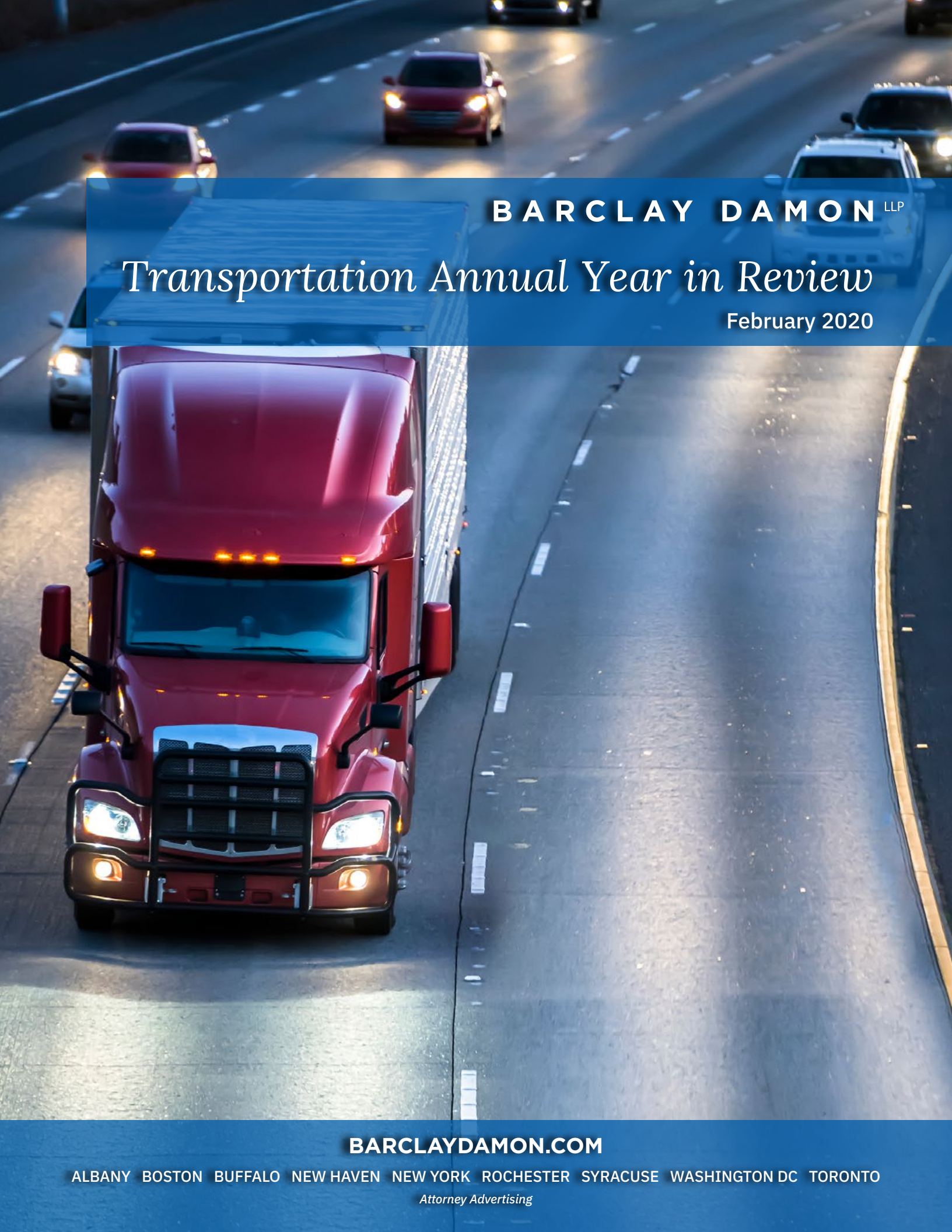

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2020 Transportation Law Update

In a recent article in *The Atlantic*, Derek Thompson argues that the efforts of Big Tech these past few decades—which have given us loads of data, software, and digital optimization as well as the ability to take pictures with our phones—have made a small number of people very rich and enhanced life for many of us, but only around the margins. What Big Tech has failed to do, so far, is deliver the new Industrial Revolution we were promised. In the world of transportation, for example, Thompson notes that, instead of the promised Eden of self-driving cars, we have the gridlock-inducing delivery of millions of packages every day by part-time contractor drivers who are not provided with the types of benefits that those of us of a certain age tend to take for granted. So far, the new economy has failed to increase wealth across the board. Millions of our citizens feel economically stagnated.

Meanwhile, in the legacy trucking world, the ongoing war of attrition between owner-operators and motor carriers continues to take its toll. Even successful companies operate on the tightest of margins while drivers struggle to support their families. Last year, a number of large truckers closed down, blaming high insurance rates. Yet, most insurance companies writing commercial auto risks are losing money, which commentators partially attribute to reptile tactics by the plaintiff bar. Here too, whatever wealth is out there is not being distributed broadly, and industry players are under constant economic pressure.

The accompanying pieces focus on different areas of law that relate to motor carriers and their insurers. While there is not a single theme that runs through the case law, the tensions described above underlie a fair percentage of the legal controversies described in the different sections. There was a flurry of activity at the end of 2019 with respect to California legislation aimed at solving what some see as the misclassification of employees, particularly in the new gig economy; others see the legislation as a bullet aimed at the heart of traditional businesses such as trucking companies. The story of the California statute known as AB-5 is told—to date—in "The Clash of Federal and State Law" section.

For the first time in many years, we do not have a section dedicated to the MCS-90 endorsement; the few cases discussing the endorsement are located in the "Miscellaneous" section. Phil Bramson and I are delighted to announce, though, that the book we're writing with underwriter Carl Sadler on the MCS-90 will be published soon.

Phil, who has worked by my side for 20 years, recently announced he will be cutting back on his legal work starting in March. He will still work with us on projects and has agreed to continue to edit *Transportation Annual Year in Review*. It will be very strange, though, not to have him next door to my office; I will greatly miss our daily interactions.

On behalf of our Transportation Team, it is our pleasure to share our summaries and evaluations of some of the key developments in the transportation arena this past year with you. As always, we look forward to your reactions and comments.

Larry Rabinovich

1. The Clash of Federal and State Law

In *Bedoya v. American Eagle Express*, 2019 US App. LEXIS 3155, the Third Circuit reviewed the history and purpose of the Federal Aviation Authorization Administration Act of 1994 (FAAAA) in assessing claims from a group of drivers who asserted their employer misclassified them as independent contractors. The court affirmed the district court holding permitting the plaintiff's lawsuit to proceed. In October, the US Supreme Court declined to take up the case.

The case focused on New Jersey wage and hour law and wage payment law. Significantly, as the court noted, these laws apply to all industries, not just to transportation companies. The statutes assume that a worker paid by a company is an employee unless the company can establish three things:

1. The worker must be free both contractually and in fact from direction and control over the services they perform.
2. The services are performed either outside the company's usual course of business or performed outside of the company's place of business.
3. The individual providing the service is customarily engaged in an independently established trade, occupation, or business.

If the company can prove all three elements, then it is exempt from the NJ employment law, including minimum and overtime wages. If not, the workers are deemed to

be employees, and the company must comply with the various employee wage laws.

The drivers filed a class action suit against AEX seeking the money they were allegedly entitled to under the NJ laws. AEX moved to dismiss on the basis that the NJ test for identifying employees was preempted by the FAAAA. The Third Circuit cited the history of the FAAAA and its role in the deregulation of the motor carrier industry as part of a broader deregulation of transportation in general. The central idea of the FAAAA is that states are not permitted to legislate on matters relating to "rates, routes, and services" of interstate motor carriers.

Courts across the country have weighed in on just how to apply this standard. The Supreme Court, for instance, has required that the impact on carrier rates, routes, or services be significant before it will find them to be preempted, and it has upheld state laws dealing with safety and insurance. Another factor is whether the law is directed at motor carriers alone or at all businesses. Also, a law that impacts the motor carrier's relationships with its customers is more likely to be preempted than one dealing with the carrier's employees. And, more generally, the FAAAA reflects a goal to avoid a patchwork of differing state laws regulating to price, routes, and services. Courts dealing with these cases must consider all of these factors.

AEX argued the NJ test for independent contractors seriously impacted the price charged to its customers since it was unable to utilize independent contractors and, instead, needed to treat its drivers as employees. This increased costs and, therefore, forced it to raise prices. AEX relied on the 2016 decision by the federal First Circuit in *Schwann v. FedEx Ground Package Sys.*, 813 F.3d 429 (1st Cir. 2016) that held that a Massachusetts law that clearly delineated between employees and independent contractors was preempted by the FAAAA. Unlike the MA statute, though, the NJ statute permits the company to establish that the worker's services are provided outside the company's usual course of business or performed outside of the company's place of business. This means that, in fact, a motor carrier may indeed utilize independent contractors. In upholding the NJ statute, the *Bedoya* court also held that, while Congress sought to ensure that market forces would determine prices, routes, and services, there was no intent to interfere with state laws guaranteeing that drivers receive livable wages, even if it led to an incidental impact on carriers' prices, routes, and services.

As these cases continue to be litigated, the question of which claims are preempted and which claims are not is very much in flux. As additional cases are resolved and appeals are decided, the criteria might become clearer (or may require the Supreme Court to eventually impose some order). For now, it is hard to predict how any case will turn out. A recurring issue is whether the FAAAA preempts claims against transportation brokers for the negligent selection of a motor carrier. In last year's edition, we summarized two cases that held that those claims were, or could be, preempted. This year, we discuss two decisions that disagree.

At *Bluefield Clinton Eugene Gilley v. C . H. Robinson Worldwide*, 2019 US Dist. LEXIS 52549 (S.D.W.V.) involved an interstate shipment for which C. H. Robinson, in its role as transportation broker, selected JT&S Transport Express to haul. Allegedly as the result of improperly maintained brakes, the driver of the rig, under the lease to JT&S, was unable to control the rig, and he collided with a passenger vehicle, killing four members of the Gilley family. Among the claims filed by the estate was one against C. H. Robinson for the negligent selection of a motor carrier. C. H. Robinson moved to dismiss, asserting the FAAAA preempted any such claim.

Similarly in *Nyswaner v. C. H. Robinson*, 2019 US Dist. LEXIS 1048 (D. Az.), C. H. Robinson was sued for negligently hiring a motor carrier whose rig caused personal injury, and the company moved to dismiss on the basis of the FAAAA. Both courts concluded the FAAAA did not preempt the negligent hiring claims. The *Nyswaner* court cited the Karen Silkwood case (464 US 238) and various other decisions that observed that a statute intended to insulate a certain industry from state regulation does not immunize the industry from liability for personal injury caused by tortious behavior. The Gilley court also noted that, in passing the FAAAA preemption, Congress carved out an exemption for laws under which states mandate or encourage motor carrier safety.

There is a two-step process for the court to engage in: first, does the state law impact a carrier's price, route, or service? If so, the court looks into whether the law can be upheld anyway since it relates to a state's legitimate concern for safety. In *Gilley*, the court found no basis for a preemption claim at all. The allegations in the complaint did not relate to C. H. Robinson's broker operations, and, therefore, there was no conflict between the state and federal laws. Both decisions found it to be problematic

to leave claimants with no claim against a broker for its failure to properly vet the carriers it utilized.

For related case law, please read our "Cargo Claims" and "Broker Liability" sections.

In *Eggleston v. UPS*, 2019 S.C. App. LEXIS 82, the South Carolina Court of Appeals held that the plaintiffs' claim against UPS for delays in delivering the husband's thyroid medication were preempted by federal law. This was not a "run-of-the-mill" personal injury action; among the allegations was that UPS was negligent in not being able to locate the plaintiffs' home address and in improperly training its personnel in parcel delivery. Since these allegations went to the heart of UPS's delivery service, preemption of state claims was appropriate.

Montoya v. CRST Expedited, Inc., 2019 US Dist. LEXIS 151831 (D. Mass.) involved alleged violations of various Iowa statutes by a motor carrier that ran a driver training school that allegedly misled and defrauded several drivers. The motor carrier argued the claims were preempted by the FAAAA, but the court found otherwise since they related to training drivers, not transporting property.

Gordon Companies v. Federal Express Corporation, 2019 US Dist. LEXIS 24571 (W.D.N.Y.) involved a claim for breach of contract against FedEx by a shipper claiming the company failed to honor an agreement to transport certain products at reduced rates. The magistrate who heard the case observed the FAAAA expresses a broad preemptive purpose regarding claims impinging upon a carrier's price, route, or service. The FAAAA does not prevent a court from enforcing the contract terms the carrier has agreed to, but a court may not enhance or enlarge the claims based on state laws or policies outside of the contract.

Here, the plaintiff acknowledged there was no explicit provision in its contract with FedEx allowing for the discount. The court held the claim for an implied agreement to grant the discount was preempted. Moreover, the contract required the customer to request an adjustment to any invoice within 180 days of shipment; the shipper missed the deadline. The shipper argued that FedEx waived this requirement. The court, though, held that a waiver claim was also preempted by the FAAAA. Since there was no claim based solely on the term of the contract, the FAAAA preempted the breach of contract suit.

Finally, we turn to California, which has passed a range of statutes designed to protect and expand worker rights and has been a major battlefield for FAAAA preemption disputes. As we reported in last year's edition, the CA Supreme Court established in *Dynamex Operations West Inc v. Superior Court*, 4 Cal. 5th 903, 416 P.3d 1, 232 Cal. Rptr.3d 1 (2018) a new test for determining whether workers should be classified as employees or as independent contractors for purposes of CA wage orders, which impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of CA employees. Wage Order No. 9 (Cal. Code Regs., tit. 8, § 11090), the subject of the *Dynamex* decision, applies "to all persons employed in the transportation industry whether paid on a time, piece rate, commission, or other basis, except for persons employed in administrative, executive, or professional capacities, who are exempt from most of the wage order's provisions." The wage order goes on to define "employ" as "to engage, suffer, or permit to work;" "employee" as "any person employed by an employer;" and "employer" as "any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person."

The CA Supreme Court held that the "suffer or permit to work" definition of "employ" contained in the wage order must be interpreted broadly—to treat as "employees" and thereby provide the wage order's protection to all workers who would ordinarily be viewed as working in the hiring business. If the worker can show they fall within this definition, the burden shifts to the putative employer to establish (a) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (b) the worker performs work that is outside the usual course of the hiring entity's business; and (c) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed (the ABC test).

In *Western States Trucking Association v. Schoorl*, 2019 US Dist. LEXIS (E.D. Cal.), the plaintiff argued the test established in *Dynamex* was preempted by the FAAAA. The court found that the plaintiff, a not-for-profit trade organization of owner-operators and motor carriers, had standing to raise the argument, but still dismissed

the action. Defendant Schoorl was the head of the CA Department of Industrial Relations, which is responsible for enforcing the state's labor laws. The suit also named CA Attorney General Xavier Becerra.

Western States argued the ABC test adopted by the *Dynamex* court directly impacted price, routes, and services of its motor carrier members, and was, therefore, preempted under the FAAAA. The court noted, though, the definition of "employ," as interpreted by the CA Supreme Court, was applicable not only to Wage Order No. 9, which relates specifically to the transportation industry, but also to 15 other wage orders unrelated to the transportation industry. The district court also rejected the argument that the ABC Test was preempted by the Federal Motor Carrier Safety Regulations, since those regulations do not address the determination of employee or independent contractor status. As set out below, though, the ongoing viability of the *Dynamex* ABC test in light of the FAAAA is back before the federal courts.

Henry v. Central Freight Lines, Inc., 2019 US Dist. LEXIS 99594 (E.D. Cal.) focused on claims by an owner-operator who asserted the motor carrier had misclassified him as an independent contractor and had not granted him certain rights and protections that employees are entitled to under the CA Labor Code. The court ruled in favor of the claimant on some issues and in favor of the company on others. In light of a 2018 FMCSA order, the CA meal and rest break rules are preempted under 49 U.S.C. § 31141, which gives the Secretary of Transportation the right to preclude the enforcement of state safety laws (see below). The wage and hour rules imposed by California, though, are enforceable. The *Henry* court found that those rules were not preempted by the Commerce Clause of the US Constitution, nor did the Truth in Leasing regulations preempt Henry's claim for reimbursement for unlawful deductions and waiting time.

Turning to the main event, the court held the FAAAA did not preempt the ABC Test that the 2018 *Dynamex* decision held determines whether a worker is an employee or an independent contractor. The CA test does not apply to motor carriers specifically (that could have been problematic); does not require the carrier to utilize employees, does not set prices; does not mandate or prohibit certain routes; and does not tell motor carriers what services they may or may not provide. Since the CA Supreme Court has now agreed to rule on whether Dynamex and the ABC Test should be applied retroactively, the judge agreed to stay the *Henry* proceedings (2019 US Dist. LEXIS 196974) until the Supreme Court rules.

Other events, though, may intervene in the question of how to classify truck drivers and other workers. After *Dynamex* was decided, a bill was introduced in the CA Assembly (AB-5) to codify the ABC Test. The bill was passed by the legislature and signed into law by Governor Newsom (Cal. Labor Code § 2750.3(a)(1)). Under the test, an employer has the burden to show that any worker is an independent contractor, not an employee. While trucking companies were among the loudest objectors, the primary targets were gig economy giants such as Uber and Lyft.

In order to prove a worker is not an employee, the company is required to prove the worker is free from its control and direction, performs work outside the scope of the company's business, and is regularly engaged in an independently established business of the same nature as the work performed for the company. This will be a difficult test for trucking companies to pass. After the law was enacted, the California Trucking Association filed suit against the CA attorney general, demanding that the law not be enforced against motor carriers.

AB-5 went into effect on January 1, 2020. A few hours earlier, though, Judge Benitez granted a temporary restraining order in favor of the California Trucking Association that prohibited CA officials from enforcing AB-5 against motor carriers (2019 US Dist. LEXIS 223065).

Two and a half weeks later, Judge Benitez extended his ruling by granting a preliminary injunction against enforcing the law against motor carriers (2020 US Dist. LEXIS 7707). In so ordering, the judge found that the California Trucking Association raised a serious question on the merits of its challenge to the ABC Test of the new law. The court found the test had more than a "tenuous, remote, or peripheral" impact on a motor carriers' prices, routes, or services. Judge Benitez himself seemed to be leaning toward finding FAAAA preemption regarding the AB-5 test; at the very least, though, he concluded the plaintiffs raised serious questions about the enforceability of AB-5 vis-à-vis motor carriers. The attorney general and other CA officials were thus enjoined from enforcing the law against motor carriers pending entry of final judgment.

The future of AB-5 as well as efforts by other states to address misclassification and offer other protections to

truck drivers will be under intense scrutiny as the case makes its way through the system.

Preemption of California's meal and rest break rules, though, may come about through federal regulatory action rather than through judicial application of the FAAAA. In our "FMCSA Watch" section of last year's edition, we reported that, on December 28, 2018 (83 Fed. Reg. 67470), the FMCSA declared that the Motor Carrier Safety Act of 1984 preempted California's meal and rest break (MRB) rules as applied to commercial motor vehicle drivers covered by the FMCSA's hours of service regulations. The administration's action was taken pursuant to the authority granted under 49 U.S.C. §31141(a) (review and preemption of state laws and regulations), which expressly provides that "[a] state may not enforce a state law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this section may not be enforced." Since the MRB rules govern the same subject matter as the federal HOS regulations, the FMCSA considers them to be rules "on commercial motor vehicle safety" as applied to property-carrying CMV drivers who are within the agency's HOS jurisdiction and, therefore, subject to preemption review under section 31141. Notably, the administration's 2018 ruling reversed its own position adopted in 2008 (73 Fed. Reg. 79204).

On March 22, 2019, the FMCSA Office of the Chief Counsel issued an opinion that the preemption decision precludes courts from granting relief pursuant to any of California's preempted statutes or regulations regardless of whether the conduct underlying the lawsuit or the commencement of the lawsuit itself occurred before or after the preemption decision. In *Labor Commissioner for the State of California v. Federal Motor Carrier Safety Administration*, case no. 19-70329 (9th Cir.), the state sought review of the FMCSA's preemption decision and whether, even if enforced, it should apply on a retroactive basis. The preemption decision has also been challenged in several actions by private parties, consolidated as *International Brotherhood of Teamsters v. FMCSA*, case no. 18-73488 (9th Cir. 2018). As of December 10, 2019, both matters had been the subject of extensive briefing, but the Ninth Circuit had not issued a ruling in either.

While acknowledging the pending litigation in the Ninth Circuit, the Central District of California concluded in *Ayala v. US Xpress Enterprises, Inc.*, 2019 US Dist. LEXIS 77089 that it had no authority to question the validity of the FMCSA's preemption order, and since California's rules were preempted, it had no basis on which to grant relief to the plaintiff on his claims arising from violations of those rules. The *Ayala* court declined to stay its decision until the Ninth Circuit has spoken. Similarly, the Eastern District of California granted summary judgment to the defendant motor carrier in *Henry v. Central Freight Lines, Inc.*, 2019 US Dist. LEXIS 99594, finding it was bound by the FMCSA's decision and, therefore, lacked authority to enforce the preempted state laws.

Another panel of the Central District, however, decided in *Silva v. Pizza*, 2019 US Dist. LEXIS 156189 (C.D. Cal.) to stay any determination of the plaintiff truck driver's claims of violations by defendant Domino's Pizza of the state's MRB rules. A Southern District of California panel took the same approach as the Silva court in *Cota v. Fresenius United States*, 2019 US Dist. LEXIS 79611, finding that a stay was warranted until the Ninth Circuit rules on the validity and retroactive effect of the FMCSA's preemption order.

The Massachusetts State Police proposed sweeping changes to the system by which towing companies would be qualified and assigned by the police to perform non-consensual tows of vehicles on state highways. In *Statewide Towing Association, Inc. v. Gilpin*, 2019 US Dist. LEXIS 204782 (D. Mass.), the plaintiff challenged the proposed changes as being preempted by the FAAAA. The court found the system was more in the nature of a contractual arrangement between the state police and the tow-truck operators and, therefore, was not an enactment having "the force and effect of law" that could trigger FAAAA preemption. Moreover, the FAAAA itself carves out an exception for state laws regarding non-consensual towing, and the court held the proposed system would fall within that exception.

Larry Rabinovich and Phil Bramson

2. *Cargo Claims*

Preemptive Effect of the Carmack Amendment

Val's Auto Sales & Repair v. Garcia, 2019 US Dist. LEXIS 17408 (E.D. Ky.) involved a claim of federal preemption of the plaintiff's state law claims in the context of a Carmack claim. The plaintiff was contracted by Ezee Trans, LLC, the defendant's employer, to transport a minivan from Louisiana to Kentucky. The defendant loaded the van

onto Ezee Trans's flatbed truck and proceeded to drive to Kentucky. Shortly before reaching his destination, the defendant attempted to pass under a railroad bridge. The minivan on the flatbed struck the bridge and was damaged.

The plaintiff filed an action in KY state court alleging negligence, vicarious liability, and negligent entrustment. The defendants removed the action to federal court and moved to dismiss the negligence claims as preempted by the Carmack Amendment, 49 U.S.C. § 14706. The plaintiff then cross-moved to remand the action back to state court and for leave to file an amended complaint that added a claim under the Carmack Amendment. The plaintiff argued its negligence claims against Garcia, as the driver, and Ezee Trans were not preempted by the Carmack Amendment because the driver was not a "carrier."

The court disagreed, holding that the Carmack Amendment preempted any claim related to the damage of goods while in the course of interstate transportation. Because the minivan was damaged while being transported in interstate commerce, the Carmack Amendment preempted the plaintiff's state law claims. The court granted the plaintiff's motion for leave to file an amended complaint pleading a cause of action under the Carmack Amendment but struck the plaintiff's state law claims on the ground that they were preempted.

On its motion to remand, the plaintiff argued the removal was not proper because the Carmack Amendment claim was not pled in its complaint, but raised by the defendants as a defense. Normally, a defendant cannot remove an action to federal court based on an anticipated defense based on a federal statute. The court, however, held that removal was proper because the Carmack Amendment "wholly displaced" state law concerning the subject matter of the complaint. Because the Carmack Amendment completely preempted state laws claims related to damage to goods shipped in interstate commerce, the complaint alleging that damage was properly removed to federal court.

The issue in *Federal Insurance v. Royal Auto Trans Inc.*, 2019 US Dist. LEXIS 172556 (D. Or.) was whether the Carmack Amendment preempted cross-claims brought by defendant STI, a broker, against T. G. R., the carrier with which STI contracted for transporting goods in interstate commerce. STI brought cross-claims for breach of contract, contractual indemnity, and common law indemnity based on the allegation that T. G. R. had impermissibly subcontracted transporting the goods to Royal Auto Transport. The carrier moved to dismiss the cross-claims as preempted by the Carmack Amendment.

STI argued that T. G. R. was acting as a broker when it subcontracted the shipment to the second carrier, and the cross-claim was not preempted because the Carmack Amendment did not apply to brokers. The court found the Ninth Circuit had not addressed the issue of whether the Carmack Amendment preempted a claim by a broker against a motor carrier. The court held that, although a claim based on an assignment of rights under a bill of lading would be preempted by the Carmack Amendment, a claim for indemnity by a broker against a shipper based on a contract other than a bill of lading would not be. Because STI's cross-claim was based on a shipping contract and not a bill of lading, the cross-claim was not preempted.

Heliene, Inc. v. Total Quality Logistics, LLC, 2019 US Dist. LEXIS 166347 (S.D. Ohio) addressed whether the Carmack Amendment preempted a claim for damages based on the late shipment of goods. The plaintiff hired the defendant to broker a shipment of solar panels from Ontario to Iowa. To avoid recently enacted tariffs, the shipment needed to enter the United States by a specific date. Although the defendant assured the plaintiff it would meet that date, the panels did not enter the United States by then. As a result, the plaintiff had to pay increased duties, lost profits, and storage fees. The plaintiff sued the defendant, asserting fraud and breach of contract. The defendant then moved to dismiss the complaint on the basis of preemption.

The court held the plaintiff's claims were not preempted by the Carmack Amendment, which governs the liability of carriers, not brokers. Because the defendant was acting as a broker in the transaction, the Carmack Amendment did not apply. The plaintiff's fraud cause of action, however, was preempted, not by Carmack, but by 49 U.S.C. § 14501(c) (see "The Clash of Federal and State Law" section). Section 14501(c) preempts state-imposed trucking regulations and prohibits states from enforcing laws, regulations, or "other provisions" related to a carrier's price, route, or service. Section 49 U.S.C. § 14501(c), therefore, preempts tort causes of action because those claims are state-imposed obligations. Section 14501(c), however, does not preempt contractual causes of action that are self imposed, not state imposed. The plaintiff's fraud claim, therefore, was preempted, but the plaintiff's breach of contract claim was not.

Does the Carmack Amendment preempt a claim of bad faith against a carrier? The plaintiff in *Security USA Services v. UPS*, 371 F. Supp.3d 966 (D.N.M.) sued the defendant in New Mexico state court for damages to a shipment that was transported from New Mexico to Texas, alleging breach of contract and bad faith. The defendant removed the action to federal court and moved to dismiss the bad-faith claim on the ground that it was preempted by the Carmack Amendment. The plaintiff argued the bad-faith claim was not based on the interstate shipment of goods, but rather on the defendant's poor dealings in handling the plaintiff's claims and, therefore, was not within the scope of Carmack preemption.

The court held that Congress enacted the Carmack Amendment to establish uniformity among states in the application and resolution of interstate shipping loss and damage cases. The statute completely occupied the field of interstate shipping, and the preemptive effect was exceedingly broad. Therefore, federal courts have dismissed nearly all state law claims related to damaged goods or ones lost in transit as preempted.

The Supreme Court, though, has not clarified the extent to which state law provisions pertaining to the claims process, as opposed to the shipping of goods, are preempted. Courts have identified a peripheral set of state and common law causes of action that are not preempted because they are incidental to the Carmack Amendment and do not expand a carrier's obligations under it. Courts have held that a carrier's responsibility is substantively enlarged if a state law imposes liability on a carrier stemming from the claims process and liability related to the payment of claims. In this case, the plaintiff's bad-faith claim was preempted because it sought to impose liability on the carrier arising out of its conduct in not paying the plaintiff's claims. The court also denied the plaintiff's motion to add a cause of action under the New Mexico Unfair Practices Act, finding it was preempted by the Carmack Amendment.

One of the issues in *Mecca & Sons Trucking Corp. v. White Arrow*, 763 Fed. Appx. 222 (3d Cir.) was whether the plaintiff, a freight broker, could recover damages under the Carmack Amendment. Grocery store chain Trader Joe's contracted plaintiff Mecca & Sons to transport a load of cheese from New Jersey to California. In turn, Mecca & Sons contracted carrier White Arrow to transport the load. A provision of the contract was that the cheeses had to be maintained at 40 degrees or below during the shipment, and the temperature of the shipment had to be monitored. When the shipment arrived in California, the monitoring records showed that the shipment spent a considerable amount of time above 40 degrees, and Trader Joe's rejected it. Mecca & Sons arranged for the cheese to be transferred to a cold-storage facility and tested, and the cheese was eventually destroyed.

The cheese producer filed a claim with Mecca & Sons for the shipment value. Mecca & Sons paid the claim and then sued White Arrow for the shipment value plus additional costs under the Carmack Amendment. White Arrow argued that, as a broker, Mecca & Sons could not sue a carrier for damages under the Carmack Amendment. The court agreed the Carmack Amendment did not grant brokers a right to sue, but held that Mecca & Sons could still avail itself of the provision granting a right of action to a "person entitled to recover under the receipt of bill of lading." The court also found that Mecca & Sons could rely on the theory of equitable subrogation or equitable apportionment under 49 U.S.C. §14706(b).

Of course, to recover under the Carmack Amendment, a plaintiff must first establish a *prima facie* case by proving (1) delivery of the goods to the initial carrier in good condition; (2) damage of the goods before delivery to their final destination; and (3) the amount of damages. In this case, there was no dispute regarding the first element, but White Arrow argued there was no proof of damage to the goods during the shipment because Trader Joe's did not perform an immediate inspection, and there was no proof that the cheese had been rendered unfit because of the high temperatures.

The court rejected that argument, holding that the fact that one of the requirements of the Trader Joe's shipping contract—maintaining the temperature of the shipment below 40 degrees—had been violated was sufficient to carry the burden of proof that the goods had been damaged during transportation. Finally, the court held that the shipment value, as stated on the bill of lading, along with the costs to Mecca & Son of transporting the rejected shipment to storage and testing the cheese were the appropriate measures of damages.

Jurisdictional Floor for Damages

The principal issue in *Rehberg v. Bob Hubbard Horse Transportation*, 2019 US Dist. LEXIS 54410 (D.N.M.) was

whether the damages in the action were sufficient to meet the $10,000 threshold for jurisdiction under the Carmack Amendment.

The plaintiff contracted the defendant to transport a horse from California to New Mexico, and the horse was injured during unloading in New Mexico. The plaintiff filed a state court action alleging negligence, and the defendant removed the action to federal court, arguing the claim was preempted by the Carmack Amendment. The plaintiff then moved to remand.

The court first held the claim was preempted by the Carmack Amendment because it completely preempted the field of damages to goods into interstate commerce. If the claim met the $10,000 threshold for claims under the Carmack Amendment, then removal was proper. The plaintiff argued the face amount of the bill of lading for the shipment was determinative, and federal jurisdiction was not present. The defendants then cited the plaintiff's pre-suit demand letter seeking $280,855.69 in damages. The court held that it would look at the complaint's allegations as well as the evidence of damages presented after the removal, such as discovery responses and affidavits. The court held the plaintiff's demand letter was sufficient to demonstrate the case met the $10,000 jurisdictional threshold.

Waiver of Carmack Amendment Rights

Aviva Trucking Special Lines v. Ashe, 2019 US Dist. LEXIS 157405 (S.D.N.Y.) looked at whether the shipping agreement effectively waived the shipper's rights under the Carmack Amendment. Thunder Bay Regional Health Sciences Center, which was insured by the plaintiff, contracted Farber Specialty Vehicles to transport a bus carrying a custom medical unit from Canada to New York. Farber then contracted Bennett Driveaway to drive the bus from Farmingdale, New York to Reynoldsville, Ohio. While improperly attempting to enter onto the FDR Drive in Manhattan, which is not open to commercial traffic (in fact, we recommend that everyone should stay off the FDR Drive), the Bennett driver struck a bridge and damaged the vehicle.

Aviva sued Bennett, alleging various state law causes of action. Bennett then moved to dismiss the state law claims, arguing they were preempted by the Carmack Amendment. Aviva responded that the agreement between Farber and Bennett contained a Carmack Amendment waiver, and its state law claims were not preempted. The agreement contained a clause stating, "This contract service is designed to meet the distinct needs of the customer and the parties expressly waive any all rights and obligations allowed by 49 U.S.C. § 14101 to the extent that they conflict with the terms of this contract."

The court acknowledged the Carmack Amendment normally preempts any state law causes of action arising out of the shipment of goods in interstate commerce unless the parties waive the Carmack Amendment provision. Citing 49 U.S.C. § 14101(b)(1), the court held that parties in a shipping contract may validly waive the Carmack Amendment if they, in writing, expressly waive any and all rights and remedies under it. To be effective, the waiver must expressly appear on the face of the contract provision in question. Courts have refused to imply those waivers from contract provisions that were not express waivers. Because the clause in the shipping agreement between Farber and Bennett contained a specific reference to the Carmack Amendment, the waiver was effective, and the state law claims were not preempted.

Claim Procedure

The procedural issue in *Barton v. North American. Van Lines*, 2019 US Dist. LEXIS 118295 (N.D. Tex.) was whether the plaintiff filed its claim for damage to a shipment in a timely manner. The plaintiff arranged for the defendant to ship antiques from California to Texas, with the defendant providing a quote for the shipment but not a bill of lading. The defendant moved the goods to a local storage facility and then made arrangements for a carrier to transport the goods to Texas. The defendant sent the plaintiff an invoice for transportation services, insurance, packing services, crating services, and storage services but, once again, did not include a bill of lading.

The goods were then transported to another storage facility in Texas and kept in storage as "goods in transit." When the plaintiff received the goods, he discovered that some of them were damaged and filed a claim with the carrier that stored the goods in Texas. That carrier forwarded the claim to the defendant, who argued the goods had been converted to permanent storage when they got to Texas and denied the claim because it was submitted more than 90 days after the goods were delivered to the TX storage facility. The plaintiff sued in

state court to recover the damages, and the defendant removed the action to federal court, moving to dismiss the complaint by alleging the claim was untimely.

Under the Carmack Amendment, carriers may contractually limit the time in which to file claims, but that time period cannot be less than nine months. The time limit is not a statute of limitations, but strict compliance with the time limit is a mandatory prerequisite to claim recovery. In this case, the issue was whether the goods were considered "delivered" when they were placed in storage in Texas, in which case, the claim was untimely, or whether the goods were delivered when they were actually received by the plaintiff, in which case, the claim was timely. Because there was an issue regarding when the shipment was actually delivered, the court denied the defendant's motion for summary judgment.

Kotick v. Allied Van Lines, 2019 US Dist. LEXIS 182130 (D.N.J.) arose out of the movement of household goods from New Jersey to Canada. The plaintiff discovered that part of the shipment was damaged and sent a letter to the carrier's president and CEO noting the shipment had been damaged. When the plaintiff did not receive any response to the letter, he filed suit in NJ state court asserting various state law claims, including breach of contract and violation of the New Jersey Consumer Fraud Act (NJCFA). Alleging preemption by the Carmack Amendment, the defendant removed the action to federal court and moved to dismiss the claims on the ground that the plaintiff had not filed a proper claim under the Carmack Amendment.

The defendant argued the plaintiff's claim should be dismissed because the plaintiff did not follow the claim procedures contained in the bill of lading. The bill of lading submitted by the defendant was double sided and contained a claims procedure on the back. The plaintiff claimed he was only provided with the front of the bill of lading and never saw the back.

The court reviewed the Carmack Amendment's provisions regarding a carrier-defined claim procedure. The time limit to file a claim could not be less than nine months, and the period to bring a civil action based on the claim could not be less than two years from the date the carrier gave the shipper notice that it was denying the claim. The defendant argued the plaintiff shipper should have had knowledge of the nine-month deadline because of the Carmack Amendment provision. The court disagreed, finding that, although the Carmack Amendment contained a provision establishing the minimum time a carrier could impose for a claim, the Carmack Amendment itself did not impose that limit.

To succeed, the defendant had to demonstrate that the shipper received a bill of lading that provided the shipper with adequate notice of the requirement to file a claim. The issue of whether the plaintiff received a double-sided bill of lading precluded granting the defendant's motion to dismiss the plaintiff's claims. The court, however, dismissed the plaintiff's NJCFA claim, finding the Carmack Amendment preempted consumer protection and deceptive practices claims, and its preemptive effect was broad enough to include all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed-upon transportation.

Forum-Selection Clauses

The issue in *In re Freightquote.com*, 2019 Tex. App. LEXIS 1594 (Tex. Ct. App.) was whether language contained in a bill of lading was sufficient to incorporate the broker's terms and conditions that were available online into the bill of lading. The shipper contracted Freightquote to transport goods from Texas to Mexico. When the shipment was misdelivered, the shipper sued in TX state court for damages. Freightquote sought a dismissal of the action based on a forum-selection clause contained in its general terms and conditions that, according to Freightquote, had been incorporated into the bill of lading for the shipment. The shipper argued the language contained in the bill of lading was insufficient to incorporate Freightquote's terms and conditions.

The court held that, given appropriate language, unsigned documents may be incorporated into an agreement by reference. In this case, the language on the bill of lading stated, "Customer agrees to the organization's terms and conditions, which can be found at www.freightpaycenter.com." Agreeing with the plaintiff, the court held that the language on the bill of lading was insufficient to incorporate Freightquote's terms and conditions into the bill of lading. The term "organization" was not defined, and the web address was not Freightquote's website. Those ambiguities were sufficient to nullify the attempt to incorporate the terms and conditions—including the forum-selection clause—into the bill of lading. The defendant's motion to dismiss was denied. *Ripley v. Long Distance Relocation Servs., LLC*, 2019 US Dist. LEXIS 186240 (D. Md.) looked at whether a forum-selection clause contained

in a bill of lading was enforceable against a shipper. The plaintiff contracted the defendant to transport household goods from Maryland to Texas. When the shipment arrived in Texas, various items were damaged or lost. The plaintiff brought an action against the carrier and various other entities in federal court in Maryland. The defendant sought to dismiss the action based on a forum-selection clause contained in the bill of lading, submitting what it claimed to be the bill of lading that consisted of a page with the forum-selection clause and a valuation addendum signed by the plaintiff. The plaintiff argued the forum-selection clause in the bill of lading did not apply because they never signed it, and there were other parties to the action that were not parties to the bill of lading.

The court held that forum-selection clauses contained in proper bills of lading are enforceable so long as they are contractually valid and the plaintiff's claim is within the scope of the clause. However, the court agreed that the defendant had not demonstrated that the plaintiff executed the bill of lading that contained the forum-selection clause. The fact that the plaintiff executed the valuation addendum did not prove the plaintiff executed the bill of lading containing the forum-selection clause. The court did not address the plaintiff's argument regarding non-parties to the forum-selection clause because it was not yet apparent that the forum-selection clause was enforceable.

Carriage of Goods by Sea Act (COGSA)

The issue in *Great American Insurance Co. v. Seaboard Marine*, 2019 US Dist. LEXIS 144304 (S.D. Fla.) was whether the plaintiff had sufficiently shown that goods delivered to the carrier were in good condition as to be entitled to recover the value of those goods when they were stolen while in the carrier's possession. The plaintiff's insured delivered a container of seafood to the defendant in Nicaragua for transportation to New Jersey. The container was stolen the next morning while being transferred to the Nicaraguan port. The plaintiff paid the claim from its insured and sued to recover under the Carriage of Goods by Sea Act (COGSA).

The plaintiff relied on the bill of lading for the shipment, but the court held that, under COGSA, the bill of lading was sufficient proof of delivery of the cargo in good condition only if it was without limiting language or contained terms the carrier could verify. In this case, the bill of lading stated "particulars furnished by shipper" and was not sufficient to prove the shipment was delivered to the carrier in good condition. The plaintiff also submitted the affidavit of the company that supplied the seafood to the plaintiff's insured, stating 3,383 cases of seafood were loaded into the container at the temperature indicated on the bill of lading. The defendant objected to the affidavit in that it did not indicate when or where the container was loaded or the condition of the cargo. The court held the affidavit was insufficient to entitle the plaintiff to recover damages as a matter of law.

The plaintiff broker in *Ultra Logistics v. First Class Solution*, 2019 US Dist. LEXIS 220307 (D.N.J.) entered into a contract with the motor carrier defendant to transport property for the plaintiff's customers. When goods were damaged in transit, the broker sued the motor carrier for breach of contract. The court agreed with the defendant that state law claims against a motor carrier for breach of contract arising out of the interstate transportation of property are preempted under the Carmack Amendment. Accordingly, the defendant's motion to dismiss was granted.

The motor carrier's claims under the Carmack Amendment for unpaid freight charges were rejected by the court in *Spedag Americas, Inc. v. Bioworld Merchandising, Inc.*, 2019 US Dist. LEXIS164774 (N.D. Tex.) because the shipment in question originated overseas and traveled under a through bill of lading (citing *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89 (2010)). The court also found that, while a shipper must bring a complaint to the federal Surface Transportation Board within 180 days if it wishes to contest the charges billed, no such "180-day" rule applies to the shipper's assertion of a defense against the motor carrier's action for unpaid charges.

The plaintiff in *Sanchez v. United Parcel Service Inc.*, 2019 US Dist. LEXIS 195140 (S.D. Fla.) cut his hand on a lamp purchased from J. C. Penny and delivered by UPS. He brought an action for damages in state court, and UPS removed the action to federal court on the grounds that it raised a question of federal law under the Carmack Amendment. The court rejected the plaintiff's argument on his motion to remand that Carmack preemption could only apply if the complaint alleged the property in question had been transported in interstate commerce, particularly if the court was reviewing evidence outside the complaint in the context of a removal motion. The district court agreed with the defendant, however, (citing *Smith v. United Parcel*

Service, 296 F.3d 1244 (11th Cir. 2002) as the controlling authority in the 11th Circuit, including Florida federal courts) that there is no bodily injury exception to the scope of the Carmack Amendment. Since the plaintiff's claims against UPS arose out of the defendant's transportation of property in interstate commerce, those claims were governed by the federal Carmack Amendment, and the plaintiff's motion to remand to state court was denied.

A dispute arising out of the transportation of household goods was also at the heart of *Biesemeyer v. Plus Relocation Services, Inc.*, 2019 US Dist. LEXIS 174326 (S.D. Tex.). In this case, however, the plaintiff was being relocated by his employer, and the employer engaged defendant Plus to arrange for the transportation of the plaintiff's household goods. Plus hired motor carrier Suddath to perform the actual transportation. Suddath transported the plaintiff's property to its warehouse in Houston when the area was struck by Hurricane Harvey; the roof of Suddath's warehouse collapsed, and the plaintiff's property was damaged.

Under these facts, the court concluded Plus had not acted as either a motor carrier or a freight forwarder and dismissed the plaintiff's claims against Plus under the Carmack Amendment. The court, however, found that the plaintiff stated claims against for breach of contract sufficiently to survive a motion to dismiss, and the court retained jurisdiction over the breach of contract claims even though the sole federal cause of action under the Carmack Amendment had been dismissed and there was not complete diversity between the plaintiff and all defendants.

The cargo at issue in *Mecca & Sons Trucking, Corp. v. J. B. Hunt Transport Services, Inc.*, 2019 US Dist. LEXIS 201197 (D.N.J.) was a load of Fibersol, a pea protein. The shipment was rejected by the consignee upon arrival because the seal on the container was broken. Upon opening the container, it was also discovered that one of the super sacks containing the product had fallen over, but no one examined them or tested the contents for damage or adulteration.

The court initially held that the plaintiff acted as a broker and did not have standing to bring a claim against the motor carrier under the Carmack Amendment. The court went further, however, to hold that the plaintiff failed to allege the shipment arrived in damaged condition, notwithstanding the consignee's rejection: Only one of the super sacks tipped over; no one examined the contents or tested the product for adulteration; the bill of lading did not require that the seal on the container be intact for the shipment to be accepted; and the absence of the seal alone did not render the shipment damaged.

Alan Peterman

3. *Bodily Injury Liability*

Is a driver involved in an accident in the south-bound lane liable when rubber-necking drivers in the north-bound lane are involved in a fatal rear-end collision? The court in *Quarles v. Tenn. Steel Haulers*, 2019 US Dist. LEXIS 26628 (M.D. Ala.) said no, under the circumstances. There was a long delay between the first accident at 5:50 p.m. and the second accident at 8:31 p.m. At the time the decedent was stuck in north-bound traffic, the scene of the south-bound accident was stable, and police had assumed control. There was no evidence that the driver of the tractor-trailer in the first accident blocked north-bound traffic and no evidence of debris spilling into the north-bound lanes. Finally, the tractor-trailer driver who caused the north-bound rear-end collision acted egregiously; everyone else slowed down for traffic, but he did not, so, it could not be said that the first accident was a distraction. Accordingly, there was no uninterrupted natural, probable, or continuous sequence from the first tractor-trailer's wrongful actions to the death of the decedent. Rather, the unforeseeable actions of the tractor-trailer driving behind the decedent broke the chain of causation.

Attempting to stretch proximate cause even further, *Beelman Truck Co. v. Raben Tire Co*, 2019 US Dist. LEXIS 178874 (E.D. Mo.) raised the question of whether negligent repairs that caused a disabled vehicle to be parked at the side of the highway could lead to liability for a subsequent collision involving other vehicles. The drivers involved in the accident sued the owner of the disabled vehicle, who, in turn, sought contribution from the repairman. The vehicle owner argued the repairman "set in motion" the events that led to the accident—that, but for his negligent repair, the accident would not have occurred. The court found, however, that proximate cause requires something in addition to the "but for" causation test. The court ultimately decided the repairman's negligent conduct was too far removed from the accident to be considered a "natural and probable" cause of the accident, given that, at the time of the incident, the roadways were wet, one of the vehicles involved in the accident was traveling over the

posted 70 mph limit on rear tires that were significantly lower than they should have been, and that vehicle swerved to avoid a truck merging into its lane.

It is a sign of the times that cell phone use while driving is frequently a factor when considering whether a driver acted negligently or even recklessly (and whether a driver's employer should be vicariously liable for compensatory or punitive damages). In *Green v. Markovitch*, 385 F. Supp. 3d 1190 (N.D. Ala.), the court found a genuine issue of material fact regarding whether the driver's conduct was "inherently reckless" in light of the fact that he was talking on a hands-free handset at the time of the accident.

Similarly, the court in *Alpizar v. John Christner Trucking, LLC*, 2019 US Dist. LEXIS 64751 (W.D. Tex.) refused to grant summary judgment on the gross negligence claim against the defendant driver, finding a question of fact regarding his cell phone use at the time of the accident and whether that could be considered grossly negligent under the circumstances. On the other hand, the court found no evidence that his motor carrier employer had authorized the driver's alleged cell phone use, committed the acts involving an extreme degree of risk, or had awareness of the risk itself.

In *Denham v. Bark River Transit*, 2019 US Dist. LEXIS 172214 (S.D. Tex.), the court denied the defendants' motion for summary judgment regarding gross negligence because there was a disputed issue of material fact regarding whether the driver was grossly negligent by using his cell phone and whether the motor carrier employer was grossly negligent by authorizing or ratifying his actions. The evidence indicated the driver made or received calls around the time of the accident, and there was nothing to corroborate his statement that he was not on the phone at the time of the accident. The evidence also showed that the motor carrier knew it was raining heavily and the driver had a flip phone, which they called him on during the morning of the accident. Taken together, the evidence was enough to raise a factual question regarding whether the motor carrier was grossly negligent by authorizing or ratifying the cell phone use.

Saldana v. Larue Trucking, 268 So. 3d 430 (La. Ct. App.) looked at the length to which vicarious liability could be assigned based on the concept of a truck driver's statutory employment under 49 C.F.R. § 390.5. Authorized motor carrier Rowland Timber entered into a verbal agreement with Larue Trucking, also an authorized motor carrier, under which Larue would haul logs for one of Rowland's customers. Larue assigned the job to driver Glover, who used the tractor he had leased to Larue. Glover was involved in an accident with Saldana, who argued that Glover was a statutory employee of Rowland. It was conceded, though, that Larue was an independent contractor, and, since Rowland had not leased the tractor from Glover, the court found no statutory employment relationship between Rowland and Glover.

In *In re Molina*, 575 S.W.3d 76 (Tex. Ct. App.), a driver was stopped by police on the left shoulder of an interstate highway. The police officer stopped behind him and directed him to move to the right shoulder. The driver and the police officer then crossed the highway at an approximate 90-degree angle in front of defendant Molina, who had been driving in the left-most lane but, seeing the police, moved one lane to the right. In trying to avoid the first driver who was crossing the highway, Molina slowed down, but a semi-trailer driven by defendant Villalta rear-ended Molina's vehicle, causing it to strike the plaintiff's vehicle.

The plaintiff sued Molina, Villalta, and Villalta's employer, and the defendants turned around and sued the driver who was crossing the highway. The trial court dismissed that driver, but the appellate court overruled, finding a reasonable jury could conclude the first driver's conduct in darting directly across a three-lane highway to get from shoulder to shoulder was negligent and was a proximate cause of the accident.

The injured plaintiff in *Poe v. Cook*, 2019 US Dist. LEXIS 137033 (D. Or.), a truck driver trainee, was riding as a passenger in a tractor-trailer operated by his trainer. When the vehicle was involved in an accident, the plaintiff sued his trainer and made the novel argument that, since they were both employed by the same motor carrier, the trainer's defense of comparative negligence was barred under the exclusive remedy provisions of the workers' compensation law. The court found this argument "both peculiar and incongruous," holding that workers' compensation immunity is not a shield for an employee from his own negligence.

In a notable state constitutional decision in *Hilburn v. Enerpipe, Ltd.*, 2019 Kan. LEXIS 107 (Kan.), the Supreme Court of Kansas struck down KS statute K.S.A. 60-19a02, which caps jury awards for non-economic damages in personal injury actions. The court held that the non-

economic damages cap of the statute was irreconcilable with the plaintiff's inviolate right of trial by jury under the KS Constitution Bill of Rights § 5 because it intruded upon the jury's determination of the compensation owed her to redress her injury.

The plaintiff's decedent in *Pacheco v. Barschow*, 2019 Conn. Super. LEXIS 1098 (Conn. Super. Ct.) was killed in a collision with a truck operated by someone who did not have a commercial driver's license. The truck was leased to the truck driver's employer by Penske. The plaintiff argued that Penske violated federal and Connecticut law by failing to ensure or warn that anyone the employer allowed to drive the truck had to have a commercial driver's license. The court disagreed that Penske had responsibility under federal law because Penske was not a motor carrier, but was solely involved in the business of truck rentals.

On the other hand, CT law provides that a person driving a "commercial vehicle" of at least 26,001 pounds must have a commercial driver's license. Connecticut defines "commercial motor vehicles" as those "designed or used to transport passengers or property." In this case, the evidence showed that the truck in question weighed 25,999 pounds; accordingly, it was not a "commercial motor vehicle," and no commercial driver's license was needed. The decision leaves open the possibility, though, that a leasing company might have a duty to warn a lessee that anyone driving a "commercial motor vehicle," as defined under CT law, must have a commercial driver's license.

The court found plenty of evidence of the truck driver's gross negligence in *De Jesus Partida Aranda v. Yrc Inc.*, 2019 US Dist. LEXIS 92787 (N.D. Tex.) to warrant sending the case to the jury. Between 1995 and 2008, the driver received 50 different warning letters, suspensions, and discharges from his motor carrier employer (most of which were for absenteeism and tardiness, but some were for driving longer than permitted by law); was involved in five non-preventable accidents; and caused one preventable injury. As the truck driver was only five to 10 minutes away from completing his trip after more than 13 hours on duty, it would be reasonable to believe he was eager to finish his route or that he was concerned about running out of time because he had been reprimanded for delayed deliveries and running time violations in the past. The plaintiffs introduced uncontracted evidence that the truck driver was traveling dangerously fast, considering the slow pace of traffic and the presence of debris in the road, and did not slow down. Additionally, the truck driver admitted he saw the vehicle that changed lanes in front of him had its turn signal on when he approached, but he did not slow down or change lanes. Based on this information, the court determined that a jury could find that the truck driver was grossly negligent.

The court did not find sufficient evidence to allow a reasonable jury to find that the truck driver's employer was vicariously liable for the driver's gross negligence. Nevertheless, there was sufficient evidence for a jury to find that the employer was itself grossly negligent in hiring, retaining, training, supervising, and entrusting a truck to the driver. To show that an employer was grossly negligent in this manner, it must be shown that prior incidents are related to the accident at issue and that the employer was aware of the peril caused by its employee and, by its acts or omissions, that it did not care. The evidence showed the driver received four warning letters for exceeding the maximum run time permitted by law, which was enough to send the question of the employer's gross negligence to the jury.

In *Miller v. Pam Transport, Inc.*, 2019 US Dist. LEXIS 174577 (S.D. Ill.), the defendant motor carrier sought to dismiss the complaint on the grounds that the plaintiff was attempting to prove negligence *per se* by alleging the motor carrier violated the Federal Motor Carrier Safety Regulations (FMCRs). The alleged violations included failure to have an adequate safety program to ensure compliance with the FMCSRs by its drivers; failure to adequately screen and investigate the driver involved in the subject accident; failure to train the driver on safely operating his tractor-trailer; and failure to discharge him because he was an unsafe driver as provided by FMCSRs. Regarding the plaintiff's citations to the FMCSRs as evidence of negligence or of wanton conduct rather than an allegation of negligence *per se*, the court, however, denied the defendants' motion to dismiss.

When a tire flew off the defendant motor carrier's trailer and struck the vehicle in which the plaintiff was a passenger, the trial court in *Le v. Colonial Freight Systems, Inc.*, 2019 Fla. App. LEXIS 18027 (Fla. Ct. App.) assigned liability to the motor carrier for $115,541.12 of the entire $521,984.39 jury verdict based on its percentage of fault. The plaintiff argued on appeal that the motor carrier should

be jointly liable for the entire verdict because it had a non-delegable duty to ensure the maintenance previously performed on the tire by the motor carrier's regular service contractor had been done properly. The flaws that caused to tire to come off the trailer, however, could not have been detected without removing the tire from its hub. The court found both the driver's outward inspection of the tire and the motor carrier's reliance on a qualified mechanic satisfied the requirements of federal law, and there was no basis to impute the negligence of the service contractor to the motor carrier.

The claimant in *Magnifico v. James*, 2019 N.J. Super. Unpub. LEXIS 2443 (N.J. App. Div.), an employee of the Township of Millburn, argued he should not be bound by the exclusive remedy provisions of New Jersey's workers' compensation law because of the exception for the employer's "intentional wrongs." The plaintiff was injured while riding as a passenger in a truck owned by Millburn and operated by another Millburn employee who the plaintiff alleged had fallen asleep at the wheel. The trial court found, and the Appellate Division agreed, that Millburn's awareness that the driver suffered from sleep apnea (a condition that did not disqualify him from obtaining and renewing his commercial driver's license) did not translate to an awareness of a substantial likelihood that the subject accident would occur. Accordingly, the "intentional wrong" threshold was not met.

The plaintiff driver in *Ahner v. Smith*, 2019 US Dist. LEXIS 190058 (N.D. Ohio) collided with Smith's tractor-trailer in the west-bound lanes of the highway, then crossed the median and collided with Hughes' tractor-trailer in the east-bound lanes. The court found that Hughes had no duty to avoid Ahner's vehicle until it actually entered the east-bound lanes; that there was no evidence to support the plaintiff's theory that Hughes could have avoided the collision by braking or swerving in the single second that passed between the time Ahner's vehicle entered the east-bound lanes and the collision; and that no negligent conduct on Hughes' part caused the collision. Summary judgment in favor of Hughes on liability was, therefore, granted. On the other hand, the court found a question of fact as to whether Ahner's negligence contributed to her collision with the Hughes vehicle.

Courts will often dismiss claims of negligent hiring, retention, training, and supervision where the defendant employer concedes vicarious liability for its employee's negligent conduct. The federal court in *Coffey v. Refrigerated*, 2019 US Dist. LEXIS 189873 (E.D. La.) found no binding Louisiana precedent on this issue, but followed the lead of other federal judges in Louisiana in ruling that claims of the employer's independent negligence in hiring should be dismissed if the employer stipulates its responsibility for the acts of the employee in the course of their employment.

In *Denton v. Universal Am-Can, Ltd.*, 2019 Ill. App. LEXIS 783 (Ill. Ct. App.), however, a jury awarded punitive damages against the employer based on its findings of negligent hiring and retention. Under Indiana law (as applied by the Illinois court), punitive damages could not be awarded against an employer on the basis of vicarious liability for the employee's conduct. The court found the plaintiff's claims for punitive damages against the insurer presented "special circumstances," which allowed the claims of negligent hiring and retention to go forward.

Stacy Marris and Roy Rotenberg

4. *Punitive Damages*

Reckless Driving

Jones v. NES Express, 2019 US Dist. LEXIS 8908 (N. D. Ala.) involved an accident in which the plaintiff was driving a pickup truck in front of a tractor-trailer driven by defendant Gilbertson for NES when Gilbertson rear-ended the plaintiff, causing the plaintiff's vehicle to be "pinched" between his tractor-trailer and another tractor-trailer traveling in front of the plaintiff. Gilbertson reported to NES that he had been cut off by the plaintiff's vehicle prior to the collision. The plaintiff asserted a punitive damages claim against Gilbertson and NES based on Gilbertson's alleged wantonness.

The court noted that, under Alabama law, wantonness is "the conscious doing of some act or the omission of some duty while knowing of the existing conditions and being conscious that, from doing or omitting to do an act, injury will likely or probably result ... while negligence is characterized as the inadvertent omission of duty." The court found there were issues of fact as to whether Gilbertson acted wantonly, and it refused to dismiss the punitive damages claim. The court noted that, while driving at a high rate of speed does not demonstrate inherently reckless behavior on its own, excess speed coupled with

other circumstances can establish that an individual's behavior was inherently reckless and, therefore, constituted wantonness.

The court went on to explain that Gilbertson knew there was a lot of construction and traffic but, despite this knowledge, he had his cruise control set to 65 mph and did not start braking until one second before his tractor-trailer collided with the plaintiff's truck. The court found that the road conditions—which arguably called for drivers to use greater caution than normal—coupled with evidence of Gilbertson's inattention and high rate of speed could support an inference of wantonness, even if the plaintiff abruptly cut Gilbertson off, because it could be inferred that Gilbertson deliberately failed to adjust his driving to the adverse road conditions he faced.

FMCSR Violations

In *Mason v. C. R. England*, 2019 US Dist. LEXIS 182099 (E.D. Mo.), defendant Smith, employed by defendant C. R. England, was operating a tractor-trailer on an interstate when he struck a police vehicle that was stopped (either on the highway or the shoulder) with its lights flashing. The plaintiff was in the front passenger seat of the police vehicle. Smith testified he was initially in the right lane when he saw emergency vehicles stopped ahead of him, at which time he moved to the center lane and used his turn signal. Smith added he looked down for a second or two due to some commotion inside the cab and, when he looked back up, he was on top of the parked police vehicle. He did not know how far he traveled while looking down. Smith said he tried to swerve to avoid hitting the police vehicle and his tractor-trailer never went onto the right shoulder, claiming the police vehicle was protruding into the travel lane. A witness traveling behind Smith at 65-70 mph when the crash occurred testified that they saw bright, flashing lights on the right side of the highway as well as "a tractor-trailer obviously going faster than me because he was ... way ahead of me. But, from a distance, I saw the tractor-trailer start going from the middle lane and kind of, as if someone was either ... not paying attention ... fell asleep and started drifting, and that's when I noticed, when he started drifting ... the truck hit both vehicles, and then kept going."

In denying summary judgment dismissing the punitive damages claim, the court pointed out that in Missouri, punitive damages may be "properly submitted upon evidence that the defendant knew or had information from which he, in the exercise of ordinary care, should have known that the alleged negligent conduct created a high degree of probability of injury, and thereby showed complete indifference or conscious disregard for the safety of others." Additionally, the court noted that, under MO law, evidence of failure to follow motor carrier regulations and industry standards can support an award of punitive damages against commercial motor carriers in addition to violations of one's own standards since those violations can constitute conscious indifference, establishing a basis for punitive damages.

In moving for dismissal of the punitive damages claim, the defendants argued that Smith's account of the accident did not give rise to any inference of conscious disregard for the safety of others, and Smith understood that changing lanes to give a parked emergency vehicle as much room as possible was required by the FMCSRs. The plaintiffs in opposition argued the witness' testimony showed that Smith failed to abide by motor safety policies and actually did the opposite of what was required. The witness contradicted Smith's testimony that he slowed down before the accident and moved into the center lane to give more room to the police vehicle. The court, therefore, found an issue of fact on punitive damages.

The subject loss in *Shelton v. Gure*, 2019 US Dist. LEXIS 149280 (M.D. Pa.) occurred when, in violation of the FMCSRs, defendant Gure—with a passenger—parked his tractor-trailer on the right berm of an interstate in a "no parking" area. Gure attempted to enter the right lane at approximately 40 mph in a 70 mph zone without his lights illuminated on the trailer. At that time, the plaintiff was operating a tractor-trailer in the right travel lane and observed Gure's unilluminated tractor-trailer traveling at a low speed. The plaintiff was unable to avoid striking the tractor-trailer, causing the plaintiff's vehicle to go airborne. In denying the defendants' motion to dismiss the allegations of recklessness and the punitive damages claim, the court noted that, under Pennsylvania law, a defendant acts recklessly when "his conduct creates an unreasonable risk of physical harm to another, [and] such risk is substantially greater than that which is necessary to make his conduct negligent."

The plaintiff claimed Gure operating the tractor trailer unilluminated and with a passenger was in violation of state and federal law, including the FMCSRs. The court held a finding of recklessness on those facts was plausible

under PA law, which holds that "[p]unitive damages will be imposed where the defendant knew or had reason to know of facts which create a high degree of risk of physical harm to another and deliberately proceeded to act, or failed to act, in conscious disregard of or indifference to that risk." The court specifically held that the allegation that the defendant violated the FMCSRs, coupled with allegations of a conscious disregard for the safety and rights of others, sufficed to support claims for recklessness and punitive damages.

Driver Drowsiness

Williams v. Hickox, 2019 US Dist. LEXIS 91303 (M.D. Ala.) involved an accident in which defendant Hickox, employed by defendant Row, drove his tractor-trailer up behind the plaintiff's car. Hickox accelerated to within 10 feet of the plaintiff's car before swinging into the left lane to pass the plaintiff. Hickox then activated his right turn signal as he moved back into the right lane and struck the plaintiff's car with his tractor, forcing the plaintiff onto the shoulder of the road. The plaintiff attempted to get back on the highway but was prevented from doing so when Hickox's trailer struck his car a second time. Hickox did not stop after the collision, so the plaintiff maneuvered back onto the road and followed Hickox until he pulled over.

The plaintiff sought punitive damages based upon Hickox's alleged wantonness, Row's vicarious liability for the same, and negligent or wanton hiring, supervision, and entrustment. The defendants moved for summary judgment to dismiss the punitive damages claim, which the court denied based on evidence that Hickox fell asleep at the wheel. The court noted that, under Alabama law, it may be wanton misconduct if, after experiencing drowsiness and fatigue, a driver continues to drive and then falls asleep. However, a driver's work schedule or the amount of sleep he had the night before an accident is not in and of itself indicative of drowsiness. Instead, there must be sufficient evidence to support a reasonable inference that the driver continued to drive in reckless disregard of the premonitory symptoms of sleep, which the court found existed in this case.

Specifically, in his deposition, Hickox estimated he departed around 2:00 or 2:30 a.m., with the accident occurring around 5:30 a.m., and Row's accident investigation report included a recommendation that Hickox should make sure to get sufficient rest before driving, implying that Row's own investigation found Hickox was fatigued at the time of the collision. The court further noted a reasonable jury could conclude that Hickox's decisions to change lanes without first looking in his mirror and to flee the scene despite knowing he collided with the plaintiffs' vehicle underscored the recklessness of his conduct.

In dismissing the negligence and wantonness claim against Row for negligent hiring, supervision, and entrustment, however, the court explained the claim required the plaintiff to show that the driver to whom the defendant entrusted the vehicle was unable or unlikely to have operated the motor vehicle with reasonable safety due to one of several characteristics, including general incompetence or habitual negligence. The court further noted that AL law does not demand perfection from a commercial driver or that the driver must have a completely clean driving record. With respect to Hickox, he had a valid CDL, no points for driving violations, and had an excellent reference from a prior employer regarding his safe driving history. He also had a DUI charge several years earlier while driving his personal vehicle, a head-on collision driving an ATV, and a speeding ticket while driving a commercial vehicle, but the court held these were not sufficient to establish Row's wantonness, or even negligence, in hiring, supervising, or entrusting the tractor-trailer to Hickox.

Driver Drowsiness and Employer Vicarious Liability

Livingston v. Greyhound Lines, Inc., 208 A.2d 1222 (Pa. Super. Ct.) involved an accident where a Greyhound bus carrying over 40 passengers collided with a tractor-trailer. Both the plaintiff bus passenger and the defendant truck driver contended at trial that the accident was caused by the bus driver falling asleep at the wheel. The plaintiffs asserted Greyhound was both vicariously liable for the bus driver's conduct and also independently liable because its procedures to prevent fatigued driving were inadequate, and they sought punitive damages against both the driver and Greyhound.

Greyhound argued the accident was caused by the tractor-trailer driver driving on the interstate at a speed of only 16 mph without activating his flashing hazard lights and disputed the plaintiffs' claims that its safety procedures were inadequate. The data recorder on the bus showed it was traveling at approximately 67 mph at the time of the accident. The bus driver testified that the last things she remembered before the accident were that her right leg

went numb and would not move off the accelerator, and she reached down with her right arm and blacked out.

The jury found both Greyhound and its bus driver liable and awarded substantial punitive damages. Greyhound appealed the punitive damages award, arguing the plaintiffs did not show that the bus driver and Greyhound had subjective knowledge that the bus driver was too fatigued to drive that night and did not show that Greyhound knew its fatigue prevention program was inadequate. The court noted that, under Pennsylvania law, punitive damages can only be awarded against a defendant if the plaintiff shows the defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and acted or failed to act in conscious disregard of that risk.

The court held there was evidence contradicting the bus driver's claim that she was not tired from which the jury could conclude the bus driver was aware she was in danger of falling asleep for a substantial period of time before the accident. Specifically, several passengers and another driver on the road testified that, shortly before the accident, the bus was swerving in and out of its lane and went onto the rumble strips. Two passengers testified that, during the trip, the bus driver looked like she was falling asleep, and a passenger who saw the truck through the front window of the bus before the collision testified that the bus did not move to avoid the truck. The plaintiffs introduced expert testimony that the bus driver fell into a micro-sleep, a brief episode of involuntarily falling asleep, in the moments before the accident.

However, the court found there was insufficient evidence for the jury to determine that Greyhound consciously disregarded a risk it subjectively appreciated. There was no evidence that Greyhound knew the bus driver had insufficient sleep on the days before the accident or knew she was fatigued on the night of the accident. The only evidence that Greyhound knew of a problem with this bus driver consisted of a single incident 10 months before the accident, where the bus driver was observed drifting in traffic lanes on a 10-mile stretch of interstate, and Greyhound then reminded her of the need to get sufficient rest. The court held this one incident by itself was not sufficient to show that Greyhound had a subjective appreciation that the bus driver, who had been driving for Greyhound for over 10 years, was likely to fall asleep at the wheel or that it was dangerous to allow her to drive on the night of the prior accident.

Nevertheless, the court held the absence of proof of Greyhound's subjective knowledge and conscious disregard did not defeat the plaintiffs' punitive damages claim against it since, under PA law, an employer is vicariously liable for the reckless conduct of an employee without proof that the employer's conduct satisfies the standard for punitive damages. Therefore, Greyhound was vicariously liable for punitive damages despite the lack of proof concerning its own wanton conduct.

Does driving while distracted by a cell phone call on a hands-free phone constitute a reckless disregard of the rights of others so as to justify the imposition of punitive damages? The court in *Nikoghosyan v. AAA Cooper Transportation Inc.*, 2019 US Dist. LEXIS 174442 (N.D. Okla.) said no, at least under Oklahoma law. The court was also not impressed by the fact that the defendant driver's Qualcomm data showed instances where he exceeded the 70 mph limit mandated by his motor carrier employer, since he was not speeding at the time of the accident. Accordingly, summary judgment on the plaintiff's claim for punitive damages was awarded in favor of the defendants.

The defendant truck driver in *Locke v. Swift Transportation Co.*, 2019 US Dist. 197583 (W.D. Ky.) was pulling to the shoulder of the highway to read a message on the Qualcomm system from his motor carrier employer when the plaintiff's vehicle collided with the defendant's tractor-trailer. The plaintiff argued that parking a truck on the shoulder in a non-emergency situation violated federal regulations, Kentucky regulations, and Swift's internal policies. The court held that, even if all of that were true, the truck driver was not so grossly negligent as to support an award of punitive damages. By the same token, absent grossly negligent conduct on the employee driver's part, no vicarious liability for punitive damages could be awarded against the motor carrier.

Vince Saccomando

5. USDOT Leasing Regulations

Heniff Transportation Systems v. Mack, 2019 WL 5440602, 2019 Tex. App. LEXIS 9329 (Tx. Ct. App.) concerned a loss involving a tractor leased by owner-operator Mack to Illinois-based regulated interstate carrier Heniff. At Heniff's request, Mack took Heniff's employee, Willett, along as a co-driver for a Texas to Florida delivery. En

route, with Willett driving, the rig was involved in an accident in which both Mack and Willett were killed. Mack's estate sued Heniff, alleging Heniff, acting through Willett, negligently violated FMSCA regulations by having Willett start out for Florida while suffering from fatigue.

Alongside various jurisdictional arguments, Heniff argued Mack was an independent contractor, and it was not responsible for his conduct—or even for Willett's—on the theory that Willet was Mack's borrowed employee. The court rejected the argument, noting that as a for-hire motor carrier operating in interstate commerce, it was responsible under the FMCSA's leasing regulations for non-owned vehicles operating under its authority. Leased autos are subject to the same safety regulations as vehicles owned by the motor carrier. Citing 49 C.F.R. §392.3, the court found that, in alleging Heniff permitted a driver whose alertness was impaired to drive, the plaintiff had made a claim that could potentially lead to Heniff being found liable. Accordingly, Heniff's motion to dismiss the complaint was rejected. This case also turned on jurisdictional issues that are not our concern in this publication.

In our 2018 edition, we discussed the New Jersey Appellate Division's decision in *Chirino v. Proud 2 Haul, Inc.*, 2017 N.J. Super. Unpub. LEXIS 2942 (N.J. App. Div.), on the USDOT leasing regulations (also known as the Truth in Leasing regulations). In April 2019, the Supreme Court of New Jersey affirmed the decision, finding the motor carrier needed to comply with the regulations even though it attempted to sidestep them by arranging for an intermediary to lease rigs from owner-operators.

The Truth in Leasing claims filed by a driver for RG Transportation, Inc. were winnowed down by the court in *Sagastume v. US Fire Insurance Co.*, 2019 US Dist. LEXIS 87675 (D. Idaho), but the court did not grant RGT's motion to completely dismiss the claims. Sagastume had entered into an owner-operator agreement with RGT, but argued that the agreement failed to comply in several respects with the Truth in Leasing Regulations, and RGT asked the court to dismiss the complaint.

The court observed that owner-operators are the intended beneficiaries of the regulations, and yet, RGT argued that precisely those sections that provide legal protection to owner-operators—49 C.F.R. §376(e) through (l)—do not apply to leases "between authorized carriers and their agents" (49 C.F.R. §376.26). It asserted that Sagastume was RGT's agent, and, therefore, the Truth in Leasing provisions did not apply.

The court also noted the language of the regulations in §376.26, which exempts leases between motor carriers and their agents, is not as clear as it might be in defining "agents." In any event, though, the court still declined to grant summary judgment to RGT, finding that there was a question of fact as to whether Sagastume was RGT's agent.

It seems to us that the court could have been a bit more definitive. The reference to "agents," as explained in §376.12(m), is to an intermediary between the motor carrier and an owner-operator. Agents are common in the household goods corner of the carrier world; large moving companies such as United Van Lines have local agents throughout the country. Congress itself specifies certain details about the carrier-agent relationship in 49 U.S.C. §13907. The agents themselves hire owner-operators to actually haul the freight or household goods. In any event, there should have been no doubt that an owner-operator such as Sagastume was not an agent as the term was used in 49 C.F.R. §376.26. In our view, the judge ought to have rejected the argument made by RGT instead of giving RGT the opportunity to prove, down the road, that Sagastume was its "agent."

By the mid-1980s, courts across the country had reached a consensus that owner-operators whose rigs were under lease to a motor carrier were the carrier's statutory employees, and the motor carrier was responsible for the negligent operation of leased vehicles during the entire term of the lease regardless of whether the rig was being used in the carrier's business at the time of the loss. In the years since, that consensus has cracked, and, in some cases, courts are finding that the motor carrier is not liable for third-party injuries.

At the core of this fundamental shift is the continuing controversy about the employment status of independent contractors, the legal issue that underlies many of the ongoing controversies related to both liability and coverage issues, troubling both trucking company management and the individual drivers. Two cases decided in 2019 concluded that the leasing regulations did not create liability even where the leased auto was being used to carry goods in the carrier's business at the time of the loss. This, it seems to us, is a significant new development and represents the starkest change we have seen yet in the reinterpretation (we might say serious misreading) of the

leasing regulations.

The plaintiff in *Jordan v. Central Transport, LLC*, 2019 US Dist. LEXIS 28360 (W.D. Ark.), a truck driver, was injured in a collision with a rig operated by Elmer Ventura and leased to Central Transport. Ventura had signed an independent contractor agreement under which he was to provide tractors with drivers to pull Central trailers. Ventura was dispatched by Central to assist the driver of a rig being operated in Central's business that had broken down. In short, there was no doubt he was engaged in Central's business at the time of the loss.

Central moved for summary judgment, claiming it had no possible exposure because Ventura was an independent contractor, not an employee. Allow us to point out that this type of thinking takes us back to the 1940s before the leasing regulations were authorized by Congress and promulgated by the ICC. In footnote 3 of the decision, the judge agreed with Central and rejected the plaintiff's argument that the federal regulations could be used as a basis to establish the tort liability of a motor carrier. That is indeed a remarkable ruling; instead, the court applied Arkansas law and found that the owner-operator—while operating in Central's business—was an independent contractor. Accordingly, Central's motion for summary judgment was granted, and Central was dismissed from the lawsuit. The judge's order was vacated as part of the settlement agreement (2019 US Dist. LEXIS 50862), but it is quite remarkable that it was issued at all.

A similar push to turn back the clock and revise the intent of the leasing regulations was apparent in *Hayslip v. Genuine Parts Co.*, 2019 US Dist. LEXIS 193139 (S.D. Ohio). The facts were somewhat complex, and that might ultimately influence the applicability of the leasing regulations. What is striking, though, is that the court appears to have concluded that the leasing regulations do not create a basis for establishing the liability of the motor carrier for the acts of an owner-operator; only state law can establish that exposure. In so holding, the court appears to have misread some recent decisions that concluded that while there may not be an irrebuttable presumption that the motor carrier is responsible for the owner-operators' negligence, there is at least a rebuttable presumption. *Hayslip* has been appealed, and we will closely follow what the Sixth Circuit does with the case.

Larry Rabinovich

6. *Employment*

In last year's edition, we reported on the US Supreme Court decision in *New Prime v. Oliveira*, 139 S. Ct. 532 (2019) involving interstate trucking company New Prime and driver Oliveira, who was employed pursuant to a contract labeling him as an independent contractor. When Oliveira brought a class action suit against New Prime for failure to pay mandated minimum wages, New Prime asked the court to invoke its authority under the Federal Arbitration Act (FAA) to compel arbitration according to the terms of their owner-operator agreements.

The claimants argued that the FAA did not apply to compel arbitration because of language in the FAA itself that excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." In his narrow holding, Judge Gorsuch found that, in 1925 when the FAA was passed, the phrase "contract of employment" referred to both actual employees and independent contractors. Accordingly, the owner-operator agreements themselves were exempt from the provisions of the FAA. The court, though, did not make any decision about the actual status of the New Prime drivers.

In *New Prime, Inc. v. Oliveira*, 2019 US Dist. LEXIS 211334 (D. Mass.), upon remand to the district court, New Prime tried an end-run around the Supreme Court's ruling, arguing the court should compel arbitration under Missouri law—at least regarding those plaintiffs who opted-in to the class action after the original lawsuit was filed. The court found, however, that New Prime was well aware of MO law when the case began and could have moved for arbitration under MO law at any time during the four years it was litigating the same argument under federal law. Instead, the opt-in plaintiffs spent four years in litigation, and New Prime raised its argument under MO law only after it lost its federal law argument. Finding that New Prime acted inconsistently with regard to its right to arbitrate and that the plaintiffs were prejudiced as a result, the court held that New Prime had waived its right to compel arbitration under MO law.

Similarly, the motor carrier employer in *Merrill v. Pathway Leasing LLC*, 2019 US Dist. LEXIS 72922 (D. Colo.) conceded that the district court was without authority after *New Prime Inc. v. Oliveira* to compel arbitration of the dispute arising under the plaintiff drivers' contracts,

but argued it was entitled to compel arbitration under MO law. Unlike the *Oliveira* plaintiffs, the plaintiff drivers did not argue that the employer had waived its Missouri law argument, but rather that Missouri's arbitration laws had been preempted by the FAA (therefore, somehow, making it impossible for the court to compel arbitration under MO law). The Colorado district court had little trouble rejecting this argument and confirmed its dismissal of the motor carrier employer from the wage claim lawsuit.

The motor carrier employer was also granted judgment in *Ege v. Express Messenger Sys.*, 2019 US Dist. LEXIS 211763 (W.D. Wash.). The district court initially held that the interstate commerce "contract of employment" exception was inapplicable, the employer was entitled to compel arbitration against the plaintiff truck drivers, and the employer should be dismissed from the lawsuit. Upon appeal to the Ninth Circuit, the appellate court refused to stay its decision pending the outcome of *New Prime Inc. v. Oliveira* in the Supreme Court and affirmed the dismissal of the employer.

Five weeks after the Ninth Circuit's affirmance, the Supreme Court decided *New Prime Inc. v. Oliveira*. In response to the drivers' motion for reconsideration, however, the district court found that the Supreme Court's ruling had not upset or overturned an established legal principle, but merely resolved a disputed issue under the FAA. The court additionally held that the drivers had not exercised diligence in pursuing relief prior to moving for reconsideration—despite the existing split of authority on the issue, they did not raise the "contract of employment" exemption issue when first opposing the employer's motion to dismiss; they did not cite the First Circuit's decision in *New Prime Inc. v. Oliveira* in either their opening brief or their reply brief to the Ninth Circuit; and they did not move to stay the appeal until almost eight months after the Supreme Court granted certiorari in *New Prime Inc. v. Oliveira*. Under the circumstances, the district court held the drivers failed to demonstrate the "extraordinary circumstances" necessary to grant relief under Federal Rule of Civil Procedure 60(b)(6).

The plaintiff truck driver in *Muller v. Roy Miller Freight Lines, LLC*, 2019 Cal. App. LEXIS 403 (Cal. Ct. App.) sought unpaid wages through a lawsuit against his employer, as permitted under California Labor Code section 229. The defendant employer sought to compel him to pursue his claims through arbitration, as provided in the employment agreement and the FAA. The driver argued, and the trial court agreed, that he was exempt from the FAA because he was a transportation worker engaging in interstate commerce. The appellate court affirmed, noting that, although the driver himself did not transport goods across state lines, his motor carrier employer was in the transportation industry, and the vast majority of the goods the plaintiff transported originated outside California.

In *State ex rel. Gallagher Bassett Servs. v. Webster*, 2019 W. Va. LEXIS 350 (W. Va.), a long-haul truck driver was injured at her motor carrier employer's terminal while attempting to connect her tractor to a trailer. When her claim for workers' compensation benefits was denied on the grounds that her injury was not work related, she brought a recovery action against both her self-insured employer and its third-party claims administrator. West Virginia's high court, however, found the action against the claims administrator was statutorily prohibited and rejected the driver's "skeletal" argument that the statute itself was unconstitutional.

The plaintiff in *C. R. England v. Swift Transportation Co.*, 2019 Utah LEXIS 8 (Utah) asserted the defendant was poaching plaintiff's drivers in contravention of their employment contracts by offering higher wages and better benefits. Utah Supreme Court took the case to reaffirm that a necessary element of a contract interference action is the defendant's interference by "improper means" (as held in *St. Benedict's Development Co. v. St. Benedict's Hospital*, 811 P.2d 194 (Utah 1991)). The court went on to clarify that "improper means," in this context, referred to means used to interfere with a party's economic relations that are contrary to law, such as violations of statutes, regulations, or recognized common-law rules, including if "they violate an established standard of a trade or profession."

In *Dailey v. Unemployment Compensation Board of Review*, 2019 Pa. Commw. Unpub. LEXIS 115 (Pa.), the employee truck driver was discharged from duties for "improper coupling and failing to report damage that occurred to a fifth wheel handle" on his employer's truck, a clear violation of the employer's policy requiring the employee to report damage to the work vehicle or trailer within four hours. The local unemployment compensation service center, the Board of Review, and the Commonwealth Court all agreed the plaintiff engaged in willful misconduct and was, therefore, not eligible for UC benefits under Section 402(e) of Pennsylvania's Unemployment Compensation Law.

The issue in *Drawsand v. Palletized Trucking, Inc.*, 2019 US Dist. LEXIS 40819 (S.D. Texas) was whether the plaintiff truck driver qualified as an "employee" of the defendant motor carrier, a necessary predicate to maintaining an action against the motor carrier for discrimination under 42 U.S.C. § 2000e-2(a)(1) (2018) (Title VII). The court found the evidence did not support an employer-employee relationship, given that the plaintiff owned the truck he operated; paid for fuel, taxes, and any fines associated with his operation; and was in charge of all the other major costs associated with the vehicle. The plaintiff also determined his own routes and never signed an employee handbook. On the other hand, the motor carrier defendant never paid the plaintiff directly and did not have authority to fire him.

Having driven almost 14 hours as a heavy snowstorm set in, the plaintiff driver in *Bauer v. Old Dominion Freight Line, Inc.*, 2019 US Dist. LEXIS 13446 (Or.) chose to divert from his assigned route and spend the night at a friend's house. When he called his motor carrier employer to advise them of his plan, he was instructed to return to the terminal, but he refused and was fired the next day. In his suit for wrongful termination, the court rejected the driver's argument that the motor carrier's demand that he return to the terminal would have caused him to violate federal hours of service (HOS) regulations. Although the employer's internal policies called for a maximum of 14 hours in a day, federal regulations would have permitted him to drive 16 hours, and the driver did not prove that returning to the terminal would have necessarily caused him to exceed that limit.

On the other hand, the Surface Transportation Assistance Act (STAA), specifically 49 U.S.C. § 31105(a)(1)IB)(ii), prohibits a person from discharging an employee "because … the employee refuses to operate a vehicle because … the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition." The court adopted the Department of Labor's interpretation of this statute that, rather than limiting it to safety concerns about the vehicle itself, expanded it to include a driver's refusal to drive in hazardous weather when the driver has a reasonable apprehension that driving in the weather conditions could pose a safety risk to the driver or the public. Accordingly, the court denied the parties' respective motions for summary judgment on this point, allowing the plaintiff driver to make his case to the jury that he was wrongfully terminated in violation of 49 U.S.C. § 31105(a)(1)IB)(ii).

We often see plaintiffs arguing (usually without success) that violating Federal Motor Carrier Safety Regulations requires the court to find negligence *per se* on the part of the tortfeasor driver. The injured plaintiff in *Franco v. Mabe Trucking Co.*, 2019 US Dist. LEXIS 5151 (W.D. La.) was involved in a motor vehicle accident with one of the defendant's 18-wheel trucks and argued for a finding of the other driver's negligence per se based on alleged violations of several Louisiana motor vehicle traffic laws. The court, however, held that the violation of a statute or regulation does not automatically, in and of itself, impose civil liability, as Louisiana has no negligence *per se* doctrine.

The plaintiff in *Herndon v. Torres*, 2019 US App. LEXIS 32356 (6th Cir.) sued both the defendant driver Torres and his putative motor carrier employer Avrora for a broken femur and permanent disability resulting from a violent beating with a metal rod (Avrora dissolved in 2017, but still had liability insurance coverage—at least potentially). The evidence showed that Torres was free to take any trip offered to him or turn it down, used his own cell phone to communicate with customers, was not required to follow any particular check-in or check-out process, and could choose his own routes. Under the circumstances, the district court found, and the Sixth Circuit agreed, that Torres was an independent contractor and Avrora could not be held vicariously liable for his (alleged) negligence. Moreover, Avrora did not have any actual or constructive knowledge of Torres' propensity for violence, and, therefore, could not be held directly liable on a theory of negligent hiring.

Phil Bramson and Janae Cummings

7. *Employment: Fair Labor Standards Act*

The federal Fair Labor Standards Act (FLSA) mandates that an "employee" must be paid a minimum hourly wage for all hours worked. The US Department of Labor (DOL) has identified six criteria for determining whether a trainee is an "employee" under the FLSA:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school.
2. The training is for the benefit of the trainees.

3. The trainees do not displace regular employees, but work under close observation.
4. The employer that provides the training derives no immediate advantage from the activities of the trainees, and, on occasion, its operations may actually be impeded.
5. The trainees are not necessarily entitled to a job at the conclusion of the training period.
6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

Montoya v. CRST Expedited, Inc., 2019 US Dist. LEXIS 151831 (D. Mass.) addressed the circumstances under which participants in a truck driver training program offered by a motor carrier could be considered "employees" of the motor carrier under the FLSA. The content of the training provided in Phase 1 of CRST's training program included both classroom and behind-the-wheel training, primarily focusing on the knowledge and skills students need to pass a CDL exam. Notably, CRST sent trainee drivers to both its in-house school and to independent driving training schools. The student drivers did not perform work that would otherwise be performed by employees or replace regular employees, and the pre-employment agreement contained clear language that student drivers understood they would not receive compensation for Phase 1. Under the circumstances, the court found the trainees were benefited more than the company and were not employees entitled to compensation for Phase 1 of the training program. The court was troubled but unpersuaded by the fact that CRST required students to work under contract for 10 months in order to pay off training expenses or else pay them off directly.

More than half of the three-and-a-half-day Phase 2 orientation, on the other hand, was dedicated to administrative requirements, hiring-related information, CRST guest speakers providing company-specific information, and other CRST-specific trainings. The court found that this training inured more to the benefit of the company itself, rather than providing generalized knowledge that the students could use elsewhere, and this factor weighed in favor of qualifying the trainees as "employees' during Phase 2.

As often discussed in *Transportation Annual Year in Review*, the Motor Carrier Act (MCA) provides an exemption to the overtime wage provisions of the FLSA for employees who are employed by entities subject to the jurisdiction of the US Secretary of Transportation and engaged in activities that directly affect the safety of operating motor vehicles in the transportation of property on public highways in interstate commerce.

The plaintiff drivers in *Bolar v. S. Intermodal Express*, 2019 US Dist. LEXIS 166783 (S.D. Ala.) argued the defendants had misclassified them as exempt employees. The court found there was no dispute that the defendants were motor carriers for the purposes of the US Department of Transportation's jurisdiction. On the issue of their activities, however, the plaintiffs argued they were "spotters," not "drivers" and, therefore, did not fall under the second prong of the MCA exemption test. The court rejected this reasoning, holding that what the plaintiffs were called was immaterial. Rather, the true test was the nature of their activities. Because the plaintiffs drove vehicles that were licensed, insured, and intended for use on public highways and because the plaintiffs drove on public highways, the court concluded their activities fell within the second prong of the MCA exemption test. It added the second prong would be satisfied even if the plaintiffs did not actually drive on public roads but were in a position where they were subject to being called to do so.

As for interstate commerce, the court explained it is well settled that drivers who complete a local segment of an interstate move are considered to be transporting goods in interstate commerce. In other words, the drivers did not have to cross state lines as long as they delivered goods within the state that were bound for an out-of-state destination. This was true even if the goods were unloaded briefly at warehouses. *Burlaka v. Contract Transport Services LLC*, 2019 US Dist. LEXIS 55472 (E.D. Wis. 2019) also includes similar arguments addressed by the court on a motion for summary judgment.

After ruling against the plaintiffs on the merits, the *Bolar* court added insult to injury by finding the action against one of the defendants was untimely. While actions under the FLSA for unpaid overtime compensation must typically be commenced within two years, the statute of limitations for a willful violation of the FLSA is three years. The court concluded there was no willful violation because evidence showed the defendants routinely confirmed whether their employees were exempt under the MCA. Significantly, the court found that "[t]he absence of an outside legal opinion

does not demonstrate a violation of the law, let alone a willful violation."

As in *Bolar*, the defendant in *Wright v. Jacob Transportation, LLC*, 2019 US Dist. LEXIS 54979 (D. Nev.) moved for summary judgment based on the MCA exemption. The employees in Wright were shuttle-bus drivers who mostly transported passengers to airports within the state but also made regular trips to airports across state lines. The defendant provided evidence that the plaintiffs were completely dependent on the trip dispatcher for their assignments and could not decline them. In the absence of any evidence by the plaintiffs to indicate otherwise, the court found this was sufficient for the drivers to meet the second prong of the MCA exemption test.

MCA Exemptions and Small-Vehicle Exceptions

Rychorcewicz v. Welltec, Inc., 2019 US App. LEXIS 11513 (5th Cir.) involved a claim by field engineers for misclassification as exempt employees under the FLSA. The primary issue was whether the plaintiffs, under the second prong of the MCA exemption, engaged in activities that directly affected the operational safety of motor vehicles in the transport of property in interstate commerce. Although evidence showed the engineers were frequently called upon to drive in interstate commerce, the plaintiffs argued that certain engineers in Welltec's Alaska and Louisiana locations did not and were not called on to drive across state lines. The court rejected this argument, holding the MCA's applicability was evaluated on a company-wide basis rather than an employee-by-employee basis.

The court also rejected the plaintiffs' argument for exception to the MCA exemption under the Technical Correction Act, holding they provided no evidence to support their assertion that the vehicles they drove weighed under 10,001 pounds. Specifically, the court held the website link showing the gross vehicle weight rating (GVWR) was insufficient because, without the year or VIN numbers, it did not show the actual GVWRs of the vehicles the plaintiffs drove.

Notably, the court added that, even if the plaintiffs had produced sufficient evidence regarding the weight, their use of those vehicles was *de minimis* because the plaintiffs only occasionally drove personal and rental vehicles. By comparison, in *Wiest v. Civil Delaware Valley Wholesale Florist, Inc.*, 2019 US Dist. LEXIS 19757 (D. Md.), the court found the plaintiff's assertion that he drove a truck under 10,000 pounds 80 percent of the time and photographs of the truck and a label showing its weight rating were sufficient evidence to deny summary judgment on this basis.

In *Butler v. TFS Oilfield Services*, 2019 US Dist. LEXIS 4131 (W.D. Tex.), the primary issue before the court was whether the plaintiffs fell within the small-vehicle exception to the MCA exemption to the FLSA. Specifically, the court addressed a procedural argument that the plaintiffs could not raise the small-vehicle exception on summary judgment for the first time because they failed to raise it after the defendants pleaded the MCA exemption in their answer. The court held that no rule or case law required the plaintiffs to raise the small-vehicle exception in their pleadings, so, they could assert it for the first time in response to the defendants' motion for summary judgment, as the defendants were not prejudiced by that assertion. The court added that the plaintiffs' sworn statements regarding the size of the vehicles and frequency of use were sufficient to withstand a motion for summary judgment. The *Butler* court cited the lower court decision in *Rychorcewicz*, noting it was on appeal before the Fifth Circuit.

Although *Piazza v. Associated Wholesale Grocers Inc.*, 2019 US Dist. LEXIS 71233 (E.D. La.) also concerned the MCA exception, it involved an issue of first impression in the Fifth Circuit. The issue was whether the defendant, by virtue of contracting with motor carrier Cardinal for distribution of its goods, became a motor carrier itself within the first prong of the MCA exemption test. The court concluded it did not. Even though the defendant owned trucks and directly provided trucking services at other facilities, it was not a motor carrier for purposes of the facility at issue, for which it used Cardinal's trucking services. The plaintiff, who was the defendant's employee, loaded Cardinal's trucks and, therefore, did not fall under the MCA exemption.

The central MCA exemption issue in *Chacon v. P&S Select Foods, Inc.*, 2019 US Dist. LEXIS 201776 (S.D.N.Y.) was whether the plaintiff, who assisted in making deliveries and loading and stacking pallets in trucks, performed duties related to the safety of operating motor vehicles (there was no dispute that the plaintiff met the first prong of the test). The plaintiff argued his duties were *de minimis* because he

merely assisted with deliveries and followed instructions in stacking the pallets. Specifically, the plaintiff relied on guidance from the US Department of Labor that provides that "an employee who has no responsibility for the proper loading of a motor vehicle is not within the exemption of a 'loader.'" The court held it was enough for purposes of showing discretion that the plaintiff was responsible for ensuring the pallets' safety, even though he followed instructions in loading them. Consequently, the plaintiff met the second prong of the MCA exemption, and the court granted the employer's motion for summary judgment. The plaintiff has appealed this decision.

The plaintiff in *Boatner v. MXD Groups*, 2019 US Dist. LEXIS 74004 (S.D. Ohio) brought an action against the defendant alleging several FLSA violations. The defendant moved for summary judgment on the ground that the plaintiff was an independent contractor, not an employee. Specifically, the defendant contended *inter alia* that the plaintiff admitted in his own deposition testimony that he was an independent contractor. The court rejected this argument, holding the plaintiff's self-identification as an independent contractor was not, by itself, dispositive of the case, and the court would still have to examine the relationship between the parties. The court then went on to apply the economic realities test, concluding there were genuine issues of material fact regarding the relationship, and it denied the defendant's motion.

In *Hayward v. Ibi Armored Services*, 2019 US Dist. LEXIS 99494 (E.D.N.Y.), the plaintiffs claimed that, despite being exempt from overtime under the FLSA because of the Motor Carrier Exemption, they were entitled to overtime under NY Labor Law pursuant to the minimum wage order (MWO). The court concluded the MWO was preempted by the Motor Carrier Exemption. Although the court, in reaching this conclusion, cited a Second Circuit opinion that seems to have reached the opposite result, it did not distinguish that case. In the previously mentioned *Burlaka v. Contract Transport Services LLC*, the court observed that the MCA exemption applied to Wisconsin wage and overtime laws. This was, however, the court's reiteration (on the plaintiff's motion for final judgment) of its earlier ruling on the defendants' motion for summary judgment.

Monroe v. J. H. O. C., Inc., 2019 US Dist. LEXIS 104959 (D. Conn.) involved an issue of detention pay, which is compensation for the time an hourly wage truck driver is detained by a customer. The plaintiff driver claimed his employment had been terminated in violation of the FLSA in retaliation for demanding detention pay. The defendant moved for summary judgment, claiming the plaintiff had not engaged in protected activity under the FLSA, which requires that the employee files a complaint within the meaning of the FLSA, and the complaint is "under or related to" the FLSA.

In granting summary judgment, the court held the plaintiff had not filed his complaint within the meaning of the FLSA because he had merely complained to his supervisor one to three times at most about detention pay. In the Second Circuit, a complaint is considered "filed" within the meaning of the FLSA when it is "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the [FLSA] and a call for their protection." Although "mere grumblings" will not suffice, it is likely sufficient for an employee to complain about an employer's failure to pay "coupled with references to the potential illegality with that failure to pay." Because the plaintiff in *Monroe* did not recall the exact number of complaints, when they were made, whether they were made in person or over the phone, or precisely what he had said, the court found that his complaints were not "filed" within the meaning of the FLSA.

As to the second element, there was no dispute that the plaintiff was exempt from FLSA overtime provisions. The defendant argued the plaintiff's complaints about miscalculating his detention pay were not implicated by the FLSA and, therefore, did not meet the second element of the test for protected activity. The plaintiff contended his detention pay was a component of minimum wage. Consequently, if he was not given detention pay, he did not necessarily receive minimum wage for the hours he was detained by customers.

The court rejected the plaintiff's argument, holding there was no evidence that the plaintiff's paycheck ever reflected minimum wage earnings, and so the miscalculation of his detention pay did not mean he did not receive minimum wage. The plaintiff's compensation was principally based upon miles traveled, so his claims for detention pay were best viewed as complaints about his right under his employment terms for additional compensation. Accordingly, they fell outside the FLSA.

Martinez v. IFA Group, Inc., 2019 US Dist. LEXIS 200116 (E.D. Pa.) concerned the approval of a settlement

agreement for the plaintiff's FLSA claims. There are only two ways that parties can compromise claims under the FLSA: a compromise supervised by the US Department of Labor or a settlement approved by a district court. In this case, the court noted it was required to "determine whether the proposed settlement furthers or impermissibly frustrates the implementation of the FLSA in the workplace." The settlement agreement contained a release regarding "any and all claims" the plaintiff had against the defendants. The court noted it had no way to analyze whether the settlement amount was sufficient for the release of "any and all" claims. Accordingly, the court approved the settlement only to the extent that it released the plaintiff's claims in the case.

In *Poe v. IESI MD Corp.*, 2019 Md. App. LEXIS 1006 (Md. Ct. Spec. App.), the issue was whether overtime wages for day-rate employees could be computed under Maryland Wage and Hour Law using federal regulation 29 C.F.R. § 778.112. Because the federal regulation calculates overtime wages at 0.5 times the regular rate of pay for day-rate employees, the plaintiff claimed it violated MD law, which does not have a similar regulation of its own. The court concluded that the MD Wage and Hour Law is the counterpart to the FLSA and, therefore, the federal regulation was persuasive. Consequently, the employer could reasonably rely on the federal regulation to compute the plaintiff's overtime wages. The court did add, however, that other states have reached a different conclusion, requiring computation of wages at 1.5 times the regular rate for day-rate employees pursuant to state wage and hour statutes.

Shaleem Yaqoob

8. *Spoliation*

In *Gitman v. Martinez*, 2019 NY. App. Div. LEXIS 1478 (3d Dep't), it was undisputed that the Zook tractor-trailer rear-ended the plaintiff's vehicle and the Crete tractor-trailer rear-ended the Zook tractor-trailer, but the sequence of collisions was in doubt. Crete moved for an adverse inference charge stemming from Zook's failure to produce any data from its event data recorder, which was granted by the trial judge. The appellate court upheld the adverse inference ruling because, even though the data had been erased before the action was commenced or any demand for preservation or production had been made, it reasoned that Zook should have expected the accident would result in litigation.

In *Torres v. Continental Apartments*, 2019 Tex. App. LEXIS 4158 (Tex. Ct. App.), the plaintiff's car was towed when she parked in front of the loading dock of the defendant's apartment building. In a hearing against the towing company, the plaintiff alleged she was charged more for her tow than what was legally authorized, and property management failed to provide reasonable parking options due to safety reasons, failed to communicate a change in the common parking practice at the dock, and failed to provide notice or warning that she could be towed when she only planned to be there a few minutes.

The Justice of the Peace Court entered findings that probable cause existed for the removal and placement of the vehicle in the storage lot, the towing charge and storage fee were authorized and just, Torres's payment of the tow fee was just and owing, and Torres was responsible for court costs. In pursuing her appeal of the JP's decision, Torres argued Continental had a duty to preserve the video recording of the tow because it would show that the "tow truck pulled up to tow the vehicle the minute the appellant entered the door to the building." The matter went all the way up to the Texas Court of Appeals, which agreed with the trial court that any alleged spoliation of the video was irrelevant as to whether there was probable cause for the tow.

The defendant in *Allen v. Sanchez*, 2019 US Dist. LEXIS 115198 (M.D. Ga.) was driving a tractor-trailer on an interstate highway when his left front tire blew out. While attempting to reach the shoulder of the road, the defendant struck the plaintiff, who was driving in the lane to the right of and slightly behind Sanchez. In the ensuing lawsuit against the truck driver and his motor carrier employer, the defendants received a spoliation letter from Allen's counsel asking them to preserve Sanchez's driver logbooks and annual inspection, daily inspection, and maintenance reports from his truck. The defendants failed to produce the requested documents, and the plaintiff moved for spoliation sanctions.

The court had no trouble determining that spoliation occurred. On this point, the plaintiff bore the burden of proving the missing evidence existed at one time, the alleged spoliator had a duty to preserve the evidence, and the evidence was crucial to their case. Sanchez was required by his employer to conduct pre- and post-trip inspections and perform maintenance checks after every "7,000 or 10,000" miles driven, fill out a report, and turn

over those reports to the motor carrier after each trip. Thus, it was clear that the reports existed at one time, and the defendant motor carrier received a spoliation letter within two weeks after the accident, providing it with clear notice of the potential for litigation and of its duty to preserve all relevant evidence.

The court also held that this evidence was crucial to the plaintiff's claim for punitive damages because those reports potentially showed that Sanchez chose to drive his truck knowing the tire that caused the accident was "defectively maintained and/or inspected." Under Georgia law, evidence of a truck driver ignoring safety concerns regarding their truck and continuing to drive is sufficient for a jury to award punitive damages, yet the defendants failed to preserve, locate, and produce the reports after multiple requests by the plaintiffs. Accordingly, the court found that spoliation had occurred and turned its attention to determining an appropriate sanction.

Under GA law, five factors need to be considered when selecting sanctions for spoliation:

1. Whether the movant 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 alleged spoliator acted in good or bad faith
5. The potential for abuse if expert testimony about the evidence is not excluded

The court had little trouble finding that the first three factors had been satisfied but could not bring itself to conclusively decide that the defendant motor carrier had acted in bad faith, even though the driver testified that he turned his reports over to the employer, and the employer testified that, although the reports would ordinarily be put in the driver's file, Sanchez's report simply could not be found. Accordingly, the plaintiff's motion for sanctions was denied without prejudice, but the jury was instructed that, if it found the motor carrier acted in bad faith, then the absence of the reports could give rise to a rebuttable presumption that it contained evidence harmful to the defendants on the issue of whether Sanchez had knowledge of the faulty tire.

Cox v. Swift Transp. Co. of Ariz., LLC, 2019 US Dist. LEXIS 131061 (N.D. Okla.) involved an accident between two tractor-trailers during which one of the drivers, plaintiff Adam Cox, suffered severe injuries. The plaintiff and his wife and the defendants both sought sanctions for the other parties' alleged spoliation of evidence. Both motions were denied.

It was undisputed that Swift failed to preserve and was unable to produce the following evidence:

1. Data stored on the electronic control module (ECM data) of the Swift tractor-trailer driven by defendant Sai Wai, which would have provided information regarding the speed of Wai's vehicle at the time of the accident and any "critical event report" prompted by hard braking or a sudden drastic change in speed
2. Messages delivered from Wai to Swift via a mobile communication system known as Qualcomm (Qualcomm messages), which would have shown "macro" codes and information indicating a breakdown or accident
3. Wai's electronic driver logs (e-logs) for the 1.5 hours immediately prior to the accident, which were also stored electronically on the Qualcomm system

The plaintiffs requested two alternative sanctions under Federal Rule of Civil Procedure 37(e): a directed verdict on the issue of liability or an adverse inference jury instruction. Both sanctions required the court to find that:

1. The electronically stored information (ESI) "should have been preserved in the anticipation or conduct of litigation."
2. Swift "failed to take reasonable steps to preserve it."
3. It "cannot be restored or replaced through additional discovery."
4. Swift "acted with the intent to deprive [plaintiff] of the information's use in the litigation" (Fed. R. Civ. P. 37(e)(2)).

With regard to Swift's non-preservation of the ECM data and Qualcomm messages, the court found Swift could have preserved the ECM data by downloading it from the truck at or near the time of the accident. Instead, the data was lost through automatic "overrides" that occurred sometime after the truck was restarted and driven. Swift could have preserved the Qualcomm messages by saving them in its computer system but, instead, the Qualcomm messages were automatically deleted pursuant to Swift's data retention policy, which provides that Qualcomm

messaging data is retained for at least seven but no more than 45 days.

Swift received actual notice of the plaintiffs' suit upon receipt of a spoliation letter from plaintiff's counsel approximately 78 days after the accident. By this time, the ECM data and Qualcomm messages were lost, although Swift admitted the evidence could have been preserved. As its justification for non-retention of evidence at the scene or prior to receipt of the spoliation letter, Swift contended that, based on the police report, it had no reason to believe the data should have been retained because the accident was caused by Cox, not Swift driver Wai. The officer on scene did not issue a citation to Wai and allowed him to leave in the truck, knowing data would be overwritten on the ECM. Swift also had an insurance adjuster at the scene of the accident who did not ensure the ECM data was downloaded and who also permitted Wai to leave the scene of the accident in the truck.

Under the circumstances, the court found that Swift did not "act[] with the intent to deprive [plaintiffs] of the information's use in the litigation" and, therefore, declined to impose either of the severe sanctions requested by plaintiffs. Even assuming that a preservation duty arose and the non-retention decisions could be deemed questionable or negligent, the court found no indication that Swift acted with intent to deprive the plaintiffs of the ECM data or the Qualcomm messages or otherwise engaged in bad-faith conduct.

As to Wai's e-logs, Swift pointed out that federal regulations require e-logs to be maintained for a six-month period (49 C.F.R. § 395.8(k)(1)). Upon receipt of the spoliation letter, Swift placed a litigation hold on Wai's e-logs pre-dating the accident. However, when the plaintiffs requested the documents in a discovery request, Swift realized it failed to retain one and a half hours of logs, stating the discrepancy arose because the accident occurred in the Central Time Zone, while the accident notification was received at Swift's Arizona office in the Mountain Time Zone. The court found this explanation was plausible, consistent with the actual missing data, and, at most, showed a negligent failure to retain by Swift. As with the ECM data and the Qualcomm messages, negligent failure to retain the e-logs was insufficient to support the plaintiffs' requested sanctions.

As to Swift's cross-motion for sanctions against Cox, it was undisputed that the plaintiffs failed to preserve and, therefore, were unable to produce the ECM data from Cox's vehicle—which, the defendants argued, would have provided information regarding the speed of Cox's vehicle at the time of the accident and potentially bolstered its expert's opinion that Cox failed to brake—and Cox's paper driver logs, which were on the dashboard at the time of the accident. Like the plaintiffs, Swift only requested the severe sanctions of dismissal of the plaintiffs' case or an adverse inference instruction regarding the spoliated evidence.

Applying the same legal principles that were applied to Cox's motion, the court easily concluded the plaintiffs did not intentionally deprive the defendant of evidence or engage in any bad-faith conduct by failing to preserve the ECM data or the logs. The engine from Cox's tractor, including the ECM device, was hauled away as debris from the scene of the accident by Environmental Remediation Services, Inc., (ERS), held for 30 days, and then sent to the scrap yard. The court rejected the notion that the plaintiffs acted with intent to deprive the defendants of this evidence when, at most, the plaintiffs failed to prevent ERS from scrapping the engine pursuant to ERS's standard retention policy. The court also noted Cox was in the hospital for five weeks after the accident.

With respect to the logs on the dashboard, the plaintiffs responded to requests for production by stating the logs were destroyed in the accident. Again, the court found the explanation plausible, given the nature of the accident, the damage to Cox's vehicle, and the undisputed speed with which Cox struck the other vehicle. This explanation was also supported by Cox's testimony that his cell phone, which his brother-in-law retrieved from the dashboard following the accident, was completely destroyed. Under the circumstances, there was insufficient proof of any intentional actions aimed at depriving the defendants of this evidence.

Phil Bramson

9. *Bad Faith*

In *Devore v. Progressive Casualty Insurance Co.*, 2019 US Dist. LEXIS 110362 (W.D. Mo.), the insured, a tow-truck operator, was involved in an serious accident with another vehicle while performing "an improper turn and improper lane usage." The insured asserted it was apparent early on in the investigation that the accident was his own fault, the claimant had suffered severe injuries, and the claimant

might recover in excess of the $300,000 policy limit. When an excess verdict of $493,797 was entered against him, the insured sued his insurance carrier for both bad-faith failure to settle a claim and for breach of fiduciary duty.

The insurer moved to dismiss the breach of fiduciary duty claim, arguing it was duplicative of the bad-faith failure-to-settle claim. In denying the motion to dismiss, the court found both causes of action were separately cognizable in Missouri. Additionally, the underlying facts supported a breach of fiduciary duty claim in that, soon after the accident, the insurer's claims adjuster texted the injured plaintiff's attorney, saying, "It's a big case … It will bring big money in. That should make you smile." The court found that, in so doing, the adjuster may have caused a loss of valuable bargaining power. The court found the actions by the insurer, if established, could therefore reasonably be found to constitute a breach of the fiduciary duty it had to its insured. The case was allowed to proceed.

In *Reliable Transportation Specialists, Inc. v. Wausau Underwriters Insurance Co.*, 2019 US Dist. LEXIS 56039 (E.D. Mich.), the plaintiffs, in bad-faith litigation against their insurer, sought to have expert testimony admitted as to whether Wausau's conduct amounted to bad faith under Michigan law. Their proposed expert was an insurance defense attorney with "extensive experience as an insurance company-retained defense attorney handling tort matters throughout Michigan." Wausau argued the purported expert must be rejected, as he had no direct claims-handling experience. In reviewing Federal Rule of Evidence 702, which requires that (1) the proposed expert witness must be qualified by knowledge, skill, experience, training, or education; (2) the testimony must be relevant; and (3) the testimony must be reliable, the court found the proposed expert was qualified to offer an opinion on bad faith.

Bad-faith actions were pursued in *Wright v. State Farm Mutual Automobile Insurance Co.*, 2019 US Dist. LEXIS 163871 (W.D. Ky.) and *Stinson v. State Farm Mutual Automobile Insurance Co.*, 2019 US Dist. LEXIS 198524 (W.D. Ky.) on behalf of two different clients by the same law firm against the same insurer and were decided by the same judge. In each case, the insured sued both the insurance agent and the insurer, arguing they conspired to fraudulently deny underinsured motorist benefits available to the insured under multiple policies. In each case, the presence of the agent, a Kentucky resident, thwarted the insurer's attempt to remove the case to federal court, so the insurer argued the bad-faith claim against the agent should be dismissed since it was the insurer alone, not the agent, that entered into the insurance contract with the insured. In *Wright*, the district court disagreed, finding the bad-faith claim against the agent could arise out of the contract between the insured and State Farm. Accordingly, the agent stayed in the case, and the matter was remanded to state court.

The *Wright* decision was based, in large part, on the court's reading of *Davidson v. American Freightways*, 25 S.W.3d 94 (Ky. 2004), in which the Kentucky Supreme Court held that claims under Kentucky's Unfair Claims Settlement Practices Act and common law bad-faith claims could only be maintained against "persons or entities engaged in the business of insurance." On the same day the court remanded *Wright*, the *Stinson* matter was also remanded. Two months later, though, the judge granted State Farm's motion for reconsideration in *Stinson*, concluding that Davidson did not allow for a bad-faith action against an agent who was not a party to the insurance contract. We will watch with interest to see whether the judge decides to dismiss the action against the agent in *Stinson*, *Wright*, or both.

Does a claim for bad faith depend entirely on the presence of coverage, or can a plaintiff proceed with a bad-faith claim even if there is no coverage for the claim under the policy? At least in New Mexico, the answer is that a bad-faith claim does not require that there be coverage for the underlying claim. In *Haygood v. United Services Automobile Association*, 2019 N.M. App. LEXIS 112 (N.M. Ct. App.), the plaintiff was assaulted while in and around a vehicle parked outside his residence. The court quickly agreed with the carrier that the plaintiff was not entitled to uninsured motorist coverage since the assault did not arise from the "normal use" of the motor vehicle. Regarding the bad-faith claims, the court also found in favor of the insurer with respect to the theory that the insurer acted in bad faith for refusing to pay a covered claim (since the court already ruled that the denial of coverage was appropriate). However, the court held the second theory for claiming bad faith—that the insurer intentionally delayed a coverage determination and failed to fairly investigate and evaluate the claim—was not predicated on coverage. The court pointed to evidence that the insurer's in-house counsel recommended further investigation that was never completed before denying coverage and denied

the claim simply on the basis that the plaintiff was an unsympathetic witness (since the assault allegedly arose out of storing drugs inside the vehicle). The appellate court remanded the proceeding back to the trial court for further findings with instruction that the bad-faith claim could proceed, even if there was no coverage.

Bill Foster

10. Broker Liability

The rise of Amazon and its commitment to expediting deliveries to its customers has created occasional backlash against it and other companies that encourage online sales that necessitate small package deliveries. One concern is that there has been an unwelcome increase in vehicular traffic in crowded urban areas and suburban residential areas. The loudest complaints, though, have followed serious accidents involving vehicles making home deliveries.

Hoffee v. AAC Transportation LLC, 2019 US Dist. LEXIS 107641 (M.D. Pa.) arose out of an accident involving two vehicles, one of which was a box truck delivering Amazon packages. The plaintiff sued the driver, the trucker, and the freight broker, J. W. Logistics, as well as Amazon—the deepest of deep pockets.

The court observed that a broker has a duty to verify the qualification of the motor carriers it hires. Plaintiffs are given the opportunity to prove the trucker was negligent and/or the broker negligently selected the carrier. However, the court found no precedent supporting the idea that a shipper such as Amazon has a duty to assess the capabilities of the motor carrier hired by a broker. Had Amazon hired the carrier directly, a plausible claim for liability against Amazon could have been pleaded. Or, if there was some evidence that Amazon knew its broker was not taking due care in its hiring of carriers then, again, a claim against Amazon could be made. Without that, though, the court had little trouble granting Amazon's motion to dismiss. Going forward, we suspect there will be some creative attempts to sue Amazon, even when it outsources the delivery at issue.

A common occurrence in transportation transactions is that the shipper reaches out for delivery services to an entity it assumes will haul the shipment, but the cargo ends up in the hands of some other entity the shipper has never heard of. This inevitably creates uncertainty about which entity or entities bear potential exposure in the event of a loss. For instance, in *Ortiz v. Ben Strong Trucking*, 2019 US Dist. LEXIS 100381 (D. Md.), a multi-vehicle accident involving a tractor-trailer rig led to a suit by a passenger in one of the other vehicles against the truck driver and against four separate entities, each of which was alleged to be responsible for the operation of the rig.

The driver was directly employed by Ben Strong Trucking. It was alleged that the original carrier selected by the shipper was Cowan Systems, LLC (CSL), and claims were also brought against related companies Cowan Systems Transportation, LLC (CST) and Cowan Systems, Inc. (CSI). The plaintiff alleged the load had been double-brokered in contravention of FMCSA regulations. The defendants contended that CSI was defunct at the time of the loss and that only CSL had anything to do with the shipment. Confusingly, though, CSI was listed as the carrier on the bill of lading.

Decisions on a series of preliminary motions eliminated certain claims against Ben Strong; it was never in doubt, though, that the basic tort case against the driver and Ben Strong would proceed to trial. The three Cowan defendants, though, which the plaintiff alleged acted as an "enterprise," all moved for judgment dismissing the entire complaint. The plaintiff responded that the shipper had contracted with CSL to act as the motor carrier. CSL, though, asserted it was merely the broker and, as such, was not subject to vicarious liability for the driver's negligence, if any. CSL was authorized by the USDOT as both a carrier and a broker. The court opted to let the questions of CSL's liability and that of the other Cowan defendants go to the jury.

In *Puga v. RCX Solutions*, 922 F.3d 285 (5th Cir.), the court rejected the argument that the trial court had defined the term "motor carrier" too broadly in its instruction to the jury. The court observed that the main difference between motor carriers and brokers relates to the operation of equipment. A broker is responsible for "providing or arranging for transportation by motor carrier," while a motor carrier actually provides "motor vehicle transportation."

Years ago, C. H. Robinson surrendered its motor carrier authority, leaving it only with broker authority. That, however, has not stemmed the flow of cases seeking damages from C. H. Robinson and other third-party logistics (3PL) companies on the theory that, in agreeing

to transport a shipment, they were acting as a carrier and not a broker. Therefore, as described in *Tryg Insurance Co. v.. C. H. Robinson Worldwide*, 767 Fed. Appx. 284 (3d Cir.), the defendant agreed to haul a shipment of miniature chocolate liquor bottles in interstate commerce. The shipper was not told that the shipment would actually be carried by National Refrigerated Trucking; in fact, the latter was required to sign a confidentiality clause, presumably to protect the 3PL's relationship with the shipper. As the result of a reefer malfunction, the cargo was a complete loss. The trial court held—and now the federal appellate court has affirmed—that since the 3PL had given the shipper (and others—the bill of lading prepared by a non-party had listed C. H. Robinson as the motor carrier) the clear impression that it was acting as the carrier, that was sufficient to create motor carrier liability even though the company only maintained broker authority.

A similar decision was made in *Richwell Group v. Seneca Logistics Group*, 2019 US Dist. LEXIS 136954 (D. Mass.), although, here, the parties entered into an agreement for the "brokerage of freight" which, one might think, should have alerted the shipper that it was dealing with a broker. The broker, Seneca Logistics, hired an entity named Rapid Logistics to haul a shipment of seafood for the shipper. The Rapid driver absconded with the cargo, and Rapid itself proved to be a chimera—Seneca had been fooled, and the documents Rapid provided showing it to be a registered carrier with insurance were all fake. With Rapid in the wind, the shipper sought to recover the value of its cargo from Seneca. Citing *Tryg* and other decisions, the court noted that a party is a carrier if it takes responsibility for the shipment. The court found that, at least for this particular shipment, Seneca was the motor carrier and, therefore, liable for the lost cargo.

For what it is worth, we think the court's reasoning here might be flexible enough to label most brokers as carriers. This suggests that the analysis by the court may have been a bit off. It seems to us that there was another way to go here. Brokers are liable for negligence in selecting a motor carrier. By not checking the USDOT databases to see if Rapid Logistics was actually registered as a carrier or confirming that it even existed, Seneca could be said to have failed to do the most basic fact-checking. That would have been grounds for finding Seneca liable as a broker for the missing cargo.

Alan Peterman and Larry Rabinovich

11. *Jurisdiction*

Long ago, the US Supreme Court held that, in diversity cases, federal courts should apply the substantive law of the state in which they are located, while applying federal law to procedural issues (commonly known as the *Erie* doctrine). In *Franco v. Mabe Trucking Co.*, 2019 US Dist. LEXIS 62129 (W.D. La.), the district court in Louisiana was asked to determine whether Louisiana's one-year statute of limitations period for negligence claims constituted substantive law or procedural law. The suit arose out of a truck accident that occurred on November 24, 2015, in Louisiana. On November 22, 2016, the plaintiff brought suit against the truck's owner in the Eastern District of Texas but failed to serve the owner until January 20, 2017—approximately 14 months after the accident. The owner successfully moved to transfer venue to the Western District of Louisiana, claiming the owner was not subject to personal jurisdiction in Texas. Once transferred to Louisiana federal court, the owner moved to dismiss the action on the basis that the suit was brought beyond the one-year prescriptive (i.e., statute of limitations) period.

The Louisiana district court originally denied the defendant's motion. However, on re-argument, the motion of the defendants (the owner and other newly named defendants) was granted, dismissing the complaint. At first, the court held there was no direct conflict between 28 U.S.C. § 1631, which mandates that a federal transferee court treat the suit as if the suit had originally been filed in that jurisdiction, and Louisiana's Civil Code Art. 3462, which states that, if a suit is filed in an improper venue, the timeliness of the suit is measured by when the defendant is served on the defendant, not when the suit is filed with the court—the federal statute simply governed when the suit was considered "filed," whereas the state law governed when the suit was timely under the applicable statute of limitations (based on service).

Turning to the issue of whether the state statute was a matter of substantive or procedural law, the court, relying upon the "outcome determination" test set forth in *Erie*, quickly concluded the statute of limitations law was clearly a substantive issue—if the claim had been brought in state court, it would have been time barred. Since the purpose of the *Erie* test is to prevent forum shopping and inequitable administration of the laws, the result should be no different if the suit is filed in federal court.

In *Neal v. Old Republic Insurance Co.*, 2019 US Dist. LEXIS 98075 (W.D. La.), the district court addressed another long-standing federal court jurisdiction issue: there are two similar proceedings arising out of the same accident, but one suit is venued in state court and the other in federal court. The so-called "Colorado River Abstention Doctrine" provides that the pendency of a state court action generally does not preclude litigating another action in federal court arising out of the same matter except in "exceptional circumstances."

In *Neal*, Neal brought suit against Cao and Lilly, among others, claiming Cao struck Neal while he was servicing a flat tire on a truck on the side of the interstate; Neal also claimed Lilly was liable for striking the rear-end of Cao, causing Cao to hit Neal. That suit was removed to federal court based on diversity of the parties. At the same time, Cao brought suit against Lilly, among others, for injuries he allegedly sustained in the accident; Cao's action remained in state court.

The federal court held that none of the "exceptional circumstances" set forth in Colorado River warranted abstention by the federal court. In particular:

1. Neither suit involved a "res" or thing of property, as both suits involved claims for personal injury.
2. Neither forum was inconvenient.
3. Significantly, although the suits might result in duplicative litigation, abstention should only be exercised where there will be piecemeal litigation resulting incomplete rulings in the federal court action.
4. The state court action was not filed long before the federal court action.
5. Federal law did not provide the law for deciding the case.
6. The parties' rights could be properly protected in both jurisdictions.

Consequently, the federal court denied the request to abstain based upon the pendency of the state court action.

A similar finding was reached by the district court in *St. Pierre v. Celadon Group*, 2019 US Dist. LEXIS 75085 (M.D. La.) where the federal court declined to abstain from proceeding, even though there was a separate pending state court action arising out of the same tractor-trailer accident. Specifically when addressing the third factor related to "piecemeal versus duplicative" litigation, the court noted that "prevention of duplicative litigation is not a factor to be considered in an abstention determination," since duplicative litigation is a natural consequence of two separate and distinct judicial systems. The real concern regarding the third factor is to avoid piecemeal litigation and inconsistent rulings, especially concerning the rights of a piece of property.

Plaintiffs often go to great lengths to ensure their case is heard in the best forum possible, including, as illustrated in *Russell v. Escobar*, 2019 US Dist. LEXIS 103488 (M.D. La.), arguing their damages might be less than the amount proposed by the defendants. In *Russell*, the defendants removed the state court action to federal court on diversity grounds, where the amount in controversy must exceed $75,000. In an effort to keep the action in state court, the plaintiff moved to remand the case, claiming the defendants could not demonstrate the amount in controversy exceeded the $75,000 threshold.

The court initially agreed with the plaintiff that it was not "facially apparent" from the petition itself that the threshold had been met since the petition merely alleged injuries to the plaintiff's neck and pain and sought unspecified damages for medical expenses and pain and suffering. However, the defendants offered the plaintiff's medical records in opposition to the motion showing the plaintiff underwent treatment following the subject accident and his treating physician recommended cervical surgery that would cost more than $75,000. Significantly, the court also cited settlement communications between the parties where the plaintiff's counsel intimated that he "cannot contemplate" a settlement for less than the defendant's policy limit of $100,000. Accordingly, the court concluded the amount in controversy had been satisfied and allowed the case to remain in federal court.

Finally, another threshold issue that plaintiffs must satisfy before proceeding in federal court is evidence of an actual case or controversy. This burden can sometimes be problematic for insurers seeking declaratory relief, as demonstrated in *Progressive Mountain Insurance Co. v. MJ Night Rider Transport LLC*, 2019 US Dist. LEXIS 171830 (N.D. Ga.). The plaintiff-insurer filed the declaratory judgment seeking a declaration that it was not obligated to provide defense or indemnification for its insured for an underlying incident. The incident involved

the insured's employee taking a work truck without his employer's permission during off-hours to run a personal errand. While running the errand, the employee got in an argument with two individuals and intentionally drove the truck into them, injuring them both and damaging their vehicle. Neither claimant (or better-stated "potential" claimant) brought a claim or suit for damages against the insured or the employee driver. Nevertheless, the insurer filed the declaratory judgment action "as an anticipatory maneuver designed to preempt whatever actions" the claimants may theoretically take in the future.

The district court rejected the insurer's attempt and granted the insured's request to dismiss the suit based upon the lack of any justiciable case or controversy. The court held the insurer's request for preemptive declaratory relief before any claims had been asserted against the insured would essentially constitute an "advisory opinion," which courts may not render. The court affirmed that, in order to seek declaratory relief, the plaintiff must allege facts from which it appears there is a "substantial likelihood that [it] will suffer injury in the future." Notwithstanding the severity of the injuries sustained by the potential claimants, there was no evidence to suggest that either intended to or had sought to hold the insured responsible for the intentional or criminal behavior of the employee driver.

Mark Whitford

12. Coverage

Standard trucking policies exclude coverage for bodily injury to employees of the insured seeking coverage, but do not provide much of a definition of the word "employee;" a fact that has repeatedly hindered attempts to enforce the employee exclusion, as we have noted multiple times in previous editions. The ISO commercial auto forms, for instance, say only the following: "'Employee' includes a 'leased worker.' 'Employee' does not include a 'temporary worker.'"

Insurers have argued for a number of years that the federal regulatory definition of "employee," found at 49 C.F.R. § 390.5—which includes anyone, even independent contractors, who drive for a motor carrier in regulated commerce—should control the interpretation of that term in policies issued to federally authorized motor carriers. This argument has occasionally been successful, but not typically.

For example, the argument failed in *National Continental Insurance Co. v. Vukovic*, 2019 US Dist. LEXIS 49222 (N.D. Ill.) (the reader is cautioned that the published opinion in this case frequently confuses the names and status of the parties; we have attempted to sort them out, given the context of the dispute). In this case, AAA was the federally authorized motor carrier, MBD was a trucking company contracted to provide AAA with trucks and drivers, Rancic was an owner-operator for MBD who provided services to AAA pursuant to a contractor's lease agreement, and Rancic was a driver. MBD agreed to transport a load for AAA and assigned the load to Rancic, with Vukovic scheduled to accompany Rancic as a "trainee and passenger." Rancic lost control of the vehicle and it rolled over, with Vukovic suffering a brain injury and needing multiple surgeries.

When Vukovic sued Rancic and AAA, National Continental, which insured AAA, denied coverage on the grounds that Vukovic, as a co-driver, qualified as a statutory employee of AAA under 49 C.F.R. § 390.5. As an "employee" of the named insured and a "fellow employee" of Rancic, coverage for both defendants was excluded.

Following its own decision in *National Continental Insurance Co. v. Singh*, 2018 US Dist. LEXIS 136941 (N.D. Ill.),—which we reported on in last year's edition—the Northern District of Illinois refused to graft the regulatory definition onto the policy. The court also noted that MBD was a trucking company, not an employment agency or staffing firm, and, therefore, Rancic and Vukovic did not qualify as "leased workers." Since the court found no other basis on which to qualify the owner-operator's driver as an employee of the lessee motor carrier, the employer's liability exclusion in the National Continental policy issued to the motor carrier did not apply to bar coverage.

Similarly, in *Canal Insurance Co. v. Butler*, 361 F. Supp.3d 1277 (N.D. Ala.), the court, applying Alabama law, rejected this argument and observed that "[t]he majority of courts to address this issue" have also rejected the argument. The court held that, if the insurer had intended to incorporate the regulatory definition of "employee" into its policy, it should have done so explicitly. There is more than a little irony in that Canal actually did, for a time, incorporate the regulatory definition of "employee" into its policies (see *Canal Insurance Co. v. Moore Freight*

Services, Inc., 2015 US Dist. LEXIS 77426 (E.D. Tenn.)), if the exclusion is going to exclude owner-operators its language will need to be reinforced.

In *Progressive Northern Insurance Co. v. Peavler*, 2019 US App. LEXIS 33811 (10th Cir.), the state court refused to dismiss a widow's tort action against her late husband's employer, finding the exclusive remedy provisions of Oklahoma's workers' compensation law did not apply to injuries incurred while the employee was being transported to work. Hearing Progressive's declaratory judgment action, however, the federal district court found the employee could have been eligible for workers' compensation benefits since the vehicle in which he was riding was also transporting tools and equipment for the employer. Since the employee's death was an obligation for which the named insurer "may" have been held liable under workers' compensation law (and that possibility had not been foreclosed by the state court's ruling in the tort action), the district court agreed that Progressive's worker's compensation exclusion applied to bar coverage.

In *State Farm Mutual Automobile Insurance Co. v. Murphy*, 2019 Ill. App. Unpub. LEXIS 19 (Ill. Ct. App.), a driver was sued by his passengers, including the vehicle owner, after an accident. The driver sought coverage under the owner's umbrella policy, which defined "who is an insured" to include anyone liable for the named insured's use of the covered auto. Since there were no allegations that the named insured had negligently used the vehicle, the driver did not qualify as an insured under the umbrella policy.

In accordance with Minnesota law, the no-fault coverage provisions of the Great West policy at issue in *Great West Casualty Co. v. Decker*, 2019 US Dist. LEXIS 2163 (D. Minn.) excluded injuries arising out of loading or unloading a vehicle, unless the injured party was "occupying" the vehicle at the time. The defendant claimant was injured when at least two bales of hay that were being loaded onto his trailer fell and struck him. At no time did he ever climb onto the trailer, and, at the time of the accident, his only physical contact with the trailer was his hand on the underside. Under the circumstances, the court found he was not "occupying" the trailer, and Great West had properly denied no-fault coverage.

Velocity Express, LLC v. Progressive Paloverde Insurance Co., 2018 La. App. Unpub. LEXIS 390 (La. Ct. App. Dec. 21, 2018) is yet another cautionary tale reminding insurers that, in some jurisdictions, the allegations in a complaint (or lack therefore) may give rise to a duty to defend, even though extrinsic evidence shows that an exclusion applies. In this case, the plaintiff did not allege he was injured in the course of his employment by any insured, even though he had been). Accordingly, the insurer could not rely on its employer's liability exclusion to deny a defense to an additional insured (please refer to our discussion of *Hudson Insurance Co. v. Alamo Crude Oil* in the "Non-Trucking Policies" section).

In *National American Insurance Co. v. ABC Concrete Mfg. Co.*, 2019 US Dist. LEXIS 30925 (D.N.M.), Murray owned two companies. One of them, Concrete, was a private motor carrier insured by National American, which owned a vehicle that it leased to Murray's other company Septic, a for-hire carrier insured by National Casualty. After the vehicle was involved in an accident, National American sought reformation of its policy to exclude the use of covered autos in for-hire transportation. Since National American had been aware that Concrete was an authorized private carrier when it applied for the policy and took no steps whatsoever to investigate the use of Concrete's vehicles, National American's attempt at reformation was rejected by the court.

In *First Acceptance Insurance Co. of Georgia v. Hughes*, 2019 Ga. LEXIS 161 (Ga.), Georgia's high court adopted the view that an insurer cannot be held liable for failure to settle a claim against its insured within its policy limits unless the injured party has presented a valid offer of such a settlement. First Acceptance determined early on that its insured was at fault in a multi-vehicle collision; there were at least five injured claimants with injuries ranging from soft tissue up to a fractured skull with brain bleeding and a coma; and the insured's probable exposure exceeded the policy's limits of $25,000 per person and $50,000 per accident.

Counsel for the most severely injured claimants wrote to the insurer, offering to settle within the $50,000 policy limits without stating a deadline for the insurer to accept the offer while, at the same time, indicating a willingness to participate in a global settlement conference with other plaintiffs. About five weeks later, the claimants filed suit, and, shortly thereafter, the counsel advised the insurer that, in light of the insurer's silence, the settlement offer was withdrawn. A judgment in excess of $5 million was ultimately entered against the insured. Nevertheless,

because the plaintiffs had not stated an express deadline for accepting their settlement offer and had indicated a willingness to attend a global settlement conference, the court held the insurer had not acted negligently in failing to accept the settlement offer before it was withdrawn.

The physical damage policy at issue in *A&R Enterprises, LLC v. Sentinel Insurance Co.*, 2019 Conn. Super. LEXIS 502 (Conn. Super. Ct.) contained the standard provision that the insured "must ... assume no obligation, make no payment, or incur no expense without [the insurer's] consent, except at the 'insured's' own cost ..." When the insured's vehicle was damaged in a one-vehicle accident, it entered into a contract with a repair shop that did not specify the actual cost of repairs. The insurer's adjuster estimated—and the insurer paid—a lower cost for repairs than what was charged by the repair shop. The insured assigned his rights to the repair shop to recover the difference from the insurer. The court held, however, that the standard policy language was unambiguous and barred the repair shop's claim for the unpaid portion of the invoice.

The policies in question in *Filed Ron Zoller v. T. H. E. Insurance Co.*, 2019 US App. LEXIS 24297 (5th Cir.) defined "mobile equipment"—which were generally not covered, as contrasted with "autos," which were covered—to include vehicles "maintained primarily for purposes other than the transportation of persons or cargo." The plaintiff was rear-ended by the insured driver who was operating a truck connected to a trailer equipped to be a "mobile kitchen on wheels ... designed primarily for food preparation and service while in a stationary position."

Since Louisiana is a direct-action state, the plaintiff included the insurers of the trailer manufacturer and the trailer buyer as defendants. Given the primary purpose of the trailer in question, both the district court and the court of appeals found it was mobile equipment, rather than auto, and did not qualify for coverage under the subject auto liability policies issued to the manufacturer and the buyer. Although the opinion does not state so, we assume the policy covering the truck that was pulling the trailer was in play.

The plaintiff insurer in *National Continental Insurance Co. v. Aiazbekov*, 2019 US Dist. LEXIS 108515 (W.D. Mich.) argued it had no coverage for the defendant insured driver with respect to a $2.6 million default judgment entered against him in the underlying bodily injury action because of the driver's lack of cooperation in that case. There was apparently no problem with the driver's motor carrier employer since the insurer did pay the claimant $500,000 to settle his claims against the named insured motor carrier, but the claimant did not grant a release for the driver. Before the settlement with the motor carrier was concluded, retained counsel for the driver sought the court's permission to withdraw and was allowed to do so.

When the insurer sought a declaration that it provided no coverage for the default judgment against the driver, the court found that National Continental made the requisite diligent effort to communicate with the insured; it communicated through a friend of the insured, attempted to contact the insured through regular mail, certified mail, telephone, and text messages on a near-daily basis, and dispatched private investigators to track him down at his purported residence. Additionally, since the insured was the only defense witness to the actual accident, his unavailability prejudiced the insurer's efforts to defend him. Accordingly, the court found the insured's non-cooperation negated the insurer's duty to indemnify him.

In a variation on the non-cooperation theme, the plaintiff insurer in *Selective Insurance Co. of America v. Wacha*, 2019 US Dist. LEXIS 93200 (D.S.C.) did not receive notice of the underlying action against the insured driver until a default had already been entered (thus establishing prejudice), and the driver refused to cooperate in any attempt to open the default. Selective, however, did not seek to avoid coverage completely, but only sought to limit its exposure to the $25,000 limit of South Carolina's mandatory coverage statute. The court had no difficulty granting Selective's motion.

Oklahoma participates in the Unified Carrier Registration (UCR) program, which allows a motor carrier to be registered and insured in one state and have that registration and insurance recognized in all other participating states. Participation is voluntary, and at present, Arizona, Florida, Hawaii, Maryland, Nevada, New Jersey, Oregon, Vermont, Wyoming and the District of Columbia do not participate. The court in *Thurmond v. CRST Expedited*, 2019 US Dist. LEXIS 13988 (W.D. Okla.), however, rejected the argument that Oklahoma's UCR participation meant a policy issued to a motor carrier in another participating state should be deemed to have been certified in Oklahoma as proof of the motor carrier's financial responsibility, thus exposing the insurer to suit

under Oklahoma's direct action statute.

It is common that a towing company's removal of an insured vehicle from an accident site (and subsequent storage) leads to some creative theories supporting the towing company's claims to recover its towing and storage costs. In *Hilario's Truck Center v. Transit Tech Logistics*, 2019 Conn. Super. LEXIS 797 (Conn. Super. Ct.), the towing company argued it was a third-party beneficiary of the policy issued to the vehicle owner and sued the insurer for breach of contract. Without any evidence whatsoever that the insurer and insured intended the insurer to assume any obligation to the towing company, the argument failed to move the court.

As a matter of practice, the defendant towing company in *Western National Assurance Co. v. Burns Towing*, 2019 US Dist. LEXIS 103469 (W.D. Wash.) would—pursuant to contracts with private property owners and the Tacoma Police Department—take possession of a motor vehicle deemed abandoned and send a written notice to the owner of record. If no response was received, the towing company would sell the vehicle at a public auction and apply the proceeds to its outstanding fees. Both the Washington State Service Members' Civil Relief Act, RCW 38.42, and its federal analog, 50 U.S.C. § 3958, require towing companies obtain a court order before selling a vehicle belonging to an active-duty service member.

In this case, the towing company sought liability coverage when it was sued by the State of Washington on allegations of unlawfully selling impounded vehicles without taking proper steps to determine whether those vehicles belonged to active-duty service members. The court first rejected the insured's argument that the harm to the service members arose from an "accident," since the owner's harm from having the impounded vehicle sold was foreseeable regardless of whether the seller realized the sale violated the law. The court further found that the insured's policy covering liability arising out of "garage operations," including the selling of vehicles, did not extend to the illegal sale of vehicles.

The plaintiff warehouse in *Leicht Transfer & Storage Co. v. Pallet Central Enterprises, Inc.*, 2019 Wisc. LEXIS 258 (Wis.) purchased pallets from the defendant for use in its warehouse operations. The plaintiff paid $505,000 for pallets that were never delivered, based on forged delivery tickets. The commercial crime insurance policy issued to the plaintiff promised payment for a loss resulting directly from "directions to pay" made or drawn by or drawn upon the plaintiff. The Wisconsin Supreme Court, however, found that the forged delivery tickets were not "written directions to pay a sum certain," but rather statements that a certain type and number of pallets had been delivered on a particular day, and the crime insurance policy provided no coverage. Notably, the court took a narrow view of the policy language and found that, even if the forged delivery tickets were the functional equivalent of a "written direction to pay," the policy required an actual "written direction to pay."

The death underlying the coverage action of *Commerce Insurance Co. v. Szafarowicz*, 2019 Mass LEXIS 573 (Mass.) arose out of a verbal altercation at a bar that escalated into one of the participants running the other participant over with his car. The driver pled guilty to voluntary manslaughter, and the victim's estate brought a wrongful-death action, alleging the death resulted from the driver's gross negligence and the vehicle owner's negligent entrustment of the vehicle to him. The vehicle owner's insurer unsuccessfully sought to intervene in the wrongful action to present evidence that the claimant's death resulted from the insured's intentional act and not from an accident. The motion to intervene was denied, and the Supreme Judicial Court of Massachusetts noted the preferable procedure would have been for the insurer to bring a declaratory judgment action to determine, *inter alia*, whether the basis of the insured's liability in the underlying action was decided correctly. The insurer's motion to stay the underlying action pending resolution of the declaratory judgment action was also denied by the trial judge; the high court found the insurer had not been prejudiced, and the trial judge acted within his discretion.

The high court further held that the insurer's offer to pay its policy limit into court—pending resolution of the coverage action—did not constitute an "offer to pay" that could cut off the insurer's obligation under the policy to pay post-judgment interest on the consent judgment the insured entered into. Perhaps most significantly, the court rejected the insurer's argument that the insured violated the policy's conditions by settling the underlying action without the insurer's consent, holding the insurer waived this condition by defending only under a reservation of rights. The court reasoned that, where the insurer has signaled it might not indemnify, the insured is entitled to mitigate that risk by entering into a settlement.

The plaintiffs in *Glover v. Liberty Mutual Insurance Co.*, 2019 US Dist. LEXIS 172665 (S.D. Fla.) sought to bring a class action asserting the defendant insurer engaged in a pattern of paying less than actual cash value on total loss vehicles under physical damage policies issued to the plaintiffs. The court agreed with the plaintiffs that actual cash value, under the applicable Florida statutes, includes title and tag fees as part of the actual cost to purchase a comparable vehicle.

The personal auto policy issued to the tow truck driver in *Borden v. Progressive Direct Insurance Co.*, 87 Mass. App. Ct. 391, 30 N.E. 856 (Mass. App. Ct.) excluded coverage for bodily injury arising out of an accident "involving any vehicle while being maintained or used by a person while employed or engaged in any auto business." "Auto business" was defined as "the business of selling, leasing, repairing, parking, storing, servicing, delivering, or testing vehicles." The subject loss occurred while the insured driver was operating a tow truck for an employer engaged in transporting vehicles between used car auctions and dealer lots. The court agreed with the insurer that, even though "towing" is not mentioned in the policy definition of "auto business," the insured was clearly involved in the business of "delivering" vehicles.

In *Cross v. National Union Fire Insurance Co.*, 2019 US Dist. LEXIS 208356 (E.D. Cal.), the insurance adjuster wrongly informed the insured that his policy provided $1 million in UM/UIM coverage. Based on this information, the insured settled with the tortfeasor for her $50,000 policy limits and then sought to collect under his UM/UIM policy. He found out too late, though, that his UM/UIM limits were actually $30,000, so the tortfeasor was not "underinsured" within the meaning of the policy. The insured sought recovery from the UM/UIM insurer and asked the court to order that the dispute be referred to arbitration. The UM/UIM coverage, however, expressly provided that "disputes concerning coverage under this endorsement may not be arbitrated," and the court refused to compel arbitration.

Zurich American Insurance Co. v. Port Authority of New York and New Jersey, 2019 N.Y. Misc. LEXIS 5750 (Sup. Ct. N.Y. Cnty.) involved priority of coverage for a workplace accident. New Hampshire insured the owner of the truck that the bodily injury claimants were unloading when he fell; its policy provided primary coverage for an auto owned by the named insured, and the court had no problem finding primary coverage under the NH policy. Issued to the subcontractor that employed one of the injured claimants, the Zurich policy included a "designated insured endorsement" that provided additional insured coverage for "any person or organization to whom or which you are required to provide additional insured status on a primary, non-contributory basis, in a written contract ..." The endorsement, however, did not expressly provide that the additional insureds would actually receive "primary, non-contributory" coverage under the Zurich policy. Since Zurich's named insured did not own the vehicle, its coverage for the putative additional insureds—the project owner and the general contractor—was excess over New Hampshire's coverage.

In *Department of Transportation v. National Interstate Co.*, 2019 Mich. App. LEXIS 7462 (Mich. Ct. App.), an over-height tractor-trailer struck a highway overpass when its escort vehicle operator failed to warn of low clearance in time to avoid the collision. The USDOT brought an action against the liability insurers of both the tractor-trailer and the escort vehicle pursuant to Michigan's no-fault law, which permits a direct action against the liability insurer of any vehicle "involved in the accident." The court found the active use of the escort car as a motor vehicle that perpetuated the motion of the tractor-trailer that caused the property damage meant the escort car was "involved in the accident" within the meaning of the statute.

In pursuit of no-fault benefits under her policy, the plaintiff in *Evans v. Travelers Insurance Co.*, 2019 Pa. Super. LEXIS 1195 (Pa. Super. Ct.) asserted she was entitled to coverage for the costs of psychiatric treatment for alleged post-traumatic stress disorder. The psychiatrist wrote to the insurer, stating the insured suffered from PTSD "related to a motor vehicle accident ..." The court held, however, that other evidence created a material question of fact as to whether her PTSD arose out of her physical injuries—a prerequisite to coverage under Pennsylvania law—and not merely from having been in the accident. Accordingly, the lower court's grant of summary judgment in favor of the insurer was reversed.

In *Global Hawk Insurance Co. (RRG) v. Wesco Insurance Co.*, 2019 US Dist. LEXIS 212019 (C.D. Cal.), Global Hawk insured the owner-lessor of the leased truck, while Wesco insured the motor carrier lessee. When the truck was involved in a fatal crash while in the motor carrier's business, settlement discussions went back and forth. Wesco defended the motor carrier and the driver, but

ultimately paid its policy limit for a release only of the motor carrier and withdrew its defense of the driver. Global Hawk disclaimed coverage but provided a courtesy defense and ultimately paid its policy limits in exchange for release of its named insured and the truck driver. The driver assigned any rights he might have had against Wesco to Global Hawk, which brought a reimbursement action against Wesco. Since the driver incurred no out-of-pocket defense costs, however, and was released from any liability to the bodily injury plaintiffs, the court found he had not been damaged. Accordingly, Global Hawk had no derivative right to reimbursement (Global Hawk had covenanted not to seek reimbursement from the driver himself, notwithstanding its disclaimer of coverage for him).

The district court further held that Wesco had not acted in bad faith by exhausting its policy limits while settling the claims against its named insured motor carrier, but not the claims against the driver. The court reasoned that such a settlement would be permitted under Texas law (implying, without saying, that it would have violated California law), and that Wesco had determined in good faith—if incorrectly—that TX rather than CA law would govern the scope of its policy obligations.

The loss in *Performance Trans, Inc. v. General Star Indemnity Co.*, Civ. Action No. 4:19-40086 (D. Mass.) occurred when the plaintiff motor carrier's tanker-truck overturned, discharging approximately 4,300 gallons of gasoline, diesel fuel, and dyed diesel fuel onto the roadway and into an adjacent reservation. The defendant's liability policy contained a total pollution exclusion and also included a "special hazards and fluids limitation endorsement" that specifically excluded costs arising from "unloading"—including an accident or spill—of "drilling fluids" from any auto. The exclusion in the endorsement was subject to an exception for "unloading" resulting from the auto's upset or overturn. The court, however, found the exception to the exclusion could not be read to affirmatively create coverage, and the total pollution exclusion unambiguously applied to deny coverage in the case.

The policy at issue in *Ranger Construction Industries v. Allied World National Assurance Co.*, 2019 US Dist. LEXIS 220478 (S.D. Fla.) did not expressly exclude coverage for punitive damages. Reviewing Florida law, the court concluded that FL public policy precluded coverage for vicarious punitive damages. While earlier FL cases permitted such coverage, FL Statute § 768.72 was amended in 1999 to provide that an employer could only be liable for punitive damages arising out of an employee's conduct if (a) the employer actively and knowingly participated in the conduct; (b) the employer's officers, directors, or managers knowingly condoned, ratified, or consented to the conduct; or (c) the employer engaged in conduct that constituted gross negligence and contributed to the plaintiff's injuries. Since the current statute required a high degree of culpability on the part of the employer, the court reasoned that permitting the employer to insure itself against its own wrongdoing would frustrate the legislative intent.

In *Elisabeth A. Shumaker Progressive Northern Insurance Co. v. Peavler*, 2019 US App. LEXIS 33811 (10th Cir.), the defendant employer in the underlying state court action argued the plaintiff's tort claims against the employer were barred by Oklahoma's workers' compensation statute. The state court denied the employer's motions to dismiss and for summary judgment, but no final determination had been made on whether the plaintiff was injured in the course and scope of his employment before Progressive filed its declaratory judgment action in the federal district court. The federal court held, and the Tenth Circuit affirmed, that as long as the employer "may be" held liable under workers' compensation law, the Progressive exclusion applied, regardless of the future outcome of the underlying action.

In attempting to circumvent Georgia's statute that permits a motor carrier's liability insurer to be joined as a defendant in an action for damages against the motor carrier, the insurer in *Mitchell v. Dixie Transport, Inc.*, 2019 US Dist. LEXIS 200117 (N.D. Ga.) made three arguments. The court made short work of the argument that the direct action statute only applied to intrastate carriers, not motor carriers operating interstate, citing a wealth of case law to the contrary.

Second, while the GA Supreme Court had previously held in *Reis v. OOIDA Risk Retention Group, Inc.*, 303 Ga. 659, 814 S.E.2d 338 (Ga. 2018)—which we discussed in last year's edition—that the federal Liability Risk Retention Act of 1986 barred the application of Georgia's direct action statute to a risk retention group, its applicability to an ordinary liability insurer was not preempted by federal law. Finally, while there might have been merit in

the insurer's argument that the motor carrier's driver was commuting and not operating his vehicle in the motor carrier's business at the time of the underlying loss, the court refused to consider the argument, as it fell beyond the page limit of the defendant's brief under court rules.

Phil Bramson

13. Non-Trucking Policies

Non-trucking liability (NTL) coverage—also known as bobtail or deadhead coverage—is often purchased by owner-operators, as many owner-operator leases require this coverage to be purchased, and it is even mentioned, though not required, in the US Department of Transportation (USDOT) leasing regulations. The coverage is meant to kick in when the owner-operator is using the rig outside of the motor carrier's business, as it was traditionally assumed that the owner-operator would be covered by the motor carrier's policy at all other times. NTL policies continue to be purchased even though, with the widespread use of the ISO Motor Carrier Coverage Form, it is no longer a given that the owner-operator will qualify for coverage under the motor carrier's policy.

NTL policies are traditionally written on a commercial auto policy providing broad coverage and are then modified by an endorsement that, to one extent or another, excludes coverage, sometimes toward a vanishing point. The downside for insurers in using this model is that many courts strictly scrutinize policy exclusions. There has been tension in certain states over the years between statutory provisions setting out the broad requirements mandated for a vehicle owner's policy of insurance and the limited coverage provided under an NTL policy.

That underlying tension was present in the coverage dispute considered by the Second Circuit in *United Financial Casualty Co. v. Country-Wide Insurance Co.*, 779 Fed. Appx. 761. Under NYS law, an NTL policy exclusion is only enforceable if the exclusion itself is conditioned on the existence of other coverage that is available to pay the claim. The matter was complicated by New York State's statutory requirement (Insurance Law §3420 (d)) that an insurer may only decline coverage if it promptly informs the insured that coverage is being denied. A delay as short as a month from the point the insurer was aware of grounds for declination has been found to estop the insurer from disclaiming coverage.

In this case, Country-Wide had issued an auto liability policy to the motor carrier, and United Financial had issued an NTL policy to the owner-operator. The NTL policy exclusion was, as required in New York, conditioned on the existence of other available coverage. A loss involving bodily injury occurred while the owner-operator was under load. That was never really disputed. The questions were focused on the point at which United Financial had a sufficient basis to decline coverage and whether it waited too long to do so. The district court accepted Country-Wide's argument that United Financial had waived its right to rely on the exclusion by not denying coverage promptly.

The Second Circuit reversed, finding that, since Country-Wide had not turned over its policy to United Financial and, in communications with United Financial, denied that Country-Wide provided any coverage to the owner-operator, United Financial was not in a position to deny coverage until it received a copy of the Country-Wide policy in discovery during the course of the coverage action. The United Financial exclusion could only be enforced if other coverage was available, and United Financial simply did not know—at least until it was able to secure a copy of the Country-Wide policy—the Country-Wide policy covered hired autos. Since the filing of the declaratory judgment action is itself sufficient under NY law to constitute a declination for purposes of §3420(d), United Financial's declination was timely.

Barclay Damon's Larry Rabinovich and Phil Bramson represented United Financial in this matter.

The court in *George v. Suarez*, 2019 La. App. Unpub. LEXIS 8 (La. Ct. App.) considered a more typical dispute between insurers involving non-trucking coverages. Trimac Trucking (insured by Great West) entered into an independent contractor service agreement with Suarez (insured by Progressive under an NTL policy) that excluded coverage when the leased rig was being used "in any business or for any business purpose." On the morning of the loss, Suarez was driving the tractor from his home to Trimac's terminal, where he was to pick up an empty trailer and then drive to Trimac's customer to pick up a load. Before he made it to the Trimac facility, though, he was involved in an accident with Stanley George. George sued Suarez and Trimac, and, since Louisiana is a direct action state, he also sued Progressive and Great West.

Progressive argued its contingent policy excluding coverage for any auto "while operated, maintained, or

used ... [i]n any business or for any business purpose" did not apply because the drive from Suarez's home to the terminal was for a business purpose. Great West disagreed, noting that Suarez's log book had him "off duty" at the time of the loss, and Suarez was not paid for the miles between his home and the terminal. In addition, Suarez had been given the opportunity to park at the Trimac, so, arguably, the ride to and from the terminal was for his own convenience. In the past, some courts have analogized this sort of use of a rig as commuting and, thus, found coverage under a non-trucking policy.

Here, though, the trial court ruled in favor of Progressive, and the appellate court agreed after reviewing Louisiana and federal case law. The court found that Suarez was operating under the terms of the lease agreement and furthering Trimac's commercial interests. Thus, he was acting in Trimac's business, and Progressive provided no coverage.

Applying Gerogia law, *Certain Underwriters at Lloyd's v. Morrow*, 2019 US Dist. LEXIS 130113 (W.D. Ky) involved a similar fact pattern. If an owner-operator is en route to a motor carrier's location as part of their regular work pattern or operational routine, then the NTL insurer is entitled to summary judgment under GA precedent. If the route from home to the terminal is not part of their regular work pattern, though, the NTL insurer covers the loss. Since the facts were not clear, the court denied both insurers' motions for summary judgment.

The court in *Hudson Insurance Co. v. Alamo Crude Oil, LLC*, 2019 US Dist. LEXIS 123146 (W.D. Tex.) considered whether a non-trucking insurer must defend its insured where it is not actually in dispute that a truck covered under its policy was being used in the lessee-motor carrier's business. The difficulty was that the tort complaint—the allegations of which, after all, determine whether or not a duty to defend exists under the so called "eight corners rule"—said nothing about the purpose of the vehicle's use at the time of the loss. This is a common problem since plaintiffs' lawyers may not know or may feel no need to focus on this factual issue when they file their complaints. An NTL insurer may have information that would justify a declination of coverage, but how can it decline to defend if the fact they wish to rely on is not mentioned in the complaint?

The Texas courts have come up with a partial solution. The court in *Hudson v. Alamo* applied this limited exception to the normal rule, which provides that the duty to defend is determined by reading the four corners of the complaint and seeing whether its allegations fall within the four corners of the policy. Generally, no outside evidence is examined. If, though, it is impossible to decide whether coverage is potentially implicated based solely on the complaint, there is external evidence that goes to the fundamental coverage question (i.e., was the rig being used in the motor carrier's business or not), and the external evidence does not engage the truth or falsity of any facts alleged in this complaint, then the court may examine the extrinsic evidence to make a coverage decision in a declaratory judgment action.

Since there was evidence that the rig at issue was being operated in the motor carrier's business and the evidence did not come into conflict with anything alleged in the tort complaint, the court awarded judgment to Hudson that it had no duty to defend. Additionally, since the duty to defend is broader than the duty to indemnify, Hudson was also entitled to judgment that it had no duty to indemnify its insured.

Courts frequently wrestle with the question of whether a non-trucking exclusion runs afoul of a state's mandatory coverage statutes. The plaintiff owner-operator in *Vantol v. Home-Owners Insurance Co.*, 2019 Mich. App. LEXIS 6581 (Mich. Ct. App.), who was insured under a Progressive policy, was injured while operating his tractor-trailer that he had leased to a motor carrier insured by Home-Owners. Progressive argued its policy provided no personal injury protection (PIP) benefits because the owner-operator's use of the insured vehicle in the business of the motor carrier lessee triggered the non-trucking exclusion. Home-Owners argued that PIP coverage is mandatory under Michigan law, and the Progressive exclusion was unenforceable. Since the Progressive exclusion was made expressly conditional on the availability of other coverage, however, and PIP coverage was available from Home-Owners, the court found that Progressive's non-trucking exclusion was valid.

Larry Rabinovich

14. UM/UIM

Bowers v. Buckeye State Mutual Insurance Co., 2019 US Dist. LEXIS 4040 (D. Colo.) illustrates that, even if an accident occurs in one state and the resulting suit is venued in that state, another state's law might apply to

the claim for underinsured motorist coverage. In Bowers, the plaintiff was injured while driving her parents' vehicle in Colorado when she was struck by another automobile. The other vehicle responsible for the accident carried a $100,000 liability limit, which was tendered to the plaintiff for her injuries. The plaintiff then sought underinsured motorist coverage under her parents' automobile policy, which included up to $100,000 of underinsured motorist coverage, but only if the driver received less than that amount from the liable tortfeasor. The insurer denied any obligation to pay underinsured benefits because the plaintiff received $100,000 from the tortfeasor. The plaintiff filed a declaratory judgment action against the insurer in Colorado.

In the first instance, the court ruled that Kansas law applied to the claim for coverage, even though the suit was venued in Colorado and the accident occurred there. KS law applied because the policy issued to the plaintiff's parents was issued in Kansas—where the parents resided—and Kansas was listed in the policy as the principal location of the insured risk. The insurer knew nothing about the daughter taking her parents' vehicle to Colorado when she moved there. Under KS law, underinsured motorist benefits are only recoverable if the amount recovered from the tortfeasor is less than the amount of the underinsured coverage, which, indisputably, had not occurred here. Consequently, the court ruled in favor of the insurer.

Can passengers be denied underinsured benefits if they are adequately compensated by the payment of liability coverage provided by the same policy? Yes, according to the court in *Thompson v. Progressive Direct Insurance Co.*, 2019 Wash. App. LEXIS 833 (Wash. Ct. App.). The plaintiff was injured as a passenger in a vehicle insured through Progressive. Progressive tendered the limits of its third-party liability coverage to the plaintiff and denied the plaintiff's claim for underinsured benefits, taking the position that the plaintiff was fully compensated for his injuries as a result of the liability payment. The trial court disagreed with Progressive, but the appellate court reversed and confirmed Progressive's decision was correct. The plaintiff was not entitled to underinsured benefits because the vehicle he was riding in did not qualify as an "underinsured motor vehicle"—the policy definition clearly referred to vehicles other than those in which the insured is a passenger. Neither public policy nor statutory provisions precluded enforcement of the express terms of the policy.

What must an insured provide as a "proof of loss" in the context of an uninsured claim? In *State Farm Mutual Automobile Insurance Co. v. Leon*, 2019 Ill. App. Unpub. LEXIS 1021 (Ill. Ct. App.), the court held that a proof of loss requires proof that there is no other insurance available to cover the insured's claim. Following an accident, the insured driver provided his personal automobile insurer, State Farm, with a police report and a letter from his employer's liability insurer stating there was no coverage available under the employer's auto policy. However, no proof was provided confirming the driver would not receive workers' compensation benefits. State Farm repeatedly requested proof and confirmation concerning the existence of workers' compensation benefits, which the insured failed to provide. Two years after the loss, State Farm denied the claim on the basis that the insured failed to demand arbitration within two years of the loss as required by the policy. The appellate court affirmed the trial court's finding in favor of State Farm, holding the insured was required to provide proof there was no other coverage available, including workers' compensation coverage. The insured's failure to respond to the insurer's repeated requests for confirmation doomed the insured's claim for coverage.

Mark Whitford

15. FMCSA Watch

It was a busy year for the Federal Motor Carrier Safety Administration (FMCSA) on the regulatory front, with numerous final and proposed rules being issued, including the latest iteration of the Hours of Service (HOS) regulations. The FMCSA issued a final rule amending its hours of service requirements applicable to drivers of property-carrying commercial motor vehicles (84 Fed. Reg. 177, 48,077 (Sep. 12)). Provisions that were promulgated in December 2011 required that a 34-hour restart include two periods between 1:00 and 5:00 a.m. and limited the use of a restart to once every 168 hours. In a series of Appropriations Acts, Congress suspended these provisions, pending completion of a naturalistic study comparing the effects of the restart provisions in effect under the 2011 rule versus provisions in effect prior to the 2011 rule's compliance date. The 2017 naturalistic study found no statistically significant benefits from the restart rule. Pursuant to a 2017 Appropriations Act, the 2011 restart rules are, therefore, void by operation of law.

On the driver training front, the FMCSA announced in July

2019 that it proposed to extend the compliance date for a prior final rule, "Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators" (81 FR 88732, Dec. 8, 2016) (ELDT final rule) from February 7, 2020, to February 7, 2022 (84 Fed. Reg. 34324 (Jul. 18)).

By way of background, the ELDT final rule established minimum training standards for the following classes of individuals:

- Individuals applying for a Class A or Class B commercial driver's license (CDL) for the first time
- Individuals upgrading their CDL to Class B or Class A
- Individuals obtaining hazardous materials, passenger, or school bus endorsements for the first time

Among other things, the final rule defined curriculum standards for theory and behind-the-wheel instruction for Class A and B CDLs, passenger and school bus endorsements, and theory instruction requirements for the hazardous materials endorsements. Finally, the final rule established an online database that would allow ELDT providers to electronically register with the FMCSA and certify that individual driver trainees completed the required training. When fully implemented, the final rule will require training providers to enter driver-specific ELDT information, which the FMCSA will then verify.

The FMCSA's rationale for the final rule at the time it was passed in 2016 was to enhance the safety of commercial motor vehicle operations on US highways by establishing a minimum standard for ELDT and increasing the number of drivers who receive ELDT.

In adopting the original February 7, 2020, compliance date for the ELDT final rule, the FMCSA noted that several changes to the ELDT notice of proposed rulemaking (NPRM) published on March 7, 2016 (81 FR 11944) reduced the regulatory implementation burden on state agencies. For example, the final rule dropped the proposed requirement for refresher training, which would have required states to issue restricted CDLs so the behind-the-wheel portion of the training could be completed on public roads. The FMCSA also removed the proposed requirements that states verify the applicant received ELDT from a provider listed on the online database and maintain a separate record of the applicant's training certification information. If retained in the ELDT final rule, these provisions would have required more extensive IT modifications from states. Therefore, the FMCSA believed, in light of the simplified requirements, the database and state-based systems could be integrated and operational by the February 7, 2020, compliance date, allowing adequate time for states to pass implementing legislation and modify their technology platforms as necessary.

The FMCSA announced, though, that due to unanticipated delays in completing the entire IT infrastructure for the database, the compliance date of February 7, 2020, must be extended to February 7, 2022. Industry representatives, including training associations, expressed disappointment with the extension and further delay, noting this will leave substandard training programs in existence while the wait for more professional standards and curriculum for professional truck drivers continues.

A summary of other notable regulatory actions by the FMCSA is provided below:

84 Fed. Reg. 84, 8,029 (March 6)

The FMCSA issued a final rule amending the existing ELDT regulations by adopting a new Class A CDL theory instruction upgrade curriculum to reduce the training time and costs incurred by Class B CDL holders upgrading to a Class A CDL. The agency believes this modest change in the Class A theory training requirements for Class B CDL holders upgrading to a Class A CDL maintains the same level of safety established by the ELDT final rule and will result in annual cost savings of $18 million.

84 Fed. Reg. 46, 8,464 (March 8)

The FMCSA revised certain regulatory guidance related to "CDL Standards: Requirements and Penalties." These regulations touch on numerous items for CDL operators, and the guidance is provided in a helpful Q&A format, which should be reviewed carefully.

84 Fed. Reg. 157, 40,272 (August 14).

The FMCSA issued a final rule amending the "Lease and Interchange of Vehicles; Motor Carriers of Passengers" May 2015 final rule in response to petitions for rulemaking. This final rule narrows the applicability of the 2015 final rule by excluding certain contracts and other agreements between motor carriers of passengers that have active passenger carrier operating authority registrations with the FMCSA from the definition of "lease" and the associated regulatory requirements. For passenger carriers that remain subject to the leasing and interchange requirements, the FMCSA

returned the bus-marking requirement to its July 1, 2015, state with slight modifications to add references to leased vehicles; revised the exception for the delayed writing of a lease during certain emergencies; and removed the 24-hour lease notification requirement.

84 Fed. Reg. 240, 68,052 (December 13)

The FMCSA issued a final rule (effective as of December 13, 2019) extending the compliance date for the requirement established by the December 5, 2016, Commercial Driver's License Drug and Alcohol Clearinghouse (final rule that states request information from the Clearinghouse about individuals before completing certain CDL transactions for those drivers. The final rule delays states' compliance with this requirement from January 6, 2020 to January 6, 2023, but gives states the option to voluntarily request Clearinghouse information beginning on January 6, 2020. The reason for the extension is to allow the FMCSA time to complete its work on a forthcoming rulemaking to address states' use of driver-specific information from the Clearinghouse as well as time to develop the IT platform through which states will electronically request and receive Clearinghouse information.

In related news, on October 31, 2019, the federal Food and Drug Administration published an extensive interim final rule with request for comments regarding "Establishment of a Domestic Hemp Production Program" (84 Fed. Reg. 58522). The rule addresses numerous facets of the growing hemp production industry, including land use, testing, and record keeping. Notably, section VI of the interim rule (Interstate Commerce), states, "Nothing in this rule prohibits the interstate commerce of hemp. No state or Indian tribe may prohibit the transportation or shipment of hemp produced in accordance with this part and with section 7606 of the 2014 Farm Bill through the state or the territory of the Indian tribe, as applicable." The rule is effective October 31, 2019, through November 1, 2021.

Sanjeev Devabhakthuni

16. *Miscellaneous Notable 2019 Cases*

Georgia law permits direct actions against primary insurers of motor carriers. *Hammonds v. Gray Transportation, Inc.*, 2019 US Dist. LEXIS 28236 (M.D. Ga.) involved a suit against a motor carrier who was involved in a fatal crash and against Hudson, which had issued an excess policy but also filed a dollar one MCS-82 surety bond with the Federal Motor Carrier Safety Administration (FMCSA). Since the direct action law was limited to suits against "insurance carriers," filing the surety bond did not make Hudson subject to a direct action.

Sentry Select Insurance Co. v. Maybank, 2019 S.C. LEXIS 18 (S.C.) addressed the question (certified from the District of South Carolina to the state's supreme court) of whether an insurer may maintain a malpractice action against counsel retained to defend the insured. Here, retained defense counsel failed to respond to requests for admissions in a timely manner, and, out of concern that the requests would be deemed admitted, the insurer settled the personal injury lawsuit against its insured for $900,000. The court held that an insurer may pursue a malpractice claim against retained defense counsel, but only in connection with a breach of duty to the insured client and not with respect to any injury claimed by the insurer itself.

Youhanna v. Auto Club Insurance Association, 2019 Mich. App. LEXIS 1442 (Mich. Ct. App.) sought to sort out the priority of no-fault coverage under Michigan's no-fault act, MCS 500.3101 et seq., among (1) the Auto Club policy covering the plaintiff driver's personal vehicle, (2) the Hudson "bobtail" policy issued to the plaintiff's business, and (3) the Amerisure no-fault policy issued to the motor carrier lessee of the plaintiff's tractor-trailer, in whose business the plaintiff was driving when an accident occurred. The trial court granted summary judgment to Auto Club because its policy only covered the plaintiff's personal auto, and that ruling was not appealed. The appellate court also agreed that no coverage was provided under the Amerisure policy because the tractor-trailer was not scheduled on the policy, and no one notified the insurer of an intent to add the vehicle to the policy before the loss occurred.

In *Mousavi v. John Christner Trucking*, 2019 US Dist. LEXIS 66796 (N.D. Okla.), the plaintiff truck driver complained the defendant employer had violated his privacy by installing a device that would record his conversations and other activities inside the truck. Interestingly, the court found a question of fact as to whether the driver had an objectively reasonable expectation of privacy inside the truck. While the motor carrier claimed the truck was the driver's workplace, the driver argued that he slept in the truck, made personal phone calls, relaxed after he finished

driving, and generally "spent almost every waking moment in his truck while on the road." Given the "fact-intensive" nature of the issue, the court found it would be premature to resolve the issue on the defendant's motion to dismiss.

The injured plaintiff in *Petit v. Penske Truck Leasing Corp.*, 2019 US Dist. LEXIS 62429 (M.D. Pa.) argued the purported owner, lessee, and lessor of a tractor-trailer involved in an accident acted negligently in failing to create and enforce policies for the safe operation of its vehicle, failing to hire a qualified driver, and failing to properly inspect and maintain the vehicle. Given the nature of these allegations, the court found the Graves Amendment, 49 U.S.C. § 30106(a)(2), which precludes claims against leasing companies based solely on their status as vehicle owners, did not require a dismissal of the complaint.

In *Franco v. Mabe Trucking Co.*, 2019 US Dist. LEXIS 37946 (W.D. La.), the court denied five of the six points raised in the plaintiff's motion in *limine* and permitted the defendant motor carrier to present expert testimony on (1) the motor carrier's obligations under the Federal Motor Carrier Safety Regulations, (2) the significance of the motor carrier's prior safety audits and ratings, (3) the defendant driver's qualifications, (4) the defendant driver's use of his vehicle's flashers at the accident site, and (5) the plaintiff's failure to disclose his carpal tunnel syndrome and sleep apnea on his US Department of Transportation (USDOT) medical form.

United States v. Diaz-Torres, 2019 US App. LEXIS 6394 (5th Cir.) addressed the criminal aspect of a recurring fact pattern that, in other cases, raised liability and coverage issues. Many undocumented immigrants have been smuggled into the United States in trucks. In this case, the driver had 72 people stowed in the trailer. The appellate court found sufficient evidence to support the jury verdict that the driver had agreed to the illegal transportation, specifically that his tractor-trailer was running when they boarded, the vehicle made no stops until the border checkpoint, the passengers were hidden among eight all-terrain vehicles inside the trailer, and the driver appeared nervous when approached by border agents.

Under New Jersey law, a no-fault insurer may seek reimbursement of no-fault benefits paid to its injured insured from the liability insurer of the offending tortfeasor. Absent agreement between the insurers, the no-fault insurer's right to reimbursement is determined by arbitration. In *Liberty Mutual Insurance Co. v. Penske Truck Leasing*, 2019 N.J. Super. LEXIS 71 (N.J. App. Div.), the court held the arbitration, rather than a parallel court action, should determine whether the liability insurer's insured was, in fact, a tortfeasor with respect to the injured party.

In *Estavien v. Progressive Casualty Insurance Co.*, 2019 Conn. Super. LEXIS 709 (Conn. Super. Ct.), the granddaughter of the named insured sued the insurance broker who asked insurer Progressive to increase the liability limits of the policy in question but not to increase the underinsured motorist coverage limits to match the liability limits. Since she was a resident relative of the named insured and, therefore, a foreseeable beneficiary of the policy, the court found she had standing to sue the broker. The court also found the broker owed a duty of care to the plaintiff (whether that duty was breached in this case, of course, will require further litigation).

We note a settlement was reached in class action *Charles Roberts and Kenneth McKay v. C. R. England, Inc. and Opportunity Leasing, Inc.*, Civil Action No. 2:12-CV-00302 (D. Utah). The plaintiff drivers filed suit in 2011 alleging, among other things, that C. R. England was violating the Utah Truth in Advertising Act, the Utah Business Opportunity Disclosure Act, and the Utah Consumer Sales Practices Act and was committing fraud, negligent misrepresentation, unjust enrichment, and breach of fiduciary duty by recruiting individuals to participate in truck lease-to-own programs and then luring participants into high-interest loans that made it difficult for them to succeed. Ultimately, C. R. England agreed to pay $37.8 million in a full and final settlement but did not concede it had committed any of the violations alleged by the drivers.

In *Haberl v. McAllister*, 2019 Ariz. App. Unpub. LEXIS 1310 (Ariz. Ct. App.), an owner-operator kept a supply of used but allegedly usable tires on hand at the facilities of the motor carrier and lessee. One of the tires exploded while mounted on a leased tractor, injuring the principal of the owner-operator. He sued the seller and manufacturer of a new tire that had originally been installed on the vehicle, and that action was dismissed when it was determined the used tire, not the new tire, was on the tractor. By that time, the statute of limitations for suing the motor carrier and its subsidiary repair shop that had installed the used tire had passed. The injured party sued his attorneys, arguing they should have discovered the potential liability of the repair shop and brought it into the suit before the statute had run.

The court found the repair shop could owe a duty to the injured plaintiff to inspect the used tire before installing it. In light of that duty, the court allowed the plaintiff's action against his attorneys to go forward.

The plaintiff in *Hines v. National Continental Insurance Co.*, 2019 US App. LEXIS 38318 (Ninth Cir.) was an inmate who obtained a default judgment against a prison-transportation contractor insured by National Continental. In an action to collect his judgment, the plaintiff argued the insurer was obligated to pay the default judgment pursuant to its MCS-90 endorsement. The default judgment, though, was obtained on a claim of violating the plaintiff's Eighth Amendment protections against cruel or unusual punishments, alleging the transportation company exhibited "deliberate indifference" and knew of, but disregarded, an excessive risk to his health and safety. Accordingly, the default judgment was not granted based on the "negligent operation, maintenance, or use of motor vehicles" as provided in the MCS-90, and the endorsement did not apply.

Since the MCS-90 endorsement is not coverage but rather an exposure the insurer takes that is akin to that of a surety, the endorsement gives the insurer the right to collect any payment made under the MCS-90 from the named insured. We don't often hear about that right in the case law, which makes the decision in *Berkshire Hathaway Homestate Insurance Co. v. Adams*, 2019 US Dist. LEXIS 125428 (M.D. Ala.) notable. The insurer paid $100,000 to help settle a claim against C&R Transport involving a non-covered truck. After its attempt to recoup the money from the insured was ignored, the insurer filed suit and was awarded judgment for the $100,000 it paid plus interest and costs.

In our 2018 edition, we discussed the decision in *Trustgard Ins. Co. v. Collins*, 2017 US Dist. LEXIS 198731 (D.S.C.) that dealt with the MCS-90. The district court granted the insurer's motion that it provided no coverage under its policy and the MCS-90 did not apply. In November, the Fourth Circuit vacated the district court's order, finding that, since the tort case had not yet been adjudicated, the district court should have declined to hear the case. First, the court suggested, without deciding, there may not even have been jurisdiction under Article III of the US Constitution since there was no judgment in tort and, therefore, it was not clear that the insurer had standing to file the declaratory judgment action. In any event, the appellate court found that the trial court had abused its discretion in hearing the suit since it was forced to consider and rule on matters that would be better handled by the state court handling the tort case.

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