BARCLAY DAMON LLP

Transportation Annual Year in Review

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2023 Transportation Law Update

The Barclay Damon Transportation Team is delighted to share with you our annual survey of new case law and statutory updates relating to the business of transportation. This year we bid farewell to our colleague Alan Peterman, who will be retiring in a few months but agreed to analyze last year's crop of cargo cases. We will miss him.

A number of our discussions this year follow up on cases we have reviewed in previous years. This includes our summary of an MCS-90 decision by the Indiana Supreme Court. Our firm was involved in the briefing for that case.

There was much agonizing in the industry last year over the refusal of the Supreme Court to accept *certiorari* on two cases out of California that were being closely watched. One involved California's statutory version of the ABC test, which many truckers were hoping that the court would find to be preempted under federal law (the FAAAA). The second was a case brought against a freight broker for negligent hiring of a motor carrier, which was also claimed to be preempted by the FAAAA. Cases continue to be brought on these issues; we describe some of them in the various sections that follow. Some courts have accepted the preemption argument, and some have not. We wonder how long the Supreme Court will be willing to let these inconsistent decisions stand. Of course, it is possible that members of the court have doubts about the preemption position (for what it is worth, we do) and are not eager to disappoint the industry by ruling against preemption. Time will tell.

Larry Rabinovich and Phil Bramson

1. MCS-90

Among the most consequential MCS-90 cases of the year was *Progressive Commercial Cas. Ins. Co. v. Xpress Transp. Logistics, LLC*, 2022 US Dist. LEXIS 499 (S.D. Tex), which confirmed that an MCS-90 endorsement does not require the issuing insurer to negotiate and attempt to settle claims prior to the entry of judgment against the named insured motor carrier. An insurer with actual policy coverage must indeed act in good faith in response to settlement demands and of course has a duty to defend. Where there is no coverage, though, and only an MCS-90 exposure, no such duties exist.

The underlying loss involved a fatal accident in which two teenagers were killed while operating a rig loaded with a shipment of steel. The originally scheduled driver took ill after picking up the load. A dispatcher reached out to another interstate motor carrier, which accepted the assignment even though it had no accredited interstate driver available at the time. (What does that tell us about how desperate small carriers are for business? And drivers…) The second carrier's principal sent her 19-year-old son to meet the load, and his 18-year-old friend went along. According to the principal, they were not to take the load to the destination but rather were to meet one of her regular drivers who would haul the load interstate. The boys, though, ignored this instruction and headed east. The 18-year-old lost control of the rig while he was driving, and the two teenagers were killed in the wreck that followed.

The case has several issues—not all of which have been resolved as of this writing. What caught our attention, though, was the court's ruling on the *Stowers* demands that were made by plaintiffs' counsel. Such demands, of course, are a standard element of Texas litigations; in other states they are known by different names or simply as "policy limits demands." The estate made such a demand here. Where coverage is available under the policy, rejection of the demand often means that the policy limits will be opened up if the plaintiff wins a large judgment. The court, though, in *Xpress* noted that the only basis for the insurer's exposure in this case was the MCS-90. The MCS-90 is in the nature of a suretyship, a safety net for the public, not an ordinary insurance provision to protect the insured.

The court concluded that since an MCS-90 exposure arises only after judgment has been entered, there is no duty to settle or even negotiate under the MCS-90. That is, an insurer's limits are not opened up by its refusal to accede to a demand to pay within limits when there is only MCS-90 exposure. We have long argued that this should be the law, but it is good to have case support.

A litigation in which our team was deeply involved concerned a different move of which plaintiffs' attorneys have grown fond. It is now reasonably well established—though not all courts agree—that in order for the MCS-90 to apply, the named insured's rig must be actively engaged in interstate commerce. (For a slight modification, see the discussion of the *Prime* decision that follows.) If the rig is being used for intrastate commerce (or for a non-commerce–related purpose), the MCS-90 does not apply under what has become the prevailing view.

As we noted last year, a trial court and appellate court in Indiana, while acknowledging this basic rule, had concluded that by incorporating various federal regulations (most significantly 49 CFR § 387, which deals with the federal BMC-91 filing and the need for interstate motor carriers to have sufficient financial security), the state of Indiana had "adopted" the MCS-90 and that, accordingly, the MCS-90 applied to intrastate Indiana loads. This theory, originated by a creative (but mistaken) plaintiff's attorney in a magazine article some years back, has been picked up by others around the country and argued in various courts.

The actual reason that states have adopted many of the

federal safety regulations is that the federal government has incentivized states to adopt federal standards and assist in roadside inspections of interstate motor carriers via the Motor Carrier Safety Assistance Program (MCSAP). States, though, have their own versions of MCS-90, either the Form E/F duo, promulgated decades ago, or special state-specific forms, such as the California DMV 67 MCP. Indiana regulations, for instance, require motor carriers operating intrastate to provide proof of financial security via the Form E. In our conversations with former employees of the Indiana Department of Revenue, however, we learned that for years, Form E has not been required in practice for interstate carriers that also work intrastate. That was a portion of the background for the decision in the trial and appellate courts that the insurer appealed in *Progressive Southeastern Ins. Co.*, 182 N.E. 3d 197 (Ind.).

The court observed that, in the past, three different approaches to the applicability of MCS-90 have been utilized in the federal cases. The broadest, which the claimant argued for, was to apply the MCS-90 whenever such a conclusion aligns with the public policy behind the motor carrier statutes—which apparently meant that if there is an injured person who has not been compensated, MCS-90 should always apply. We are not sure that any federal court has actually so held; the court, in any event, rejected that approach as overly broad. (Perhaps the court was referring to a view found in some older case law that held that the MCS-90 can apply whenever the accident vehicle is available for interstate use, even if, on the date of loss, it is used locally.)

That, in the court's recounting of the case law, left two options: 1. The trip-specific approach (which the court correctly identified as the majority view) and 2. A similar approach looking at whether the transportation is interstate or intrastate by the essential character of the commerce, manifested by the shipper's fixed and persisting transportation intent. The court found it clear under either of these tests that the transportation at issue was intrastate and that the MCS-90 did not apply in this case under federal law. That part of the court's analysis was similar to that of the Indiana appellate court.

That was not the last word, though, because the alternative claim was that the MCS-90 applied *under Indiana law*. It seems remarkable to us (and not in a good way) that two levels of Indiana courts accepted such an argument. The plain language of the MCS-90 should have made such a reading impossible, since it is explicitly formulated to refer to interstate commerce.

The court acknowledged that Indiana had incorporated the federal minimum levels of financial responsibility for certain motor carriers into state law. However, reaching the plain meaning of the regulations, the court found no evidence that the federal limits applied to all intrastate carriers. Only intrastate carriers of hazardous commodities were required to comply with the federal requirements required. Oddly there was little discussion of the terms of the MCS-90 itself, but the court concluded, correctly in our view, that MCS-90 did not apply under Indiana law. As noted above, plaintiffs around the country have increasingly focused on this argument in similar scenarios. One would hope that as a result of the decision, the Indiana regulators ask all carriers that operate intrastate to provide proof of financial security through Form E as the regulations provide. We suspect, though, that we have not heard the end of the argument that state X or Y has adopted the MCS-90.

As we were editing this publication, the Seventh Circuit Court of Appeals issued its ruling in the matter of *Prime Ins. Co. v. Wright*, 54 F.4th 597; we summarized the decision of the district court last year. The court affirmed the holding of the district court in favor of the plaintiff that MCS-90 applied to the loss. However, its reasoning was a bit different from that of the lower court; the Seventh Circuit also took a swipe at the Fifth Circuit's decision in *Canal Insurance v. Coleman*, 625 F.3d 244 (2010), which has been seen as the forerunner of the majority view.

The facts of the case were certainly favorable for finding that the MCS-90 applied except under the broadest reading of *Canal*. The Fifth Circuit had held in that 2010 decision that since the truck at issue was deadheading rather than actively hauling goods in interstate commerce at the time of the loss, the MCS-90 could not apply. That sounded to some as though the court was saying that even if the driver was engaged in activities *relating to* an interstate move, there would be no trigger of the MCS-90 unless cargo was actually being hauled at the moment of the collision. The *Canal* court was very careful, though, to say that its review of the lower court's decision was limited because of the way that the bodily injury plaintiff had argued the case: in particular the parties had jointly stipulated that the truck was not engaged in the transportation of property at the time of the loss. The claimant's attorney agreed to that, no doubt because he understood that the rig had no cargo at the time of the loss. As such, counsel presumably felt that nothing was sacrificed by so stipulating. The court concluded that the MCS-90 is triggered only where the trucker was held liable for "transportation of property" in interstate commerce, so that was the ballgame. ("[W]e conclude that the endorsement covers vehicles only when they are presently engaged in the transportation of property in interstate commerce.") The question was what "transportation of property" means; the Fifth Circuit was spared from deciding the question because of the stipulation.

The claimant's attorneys in *Prime Ins. v. Wright* made no such mistake. The decision by one of the nation's most distinguished judges, Frank Easterbrook, goes straight to the heart of the matter. The court affirmed the decision below but with a more direct approach. Riteway Trucking's driver Decardo Humphrey

was based in Illinois. His assignments always started there and ended there. On the date in question, he was dispatched to deliver a load to a location in Fort Wayne, Indiana, which he completed successfully. He was then told to go to a different location in Fort Wayne, where he was to pick up a second load and haul it back to Illinois. En route to that second pickup, he was involved in an accident. Thus there was no cargo in the vehicle at the time of the loss. The most expansive (but inaccurate) reading of *Canal* would have found no MCS-90 exposure in that scenario.

Nonetheless, the Seventh Circuit concluded that the MCS-90 applied. As noted, the court criticized the Fifth Circuit, but, as we observed above, we think the Fifth Circuit would likely have come to the same conclusion absent the stipulation. Judge Easterbrook was not impressed with the theories known as "fixed intent" or "totality of circumstances," which the District Court had weighed. He was also troubled by the outdated reference in the MCS-90 to the 1980 Motor Carrier Act. (USDOT, take note.) The parties had stipulated, though, that the current controlling statute was 49 USC § 31139(b)(1), which provides for financial responsibility to satisfy the minimum limits required by USDOT for public liability for "the transportation of property by motor carrier…(as such terms are defined in Section 13102 of this title.)" The court noted that the statute does indeed refer to "transportation of property" as the Fifth Circuit had held but does not include the qualifier "at the time of the loss" that the Fifth Circuit read into the statute.

Looking at the definition of "transportation" at Section 13102(23)(B), the court found that it includes services relating to the interstate movement of goods. That is, "transportation means more than just carrying freight." Exactly where the dividing line is between what is and what is not included in "transportation" the court did not say. But it had little trouble concluding that the driver in this case was engaged in interstate transportation and, therefore, that the MCS-90 applied. The result sounds correct to us. We will see how other courts react to the decision. We gather that in the end, Judge Easterbrook agreed that the "transportation"—however broadly it is to be interpreted—must be happening at the time of the loss. Thus, as we understand his opinion, the trip-specific approach remains the correct approach, except that trip or "transportation" is to be interpreted more broadly than some courts (and lawyers) have been doing.

Interestingly, in *Russell v. Escobar*, 2022 US Dist. LEXIS 7605 (M.D. La.), a court in the Fifth Circuit understood Fifth Circuit precedent to be in accordance with Judge Easterbrook's view—the question was precisely the parameters of what "transportation of property in interstate commerce" means. In this case, the driver was deadheading to Florida to get his trailer repaired. The motor carrier to which he was leased had not instructed him to do so, and the court held that he was not engaged in interstate transportation. It does not require the gift of prophecy to suggest that the next line of battle in this area will be precisely how to tell when a driver is engaged in interstate transportation when they are not under load. *Prime* and *Russell* are markers of just what is meant by "transportation."

The court in *Lancer Ins. Co. v. Jet Exec. Limousine Serv.*, 2022 US Dist. LEXIS 125649 (N.D. GA) also accepted what it viewed as the majority view that only interstate transportation can trigger the MCS-90 (or in this case, the version for bus carriers, the MCS-90B) and that "the relevant focal point" is the time of the accident. (As noted above, our sense is that Judge Easterbrook also in the end agreed that the time of the accident is the focal point.) The bus ride in this case was between two Georgia cities, Atlanta and Augusta. The court acknowledged that the MCS-90B could have applied if the bus trip were merely a leg of an interstate trip; an 11th Circuit decision had found in one case that a shuttle company that transported passengers from one Florida airport to another was engaged in interstate commerce because of an ongoing relationship between the shuttle company and companies that provided hotel and airfare packages and involved mostly passengers from abroad or from states other than Florida. Here though there was no evidence of continuity of movement or coordination between the bus company and other providers. Accordingly, the transportation was not interstate, and the MCS-90B did not apply.

Several cases last year also considered the Forms E and F, which are the state equivalents to the BMC-91X filing and the MCS-90. Among those was *New S. Ins. Co. v. Capital City Movers*, 2022 US Dist. LEXIS 36822 (S.D.N.Y.). The loss involved a collision between the moving company's truck, which was hauling property between two residential addresses in lower Manhattan, and a bicycle. The accident vehicle was not scheduled on the New South policy. The vehicles scheduled and policy limits were changed multiple times prior to the accident. On the date of loss, the policy limits were $750,000, and the Form E limits were $100,000/300,000, which satisfied New York's minimum financial requirements. The court agreed with New South that its obligations under the filing were only $100,000/300,000, even though the policy limits had been raised to $750,000. The court also agreed with New South that the Forms E and F do not impose a duty to defend.

Larry Rabinovich

2. *Cargo Claims and the Carmack Amendment*

APPLICABILITY OF THE CARMACK AMENDMENT

The issue in *Emco Corp. v. Miller Transfer & Rigging Co.*, 2022 US Dist. LEXIS 53592 (N.D. Ohio), was whether the Carmack Amendment applied to a shipment that was hauled from Ohio to Germany by way of the pier in Baltimore. The shipment first went from Cuyahoga Falls, Ohio, to Dover, Ohio, where it was crated for shipment. The shipment them went from Dover to Baltimore, where it was loaded onto a ship that brought it to Germany. When the shipment arrived in Germany, it was discovered to be damaged. The shipper sued the carrier for the damage.

Since the goods moved in both interstate and international commerce, the court was required to decide if the relevant statute was the Carriage of Goods by Sea Act (COGSA) and its one-year statute of limitations or the Carmack Amendment, which has a two-year statute. The claim was made between those two deadlines. The court found that the issue turned on whether the shipment could have been considered to have moved under a "through bill of lading" from Ohio to Germany. If the bill of lading was a through bill of lading, COGSA would apply, and the claim would be barred. If not, the Carmack Amendment would apply, and the claim could proceed. The court found that each leg of the shipment had moved on its own bill of lading. As the result, that portion of shipment within Ohio and between Ohio and Baltimore was covered by the Carmack Amendment. Because the plaintiff could not prove that the shipment was damaged when it arrived in Baltimore, the defendant's motion for summary judgment was granted.

BROKER V. CARRIER

An issue in *Freightliner Custom Chassis Corp. v. Landstar Ranger Inc.*, 2022 US Dist. LEXIS 15256 (N.D.N.Y.), was whether the Carmack Amendment applied to the defendant's actions taken on behalf of the plaintiff. The plaintiff had contracted with the defendant for the transportation of five custom truck chassis from South Carolina to Quebec, Canada. The defendant, in turn, contracted with another carrier to perform the transportation. The chassis were damaged when the subcontractor's driver was involved in an accident in New York. The plaintiff sued defendant for the damages to the chassis under the Carmack Amendment. The defendant moved to dismiss the plaintiff's Carmack Amendment claim, arguing that it had acted as a broker not a carrier. Landstar Ranger has authority as carrier, freight forwarder, and broker.

Federal law defines a "carrier" as a motor carrier, a water carrier, and a freight forwarder. A "motor carrier" is a person providing motor transportation for compensation. A broker is a person other than a motor carrier that, as a principal or agent, sells or offers to sells, provide, or arrange for transportation by a motor carrier. In this case, the court held that, in deciding whether an entity acted as a carrier or a broker, the question turns on how the party acted in the "specific transaction" at issue, which included the understanding among the parties involved, and consideration of how the entity held itself out. One does not see too many decisions these days dealing with freight forwarders, once a popular category of actor in the transportation business whose role was usually to gather together smaller shipments and pass them on to a motor carrier for point-to-point delivery. Unlike a broker, a freight forwarder has a broad scope of potential exposure, much like a carrier. (The traditional explanation was that the freight forwarder had a status of carrier vis-à-vis the shipper and the status of shipper vis-à-vis the motor carrier.)

The court found that the defendant had acted as a freight forwarder not a broker. The defendant had listed itself as the "carrier" on the bill of lading. There was no other carrier listed on the bill of lading. There was also an allegation that the defendant had assembled the shipment for transit. Finally, the defendant had retained another carrier to actually perform the shipment. The court denied the defendant's motion to dismiss.

LIMITATION ON LIABILITY

The issue in *I'm Still Standing Community Corp. v. Stewart Moving & Storage*, 2022 US Dist. LEXIS 10501 (D. Md.), was whether a limitation on liability contained in the defendant's bill of lading successfully limited the damages that the plaintiff could recover in an action under the Carmack Amendment. The plaintiff entered in a contract with the defendant for the transportation of the plaintiff's property, including office furniture and equipment. The sales contract between the parties described the services to be provided and contained a clause limiting the defendant's liability for any damage to the material being transported to 60 cents per pound. The actual transportation of the goods was under a bill of lading that contained a provision that stated that "the agreed or declared value of the property is hereby specifically stated by the customer (shipper) and confirmed by their signature hereon to be NOT exceeding 60 cents per pound per article unless specifically excepted." Neither party included any exception specifying that the value of the property was above 60 cents per pound.

When the defendant delivered the load, the plaintiff accepted the first trailer of goods but rejected the second trailer due to water damage. Stewart had not weighed the actual shipment nor did it calculate the weight of the pieces in the shipment

by using a "table of weights," as was industry practice. Rather, the defendant argued that the maximum weight load for the rejected trailer was 20,000 pounds, so the maximum loss would be $12,000.

The plaintiff filed a state court action alleging trover and conversion, detinue (there's a claim one doesn't see every day), and negligence, seeking compensatory damages, interest, costs, and injunctive relief. The defendant removed the action to federal court. After completion of discovery, the plaintiff moved for partial summary judgment, arguing that because the defendant did not provide any actual weight for the shipment, either by actually weighing the shipment or calculating the weight using industry accepted tables, the defendant could not rely on the limitation based on the weight of the shipment in the bill of lading. The court rejected the plaintiff's argument, finding that there was no reason that the defendant's failure to weigh the shipment before the shipment should not preclude the defendant from relying on the limitation contained in the bill of lading, especially when the shipment remained available for weighing.

The issue in *Certain Underwriters at Lloyd's v. CSX Transportation*, 2022 US Dist. LEXIS 25414 (S.D. Ill.), was whether the railroad carriers involved had effectively limited their liability. The plaintiff's insured sold four locomotives to a customer in Guinea and arranged through a website (PAL Connect) for transportation of the locomotives to North Carolina. The first leg of the shipment was handled by the Evansville Western Railroad, Inc. (EWRI). The second leg of the shipment was handled by the defendant, CSX. The locomotives were damaged when the train on which they were being carried derailed in North Carolina. The plaintiff paid the claim and sought recovery in subrogation against CSX and EWRI.

The rail carriers essentially admitted that they were liable to the plaintiff under the Carmack Amendment but argued that they had effectively limited their respective liability under the amendment. The court applied a three-part test to determine whether a limitation on liability is enforceable: (1) obtain the shipper's agreement as to its choice of liability, (2) give the shipper a reasonable opportunity to choose between two or more levels of liability, and (3) issue a receipt or bill of lading prior to moving the shipment. The court found that EWRI had effectively limited its liability because the bill of lading cited a section of the Standard Transportation Commodity Code (STCC) as did EWRI's pricing sheet. Because CSX bills of lading did not contain the same designation, CSX did not effectively limit its liability.

The issue in *Arnold v. Allied Van Lines, Inc.*, 2022 US Dist. LEXIS 116529 (W.D. Tex.), was whether a household goods carrier had an enforceable limitation on liability. The plaintiffs contracted with the defendant for the transportation of their furniture and personal goods from Alabama to Texas. As part of the transaction, the plaintiffs were offered two options for carrier liability: standard full value protection and waiver of full replacement value. The plaintiffs selected the full replacement value protection. In addition, the plaintiffs completed a form that stated that the full value of the shipment was $150,000. Finally, the plaintiffs completed an additional form, High Value Inventory, that listed certain high value items separately.

When the shipment arrived in Texas, certain furniture was damaged, and guns and jewelry were missing. The plaintiffs filed a claim against the defendant for the value of the damaged and missing goods. The defendant made a motion for summary judgment seeking a declaration that its liability was limited to the $150,000 declared by the plaintiff on the Full Replacement Value form. The plaintiffs argued that they were entitled to recover the value of the items listed on the High Value Inventory form in addition to the $150,000 limitation.

The court first found that the defendant had effectively limited it liability for damages to the shipment. The carrier (1) had a maintained a valid tariff with the Surface Transportation Board, (2) had obtained the shippers' agreement as to the choice of liability, (3) had given the defendants a reasonable opportunity to choose between two or more levels of liability, and (4) had issued a bill of lading. The limitation on liability, therefore, was enforceable. There was an issue, however, as to whether that limitation applied to the articles listed on the High Value Inventory form. After analyzing the language of the bill of lading and High Value Inventory form, the court found that, as a matter of law, the documents were ambiguous. The interpretation of those documents, however, was a question of fact for the jury to decide. The court denied the defendant's motion for summary judgment on the issue of limitation of liability.

PREEMPTION

The issue in *Prismview, LLC v. Old Dominion Freight Line, Inc.*, 2022 US Dist. LEXIS 5735 (D. Utah), was whether the Carmack Amendment preempted state law claims that were pled in the alternative to Carmack Amendment claims. Plaintiff Prismview had contracted with defendant Old Dominion Freight for the transportation of goods from Utah to Oklahoma. When the goods arrived damaged, the plaintiff filed an action in Utah federal court, pleading a cause of action under the Carmack Amendment. The plaintiff also asserted claims under state law.

The defendant moved to dismiss the state law claims, arguing that the Carmack Amendment preempted any such claims. The court first held that the Carmack Amendment imposed liability on freight forwarders "for the actual loss or injury to property

caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the United States." The Carmack Amendment preempted any state law claims against common carriers for negligent loss or damage to goods shipped under a lawful bill of lading. The plaintiff argued that there was a question of fact in the litigation as to whether the defendant acted as a motor carrier, in which case the Carmack Amendment would apply, or as a freight broker, in which case it would not. After reviewing the complaint and the answer, the court found that there was no issue of fact as to the defendant's status as a motor carrier, because the complaint alleged that the defendant was a motor carrier, and the defendant had admitted that allegation. Therefore, the Carmack Amendment applied, and the defendant's motion to dismiss the state law claims pled in the alternative was granted.

The issue in *Freightliner Custom Chassis Corp. v. Landstar Ranger Inc.*, 2022 US Dist. LEXIS 15256 (N.D.N.Y.), was whether the Interstate Commerce Commission Termination Act (ICCTA) preempted the plaintiff's state law claims for negligence against the defendant. (This is known as FAAAA preemption as opposed to Carmack preemption.) The plaintiff contracted with the defendant for the transportation of five custom truck chassis from South Carolina to Quebec, Canada. The defendant, in turn, contracted with another carrier to perform the transportation. The chassis were damaged when the subcontractor's driver got in an accident in New York. The plaintiff sued the defendant for the damages incurred due to the accident and included a state law causes of action negligence and breach of contract. The plaintiff filed a claim for damages under the Carmack Amendment and state law claims for negligence and breach of contract based on the defendant's selection of the subcontractor actually hired to transport the chassis. The defendant moved to dismiss the plaintiff's state law claims, arguing that the ICCTA preempted the plaintiff's state law cause of action.

The court found that the ICCTA prohibits states from enacting any statute, law, regulation, or other provision that related to a price, route, or service of any motor carrier with respect to the transportation of property. 49 USC § 14501(c)(1). The court, however, found that the ICCTA allows shippers to bring common law claims for negligence against brokers that breach a general duty of care not otherwise related to prices, routes, or services. The court also held that the ICCTA did not preempt the plaintiff's state law breach of contract claims as long as the state law claim did not relate to prices, route, or services. The defendant's motion to dismiss the plaintiff's state law claims was denied.

The issue in *Track Trading Co. v. YRC, Inc.*, 2022 US Dist. LEXIS 181265 (W.D. Tex.), was whether the Carmack Amendment preempted the plaintiff's claims under state law based on the defendant's failure to timely deliver a shipment. The plaintiff had contracted with the defendant to deliver materials for a trade show in Las Vegas. The bill of lading stated that the shipment was "expedited delivery" and that shipment had to be delivered by the close of business on October 19, 2021. The plaintiff tendered the shipment to the defendant on October 8, but the defendant failed to locate the shipment until after the show was over. The defendant returned the shipment to the plaintiff undamaged.

The plaintiff filed a state court action alleging negligence, gross negligence, breach of contract, deceptive trade practices, negligent misrepresentation, fraud, and fraudulent inducement. The defendant removed the case to federal court and moved to dismiss the complaint as preempted by the Carmack Amendment.

The court held that the Carmack Amendment established the standard for imposing liability on a motor carrier for the actual loss or injury to property transported through interstate commerce and provides the exclusive remedy for a breach of contract of carriage provided by a bill of lading. The defendant argued that the Carmack Amendment preempted the plaintiff's state law claims because the plaintiff contracted with the defendant to transport goods through interstate commerce, and the plaintiff's claims arose from the parties' bill of lading. The plaintiff argued that the Carmack Amendment did not preempt the state law claims for fraudulent inducement or negligent misrepresentation because those claims were based on misrepresentations that the defendant made before the parties entered into a bill of lading. The plaintiff also argued that the Carmack Amendment did not apply because the shipment was not "lost" or "damaged" as required by the amendment.

The court held that a delay in the shipment of goods constituted a "loss" under the Carmack Amendment. Under the statute, a carrier must provide a separate rate for delivery that is not guaranteed (as opposed to a rate for guaranteed delivery) and must not present false or misleading information about those rates. Those provisions enabled the plaintiff to bring a cause of action for losses associated with the delay of a guaranteed delivery under the Carmack Amendment. The court then held that the Carmack Amendment also preempted the plaintiff's fraudulent inducement and negligent misrepresentation because those claims were based on conduct that formed part of the contracting process for the transportation of goods in interstate commerce. The defendant's motion to dismiss the plaintiff's state law claims was granted.

The issue in *Starceski v. United Van Lines*, 2022 US Dist. LEXIS 190949 (M.D. Fla.), was whether the Carmack Amendment preempted the plaintiff's state law claims arising out of a shipment of household goods from California to Florida. The defendant issued the plaintiff a bill of lading and accepted the goods for storage. Several months later, the defendant delivered one load of the plaintiff's household goods to Florida. The second shipment never arrived because, according to the defendant, the truck transporting the goods caught fire. The plaintiff believed that the goods had been converted, embezzled, or stolen.

The plaintiff filed a 24-count complaint against seven different entities with causes of action ranging from state law breach of contract claims to a constitutional challenge to the Carmack Amendment. The defendants moved to dismiss all of the plaintiff's causes of action except for the one claim based on the Carmack Amendment. The court summarily dismissed the plaintiff's constitutional challenge to the Carmack Amendment, holding that the Supreme Court and almost every court of appeals that had considered the issue had found that the power of Congress to regulate interstate commerce gave Congress the authority to regulate contracts between shippers and carriers by defining the liability of the carrier for loss, delay, injury, or damage to such property.

The court then considered the plaintiff's state law claims and found that they were preempted by the Carmack Amendment—that the amendment was enacted to supersede all the regulations and policies of a particular state upon the subject of interstate commerce. Because all of the plaintiffs' state laws claims were based on the defendant's failure to provide him with proper transportation of his household goods from California to Florida, there was no doubt that the plaintiff's state law claims were preempted by the Carmack Amendment.

"SERVICES" UNDER THE CARMACK AMENDMENT

The issue in *Certain Underwriters at Lloyd's v. CSX Transp.*, 2022 US Dist. LEXIS 25413 (S.D. Ill.), was the scope of services covered by the Carmack Amendment. The plaintiff's insured had sold four locomotives to a customer in Guinea and had arranged for transportation of the locomotives to North Carolina on a website called PAL Connect. The first leg of the shipment was handled by the Evansville Western Railroad, Inc. (EWRI). The second leg of the shipment was handled by defendant CSX. The locomotives were damaged when the train upon which they were being carried derailed in North Carolina. The plaintiff paid the claim and sued CSX and EWRI for damages. In a second amended complaint, the plaintiff added Paducah & Louisville Railway, Inc. (PLR), the owner of the website, as a defendant, claiming that by providing a website that customers could use to arrange for the transportation of goods, PLR was providing "services" under the Carmack Amendment. PLR moved to dismiss the claim, arguing that it was not providing services under the Carmack Amendment.

The court pointed out the differences in the Carmack Amendment between rail carriers and motor carriers. The amendment, in the context of rail transportation, defined services as "related to the movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling and interchange of passengers and property." 49 USC § 10102(9)(B). In contrast, the section of the Carmack Amendment that governed motor carriers defined "services" as "services related to that movement, including *arranging for*, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property…" 49 USC § 13102(23)(B). The court found that the omission of the language for "arranging for" transportation in the section involving rail carriers clearly intended to limit that definition to those directly related to the transportation of freight. Because the shipment in question was moving by rail, PAL was not providing a "service" under the Carmack Amendment. In granting PAL's motion to dismiss, the court noted that, at best, by allowing for the procurement of transportation, PAL was acting as a broker, not subject to liability under the Carmack Amendment. The court granted PAL's motion for summary judgment and dismissed the second amended complaint as against PAL.

STATE LAW ANTI-INDEMNIFICATION STATUTES

The issue in *Coyote Logistics Coyote Logistics, LLC v. Bajan Enterprise*, 2022 US Dist. LEXIS 102271 (E.D. Ill.), was whether a state law anti-indemnification statute barred an action to recover damages to a shipment. Coyote Logistics was a freight broker that contracted with the defendant for the transportation of a shipment of cheese from Tennessee to Florida. The defendant's tractor-trailer was in an accident, and the cheese was declared a total loss. The customer deducted the value of the cheese in its next payment to the plaintiff. The plaintiff sued the defendant to recover the freight charges the shipper had refused to pay. In other words, the claim for the ruined cheese came from the broker rather than the shipper: the first cause of action was under the Carmack Amendment, and the second was for breach of contract based on a contractual indemnification clause contained in the Broker Carrier Agreement.

The defendant moved to dismiss the plaintiff's second cause of action based on the Illinois Anti-Indemnification Law, which generally prohibits contracts that oblige one party to indemnify the other party for its own negligence. The statute prohibits a promisee from recovering losses caused by the promisee's own negligence. However, if a party has a right to indemnification for

some other reason, the contract's indemnification provision is enforceable. Case law has clarified that the anti-indemnification law protects carriers from the negligence of shippers. The opposite, though, is not so. It does not protect shippers from being held responsible for a carrier's negligence, said the court.

The court then found that the contract between the plaintiff and defendant contained a broad indemnification clause that would require the carrier to indemnify the broker for the broker's own negligence. The contract, therefore, ran afoul of the state anti-indemnification law. The plaintiff, however, was not seeking such indemnification in the case before the court but was seeking damages based on the carrier's negligence. The issue was whether the state anti-indemnification law made the whole contract unenforceable. The court held that, because the Broker-Carrier Agreement contained a severability clause, a portion of the agreement could be unenforceable without holding the whole agreement unenforceable. The plaintiff's claim for indemnification was allowed. The defendant's motion was denied.

EXCEPTIONS TO THE CARMACK AMENDMENT

The issue in *Lock Logistics, LLC v. Harun Transportation, Inc.*, 2022 US Dist. LEXIS 212386 (E.D. Ky.), was whether the Carmack Amendment applied to an interstate shipment of fresh flowers. The plaintiff contracted with the defendant for the shipment of fresh flowers from Florida to Massachusetts. The shipment was rejected because the flowers froze en route. The plaintiff sued the defendant to recover the value of the shipment, pleading a cause of action under the Carmack Amendment as well as several state law causes of action.

The defendant moved for summary judgment seeking dismissal of the plaintiff's complaint. The court did not address the motions for summary judgment, however, because it found that it did not have subject matter jurisdiction over the dispute. The court admitted that the Carmack Amendment created a national scheme of carrier liability for loss or damages to goods transported in interstate commerce. The court also found, however, that the Carmack Amendment applies only to transportation subject to motor carrier or freight forwarder jurisdiction of the Secretary of Transportation or the Surface Transportation Board. Pursuant to 49 USC § 13506(a)(6), neither the Secretary of Transportation nor the Surface Transportation Board has jurisdiction over the transportation by motor vehicle of agricultural or horticultural commodities. Flowers, growing or cut, were exempt horticultural commodities. Because the court could not find any other basis for federal jurisdiction, it dismissed the Carmack Amendment claim with prejudice and the state law claims without prejudice. This is an issue that has been litigated in different contexts but not in our memory to cargo losses. We will be keeping an eye on whether this decision is cited going forward.

Alan Peterman

3. *Freight Brokers*

Miller v. Costco Wholesale Corp., 2022 US Dist. LEXIS 30504 (D. Nev.), involved an accident in which an RT Service semi-truck encountered black ice and overturned on an interstate. The plaintiff was unable to avoid the overturned tractor-trailer and was rendered a quadriplegic as a result of the collision. The plaintiff alleged that the semi overturned because RT's driver drove in an unsafe manner given the ice and snow conditions.

A freight broker, CHR, had contracted RT to deliver a shipment for Costco from California to Utah. The plaintiff named CHR as a defendant, asserting a claim for negligent hiring. CHR moved for summary judgment claiming that the plaintiff could not establish, as a matter of law, that CHR violated the standard of care and/or that CHR's conduct was the proximate cause of the accident. CHR argued that it did not violate its duty since it performed a reasonable background check on RT by ensuring that RT was registered by the FMCSA and had federally mandated insurance. The plaintiff countered that CHR ignored serious red flags that RT was a chameleon carrier and unfit for the job and should have further investigated RT. ("Chameleon" carriers, also known as "reincarnated" carriers, are companies that artificially shut down their business and resurrect operations as a new legal entity. Such companies can fly under the radar this way to cleanse themselves of regulatory compliance and public safety penalties that fall under the FMCSA's oversight.)

In denying summary judgment to CHR, the court held that a reasonable juror could find that several "red flags" should have triggered CHR to further investigate RT as a chameleon carrier, including that CHR had previously contracted with another motor carrier, Rhea, owned by the RT driver before he formed RT, and that his license had been permanently revoked by the FMCSA due to multiple egregious violations. The court also rejected CHR's argument that the plaintiff could not establish proximate cause because there was no evidence CHR knew of the relationship between Rhea and RT, and because CHR had no control over which driver and vehicle were selected to deliver the shipment. CHR also suggested that speeding by both parties, rather than the vehicle's brake issues and RT's prior hours of service violations, was the cause of the accident. The court, however, found that a reasonable juror could conclude that the accident was a foreseeable harm of CHR's inadequate and unreasonable screening measures and that CHR's negligence created an undue risk to others by placing a dangerous motor carrier on the road.

LaGrange v. Boone, 337 So. 3d 921 (La. Ct. App.), involved a tractor-trailer and motorcycle collision. The plaintiff brought suit against numerous defendants, including KLLM, a broker that had contracted the trucking company, alleging that KLLM was vicariously liable for the alleged negligence of the tractor-trailer driver, Boone, and was negligent in hiring and retaining the trucking company and in hiring and retaining Boone as a driver for KLLM. The trial court granted KLLM's motion to dismiss the vicarious liability claim based on KLLM's status as a broker and not employer of the tractor-trailer driver. The trial court also concluded that federal law preempted state law negligent hiring claims against freight brokers—which, of course, is a cutting edge and controversial issue.

The appellate court affirmed the dismissal of the vicarious liability claim, noting that KLLM established that it did not pay or have an employment contract with the tractor-trailer driver; that KLLM had no contractual right to, nor did it exercise, supervision and control over tractor-trailer driver; and that KLLM had no role in the transportation of freight. The appellate court agreed with KLLM that it was a broker that merely arranged for the transportation of the freight by a motor carrier. Although the plaintiff submitted documents reflecting that KLLM has both a federal broker DOT number and carrier DOT number, the court noted that the plaintiff presented no evidence to show that in this instance KLLM was acting as a carrier. In an attempt to avoid summary judgment, the plaintiff pointed out that KLLM did not sign the agreement with the trucking company. In the agreement, KLLM is identified as "broker," and the trucking company is identified as carrier and as an independent contractor. It also provided that KLLM had no right to control the services provided by the trucking company or its employees. In rejecting the plaintiff's argument, the court noted that KLLM clearly took actions indicating its acceptance of the broker-carrier agreement despite failing to sign the agreement.

The appellate court, however, reversed the trial court's finding that the FAAAA preempted the plaintiffs' negligent hiring claims. Section 14501(c)(1) preempts state laws that are "related to a price, route, or service of any . . . motor private carrier, broker, or freight forwarder with respect to the transportation of property." Nevertheless, Section 14501(c)(2) set forth an exception for state safety regulations providing that the FAAAA's preemption "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." Relying on *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016 (9th Cir. 2020), the court noted that the safety exception exempts from preemption safety regulations that have a connection with motor vehicles, whether directly or indirectly. Thus, the court held that the plaintiffs' negligent hiring claims against KLLM were not preempted by the FAAAA since the safety exception in section 14501(c)(2) exempted Louisiana's power to regulate safety through state law tort claims, and the plaintiffs' negligent-hiring claims against KLLM arose out of a motor vehicle accident.

With respect to the FAAAA preemption for claims against brokers for negligence in selecting motor carriers, courts continue to disagree. For two very different perspectives, see *Ever Better Eating, Inc. v. Jama's Express,LLC*, 2022 US Dist. LEXIS 227934 (M.D. Fla) (claims against broker preempted under FAAAA), and *Wardingley v. Ecovyst Catalyst Techs, LLC*, 2022 US Dist. LEXIS 201265 (N.D. Ind.) (claims against broker not preempted).

Vince Saccomando

4. *Employment*

MISCLASSIFICATION: LEASES

In the ongoing battle over "misclassification," two courts recently struck a blow against trucking companies that attempt to create an independent contractor status for their drivers.

In *Brant v. Schneider Nat'l, Inc.*, 2022 U.S. App. LEXIS 21487, the Seventh Circuit Court of Appeals reversed a district court decision that had upheld a contract in which truck drivers were labeled independent contractors. The Seventh Circuit said the lower court gave too much deference to the terms of the agreement. Under the Fair Labor Standards Act, what matters is the economic reality relationship between an employer and employee, not the terms of a contract. Here, the plaintiff was found to be totally dependent on the trucking company, with little true control over their so-called independent businesses.

While most of the truckers employed by the defendant in this case were classified as employees, others had been hired as "owner-operators" who leased trucks from the company in exchange for a portion of the gross revenue for its shipments that the driver hauled. The "owner-operator" contract purported to set up an independent contractor relationship whereby drivers had their own businesses. They were responsible for their own expenses, they were ostensibly able to haul loads for other carriers, they could hire their own employees, and they had permission to accept or reject shipments from the trucking company. The Seventh Circuit reviewed six factors, with an emphasis on the totality of the circumstances. The factors were an employee's control, opportunity for profit or loss, investment in equipment or materials, and special skill needed as well as the permanency of the working relationship and whether the service was integral to the employer's business.

The court found the economic reality of the relationship with the plaintiff and other "owner-operators" weighed in favor of a finding that they were, in fact, employees. The trucking

company controlled advertising; personal appearance; and method and manner of driving, hauling, and loading deliveries. The company extensively monitored these truckers, including their hours of work, engine operational data, and driving—including speed, hard braking incidents, collisions, etc. And the factors that normally favor an independent contractor status—the plaintiff's ability to hire his own employees and work for other carriers—did not tip the scales because the contract contained such controlling terms that it was not economically feasible to act on these provisions. For example, the company had veto power over their efforts to haul freight for different carriers, and while turning down shipment offers was within a driver's right, if they did not make enough money to make the lease payments, the company could cancel the contract and demand the remaining payments or force them to purchase the truck outright.

Similarly in *SAIF Corp. v. Ward (In re Comp. of Ward)* (369 Ore. 384), the leasing agreement that the trucker had its drivers execute was not enough to exempt it from Oregon's Worker's Compensation law, which provided for an exception for benefits for individuals who had ownership or leasehold interest in equipment and who operate said equipment. But here, the reality of the contract was such that drivers did not have a sufficient interest in the equipment to meet that exemption. The drivers were not allowed to haul loads for any other carriers; the company monitored their mileage, truck cleanliness, and appearance; and they were limited to taking assigned routes. The Supreme Court of Oregon found the legislature did not intend to exempt individuals in the present situation—situations where the lessor maintained exclusive control over the vehicle and the driver's so-called leasehold interest was limited to mere use and possession of the vehicle.

FEDERAL PREEMPTION

While many in the industry are still regrouping from last year's decisions by the Supreme Court not to review two federal circuit decisions that declined to broadly apply the FAAAA preemption, some courts continue to preempt certain state claims.

Courts continue to enforce the decision from the Federal Motor Carrier Safety Administration (FMCSA) that state meal and rest break claims are preempted by federal regulations. In *Freitas v. Heartland Express, Inc.*, 2022 US Dist. LEXIS 5552 (E.D. Wash.), the Eastern District of Washington dismissed a truck driver's claims that an Iowa-based national trucking company failed to comply with Washington meal and rest-break laws. Citing the Ninth Circuit's decision on a similar case involving California labor laws, the Eastern District stated that these kinds of laws are rules on commercial motor vehicle safety and thus preempted by the FMCSA.

Likewise, in *Cota v. Fresenius United States*, 2022 US Dist. LEXIS 46166, the Southern District of California upheld the preemption. The driver in this case argued that the federal preemption decision from the FMCSA, which was issued in December 2018, did not apply to conduct occurring before that time. The Southern District disagreed, noting that the statute under which FMCSA claimed preemption says that states may not "enforce" state laws or regulations touching commercial motor vehicle safety that the Security of Transportation decides may not be enforced. As the court noted, "[we] can't enter judgment for violations of unenforceable laws, regardless of whether the offending conduct occurred while those laws were still unenforceable."

CHOICE OF LAW

Where truck drivers are based may not be the decisive factor in determining what state laws apply to their labor and employment causes of action. The court in *Sanders v. Western Express, Inc.*, 2022 US Dist. LEXIS 98060 (E.D. Wash.), found that a Tennessee choice-of-law provision governed a Washington-based driver's claim. The trucking company in this case shipped goods across the country and had a few employees in Washington, but it was based in Tennessee. The driver here only spent approximately 8 percent of his time on the road in Washington, and his orientation—as well as the place of bargaining—were in California. While the employee occasionally received assignments while he was in Washington, the company had little business in that state and did not maintain any offices or facilities there. Given that the contract was negotiated in California and the agreement provided for Tennessee law to apply, the court said the parties could not have reasonably expected Washington law—where the driver spent so little of his time—to govern.

Payne Horning

5. *Liability*

CAUSATION

The accident in *Snider v. American Forest Products, LLC*, 2022 US Dist. LEXIS 32578 (D.N.J.), occurred when the plaintiff's husband (decedent), operating a tractor-trailer, departed his lane and entered into the left lane in order to pass a vehicle in front of him that displayed hazard lights. As the decedent went to pass in the left lane, he crashed into defendant's flatbed trailer, which was parked on the side of the road, displaying no hazards. The plaintiff sued, alleging that pursuant to

Federal Motor Carrier Safety Regulation (FMCSR) § 392.22, the defendant was required to display warning devices within 10 minutes of being stopped on the highway.

In support of their motion to dismiss, the defendant argued that FMCSR § 392.22 only applied to "stopped" vehicles, whereas the defendant's truck was "legally parked." In denying the defendant's motion, the court held that the defendant's argument raised a defense to liability rather than a deficiency in the plaintiff's pleading under FRCP 12(b)(6) and that the plaintiff had sufficiently pleaded that the defendants breached their duty of care. Additionally, while the defendants argued that, notwithstanding any duty, they did not proximately cause the accident, the court held that lack of proximate causation was also an affirmative defense not proper for a 12(b)(6) motion, as it often presents questions for the jury.

In *Shepp v. Custom Cartage, Inc.*, 2022 US Dist. LEXIS 94137 (N.D. Ga.), defendant's tractor-trailer, driven by an employee of Custom Cartage, struck the plaintiff's vehicle from behind while they were traveling in the same direction. Both were traveling under the speed limit due to traffic conditions at the time. The plaintiff sued Custom Cartage for negligence, negligent hiring, and the need for future back surgery. The defendants moved to dismiss.

Under Georgia law, employers are bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency. In order to establish negligent hiring, a plaintiff must prove that the employer knew or should have known of the employee's propensity to engage in the type of conduct that caused the injury, which is generally a question for the jury. Here, the defendant driver had received a speeding violation three months after beginning employment with Custom Cartage and prior to the accident at issue, for which he was not suspended. The court held that this was sufficient to create a jury question as to negligent hiring, retention, and supervision—especially given that Custom Cartage's own policy called for the driver's suspension at the time, which they failed to follow. Regarding the defendant's argument that the plaintiff required expert testimony to prove causation between the accident at issue and the plaintiff's need for back surgery, the court held that a plaintiff's treating doctors could provide lay testimony as to why they prescribed treatment/surgery so long as they did not speculate about the cause.

CONTRIBUTORY NEGLIGENCE

Wolff v. Maybach International Group, Inc., 2022 US Dist. LEXIS 163796 (E.D. Ky.), involved an accident that occurred when the plaintiff and defendant both had their trucks parked in adjacent parking spaces. The plaintiff was performing a post-trip inspection around his truck when the defendant attempted to back out of the parking spot. As a result of the defendant's misjudgment of the turn, the defendant's trailer swung into the plaintiff's truck, and the plaintiff was pinned against his own trailer, suffering severe injuries. The plaintiff sued the defendants for negligence, negligent entrustment, and negligence per se. The defendants moved for summary judgment.

In determining the defendant's motion, the court held that a driver on private property only owes a general duty of care for his own safety and the safety of others as an ordinary, careful, and prudent person would exercise in the same or similar circumstances. Here, the court found the defendant had breached its duty by failing to account for swing of the truck when maneuvering out of the parking spot, leaving causation for the jury. The court also held that there was some evidence of contributory negligence on the part of the plaintiff regarding questions of whether he was wearing his safety vest, the location of the plaintiff at the time of the accident, and the plaintiff's apparent unawareness of his surroundings and of the moving truck next to him. Finally, the court found there was a triable issue as to whether the defendant driver was an employee or independent contractor of Maybach. Accordingly, the defendant's motion was denied and a jury trial scheduled.

INDEPENDENT CONTRACTORS

Ruh v. Metal Recycling Services, 2022 US App. LEXIS 2077 (4th Cir.), involved the plaintiff's appeal of a district court order granting the defendant's motion for summary judgment. The accident occurred when the defendant driver, employed by Norris Trucking, struck the plaintiff's vehicle. The truck at issue was carrying scrap metal at the time pursuant to a contract with defendant Metal Recycling Services (MRS). The plaintiff sued MRS for punitive damages, alleging it breached a duty of care by hiring Norris Trucking when it knew or should have known that Norris Trucking had a poor safety record. The defendants moved to dismiss, which was granted on the basis that, under South Carolina law, an employer is not liable for the torts of an independent contractor committed in the performance of contracted work.

On appeal, the plaintiffs argued that among the exceptions to the general rule of Restatement of Torts § 411 is that an employer is subject to liability caused by his failure to exercise reasonable care to employ a competent and careful contractor to do work that will involve a risk of physical harm unless it is skillfully and carefully done. The court held that while hauling scrap metal via commercial tractor-trailer would fall within this exception in the Restatement, it could not say whether the Supreme Court of South Carolina would adapt same and instead called on the Supreme Court to accept the case to provide definitive guidance. We will be following any future proceedings.

LEASED VEHICLES

In *Whittley v. Kellum*, 2022 US Dist. LEXIS 42749 (E.D. Tex.), the accident occurred when the defendant tractor-trailer, driven by Kellum and owned by GEX Trans Group, Inc. (GEX), collided with the plaintiff's vehicle. GEX had leased the trailer to GAT Global Solutions, Inc. (GAT), who had ultimately directed the operation of the tractor-trailer by Kellum. As against GEX, the plaintiff alleged negligence, negligent entrustment, and *respondeat superior*, to which GEX moved for summary judgment.

In granting GEX's motion for summary judgment, the court determined that mere ownership of a vehicle is not conclusive to demonstrate entrustment. Here, while GEX was the owner of the vehicle in question, it had leased the vehicle to GAT. It was GAT who then entrusted the vehicle to Kellum. Thus, the court found that the plaintiff had offered no evidence that GEX maintained control of the trailer on the date of the accident. Under similar reasoning, the court dismissed the plaintiff's claims of *respondeat superior* against GEX as GEX had no control over Kellum as an employee. Finally, the court dismissed the plaintiff's negligence claim, holding that it would be unreasonable to impose a duty on the owner-lessor of a vehicle such as GEX to train and supervise its lessee's employees as the plaintiff had alleged here.

HIGHWAY STOPPING

The accident in *Cassels v. Schneider National Carriers, Inc.*, 2022 US Dist. LEXIS 93618 (S.D. Ohio), occurred when a carpet fell off the back of a truck in front of the plaintiff's vehicle. The plaintiff stopped and exited his vehicle to move the carpet off the road and onto the shoulder. The defendant tractor-trailer, driven by an employee of Schneider National Carriers (SNC), also stopped his truck in the middle of the lane to help move the carpet—but neglected to turn on his hazards. As a result, another defendant driver came up to the scene and failed to realize that the truck was stopped. That driver swerved to avoid the truck and instead struck the plaintiff, who suffered serious injuries.

The plaintiff sued defendant SNC, alleging negligence in failing to equip the defendant's trailer with proper operational lighting, reflective tape, or other safety equipment. In denying the defendant's motion to dismiss, the court held that the plaintiff's allegations regarding the failure of equipment raised a reasonable inference that SNC was negligent in failing to use hazards or equip the trailer with safety lights and could not be dismissed at this stage.

RES IPSA LOQUITOR

Misiaszek v. ABC Insurance Co., 2022 Wisc. App. LEXIS 462, involved the plaintiff's appeal of an order granting summary judgment to the defendants, Heartland Express, Inc. (Heartland) and Columbian Logistics Network, Inc. (Columbian), on claims involving an accident in which the plaintiff was injured by a falling pallet. At the time of the accident, the plaintiff, an employee where the truck in question had been dropped off, had moved a semi-truck trailer within the yard from one side to the other. When he went to open the driver-side trailer door, the door flew open, and a pallet that was resting on the door hit him, causing injuries. The trailer had been loaded by Columbian, whose employee signed the bill of lading, and had been driven to the yard by a driver for Heartland. The plaintiff sued for negligence and *respondeat superior*, which was decided in the defendant's favor on summary judgment. On appeal, the plaintiff argued that doctrine of *res ipsa loquitor* applied and was sufficient to defeat the defendants' motion for summary judgment.

In reexamining the lower court's decision, the court noted that *res ipsa loquitor* is applicable when (1) the event in question would not ordinarily occur in the absence of negligence, and (2) the agency of instrumentality causing the harm must have been within the exclusive control of the defendant. The defendants here stipulated to the first prong, so the remaining question involved exclusive control. Under *res ipsa loquitor*, "exclusive control" is defined as the moment the negligence occurred, not when the accident occurred. Here, the court found that, based on the evidence presented by the plaintiff, a reasonable inference could be drawn that defendant Heartland had exclusive control over the trailer during the trip, while defendant Columbian had exclusive control over the trailer when it was loaded and secured. Since the defendants did not present any evidence to rebut those inferences, the court found *res ipsa loquitor* applicable and sufficient to defeat the defendants' motion for summary judgment. Notably, however, while *res ipsa loquitor* was sufficient to defeat summary judgment at this juncture, it did not mean the instruction had to be given to the jury at close of trial.

DIRECT NEGLIGENCE V. VICARIOUS LIABILITY

McQueen v. Green/Pan-Oceanic Engineering Co. Inc., 2022 IL 126666 (Ill.), involved an appeal to the Supreme Court of Illinois raising the following question: Can an employer that admits liability under *respondeat superior* be liable for its own independent negligence absent negligence of the employee? According to the facts, defendant Green was an employee of defendant Pan-Oceanic Engineering Co. Inc. (Pan-Oceanic) and was instructed to pick up a shipment from Patten Industries.

Patten employees had loaded the haul incorrectly and refused to redo it upon Green's request. Green called his supervisor at Pan-Oceanic to report the issue and was told to drive with the load anyway. Later, as he was driving, Green noticed the load bouncing. As he was switching lanes, Green stepped on his brakes, which caused his truck to spin and collide with the plaintiff's car.

The plaintiff sued the driver for negligence in operating an improperly secured rig and the company for negligent training and supervision. At the end of trial, the jury found in favor of the plaintiff as to Pan-Oceanic but not as to Green. Defendant Pan-Oceanic appealed, and the appellate court ordered a new trial. A company cannot be found liable for direct negligence when they had already admitted liability under *respondeat superior* and their employee was deemed not negligent. The plaintiffs then appealed to the state supreme court. In granting the plaintiff's appeal, the Illinois Supreme Court rejected the often-cited rule in *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995), that held direct negligence claims are barred against an employer who acknowledges vicarious liability; instead the court held that the plaintiff was permitted to plead multiple causes of action, including vicarious liability and direct negligence against an employer. Given the evidence that Pan-Oceanic maintained control over Green and had instructed defendant Green to drive the truck despite Green's safety concerns for the load, the court agreed it had demonstrated utter indifference toward the safety of others. Thus, it was proper to find Pan-Oceanic had acted negligently based on its own actions while simultaneously finding that their employee Green was not negligent.

Meghan Tuma

6. *Punitive Damages*

LOSS OF GOODS

Siaci Saint Honore v. M/V Berlin Bridge, 2022 US Dist. LEXIS 207425 (D.N.J.), involved a shipment of cosmetic products from Italy to New Jersey for which defendant West End was the trucker responsible for delivering the products from the Port of New Jersey to the final destination in Monroe Township, New Jersey. West End picked up the shipment at issue the day it arrived but did not deliver the products until eight days later, at which time it was noted that several cartons were missing from the shipment. As a result, the plaintiff sued the various defendants for cosmetic products that were allegedly stolen while the load was in transit from Italy to New Jersey. The plaintiff asserted numerous claims against each defendant, including negligence and gross negligence, and sought punitive damages on the gross negligence claims. Defendant West End, the shipping company, moved to dismiss certain claims, including those for punitive damages.

In determining whether claims of punitive damages could proceed, the court first looked to assess the scope of the FAAAA's preemption clause and determined that the FAAAA's preemption is extremely broad and explicitly provides that states "may not enact or enforce a law, regulation or other provision ... related to a price, route, or service of any motor carrier ... with respect to the transportation of property." With respect to such language, many courts have gone on to determine that the FAAAA preempts even state law–based private claims, such as negligence, conversion, gross-negligence, or punitive damages pursuant to the "other provision" language of the statue. Accordingly, given defendant West End was a "motor carrier" as defined in the statute, this court held that the plaintiff's state law claims of negligence, gross negligence, and punitive damages were preempted by the FAAAA and granted West End's motion to dismiss those claims on that ground. (Of course, preemption remains a controversial doctrine, and the courts are split on the doctrine.)

ACCIDENTS

In *Drake v. Old Dominion Freight Line*, Inc., 2022 US Dist. LEXIS 182856 (E.D. Mo.), the plaintiffs alleged that the defendant negligently operated his semi-truck, drove in a reckless manner, failed to yield to oncoming traffic and the right of way, collided with the plaintiff, and knew or should have known there was a reasonable likelihood of collision and sought an award of punitive damages. In reply, the defendants moved to dismiss the plaintiffs' punitive damages claims.

To establish a claim for punitive damages in Missouri, the plaintiff must demonstrate that the defendant (1) knew or had reason to know there was a high degree of probability that the defendant's conduct would result in injury, and (2) showed complete indifference to, or conscious disregard for, the safety of others. While the court did not address whether punitive damages would ultimately be awarded in this case, it denied defendants' motion to dismiss and held that such a motion was procedurally improper under FRCP 12(b)(6) at this stage of litigation. Additionally, given the defendants had not shown there was a statutory or other bar to punitive damages, the court allowed the claim to proceed.

The defendant tractor-trailer in *Coakley v. Cole*, 2022 US Dist. LEXIS 130224 (S.D. Mich.), struck the rear of the plaintiff's vehicle at a "high rate of speed" while in the right-hand lane, resulting in the plaintiff's vehicle being propelled onto, across, and off the southern shoulder of the road and into a ditch, causing the airbag to deploy. The plaintiff sought punitive damages against both the defendant driver and defendant employer based on gross negligence. The defendants moved to dismiss the plaintiff's punitive damages and gross negligence claims.

To establish a claim for punitive damages in Mississippi, the plaintiff must show that the defendant against whom punitive damages are sought acted with actual malice; gross negligence that evidences willful, wanton, or reckless disregard for the safety of others; or committed actual fraud. Typically, in Mississippi, punitive damages are reserved for the most extreme cases and allowed only "with caution and within narrow limits." They are not typically awarded where a collision involves the mere commission of a traffic violation. Mississippi further defines "gross negligence" as conduct that disclosed a reckless indifference to consequences without the exertion of any substantial effort to avoid them.

Here, the court found there were no factual allegations to support that the defendant driver was anything more than simply negligent and was insufficient to support a claim of punitive damages. Additionally, the court held that, based on the defendant employer's admission of vicarious liability, independent claims against them for negligence and punitive damages could not stand, as such claims are deemed redundant. Accordingly, the court granted the defendant's motions to dismiss same.

In *Russ v. Ecklund Logistics, Inc.*, 2022 US Dist. LEXIS 52314 (D. Minn.), the defendant truck owned by Ecklund Logistics, Inc. (Ecklund) struck the decedent's car from behind on the interstate highway while hauling a freight load contracted by XPO Logistics (XPO). As a result, a chain reaction crash occurred involving three other vehicles. The decedent died at the scene. The plaintiff, the wife of decedent, filed suit and herein moved to amend the complaint for a third time to add claims of punitive damages against both Ecklund and XPO. Both defendants opposed.

Minnesota Statutes § 549.20 requires that "[p]unitive damages shall be allowed . . . only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights and safety of others." Thus, a plaintiff must show: (1) the defendant had knowledge of or intentional disregard for facts that make injury to the plaintiff's rights highly probable, and (2) the defendant deliberately proceeded with at least indifference to the risk of injury. The court ultimately granted defendant XPO's motion, finding that the facts did not suggest XPO, as contractor, knew or should have known that Ecklund did not have enough time to deliver the freight or that their delivery time would incentivize Ecklund to violate hours regulations and act negligently. However, with respect to Ecklund, the court found that Ecklund knew or should have known about its driver's past employment history and criminal record, which noted various recent safety issues, and also that it knew he did not have enough time to complete the delivery as scheduled. In denying Ecklund's motion to dismiss, the court reasoned that the plaintiff had sufficiently alleged that Ecklund had acted with willful indifference.

In *Anthony v. Alvarez*, 2022 US Dist. LEXIS 162515 (M.D. Ga.), the plaintiff truck was parked at a truck stop when the defendant's truck collided with the driver's side of the plaintiff's truck near the fuel tanks as the defendant driver dozed off. The defendant was traveling at approximately 10 miles per hour, but the plaintiff driver was knocked to the passenger seat from impact, and the plaintiff's truck began to smoke.
The plaintiff brought claims for wantonness, negligent hiring, and negligent entrustment against the driver and his employer. The defendants moved for partial summary judgment on those claims.

Under Georgia law, punitive damages are awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that the entire want of care that would raise the presumption of conscious indifference to consequences. Here, the evidence indicated that the driver had admitted he was drowsy prior to the accident at issue but had made the conscious decision to pull over and park at the truck stop. While it was unfortunate the accident occurred, the court found it was not willful, given the steps the driver had taken to attempt to avoid a different accident. Additionally, as to the employer, punitive damages are awarded only where the plaintiff has shown the employer had actual knowledge of numerous and serious violations on its driver's record or when the employer has flouted a duty to check a record showing such violations. Here, the employer did check the driver's record, and in any event, there was no serious history of driving accidents on the driver's record. Accordingly, both defendants' motions were granted.

Taggart v. Casing Crews, 2022 US Dist. LEXIS 12157 (W.D. Okla.), involved the defendant pickup truck and flatbed trailer, which came to an intersection and subsequently crossed a highway in front of the plaintiff tractor-trailer, causing the plaintiff's tractor to collide with the rear wheel area of the defendant's flatbed, resulting in minor damage to the defendant, moderate damage to the plaintiff, and injuries to the plaintiff driver. The plaintiff filed various negligence claims and sought punitive damages to which the defendants moved for partial summary judgment.

In Oklahoma, punitive damages are only available in actions involving fraud, oppression, malice, or gross negligence supported by clear and convincing evidence that the defendant is guilty of reckless disregard for the rights of others or acted intentionally and with malice toward others. The question of punitive damages is generally a question for a fact-finding jury. Here, the court denied the defendants' motion for summary

judgment because it was not clear how the defendant entered the intersection, how careful he was regarding the time it would take him to cross the intersection, or whether he failed to drive with adequate care. Given the uncertainty of how the evidence was to develop at trial, the court declined to grant summary judgment at this juncture and allowed claims of punitive damages to proceed.

The defendant truck in *Dillard v. Smith*, 2022 US Dist. LEXIS 83706 (N.D. Ga.), was being operated on a local road when the driver of the truck noticed brake issues involving some difficulty stopping his truck. As the defendant's intended stop was "just up the road," and there was no safe place to pull over, the defendant chose to continue on before stopping to check them. Prior to reaching his destination, at the next red light, the defendant collided with the plaintiff when he was not able to stop in time due to his brake failure. As a result, the defendant drove through the red light and crashed into the plaintiff at approximately 55 miles per hour, despite attempting to avoid the crash. The plaintiff sought punitive damages against the defendant, who moved for partial summary judgment.

As in *Anthony v. Alvarez*, supra, Georgia law requires clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that the entire want of care that would raise the presumption of conscious indifference to consequences in order to support an award of punitive damages. Here, the court found the accident at issue to be the result of a mechanical brake failure, which the driver had not been aware of until the intersection before. Given the defendant had formulated a plan to resolve the issue once he reached his destination, as he could not safely pull over prior to reaching same, the court held that even if the defendants' actions were negligent or even grossly unreasonable, they did not rise to the level of "conscious indifference to the consequences." Ultimately, the court held, like many other courts in Oklahoma, that "punitive damages are not recoverable in automobile collision cases when a driver simply violates a rule of the road" and granted the defendant's motion with respect to the plaintiff's claims of punitive damages.

Meghan Tuma

7. Spoliation

Paul v. Western Express, Inc., 2022 US Dist. LEXIS 50310 (W.D. Va.), involved a multi-vehicle accident in which defendant Worthy, a truck driver for defendant Western Express, struck plaintiff Paul's Kia. Counsel for Western Express sent a litigation preservation letter to counsel for Paul, advising Paul to preserve the Kia and requesting an inspection to photograph the Kia and perform a data download. Counsel for Paul advised that Paul's carrier, GEICO, had ownership of the Kia and had hired a company to sell the Kia at an auction following the settlement of the vehicle's insurance claim and directed Western Express' counsel to direct any requests to GEICO. Subsequently, an inspection was held, but the Kia's data was not downloaded either because Western Express's expert did not have authority to do so or because the tool necessary to do so was not available. None of the parties sought to reschedule the inspection until almost two years later, when Western Express' counsel asked Paul's counsel whether Paul's expert had conducted a data download on the Kia, and whether the vehicle was still in storage. By that time, however, GEICO had sold the Kia, and it had been destroyed. Western Express then sought sanctions for spoliation of evidence.

The court noted that spoliation means "the destruction or material alteration of evidence or . . . the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation," quoting *Silvestri v. Gen. Motors. Corp.*, 271 F.3d 583, 590 (4th Cir. 2001). The court further explained that a party seeking sanctions based on spoliation must establish three elements: (1) the party having control over the evidence had an obligation to preserve it when it was destroyed or altered, (2) the destruction or loss was accompanied by a "culpable state of mind," and (3) the evidence that was destroyed or altered was "relevant" to the claims or defenses of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable fact-finder could conclude that the lost evidence would have supported the claims or defenses of the party that sought it.

In light of this standard, the court found the motion was premature because the parties had not completed discovery, and the record was insufficient to decide the exact relevance of the Kia and the prejudice of its loss to the defendant. The defendant contended that the data from the Kia was the only piece of evidence that could establish whether the Kia was fully stopped at the time of the first impact or, if not, its speed at that time; whether the Kia's brakes were engaged; the Kia's engine's revolutions per minute at the time of impact; how many times the Kia was struck; the severity of the impacts; and the time that elapsed between the impacts.

However, the court noted that it is possible that similar evidence could be obtained through fact witnesses, photographs, data downloads from the other parties' cars, post-accident reports, and accident reconstruction. The court explained that if there is other evidence that serves the same purpose as the data download from the Kia, then there is no prejudice and, thus, no basis for sanctions. The court also voiced a concern about whether the defendant could meet its burden to show that the plaintiff's conduct was willful such that an adverse inference instruction is warranted.

Fielder v. Superior Mason Prods., LLC, 2022 US Dist. LEXIS 228989 (M.D. Ga.), involved an accident in which Turner, a

driver and employee of Latium, crossed the double yellow lines and entered the opposing lanes to try to pass a tractor driving in front of him, resulting in a multi-vehicle collision. During the course of the personal injury lawsuit, the plaintiffs filed a motion seeking sanctions for spoliation of evidence, contending that defendants Turner and Latium failed to preserve (1) the driver's electronic logging device (ELD) and other federally mandated logs, (2) "subject trip documents," and (3) drug and alcohol test results from the day after the accident.

The court explained that "spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." The court noted that defendants engaged in "troubling discovery patterns," including falsely stating that no records of duty status or daily logs existed for Turner; producing documents in the middle of a deposition; producing Turner's post-accident drug/alcohol tests after discovery was closed; and, only four days before the spoliation motion hearing, producing logs showing Turner's status as "off duty" on the day of the accident.

With respect to the driver's ELD and other federally mandated logs and trip documents that the plaintiffs claimed were spoliated, Turner testified that he turned in his paperwork, including federally mandated logs, to Latium the day after the accident. Latium's transportation manager testified that he pulled the logs from the ELD portal, gathered the relevant trip documents, and turned them over to members of upper management. However, the defendants claimed they could not find the documents but then turned over the documents four days before the spoliation motion hearing.

The defendants argued that they did not spoliate the evidence because the contents of the documents were inconclusive in that Turner's GPS and ELD machines must have malfunctioned because they show that Turner was off-duty on the day of the accident, although he clearly worked that day. The court rejected the defendants' argument and instead found that the defendants owed the plaintiffs an obligation to preserve such evidence because (1) the defendant was aware of the accident, therefore litigation was "reasonably foreseeable," (2) the plaintiffs sent the defendants spoliation letters, and (3) the Federal Motor Carrier Safety regulations required the defendants to maintain these logs and records for a period of at least six months pursuant to 49 CFR § 395.8. Additionally, if the GPS did malfunction, the defendants were required to record that malfunction within eight days under 49 CFR § 395.34...but did not allege a GPS malfunction until the hearing on the spoliation motion.

The court further held that the information requested is crucial to the plaintiffs' ability to prove their case, including the plaintiffs' allegation that Turner violated federal service hours regulations. The court found that it was nearly impossible for the plaintiffs to prove that without logs and data regarding Turner's hours on the days and week surrounding the accident. The court noted that if the defendants did not dispute liability, its analysis would be different.

In concluding that spoliation occurred, the court explained that in fashioning the appropriate sanction it must consider (1) whether the moving party was prejudiced as a result of the destruction of evidence, (2) whether the prejudice could be cured, (3) the practical importance of the evidence, (4) whether the spoliating party acted in good or bad faith, and (5) the potential for abuse if expert testimony about the evidence was not excluded. Spoliation sanctions are intended to "prevent unfair prejudice to litigants and to insure the integrity of the discovery process." *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005). The court found that the defendants acted in bad faith throughout the discovery process through a pattern of delay and obfuscation that led the court to conclude that they deliberately tried to evade discovery. Although not rising to the level necessary to strike the defendants' answer, the court determined that an adverse jury instruction was appropriate, with the exact language of the construction to be determined at a later time.

Vince Saccomando

8. Insurance Coverage

As always, the question of when owner-operators should be classified as employees for coverage purposes (see also the "Employee" section) produced some noteworthy jurisprudence. Generally, you can count on splitting the positions in this argument into two camps: first, the carriers, who insist that the broad definition of "employee" set forth in the Federal Motor Carrier Safety Regulations (which includes independent contractors while operating a motor vehicle) carries the day, and, second, claimants (often injured drivers or their estates), who insist that state common law tests about the "right to control" a driver should govern. That is, should the federal law be taken into account in interpreting the policy, even if the policy does not incorporate the relevant regulatory language? (In past years we have discussed instances in which some insurers *have* incorporated the relevant language.) This year's crop of cases focused on a sub-issue: what is the status of the non-driving partner, and what is the status of a driver during loading and unloading?

Recall, 49 CFR § 390.5, as relevant here, states that "employee" "means any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (*including an independent contractor while in the course of operating a commercial motor vehicle*), a mechanic, and a freight handler."

As the italics suggest, the nagging question here—one nearly as philosophical as it is legal—is when, precisely, is one "in the course of operating a commercial motor vehicle"? Traditionally, two camps have formed. The growing majority position is embodied by numerous Fifth Circuit decisions that hold that even a passenger can be "operating" a commercial motor vehicle where they were present for the purpose of the vehicle's operation, even if not actively doing so at the time of the loss. The minority position, traceable to a 2003 Connecticut federal district court decision, insists that "operating" a commercial motor vehicle is limited to "driving" the vehicle at the time of the loss.

A June 2022 decision from the Middle District of Pennsylvania injected a third interpretation that, if accepted, would radically shift the debate in this area in favor of enforcing the exclusion—even for co-drivers not actively driving at the time of the loss or those engaged in unloading or even watching the unloading. Perhaps overenthusiastic to demonstrate his understanding of the late Justice Scalia's book on statutory interpretation, the judge in *United Fin. Cas. Co. v. Mid State Logistics* retreated to arcane rules of interpretation and rejected both sides of the debate based on the meaning of the word "including."

Recall that the definition of "employee" in the motor carrier regulations is two sentences: first, a person must be employed by an employer and directly affect commercial motor vehicle safety. Second, in the case of an independent contractor, they must be "in the course of operating a commercial motor vehicle." The court in *Mid State* was tasked with finding whether an independent contractor driver asleep in the truck's sleeper berth was an "employee" when his co-driver got into an accident.

The court based its decision solely on the first sentence of the definition under Section 390.5, going so far as to hold that the "independent contractor" provision merely meant that "an independent contractor operating a commercial motor vehicle is an employee, but nothing more." In other words, the court struck that sentence as a mere example of an employee. Thus, to the Middle District of Pennsylvania, the only questions to determine employment status with a motor carrier are (1) was plaintiff employed by an employer, and (2) did plaintiff directly affect commercial motor vehicle safety in the course of his employment? Ultimately, the carrier prevailed under this favorable test. We will continue to monitor to see if this novel approach achieves broad acceptance.

TRIPLE L

While the dispute around the definition of an "employee" for coverage terms frequently revolves around the definition of that term in the federal motor carrier rules, we observe states that continue to adhere to their own tests far removed from the language of the federal regulations. The Ninth Circuit's decision in *State Farm Mut. Auto. Ins. Co. v. Triple L, Inc.* lends insight as to how one state, Montana, approaches the question. The claim in *Triple L* arose from an injury to a driver employed by Phoenix R.C.M., Inc., (R.C.M.), which had an arrangement with Triple L whereby R.C.M.'s drivers serviced Triple L's contract with the US Postal Service to deliver mail in rural Montana using Triple L vehicles. The driver's claims were met by a federal declaratory judgment action seeking a declaration that State Farm, Triple L's insurer, was not required to cover the driver's claims under their policy's "employee" exclusion. The trial court granted summary judgment to State Farm based on the "control" test for employment applied to workers' compensation matters.

On appeal, the Ninth Circuit reversed the trial court's decision because it had used the wrong test. Montana law, in fact, already provided a separate test for whether one was an "employee" in the insurance exclusion context, which hinged on whether one was "engaged in . . . services for wages and salary by another." Noting that R.C.M., and not Triple L, paid the driver's wages, the Ninth Circuit held that R.C.M. was the driver's employer, not Triple L, and that coverage was not excluded under the policy's employee exclusion. We note that the dissent in *Triple L* did not advocate for the definition of "employee" from the federal regulations but instead said the "control" test should apply.

EXCLUSIONS: STATUTORY OR POLICY MINIMUM COVERAGES

Where a policy exclusion that would otherwise preclude a claim is held invalid—often as violating a state's minimum insurance requirements or permissive driver coverage requirements—the next question the parties have is often "but how much coverage is available now?" since the policy itself does not provide a limit for claims the carrier would otherwise deny. Faced with the question recently, the Fourth Circuit certified another variation on this question to the West Virginia Supreme Court, asking the state court to decide the amount of coverage that must be provided for a claim arising from a non-employee permissive user of an insured vehicle that caused personal injuries to an

employee of the named insured. *Ball v. United Fin. Cas. Co.*, 2022 W.Va LEXIS 713.

The underlying facts are as follows: while the employees of a hardware store were performing construction work at a customer's home, the owner of the hardware company authorized an employee, Perry, to move one of the company's trucks so it was not blocking the customer's driveway. While backing the truck up, Perry struck Ball, another employee, pinning him between two trucks and causing serious injuries. Ball demanded that the employer's insurer United Financial, indemnify him for his injuries. United Financial sought a declaration that it had no coverage obligation for the liability to Ball from the accident. The district court initially granted United Financial summary judgment on its argument that it owed no coverage under the policy's employee indemnification and employer's liability exclusion and worker's compensation exclusion. That early victory was vacated for two reasons: first, Ball's claim was against a third party, not his employer, making those exclusions inapplicable, and, second, because applying those exclusions to preclude coverage violated West Virginia's statewide minimum insurance requirements for permissive users (as Perry was once authorized by the named insured to drive the insured vehicle).

The next dispute—the one certified to the state supreme court—revolved around whether the coverage afforded under the policy was limited to the minimum coverage of $25,000 required by West Virginia law to "insure the person named [in the policy] and any other person, as insured, using any [covered vehicle] with the express or implied permission" of the named insured or whether the coverage was subject only to the $1 million policy limit. Critically, that law also required permissive users to be insured against liability "within the coverage of the [applicable insurance] policy."

The court surveyed its prior decisions, noting that the state's insurance requirement for permissive drivers was intended to provide greater coverage to those injured in auto accidents and that the state's statutes demonstrated a policy of maximizing available insurance coverage to satisfy claims for injuries. Ultimately, the West Virginia Supreme Court held that the relevant statute required that "when an exclusion in a motor vehicle liability insurance policy violates West Virginia Code § 33-6-31(a) because it would deny coverage to a permissive user of an insured vehicle, **the exclusion is void, and the insurance policy must provide coverage to the permissive user up to the full limits of liability coverage under the policy."** While the *Ball* decision may be limited by its reliance on West Virginia law, carriers should review the mandatory insurance requirements for states they write policies in to determine whether other states' insurance laws contain similarly worded laws requiring coverage "within the coverage of the policy" for permissive drivers.

While nominally about the scope of coverage, the Ball case hinged on the common issue of what constitutes a "permissive driver." Two additional cases are worth noting on the issue of "permissive" users of insured vehicles.

The first decision was issued by the District Court for the Western District of Virginia. In *Progressive Gulf Ins. Co. v. Reynolds*, the court reaffirmed the uncontroversial proposition that when a passenger grabs the steering wheel without a driver's permission, that act per se exceeds any "permissive use" of another's vehicle outside of specific exigent circumstances (such as a sudden medical incapacitation of the driver).

But who can even grant permission for a permissive user while assuring continued coverage? In *W. v. Shelter Mut. Ins. Co.*, the Arkansas Court of Appeals held that it should probably be the vehicle's actual owner. There, Nancy Mathis insured a Dodge Ram pickup, stating in her policy application that she was the title owner and listing no additional drivers. In fact, the Dodge Ram was exclusively owned and driven by her adult son, Stacy Mathis, who lived separately from Nancy. These facts came to light after Shelter Mutual Insurance Co. denied a claim by an innocent third party injured in an accident involving the Dodge Ram as it was being driven by Stacy Mathis. West sued over that denial, losing at the trial court.

The appellate court rejected the innocent victim's theory that Nancy's "consent [was] evidenced by her fraudulent misrepresentation" to her insurer that she owned the truck because that was necessary to permit Stacy, an ex-convict, to be able to use the Dodge Ram. In particular, the court noted that "permission" meant "the consent **of the vehicle owner**," which Nancy was not (meaning she could not consent to Stacy's use, making it permissive). Further precluding coverage was the fact that the Dodge Ram was not owned by the named insured and thus could not be an "insured auto" under the policy.

DECLARATORY JUDGMENT PUSHBACK

2022 witnessed another growing trend we are concerned about: dismissing carrier declaratory judgment actions as premature or failing to present a concrete case that can be decided by the court. Late in 2022, the federal district court for North Dakota joined the growing list of courts that have dismissed declaratory judgment actions brought by an insurer seeking a declaration of no coverage. The coverage dispute in *Great West Casualty Co. v. Halvorson*, *et al.*, arose from a fatal accident in which the insured's employee was struck and killed

by a dump truck. Prior to the filing of any tort suit relating to that accident (though Great West was advised of imminent litigation), Great West initiated a federal declaratory judgment action seeking to disclaim any defense or indemnity obligations to Halvorson. Federated Mutual, one of the declaratory judgment defendants, moved to dismiss the complaint as failing to present a concrete dispute sufficient to justify the court's intervention. The court agreed with Federated, noting that without operative facts in an underlying complaint, the court was unable to assess or even determine whether Great West was obligated to cover any claims by Halvorson relating to the underlying accident. The court refused to "reach the merits of liability of still hypothetical claims in the guise of a declaratory judgment action" and dismissed the case.

Benjamin Zakarin

9. Non-Trucking ("Bobtail") Policies

A non-trucking policy will cost an owner-operator only a small percentage of what a full liability policy would cost. However, what follows in the event of a loss is often a dispute between the motor carrier's insurer and the owner-operator's non-trucking (NTL) insurer. The situation has only become more uncertain since the adoption by many insurers of ISO Motor Carrier Coverage Form, which, as we have discussed in prior years, excludes all coverage for owner-operators in many cases.

The owner-operator in *Progressive Paloverde Ins. Co. v. BJ Trucking Earthmover, LLC*, 2022 US App. Lexis 19649 (5th Cir.), Bobby Jenkins, saved $17,000 on his auto liability premium when he switched from a full liability policy that he had purchased in previous years to an NTL policy. He did his hauling for Heck Industries, which provided the trailers that Jenkins attached to his tractor. Since, as Jenkins told the insurer, Heck provided coverage for the trailer, he only needed NTL coverage. It does not appear that he checked with Heck to make certain that they were in agreement.

The underlying facts were tragic. Jenkins drove his rig around a barrier at a train crossing without stopping to see if a train was coming. An Illinois Central train was, in fact, approaching at 79 miles per hour, and Jenkins did not survive the collision. Various claims were filed, including by people on the train who suffered bodily injury.

Heck was a defendant in the suits brought by the injured train passengers, although it successfully argued that Jenkins was an independent contractor, not an employee. Gray Insurance insured Heck, but both Gray and Heck argued that that coverage was excess to Progressive's. In fact, Heck had been listed as an additional insured on the Jenkins policy when it was a full liability policy. Heck remained an additional insured even after the policy was converted into an NTL policy. This, of course, was unusual since non-trucking policies almost always exclude the lessee motor carrier. In any event, the district court ruled in favor of the NTL insurer, finding that Jenkins was engaged in Heck's business at the time of the loss.

There were multiple issues on appeal to the Fifth Circuit; we will focus only on the NTL question. Heck insisted that it was entitled to a defense and indemnification under the NTL policy. In so arguing, it pretty much threw the kitchen sink into the brief, including the argument that NTL exclusions are contrary to public policy. The court didn't waste much time on that argument, noting that such provisions have been upheld in prior Louisiana cases. The court also rejected Heck's argument that it was entitled to notice of the change in the policy from a full liability policy to an NTL policy and, that since it had no notice, the NTL exclusion could not be used to deny coverage to Heck. The court accepted the NTL insurer's argument that since Jenkins told the insurer that Heck was providing primary coverage, the insurer had no obligation to inquire further. Since the vehicles were being used to haul goods at the time of loss, the NTL policy provided no coverage.

Great American Assur. Co. v. Acuity, 185 N.E. 3d 124 (Ohio App.), was a common enough dispute between the auto liability insurer and the NTL insurer. Great American's NTL policy has for many years differed from the ISO form in that it lists specific scenarios in which the policy does not apply. (ISO excludes vehicles actually under load and vehicles otherwise "in the lessee's business.") And Great American has been thorough in selecting scenarios. The Ohio court focused on language excluding coverage for the scheduled auto(s), "while travelling from ... (1) any terminal or the facility of any lessee; ...to any location where the covered auto is regularly garaged." In other words, the NTL policy excludes coverage when the driver has finished his or her work for the day and has dropped off the trailer and or the paperwork at the home terminal and has begun to drive home. That is normally a situation in which courts find that the non-trucking policy applies, but, as we mentioned, the Great American list of scenarios is thorough. The court enforced the exclusion.

The lesson in *Progressive Express Ins. Co. v. Tate Trans. Corp.*, 2022 US Dist. LEXIS 208183 (M.D. Fla.), is that an NTL carrier may need to defend certain cases even if it believes its exclusion clearly applies; where the complaint does not clearly indicate that the rig was being used to haul goods, the defense duty may well apply. (The court did not address the question of what happens when the complaint makes allegations that fall within the coverage terms of more than one policy.)

The NTL insurer had more success with its declaratory judgment action in *Great West Cas. Co. v. Maric Transp. Co.*,

2022 US Dist. LEXIS 168194, (D. Ohio). It didn't hurt that the accident vehicle (tractor and trailer) was not even scheduled on the NTL policy. The court granted judgment that the NTL carrier had no exposure even though the motor carrier's insurer had been placed in receivership—meaning that there was no other insurer available to pay any judgment.

Argonaut Ins. Co. v. Atl. Specialty Ins. Co., 2022 US Dist. LEXIS 83078 (E.D. La.), focused on the question of whether an NTL policy applies if the driver makes even a minor deviation while under load or after having been dispatched. The NTL policy (like the Great American policy discussed above) precluded coverage when the covered was being returned to its principal place of garaging, perhaps questionable from a public policy perspective but enforceable in the view of many courts.

The policy language (some of which we think was a bit awkward) provided that coverage applied only when the rig is being operated "solely for personal use." In this case, the driver had completed his work for the day and bobtailed toward a local grocery store. Realizing that he didn't have enough money to make the purchases he had intended, he instead headed home. Then he changed his mind again and decided to go to another store to purchase cigarettes. En route there, he was involved in an accident. The motor carrier's insurer (Argonaut) paid the claim then sought to recover from the NTL insurer (Atlanta).

Atlanta argued that the NTL policy did not apply because the driver was not operating solely on personal business at the time of the accident. He would not have been operating the vehicle at the time of the loss had the motor carrier not given him an assignment earlier in the day. Argonaut replied that going to pick up cigarettes is about as personal use of a rig as one can imagine.

The court found that since the NTL policy excluded trips to the place where the vehicle is regularly parked, the NTL policy did not apply. A slight deviation, whether to pick up groceries or cigarettes, did not change the character of the trip—which was to return the tractor to its usual place of garaging. Thus the NTL policy did not apply.

Larry Rabinovich

10. *Uninsured/Underinsured Motorist*

The plaintiff in *Mabin v. Artisan & Truckers Casualty Co.*, 2022 Wisc. App. LEXIS 244 (Wis. Ct. App.), was rear-ended by a tractor-trailer. Neither the tractor-trailer nor its driver was scheduled on the liability policy issued to the motor carrier, but the policy had been certified to the USDOT as proof of the motor carrier's financial responsibility. The Artisan policy issued to Mabin defined "uninsured motor vehicle" as "a land motor vehicle … to which no bodily injury liability bond or policy applies at the time of the accident and the owner or operator has not furnished proof of financial responsibility for the future." Since the motor carrier's insurer had furnished proof of financial responsibility to the USDOT, the court held that the tractor-trailer was not uninsured within the meaning of the Artisan policy. The state supreme court denied review.

The key (and novel) legal issue in *Loomis v. Ace American Insurance Co.*, 2022 US Dist. LEXIS 53495 (N.D.N.Y.), was whether the law of Indiana permitted an insurer to make mandatory UM/UIM coverage subject to a retained limit that the insured must pay before UM/UIM coverage would attach. The Indiana UM/UIM statute requires auto liability insurers to provide UM/UIM "coverage … in limits at least equal to the limits of liability specified in the bodily injury liability provisions of an insured's policy." Since the retained limit did not reduce UM/UIM coverage below the policy's liability limits but merely required the insured to pay the retained limit before the UM/UIM coverage would be available, the court found that the retained limit provision did not violate the statute.

The law of Louisiana requires an insurer to provide UM/UIM coverage with limits equal to the policy's liability limits unless a lower limit of coverage is selected in a written form executed by the insured. The law of Georgia does not impose this restriction. In *Houghton v. Allstate Property & Casualty Insurance Co.*, 2022 US Dist. LEXIS 122491 (M.D. La.), Houghton's employer, AIR, was the named insured on a policy issued by Sentinel. AIR told Sentinel that all of its vehicles and drivers were located in Georgia, even though Houghton and his company vehicle were located in Louisiana. Under the circumstances, the court found that Georgia law should control UM/UIM coverage under the Sentinel policy.

The UM/UIM provisions at issue in *Eberlein v. Standard Fire Insurance Co.*, 2022 US App. LEXIS 24936 (8th Cir.), provided that Standard Fire does "not provide coverage *under this Coverage Section* for 'bodily injury' sustained by any 'insured': 1. While 'occupying' any motor vehicle owned by that 'insured' which is not insured for *this coverage* …" (emphasis by the court). The plaintiff argued that "this coverage" simply referred to UM/UIM coverage, regardless of which policy provided the coverage. The court agreed with Standard, however, that the provision referred to vehicles qualifying for coverage under the Standard policy itself. Since the plaintiff was injured while riding his motorcycle, which was not covered under the Standard policy—although it was covered under a different policy—the plaintiff was not entitled to UIM coverage under the Standard policy.

The appellate court in *Progressive County Mutual Insurance Co. v. Caltzonsing*, 2022 Tex. App. LEXIS 84849 (Tex. Ct. App.), addressed, as a matter of first impression, whether Caltzonsing

was precluded from recovering under Progressive's UM/UIM coverage because the owner of the tortfeasor's vehicle, Enterprise Rent-A-Car, was issued a certificate of self-insurance by the Texas Department of Public Safety. The policy excluded from the definition of an uninsured vehicle any vehicle that was "owned or operated by a self-insurer under any applicable vehicle law, except a self-insurer that is or becomes insolvent."

The court concluded that, notwithstanding the certificate of self-insurance issued to Enterprise by the TDPS, a reasonable meaning of the term "self-insurer" requires a lack of actual insurance, financial responsibility, and some form of risk retention. The court then went on to determine that Enterprise retained no risk in this case, since, pursuant to the federal Graves Amendment, 49 USC § 30106, a leasing company like Enterprise could not be held vicariously liable for the negligence of a lessee driver. Since there was no contention that Enterprise itself was in any way negligent or committed a crime, the court found that the Graves Amendment eliminated Enterprise's risk for the loss; accordingly, Enterprise was not a "self-insurer" under the terms of the Progressive policy.

The court went on to hold that, even if Enterprise had qualified as a "self-insurer," the exclusion in the claimant's policy would have violated public policy as it would deny an insured statutorily mandated UM/UIM coverage every time he or she was injured by the operator of a rental car.

Phil Bramson

11. Jurisdiction

In *Allen v. Foxway Transportation, Inc.*, 2022 US Dist. LEXIS 15303 (M.D. Pa.), a tractor-trailer dispatched by two Canadian companies, a motor carrier and a broker, was en route to Pennsylvania when it was involved in an accident in New York, resulting in the death of two children who were residents of Pennsylvania. The children's estate brought suit in Pennsylvania, and the Canadian companies sought dismissal on grounds of lack of personal jurisdiction. The court found that, because both defendants had purposely availed themselves of the privilege of doing business in Pennsylvania, and their truck was heading to make a delivery in Pennsylvania when it was involved in the accident, specific personal jurisdiction over the Canadian companies was proper.

The plaintiff and defendant in *Wesco Insurance Co. v. Prime Property & Casualty Insurance*, 2022 US Dist. LEXIS 43516 (S.D.N.Y.), insured two commercial vehicles involved in an accident with each other. Prime disclaimed coverage because its policy included a "scheduled drivers endorsement," and the named insured's driver was not a scheduled driver on the accident date. Prime filed a declaratory judgment action in Utah, and Wesco followed with a declaratory judgment action in New York. The Southern District, applying the principles set out in *Colorado River Water Conservation District v. United States*, 424 US 800 (1976), chose to abstain from asserting jurisdiction rather than risk contradictory judgments on coverage.

Nakota Trucking, LLC v. Hub International Mountain States Ltd., 2022 US Dist. LEXIS 123886 (D. Idaho), is notable for its holding that neither general nor specific jurisdiction attach to an insurer simply by virtue of its insured's state of domicile (particularly where the policy documents indicate an address in Colorado and the insurer arguably had no idea that its insured was domiciled in Idaho).

To invoke subject matter jurisdiction in federal court, Article III of the Constitution of the United States requires a plaintiff to show (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) that a favorable decision will likely redress the injury. In *Great West Casualty Co. v. Halvorson*, 2022 US Dist. LEXIS 215998 (D.N.D.), the court held that the insurer could not make that showing when bringing a declaratory judgment action on coverage where no action for damages had yet been brought against its insured. The court noted that determining insurance coverage generally requires comparing the applicable policy language to the operative facts alleged in an underlying claim or complaint, without which it is impossible to assess all of the parties' contractual obligations under the insurance policies at issue. The court was also concerned by the uncertainty of whether the injured party would ever assert claims against parties other than the named insured, which parties the insurer sought to implead in its declaratory judgment action.

Phil Bramson

12. Transportation Network Companies (TNC)

Two cases this year looked at whether a transportation network company, such as Uber or Lyft, can be held vicariously liable for the negligence of one of its drivers, notwithstanding contentions that the driver was an independent contractor.

In *Mason v. Uber Technologies, Inc.*, 2022 Cal. App. Unpub. LEXIS 1848 (Cal. Ct. App.), an Uber driver who was transporting four passengers parked his car along the street in front of a San Francisco hotel rather than in the hotel's driveway. Moments later, one of his rear passengers attempted to exit on the driver's side of the vehicle and opened the car door just as a garbage truck drove past. Plaintiff Mason, who was standing on the back of the garbage truck, was knocked to the ground, and suffered serious physical injuries. The appellate court overruled

the trial court and held that the Uber driver owed Mason a general duty to exercise due care in offloading his passengers. Among other factors, the court noted that the general duty of care should be imposed when the driver offloads passengers in a location where the passenger's door could foreseeably be opened into oncoming traffic.

Salaam v. Bowman, 2022 N.Y. Misc. LEXIS 5512 (N.Y. Sup. Ct. N.Y. Cnty.), arose out of a motor vehicle accident in which the plaintiff, a pedestrian, was allegedly struck by a car driven by defendant Bowman. At the time of the accident, Bowman was providing transportation through Via, a technology company that created the Via cellphone application, and Flatiron, its wholly owned subsidiary that coordinates transportation services, dispatching "driver partners" to fulfill trips arranged through Via's application.

Via and Flatiron asserted that, because Bowman was an independent contractor, they had no vicarious liability for her actions. In support of this contention, the defendants showed that Bowman made her own hours and could work for other driving applications; received no fringe benefits and received a 1099 tax form as opposed to a W-2; and provided her own vehicle and insurance. Bowman's own testimony, however, showed that Via and Flatiron provided turn-by-turn instructions through its application's GPS function, which Bowman was required to follow; required Bowman to have the Via magnetic logos on her vehicle; specified vehicle and insurance requirements for Bowman; collected from customers and paid Bowman on a trip performance basis; paid Bowman's toll expenses; and arranged for the lease of the vehicle, paid for the lease directly, and then paid Bowman the difference. Given the evidence that Via and Flatiron controlled significant aspects of Bowman's work by dictating which customers to pick up and which route to take to transport them to the destination and controlled all aspects of pricing and payment, the court found a triable issue of fact as to whether the defendant was vicariously liable for the driver's conduct.

Phil Bramson

13. FMCSA Watch

2022 was a fairly quiet year for the Federal Motor Carrier Safety Administration (FMCSA) on the regulatory front. The agency proposed requiring the use of speed-limiting technology on commercial motor vehicles (CMVs). The FMCSA also sought comment on the use of electronic identification for CMVs to enhance agency enforcement. The agency's last COVID-19 exemption for driver hours-of-service requirements was allowed to expire, and the agency proposed limiting the duration and scope of regional disaster relief exemptions issued by the agency or state governors.

In March 2022, the FMCSA issued a Final Rule amending its regulations to eliminate the requirement that drivers operating CMVs in interstate commerce prepare and submit a list of their convictions for traffic violations to their employers annually. The agency noted that this requirement was largely duplicative of a separate rule that requires each motor carrier to make an annual inquiry to obtain the motor vehicle record for each driver it employs from every state in which the driver holds or has held a CMV operator's license or permit in the past year. To ensure motor carriers are aware of traffic convictions for a driver who is licensed by a foreign authority rather than by a state, the agency amended the rule to provide that motor carriers must make an annual inquiry to each driver's licensing authority where a driver holds or has held a CMV operator's license or permit.

In addition, a couple of noteworthy court decisions were issued this year by state and federal courts upholding the legality of FMCSA rules. In March 2022, a New York State intermediate appellate court issued a decision in a case brought by a group of owners and operators of CMVs challenging the legality of laws requiring CMV operators to record their hours of service and duty status as well as other relevant data and to produce such records for inspection upon demand by state law enforcement (49 USC § 31142[d]). The relevant Final Rule issued by the FMCSA, which was incorporated into New York State law, required, subject to certain exceptions, that electronic logging devices be installed and in use in CMVs by December 18, 2017 (49 CFR 395.8, 395.15, 395.22, 395.24). The petitioner asserted these requirements violated the New York State constitution's prohibition of unreasonable searches and seizures, among other things. The court rejected the petitioner's arguments, holding that the requirements were reasonable and thus not in violation of the constitution. *Matter of Owner Operator Indep. Drivers Ass'n, Inc. v. N.Y. State Dep't of Transp.*, 205 A.D.3d 53 (N.Y. App. Div. 3rd Dept 2022).

In July 2022, a US circuit court for the District of Columbia Circuit denied a union's petition for review of modifications to the hours-of-service rules for truck drivers because the FMCSA not only directly tackled the issue of driver health but also reasonably explained why the health benefits estimated in the subject rule (promulgated in 2011) would continue under the modified 30-minute break rule. The court further held that the modifications to the hours-of-service rules were sufficiently explained and grounded in the administrative record. *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 41 F.4th 586 (D.C. Cir. 2022).

Sanjeev Devabhakthuni

14. Miscellaneous

After the subject collision in *Gilley v. C.H. Robinson Worldwide, Inc.*, 2022 US Dist. LEXIS 49715 (S.D. W.Va.), occurred, the Federal Motor Carrier Safety Administration (FMCSA) completed a compliance review (CR) of defendant J&TS Transport Express's operations, resulting in an overall "unsatisfactory" rating. Among numerous motions in limine, defendants sought to exclude the CR, arguing that it was inadmissible both by statute and by the Federal Rules of Evidence. *49 USC § 504(f)* provides:

> *No part of a report of an accident occurring in operations of a motor carrier, motor carrier of migrant workers, or motor private carrier and required by the Secretary, and no part of a report of an investigation of the accident made by the Secretary, may be admitted into evidence or used in a civil action for damages related to a matter mentioned in the report or investigation.*

The question for the court was whether the CR constituted a report of "an investigation of the accident." The court found that the CR had a section regarding the collision, which needed to be redacted, as well as comprehensive general review of J&TS's operations, which was admissible as evidence as to whether J&TS was a careful and competent motor carrier.

In *Skillett v. Allstate Fire & Casualty Insurance Co.*, 2022 Colo. LEXIS 198 (Colo.), an Allstate adjuster reviewed Skillett's claim for underinsured motorist benefits and denied it. Skillett sued both Allstate and the adjuster under Colorado Revised Statute section 10-3-1115(1)(a), which provides that "[a] person engaged in the business of insurance shall not unreasonably delay or deny payment of a claim for benefits owed to or on behalf of any first-party claimant." The Supreme Court of Colorado, though, held that the statute authorized actions against insurers but not against individual claim adjusters.

The plaintiff in *Walter v. CSX Transportation, Inc.*, 2022 US Dist. LEXIS 83501 (W.D.N.Y.), fell through a hole in the deck of a lowboy trailer. The court found that the defendant owner of the subject construction project was not liable to the plaintiff under New York's Labor Law since CSX did not supervise Walter or control his work or the surface he worked on and did not have actual or constructive notice of the condition of that trailer or of its missing plank (Labor Law § 200); (2) a hole in a flatbed trailer does not present an elevation-related hazard for which protective devices are required (Labor Law § 240[1]); and the 18-inch difference between the trailer deck and the ground did not constitute such a hazard that the hole violated the State Industrial Code (Labor Law § 241[6]).

Connell West Trucking Co. v. Estes Express Lines, 2022 US Dist. LEXIS 126676 (W.D. Tex.). When two Connell West drivers were injured in an accident with an Estes Express truck, Connell West borrowed two drivers from Lanna, a company under common ownership with Connell West. Lanna sued Estes Express, asserting profits lost due to being understaffed. The court, however, found no authority (and did not elect to create authority) for the proposition that an employer may be awarded damages for the consequences of an employee's injuries and inability to work due to another's negligence.

In *Certain Underwriters at Lloyd's of London v. Scents Corp.*, 2022 US Dist. LEXIS 181559 (S.D. Fla.), Lloyd's insured the shipper of a load of perfume that was stolen en route to the defendant consignee. The shipper asserted that the risk of loss had passed to the consignee when the cargo was loaded onto the truck, but the consignee refused to pay the shipper for the goods. Lloyd's then paid the shipper and brought suit to recover from the consignee. Since Lloyd's contract with the shipper did not provide expressly for subrogation rights, and since Lloyd's did not pay a debt owed by the shipper, the court found that Lloyd's did not have standing to assert a claim for either contractual subrogation or equitable subrogation.
No good deed…

The plaintiff in *Brendon Banks v. Progressive Paloverde Insurance Co.*, 2022 La. App. LEXIS 1696 (La. Ct. App.), was a driver for Progressive's motor carrier insured RLH, and he sued his employer claiming that its negligent maintenance of his truck led to equipment failure and an accident. RLH received a preservation letter from Banks but proceeded to dispose of the truck. When RLH was held liable to Banks for spoliation, RLH brought a third-party action against its insurer, asserting that its adjuster had assured RLH that it would be proper for RLH to dispose of the truck. Based on evidence, including an email to the insurance adjuster attaching a copy of the preservation letter, the trial court found that the insurer had improperly denied a request to admit that it had received the preservation letter. Finding further that merely checking its claim file and not seeing the letter was an inadequate effort, the court had sanctioned the insurer by precluding it from introducing evidence that it had not received the preservation letter. The appellate court, however, lifted the trial court's sanction and permitted the insurer to introduce evidence that it had not advised RLH to dispose of the truck.

The defendants in *Ballinger v. Gustafson*, 2022 US Dist. LEXIS 190974 (D. Neb.), moved to strike the counts in the plaintiff's complaint alleging violations of the Federal Motor Carrier Safety Regulations (FMSCR) on the grounds that the FMCSR does not provide a private cause of action. The court found, however, that the complaint did not attempt to state a claim for relief under the FMSCR or allege a violation of any federal regulations as a cause of action in its own right but merely alleged the

violations as evidence of negligence to be considered with all the other evidence in the case. Accordingly, the court denied the defendants' motion to strike paragraphs of the complaint, referring to the defendants' alleged violations of the FMSCR.

In *Balister v. C Mac Transportation*, LLC, 2022 Ohio App. LEXIS 3661 (Ohio Ct. App.), Balister's company, Roadway, leased a tractor to C Mac. Balister was involved in an accident, which was not his fault, while driving the tractor with an attached trailer. After the tractor-trailer was towed from the accident scene and stored by the towing company, C Mac agreed to pay the costs of towing and storing the trailer but refused to pay the costs of towing and storing the tractor. The appellate court upheld the trial court's grant of directed verdict in favor of C Mac on Balister and Roadway's claims under federal Truth in Lending regulations because motor carrier lessees are not obligated under the regulations to pay for towing and storage costs incurred by an independent owner-operator lessor during the term of the lease. Moreover, since the lease provided that C Mac was not liable to Roadway for any "negligence, depreciation, loss or damage that may occur" to the leased tractor due to "collision, fire, theft, or similar occurrence," the appellate court upheld the directed verdict dismissing the plaintiffs' breach of contract claims.

New York Vehicle and Traffic Law § 388 imposes vicarious liability on the owner of a motor vehicle where the driver is involved in an at-fault accident (even where the driver is not operating in the service of the owner). *Rosario v. Northeast Truck Rental Leasing LLC*, 2022 N.Y. Misc. LEXIS 7114 (Sup. Ct., Bronx Cnty.), however, is a recent example of the New York courts overriding VTL § 388 and enforcing the federal Graves Amendment (49 USC § 30106), which prohibits imposition of vicarious liability for a motor vehicle accident on a person or entity in the business of renting or leasing vehicles.

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