim for negligent hiring, the court applied Iowa law which holds that the "core predicate for imposing liability is one of foreseeability." While plaintiff proffered various theories of liability regarding the failure to investigate omissions in the employee's application—most notably a seven-year-old conviction for operating while intoxicated which resulted in a suspended license, and some missing prior employers—the court determined that the plaintiff's claims for negligent hiring should nonetheless be dismissed as there was no evidence that any of the information the employer could have discovered would have prevented a reasonable employer from hiring the defendant operator. The subject accident was not caused by operation of a vehicle while intoxicated. The prior conviction was seven years old. Any further inquiry into the operator's history with older employers would have revealed that she was possessed significant experience, as she indicated in her application.

Regarding the plaintiff's claim for negligent training, the court found that the plaintiff failed to offer any evidence establishing a standard of care from which the defendant employer deviated. While the defendant employer admitted that he largely relied on a driver's past experience, and did not provide training other than supplying new employees with a company policy manual, a copy of federal regulations, and requiring the employee to review a few safety videos, the plaintiff failed to offer any evidence—expert or otherwise—that this training did not meet the federal requirement for a "driver safety training/orientation program" or otherwise violated a relevant standard of care.

The court also dismissed the plaintiff's claim for negligent supervision, which was based on the theory that the defendant employer negligently supervised the defendant employee by allowing her to drive with an oversized load, without a permit, at a time prohibited by state law. In dismissing the claim, the court determined that the plaintiff failed to present any evidence that the load was oversized, and that the plaintiff was not entitled to a negative inference for the defendant's failure to produce the bill of lading as the plaintiff failed to establish bad faith and prejudice. Moreover, evidence from other bills of lading produced during discovery demonstrated that the defendant employee did not regularly carry oversized loads.

Finally, with respect to the plaintiff's claim that the defendant employer should be liable for lacking a written lease agreement as required by federal regulations, the court found that the violation lacked a causal relationship with the subject accident. Accordingly, because the lack of proper paperwork did not create a foreseeable risk that the defendant operator would negligently drive the vehicle, the plaintiff's claims for negligent leasing were also dismissed.

Dan Coleman

6. *Spoliation*

Counsel for plaintiff in *Loyd v. Salazar*, 2021 US Dist. LEXIS 133813 (W.D. Okla.), sent a litigation hold letter to defendant trucking company and its insurer shortly after an accident. Within three months after the accident, defendant's insurance adjuster advised defendant to preserve the records. During discovery, though, defendant produced only four pages of documents: the driver's employment application and his commercial driver license. Instead of preserving documents, the defendant had actually disposed of driver logs, trip documents, driver qualification records, and vehicle maintenance files or inspection reports, all of which plaintiff sought. The court held that, under federal law, spoliation sanctions are proper when (1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence.

The court held that the driver qualification file was relevant to defendant's investigation into the driver's qualifications. The court determined that plaintiff showed willful destruction of relevant records and bad faith conduct in its failure to preserve the driver qualification file. Thus, plaintiff was entitled to an adverse inference instruction at trial that the driver qualification file would have shown an incomplete investigation by defendant of its driver's qualifications to drive a commercial vehicle. However, the court found that the logbook and trip log were only connected in a general way to the accident, and that plaintiff had not explained how an overweight load, for which the driver pled guilty, contributed to the accident. Nor did plaintiff claim the accident was caused by driver fatigue or unsafe equipment. Thus, plaintiff was not prejudiced by destruction of the logbook and trip documents. The court rejected the argument that those documents are always relevant in a trucking accident case.

In *Tighe v. Castillo*, 2021 Del. Super. LEXIS 38 (Del. Super. Ct.), plaintiff sent a preservation letter to defendant trucking company to preserve the engine control module (ECM) following an accident. However, defendant took no steps to preserve the ECM, even though the truck and ECM were in its possession for several years thereafter. In discovery, defendant advised that the ECM data "no longer existed." Defendant's office manager testified that she had received the preservation letter and that she received about 50 such letters per year, and that she believed that her only responsibility was to forward the letter to defendant's insurance company.

Plaintiff sought an adverse inference advising the jury they could assume that, had the ECM data been preserved, it would have been unfavorable to defendant. The court noted that defendant failed to explain when the ECM was destroyed or became unavailable, and that defendant's arguments in opposition to the motion shifted over time, including blaming plaintiff for only requesting the downloads—which did not exist—as opposed to requesting ECM data. The argument was that defendant did not know how to download ECM data, and any failure to preserve ECM data was an innocent mistake. In granting an adverse inference instruction, the court found that defendant's failure to preserve the ECM data was reckless in that defendant received a timely preservation letter and failed to take any steps to preserve critical evidence.

The court in *Shackelford v. West Coast Freightline, LLC*, 2021 US Dist. LEXIS 165167 (W.D. Wash.), noted that, although defendant trucking company may have wrongfully destroyed logbooks six months after the accident, and litigation was arguably foreseeable, copies of the logs were secured by the police and made available to plaintiff; accordingly no adverse inference instruction was necessary. Additionally, the court noted that the driver's failure to start a log on the date of the accident, although it may have been in violation of federal regulations, did not constitute spoliation of evidence.

Vince Saccomando

7. *Cybersecurity*

TRUCKING: THE LATEST INDUSTRY TARGETED BY CYBERCRIMINALS

Historically, the trucking industry hasn't been a target for cybercriminals. After all, it doesn't have the types of information typically considered valuable and sold on the deep and dark web, such as credit card numbers. But as the value of credit card numbers and other personal information has declined, cybercriminals have pivoted to other disruptive and costly tactics, most notably ransomware, while concurrently expanding their repertoire of bountiful enterprises.

The trucking industry has been particularly susceptible to cyber breaches because of its reliance on networked systems for operations. While the technology is a blessing for increasing efficiency, it also makes the industry a more attractive target for ransomware attacks. Since the success of a ransomware attack hinges on business disruption to coerce payment, malicious actors capitalize on the interconnectivity of the supply chain required to deliver cargo loads.

ANATOMY OF A RANSOMWARE ATTACK

Typically, a ransomware attack begins with a "spear" phishing email, enticing an unsuspecting employee to click on an attachment or link which contains malware, which is then deposited on the computer. After elevating access rights, the cybercriminal begins to move virtually throughout the company's environment, seeking critical systems to execute the ransomware—a form of malware that is capable of encrypting systems.

Once systems are encrypted by ransomware, cybercriminals demand payment, either in cash or bitcoin. Although most companies have backups that could be used for recovery, cybercriminals anticipate that scenario and often encrypt those systems or delete the backups entirely. Additionally, attackers will exfiltrate confidential client information prior to encrypting systems, which they then threaten to release on the web to shame victims into paying the ransom, even if they are able to recover from backups.

While all industries are now targets, the types of information a company holds has become less relevant; industries like trucking are likely to suffer greater revenue losses from the business disruption than from the actual cost of responding to the ransomware event and payment. When caught between a rock and a hard place, it can be more cost effective to pay the ransom and obtain the encryption keys, allowing the victim company to more quickly restore systems and resume operations.

This was the case when a large trucking and freight transportation logistics company was hit with ransomware in 2020, forcing the company to temporarily suspend its electronic data interfaces with customers. In its 8-K filing, the company reported a $7.5 million loss in its Q4 financial statements, which was attributed to LTL lost revenue and not the cost of responding to the incident. (Source: "*Trucking Company Forward Air Said Its Ransomware Incident Cost It $7.5 Million*," ZDNet, Feb. 3, 2021.)

THE BUSINESS OF RANSOMWARE

Ransomware attacks are highly profitable for cybercriminals, with the average revenue gained from a ransomware attack of $140,000 per attack. (Source: Coveware blog, "*Ransomware attackers down shift to 'Mid-Game' hunting in Q3 2021*," Oct. 21, 2021) The average downtime that cyberattack victims experience is 23 days, which may result in both large financial losses, and damages from lost customers, breach of contract, and the potential for subsequent lawsuits—even when the ransom is paid. As a result, the cost of a ransomware attack can reach into the millions.

At the start of the pandemic, ransomware complaints poured into the FBI's Internet Crime Complaint Center (IC3), with an increase of 62 percent from the first half of 2020. (Source: Cybersecurity & Infrastructure Security Agency (CISA) Alert AA21-243A: *Ransomware Awareness for Holidays and Weekends*, released Aug. 31, 2021, revised Sept. 2, 2021.) Losses grew as well, with the total average cost of a transportation industry data breach reaching $3.75 million in 2021. (Source: 2021 Ponemon Cost of a Data Breach Report) The high payout, compared to the low risk of arrest and zero barrier to entry, makes ransomware a very attractive business model—and one that's likely to continue. Trucking companies need to understand the growth of ransomware and take steps to mitigate its risks.

HEIGHTENED ATTENTION ON OVERSIGHT

With the skyrocketing number of ransomware events and the damage to American businesses, there is an escalation in calls for guidance and regulation. The SolarWinds data breach, which impacted hundreds of companies and federal agencies, and the ransomware attack on Colonial Pipeline, which disrupted the nation's critical infrastructure, created a flurry of activity both in the White House and in Congress. In May 2021, the White House issued an Executive Order on Improving the Nation's Cybersecurity followed by a memo urging companies to protect against the threat of ransomware. Both the executive order and the memo provided recommended actions to protect companies against the threats of cybercriminal attacks.

Congress also introduced a number of bills that would require critical infrastructure, which generally includes transportation, to report a cybersecurity incident to the Cybersecurity and Infrastructure Security Agency (CISA) within 24 to 72 hours. (Source: "*Cybersecurity Legislation is Waiting in the Wings*," The Wash. Post, Oct. 18, 2021) Currently, there is no national requirement for critical infrastructure to report a breach. This is new ground; some critics believe the 24-hour reporting timeframe is unrealistic. (Source: "*Senate Bill Would Mandate Reporting Infrastructure Data Breaches*," SecurityInfoWatch.com, Oct. 5, 2021) Additionally, skeptics are concerned about the possibility of enforcement action proposed in the Cyber Incident Notification Act, which includes fines that could be issued for a violation not to exceed 0.5 percent of gross revenue.

In addition to the increased pressure from the White House and Congress to increase security and report data breaches, DHS's Transportation Security Administration (TSA) issued a directive for surface transportation owners. (National Press Release, *DHS Announces New Cybersecurity Requirements for Surface Transportation Owners and Operators*, Dec. 2, 2021) The directive targets higher-risk rail operators, but encourages lower-risk surface operators to voluntarily adhere to the following recommendations:

1. Designate a cybersecurity coordinator.
2. Report cybersecurity incidents to CISA within 24 hours.
3. Develop and implement a cybersecurity incident response plan to reduce the risk of an operational disruption.
4. Complete a cybersecurity vulnerability assessment to identify potential gaps or vulnerabilities in their systems.

RECOMMENDATIONS

It is imperative that companies understand these directives and consider implementing best practices to defend themselves, as well as the country's infrastructure ecosystem. As the trucking industry continues to be targeted by cybercriminals, and faces

more scrutiny and regulation because of its importance to the nation, it can no longer wait to invest in its cybersecurity defenses.

Below are some recommendations to protect information security against both cybersecurity attacks and adhere to the increased attention on cybersecurity defenses:

1. Install and properly configure Enterprise Detection & Response (EDR) tools to help detect and block malicious activity on a system.
2. Install multifactor authentication (MFA) to reduce cybercriminals' ability to compromise passwords and gain access to systems.
3. Patch systems rapidly to reduce vulnerabilities that can be exploited by cybercriminals.
4. Test backups and "air gap" (essentially isolate them from other devices and the internet) to reduce the cybercriminals' ability to decrypt them during a ransomware attack.
5. Retain incident response providers to assist in a ransomware attack.
6. Have a third party perform penetration tests to identify gaps in cybersecurity defenses.
7. Practice the company's incident response plan through a tabletop exercise.
8. Educate employees on cybersecurity to help defend against social engineering attacks and to help employees understand how to report an attack.

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8. *Punitive Damages*

The defendant tractor-trailer driver in *Williams v. SFC International, Inc.*, 2021 U.S. Dist. LEXIS 38042 (W.D. Mo.), struck the plaintiff, another tractor-trailer driver, as the plaintiff was inspecting his tires on the side of the highway. The plaintiff sought punitive damages against the defendant driver and his employer based on the latter's admission that he had taken prescription hydrocodone the night of the accident and had blacked out. The defendants moved for summary judgment dismissing the plaintiff's punitive damages claims.

To establish a claim for punitive damages in Missouri, the plaintiff must demonstrate that the defendant (1) knew or should have known, based on the surrounding circumstances that its conduct created a high degree of probability of injury, and (2) showed complete indifference to, or conscious or reckless disregard for, the safety of others. Missouri courts have previously found that an award punitive damages could be justified against a commercial tractor-trailer driver involved in an accident after taking narcotic pain medication and other medicine known to cause drowsiness. Whether the evidence in a particular case is sufficient to support such damages, however, is a legal question.

Here, the court denied the defendant's motion for summary judgment because it was not clear how much opiate was in the driver's system at the time of the accident. Given the uncertainty about what evidence would be introduced at trial, and given the need to consider all the evidence in context, the court could not determine, on motion, whether the plaintiff would fail to meet the burden supporting an award for punitive damages.

Swanson v. Murray Bros. LLC, 2021 US Dist. LEXIS 37123 (C.D. Ill.), involved a defendant truck driver who was involved in and allegedly caused a chain reaction accident. Two groups of plaintiffs alleged negligence, vicarious liability, and willful and wanton conduct against the defendant driver, and his employer. The defendants filed a motion to dismiss the plaintiffs' claims of willful and wanton conduct.

In Illinois, to recover damages based upon a defendant's alleged negligence involving willful and wanton conduct, the plaintiff must allege and prove either a deliberate intention to harm or an utter indifference to or conscious disregard for the welfare of the plaintiff. The plaintiff here alleged that the defendant driver had manipulated the brakes and speed governor with pliers, was speaking to his employer on the telephone around the time of the accident, and generally operated the truck in a condition likely to cause an accident. In denying the defendant's motion to dismiss, the court reasoned that the plaintiffs had sufficiently alleged that the defendant employer knew of certain conduct of the defendant driver, and was generally aware of the condition of the truck that, taken as a whole, could amount to willful and wanton conduct.

The accident in *Waters v. Hall*, 2021 US Dist. LEXIS 36294 (S.D. Ala.), occurred when the defendant driver blocked two lanes of traffic in order to make a right-hand turn into a private driveway. The plaintiff, who was travelling behind the defendant, collided with the defendant's tractor-trailer as the defendant maneuvered into the left lane before making the tight right turn. The plaintiff alleged the defendant's behavior amounted to willful and wanton conduct. The defendants moved for summary judgment to dismiss these claims.

To establish wantonness in Alabama, the plaintiff must prove that the defendant, with reckless indifference to the consequences, consciously and intentionally did some wrongful act or omitted some known duty that will likely or probably result in injury. Wantonness is not simply a more severe version of negligence in Alabama, but is an entirely

different tort concept. In the context of an automobile accident, a plaintiff must demonstrate that the driver was either so dispossessed of his normal faculties, such as from voluntary intoxication, that he was indifferent to the risk of injury to himself, or that his act was so inherently reckless that he showed depravity consistent with disregard of instincts of safety and self-preservation.

Here, the basis of the plaintiff's claims against the defendant driver was that he should have known blocking both lanes of traffic to make the right-hand turn would lead to injury. The defendant testified, however, that prior to making his turn, he looked in his rearview mirrors, utilized his blinker, and believed the vehicles behind him were a reasonable distance away. The court granted the defendant's motion for summary judgment, and reasoned that an error as to the amount of time it would take the driver to make the right-hand turn and/or an error in gauging the time it would take the vehicles behind him to catch up to him on the roadway is insufficient to prove willful and wanton behavior.

The plaintiff in *Cristo v. C.R. England, Inc.*, 2021 US Dist. LEXIS 41324 (W.D. Tex.), was sideswiped by the defendant's tractor-trailer while traveling on the highway. The plaintiff asserted a gross negligence cause of action against the defendant and his employer. The defendants filed a motion for summary judgment requesting dismissal of this claim.

Under Texas law, gross negligence requires an act or omission: (1) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (2) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others. The standard for proving gross negligence in Texas is considerably more stringent than the "reasonable person" standard for ordinary negligence.

In support of his claims, the plaintiff alleged that the defendant driver changed lanes when unsafe to do so, was inattentive, failed to keep a proper lookout, failed to timely apply his brakes, and drove while distracted. As against the defendant driver's employer, the plaintiff claimed it was aware of its driver's repeated lane change issues during road tests, and manually changed his driver logs in the month leading up to the subject accident. The court, in relying on prior case law, granted the defendant's motion, and held that such allegations are insufficient as a matter of law to establish claims of gross negligence.

The complaint in *Calabrese v. Graham*, 2021 US Dist. LEXIS 105032 (M.D. Pa.), alleged that the defendants' tractor-trailer, while in a construction zone, rear-ended the plaintiff's vehicle, causing it to roll over while the tractor-trailer became engulfed in flames. The plaintiff alleged that the defendant-driver was distracted as he drove, consciously chose to exceed the speed limit as he approached a construction zone, and understood he was creating an increased risk of an accident. Because of these alleged actions, the plaintiff sought punitive damages against the defendant driver, and his employer. The defendants filed a pre-answer motion to dismiss these claims.

Under Pennsylvania law, punitive damages are an extreme remedy, available in only the most exceptional matters. Punitive damages do not comprise a stand-alone claim—they are a component of damages that must be proved as part of the plaintiff's negligence claim. A negligence plaintiff may recover punitive damages by proving 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, as the case may be, in conscious disregard of that risk. The state of mind of the actor is vital in considering whether punitive damages are warranted.

The court denied the defendant's motion, reasoning that whether their actions illustrate that the defendant driver's state of mind rose to the level of recklessness is not a matter to be decided on a motion to dismiss. The court did not find the defendant's argument convincing that this was a run-of-the-mill rear-end collision because, as stated by the court, a flipped vehicle and a tractor trailer engulfed in flames hardly constitute a routine motor vehicle accident.

White v. Bush, 2021 US Dist. LEXIS 104090 (E.D. Pa.), involved an accident where a tractor-trailer traveled through a red light and struck the plaintiff's vehicle in the middle of an intersection. The plaintiff claimed the defendant driver was speeding, distracted, and operating a cell phone at the time of the accident. The plaintiff moved to amend his prior complaints to add claims of recklessness, and request punitive damages. The defendant opposed the plaintiff's motion on the basis that the defendant driver was not reckless, and therefore, that punitive damages were not warranted.

Under Pennsylvania law, a defendant acts recklessly when his conduct creates an unreasonable risk of physical harm to another, and such risk is substantially greater than that which is necessary to make his conduct negligent. Here, the plaintiff alleged the defendant driver failed to stop at a red light, was speeding, and was using a cell phone at the time of the accident. As against the defendant driver's employer, the plaintiff claimed it failed to train and supervise the driver, provide a safety program, monitor its drivers' speeds, require job applications and employment history, and discipline its drivers for infractions. These allegations, according to the court, were sufficient to plead recklessness and punitive damages.

Montgomery v. Caribe Transport II, LLC, 2021 US Dist. LEXIS 170788 (S.D. Ill.), involved an accident between the

defendant's tractor-trailer, and the plaintiff's pickup truck. The plaintiff claimed the defendant employer engaged in willful and wanton conduct. The defendant moved to dismiss these claims.

In Illinois, willful and wanton conduct is a form of aggravated negligence, and is not a separate tort. It can be pled along a scale with a heightened degree of ordinary negligence on one end and intentional tortious misconduct on the other. Here, the plaintiff alleged that the defendant employer was flouting and encouraging the defendant driver to ignore safety standards and regulations, failed to adequately train its driver, and recklessly employed the driver, who had a history of motor vehicle accidents. These allegations, according to the court, were sufficient to sustain a cause of action for willful and wanton conduct.

The accident in *Coram v. Southwind Transportation, Inc.*, 2021 U.S. Dist. LEXIS 193996 (S.D. Ala.), occurred when the defendant's tractor-trailer rear ended the plaintiff's Corvette as he stopped for traffic. The plaintiff alleged negligence, wantonness, and negligent entrustment, hiring, and/or supervision against the defendant and his employer. The defendant moved to dismiss the plaintiff's claims of wanton behavior.

Wantonness, in Alabama, is defined as the conscious performance of some act or the conscious 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. Though wantonness requires a conscious or an intentional act, the actor's knowledge may be proved by showing circumstances from which the knowledge is a reasonable inference; it does not need to be proved by direct evidence. It is not essential to prove that the defendant entertained a specific design or intent to injure the plaintiff.

In motor vehicle accidents, speed alone is not sufficient to demonstrate wantonness, but it may rise to that level when coupled with other factors. Nor does a negligent failure to exercise good judgment while driving mean that the driver's conduct constitutes reckless indifference to a known danger to inflict injury.

Here, the plaintiff claimed the defendant driver made a "dangerous gamble" in abruptly moving from the right lane to the left lane at a high rate of speed, ultimately to a position behind the plaintiff's vehicle. As against the defendant's employer, the plaintiff claimed it failed to adequately hire, train, and supervise its driver, and overlooked his numerous past driving infractions. In granting the defendant's motion, and dismissing the plaintiff's claims, the court reasoned that the defendant driver's shift between lanes was not abrupt. In addition, he was not consciously aware that his shift of lanes would lead to a collision. Rather, the defendant's actions amounted to a mere "error in judgment" and timing, which in Alabama, is not indicative of wanton behavior.

The plaintiff in *Gaydos v. Gully Transportation, Inc.*, 2021 US Dist. LEXIS 205506 (E.D. Mo.), was rear-ended by the defendant's tractor-trailer while on the highway. In relevant part, the plaintiff moved to amend his pleading to add a claim for punitive damages. The defendants, in opposition, argued that Missouri Revised Statutes § 510.261(5) did not allow a plaintiff to assert punitive damages in an initial, or subsequent pleading. The court ruled in favor of the plaintiff, and held that this case, in federal court pursuant to diversity jurisdiction, was governed by the Federal Rules of Civil Procedure. Thus, the claim for punitive damages was allowed to proceed.

Williams v. Korn, 2021 U.S Dist. LEXIS 218029 (M.D. Pa.) involved an accident after the rear wheels from the defendants' tractor-trailer, which were recently serviced at a rest stop, detached from the trailer and struck the plaintiff's vehicle, which was traveling behind the defendant. The plaintiff alleged, in relevant part, recklessness against the defendant driver and the service rest stop, which in turn, would support claims for punitive damages. The defendants moved to dismiss the plaintiff's claims for punitive damages.

In Pennsylvania, a punitive damages claim 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, as the case may be, in conscious disregard of that risk. Courts routinely deny requests to dismiss punitive damages claims in motor vehicle accident cases at the outset of litigation. Because the question of whether punitive damages are proper often turns on the defendant's state of mind, this question frequently cannot be resolved on the pleadings alone, but must await the development of a full factual record at trial.

In support of her claim of reckless behavior against the defendant driver, the plaintiff alleged the driver recklessly failed to exercise reasonable care in the operation of the tractor-trailer, neglected to exercise the high degree of care expected of a professional driver, and failed to inspect the tractor-trailer following the repair to discover unsafe or dangerous conditions. In denying the defendants' motion to dismiss, the court reasoned, given what is described as a catastrophic failure of the dual rear tires on this tractor-trailer shortly after these repairs were performed, the well-pleaded facts would also permit an inference that the defendant driver may have acted recklessly in failing to inspect and ensure the safety of this vehicle before he proceeded onto the highway. Therefore, the defendants' motion to dismiss was denied.

Ryan Altieri

9. *Freight Brokers*

Questions of federal preemption (see sections 1 and 2) are arising more frequently in the transportation world not only on the employment front but in other areas as well, and none attracted more attention in 2021 than the issue of F4A preempting negligence claims against transportation brokers.

The most talked about broker liability case in many years is *C.H. Robinson Worldwide, Inc. v. Miller*, which was decided in 2020 by the Ninth Circuit (as *Miller v. C.H. Robinson*, 976 F.3d 1016 [2020]) and is now possibly perched for review by the Supreme Court. (The justices recently asked the solicitor general to weigh in on the merits of the decision, as well as whether the high court should take the case.) C.H. Robinson convinced the district court (but not the Ninth Circuit) that Miller's claims against it for negligent selection of a motor carrier are preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA or F4A).

F4A, after all, speaks of both motor carriers and brokers (and freight forwarders). State laws that are "related to price, route, or service of any … broker," are preempted by F4A. The Ninth Circuit agreed with C.H. Robinson, and the district court, up to a point: that a suit against a freight broker by an injured motorist such as *Miller*, claiming that the broker had negligently selected a sub-standard and dangerous motor carrier was indeed related to the broker's services, and thus the preemption was potentially triggered (step one of the analysis). (It is precisely on this point that there is potential tension with the 9th Circuit's other case now getting Supreme Court scrutiny, the *Bonta* case discussed in Section 1) However, the court concluded, negligence claims of this sort were protected from the reach of federal preemption by the statute's safety exclusion (step two). Congress, the court explained, intended to preserve a state's right to regulate conduct not only through legislation and regulations but also through common law negligence suits.

C.H. Robinson, trying to turn around its losing streak with an eleventh-hour knockout in the Supreme Court, has drawn the support of major players both in the transportation field and also the National Associates of Manufacturers and the Chamber of Commerce. For what it is worth—not much to be sure—we question the application of F4A to tort cases. We are quite sympathetic, to be sure, to freight brokers who have been repeatedly wronged by outrageous jury results, or pressured into settlements when they have done nothing wrong.

A better resolution—sadly not one on the horizon—would be to establish a legal order under which brokers would be able, absent any egregious behavior, to successfully move to dismiss most claims for negligent selection of a carrier by showing that the carrier was a registered motor carrier. Broker liability should be a comparatively rare exception, not the norm. In the absence of a trend in that direction C.H. Robinson's bold move is to attempt to preclude the possibility of negligence suits against brokers altogether. Let us see whether the Supreme Court decides to take up this fraught issue.

In the meantime, other courts around the country continue to take the view that F4A does not block suits for negligent selection of motor carriers by broker. In *Taylor v. Sethmer Transportation, Inc.*, 2021 US Dist. LEXIS 196230 (S.D.N.Y.), the plaintiff presented a typical double-barreled claim against the broker: 1) vicarious liability for the negligence of the driver, and 2) negligent selection of a motor carrier. The court rejected the broker's attempt to have the claim for vicarious liability dismissed at an early stage. In order to plead a claim for vicarious liability, plaintiff was required only to show a business relationship between the broker and the driver/motor carrier, and to provide notice in the complaint of the vicarious claim against the broker. That is a rather low bar. In this particular case, the broker was making a motion to dismiss; perhaps a motion for summary judgment—including evidence that the broker did not exercise control over the carrier—might have been successful.

One other important point: even if C.H. Robinson is able to convince the Supreme Court that claims against brokers for negligent selection are preempted by F4A, claims for vicarious liability are expected to live on. This has been a growing trend since the decision in *Schramm v. Foster*, 341 F. Supp. 2d 536 (D. Md. 2004). As we have pointed out in the past, the theory is not completely implausible, in light of the growth of large third-party logistics companies.

On the preemption front, the *Sethmer* court agreed with the Ninth Circuit's view in *Miller v. C.H. Robinson* that the safety exception in 49 U.S.C. § 14501(c)(2)(A) permits claims against brokers for negligent selection of a carrier to proceed.

If the Supreme Court does indeed take the *Miller* case and finds in C.H. Robinson's favor it will be doing so in the face of a large number of 2021 cases which found that the preemption argument failed at either step one or step two. Here is a sampling: *Rigging & Logistics*, LLC, 2021 U.S. Dist. LEXIS 49000 (D. Conn.) (not preempted, no need to reach safety exception); *Gilley v. C.H. Robinson Worldwide, Inc.* 2021 U.S. Dist. LEXIS 161786 (S.D.N.Y.) (preemption claim fails at step one, no need to reach safety exception); *Grant v. Lowe's Home Centers, LLC*, 2021 U.S. Dist. LEXIS 16332 (D.S.C.) (safety exception permits negligence lawsuit); *Gerred v FedEx Ground Packaging System, Inc.*, 2021 U.S. Dist. LEXIS 187602 (N.D. Tex.) (safety exception permits claim); *Bertram v. Progressive Southeastern Insurance Co.*, 2021 U.S. Dist. LEXIS 131251 (W.D. La.) (safety exception permits claim).

The preemption argument does not always lose. In *Custom Stud, Inc. v. Meadow Lark Agency, Inc.*, 2021 U.S. Dist. LEXIS 196513 (D. Minn.), the shipper sued the broker for hiring an incompetent carrier; the broker presumably denied that allegation but also sued the trucker for indemnification, and the trucker counterclaimed. The broker argued that the trucker's counterclaims were preempted: they alleged breach of contract for misleading the trucker about the type of load to be carried, and other improper behavior before pickup and after the load fell off the truck and was damaged. The court was aware of the body of case law, finding that preemption is not available but felt that for a series of reasons the trucker's counterclaims were preempted.

Other broker issues were also on the agenda. In *Trujillo v. Werner Enterprises*, 2021 Tex. App. LEXIS 9914, a trucker hired by Werner to deliver a load for a shipper was involved in a fatal accident. Plaintiffs sued Werner, which has dual authority, as both a broker which had negligently hired the trucker and, in the alternative, as the carrier vicariously liable for the driver's negligence. In reply, Werner moved for summary judgment, which the trial court granted, finding that Werner had acted as a broker, and as a broker claims against it were preempted. (Preemption is on everyone's lips).

The court of appeals did not agree, and here we find another example of the law not recognizing clear boundaries on cases involving brokers. When an entity has both carrier and broker authority it needs to be especially alert to the possibility that its role will be questioned when it attempts to broker a load. It must make clear to the shipper that its role is that of a broker and not make any promises about taking responsibility for the load. For business reasons, though, many dual authorized entities are loath to make this at all clear.

Courts, in turn, as the appellate court noted here, have been reluctant to grant summary judgment on this issue because of the case specific and fact intensive analysis required. Review of the written contracts (shipper/broker and broker/carrier) is also crucial. In this case Werner's contract with the shipper (interestingly called a "transportation agreement") actually identified Werner as the carrier and gave it significant responsibility for delivering the cargo. In fact, the language in the contract was such that it hard to see Werner as anything other than carrier. And the actual bill of lading listed Werner as the carrier. Werner was lucky to avoid an outright reversal. The saving grace was an addendum, which permitted Werner to enlist third-party carriers in order to meet the shipper's needs. The trucker acknowledged that it had been hired by Werner's brokerage division. Ultimately, the court sent the case back to be tried in the lower court. Here, too, then, we see the pressures that competition for business, the tendency of the law in this area to incentivize irresponsibility by brokers (insistence by brokers that the carrier maintain certain standards being interpreted as control) and the assumption by many courts that summary judgment is improper, all make brokers excellent targets for plaintiffs.

Of course, sometimes brokers do win on summary judgment; the system would be fairer if such judgments were awarded more frequently. Some examples of broker wins: *Ying Ye v. Global Sunrise, Inc.*, 2021 U.S. Dist. LEXIS 210879 (N.D. Ill.) (broker which had no carrier authority and owned no equipment brokered loads for U-Haul using various motor carriers; the level of control maintained over driver was insufficient to impose liability); and *Courtney v. Class Transportation*, 2021 U.S. Dist. LEXIS 6347 (D. Colo.) (Landstar had dual authority and was alleged to be liable for both negligent hiring of carrier and vicarious liability. Court found that plaintiff failed to make a case for negligence (duty, breach, injury, causation), and vicarious liability was not established in light of Landstar's contractual language in the agreement with the trucker which indicated that Landstar did not have the right to control or direct the method or manner in which the trucker was to carry out its responsibilities).

Larry Rabinovich

10. *Coverage*

We have discussed in previous years the problem insurers face when the file contains clear evidence that a loss is not covered but the complaint omits any reference to that evidence. In determining a liability insurer's duty to defend, Texas courts generally look within the "eight corners" of the underlying complaint and the policy. The insurer plaintiff in *Canal Insurance Co. v. Greenland Trucking*, 2021 U.S. Dist. LEXIS 24212 (N.D. Tex.) sought to deny coverage on the grounds that the injured plaintiff and the defendant truck driver were both employees of the same motor carrier employer—facts which were not alleged in the underlying complaint. Since those extrinsic facts were critical to Canal's coverage action, and since determination of the employment issue would not affect the underlying determination of liability for the plaintiff's injuries, the court found that Canal's declaratory judgment complaint fell within an exception to the "eight corners" rule.

One often hears that if an insurer issues a reservation of rights letter to the insured, the insured is entitled to select their own attorney at the insurance company's expense. The (federal) Ninth Circuit—applying California law—observed that not every reservation of rights letter creates a conflict of interest requiring appointment of independent counsel. *G&J Heavy Haul v. Williamsburg National Insurance Co.*, 2021 U.S. App. LEXIS 35129. Williamsburg had issued both a general liability policy

and a truckers liability policy to G&J Heavy Haul. In defending the insured in an underlying bodily injury action involving one of the insured's trucks, Williamsburg issued a reservation of rights stating that coverage was owed under one or the other policy, but not both. G&J Heavy Haul argued that it was entitled to select independent counsel, given the insurer's reservation of rights. The court agreed with Williamsburg that the reservation of rights was unrelated to any issues of the insured's liability in the underlying action. Independent counsel is needed only where a defense counsel could potentially steer a case to judgment on a non-covered claim. Here there was going to be coverage one way or the other.

In *American Empire Surplus Lines Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, 2021 N.Y. Misc. LEXIS 974 (Sup. Ct. N.Y. Cnty.), where a worker at a construction site fell out of a flatbed truck, the general liability policy issued by American Empire excluded bodily injury arising out of loading or unloading a motor vehicle owned by the named insured Skyline. The court found, however, that the allegations in the underlying complaint—that the injured plaintiff was standing on a truck to pass wooden planks to his coworkers—did not constitute an allegation that he was "unloading" the truck. (The court noted further that American Empire's duty to defend was triggered by extrinsic evidence from the plaintiff's deposition testimony in that action that he was not passing any wooden planks to coworkers when he fell but rather was passing a cup of soda.)

On the other hand, the court found that the allegations in the underlying complaint also triggered State Farm's duty to defend under the motor vehicle liability policy covering the truck. The court held that those allegations were sufficient to establish a claim that the injured plaintiff was "using" the truck, even if he was not unloading it. Moreover, as the complaint alleged further that the construction site owner breached a duty to provide the injured plaintiff with a safe workplace, but did not allege any specific acts of negligence as against the owners, the underlying complaint could be read as seeking to hold the owner vicariously liable under New York's *Labor Law §§ 240 and 241(6)*. Accordingly, the owner qualified as an "insured" under the State Farm policy definition which included by endorsement "any other person or organization vicariously liable for the use of a vehicle by an insured" only to the extent that "the vehicle is neither owned by, nor hired by, that other person or organization."

In *Continental Casualty Co. v. Pennsylvania National Mutual Casualty Insurance Co.*, 2021 U.S. Dist. LEXIS 46561 (E.D. Pa.), employees of a catering company and an unrelated audiovisual company decided to carpool to attend a trade show. The catering company employee was driving the audiovisual company vehicle when she struck a motorcyclist on the highway. The court found that the catering company had not "borrowed" the vehicle, adopting what it referred to as the majority view that borrowing requires obtaining substantial possession and control over the vehicle, rather than simply receiving some benefit. Accordingly, the employee was not entitled to liability coverage under the Penn National policy as a permissive user of a covered auto owned, hired, or borrowed by the named insured catering company.

Compare *Continental with Castro v. Zurich American Insurance Co.*, 2021 U.S. Dist. LEXIS 80075 (D.N.M.), in which a Zurich business auto policy provided liability coverage for losses arising out of the use of "any auto." The policy also expressly extended additional insured coverage to operators of a leased auto, but only if the leasing agreement required the named insured to provide insurance coverage to the lessor, and if the lessor was not operating the vehicle at the time of the loss. The vehicle involved in the subject loss was owned by an employee of the named insured. Absent any agreement that the named insured would provide the employee with liability insurance for his vehicle, the court found that it was not a "leased auto" within the meaning of the Zurich policy. That, combined with the fact that the employee was operating the vehicle at the time of the loss, was sufficient to deny him additional insured coverage. (The issue of whether the named insured was entitled to "any auto" coverage, even if the vehicle was not "leased," was avoided because the named insured had been dismissed from the underlying action upon proof that the employee was not using his truck in the course and scope of his employment.)

In *State Farm Mutual Automobile Insurance Co. v. Triple L, Inc.*, 2021 US Dist. LEXIS 80594 (D. Mont.), husband Jeffrey Love owned motor carrier Triple L, while wife Mika Love owned employment agency Phoenix which supplied all of Triple L's drivers. (She also served as secretary/treasurer of Triple L). Since Triple L's contract with the United States Postal Service required Triple L to control the details by which its drivers performed their deliveries Triple L supplied delivery trucks to its drivers, and Triple L effectively had the right to fire drivers; the court had no difficulty determining (under Montana law) that the drivers provided by Phoenix were Triple L employees. Accordingly, State Farm provided no liability coverage to Triple L when one of its drivers was injured while operating the tailgate on a company truck.

In *Urena v. Parkchester South Condominium*, 2021 N.Y. Misc. LEXIS 2292 (Sup. Ct. Bronx Cnty.) (a case in which Barclay Damon served as coverage counsel), the plaintiff was loading materials onto a flatbed truck while standing on a pile of construction material, i.e., pallets that he stacked to elevate

himself. While moving materials off and onto the truck, Urena lost his balance as he tried to avoid being hit by falling construction materials. He slipped off the pallets onto a pipe and, ultimately, onto the ground.

AIG, the workers' compensation insurer, claimed a $221,536.15 lien against any liability recovery Urena might collect. Urena argued that AIG was statutorily obligated to reduce its lien by $50,000, reflecting the amount that Urena could have collected under no-fault auto insurance had his accident not been job-related. The court was unimpressed by AIG's argument that Urena's use of the truck was not the proximate cause of his injuries, since Urena was unloading his vehicle while standing on the insured truck, and the injuries were sustained as a result of his being struck while on this truck and falling off of this vehicle. AIG, there, could not assert a lien on the $50,000 it paid Urena which was effectively in lieu of no-fault payments that he could otherwise have collected.

South Carolina Code § 38-77-142(A) mandates that any motor vehicle liability policy issued in the state must provide liability coverage to the named insured and any permissive user of a covered auto "within the coverage of the policy or contract." § 38-77-142(C) provides further that "[a]ny endorsement, provision, or rider attached to or included in any policy of insurance which purports or seeks to limit or reduce the coverage afforded by the provisions required by this section is void." The personal auto liability policy at issue in *Nationwide Mutual Fire Insurance Co. v. Walls*, 2021 S.C. LEXIS 19 (S.C.), provided, in pertinent part:

> B. This coverage does not apply, with regard to any amounts above the minimum limits required by the South Carolina Financial Responsibility Law as of the date of the loss, to:
>
> 6. Bodily injury or property damage caused by:
>
> a) you;
>
> b) a relative; or
>
> c) anyone else while operating your auto;
>
> (1) while committing a felony; or
>
> (2) while fleeing a law enforcement officer.

Passengers in Walls' vehicle were injured when the driver lost control following a high-speed pursuit by police. Nationwide argued that its exposure was limited to South Carolina's mandatory coverage of $50,000 per accident. In a 3-2 decision, however, the Supreme Court of South Carolina interpreted § 38-77-142 as mandating that a motor vehicle policy must provide liability coverage to the named insured and/or a permissive user for the full policy limits, and that Nationwide's step-down provision was void as against public policy. The majority cited to its decision in *Williams v. Government Employees Insurance Co.* (GEICO), 409 S.C. 586, 598, 762 S.E.2d 705, 712 (2014), which cited § 38-77-142 as a basis for striking down a step-down provision in cases of bodily injury to a member of the named insured's household. The dissent, which had also dissented in *Williams*, argued again that § 38-77-142 was intended only to mandate the statutory minimum coverage for the named insured and permissive users.

Sentry Select Insurance Co. v. Home State County Mutual Insurance Co., 2021 US Dist. LEXIS 93897 (S.D. Tex.), involved Ortiz, who purchased a used Kia automobile from a dealer but was loaned a Hyundai by the dealer because the Kia needed some repairs before it could leave the lot. Ortiz used the Hyundai to travel to an insurance agent to purchase the Home State policy on the Kia, and then returned to the dealer to see if the Kia was ready. When told that it was not, Ortiz left in the Hyundai as a passenger with Ramirez driving. Ramirez was involved in a one-vehicle accident, injuring Ortiz, who then sued Ramirez. The court determined that, under the circumstances, the Hyundai could be considered a "temporary substitute" for the covered Kia, even though Ortiz never had possession of the Kia prior to the accident, and actually had possession of the Hyundai even before the Home State policy was issued. Accordingly, the permissive user Ramirez was entitled to liability coverage under the Home State policy. (Sentry Select, which insured the dealer, was off the hook, since its policy only provided coverage where the statutory minimum was not met by other coverage.)

Jarvis v. Foremost Express Insurance Agency, Inc., 2021 La. App. Unpub. LEXIS 121 (La. Ct. App.), offers yet another cautionary tale of the need to use precise language when cancelling a policy. The notice of cancellation issued by Foremost contained the language "will be cancelled," but also contained additional language that if sufficient payment was received, the insurance coverage would continue—and that to maintain coverage beyond the cancellation effective date the insured must pay the amount past due. Following its own precedent, the court treated Foremost's notice as a demand for payment, and not a clear and unequivocal notice of cancellation, as required by statute. The court further rejected Foremost's argument that a notice of cancellation for a commercial policy did not have to meet the same stringent requirements as a notice of cancellation for a consumer policy.

The coverage provided under the garage policy at issue in *United Specialty Insurance Co. v. Bani Auto Group, Inc.*, 2021 US Dist. LEXIS 174696 (N.D. Cal.), for losses arising out of the use of a covered auto, was limited in two significant aspects: an endorsement provided that the insurance did not apply to any covered auto rented to others, and "Limitation of Coverage—Schedule of Operations" provided that "[t]he coverage provided

by Section I—Covered Autos Coverages, paragraph D., Covered Autos Liability Coverages . . . applies only if the actual and/or alleged 'bodily injury' ... is caused by or results from the operations shown in the Schedule above." The "Schedule above" listed three operations: "Auto Storage—No Repair," "Consignment Sales," and "Dealers—Used Autos." Accordingly, the court had little trouble finding no coverage for the loss which occurred when a tire blew out on a Ferrari which an insured entity had rented to a customer as part of its exotic car rental business.

Moreover, California law allows an insurer to seek reimbursement for noncovered claims included in a reasonable settlement payment where there is (1) a timely and express reservation of rights; (2) an express notification to the insureds of the insurer's intent to accept a proposed settlement offer; and (3) an express offer to the insureds that they may assume their own defense when the insurer and insureds disagree whether to accept the proposed settlement. Progressive demonstrated that it had met these three criteria, and the court rejected the insureds' argument that Progressive had a separate burden of proving that its settlement of the underlying claims against the insureds was reasonable.

The plaintiff in *Stevens v. Yusuf*, 2021 US Dist. LEXIS 189484 (D. Kan.), was a passenger in a vehicle which collided with a commercial vehicle driven by the defendant. Stevens sued Yusuf and his motor carrier employer, and also brought direct actions against Great West and Wesco as the alleged liability insurers for the other defendants. The insurers moved for dismissal of the claims against them on the grounds that Yusuf had not alleged that the subject policies were filed with and approved by the Kansas Corporation Commission ("KCC"), since K.S.A. § 66-1,128 provided that no certificate, permit, or license shall be issued by the KCC to a motor carrier unless the applicant has filed a liability insurance policy containing particular terms that the KCC has approved. The district court, however, denied the motions, noting that the Kansas Supreme Court had never sanctioned or required the dismissal of a direct action against an insurer because of the failure to allege or to prove KCC filing and approval, but had rather expressly acknowledged that a direct action may be maintained even in the absence of such filing and approval.

The Penske rental agreement at issue in *State Farm Mutual Automobile Insurance Co. v. Penske Truck Leasing Co.*, L.P., 2021 US App. LEXIS 30921 (9th Cir.), provided in pertinent part:

> Penske Provides Coverage. If Customer elects Penske Liability Coverage, Penske agrees to provide liability protection for Customer . . . *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. (Emphasis added.)

Penske and its insurer Old Republic argued that this provision promised only coverage equivalent to a state's required minimum personal auto policy limits. State Farm and its insured motor carrier, which leased a truck from Penske, argued that the rental contract guaranteed coverage in amounts required for motor carriers. The court found that the rental agreement was sufficiently ambiguous as to favor the rental customer's interpretation. The dissent pointed out a 2015 California appellate decision in which the court faced the same issue involving the same Penske rental agreement, and flatly rejected the argument that it provided the higher commercial limits. The majority of the Ninth Circuit panel, however, pointed out that the opinion cited by the minority was unpublished and, in keeping with California's long-standing attitude toward unpublished opinions, refused to treat it as authoritative.

In *Acuity v. Dominguez*, 2021 U.S. Dist. LEXIS 195952 (N.D. Tex.), a truck driver shattered his knee when his truck's parking brake failed and he fell while chasing the truck down a hill. When the driver sued the truck's owner, the owner's liability insurer Acuity denied coverage on the grounds that the accident—a fall which occurred outside of the truck—did not "result[] from the ownership, maintenance or use of a covered auto," and thus did not trigger coverage under the policy. The court, however, found that the loss did result from the "use" of the truck, in that (1) the driver had parked the truck in the course of making a delivery of cargo, (2) his accident occurred within the natural territorial limits of the truck, and (3) his accident was a natural result of his attempt to stop the truck and prevent harm to others.

The rental agreement at issue in *Old Republic Insurance Co. v. Pocono Motor Freight, Inc.*, 2021 Pa. Super. Unpub. LEXIS 2987 (Pa. Super. Ct.), required Ryder to maintain automobile liability insurance covering Pocono, with a combined single limit of $1 million per occurrence. Ryder obtained a primary $1 million policy, and three excess policies, from Old Republic. Excess policies 1 and 2 provided that, where coverage for an additional insured was required by another contract or agreement, coverage would be limited to "the amount of insurance required by the contract, less any amounts payable by any 'controlling underlying insurance.'" The excess policies also provided that "Additional Insured coverage provided by this insurance will not be broader than coverage provided by the 'controlling underlying insurance." The court held that, where, as here, the rental contract did not provide for coverage beyond the limits of the bargained-for primary coverage, the two excess policies did not provide coverage for the additional insured. (A third Old Republic excess policy excluded from "insureds" any "person or organization, for whom the Named Insured has become

obligated by a written lease or rental agreement to provide liability insurance under the 'controlling underlying insurance.'" Since Ryder was only obligated to provide additional insured coverage to Pocono by virtue of the rental agreement, Pocono was not entitled to coverage under the third excess policy.)

The scorecard for identifying the players in *Carolina Casualty Insurance Co. v. Travelers Property Casualty Co.*, 90 F. Supp.3d 304 (D.N.J.), reads as follows:

- Kanard, a truck driver employee of Ho-Ro, was injured when employees of Gardner Bishop dropped a concrete barrier on his foot while loading it onto his trailer.
- Travelers issued a primary general liability policy to Gardner Bishop, which covered liability arising out of use of an auto so long as it was not owned, operated, or rented by Gardner Bishop.
- Illinois National issued an excess policy to Gardner Bishop.
- Carolina Casualty issued a primary auto liability policy to Ho-Ro, which owned the trailer. The Carolina Casualty primary policy also covered the attached tractor leased to Ho-Ro, and included the tractor owner Penske as an additional insured.
- Lexington issued an excess policy to Ho-Ro.
- Old Republic issued both a primary auto liability policy and an excess policy to Penske, which leased to Ho-Ro the tractor attached to the trailer at the time of the loss.

There was no judgment allocating liability for Kanard's injuries. Rather, Travelers and Illinois National settled his claim for $5 million, and the insurers then litigated the proper allocation of the settlement amount.

The court noted that Penske was named as an additional insured on the Carolina Casualty policy; the opinion does not state expressly, but implies, that the tractor leased by Penske to Ho-Ro was a covered auto under the Carolina Casualty policy. The court accepted the long-standing majority view (see *Blue Bird Body Co. v. Ryder Truck Rental, Inc.*, 583 F.2d 717, 726-727 [5th Cir. 1978]) that one who uses either end of a tractor-trailer rig uses the entire vehicle.

Accordingly, Gardner Bishop, while loading the trailer, was also a permissive user of the covered tractor, and entitled to additional insured liability coverage under the Carolina Casualty policy. (The policy would have excluded Gardner Bishop from the definition of an "insured," since its liability arose only from loading the vehicle, but the court recognized that long-standing New Jersey precedent would negate this limitation, see, e.g., *Potenzone v. Annin Flag Co.*, 191 N.J. 147, 155, 922 A.2d 745 [1992].)

As to allocation of the settlement, the court found that Carolina Casualty, Travelers, and Old Republic were each obligated to pay their policy limits ($1 million each for Carolina Casualty and Travelers, $15,000 for Old Republic). The Old Republic excess policy was not triggered (since the Penske rental agreement did not obligate Penske to obtain coverage beyond New Jersey's mandatory minimum). The respective "other insurance" clauses of the Illinois National and Lexington excess policies were disregarded as mutually repugnant, and the court divided the remaining portion of the settlement equally between those two insurers.

Phil Bramson

11. *The MCS-90 Endorsement*

The idea that an insurer should not have to pay under the MCS-90 where a plaintiff has already been able to recover $750,000 (or the mandatory limits) from another source is deeply ingrained in the minds of some underwriters and claims professionals, and one can certainly make a plausible public policy argument supporting such a position. The case law, unfortunately, does not.

The most recent pronouncement on the issue was in *Carolina Casualty Insurance Co. v. Capital Trucking, Inc.*, 523 F. Supp. 3d 661 (S.D.N.Y.). Capital, a for-hire motor carrier insured by Carolina, had leased a tractor with driver for use in its business. Attached to the tractor was a trailer that had been leased from an entity called Trucker's Association of Chicago, which was insured by Imperium Insurance. The rig consisting of those two components was involved in an accident while being used in Capital's business and under its authority. The Carolina policy scheduled neither the tractor nor trailer; Imperium, though, covered the trailer and, acknowledging its obligation, paid its limits ($1 million less about $6,500 in expenses paid) after the trial court found that Capital and Trucker's Association were both vicariously liable for the negligence of the truck driver. Plaintiff also demanded $750,000 (presumably the filing limits) from Carolina.

Carolina filed suit in the district court for the Southern District of New York, seeking a declaration that its base policy provided no coverage (a slam dunk) but also that, in light of Imperium's payment, Carolina was excused from paying its MCS-90 limits. The Mother Court, though, was not impressed.

The court's legal analysis got off to a bumpy start, as the court seriously misstated the facts of controlling precedent from the Second Circuit. In a 1991 decision (*Integral Insurance v. Fulbright*, 930 F.2d 258) the court had faced a remarkably similar scenario in which the applicability of the MCS-90 was at issue even though another insurer (which insured a second motor carrier) had already paid its USDOT limits to plaintiff. The

Carolina court described *Fulbright* as a case in which plaintiff was not able to recover from the other motor carrier's insurer—but that was exactly wrong. Even good courts sometimes make mistakes, but this is an unusually serious misreading of a case which arguably should have been controlling precedent. In *Fulbright*, plaintiff was able to collect both from the trucker's insurer as well as from the MCS-90 issued to the lessor of the tractor, which was liable based on New York's ownership liability statute.

Instead of citing *Fulbright* and signing off, the court reviewed the case law produced in the wake of the 2009 Yeates decision by the federal Tenth Circuit which we have discussed in our annual summary almost every year since then. The consensus view of *Yeates* that has developed, including by the Tenth Circuit itself, is that where two motor carriers are found liable, and one is covered by a policy, while a second trucker's insurer has no coverage but is exposed under the MSC-90, then plaintiff is entitled to both limits. In *Yeates*, the two policies at issue (one of which covered the accident vehicle, one of which did not but had a MCS-90) were issued to the same insured. For that reason, the MCS-90 was not tacked on to the recovery by plaintiff. Where the two policies, though, are issued to two separate insureds (each of which is a defendant) then the MCS-90 is indeed available if the insured on that policy is found liable. (Our preferred formulation would add the words if the insured on that policy is found liable "as the motor carrier of record.") On that basis the court found Carolina liable to pay its MCS-90 limits.

The court, thought, did make one concession to Carolina that did not change the result—but could impact on at least some future claims of this type. Relying on *dicta* from a federal court in West Virginia, the court suggested that if, at the time of the loss, the insurer that covered the truck had previously identified both motor carriers as insureds, then the insurer which issued the MCS-90 would be excused from paying. This was not the case here. Had, though, there been an additional insured endorsement in effect for the Carolina insured under the Imperium policy, Carolina would not have been required to pay under its MCS-90. (The fact that Capital qualified as an insured under the terms of the policy was not enough to excuse Carolina; Capital's status as insured would have had to be open and obvious to all at the time of the accident.) Time will tell whether future decisions will accept this approach.

A series of decisions from around the country remind us that, while an insurer's exposure under a BMC-91X filing or the MCS-90 endorsement is broad, it is not unlimited.

In *American Inter-Fidelity Exchange v. Hope*, 2021 U.S. Dist. LEXIS 137644 (N.D. Ill.) claimant argued that the judgment against the truck driver triggered the MCS-90. As we have noted over the years, in 2005 the USDOT made clear that the MCS-90 is triggered only by judgment against the named insured motor carrier; here, only a company called Expeditor Systems was named on the policy declarations as the insured (and presumably was the only one who paid the premium). Plaintiff, though, had not sued Expeditor; the primary defendant was the truck driver. Defense counsel, in answering interrogatories directed to the driver, had incorrectly indicated that the driver was also a named insured on the Expeditors policy; plaintiff attempted to portray this as admission by the insurance company. Citing to the 2005 USDOT guidance, though, the court concluded that even if the driver were deemed to be the named insured he was not the "named insured motor carrier." The MCS-90 was not applicable.

Another limiting factor in triggering the MCS-90 is the nature and model of vehicle involved. *Redwood Fire & Casualty Insurance Co. v. Green*, 2021 US Dist. LEXIS 18658 (C.D. Cal.) involved a commercial auto policy that plaintiff insurer had issued to Marcus Green Transportation, covering a semi-tractor and trailer. This is not a happy story. The principal, Marcus Green, borrowed his ex-wife's Porsche 911 and decided to use it for a street race. That was foolish enough, but in addition he raced with his girlfriend Kristen Lauer and their infant girl in the Porsche. During the race he lost control of the car, hit the guardrail, and careened down the embankment. Lauer was seriously injured, and the baby was killed.

Redwood had little difficulty concluding that the sports car was not a covered auto and the court rejected Lauer's argument that it qualified as a temporary substitute for the commercial rig. Nor did the MCS-90 apply: the USDOT regulations apply only to for-hire carriers operating vehicles transporting property in interstate commerce; the commercial vehicle must have a gross vehicle weight rating of at least 10,001 pounds in order for the MCS-90 to be triggered. The Porsche and its use by the insured failed this test on various grounds. The loss was horrendous and the actions by the insured unconscionable, but that does not automatically result in exposure for the insurer under a filing. Redwood's motion that it had no exposure was granted.

Some important procedural questions were addressed in *Wesco Insurance Co. v. Rich*, 2021 US Dist. LEXIS 230736 (S.D. Miss.). The split decision, though, highlights the difficulties many insurers are finding when they attempt to find out the extent of their exposure in a declaratory judgment filed prior to entry of judgment in the tort case. Insurers much prefer to have their exposure made clear long before a tort judgment is entered, but more often than in earlier years, courts are dismissing these coverage actions as premature. (Other examples of this trend are discussed in the section entitled "Jurisdiction.")

The underlying claim here involved a crash between a passenger vehicle in which the claimant was traveling, and a rig owned by one of the principals of DKY Express, a motor carrier insured by Prime Insurance. The tractor was (allegedly) leased to Sam Freight Solutions, which may or may not have been affiliated in some way with DKY, and which was insured by Wesco. The tractor was not scheduled on either the Prime or Wesco policy which created a bit of a stalemate; both policies were fitted with an MCS-90.

As the tort lawsuit got underway, Wesco filed a declaratory judgment action asking the court to rule that it had no coverage for the loss; it also sought a declaration that Prime *did* have coverage or exposure under its MCS-90; also, it sought a ruling that, to the extent Wesco was obligated to pay under its MCS-90, then it was entitled to reimbursement from its insured.

Prime moved for judgment on the pleadings claiming that Wesco lacked standing to litigate the question of coverage under Prime's policy by filing what was essentially a "direct action" against Prime. (Direct actions by claimants are not permitted under Mississippi law.) The court concluded, though, that it is permissible for one insurer to sue another to enable a court to determine which policy covers the loss at issue.

Wesco's satisfaction with that portion of the ruling was of very short duration since the court had no troubling concluding that the accident vehicle was not covered under the Prime policy. Moreover, Wesco had no standing to seek a declaration of Prime's exposure under Prime's MCS-90. That, in any event, was the court's reading of Fifth Circuit precedent on the MCS-90. (We are not convinced that the existing precedent required that result.)

The court noted that the bodily injury plaintiff could file suit to recover under the MCS-90—so that eventually the Prime MCS-90 would be examined for its applicability. That, though, would only be possible once judgment had been entered in the underlying tort case. The court's approach seems overly restrictive and frustrated the parties' ability to work out the status of the coverage dispute before the tort action is completed.

The inability of one insurer to sue another for recovery under the MCS-90 was also raised in *Williamsburg National Insurance Co. v. New York Marine & General Insurance*, 2021 U.S. Dist. LEXIS 187277 (C.D. Cal.). Williamsburg insured DLR Express under a $1 million policy with an attached MCS-90. New York Marine had issued a policy which included an MCS-90 to a group of owner-operators including Arthur Trimble who was operating a rig that he had leased from DLR. Trimble had also entered into a sub-haul agreement with DLR and had arranged for DLR to be an additional insured under the NY Marine policy.

Trimble was involved in an accident and was sued by the injured party; NY Marine defended Trimble and settled the case against him for $155,000. DLR had been added as a "Doe" defendant; DLR was not provided with a defense and a default was taken against the company. Williamsburg ultimately paid the entire judgment after failing in its attempt to open up the default.

Williamsburg then sued NY Marine for recoupment of its payment, claiming that DLR was an insured under the NY Marine policy and should have been defended. NY Marine responded that DLR had waived its right to defense and indemnification by failing to tender its defense. The court agreed that Williamsburg had no claim for equitable subrogation against NY Marine in light of DLR. And, with respect to that claim, the NY Marine MCS-90 was of no help to Williamsburg because the MCS-90 "is not implicated in a dispute between two insurers." (The court found that Williamsburg could maintain in action on the alternative theory of equitable contribution and was able to seek declaratory relief.)

One of the recurring questions in MCS-90 litigation is whether the motor carrier's rig needs to be actively engaged in interstate commerce at the time of the loss in order to trigger the MCS-90. Earlier case law had found that so long as the vehicle was available for interstate work, the MCS-90 would apply even if, at the time of the accident the truck was being used on intrastate business. The trend in the case law for the past 10 years or so, though, is to require that interstate operations be ongoing at the time of the loss in order for the MCS-90 to apply. A variation of these facts which has been popping up in some of the case law is when the truck is not being used directly in any kind of transportation at the time of the loss.

An example of this scenario is *Lancer Insurance Co. v. Personalized Coaches, Inc.*, 2021 US Dist. LEXIS 220770 (E.D. Wis.), in which the claimants (father and son) were run over while performing maintenance on an out-of-service bus; the bus suddenly rolled forward, killing the son and injuring the dad. Lancer had issued a commercial auto policy, as well as a general liability policy, to their bus company employer. The CGL policy did not apply in light of the employee exclusions and the auto exclusion; the auto policy would have applied had the bus been scheduled on the policy, but it was not.

That left the two specialized endorsements on the auto policy, the (federal) MCS-90B and the (state) Form F. Lancer argued, successfully, that the MCS-90B (the bus version of the MCS-90) applies only to liability arising from interstate commerce or travel. Relying on the plain language of the endorsement and the language in the underlying statute, as well as case law from around the country, the court held that the MCS-90B could be triggered only when the carrier is actively engaged in the interstate transportation of passengers. The repair of a bus in the garage (particularly a bus deemed out of service) was too remote.

If the interstate endorsement was not available, what about the Form E filed with the Wisconsin DMV and the complementary Form F attached to the policy? Wisconsin's Supreme Court had held that "operations" for the purpose of the Form F included loading and unloading; claimants argued that the same should be true of maintenance and repair. The court disagreed: maintenance is not the same as loading or unloading. It did not help the claimant's cause that the bus had been out of service for over a year. The court also accepted Lancer's argument that the men injured here were not "members of the travelling and shipping public" that the statute and regulations were designed to protect. Lancer, accordingly, was awarded summary judgment.

Where the insured has secured both federal and state filings—and cases such as *Philadelphia Indemnity Insurance Co. v. Transit U Inc.*, 2021 U.S. Dist. LEXIS 136595 (D. Del.), correctly stress that it is the motor carrier's obligation, not the insurer's, to make sure that financial security is maintained— then one or the other should apply in most cases (though not in all as the *Lancer* case discussed above shows). Sometimes, though, identifying whether a particular run is interstate or intrastate is not immediately obvious.

Thus, in *Prime Insurance Co. v. Wright*, 2021 U.S. Dist. LEXIS 228400 (N.D. Ind.), Riteway, the defendant motor carrier, had defaulted in Wright's tort action. In its declaratory judgment action, Prime established that the rig involved in the loss was not scheduled on the policy and the court concluded that the basic policy provided no coverage. The question involving applicability of the MCS-90 was a different story. The evidence showed that the driver was based in Illinois. On the date in question he was physically located in Indiana, having delivered a load there, and he received instructions to pick up a new load in Fort Wayne, IN. This load was to be dropped off in Illinois.

The accident occurred just before the driver arrived at the Fort Wayne location of the shipper. After the accident, the driver did pick up the load and hauled it to the consignee's location in Illinois. This was a lot closer to interstate commerce than the scenario in the Lancer case discussed above. There is to be sure language as far back as *Canal Insurance Co. v. Coleman*, 625 F.3d 244 (5th Cir. 2010), which Prime cited, that can be read as drawing a bright line between rigs carrying a load interstate (MCS-90 applies) and a rig not carrying anything (MCS-90 does not apply). Since the driver here had no cargo in his rig at the time of the loss Prime argued that that the MCS-90 could not apply. But the Fifth Circuit had pointed out that it reached its decision in favor of the insurer in part because the claimant had failed to make what might have been a winning argument—that even when a driver is not actually hauling goods, they might be engaged in "transportation of property." That left the door wide open for someone to argue, even to the Fifth Circuit, that one might well be involved in interstate commerce even if there was no cargo on the truck at the moment of the loss.

Prime's insistence on this point led the court to conclude that no matter how many courts have adopted the "trip specific approach," a better way to resolve such cases would be a "totality of circumstances" analysis. Permit us to observe that, while we agree with the court's decision in favor of the claimant, a proper reading of *Canal v. Coleman* would have led to the same result. The "totality of circumstances" approach the court preferred is subsumed under the "trip specific" approach since it looks at the totality of circumstances in this specific situation (truck driver under dispatch orders and about to pick up Indiana load to deliver to Illinois). The opposite of "trip specific" is not "totality of circumstances." Rather the opposite view, as noted above, looked to whether the rig was available for interstate commerce or sometimes used for interstate commerce quite apart from whatever it was doing on the particular date of loss. That the court granted the plaintiff's motion arguing that the MCS-90 applied was no surprise. We hope, though, that the legacy of the decision will not be to weaken the industry's hard-fought success in convincing courts to use the trip specific approach.

On December 16, the Supreme Court of Indiana held oral argument in *Progressive Southeastern Insurance Co., v. Bulk*, 21S-CT-00496, a case involving a local move within Indiana and the applicability of the MCS-90. The lower courts had held that even though under federal law the MCS-90 does not apply to a purely intrastate move, Indiana had adopted the federal regulations (49 CFR Part 387) and therefore the MCS-90 applied to the intrastate loss under *state* law. A decision is expected in early 2022. Barclay Damon attorneys assisted Progressive in the run-up to the argument.

Larry Rabinovich

12. Non-Trucking Coverage

The federal court in *Bell v. L&B Transport, LLC*, 2021 U.S. Dist. LEXIS 9919 (M.D. La.), drew on the extensive case law from Louisiana courts and from the Fifth Circuit to find for the NTL carrier Hudson Insurance on the basis that at the time of the loss the owner-operator was furthering the business interests of the motor carrier/lessee. The language of the Hudson policy's exclusion is similar to that of the familiar ISO language.

What is interesting about the decision is that at the time of the loss, the owner-operator was driving from his home to the carrier's terminal to pick up an empty truck; he was scheduled to take the trailer to the shipper's location for loading and would ultimately have driven the load to the customer in Missouri.

The owner-operator had also arranged for a tire supplier to meet him at the terminal; he intended to replace two of his

tires. Some courts around the country have found that when the owner-operator is driving from home to the terminal they are

simply commuting and the non-trucking policy is applicable, just as it is when the driver is commuting home from the terminal after completing work and signing off for the day. (In many scenarios, courts hold that the driver remains in the business of the motor carrier until they return home.)

The court here, though seems to have been influenced by the fact that the driver already had his assignment. Also, the purchase of tires was understood to be part of the owner-operator's contractual obligation to maintain his rig. As always, the line between operating in the motor carrier's business and not is very difficult to draw.

Sometimes one hears even experienced players in the industry insisting that one must distinguish between bobtail, deadhead, and non-trucking coverages. The courts have consistently, though, focused not on what a particular coverage is called, but rather on what the policy exclusion or limitation actually says. In *Progressive Paloverde Insurance Co. v. Estate of Jenkins*, 2021 US Dist. LEXIS 30107 (E.D. La.), the insured defendant may not have completely understood what non-trucking coverage is at the time he purchased it. The court's description suggests the following: Jenkins's premium on his auto liability policy had gone up after a previous accident. When the policy renewed he found—possibly inadvertently—that he could save a lot of money by adding the "non-trucking liability" endorsement to his policy. Of course, by adding the non-trucking endorsement, he cut out almost all of the coverage that the policy provided, and that was why the premium was significantly reduced. We suspect that he did not realize that; in any event at the time of the loss, he was operating in the business of his lessee. The accident under discussion was caused by Jenkins ignoring a stop sign at a railroad crossing. His truck was hit by an Amtrak train, killing Jenkins and causing various other injuries and damages. Progressive denied coverage under its non-trucking policy, as it was undisputed that Jenkins was hauling sand at the time of the accident.

Jenkins's employer Heck, attempting to convince the court to find that the Progressive policy (rather than its own, presumably) applied to the loss, argued that Jenkins had requested a bobtail policy but had been given a non-trucking policy instead by Progressive. That was supposed to justify penalizing Progressive and forcing it to provide coverage. "Bobtail coverage," as Heck understood it and explained it to the court, supposedly applies when the driver is "bobtailing" (operating the tractor with no trailer), but never otherwise. Non-trucking policies, according to Heck, cover the driver's exposure when he is not acting in the lessee's business (even if the tractor is attached to an empty trailer). The court pointed out that even if such a distinction exists, Jenkins, who was actively hauling a load of sand for a customer, would have been excluded. The court also rejected the employer's arguments that the non-trucking coverage was somehow violative of Louisiana public policy or that it provided only illusory coverage. If Jenkins was not carrying the appropriate insurance that was not Progressive's fault, and the coverage was not illusory; the reduction in coverage provided by a bobtail policy—as opposed to a full liability policy—was accompanied by a large reduction in premium.

The court in *Lopez v. Western Surplus Lines Agency, Inc.*, 2021 U.S. Dist. LEXIS 189799 (D.N.M.), turned back wave after wave of attacks against the non-trucking policy (standard ISO business auto policy with endorsement TE 2309) that Redpoint County Mutual had issued to Ramon Fabelo, the owner of a truck he had leased to Oil Field Outfitters. Fabelo's driver, Ferras, was involved in an accident—caused by Ferras's negligence—while driving to pick up a load of sand for Oil Field. In short, this is a rather straightforward matter in which the non-trucking insurer should have no exposure.

Fabelo's liability was eventually stipulated to (as part of the settlement in the tort action), and the plaintiffs then filed suit against Redpoint seeking collection of the limits of the non-trucking policy. Redpoint denied coverage. The court rejected all of the plaintiffs' many arguments and granted summary judgment to Redpoint.

In attempting to undercut Redpoint's position, plaintiffs pointed out that Outfitter had a joint venture in place with another entity and as a result, it was not clear just for whom the driver was hauling. They also pointed to some inconsistencies in the factual record (as though that never happens) and that the driver was not an employee of Outfitters under the terms of the lease agreement (as though that is a factor of any importance). The court was unimpressed.

Going back to first principles—and ignoring sixty years of precedent—plaintiffs made the interesting argument that the architecture of the ISO non-trucking coverage—a business auto form amended by the broad exclusion (Endorsement 2309)—is misleading. After all, the basic policy form is the (relatively broad) business auto form to which the endorsement entitled "Insurance for Non-Trucking Use" appears simply, at least if one does not actually read it, to add additional coverage. Instead, the endorsement takes away almost all of the coverage that the business auto form grants. A stand-alone "bobtail policy" would be enforceable, plaintiffs claimed, but how was a (presumably) unsophisticated trucker like Fabelo supposed to understand that the non-trucking endorsement *reduced* coverage and to such a significant extent? The court rejected the argument, in part based upon the absence of any evidence about Fabelo's

expectations—and because the policy pieces fit together and mean precisely what the insurer claimed. The court also found insignificant the fact that the endorsement itself did not identify the covered auto since it was identified elsewhere in the policy.

The plaintiffs' assault continued—they claimed that even if the policy excluded direct liability for use of the auto, claims for negligent hiring, supervision and training were not excluded. The court, though pointed out that this reading was simply incorrect. Nor was the phrase "in the business of" the lessee ambiguous, as plaintiffs claimed.

Undeterred, plaintiffs then argued that New Mexico courts overrule foreign law (the policy was delivered to the insured in Texas, and the court used Texas case law in upholding its terms) where applying that foreign law would result in a violation of fundamental principles of justice. They argued that the exclusion was invalid because it swallowed the coverage clause, and that New Mexico would follow New York law and refuse to enforce the standard ISO exclusion. All of these, too, were rejected by the court. If nothing else, the decision offers a deep review of legal issues that may arise in a non-trucking coverage case.

Over the years we have worked with several underwriters to develop a different model of non-trucking policy—along the lines of what the plaintiffs in *Lopez* asserted that a non-trucking or bobtail policy should look like: one that does not begin with a broad grant of coverage and then take it back. Historically, such experimental forms have not had much traction, but we wonder if that is now going to change in light of adoption by Great West Casualty of a new "Non-Trucking Use Coverage Form," as is apparent in *Great West Casualty Co. v. Ross Wilson Trucking*, 2021 U.S. Dist. Lexis 120398 (C.D. Ill.). The form's coverage grant applies only while the covered auto is *not* used to carry property in any business and while it is not used in the business of a lessee. In other words, the provisions of the exclusion, e.g., ISO Form CA 2309, have been incorporated into the coverage grant. In a belt-and-suspenders move, Great West has also added an exclusion which mimics CA 2309.

We apologize for the convoluted description which follows. The decision is oddly structured and the follow up decision, also discussed below, is particularly hard to understand or to agree with. Great West had divided its non-trucking coverage into two policies: a primary one with limits of $100,000, and a $900,000 excess policy. No mention is made in the opinion of the policy that we assume was in effect for the lessee, Transport Services.

Ross Wilson driver Mark Muncy made a delivery for the lessee Transport, and was pulling into his driveway when the loss occurred—the tanker attached to his tractor was blocking the road and claimants vehicle ran into it causing serious injuries, In response to Great West's motion for summary judgment on both policies, the other parties (presumably including the claimants and the insured) raised many objections to the enforceability of the Great West policy—including some described in the previous cases in this section. In addition, they argued that since under the lease agreement, RWT had agreed to defend and indemnify Transport, that obligation constituted an "insured contract," which Great West was obligated to insure on a primary basis. The court's focus was on the duty to defend, not the ultimate duty to indemnify, which helps explain the somewhat odd structure of the opinion.

Since Muncy testified that he never parked in his driveway when the tanker had any gasoline in it, the court deducted that the tanker must have been empty, making the first of the Great West exclusions irrelevant. The focus, then, was on the second exclusion, use of the vehicle in the business of a lessee. The electronic log system provided the court with clear evidence of just what Muncy was up to and when. (This is among the first decisions we have seen which relies extensively on electronic logs.) On the date of loss, he drove a different truck than he ordinarily did because he had left his usual assigned vehicle at a repair shop (apparently a day or two before). After completing his deliveries on the date of loss, he and his wife travelled in their personal pickup to the shop in Indiana to recover the repaired tractor, which he drove towards his home (while his wife drove the pickup). As he drove back home he was marked "On Duty" on the electronic log. The loss occurred, as noted above, as he was pulling into his driveway. Relying on Illinois precedent including the landmark 1977 *Frankart* decision, the court found that Muncy was still engaged in Transport Services's business. The court also rejected the argument that the "insured contract" provision created a primary duty to defend.

The court returned to this case a few months later (2021 U.S. Dist. LEXIS 209903), and the result was disastrous from the perspective of non-trucking insurers. While the coverage grant and exclusion were clear enough, the court found an ambiguity in the policy's "other insurance" clause—which somehow resulted in a finding that Great West's primary non-trucking policy shared equal primary billing with the lessee's primary policy both for defense and indemnification. We imagine that if there was indeed an ambiguity, it will be corrected in future editions. The negative turn might discourage other insurers from abandoning the traditional non-trucking policy structure, but in principle, the attempt by Great West to set up a non-trucking policy which makes clear exactly what is covered is one that is should be praised.

Larry Rabinovich

13. *Jurisdiction*

The issue in *Weyerhaeuser Co. v. AIG Property Casualty, Inc.*, 2021 U.S. Dist. LEXIS 77809 (W.D. Wash.), was whether the

defendant insurers' motion to transfer venue from the Western District of Washington to the Central District of California should be granted, where the disputed excess insurance policies were negotiated with a non-party transportation company based in California. The plaintiff was a Washington-based forest product supplier which had executed a master motor carrier contract with Gardner Trucking, Inc., a California-based transportation company, to distribute its products. A driver employed by Gardner commenced a lawsuit against plaintiff in California federal court, alleging that he had sustained substantial injuries when a load of lumber fell onto him at a California distribution center owned by plaintiff. Despite the fact that the plaintiff had tendered the driver's claim to Gardner's second-, third-, and fourth-level insurers, they each refused to contribute to the settlement with the driver, arguing that the plaintiff did not qualify as an additional insured under the excess policies issued to Gardner. Plaintiff subsequently commenced an action against the defendant second-, third-, and fourth-level insurers in the Western District of Washington, arguing that it was an additional insured under all policies purchased by Gardner, as required by the master motor carrier contract. The defendants then filed a motion to transfer venue to the Central District of California.

After determining that personal jurisdiction existed over the defendant insurers in California—as they had issued excess policies to Gardner, a California resident—the court applied a nine-factor test to assess whether the motion to transfer venue should be granted. In its analysis of each factor, the court ruled that (1) the "location where the relevant agreements were negotiated and executed" factor strongly weighed in favor of transfer because the excess policies were issued in California and negotiated with Gardner's California-based management and representatives; (2) the "state most familiar with the governing law" factor was neutral because the applicable law was not complex, and federal courts are equally equipped at applying foreign laws; (3) the "plaintiff's choice of forum" factor weighed against transfer but was afforded less weight, given that only the underlying master motor carrier contract—which was not in dispute—was issued and negotiated in Washington while all of the excess policies—which were in dispute—were issued and negotiated in California; (4) the "respective parties' contacts with the forum" factor weighed in favor of transfer because all of the parties conducted business in California while some of the defendant insurers did not conduct business in Washington; (5) the "contacts relating to the plaintiff's cause of action in the chosen forum" factor weighed strongly in favor of transfer because the excess policies were negotiated and issued in California and the underlying accident, lawsuit, and settlement occurred in California; (6) the "differences in the costs of litigation in the two forums" factor was neutral due to the parties' failure to identify specific witnesses they intended to depose or call at trial; (7) the "availability of compulsory process to compel attendance of unwilling nonparty witnesses" was neutral due to the parties' failure to identify unwilling nonparty witnesses whose attendance would need to be compelled; (8) the "ease of access to sources of proof" factor weighed in favor of transfer because the majority of nonparty witnesses—Gardner's management and representatives—were located in California; and (9) the "public policy considerations of the forum state" factor—which takes into account both judicial economy and each forum's local nexus—weighed against transfer because both forums had a local nexus and the resolution of a number of motions pending before the court would be delayed by the transfer.

Given that two factors strongly weighed in favor of transfer, two factors generally weighed in favor of transfer, three factors were neutral, and two factors weighed against transfer, the Court granted the defendant insurers' motion to transfer venue.

The court in *National Specialty Insurance Co. v. South Florida Transport Services Corp.*, 2021 US Dist. LEXIS 48944 (S.D. Fla.), addressed the question of whether it had subject matter jurisdiction over the plaintiff insurer's declaratory judgment action pursuant to the justiciable controversy doctrine and the factors outlined by the Eleventh Circuit in *Ameritas Variable Life Insurance Co. v. Roach*, 411 F.3d 1328 (2005). The plaintiff insurer sought a declaratory judgment in federal district court, declaring that it did not have a duty to defend the defendant transportation company in a separate personal injury action which had already concluded with an adverse judgment against the transportation company. The plaintiff insurer also sought an order declaring that the MCS-90 endorsement in the policy did not oblige it to indemnify the transportation company for the judgment. The defendants filed a motion to dismiss, arguing that there did not exist a justiciable controversy with respect to plaintiff's duty to defend and that the court should exercise its discretion to dismiss the action as it pertains to the MCS-90 endorsement, because that issue was already being litigated in proceedings supplementary to the underlying state action.

With regard those aspects of the plaintiff's complaint pertaining to the duty to defend, the court determined that there did not exist a justiciable controversy sufficient for the court to obtain subject matter jurisdiction. In doing so, the court cited the fact that the plaintiff insurer failed to present evidence that the defendant transportation company ever requested a defense from plaintiff, as an insurer "does not have a duty to defend an insured who does not want a defense." The court also concluded that the question of whether such a duty existed was moot because the underlying proceedings had already concluded with the entry of an adverse judgment against the transportation company.

The court then applied the nine factor *Ameritas* test—which provides criteria for assessing whether a federal district court should retain or dismiss an action under the Declaratory Judgment Act—to dismiss the plaintiff insurer's declaratory judgment as it pertained to the interpretation and application of the MCS-90 endorsement. The court first determined that the first, fifth, and ninth *Ameritas* factors—which look to concerns of comity and the interest of the forum state in resolving the legal issues presented—and the seventh and eighth *Ameritas* factors—which examine the ability of the state court to resolve the legal and factual issues relative to the federal court—each weighed in favor of dismissal.

In doing so, the court pointed to the fact that the principal controversies involved questions of contract interpretation under Florida law, that the underlying action was brought in Florida state court, and that the state court handling the supplementary action was already familiar with the relevant facts and issues. Although questions pertaining to interstate commerce and the MCS-90 policy involved the application of federal law, state courts are well-equipped to analyze such issues and they potentially would not even need to be addressed. The court then determined that the second, third, and sixth *Ameritas* factors—which ask whether the declaratory judgment action is the most efficient and economical forum to resolve the rights of all parties—and the fourth *Ameritas* factor—which asks whether the declaratory judgment action was commenced for the pretextual purposes—each weighed in favor of dismissal. In doing so, the court again cited the fact that the issues were already being addressed in a supplementary proceeding before a state court which was familiar with all of the relevant issues and facts. It also found relevant that the supplementary proceedings were not otherwise removable to federal court. The court consequently exercised its discretion to dismiss the remainder of the plaintiff's complaint.

The principal issue in *McIntire v. Riven Ventura*, 2021 US Dist. LEXIS 92499 (S.D. Ga.), was whether the plaintiff fraudulently included a risk retention group as a defendant in order to defeat diversity jurisdiction and prevent removal to federal court. The plaintiff was a North Carolina resident who was injured in an accident involving two tractor-trailers on an interstate highway in Georgia. He subsequently commenced an action for personal injuries in Georgia state court against the operators and owners of the tractor-trailers. Plaintiff's complaint also asserted direct claims against the owners' alleged insurers pursuant to a Georgia statute that permits direct claims against insurers of motor carriers. One of the alleged insurers was a North Carolina–based company, County Hall Insurance Company, Inc., A Risk Retention Group. After the defendants removed the case to federal court, the plaintiff filed a motion to remand on the basis that both plaintiff and County Hall were North Carolina residents and therefore the federal court did not have diversity jurisdiction.

The court denied the plaintiff's motion to remand, finding that the plaintiff could not assert a direct claim against County Hall because it was a risk retention group rather than an insurance company and therefore diversity jurisdiction existed. In doing so, the court cited Eleventh Circuit and Fifth Circuit precedent, which permitted it to examine extrinsic evidence where a defendant contends that a party was fraudulently added to an action to defeat diversity jurisdiction. Based upon the extrinsic evidence produced by the defendants—particularly County Hall's state-issued licensure as a risk retention group in North Carolina—the court determined that County Hall qualified as a risk retention group under federal law. The court further held that plaintiff could not bring a direct claim against a risk retention group under Georgia state law, citing the Georgia Supreme Court's holding that the federal Liability Risk Retention Act of 1986 preempts Georgia law regarding direct actions against risk retention groups. The court consequently denied plaintiff's motion to remand, as plaintiff's sole argument was that the court did not have diversity jurisdiction on the basis of County Hall's presence as defendant.

The court in *Parsons v. National Interstate Insurance Co.*, 2021 US Dist. LEXIS 114533 (D. Utah), analyzed the questions of (1) whether the defendant insurer's notice of removal was improper for failing to articulate the basis of citizenship for each party with greater specificity; (2) whether removal was improper for failing to obtain the consent of a party which was not served; and (3) whether the defendant insurer waived its right to assert diversity jurisdiction by filing a complaint state court.

The proceedings arose from two separate actions arising from the same set of facts, and which were commenced in Utah state court. The plaintiff was a tractor-trailer operator who was injured in an accident involving another tractor-trailer. The defendant, plaintiff's workers' compensation carrier, subsequently paid the plaintiff more than $400,000 in workers' compensation benefits. After the defendant denied the plaintiff's application for UM/UIM benefits, the plaintiff filed a claim in Utah state court alleging that the denial was improper. Before the defendant was served with the plaintiff's complaint or otherwise made aware of the lawsuit, the defendant filed its own complaint in Utah state court seeking subrogation from the plaintiff due to his alleged receipt of settlement proceeds from the carrier for the other tractor-trailer. After the defendant was served with the plaintiff's complaint and became aware of the first action, it filed a notice of removal on the basis of diversity of citizenship. The plaintiff then filed a motion to remand, arguing that the defendant's notice of removal was deficient, and that

it had waived its right to invoke diversity jurisdiction through its filing of a complaint in Utah state court.

The court first addressed the sufficiency of the defendant insurer's notice of removal, holding that it included all necessary information to establish a basis for removal. With regard to plaintiff's argument that the defendant needed to provide specific information establishing the basis of each party's citizenship, the court held that simply stating each party's citizenship was sufficient and that if plaintiff possessed proof that a party's citizenship was improperly described, it should have produced it. With regard to the plaintiff's argument that the notice failed to describe why it had not obtained the consent of a defendant who had not been served in the underlying proceedings, the court held that it was sufficient to simply state that the party had not been served, because consent is not required from a party who was not put on notice of the underlying proceedings.

The court then addressed the question of whether the defendant insurer waived its right to invoke diversity jurisdiction, holding that the right was indeed waived by the defendant insurer's filing of a complaint in Utah state court. In doing so, the court first determined that the facts presented fell outside established case law because it involved a party who had manifested an intent to litigate in state court before the right to removal accrued. The court consulted common-law principles of waiver, which direct that a party cannot waive a right of which it is unaware. However, despite the fact that the defendant insurer was not aware of its right to removal of the plaintiff's proceedings at the time it filed its own complaint in state court, the court determined that it had nonetheless waived its right to invoke jurisdiction in a federal forum because its complaint could have been filed in federal court in the first instance. Put another way, the facts that provided the basis for removal of the plaintiff's action were both equally applicable and known at the time that the defendant insurer filed its complaint in state court rather than federal court. The court thus granted the plaintiff's motion to remand.

Nnaji v. Fernandez, 2021 U.S. Dist. LEXIS 112047 (S.D.N.Y.), involved a federal district's application of 28 U.S.C. § 1447(e) to determine whether a case removed on grounds of diversity jurisdiction should be remanded back to New York state court for consolidation with another matter arising from the same motor vehicle accident. The plaintiff and his infant son had been involved in a motor vehicle accident with the defendant truck driver. The plaintiff subsequently commenced a personal injury action in New York state court against the operator, his employer, and the owner of the truck. The plaintiff's wife—as mother and natural guardian of the infant son—then commenced a separate action against the same defendants and the plaintiff, alleging that the plaintiff had been contributorily negligent in causing the accident. The defendants removed the first action to federal court upon the basis of diversity jurisdiction. As the plaintiff and his son were both New York residents, the defendants could not remove the second state action. Following the defendant's removal, the plaintiff filed a motion to remand the case back to state court pursuant to 28 U.S.C. § 1447(e).

The court ultimately granted the plaintiff's motion, applying a broad interpretation of § 1447(e) to find that the case should be remanded so that it could be consolidated with the second state court action. Generally, § 1447(e) provides that, where a matter has been removed to federal court upon the basis of diversity jurisdiction, and the plaintiff seeks to join parties whose presence in the case would destroy complete diversity, the court may deny joinder or remand the case back to state court so that joinder of the non-diverse parties may be completed. In *Nnaji*, the court relied upon Southern District of New York precedent, applying a broad interpretation of § 1447(e) to hold that the statute permits a federal court, in its discretion following a balancing of equities and the interests and prejudices to all parties, to remand a case to state court in order to facilitate consolidation with related state actions.

In balancing the equities, interests, and prejudices to all parties, the court found critical the fact that both actions arose from the same incident, involved essentially the same parties, and turned on virtually identical questions of law and fact. The court thus determined that denying plaintiff's motion to remand created a danger of inconsistent outcomes and was not judicially economical because it would require the parties to conduct duplicative discovery and litigation. The court found the defendants' argument that discovery could be shared across the actions unpersuasive, reasoning that it only possessed subpoena power over some of the parties in the first action as opposed to all of the inherent discovery powers granted to the state court in matters directly before it. The court therefore decided to grant the plaintiff's motion to remand pursuant to § 1447(e) so that the two actions could be consolidated in state court.

The issue in *Westfield Insurance Co. v. J.B. Hunt Transport, Inc.*, 2021 US Dist. LEXIS 134887 (W.D. Ky.), was whether the federal district court should grant the plaintiff insurer's motion to remand a declaratory judgment action back to Kentucky state court where the underlying personal injury action was venued in California state court. The underlying personal injury action arose from an accident where a truck operator was injured while transporting cargo from Illinois to Kentucky for the defendant transportation company J.B. Hunt. Transport, Inc.

The accident allegedly occurred as a result of improper loading of cargo by a manufacturer in California. The truck operator subsequently commenced an action for personal injuries against both the manufacturer and the defendant J.B. Hunt in California state court. J.B. Hunt then sought indemnity and a defense from the insurer of third-party carrier Dassler Domestic Logistics, Inc. pursuant to an interchange agreement in which J.B. Hunt had agreed to transport the subject cargo on behalf of Dassler from Illinois to Kentucky. Dassler's insurer subsequently commenced a declaratory judgment action against J.B. Hunt in Kentucky state court, seeking a declaration that it had no duty to defend or indemnify the defendant. The defendant then removed the action to federal district court on the basis of diversity jurisdiction. The plaintiff insurer consequently filed a motion to remand, arguing that the federal district court should not exercise its discretion under the Declaratory Judgment Act to hear and decide the action.

In denying the plaintiff insurer's motion to remand, the court weighed five factors outlined by the Sixth Circuit for determining whether discretion to consider a declaratory judgment action should be exercised under the Declaratory Judgment Act. The first two factors "overlap substantially," asking whether the declaratory judgment action "would settle the controversy" and whether it would "serve a useful purpose in clarifying the legal relations in issue." The court determined that both factors weighed in favor of the discretionary grant of jurisdiction, as the relevant controversy and legal relations pertained to the duty to defend and indemnify, which were purely legal questions and the sole issues in dispute in the Kentucky declaratory judgment action which had been removed to federal court.

The court then determined that the third factor, which asks whether removal was sought for purposes of "procedural fencing" or to create a "race to *res judicata*," also weighed in favor of granting jurisdiction. In doing so, it pointed to the fact that the plaintiff-insurer filed its declaratory judgment action after the underlying personal injury action had already commenced. The court then considered the fourth factor, which consists of three sub-factors asking whether "accepting jurisdiction would increase friction between federal and state courts."

The first sub-factor asks whether "the state court's resolution of factual issues" is necessary for the district court's resolution of the declaratory judgment action. The court determined that this sub-factor weighed in favor of granting jurisdiction as the issues in dispute where purely legal questions regarding the duties to defend and indemnify based upon the language of the policy and allegations on the face of the California complaint. The second sub-factor, which asks whether the federal or state court is better placed to decide the declaratory judgment action, was determined to be neutral and relatively unimportant as there was no indication that the questions of coverage implicated novel questions of Kentucky law. The third sub-factor, which asks whether the action implicates important state policies, was determined to weigh against granting jurisdiction as the issues in question concerned the application of Kentucky state law to a Kentucky insurance contract.

Finally, the court determined that the fifth factor, which asks whether there exists a more effective alternative remedy than federal declaratory relief, also weighed against granting jurisdiction as Kentucky courts provide an effective state procedure for declaring rights which can result in the consolidation of actions.

The court ultimately denied the plaintiff insurer's motion to remand, reasoning that the first three factors and one sub-factor weighed in favor of granting jurisdiction, one sub-factor was neutral and relatively unimportant, and only the final factor and one sub-factor weighed against granting jurisdiction. Importantly, the court noted that the Sixth Circuit has not provided guidance as to the relative weight that should be applied to each factor, and thus the district court was free to determine how much weight to apply to each factor in its discretion.

In *Progressive Casualty Insurance Co. v. Future Van Lines, LLC*, 2021 US Dist. LEXIS 184067 (M.D.N.C.) the federal district court applied an 11-factor test to determine whether it should grant the defendant's motion to transfer venue. The underlying action arose from a motor vehicle accident that occurred in North Carolina involving a tractor-trailer owned and leased by a New Jersey transportation company and a Maryland transportation company. The tractor-trailer was occupied by two employees of the Maryland transportation company, one of whom was operating the vehicle. The employee-passenger subsequently commenced an action for personal injuries against his employer and the employee-operator in North Carolina state court. The employer's insurer then commenced a federal declaratory judgment action in the Middle District of North Carolina, seeking a declaration that it did not have a duty to defend or indemnify the defendant-employer for the employee-passenger's claims. The employee-passenger, a named defendant in the declaratory judgment action, then moved to transfer venue to the District of Maryland pursuant to 28 U.S.C. § 1404(a).

The court first determined that transfer was permissible to the District of Maryland under 28 U.S.C. § 1391(b), as several of the defendants were Maryland residents and a substantial part of the events giving rise to the claim—namely the parties' entry into the subject contract for insurance—occurred in Maryland. The court then applied the 11-factor discretionary test to determine whether transfer was warranted.

In doing so, the Court determined that the normal deference owed to the plaintiff insurer's choice of forum was diminished as the coverage issues in dispute had minimal connection to North Carolina; that access to source of proof—namely the witnesses with information germane to the coverage issues in the dispute—would be easier in Maryland; that there was no indication that witnesses would be unwilling to participate in the litigation; that a significant portion of the issues in dispute would be controlled by Maryland state law; and that Maryland had a greater interest than North Carolina in resolving coverage issues arising from a Maryland insurance policy.

The court also found a number of factors wholly irrelevant to the inquiry presented by the defendant's motion, as the case did not involve a "subject premises" necessary to visit; neither party claimed anticipated difficulty in obtaining a judgment or fair trial; and there was no evidence presented that administrative difficulties or other issues would result from court congestion. The court thus decided to grant the defendant's motion to transfer venue to the District of Maryland.

Dan Coleman

14. *FMCSA Watch*

It was another busy year for the Federal Motor Carrier Safety Administration (FMCSA) of the Department of Transportation (DOT) on the regulatory front. A few of the agency's notable actions are summarized below.

86 Fed. Reg. 6, 1745 (January 11). The DOT issued a final rule revising certain FMCSA regulations to make sweeping adjustments to civil penalties for violations of federal law. The purpose of the revisions reflects inflationary adjustments, as set forth by the Office of Management and Budget.

On May 9, in light of the ransomware attack and shutdown of the Colonial oil pipeline, the FMCSA issued a temporary hours of service exemption that applied to those transporting gasoline, diesel, jet fuel and other refined petroleum products to the states impacted by the incident, including Alabama, Arkansas, District of Columbia, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia.

86 Fed. Reg. 139, 38937 (July 23). The FMCSA issued a final rule codifying the statutory requirement that state driver licensing agencies implement a system and practices for the exclusively electronic exchange of driver history record information through the Commercial Driver's License Information System, including the posting of convictions, withdrawals, and disqualifications. The rule aligned the FMCSA's regulations with existing statutory requirements set forth in the Moving Ahead for Progress in the 21st Century Act, enacted in 2012.

86 Fed. Reg. 192, 55718 (October 7). The FMCSA issued a final rule amending its regulations to establish requirements for state driver licensing agencies to access and use information obtained through the Drug and Alcohol Clearinghouse, an FMCSA-administered database containing driver-specific controlled substance (drug) and alcohol records. Pursuant to the rule, states, among other things, must not issue, renew, upgrade, or transfer a commercial driver's license, or commercial learner's permit, as applicable, for any individual prohibited under the FMCSA's regulations from performing safety-sensitive functions, including driving a commercial motor vehicle, due to one or more drug and alcohol program violations.

86 Fed. Reg. 244, 72851 (Dec. 23). In a final rule, the FMCSA amended its Hazardous Materials Safety Permits regulations to incorporate by reference to the April 1, 2021, edition of the Commercial Vehicle Safety Alliance (CVSA) handbook containing inspection procedures and Out-of-Service Criteria (OOSC) for inspections of shipments of transuranic waste and highway route controlled quantities of radioactive material. The OOSC provide enforcement personnel nationwide, including FMCSA's state partners, with uniform enforcement tolerances for inspections.

In addition, in a decision issued in January 2021, actions taken by the FMCSA with respect to certain California state regulations were reviewed by a federal appellate court. In *International Brotherhood of Teamsters, Local 2785 v. Federal Motor Carrier Safety Administration*, 986 F.3d 841 (9th Cir.), the Ninth Circuit held that the FMCSA permissibly determined that California's meal and rest break rules were within the agency's preemption authority and that the agency did not act arbitrarily or capriciously in finding that enforcement of the rules "would cause an unreasonable burden on interstate commerce."

Sanjeev Devabhakthuni and Phil Bramson

15. UM/UIM

The different policy objectives inherent in state UM/UIM statutes aimed at protecting individual drivers as opposed to commercial insureds was once again highlighted in *Kulane v. Great American Assurance Co.*, 2021 U.S. Dist. LEXIS 232138 (D. Minn.). Plaintiff Abdikarim Kulane was seriously injured by an uninsured negligent driver while hauling cargo in his Freightliner semi-trailer. Kulane, an owner-operator leased to Central Trucking, was a named insured under a "Non-Trucking Liability and Physical Damage Policy" which contained the standard non-trucking endorsement (which the court referred to as a "business-use exclusion"); Great American denied coverage since the rig was under load at the time of the loss. As is now standard, the NTL endorsement specified that the exclusions applied to both liability claims and UM claims.

The UM endorsement made no reference to any business exclusion one way or the other. Kulane argued in his declaratory judgment action that the Minnesota UIM endorsement in the policy superseded the business-use exclusion, or, in the alternative, that the business-use exclusion violated Minnesota public policy as a 2011 state decision had held. The court distinguished that earlier decision. In that case, the insured used a personal vehicle to make deliveries for his employer. He had a personal lines policy which excluded all business activity. In that context, UM had to be available by law. Here the court was interpreting a commercial auto policy which the court was convinced was fundamentally different. The court also was quite certain that other UM coverage would be available to the driver through his employer. (Permit us to express some skepticism on that point.) The court wisely granted no one summary judgment, opting to wait until all policies were produced and the full coverage picture could be analyzed.

In *Auto-Owners Insurance Co. v. Shipley*, 2021 Ind. App. LEXIS 373 (Ind. Ct. App.), Zachary Shipley, a roadside tire repair employee who was assisting a customer and had pulled over on an interstate exit, was struck and injured by an errant tire from another vehicle. Shipley sued his auto insurer for UIM benefits, but the insurer moved for summary judgment, arguing that Shipley was not "using" his company van at the time of the accident and that, even if he was, he was not using it "as an auto" as required by the policy. The court disagreed with the insurer, noting that under Indiana's public policy "those persons who have liability coverage must be considered to be insured for the purpose of uninsured or underinsured motorist coverage." The court found that Shipley was entitled to UIM coverage because Shipley was "using" the van under the liability section of the policy. Although the policy did not define the term, "use," the court reasoned that Shipley was "using his roadside assistance van as a roadside-assistance van—to accomplish the repair necessary to get the customer back on the road." The court noted, but did not decide, that Shipley would also have been afforded UIM coverage if Shipley met the definition of "insured," which was defined as, "anyone occupying a covered auto"—with "occupying" defined as "in, upon, getting in, on, out or off."

Where to draw the line as to whether a person was or was not "occupying" a car for purposes of determining entitlement to UIM coverage was taken up in *Progressive Northern Insurance Co. v. McGrath*, 2021 VT 79. The Supreme Court of Vermont held that a plaintiff seeking UIM coverage was not "operating" a vehicle when he was pumping gas or intending to remotely unlock the car. Plaintiff-driver and owner-passenger had stopped at a gas station en route to the airport to catch a flight. Heading back to the auto after purchasing coffee at the gas station convenience store, plaintiff and the owner were struck by a pickup truck about 30 to 40 feet from their car. Plaintiff sought UIM coverage under the owner's auto insurance policy issued by Progressive. Since the plaintiff was not a named insured, he could only qualify for UIM coverage if he was "operating" or "occupying" the car. The policy did not define "operating" but defined "occupying" to mean "in, on, entering, or exiting."

Progressive denied coverage, arguing that plaintiff was not "operating" or "occupying" the car. The court held that plaintiff was not "operating" the car because there was no evidence that he was actually unlocking the car at the time of the accident and "a mere intention to remotely unlock the vehicle is insufficient to trigger coverage." As to whether plaintiff was "occupying" the car, the issue turned on whether he was "entering" the car, a term which the court concluded "may be ambiguous." Ultimately, the court held that the facts "fell outside the limit" of when one is reasonably entering a car, noting that plaintiff had finished pumping gas, had gone into the store to get a coffee, and was 30 to 40 feet away from the car when he was struck. The court held that the intent to enter the car was not "entering" the car for coverage purposes.

A family member who seeks to recover additional UIM benefits under another family member's policy will be precluded where the other family member signed a stacking waiver. In *Bubonovich v. State Farm Mutual Automobile Insurance Co.*, 2021 US Dist. LEXIS 41027 (W.D. Pa.), plaintiff, a named insured on an automobile insurance policy issued by State Farm Mutual Automobile Insurance Company, was injured when her vehicle was struck by Kevin Kramer. Kramer's insurer paid its $100,000 per person limits. State Farm paid plaintiff the full per person policy limit for UIM coverage of $25,000. The State Farm policy included stacked UIM coverage with per person policy limits of $25,000. At the time of the accident, plaintiff lived with her son, Nicholas Bubonovich who was insured under a separate State Farm policy with $100,000 per person limits and non-stacked UIM benefits. State Farm denied plaintiff's claim for additional UIM benefits under her son's policy due to the household vehicle exclusion and a stacking waiver allowed by Pennsylvania statute that was executed by her son. The court held that the plaintiff could not recover additional UIM benefits from her son's policy because her son had clearly signed a stacking waiver.

A court will also uphold an insured's voluntary waiver of reduced UIM coverage limits. In *Geist v. State Farm Mutual Automobile Insurance Co.*, 2021 U.S. Dist. LEXIS 235574 (E.D. Pa.), a daughter injured as a passenger in another car sought UIM benefits under her parents' policy with State Farm. The State Farm policy was originally issued with liability coverage of $100,000 per person/$300,000 per accident; the father, at

issuance, signed an "Election of Lower Limits of Coverage" and selected UIM coverage limits of $50,000 per person/$100,000 per accident. Although Pennsylvania's Motor Vehicle Financial Responsibility Law requires insurers that provide motor vehicle insurance to offer UM and UIM coverage, it also allows individuals to reduce their UM/UIM coverage. Such a voluntary reduction will be valid as long as the change is made to a pre-existing policy and no new policy is issued. The plaintiff had argued that when the parents added a car to the policy, a new policy was effectively issued, and therefore, the UIM reduction was not valid. The court rejected the plaintiff's argument and dismissed the claims with prejudice. The court held that the addition of a new car to the policy was merely a change to a pre-existing policy that did not result in the issuance of a new policy.

In *Parker v. ACE American Insurance Co.*, 2021 U.S. Dist. LEXIS 230662 (D. Conn.), the court held that a commercial insured voluntarily intended to bind UM coverage for the statutory minimum amount. Plaintiff Richard Parker, an employee of Ryder Truck Rental, was injured by an underinsured motorist while driving a truck. Parker's supervisor, Rosa Rodriguez, a senior risk manager for Ryder, had completed a coverage questionnaire by checking a box indicating that Ryder wished to reject UM/UIM coverage if permitted by state law, and carry the minimum amount of coverage required by state law. The court was "unpersuaded by Mr. Parker's argument that Ryder's status as a large, and presumably sophisticated commercial fleet company suggests that Ryder intended to purchase full limits."

An insurer obligated to pay UM/UIM benefits should look to statutory sources for offsets. In *American Family Connect Property & Casualty Insurance Co. v. Huebner*, 2021 U.S. Dist. LEXIS 230281 (W.D. Wash.), the court found that the plain language of a Washington statute allowed the UIM carrier to seek an offset from the underinsured tortfeasor's settlement payment to the UIM carrier's policy limits. "A fundamental policy underlying UIM insurance is that liability insurance is primary, while UIM insurance is secondary."

The insured plaintiff in *Davis v. Progressive Direct Insurance Co.*, 2021 Ky. LEXIS 151 (Ky.), was driving her motorcycle when she encountered a horse-drawn buggy operated by Gingerich. The horse got spooked and jumped into oncoming traffic, and Davis collided with the horse and was gravely injured. As a member of the local Amish community, Gingerich carried no insurance on the horse-drawn wagon. Progressive, however, denied Davis's claim under the uninsured motorist provision of her motorcycle coverage on grounds that a horse-drawn wagon was neither a "motor vehicle" nor a "trailer of any type" as defined by the policy language. The court agreed with Progressive, noting (1) that the horse and buggy functioned as a single unit, and (2) the term "trailer," in any event, contemplated a vehicle being pulled by another vehicle, not by a horse.

Davis made a public policy argument that the horse and buggy was the primary mode of highway transportation for the local Amish community, and that she reasonably expected the horse and buggies she encountered on the highway to be subject to the same "rules and regulations as other vehicles operating on the public roads of the Commonwealth." However, since there was no meaningful ambiguity in the policy, the court found that she had no reasonable expectation of coverage, and that the public policy behind required UM coverage was to protect insureds from damage by vehicles on which liability insurance is customarily carried (which did not include horse-drawn buggies).

Ben Carroll

16. Miscellaneous

The injured plaintiff in *Adinyayev v. Ryder Truck Rental, Inc.*, 2020 N.Y. Misc. LEXIS 10903 (Sup. Ct. Kings Cnty.), sought to impose liability on Ryder, owner and lessor of the tortfeasor vehicle, on the grounds of negligent maintenance. Ryder argued that it was immune from liability pursuant to the federal Graves Amendment (49 USC § 30106 [a] [1]), since it was a business "engaged in the trade or business of renting or leasing motor vehicles." The Graves Amendment, though (as regular readers of this review know), only prohibits imposition of ownership liability or other vicarious liability, and does not shield a leasing company from liability for its own independent negligence, such as negligent maintenance. The court found that negligent maintenance had been pled sufficiently, and that there was an issue of fact on this claim, and denied Ryder's motion for summary judgment.

Moura v. Cannon, 2021 U.S. Dist. LEXIS 184736 (D. Mass.), presented an interesting wrinkle in the Graves Amendment argument, in that Success, the leasing company which owned the vehicle, and Prime, the motor carrier which leased the vehicle, were under common ownership. The plaintiffs argued, citing *Stratton v. Wallace*, 2014 U.S. Dist. LEXIS 105816 (W.D.N.Y.), that the negligence of an "affiliate" of the vehicle owner could deprive the leasing company owner of the protections afforded by the Graves Amendment. Since, however, there was no evidence of independent negligence or criminal wrongdoing on the part of either the leasing company or the affiliated motor carrier, the Graves Amendment supported summary judgment in favor of the leasing company.

The court also found that the exclusive remedy provisions of Massachusetts' workers compensation law prohibited a tort action against Prime's driver, Cannon, by Moura, who was in the sleeper compartment of Cannon's tractor when the subject accident occurred. Prime provided Moura, a trainee, and his services as a second-seat driver to Cannon, a trainer, at Cannon's request.

Cannon's "expectations agreement" with Prime put him in charge of "all operational decisions," including setting driving shifts, and his personnel service agreement made him responsible for Moura's "supervision and conduct," including ensuring that Moura abided by all work safety rules and maintained proper logs, inspections, and reports. While Cannon did not hire Moura and could not fire Moura from Prime, Cannon could have requested that Prime substitute a driver in Moura's place if he became dissatisfied with Moura's performance. Cannon paid Moura's wages, withholding taxes, and benefits (including workers' compensation coverage)—although he did so indirectly by reimbursing Prime for the amounts it paid to or on behalf of Moura. Cannon was also responsible for the operation, maintenance, and repair of the tractor he leased from Success, at his own expense. Under the circumstances, the court found that Cannon was also Moura's employer and entitled to the exclusive remedy protections of the workers' compensation statute.

Wisconsin's omnibus auto coverage statute, Wis. Stat. § 632.62(3), mandates liability coverage for "any person using any motor vehicle described in the policy." Wisconsin's courts have interpreted this language as requiring that an auto liability policy's full limits must apply separately to each insured who was "actively negligent" in using a vehicle "described in the policy." In *Thom v. 1st Auto & Casualty Insurance Co.*, 2021 Wisc. App. LEXIS 193 (Wis. Ct. App.), a 13-year-old driver of his aunt's car was involved in an accident, and the plaintiff argued that the policy issued to the boy's father provided coverage at three times its stated limit, reflecting the negligence not only of the teenager but also of the boy's father and mother. The policy, however, defined "covered auto" to mean:

1. Any vehicle shown in the Declarations.
2. Any "newly acquired auto.
3. Any **"trailer"** you own.
4. Any auto or **"trailer"** you do not own while used as a temporary substitute for any other vehicle described in this definition which is out of normal use because of its[breakdown, repair, servicing, loss, or destruction].

The aunt's car did not qualify as a "covered auto" under any of these categories in the father's policy. The plaintiff argued, however, that it was a covered auto since the son, as a family member of the named insured, was an insured for an accident arising out of the use of "any auto." The court, however, rejected the notion that, if a policy insures a *person* for the use of any vehicle, then any *vehicle* that person uses is a "covered" vehicle, and found that the Wisconsin omnibus statute did not require such an interpretation. Since the aunt's vehicle was not in any way "described" on the father's policy, coverage for the son was capped at the policy's stated limit (and the court did not have to decide whether either of the parents was "actively negligent").

The defendant in *Sentry Select Insurance Co. v. Clark*, 2021 US Dist. LEXIS 113425 (D.N.J.), was defense counsel retained by Sentry Select to represent both named insured motor carrier and the owner-operator who leased his truck to the named insured and was involved in an accident. When counsel settled the underlying bodily injury action, she agreed that all cross-claims among the defendants would be released. The owner-operator's insurer, Owner-Operator Independent Drivers Association (OOIDA), argued that this effectively released it from any claims Sentry Select might later want to bring for contribution and/or indemnification. The court agreed that the nominal purpose for Clark's engagement—defending the insureds in the underlying action—did not permit Clark to ignore Sentry Select's related interest in having OOIDA contribute to the cost of defending and settling the underlying litigation where Clark knew of the OOIDA policy. The court acknowledged that Sentry Select would have no claim against OOIDA if OOIDA had not wrongfully refused to meet a primary duty to defend, but found that this factual issue was not yet developed sufficiently to justify dismissal of Sentry Select's legal malpractice action against Clark.

The plaintiff truck driver in *Haddock v. Westrock Cp*, 2021 U.S. Dist. LEXIS 240884 (E.D. Cal.), was struck when he opened the container doors at delivery and the cargo, loaded by the defendant shipper, fell on him. The shipper argued, based on the Federal Motor Carrier Safety Regulations, that the driver bore the responsibility of ensuring that the load was packed safely; the driver argued that California law should apply because the transportation in this case was purely intrastate. The court found that both federal law and California law imposed a duty of care on the shipper only for defects in loading that are latent and not discoverable by the driver through reasonable inspection. However, since the nature of the loading defects was a question of fact, the shipper's motion for summary judgment was denied.

Technology came to the aid of justice in *Ezzi v. Domino's Pizza LLC*, 2021 N.Y. Misc. LEXIS 6533 (Sup. Ct. Richmond Cnty.), in which the dashboard camera in the defendant's tractor-trailer showed that (1) he was traveling at 17–18 miles per hour, (2) at least three and a half car lengths behind the vehicle in front of him, when (3) the vehicle in which the plaintiff was a passenger swerved across multiple lanes of the highway and slammed on the brakes in front of the defendant. The court ruled that the video evidence, coupled with the defendant driver's affidavit, showed decisively that no negligent action on the part of the defendant driver was a proximate cause of the "accident" (or, rather, the event staged by the plaintiff's driver); summary

judgment was granted in favor of the tractor-trailer driver and his employer.

The plaintiff logistics companies in *C. Pepper Logistics, LLC v. Lanter Delivery Systems, LLC*, 2021 U.S. Dist. LEXIS 158736 (E.D. Mo.), asserted that the defendant motor carriers "hijacked" power units and trailers belonging to the plaintiffs by using them to provide services to other customers, in contravention of the contracts between the logistics companies and the motor carriers. After sorting through numerous questions of personal jurisdiction and pleading deficiencies, the court turned its attention to plaintiffs' contention that the motor carriers' actions violated the federal truth in leasing statute, 49 USC § 14704, and related regulations, including 49 C.F.R. §§ 376.11, 376.12, and 390.13.

The court found that the primary motivation for the statute and regulations is to protect against "abusive leasing practices," and to promote "a full disclosure between the carrier and the owner-operator of the elements, obligations, and benefits of leasing contracts signed by both parties." Under this analysis, though, the statute and regulations could only provide plaintiffs a cause of action against Ryder, from whom the power units and trailers had been leased (and whom the court had dismissed for lack of personal jurisdiction). Moreover, the court found that the plaintiffs (who were not individual, independent owner-operators but instead were sophisticated corporate entities engaged in the business of delivery logistics) and their claims in this case—which did not relate to the improprieties of a lease agreement with the defendants—did not fall within the zone of interests established by § 14704. The statute and regulations, rather, are aimed at preventing disparities in bargaining power between independent truckers and federal motor carriers negotiating a lease agreement. Accordingly, the plaintiffs' truth-in-leasing claims were dismissed.

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