ALERT

January 2017

Table of Contents

This publication is not intended to render legal services; the publisher assumes no liability for the reader's use of the information herein.
© 2017 Barclay Damon, LLP

Attorney Advertising

Transportation: Annual Year in Review

Barclay Damon's Transportation Team

Our opening article this year focuses on the MCS-90: courts around the country have increasingly come to accept the trip-specific approach, which determines the applicability of the MCS-90 based upon the driver's activities and the dispatch instructions for the particular load at issue rather than taking a broader view of what the driver and/or rig are assigned to do or are available to do on other days. Also discussed in several decisions this year is what it means for a trucker to be acting "for-hire".

In article two, Phil Bramson (the co-editor) looks at transportation network companies which are revolutionizing the way that people now travel within cities. Courts have began to confront new issues relating both to liability and coverage that arise out of the increasing popularity of this new mode of transportation.

Questions relating to employee benefits and rights continue to dominate litigation in the transportation arena. We welcome to the transportation team Mike Sciotti, a partner in the Syracuse office who focuses on employment issues, along with Cassandra Santoro and Ross Greenky, who also concentrate on labor and employment issues and who have contributed to this review. We also welcome Arianna Kwiatkowski of our Buffalo office who analyzed jurisdictional issues resolved in the case law last year.

Our New York City office has been upgraded with the addition of a veteran litigator John Canoni (who contributed article 5 on a trucker's vicarious liability for the negligence of its drivers) who strengthens the Team's defense capability in New York City and its environs and in New Jersey. As has been traditional, we have contributions from various team members, including Alan Peterman's assessment of the year's cargo cases.

We look forward to hearing our readers' thoughts and comments and stand ready to assist with any legal needs you may have.

Larry Rabinovich

TRANSPORTATION TEAM

Laurence J. Rabinovich
(212) 784.5824
lrabinovich@barclaydamon.com

Gary H. Abelson
Defense / Rochester

Jonathan H. Bard
Defense / Albany

Philip A. Bramson
Coverage

John C. Canoni
Defense / New York

Michelle K. DeKay
Defense / Syracuse

Sanjeev Devabhakthuni
Coverage

Thomas J. Drury
Defense / Buffalo

Jesse R. Dunbar
Reinsurance

Michael E. Ferdman
Defense / Buffalo

William C. Foster
Coverage

John P. Gaughan
Defense / Buffalo

Ross M. Greeky
Employment

Yvonne E. Hennessey
Energy

Meredith Ireland
Coverage

Ariana E. Kwiatkowski
Defense / Buffalo

Matthew J. Larkin
Defense / Syracuse

George G. Mackey
Defense / Rochester

Bryan J. Maggs
Defense / Elmira

Alan R. Peterman
Defense / Syracuse

Matthew J. Rosno
Defense / Elmira

Vincent G. Saccomando
Defense / Buffalo

Cassandra L. Santoro
Employment

Michael J. Sciotti
Employment

Robert M. Shaddock
Defense / Rochester

Transportation Annual Year in Review

Edited by: Laurence J. Rabinovich
& Philip A. Bramson

1. The MCS-90 Endorsement and State Filings

The year's crop of MCS-90 decisions, many from state courts, gives us the opportunity to review some basic principles relating to the scope of the federal filing. In *Grange Indemnity Insurance Co. v. Burns*, 337 Ga. App. 532, 788 S.E. 2d 138, the insurer issued a liability policy to J.B. Trucking, Inc., a local hauler, with limits of $350,000 and, for reasons unknown, an MCS-90 endorsement with the amount $350,000 typed in on the front side of the endorsement. The back of the endorsement, of course, sets out the three basic amounts of filing requirements for property carriers for-hire, $750,000, $1 million and $5 million. To be sure, insurers are allowed to "aggregate," that is to team up to provide the required limits. Here, though, there was no compelling evidence that J.B. Trucking was an interstate carrier that required a federal filing and, in fact, no filing was made. The court offered no explanation for any of this, and we wonder whether the underwriters issued this MCS-90 in error.

The J.B. Trucking vehicle involved in the loss was being used in intrastate commerce, but plaintiff was looking for a recovery in excess of $350,000 and thought that the MCS-90 might offer an opportunity since the endorsement is generally issued in one of the higher amounts set out above. Plaintiff, who had sued both J.B. and Grange, argued that the MCS-90 applied and that its limits needed to be increased to $750,000. (In Georgia, the plaintiff may sue the defendant and insurer in the same lawsuit.) Prior to trial the court found that J.B. was an interstate carrier (although the finding is questionable), and ruled that the MCS-90 applied even in the context of an intrastate load. And, as if that weren't enough, the court found that the MCS-90 should be increased to $750,000. The case then went to trial and judgment was entered against J.B. for over $2 million.

Grange appealed the coverage determinations and the Georgia appellate court reversed. Focusing on the scope of the MCS-90 (Grange had other arguments as well) the court held that under the prevailing trip-specific view, the MCS-90 does not apply if a loss occurs during an intrastate run even if, on other occasions, the insured is engaged in interstate operations. Burns, the plaintiff, had argued that Georgia regulations had adopted the MCS-90 for the intrastate operations of interstate carriers. The court, quite properly, rejected that argument, as well. The case, thus ended, where it should have, with the insurer exposed only in the amount of $350,000. The case demonstrates, yet again, that issuing an unnecessary MCS-90 can lead to costly mischief even where it does not lead to ultimate recovery by a claimant.

The trip-specific approach to the MCS-90 was also adopted by the Connecticut Supreme Court in *Martinez v. Empire Fire & Marine Insurance Co.*, 322 Conn. 47, 139 A.3d 611. The insured, Tony's Long Wharf Transport, was an authorized USDOT for-hire carrier which appears to both haul freight interstate and engage in towing services. (As the case was being decided, and for unrelated safety violations, the motor carrier was shut down by state regulators.)

On the date of loss, a Tony's employee was driving a Tony's pick-up truck from New Haven to Hamden, Connecticut, a nine mile trip which did not

involve crossing any borders, for the purpose of purchasing repair parts from a dealer. The parts were going to be installed in tow trucks that would be used both inside and outside the state. On the way back from the dealer, the truck collided with a passenger vehicle operated by Martinez causing her bodily injury. She filed suit and won a judgment in the amount of nearly $700,000. Martinez then filed suit against Tony's insurer. The truck involved in the accident had been deleted from the Empire policy so plaintiff focused instead on the MCS-90 endorsement. The trial court held that the MCS-90 did not apply since the repair parts were not being moved interstate.

The intermediate appellate court affirmed the decision, but on a different ground. In responding to Martinez's appeal, Empire had cited to the rationale adopted by the trial court, but added, as an alternative argument, that the MCS-90 could not apply where the named insured was not acting as a for-hire carrier at the time of the loss. The appellate court accepted that argument, making it unnecessary to consider the issue the trial court had focused on, namely whether the load was interstate. The trial court had rejected Empire's "for-hire" argument because it felt that since the driver had been paid for his efforts that day, his vehicle was being used "for-hire". The appellate court, quite rightly in our view, held that the issue was not whether the driver was paid (of course he was) but that Tony's, the motor carrier named insured, was not engaged in for-hire transportation, that is, it was not hauling the property of others for a fee at the time of the loss. It was carrying parts that it had purchased from the dealer for the maintenance of its own vehicles.

The Supreme Court of Connecticut has now affirmed judgment for the motor carrier, although it relied only on the reason accepted by the trial court. The Supreme Court seems to have concluded that Tony's was acting as a for-hire carrier based on what it called "undisputed evidence" (presumably the payment to the driver). That was unfortunate.

Instead, the court concentrated on whether the proper test is the trip-specific approach, and whether the particular transportation was interstate in nature. Over the dissent of one justice who held that the language of the MCS-90 shows that it was meant to apply even if the trip at issue was local, the majority followed the view of the federal Second Circuit (and others) that the MCS-90 only applies where the for-hire carrier is actively engaged in interstate hauling at the time of the loss. The court acknowledged that there are times when a trip within one state may nonetheless be considered interstate; the trip may be one leg of a continuous movement of goods which ultimately crosses state lines. Here, though, the truck parts were not being transported interstate – they were going to be installed in company trucks at its facility in Connecticut. The fact that some of these trucks would eventually be dispatched out of state carrying loads did not convert the load of truck parts into an interstate shipment.

KLLM Transport Services v. Hallmark, 2016 Tex. Ct. App. LEXIS 10089 (Tx. App.), involved a policy issued by Hallmark to Edwin Rodriguez d/b/a Total Transport, a trucker who operated as an individual and who was identified on the policy as an individual (not a corporation). A Total truck, operated by a Total driver (not Mr. Rodriguez) damaged a tractor owned by KLLM, which sued the driver as well as an entity called Total Transport Logistics, Inc. and won a default judgment.

The relationship, if any, between the incorporated entity and the DBA was not explained. Citing to the USDOT regulatory guidance from 2005 which provides that the MCS-90 applies only to a judgment entered against the named insured motor carrier, and observing that the incorporated entity was not Hallmark's named insured, the court had little trouble concluding that the MCS-90 did not apply.

The 11th Circuit Court of Appeals affirmed a decision by a federal district court in Florida that we discussed in last year's summary. *National Specialty Ins. Co. v. Martin-Vegue*, 644 Fed. Appx. 900 (11th Cir.). Howard Martin-Vegue was killed in a collision with a truck operated by Andrii Plys. The estate sued Plys and the motor carrier that he was working for, ABS Transport. National Specialty paid the limit of its policy issued to ABS Transport. The estate argued that it was also entitled to the limits of a separate policy that National Specialty had issued to ABS Freight, a motor carrier operated by the ex-husband of the principal of ABS Transport. As often occurs when family members operate multiple entities, there appears to have been a certain amount of overlap between the two companies, which could have caused both the insureds and their insurers unnecessary exposure.

National Specialty filed a declaratory judgment action seeking an order from the court declaring that the policy and the MCS-90 that it had issued to ABS Freight had no applicability to the loss, and the district court agreed. The Eleventh Circuit has now affirmed that decision. Part of the difficulty for National Specialty was that the

trailer attached to ABS Transport's tractor was owned by ABS Freight. That left open the possibility that Plys might have been an insured under the Freight policy as the permissive user of a covered auto (the trailer). However, the court found that Plys did not so qualify because the policy excluded coverage for anyone using an ABS Freight vehicle pursuant to a lease agreement or interchange agreement.

That left the MCS-90. Studying the evidence, the court concluded that Plys was hauling for ABS Transport, and that ABS Transport, not ABS Freight, was the for-hire motor carrier. Since ABS Freight was not the for-hire carrier in this instance, the MCS-90 issued by National Specialty to ABS Freight could not apply.

In *OOIDA Risk Retention Group, Inc. v. Griffin*, 2016 U.S. Dist. LEXIS 57469 (E.D. Va.), neither the tractor nor the trailer involved in the loss was scheduled on the policy, which covered "specifically described" autos only. More importantly, the complaint filed against the insured alleged no facts regarding the make, type, or identifying features of the tractor or trailer involved in the loss, beyond asserting that the USDOT census number of the insured motor carrier was displayed. On that basis, the court held that the complaint failed to allege any facts which would even potentially bring the loss within coverage, and that OOIDA had no duty to defend the insureds in the underlying action. The court further declared that OOIDA's MCS-90 endorsement did not apply to the loss, based on the uncontroverted declaration of the tractor-trailer driver that he was driving only between points within Virginia, and that he was not transporting property for compensation at the time of the loss. The claimant's arguments, that the tractor-trailer might have been engaged in for-hire interstate commerce because it was traveling west on Route 460, and because the authorized motor carrier's USDOT number was apparently displayed, were rejected as mere speculation. (Since the insurer's duty to compensate a victim under the MCS-90 is not triggered until there is a judgment against the insured motor carrier, this case is noteworthy for the court declaring the MCS-90 inapplicable even before judgment was entered against the motor carrier.)

We very much like the comments of the Supreme Court of Montana concerning the MCS-90 in *Westchester Surplus Lines Insurance Co. v. Keller Transport, Inc.*, 382 Mont. 72, 365 P. 3d 465 (a case described more fully in the Coverage section). The court stressed that the MCS-90 is similar to a surety or guarantee, and that it is separate from the policy. Therefore one may not use language from the MCS-90 to interpret the policy (and create an ambiguity). This should work both ways – one should not be able to use policy terms to interpret the MCS-90.

The federal court in *Rothschild v. Lancer Insurance Co.*, 2016 U.S. Dist. LEXIS 43809 (W.D. PA) remanded the matter back to state court. The insurer had removed the suit to federal court on the basis that the MCS-90 in its policy created a federal question. The court held that the interpretation of an insurance policy, even one which included an MCS-90, does not automatically create federal question jurisdiction. It was not obvious that the MCS-90 issue would ever need to be decided.

A related issue was raised in *Fortenberry v. Scottsdale Insurance Co.*, 2016 U.S. Dist. LEXIS 142476 (E.D. La.). A state court action dealing with coverage issues was already underway. The claimants filed a separate declaratory judgment action in federal court on the (interesting) issue of whether the MCS-90 is applicable where the claimant has the possibility of recovery under uninsured motorist coverage. The federal court did not hold that it lacked subject matter jurisdiction – it may be that the standard for federal question jurisdiction was met since the scope of the MCS-90 would have been front and center. However, the court stayed the federal action with the expectation that all issues including the MCS-90 issue would be decided in the state court.

The federal court in *Rushfeldt v. State of Texas*, 2016 U.S. Dist. LEXIS 71507 (W.D. Wis.) did not dismiss the action, or deny that there was subject matter description, but quite understandably transferred venue of the suit against the State of Texas from Wisconsin to a federal court in Texas. Plaintiff was the principal of a Wisconsin-based interstate motor carrier. The motor carrier's new insurer had failed to file the mandated Texas insurance certificate and, as a result, the Texas DMV revoked the motor carrier's registration certificate. Contending that Texas law harasses truckers and that the Texas filing serves no legitimate public purpose, the plaintiff argued that Texas had violated the Eighth Amendment's prohibition of excessive punishment. Texas responded with a battery of affirmative defenses including sovereign immunity and the absence of subject matter jurisdiction. It is hard to imagine that the case will ever get much traction. The Wisconsin judge, though, opted to transfer the case to the district court in Texas; round two of this unusual battle will be fought there.

Larry Rabinovich

2. Transportation Network Companies

A "transportation network company" (TNC) is a company that uses an online-enabled platform to connect passengers with drivers using their personal, non-commercial, vehicles. This rapidly growing segment of the transportation industry has contributed more than its share of transportation-related litigation. In August, 2016, it was estimated that Uber, perhaps the world's best-known TNC, was the defendant in more than 70 pending federal lawsuits and many more in state courts. Kelly, "Uber's never-ending stream of lawsuits," http://money.cnn.com/2016/08/11/technology/uber-lawsuits/index.html.

We note that the cases over the last two years suggest a recurring pattern, in TNC lawsuits. Relatively early in the litigation the defendant TNC moves for summary judgment, the courts find a question of fact, and the TNC then settles the case without waiting for a potentially adverse factual determination. A sampling of the reported decisions does reflect, however, the variety of claims that are being asserted against TNCs:

A. Injury to Passengers

i. Bodily Injury

In *Doe v. Uber Technologies, Inc.*, 2016 U.S. Dist. LEXIS 60051 (N.D. Cal.), two women sought damages from Uber arising out of sexual assaults by Uber drivers. Uber argued that the claims for vicarious liability should be dismissed because (1) the drivers were independent contractors, not employees, and (2) because the assaults were outside the scope of the drivers' duties in any case. The Northern District of California found that the plaintiffs had asserted sufficient indicia of control to raise a material question of fact as to whether an employment relationship existed. The court held that the plaintiffs had stated a viable claim for vicarious liability to the extent that the assaults could be found to be incidental to the drivers' services to Uber.

Notably, the court also considered (but did not answer) the question of whether Uber should be held to a heightened duty of care as a "common carrier." Under California law, a common carrier is "everyone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages…." Moreover, a common carrier's liability for an assault by one of its employees does not depend on whether the employee was acting within the scope of his duties, but is based on the common carrier's separate duty to keep its passengers safe. Again, the court found that the plaintiffs had alleged sufficient facts to survive a motion to dismiss their allegations that Uber is a common carrier.

ii. Discrimination

National Federation of the Blind of California v. Uber Technologies, Inc., 103 F. Supp.3d 1073 (N.D. Cal. 2015), involved an allegation that Uber and its California subsidiaries discriminated against blind persons by refusing to transport guide dogs, in violation of the federal Americans with Disabilities Act, the California Civil Rights Act, and the California Disabled Persons Act. Uber contended that it is not a "public accommodation" as that term is defined under the ADA. However, since "travel service" is one of twelve categories of "public accommodation" under the statute, the court found that the complaint survived a motion to dismiss.

The plaintiff in *McPhail v. Lyft, Inc.*, 2015 U.S. Dist. LEXIS 31467 (W.D. Tex.), has a physical disability and uses a wheelchair for mobility. She alleged that Lyft failed to provide her accessible cab or equivalent transportation service, in violation of the Texas Human Resource Code. Lyft removed the case to federal court. The district court found that plaintiff's petitions failed to adequately assert a claim under the ADA, so no federal question jurisdiction was present. Moreover, plaintiff had submitted a binding stipulation limiting her recovery to less than $75,000, the minimum amount in controversy necessary for federal jurisdiction. Considering further that plaintiff's primary objective was injunctive relief, the matter was remanded to Texas state court.

iii. Overcharges

In *Tadepalli v. Uber Technologies, Inc.*, 2016 U.S. Dist. LEXIS 55014 (N.D. Cal.), the court approved a settlement of a class action on behalf of passengers who paid Uber drivers taxes, fees, tolls or surcharges for airport pick-ups or drop-offs when no such fees were in fact charged by the airports, and Uber was not transferring money for the "fees" to the airports. The settlement amounted to $1,814,909.55.

B. Wage & Hour Issues

The class action plaintiffs in *O'Connor v. Uber Technologies, Inc.,* 82 F. Supp.3d 1133 (N.D. Cal. 2015), asserted that they were employees of Uber, rather than independent contractors, and therefore entitled to various protections under the California Labor Code, including the right to keep the entire

amount of any gratuity paid by customers. The court found a material question of fact as to whether Uber drivers are independent contractors, and denied Uber's motion for summary judgment. Uber exercised substantial control over the qualification and selection of drivers through the application process, background checks, city knowledge exams, vehicle inspections, and personal interviews. The parties disputed the degree to which Uber could fire drivers at will, compel drivers to accept assignments, or control the manner and means by which the drivers provided transportation services.

Notably, the court observed:

> First, Uber's self-definition as a mere "technology company" focuses exclusively on the mechanics of its platform (i.e., the use of internet enabled smartphones and software applications) rather than on the substance of what Uber actually does (i.e., enable customers to book and receive rides).…If, however, the focus is on the substance of what the firm actually does …, it is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one. In fact, as noted above, Uber's own marketing bears this out, referring to Uber as "Everyone's Private Driver," and describing Uber as a "transportation system" and the "best transportation service in San Francisco."

Cotter v. Lyft, Inc., 60 F. Supp.3d 1067 (N.D. Cal. 2015), was another class action in which the plaintiffs sought statutory benefits (including minimum wage and expense reimbursement) as employees of Lyft, rather than independent contractors. Again, the court found facts on both sides of the question (factors echoed in the *O'Connor* analysis), precluding summary judgment for either party. (For a broader consideration of the employee/independent contractor conundrum, see sections 3 and 4.)

C. Unfair Competition

In *Philadelphia Taxi Association, Inc. v. Uber Technologies, Inc.,* 2016 U.S. Dist. LEXIS 152431 (E.D. Pa.), an association of Philadelphia taxicab companies, asserted claims against Uber for attempted monopolization in violation of federal antitrust laws, and state law claims of unfair competition and tortious interference with present and prospective contractual relations. The court noted, *inter alia*, that the value of a taxi medallion had dropped from a high of $530,000 several years back to $80,000. Nevertheless, the court granted Uber's motion to dismiss all counts, noting that the antitrust claim must fail because the plaintiff's claim was not injury to competition itself, but rather economic loss incurred due to the competition posed by Uber. The claims of unfair competition failed because they were premised upon Uber's alleged evasion of state and municipal statutes and regulations, none of which provided a private right of action.

Another Philadelphia taxicab company asserted claims against Uber in *Coachtrans, Inc. v. Uber Technologies, Inc.,* 2016 U.S. Dist. LEXIS 110546 (E.D. Pa.), for tortious interference with prospective business advantage, as well as false advertising under the federal Lanham Act. The court found that mere allegations that Uber was operating a taxi service in violation of state or municipal statutes or regulations would not support either claim. The complaint was dismissed without prejudice, allowing plaintiff fourteen days to file an amended complaint.

After Massachusetts enacted regulations on January 16, 2015, establishing standards for the registration of vehicles providing services to TNCs, taxicab companies argued in *Boston Taxi Owners Association, Inc. v. City of Boston*, 2016 U.S. Dist. LEXIS 43496 (D. Mass.), that the regulations themselves, and Boston's enforcement of those regulations, violated their constitutional and contractual rights. The court found that the state permitting TNCs to operate without taxi medallions did not impede the taxi owners' rights to use their medallions, even if the competition effectively reduced the value of the medallions, and consequently there was no unconstitutional "taking" of property rights. The court also found that Boston, by issuing medallions, had not entered a binding contract that was breached by also allowing TNCs to operate. Nevertheless, the court refused to dismiss the claim that taxicab companies and TNCs were providing similar services but being treated differently under the law, with no legitimate governmental reason for doing so.

Philip A. Bramson

3. Truck Driver as Employee – Overtime

In *Matter of Bogart, (Lavalle Transp., Inc.--Comm'r of Labor),* 140 A.D.3d 1217, 34 N.Y.S.3d 195 (3d Dept.), the claimant was a long-haul trucker who filed for unemployment insurance benefits after his work with a trucking company ended. The court determined that the New York State Unemployment Insurance Appeal

Board ("NYSUIAB") erred in holding the respondent, a commercial trucking company providing freight transportation services nationwide, liable for unemployment insurance contributions on payments to the claimant and similarly situated drivers. Instead, the court determined that the claimant and similarly situated drivers were independent contractors of the respondent because they met virtually none of the criteria typically considered for an employer-employee relationship. Respondent did not supervise the drivers, who were free to choose any route desired when transporting loads. Drivers received no fringe benefits, were not subject to a dress code, were not required to attend any meetings, were not trained by the respondent, and the respondent did not reimburse them for their expenses. The court also relied on the fact that the claimant and similarly situated drivers were not required to work exclusively for the respondent or to lease their trucks from the respondent, could work when and if they wanted, or not at all, and, subject to compliance with insurance and regulatory requirements, were allowed to hire other drivers to make the deliveries. (Michael Sciotti of Barclay Damon represented the trucking company.)

Generally, the Motor Carrier exemption of the Fair Labor Standards Act ("FLSA") applies to truck drivers who: (1) are employed by a carrier that is subject to the jurisdiction of the Secretary of Transportation; and (2) are engaged in activities that directly affect the safety of transporting property or passengers in interstate commerce. The Motor Carrier exemption applies if there is a "reasonable expectation" that the employee will be directed to perform interstate driving. In contrast, the exemption does not apply an employee's safety-affecting activities are so trivial, casual, and insignificant as to be *de minimis*. In *Alexander v. Tutle & Tutle Trucking, Co.*, 834 F.3d 866 (8th Cir.), eleven truck drivers engaged in interstate transportation less than 1% of the time that they made deliveries for their joint employer. The U.S. Court of Appeals for the Eighth Circuit held that the drivers were still subject to the Motor Carrier exemption, and not entitled to overtime compensation under the FLSA and the Arkansas Minimum Wage Act. The court held that the activities of someone who drives in interstate commerce, however frequently or infrequently, are not trivial. Therefore, the Motor Carrier exemption applies to truck drivers whose interstate transportation makes up a small percentage of their duties.

In *Bradford v. GG Distributing, LLC*, 2016 U.S. Dist. LEXIS 32017 (E.D. Tex.), the issue was whether employers who transport solely within a single state are exempt from the FLSA under the Motor Carrier exemption. "A practical continuity of movement" is sufficient to trigger jurisdiction under the FLSA when the goods come to rest at a warehouse before completing their journey through intrastate transportation. Accordingly, once the goods enter into "the channels of interstate commerce," a stop in the movement of the goods does not necessarily mean that they are no longer in interstate commerce. Goods that are delivered pursuant to an "understanding" between the distributor and retailer, even though not part of a specific order, satisfy the "practical continuity of movement" requirement. The *Bradford* court held that GG Distributing's employee-drivers had clear understandings with the retailers, based on both the instructions of the retailers and on the carefully recorded history of their sales, as to how much product would be needed at any given time by any given retailer. The bigger the retailer, the clearer these understandings were. Accordingly, the Motor Carrier exemption applied.

The defendant in *Byers v. Care Transport, Inc.*, 2015 U.S. Dist. LEXIS 128111 (E.D. Mich.) was a transportation services company that focused on providing transportation for disabled veterans. Drivers are entitled to overtime under the FLSA, if they are employed by a motor carrier or motor private carrier and they work "in whole or in part" with vehicles: (1) weighing 10,000 pounds or less; and (2) "designed or used" to transport less than nine (9) passengers for compensation. This is referred to as the "small vehicle exception," enacted as part of the SAFETEA-LU Technical Corrections Act of 2008 ("SLTCA"). The issue in Byers was whether a driver falls within the "small vehicle exception" if he or she engages in mixed driving activity between small vehicles that transport fewer than nine (9) passengers and large vehicles that transport nine (9) or more passengers. The court construed "in whole or in part" to imply that if any *de minimis* part of a driver's work involves vehicles covered by the small vehicle exception, then he or she is entitled to overtime pay for that work. Accordingly, the court held that where a driver combines **more than *de minimus work*** involving a vehicle ***covered*** by the small vehicle exception with work involving a vehicle **not covered** by that exception, the employee is entitled to overtime under the FLSA for the weeks in which the combined work occurs.

In *Deherrera v. Decker Truck Line Inc.*, 820 F.3d 1147 (10th Cir.), a motor carrier agreed to transport shipments of empty kegs, pallets, hops, and other

materials from a warehouse to a brewery located within the same state approximately five (5) miles apart. The materials had arrived at the warehouse primarily from out-of-state locations, and the intrastate transportation was only the last leg of the materials' journey. The U.S. Court of Appeals for the Tenth Circuit held that commercial truck drivers who participate in a purely intrastate leg of a multistate shipping process may be engaged in interstate commerce. If, at the time a shipment begins, the final intended destination is another state, then the FLSA's Motor Carrier exemption applies throughout the shipment, even to a driver that is only responsible for an intrastate leg. Accordingly, the drivers in this case were exempt from overtime under the Motor Carrier Exemption of the FLSA and the Colorado Minimum Wage Order.

A former employee alleged in *Harrison v. Delguerico's Wrecking & Salvage*, 2016 U.S. Dist. LEXIS 75955 (E.D. Pa.) that the defendant employer failed to pay him overtime for years. Instead, the employee alleged that he was only paid his "regular rate of pay" for overtime hours. DelGuerico's alleged that the employee fell with the FLSA's Motor Carrier exemption. The court adopted the "four-month rule" applied by the U.S. Department of Transportation, which states that the Motor Carrier exemption applies to an employee for a four-month period from the time that the employees perform, or could be asked to perform, the exempt work. Since Delguerico's failed to provide evidence that it, or the former employee, engaged in interstate travel during his employment or within four (4) months of his employment, the court could not conclude that the FLSA's Motor Carrier exemption applied to the former employee.

The "four-month rule" was also applied in *Wells v. A.D. Transport Express, Inc.*, 2016 U.S. Dist. LEXIS 75598 (E.D. Mich.), in which the plaintiff was a former employee of the defendant, a Michigan-based trucking company engaged in short and long-haul shipping throughout the continental U.S. Wells worked as a "Breakdown Associate," ensuring the safe operation of trucks, but he also worked part-time for A.D. Transport as a driver on his regularly scheduled days off from his Breakdown Associate position. After plaintiff resigned, he alleged a claim of unpaid overtime under the FLSA. The evidence showed that plaintiff had performed both interstate and intrastate shipments for A.D. Transport. While plaintiff sometimes drove interstate shipments, he also completed intrastate legs of interstate trips by driving the interstate shipments to their final destination within Michigan. In addition, plaintiff recovered trucks and trailers from other states and returned them to Michigan, or vice versa. The court held that an employee is exempt for a four-month period beginning with the date that the employee could have been called upon to, or actually did, engage in the employer's interstate activity. The court determined that plaintiff drove in interstate commerce at least once during every four-month period of the time period at issue, and was therefore exempt from overtime under the FLSA's Motor Carrier exemption.

In *Huete v. Arguello Delivery & Cargo Corp.*, 2016 U.S. Dist. LEXIS 99639 (S.D. Fla.), plaintiff, a former employee of Arguello, brought claims for unpaid overtime under the FLSA. The court declined to dismiss the case because it could not conclude that plaintiff was exempt from overtime under the FLSA's Motor Carrier exemption. Arguello failed to establish that it was subject to the jurisdiction of the Secretary of Transportation, as required by the FLSA's Motor Carrier exemption. In addition, plaintiff submitted an affidavit that he only made local deliveries, and never delivered goods out of state. Finally, the Technical Corrections Act ("TCA") states that employees who work "in whole or in part" on vehicles weighing 10,000 pounds or less are covered under the FLSA. Plaintiff's affidavit stated that he would "frequently" deliver goods in a van that weighed less than 10,000 pounds.

In *Road Hog Trucking, LLC v. Hilmar Cheese Co.*, 2016 U.S. Dist. LEXIS 152281 (N.D. Tex.), Road Hog Trucking and its co-owners, Jared and Emily Berg, handled and hauled commodities from CDF's dairy to Hilmar's cheese manufacturing plants. The Bergs alleged that they were misclassified as independent transportation contractors rather than as employees of both Hilmar and CDF, and that Hilmar and CDF violated the FLSA by denying them minimum wage and overtime pay. The court held that even if the Bergs were "employees" of Hilmar and CDF under the FLSA, the Bergs and all of the Road Hog employees were paid far more than minimum wage. In fact, Hilmar and CDF paid them over $70 per hour more than minimum wage for every hour worked, including all possible overtime owed. Therefore, the court dismissed the FLSA claims.

The defendant in *Walker v. Coen Auto Transporters, Inc.*, 2015 U.S. Dist. LEXIS 182411 (M.D. Fla.), transported vehicles within the state of Florida, as well as to and from other states. Plaintiff, a driver with Coen Auto, alleged violations of the FLSA for Coen Auto's failure to pay him overtime, while Coen Auto contended

that the FLSA did not apply because plaintiff participated in the interstate transport of vehicles under the "practical continuity of movement" theory. The court held that one possible instance of a continuous stream of travel in the three (3) years prior to the lawsuit was insufficient for plaintiff to fall under the Motor Carrier exemption through this theory. Notwithstanding Coen Auto's contention that plaintiff could have reasonably been expected to drive in interstate commerce, the evidence showed that only 10% of Coen Auto's business involved the movement of vehicles over state lines, and plaintiff never drove out of state during his eight years of employment. Further, plaintiff testified that upon hire, Coen Auto told him that he would be a local driver and would not leave the state, and that for his entire employment he did not have the proper license, motor carrier number, or authority to leave the state. For all of these reasons, the court refused to hold that plaintiff was exempt from overtime under the FLSA's Motor Carrier exemption.

In *Winston v. Air Truck Express, Inc.*, 2016 U.S. Dist. LEXIS 9755 (D. Nev.), plaintiff was a local truck driver with Air Truck Express, Inc., and performed services for D&N Delivery Corp. Air Truck and D&N argued that plaintiff was exempt from overtime under the FLSA's Motor Carrier exemption. Plaintiff alleged that the exemption did not apply because he was only employed to perform local deliveries. Nevertheless, both Air Truck and D&N were motor carriers engaged in interstate transportation, and the court determined that plaintiff could reasonably have been expected to perform one of Air Truck or D&N's interstate shipments. The court relied on plaintiff's own admissions that (1) his duties included performance of "safety affecting activities on a motor vehicle used in transportation on public highways in interstate commerce," (2) the goods he delivered had originated outside of the state, and (3) he could have reasonably been expected to engage in interstate travel. As a result, the court determined that plaintiff was not entitled to overtime under the FLSA.

Sleepy's LLC is a New York based mattress and bedding company (recently purchased by, and now operating as "Mattress Firm"). In *Hargrove v. Sleepy's, LLC*, 2016 U.S. Dist. LEXIS 156697 (D.N.J.), delivery drivers alleged that they were entitled to overtime because Sleepy's wrongfully classified them as independent contractors. To determine plaintiffs' employment status, the court used the "ABC test" derived from the New Jersey Unemployment Compensation Act. The ABC test presumes that an individual is an employee, unless the alleged employer shows that: (A) the individual has been, and will continue to be, free from control or direction over the performance of such service; (B) the service is either outside the alleged employer's usual course of business, or that the service is performed outside all of its places of business; and (C) the individual is customarily engaged in an independently established trade, occupation, profession or business.

In this case, (A) Sleepy's controlled the delivery process for the plaintiffs: Sleepy's trained plaintiffs on how to interact with customers, how to load the trucks, and how to fill out Sleepy's paperwork. Sleepy's gave plaintiffs specific routes to drive in making deliveries, and could monitor plaintiffs' movements through a mobile application. Sleepy's performed surprise audits to determine whether plaintiffs appropriately delivered its products. In addition, Sleepy's supervised and monitored plaintiffs' work, and determined the time that plaintiffs began work. Finally, Sleepy's required the deliverers to sign IDAs, which prevented plaintiffs from performing any other business while on duty with Sleepy's, required plaintiffs to purchase insurance and list Sleepy's as an additional insured, and required plaintiffs to wear Sleepy's uniforms and display Sleepy's logos on their trucks. (B) Although Sleepy's was not a trucking company, part of its marketing scheme was quick delivery of its products, and the court held that the delivery of its mattresses is clearly an integral part of Sleepy's business. (C) Plaintiffs did not work for any other company, and relied on Sleepy's for their income. In fact, some of the plaintiffs earned all of their income from Sleepy's. Since all three of "ABC" conditions were in plaintiffs' favor, the district court determined that the plaintiffs were employees of Sleepy's, and not independent contractors.

In *Ferguson v. Randy's Trucking, Inc.*, 2016 U.S. Dist. LEXIS 155112 (E.D. Cal.), former drivers claimed to be entitled to overtime pay from the defendant trucking company under California Wage Order 16, which applies to "all persons employed in the on-site occupations of … drilling, including but not limited to all work required to drill, establish, repair, and rework wells for the exploration or extraction of oil, gas…." The defendant argued that the drivers were exempted from Wage Order 16 pursuant to Wage Order 9, which applies "to all persons employed in the transportation industry whether paid on a time, piece rate, commission, or other basis." "Transportation industry" includes "any … business … operated for the purpose of conveying persons or property from one place to another … by …

highway ... and all operations and services in connection therewith…." The court held that the plaintiffs did not operate solely "on or at or in conjunction with [an] … oil drilling" site, but rather drove from the defendant's terminal to different locations, and performed assignments for non-oil drilling clients. Therefore, Wage Order 16 did not apply to the plaintiffs. On the other hand, the court held that Wage Order 9 applied to the plaintiffs because each of their job assignments required them to drive on a highway. Therefore, the court dismissed the plaintiffs' claims for overtime pay.

Ross M. Greenky

4. Truck Driver as Employee – Workers' Compensation

In *CEVA Freight, LLC v. Employment Department*, 379 P.3d 776 (Or. Ct. App.), CEVA petitioned for judicial review of an administrative law judge's order assessing unemployment compensation taxes on remuneration CEVA paid to owner-operator truck drivers. The ALJ had found that that the owner-operators were employees, and not independent contractors, for three reasons. First, CEVA's operating authority was a prerequisite for their work and because they were not responsible for obtaining their own operating authority the ALJ found they were not independent contractors. The Court of Appeals, however, stated that the focus must instead be on the services provided by the person who is paid the remuneration. Here, the owner-operators were not performing interstate transport for the public for which they were required to have interstate operating authority, but rather they performed services to CEVA and were required only to obtain state driver licenses necessary to carry out those delivery services.

Second, the ALJ found that CEVA had the right to exercise direction and control over their means and manner of providing services. Aside from requiring driving logs and inspection reports, CEVA played only a small role in how the owner-operators performed their work. Furthermore, the Court of Appeals held that the direction and control test does not require that an independent contractor be free from all direction and control because if they are compensated by someone else, there will always be some level of oversight. The determination instead focuses on whether there is control over the means and manner of performance. Here, the owner-operators controlled the method by which they performed the services required by CEVA, and therefore fit the definition of independent contractors.

Third, the ALJ found that CEVA failed to show that the owner-operators were engaged in an independently established business. The Court of Appeals, however, found that the terms of the owner-operator agreements with the motor carrier proved the opposite. The Court of Appeals held that the owner-operators bore the risk of loss related to their business, made significant investments in their business through the ownership or lease of their vehicles, and had the authority to hire and fire people to assist them. The court therefore held the owner-operators met each of the criteria necessary to be treated as independent contractors, and their services were exempt from employment.

The plaintiff in *Esquinca v. Illinois Workers' Compensation Commission,* 51 N.E.3d 5 (Ill. Ct. App.), filed an application for adjustment of claim under the Workers' Compensation Act to receive benefits for a back injury he allegedly sustained while working for Romar Transportation Systems. The parties had been operating under a Contractor Service Agreement which stated Esquinca was an independent contractor, but Esquinca continued driving for Romar even after the Agreement expired (seven months prior to the accident) and was never expressly renewed.

The Illinois Court of Appeals found there was sufficient evidence to support the findings of the Illinois Workers' Compensation Commission and the circuit court of Cook County that Esquinca was an independent contractor. Romar did not have the right to control Esquinca's work performance to a significant degree because it did not tell him what route to take, he picked his own schedule, and he could pick which deliveries to accept. Esquinca owned the truck he used and paid all operational expenses, which means the employer did not furnish all of the primary equipment used to perform the work. Although Esquinca drove exclusively for Romar, he could have driven for other companies. Esquinca was responsible for deducting taxes out of his earnings. Although there was some evidence that indicated he was an employee, including that Esquinca worked exclusively for Romar and had no customers of his own, the appellate court held that there was more than enough evidence to support the determination that he was an independent contractor. Furthermore, the fact that the Agreement (which labeled the relationship as once of an independent contractor) was expired might render it unenforceable for a breach of contract claim, but that fact is not determinative on the issue of whether or not Esquinca was an independent contractor. The appellate court held that the Commission prop-

erly considered all relevant facts and Esquinca was in fact an independent contractor who should be denied benefits.

In hiring the truck driver plaintiff in *Walton v. Colonial Freight Systems, Inc.*, 2016 Tenn. LEXIS 316 (Tenn.), the defendant agreed to provide workers' compensation coverage to Walton. When Walton was injured in a collision while driving, however, Colonial denied his claim for workers' compensation benefits on the grounds that he had made material misrepresentations regarding his physical condition during his pre-employment medical assessment, which induced Colonial to enter into a contractual relationship with him.

The Supreme Court of Tennessee, however, concluded that Colonial voluntarily extended workers' compensation coverage to Walton, and the court could not find a law in Tennessee that made the Tennessee Workers' Compensation Act inapplicable to an independent contractor alleged to have misrepresented his physical condition in the employment agreement. By choosing to extend workers' compensation coverage to Walton, Colonial voluntarily subjected itself to the rules and procedures of the workers' compensation system. Colonial could assert misrepresentation of physical condition at the time of hiring as a defense in a workers' compensation action, but would need to prove that the employee knowingly and willfully made a false representation of his physical conditions, that the employer relied upon that misrepresentation in deciding to hire him, and that the misrepresentation was material, meaning there was a causal relationship between the false representation and the injuries incurred in the accident itself. The court held, however, that Colonial failed to offer proof there was a causal relationship between the alleged false representation and the work-related injury.

In *In re Claim of Harold*, 133 A.D.3d 1069 (N.Y. 3d Dep't 2015), an administrative law judge, the Unemployment Insurance Appeal Board, and the appellate court all agreed that that Leonard's Transportation was liable for additional unemployment insurance contributions on remuneration paid to the claimant truck driver and others similarly situated. The Third Department held that, although not dispositive on its own, perhaps the most important inquiry in determining if an employer-employee relationship exists is whether an employer retained control over the means used by the employee to fulfill his work obligations. The court further held that there was substantial evidence that Leonard's exercised the degree of control over claimant that would render him an employee. Although some of that control was mandated by federal regulations, which alone is not enough to establish an employer-employee relationship, the extent to which the regulations governed their relationship can still be considered when determining the level of control the employer exercised.

The claimant was not allowed to sublease or have any other party use the trucks without consent. Further, he was required to use trucks leased from Leonard's related company. He was also bound by a one-year noncompetition agreement and required to comply with Leonard's safety and procedures manual. He had no set schedule, but was expected to contact Leonard's daily with his status while hauling and contact Leonard's if he anticipated any delays. He did not haul freight for any other company or customers during the time he hauled for Leonard's. He also did not deal directly with customers because Leonard's handled that aspect. He received his assignments from Leonard's, and Leonard's established the rates for pickup and delivery. Prior to receiving any payment, he had to submit weekly paperwork to Leonard's. Additionally, Leonard's paid him regardless of whether the customer paid Leonard's. Substantial evidence, therefore, supported the finding that there was an employer-employee relationship, rather than an independent contractor relationship.

The question before the California Court of Appeals in *Lexington Insurance Co. v. Workers' Compensation Appeals Board*, 80 Cal. Comp. Cases 1383 (Cal. Ct. App. 2015) was whether a truck driver injured while unloading a load owned by a transportation company was an employee of the company within the meaning of the Workers' Compensation Act. Ali's Trucking entered into a "Lease Agreement Independent Contractor" ("Lease") with Trimac that listed Ali's Trucking as an independent contractor, and the injured worker, Sheik Zahid Ali ("Sheik"), entered into a separate "Independent Contractor Agreement" with Ali's Trucking (and the form contract provided by Trimac). Weighing the evidence on both sides of the issue, the Workers' Compensation Appeals Board and the court determined that the driver Sheik was an employee of Trimac, and the relationship between Ali's Trucking and Trimac was one of joint employment because both had the right to direct and control Sheik while he was at work. Trimac made decisions with regard to hiring and training of Ali's Trucking drivers, monitored their work, supplied tools and safety equipment, determined the routes, gave driving assignments, and required the drivers to call its dispatcher when finished. Furthermore, Trimac's employees and independent contractors operated in the same

way: Trimac fired independent contractors' employees, and Trimac procured insurance and deducted the cost from independent contractors' payments.

The workers' compensation insurance carrier, Lexington, argued that because the trucking industry is so heavily regulated, every instance of training and supervision was part of Trimac's effort to comply with those laws, but the court held that argument went too far because it would lead to the conclusion that every driver could be an independent contractor. Although Trimac's decision to train the independent drivers helped them comply with regulations, there is no law requiring Trimac to conduct the training itself. Additionally, Trimac trained on its own rules and methods, which is some evidence of control. Similarly, federal regulations require motor carriers to carry sufficient liability insurance for all drivers, but Trimac procured multiple types of insurance and failed to show that it was required by law to procure all of them.

Cassandra L. Santoro

5. Motor Carrier Liability for Driver Conduct

How many accidents by a single driver are enough to support claims for negligent retention and punitive damages against a trucking company? At least in Ohio, the answer appears to be more than seven. In *Laumann v. ALTL, Inc.*, 2016 U.S. Dist. LEXIS 181 (S.D. Ohio), the trucking company (ALTL) stipulated that it was vicariously liable for the negligence of its driver (Robert Snyder) in causing the accident that harmed the plaintiffs. ALTL moved for partial summary judgment dismissing the negligent retention and punitive damages claims against it. Plaintiffs' opposition to the motion highlighted the seven "Motor Accident Reports" ALTL had in Snyder's personnel file. The issue for the district court on the negligent retention claim, applying Ohio law, was whether these seven accidents were enough to create a factual issue regarding Snyder's alleged incompetence as a driver. The court noted that before hiring Snyder, ALTL ran a criminal background check on him, and confirmed that had prior truck driving experience and training. After he was brought on board, Snyder participated in ALTL's orientation and training programs, attended annual safety meetings and received individual instruction and safety tips. ALTL reviewed Snyder's FMCSA safety scores monthly and his driving record annually. The court concluded that Snyder's seven accident reports did not involve anything severe enough to cast doubt on Snyder's competence as a driver: "These seven Reports amount to less than one per 100,000 miles driven. No personal injury resulted. Other vehicles were involved only twice, and they were stopped rather than in motion. Snyder was never cited [by police]. And property damage, if any, was negligible." In language that should comfort motor carriers and their insurers, the court rebuffed plaintiffs' efforts to inflate these reports into a viable opposition to summary judgment, noting "[i]n the absence of supporting case law, Counsel's rhetoric cannot win the day." Having characterized the seven accident reports as "inconsequential", the court had little difficulty dismissing the related punitive damages claim, holding: "Nothing about their circumstances come close to the standard necessary to prove conscious disregard of an *almost certain risk* of substantial harm." *Laumann* demonstrates the importance of background checks and initial and ongoing safety training for drivers to enable trucking companies to defend against negligent hiring/retention and punitive damages claims.

We have reported over the years on the significance of the Graves Amendment in an insurer's arsenal of arguments to win early dismissal of a vicarious liability claim against an insured in the business of renting or leasing motor vehicles. *Johnke v. Espinal-Quiroz*, 2016 U.S. Dist. LEXIS 14057 (N.D. Ill.) is yet another example of the success of aggressive motion practice involving this defense. As the court noted, the Graves Amendment (49 U.S.C. § 30106) "protect[s] the motor vehicle rental and leasing industry against claims of vicarious liability where the leasing or rental company's only relation to the claim is as the owner of the motor vehicle in question." In *Johnke*, Mr. Espinal-Quiroz was driving his own tractor and pulling a semi-trailer leased to him by Eagle Transport Group LLC. Espinal-Quiroz, who was allegedly blind in one eye, failed to heed the signs warning of an upcoming construction zone and drove his vehicle into stopped traffic at a speed of about 65 mph, causing multiple fatalities. Eagle Transport moved to dismiss all of the state law claims against it on the grounds that the Graves Amendment preempted state law and mandated dismissal. One of the plaintiffs objected to the court consideration of an affirmative defense at the pleading stage as premature. But the court relied on case law dismissing vicarious liability claims, holding: "[A]ssuming that there is no dispute over whether a defendant was engaged in the business of leasing motor vehicles and that it owned the motor vehicle involved in the accident, a court can assess Graves Amendment preemption at the motion to dismiss stage, dismissing any claims not based on the les-

sor defendant's own negligence or criminal wrongdoing." Plaintiff argued that Eagle was also (maybe primarily) a trucking company and therefore not entitled to the protection of the Graves Amendment. The court found, though that the Graves Amendment can be applicable even where the defendant does things other than lease vehicles. (A very different result might be expected if the court were not convinced that the arrangement was actually a lease of a trailer. In our experience it is sometimes not easy to tell whether the driver had leased his tractor to the company for use in its business, or whether the company had leased its trailer to the driver for use in his.) Since the complaint alleged that Eagle Transport was the owner of the vehicle and the lease agreement established that it was engaged in the business of renting or leasing motor vehicles, the court applied Graves Amendment preemption and dismissed all the vicarious liability claims against Eagle Transport. However, Eagle Transport did not completely extricate itself from the case. The Graves Amendment will only provide a defense to claims of indirect negligence, i.e. vicarious liability; it will not help to defeat claims of an owner-lessor's direct negligence. In the past Eagle Transport, which was also a trucking company, had dispatched Espinal-Quiroz in its business. As such it knew or should have known of his medical issue; the court permitted the plaintiff to proceed with his case on the theory that Eagle Transport should not have leased its trailer to someone with vision problems of this nature.

In *Lester v. SMC Transport, LLC*, 2016 U.S. Dist. LEXIS (W.D. Va.), the driver Israel Martinez, Jr., drove out of a rest area using the entrance ramp instead of the exit, and made an illegal U-turn onto an interstate highway. This maneuver caused his tractor, which was towing a disabled tractor, to temporarily block all lanes of traffic on the highway. Another defendant, Roy Salinas ("Roy"), was a passenger in the tractor and allegedly directed Martinez to perform the maneuver. The plaintiff Brandon Lester, who was driving on the interstate, was unable to stop or maneuver his vehicle in time and struck the tractor; moments later a second vehicle struck Lester's vehicle. Defendant SMC Transport, the owner of the tractor Martinez was driving, moved to dismiss the vicarious liability claim against it based on Roy's negligence, arguing that Roy was an independent contractor and not its employee. The court found that Lester had alleged enough facts to establish a plausible claim of a master-servant relationship between SMC and Roy. SMC was successful in having the punitive damages claim against it dismissed because Lester failed to allege facts suggesting that SMC ratified, acquiesced or participated in the wrongful acts. The court also granted SMC's motion to dismiss the negligent entrustment, negligence per se and constructive fraud claims against it because of pleading deficiencies. Lester, for his part, succeeded on his motion for partial summary judgment against the employer of Roy and Martinez on the grounds of vicarious liability, with the court finding that Roy and Martinez acted in the scope of their employment when the accident occurred. (The *Lester* case is related to the *Falls Lake National Insurance Co. v. Martinez* matter, discussed in both our Coverage and Miscellaneous sections, *infra*.)

In *Raja v. Big Geyser, Inc.*, 2016 N.Y. App. Div. LEXIS 7901 (2nd Dep't), an intermediate appellate court affirmed the trial court's decision granting summary judgment on vicarious liability claims to a distributor (Big Geyser) who had contracted with a trucking company (Dynasty Distributors) to distribute its goods. Dynasty's employee (Andre Cruz) drove the truck that struck Raja's vehicle and Raja sued Big Geyser. Big Geyser was able to establish that Cruz was not its employee. Plaintiff argued that the distributor agreement between Big Geyser and Dynasty designated a limited geographical area in which Dynasty could distribute Big Geyser's products and provided Big Geyser with some control over the storage and cleanliness of Dynasty's truck. But the court found that those facts were insufficient to create a triable issue of fact as to whether Cruz was Big Geyser's employee.

Puga v. About Tyme Transport, Inc., 2016 U.S. Dist. LEXIS 93572 (S.D. Tex.), describes a group of dysfunctional entities trying to run trucking and brokerage operations with little or no understanding of the business or of its regulatory requirements. These conditions may have contributed to the disastrous result. Truck driver Ronald Brown was driving too fast on a wet road and also talking on his cell phone when his tractor-trailer rig apparently hydroplaned. Brown failed to take appropriate action and his rig crossed the median, struck a vehicle carrying plaintiff Alexandro Puga, and then jackknifed. Both vehicles caught fire and Brown died as a result, while Puga was hospitalized. The companies that owned the tractor (About Tyme) and the trailer (Xtra Lease LLC) resolved the case by settlement or obtaining dismissal. Puga and his wife sued defendant RCX Solutions, which hovered somewhere between broker and motor carrier status, and the issue before

the court was whether RCX was Brown's statutory employer under the Motor Carrier Act (MCA), 49 U.S.C. § 31100. RCX had originally been tapped to deliver the shipment that Brown was carrying, but encountered equipment problems and could not complete the job. An RCX employee called Brown, who had previously informed RCX that he was available, and Brown agreed to complete the delivery. RCX argued that About Tyme was Brown's sole employer (About Tyme admitted being Brown's employer), and that Brown could not have two employers. The court did not reach the issue of whether or not Brown could have more than one employer, instead finding that disputed issues of material fact precluded summary judgment.

The interesting question of whether a truck driver can have two employers was considered in a rather different context by an intermediate appellate court in Louisiana in *Knoten v. Westbrook*, 193 So. 3d 380. This is a disturbing decision from the point of view of manufacturers and shippers. Tammy Westbrook was driving an eighteen-wheeler shortly after midnight on Christmas morning when she collided with the rear of Knoten's vehicle, causing Knoten to collide with a third vehicle. Three people were killed in the accident. Westbrook had been driving for 33 of the past 36 hours, having picked up cargo in California two days earlier, and was trying to get to her parents' home for Christmas morning. Her plan was to finish making deliveries of the cargo after Christmas in Louisiana and Tennessee. Westbrook was employed by Western Star Transportation, which owned the vehicle she was driving, and the load of plants she was carrying was owned by Nurserymen's Exchange. Nurserymen's had contracted with a freight forwarder to arrange for the transportation of the plants, and the freight forwarder had in turn contracted with Western Star to provide the transportation and delivery. Prior to Nurserymen's releasing the plants to Westbrook in California, a Nurserymen's employee met with Westbrook and made her sign a delivery instruction sheet. On that basis plaintiffs claimed that Nurserymen's was more than just a shipper.

At trial, the jury awarded damages of more than $90 million, but did not find that Westbrook was in the course and scope of a master-servant relationship with Nurserymen's. Plaintiffs appealed, contending that the jury erred by failing to find that Westbrook was Nurserymen's servant/employee and that the trial court gave incorrect jury instructions regarding the master-servant relationship. The appellate court found that the jury should have been instructed on the standard for finding dual employment under Louisiana's "two masters" rule. The court then went on to conduct a *de novo* review of the evidence to see whether Nurserymen's was vicariously liable for Westbrook's negligence. Although Nurserymen's contended that Westbrook was an independent contractor, the court found sufficient evidence to conclude that Nurserymen's exerted enough control over Westbrook's delivery of the plants to be considered a second employer. The court's finding relied on the driver instruction sheet that a Nurserymen's employee made Westbrook sign before releasing the plants to her. The sheet mandated, among other things, that a temperature recorder be used, that temperature be maintained within a specified range, and that the recorder be returned to Nurserymen's or else Westbrook could be fined $150. If Westbrook had not signed the driver instruction sheet, the plants would not have been released to her and she would not have been paid. *Knoten* serves as an instructive warning for avoiding vicarious liability claims in jurisdictions that utilize the two masters rule. Nurserymen's contract with the freight forwarder contained an appendix of temperature control requirements that was very similar to the driver instruction sheet Nurserymen's made Westbrook sign. The court indicated that had Nurserymen's not taken the extra step of requiring Westbrook to sign the instruction sheet, but rather relied on the contract with the freight forwarder to ensure proper temperature was maintained, the court might have reached a different result and found Westbrook to be an independent contractor. If an insured goes to the trouble of inserting delivery specifications into a contract, it should not then interact with the driver to doubly ensure those specifications are met. In this case, the "belt and suspenders" approach was not added protection. Instead, it painfully resulted in liability for a portion of a hefty jury verdict that might have been avoided.

The reverse situation was presented in *Lacy v. Time Dispatch Services, Inc.*, 2016 U.S. Dist. LEXIS 157703 (S.D. Ind.). In that case, the employer of a driver who caused an accident claimed that an agency relationship existed between the driver and a broker contracted with the employer. At the time of the accident, the driver was operating a vehicle owned by the broker. The court was not convinced by the employer's argument, denying its motion for summary judgment and holding that an employer may not escape vicarious liability by establishing that another entity might potentially be liable. Relying on prior cases in both federal and state

court, the court concluded that the employer failed to demonstrate that the broker's potential liability excused the employer's responsibility for its employee.

John C. Canoni

6. Carmack Amendment and Freight Claims

A. Waiver of Carmack Rights

The Carmack Amendment dominates most discussions of cargo claims but its provisions may be waived by agreement of the shipper and motor carrier. 49 U.S.C. § 14706. The defendants in *Sanofi-Aventis U.S., LLC v. Great American Lines*, 2016 U.S. Dist. LEXIS 112171 (D.N.J.) argued that plaintiff had waived its rights under the Carmack Amendment. Plaintiff responded that the waiver was not sufficiently unambiguous and complete to constitute such a waiver. The court acknowledged that the Carmack Amendment has completely occupied the field of interstate shipping and supplies the exclusive cause of action for interstate shipping claims alleging loss or damage to property. The court also recognized the fact that Congress had statutorily allowed carriers and shippers to enter into a contract to opt out of the Carmack Amendment default rules when they "in writing, expressly waive and or all rights thereunder." *See* 49 U.S.C. § 14101(b)(1).

The language at issue in *Sanofi-Aventis* stated that:

> Pursuant to 49 U.S.C.A. 14101(b)(1), the parties expressly waive any and all provisions under the ICC Termination Act of 1995, U.S. Code Title 49, Subtitle IV, Part B, and the regulations thereunder, to the extent that such provisions conflict with the terms of the [Transportation Contract] or the parties course of performance thereunder.

The court found that the parties clearly and expressly waived Carmack Amendment claims in the first part of the clause. Plaintiff had argued that the second part of the clause rendered the waiver ambiguous and ineffective. The court disagreed finding that the second clause in the waiver should be understood to mean that plaintiff had agreed to waive the Carmack Amendment as a whole but wanted to make clear that any of the default rules of the Amendment that were incorporated into the agreement should not be disturbed. Plaintiff had effectively waived its rights under the Carmack Amendment.

B. Standing to Recover Under the Carmack Amendment

In *Loves Express Trucking LLC v. Central Transport LLC*, 2016 U.S. Dist. LEXIS 114912 (E.D. Mich.), plaintiff's truck broke down at a rest stop in Illinois when its engine failed. Plaintiff purchased a new engine from Chicago Truck. Chicago Truck arranged to have an engine shipped from Ohio to the rest stop in Illinois through its transportation broker, and the broker retained defendant to handle the shipment. The engine, however, arrived at the rest stop damaged. The transportation broker requested that the engine be delivered back to Chicago Truck. Chicago Truck, though, went out of business without repairing the engine, and, in fact sold the engine without submitting the proceeds to the plaintiff. Nor did Chicago Truck ever submit a damage claim, either to the broker or to defendant.

Plaintiff sued defendant under the Carmack Amendment, arguing that it stood in the shoes of Chicago Truck with respect the damage claim against defendant. Defendant moved for summary judgment arguing that plaintiff had not filed the claim within the time limits specified in its tariff. Plaintiff argued that it was not bound by the time limits for filing a claim because it was not a party to the bill of lading for the shipment. The court then determined it had to decide whether plaintiff, as owner of the shipment, had standing to recover under the Carmack Amendment when it was not named as a party to the bill of lading. The court found that because plaintiff was not a party to the bill of lading or shipping receipt, nor listed as consignee, consignor, shipper or carrier, it had no standing under the Carmack amendment.

The court also found that plaintiff could not stand in the shoes of Chicago Truck with respect to any claim that Chicago Truck may have had against defendant. Plaintiff had argued that it had standing under the indemnification provision of 49 U.S.C. § 14706(b). The court held that section applied only to claims for indemnification between carriers, and not owners and carriers. Finally, the court held that even if plaintiff had standing to file the claim under the Carmack Amendment, the complaint was filed outside the time limits specified in defendant's tariff. The court also rejected plaintiff's argument that defendant's actual knowledge of the damage to the engine precluded plaintiff from having to comply with the notice of claim provision of the tariff finding that those provisions had to be strictly complied with.

Plaintiff in *United Logistics LLC v. DVM Car Tran LLC*, Dist. LEXIS 97881 (E.D. Mich.), was a freight broker

that specialized in arranging the transportation of motor vehicles throughout the United States. Plaintiff entered into an agreement with defendant, a registered motor carrier, for the transportation of motor vehicles. Subsequently a new car was damaged while being transported from the General Motors facility in Tennessee to a dealership in Indiana. General Motors determined the car was a total loss, destroyed the car and charged plaintiff $23,631.45. Plaintiff paid the claim and requested reimbursement from defendant.

When defendant refused to reimburse plaintiff, plaintiff filed an action under the Carmack Amendment. Defendant moved to dismiss plaintiff's complaint arguing that plaintiff did not have standing under the Carmack Amendment, arguing that the person entitled to recover under the receipt or bill of lading was the shipper, General Motors, and not plaintiff. The court found that the issue was whether plaintiff was a "carrier" under the Carmack Amendment that somehow stepped into the shoes of the shipper/owner who would be entitled to recover against the carrier.

Plaintiff tried to argue that it was, in fact, a carrier under the Carmack Amendment. The court rejected that argument based on the fact that the Broker/Carrier Agreement identified plaintiff as a broker and defendant as a carrier and the fact that defendant was shown as the carrier on the bill of lading. The court also found that plaintiff had not introduced any evidence that General Motors has assigned its rights as a shipper to plaintiff that would have allowed the plaintiff to stand in General Motors shoes. The court granted defendant's motion to dismiss.

C. Elements of a Carmack Amendment Claim and Defenses Thereto

Plaintiff in *Mecca & Sons Trucking v. White Arrow, LLC*, 2016 U.S. Dist. LEXIS 127260 (D.N.J.) contracted with a dairy to transport a load of cheese for Traders Joe's from Bayonne, New Jersey to Fontana, California. One of the requirements of contract was that the cheese had to be kept at or below forty degrees during the shipment. Plaintiff subcontracted with defendant to handle the shipment. Defendant quoted plaintiff a rate for shipping pallets "chilled forty degrees." Although the trailer was set to forty degrees, temperature recording equipment in the trailer and on the pallets registered a significant number of readings above forty degrees. Trader Joe's, without further testing, rejected the load. Defendant subsequently had the cheese inspected and received an opinion that the cheese had not been negatively affected by the temperature in the trailer during the shipment.

Plaintiff filed an action sounding in negligence, breach of contract and indemnification against defendant in state court in New Jersey. Defendant removed the action to federal court. Plaintiff then filed an amended complaint adding Trader Joe's as a defendant, alleging wrongful rejection of the shipment. Defendant filed a cross claim against Trader Joe's alleging wrongful rejection of the shipment.

Trader Joe's moved for summary judgment seeking dismissal of the wrongful rejection claim. The court found that the obligations of Trader Joe's with respect to the shipment were governed by a Master Vendor Agreement between Trader Joe's and the shipper that required all refrigerated products to be shipped and received at 40°F or less. Because the shipment handled by defendant did not comply with that requirement, Trader Joe's had the right to reject the shipment. The court granted Trader Joe's motion and dismissed the claims against it. Defendant argued that plaintiff failed to demonstrate that the cheese was damaged in transit, relying on the opinion of its expert that there was no evidence that the improper temperature during the shipment caused any harm to the cheese. The court held that defendant failed to appreciate the gravity of the responsibility that retailers such as Trader Joe's has to assure the safety of the food that it sells to its consumers. The court held that the temperature requirement was a reasonable safeguard to assure food integrity and protect Trader Joe's and its customers. Defendant was aware of that requirement but did not comply with it. The court also held that defendant failed to prove that it was not negligent in handling the shipment. The court granted judgment to the plaintiff finding that defendant was liable for the damage to the shipment.

In *Mitsui Sumitomo Ins. Co. of Am. v. Mac R Behnk Rentals, Ltd.*, 2016 U.S. Dist. LEXIS 145621 (W.D. Mich.), plaintiff's insured contracted with defendant shipper for the transportation of some blower motors from North Carolina to Michigan. Defendant's driver had an accident while travelling through Ohio. The cargo had to be loaded into a different trailer to complete the shipment. Plaintiff's insured discovered damage to the cargo after delivery. Plaintiff paid its insured for the damage and was subrogated to its claims. Plaintiff filed an action against defendant pleading causes of action under the Carmack Amendment and a state law claim for bailment. Defendant moved for summary judgment seeking

dismissal of the Carmack claim and the bailment claim.

The court held that plaintiff had established the first element of its claim by presenting evidence as to its quality control procedures with the respect to the manufacture and shipping of the blowers. In addition, the defendant accepted the shipment without noting any exceptions to the condition of the cargo or the packaging. Plaintiff established the second element by demonstrating that cargo was delivered in damaged condition to the consignee. Defendant argued that plaintiff had not demonstrated an actual loss because the "actual value" of plaintiff's physical property at delivery was the same as it was at the time of shipment. Defendant, however, admitted that 32 blowers may have been damaged in the accident. The only way that the absence of damage could be proved would be to do destructive testing. Plaintiff's evidence established a value of $144,472.66 which included the invoice cost of the cargo, plus freight and insurance. Plaintiff had demonstrated the elements of its Carmack Amendment claim. The court denied plaintiff's cross-motion for summary judgment, however, finding that there was a question of fact as to the number of motors that were damaged.

D. Sufficiency of Notice of Claim

Plaintiff in *Heniff Transportation Systems, LLC v. Trimac Transportation Services, Inc.,* 2016 U.S. Dist. LEXIS 146456 (E.D. Tex.), agreed to transport to shipment of chemicals for a shipper. The bill of lading specified that a "kosher wash" was required for the trailer before the shipment was loaded. Plaintiff contracted with defendant to wash the trailer. Nevertheless, the shipment of chemicals was ultimately rejected because the shipment was contaminated. Plaintiff settled the shipper's claim, obtaining a release from the shipper and then sued defendant in state court alleging indemnity, negligence, breach of contract and breach of various warranties. Defendant removed that action to federal court based on preemption by the Carmack Amendment.

The court, citing federal regulations, specified the minimum filing requirements for a notice of claim, to wit, a written or electronic communication from a claimant, filed with the proper carrier within the time limits specified in the bill of lading or contract of carriage: (1) containing facts sufficient to identify the baggage or shipment of property; (2) asserting liability for the alleged loss, damage, injury, or delay; and (3) making claim for the payment of a specified or determinable amount of money. 49 C.F.R. § 1005.2. Defendant's tariff contained a provision that required the claim to be filed in writing within nine months after delivery of the property.

Plaintiff relied on a letter from its insurance carrier notifying defendant that the insurance carrier was seeking to recover damages against the carrier. The court found, however, that the letter was sent ten months after the shipment was made and, therefore, did not comply with the notice requirements of the tariffs. In addition, even if the letter had been timely, notification from the plaintiff's insurer that it would be seeking recovery was insufficient to constitute notice from the plaintiff itself. The court dismissed plaintiff's damage claim.

Plaintiff's insured in *New York Marine and General Insurance Company v. Estes Express Lines, Inc.*, 2016 U.S. Dist. LEXIS 171676 (S.D. Cal.) arranged for the transportation of a shipment of batteries from California to New Jersey. The shipment was transported by defendant but the shipment arrived damaged. Plaintiff paid the damages claim and became subrogated to its insured's rights. Plaintiff then sued defendant to recover the amount paid to its insured. Defendant argued that the claim was not timely.

The court held that under a strict application of the federal regulations, the plaintiff's insured's submission was insufficient to constitute a claim because defendant could not reasonably determine from the submission whether plaintiff or its insured had ascertained the actual damage for which they intended to hold defendant liable. In addition, plaintiff ignored the fact that defendant had requested that the claim be updated to include a monetary amount and that its insured had agreed to do that. Absent the requested supplementation, the claim did not comply with the requirements of the regulations. The court granted defendant's motion for summary judgment.

E. Liability of Originating Carrier

In *Mitsui Sumito Insurance Co., Ltd. v. Wheels MSM Canada, Inc.*, 2016 U.S. Dist. LEXIS 150053 (N.D. Ill.), plaintiff's insured contracted with defendant for the transportation of electronic equipment from Tennessee to Illinois. Defendant then contracted with another carrier to deliver the shipment, which, in turn, contracted with a third carrier. The shipment was damaged when a driver for the third carrier fell asleep at the wheel. Plaintiff sued defendant and the third carrier for damages.

Defendant moved to dismiss the complaint arguing

that it was not actually carrying the cargo at the time of the damage and was free of fault for the damage to the shipment and, therefore, could not be liable under the Carmack Amendment. The court rejected that argument holding that, under the Carmack Amendment, an originating carrier was liable for any damage to the cargo regardless of whether it was the carrier that was actually carrying the cargo at the time it was damaged. The court held that a shipper must either sue the carrier that issued the bill of lading or the shipper that actually delivered the cargo. Either of those carriers would be liable for damage caused by any used during the trip. Because defendant had issued the bill of lading for the shipment, defendant was liable to the plaintiff for any damage that occurred during the shipment. If the damage was, if fact, caused by another carrier, defendant would have a claim over against the carrier that actually caused the damage under 49 U.S.C.§ 14706(b) which permits a carrier issuing the bill of lading to recover from the carrier over whose line or route the loss or injury occurred.

F. Preemption

i. Subrogation

Plaintiffs in *Kidd v. American Reliable Insurance Co.*, U.S. Dist. LEXIS 118960 (C.D. Cal.) purchased a boat located in Connecticut and arranged for it to be shipped to California. Plaintiffs purchased insurance on the boat from defendant. When the boat was damaged in transit, plaintiffs filed a claim with defendant, which defendant denied. Plaintiffs then sued defendant for breach of contract, and breach of the covenant of good faith and fair dealing seeking compensatory damages as well as damages for emotional distress, punitive damages and exemplary damages. Defendant brought a third-party action against the motor carrier which handled the shipment seeking a declaration that, if it was required to pay plaintiffs' claim, it was entitled to be reimbursed by the third-party defendant carrier. The carrier moved for judgment on the pleadings arguing that the claims in the third-party complaint were preempted by the Carmack Amendment and that the defendant, an insurance carrier that had not paid the claim related to the shipment, did not have standing under the Carmack Amendment to bring the third-party action against the carrier.

The court acknowledged that the Carmack Amendment specified that carriers were liable specifically "to the person entitled to recovery under the receipt or bill of lading" but noted that defendant had brought the third-party action as the subrogee of the plaintiffs. Applying California law, the court held that the fact that defendant had not yet made any payment to the plaintiffs did not preclude defendant from seeking a determination of its rights if it should make such a payment. The court also rejected carrier's argument that the Carmack amendment preempted defendant's action for declaratory judgment. The court held that the Declaratory Judgment Act offers a means by which rights and obligations may be adjudicated in cases that have not reached a stage at which each party may seek a coercive remedy and in cases where a party who could sue for coercive relief has not yet done so. Because declaratory judgments did not alter the nature and scope of liability, they were available in the context of a Carmack Amendment Claim. The carriers motion to dismiss defendant's third-party complaint was denied.

ii. Brokers

In *Traffic Tech, Inc. v. Arts Trans., Inc.*, 2016 U.S. Dist. LEXIS 44429 (N.D. Ill.), PepsiCo, Inc. hired plaintiff to arrange for the transportation of a load of a dehydrated apple slices from Washington to a Quaker Oats facility in Waterloo, Iowa. Plaintiff entered into a Broker-Carrier Transportation Agreement with defendant. Plaintiff alleged that defendant allowed the apple slices to be loaded into a trailer which also contained two tires. The shipment was rejected due to the presence of the tires, which allegedly violated food safety laws. Defendant then disposed of the shipment. Plaintiff paid Pepsi for the loss and then sued defendant for breach of contract and violation of the Carmack Amendment, 49 U.S.C. §14706. Defendant moved to dismiss the claims in plaintiff's complaint claiming that the state law claims were preempted by the Carmack Amendment and that plaintiff could not bring claims under the Carmack Amendment because it was merely a broker and not a shipper.

The court held that "in general the Carmack Amendment preempts separate state-law causes of action that a shipper may pursue against a carrier for lost or damaged goods." The court went on to note, however, that the preemption does not apply to "every claim even remotely associated with the transfer of goods from one place to another." The court found that plaintiff was not bringing its claims as a shipper against a carrier. Rather, plaintiff was bringing its claims for indemnity as a broker. Plaintiff's state-law claims based on the Broker-Carrier Transportation Agreement were not pre-empted by the Carmack Amendment.

The court did grant defendant's motion to dismiss plaintiff's Carmack Amendment claim holding that a freight broker is not a shipper and thus cannot sue a carrier under the Carmack Amendment.

The court acknowledged in *Coyote Logistics, LLC v. All Way Transport, Inc.*, 2016 U.S. Dist. LEXIS 171722 (N.D. Ill.), that the Carmack Amendment generally pre-empts separate state law causes of action that a shipper may pursue against a carrier for lost or damages goods. It also found, however, that claims for indemnity as a broker are separate and distinct claims outside the pre-emptive scope of the Carmack amendment. Because there was a question of fact as to whether the defendant was acting as a motor carrier or a broker with respect to the shipment, the motion to dismiss was denied.

iii. Through Bills of Lading

The issue in *Navigators Management, Company, Inc. v. Michael's Cartage, Inc.*, 2016 U.S. Dist. LEXIS 39805 (N.D. Ill.), was whether the Carmack Amendment preempted a state law breach of contract claim based on damage to a piece of machinery that was being transported to an in-state railway terminal for ultimate delivery to a consignee in Russia. Plaintiff had filed the an action for damages claim in state court in Illinois, attaching a bill of lading showing transportation within the state of Illinois. Defendant removed the action to federal court attaching a copy of a though bill of lading showing that the machine was going to be shipped from the railway terminal to Montreal and then to Russia. Defendant argued that the claim was preempted by the Carmack Amendment. The court requested that the parties brief the issue of federal jurisdiction.

Plaintiff argued that it had the right to plead only state law causes of action because the bill of lading for the shipment was for only the intrastate transportation of goods. The court looked beyond the bill of lading and found that it was apparent that the goods were destined for an overseas destination. The court then determined that because the transportation involved in the case was essentially the export of a shipment from the United States, the Carmack Amendment did not apply, citing the United States Supreme Court's decision in *Kawasaki Kisen Kaisha Ltd. V. Beloit Corp.*, 561 U.S. 89 (2010). Because the Carmack did not apply to plaintiff's claim, there was no federal jurisdiction and the case was remanded to state court.

iv. Overcharges

Plaintiff in *Gordon Cos. v. Federal Express Corp.*, 2016 U.S. Dist. LEXIS 120205 (W.D.N.Y., filed an action seeking to recover overcharges allegedly imposed by defendant. Defendant moved to dismiss the complaint arguing that the claim was barred by the Carmack Amendment. The court rejected the argument finding that the Carmack Amendment only controlled claims for loss or damage during a shipment. A claim for overcharge, however, was not a claim for loss or damage to the cargo and was not preempted by the Carmack Amendment.

G. Limitations on Liability

i. Requirements to Limit Liability

In *Indemnity Insurance Co. of North America v. UPS Ground Freight, Inc.*, 2016 U.S. Dist. LEXIS 72717 (D. N.J.), plaintiff insured certain shipments for the shipper that were damaged during transit. Plaintiff brought an action for damages totaling $1,039,484.94. Defendant-carrier argued that the damages were contractually limited to the value declared on the bill of lading, $2.30 per pound which would total $15,772.80.

The court held that a carrier may limit its liability "to a value established by written or electronic declaration of the shipper or by written agreement between the carrier and the shipper if that value would be reasonable under the circumstances surrounding the transportation." Defendant argued that the bill of lading stating that the value of the shipment was $2.30 per pound was such a writing. Plaintiff argued that override provisions in the contract between the shipper and the carrier governed the dispute and limited damages to a maximum of $250,000. Finding an inconsistency between the notation on the bill of lading and the contract, the court denied defendant's motion.

The parties in *Kelly Aerospace Thermal Systems, LLC v. ABF Freight System, Inc.*, 2016 U.S. Dist. LEXIS 75141 (E.D. Mich.), entered into an agreement to ship plaintiff's aircraft parts from Ohio to California. The parts were delivered to defendant in good condition but arrived in California damaged. Its liability for the damage was limited to the amount specified in its tariff.

After suit was filed defendant moved for partial summary judgment limiting its exposure to $25.00 per pound as set out in its tariff. The court found that ABF had successfully triggered its limitation of liability.

In *Synergy Flavors Oh, LLC v. Averett Express, Inc.*, 2016 U.S. Dist. LEXIS 123396 (S.D. Ohio, Case No. 1:15-cv-547, Sept. 12, 2016), plaintiff contracted with defendant to transport a piece of equipment from Ohio

to Indiana. Plaintiff prepared the bill of lading for the shipment. The bill of lading contained a provision concerning the limitation of liability for any damage to the shipment but did not contain a space where the shipper could declare the value of the cargo being shipped. At some point during the shipment, defendant's driver affixed a "pro-sticker" to the bill of lading that stated that "the shipment is subject exclusively to the Uniform Bill of Lading, the liability limitations and all other applicable provisions of the carrier's individual and collective tariffs, including NMF 100." The defendant's tariff in effect at the time limited liability for damage to shipments of the type involved to $.10 per pound. The tariff also stated that if the shipper wanted coverage in excess of $.10 per pound the shipper had to so indicate in writing on the bill of lading at the time at the time of shipment and pay the total amount of excess valuation required. Plaintiff submitted a claim to defendant when the equipment arrived damaged seeking $49,748.00.

As for defendant's attempt to limit its liability, plaintiff argued that it had not be given an effective opportunity to choose between different levels of limitations on liability. Defendant argued that plaintiff had constructive notice of the available options because plaintiff had prepared the bill of lading. Defendant also argued that the bill of lading and pro-sticker constituted the shipping contract between the parties and effectively limited its liability. The court held that the default rule under the Carmack Amendment was the full imposition of liability on the carrier for damage to cargo "unless the shipper has agreed to some limitation in writing." To successful limit its liability under the Carmack Amendment, a carrier must: (1) provide a shipper with the carrier's tariff if the shipper requests it; (2) provide the shipper with a fair opportunity to choose between two or more levels of liability; (3) obtain the shipper's written agreement as to its choice of liability; and (4) issue a receipt or bill of lading prior to moving the shipment. The burden is on the carrier to prove that it has complied with the requirements.

Defendant argued the fact that plaintiff had prepared the bill of lading was sufficient to demonstrate that plaintiff has constructive knowledge of the tariff, the opportunity to elect a different level of liability and agreed to that limitation in writing. The court found that the bill of lading only stated that a limitation of liability may apply but did not specify the limitation that did apply or that the parties agreed to the limitation for the shipment. Whether the pro-sticker could be considered part of the contract of carriage depended on whether the sticker had been attached to the bill of lading before or after the bill of lading had been signed by plaintiff. The parties disagreed on that issue so the court could not make a definitive ruling on that issue. Finally, the court held that the fact that plaintiff had not inserted a release value in the bill of lading was insufficient to constitute a written agreement to any limitation on liability. Defendant's motion seeking a declaration as to the limit on its liability was denied.

ii. Intermediaries

In *Houston Specialty Insurance Co. v. Freightz Transportation, Inc.*, 2016 U.S. Dist. LEXIS 162345 (M.D. La), plaintiff's insured purchase a scanner and arranged, through defendant, to ship the scanner from Minnesota to Louisiana. Defendant contracted with YRC for the shipment. The scanner became dislodged within its shipping container during the shipment and was damaged beyond repair. When defendant and YRC refused to pay for the scanner, plaintiff paid its insured for the value of the scanner minus salvage value. Plaintiff brought claims against the defendant and YRC.

The court found that there was no question as to whether YRC had issued a tariff. In addition, Freightz had agreed to the liability of $.50 per pound limitation for used goods and paid the applicable rate for such liability. The third factor was proved by the fact that Freightz had utilized YRC's online tool to request specific pricing that features a corresponding liability limit, and the correlating tariff could have been requested or viewed on line by the intermediary. The was also no dispute that YRC had issued a bill of lading prior to the moving the shipment. Because YRC had properly limited its liability to Freightz, YRC's liability to the shipper was also limited.

H. Forum Selection Clauses

i. Carmack Amendment

The issue in *Scotlynn USA Division, Inc. v. Parvinder Singh*, 2016 U.S. Dist. LEXIS 121950 (M.D. Fla), was whether a freight forwarder could enforce a forum selection clause contained in the parties' Property Broker/Carrier Agreement that required an action on the contract to be brought in Florida. Plaintiff had brought an action to collect shipping charges in the federal court in Florida in accordance with a forum selection clause in the contract. Although the defendant defaulted, the court issued an Order to Show Cause requiring the plaintiff to show why the action should not be dismissed

or transferred pursuant to the venue provisions of the Carmack Amendment.

The court, citing the United States Supreme Court's decision in *Atlantic Marine Const. Co. v. U.S. Dist. Court for the W. Dist. Of Texas*, 134 S. Ct. 568 (2013), held that a plaintiff's initial choice of venue by contract is given some deference, but plaintiff bears the burden of showing why the case should not be transferred. The court observed that factors under the traditional analysis favored retaining the case in Florida but then acknowledged that the Carmack Amendment contained its own venue provisions that may override any agreement to the contrary. The court found, however, that the prohibition on enforcement of forum selection clauses applied only to the transportation of household goods, citing the language in 49 U.S.C. § 14101(b)(1) that provides that "A carrier providing transportation or service . . . may enter into a contract with a shipper, *other than for the movement of house hold goods*. . . ." The court held that the plaintiff was a freight forwarder, not a carrier of household goods, and could contract around the venue provisions of the Carmack Amendment.

ii. Carriage of Good by Sea Act ("COSGA")

In *Idaho Pacific Corp. v. Binex Line Corp.*, 2016 U.S. Dist. LEXIS 27492 (D. Idaho), Binex Line was retained by a customer of Idaho Pacific to transport a shipment of potato flour from plaintiff's facility in Idaho to Busan, Korea. The customer rejected a portion of the shipment and arranged through Binex to have the rejected portion of the shipment transported back to Idaho. A dispute arose between Binex and Idaho Potato concerning storage charges for the flour while it was being held in Oakland for federal inspection. Idaho Pacific filed a declaratory judgment action in Idaho state court seeking a determination as to the correct freight charges that were due and owing. Binex removed the case to federal court and then moved to have the case transferred to the Central District of California, the court specified in the forum selection clause contained in the bill of lading.

The court first had to determine whether the action arose under the Carmack Amendment, 49 U.S.C. § 11706, or the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1300, because forum selection clauses were treated differently under the two statutes. COGSA generally recognizes the validity of forum selection clauses. The court found that COGSA applied which means that in most causes, forum selection would have been enforceable. Here, though, Idaho Pacific was not a party to the bill of lading and had not negotiated the terms of the bill of lading constituted sufficient exceptional circumstances to deny enforcement to the forum selection clause. The court rejected Binex's argument that the terms of the bill of lading should be enforced against Idaho Pacific because Idaho Pacific had the option of retaining its own carrier for the return shipment and also rejected Binex's argument that Idaho Pacific had accepted the terms of the bill of lading because it had brought suit of the bill of lading. The court rejected the last argument finding that Idaho Pacific had alleged in its complaint that it had never received a bill of lading for the shipment.

Alan Peterman

7. Transportation Brokers and Freight Forwarders

USDOT regulates three types of transportation entities, motor carriers, brokers and domestic freight forwarders. (Companies that provide "logistics" services must self-identify, at least to USDOT, with one or more of these classifications.) In practice, it is not always easy to tell in which capacity a particular entity has acted.

Dragna v. KLLM Transport Services, 638 Fed. Appx. 314 (5th Cir.) considered the respective responsibilities of two related entities, KLLM Logistics and KLLM Transport Services, for the negligence of a driver. KLLM Transport had a transportation contract with a shipper; on this occasion, KLLM was unable to perform the transportation and referred the assignment to what we gather is a sister corporation, KLLM Logistics. Logistics then hired A&Z Transportation, a regulated motor carrier, to haul the load. The decision does not tell us at what point the shipper learned that KLLM Transport was not transporting the load itself, or whether the contract made a provision for such a contingency. Plaintiffs settled their claims against A&Z and several other defendants, but suit continued against the KLLM entities.

In February, 2015, the federal district court in Louisiana issued a long decision which concluded that KLLM Logistics had acted as a freight broker in arranging for A&Z to move the load and, therefore, was not vicariously liable for the negligence of A&Z or its driver. Citing to Fifth Circuit precedent, the court held that a principal may be liable for the acts of an independent contractor only where the principal has at

least some degree of operational control over the manner in which the work is done. The record showed that KLLM did not hire, pay, discipline or fine A&Z drivers, nor did it train or qualify them. There was a required periodic check-in call to KLLM and there was a contractual duty to notify KLLM in the event of an accident. This, the court held, did not constitute operational control. Nor, the court concluded, was there evidence of a joint venture between A&Z and the two KLLM companies, pointing to Louisiana's seven part test for identifying joint ventures.

The Fifth Circuit affirmed in a decision which offers a succinct review of the three most common claims made against transportation brokers. A joint venture involves, among other things, a proportionate contribution, a joint effort, a mutual risk of loss and sharing of profits. Here A&Z used its own "resources" (its truck and driver) to transport the shipment and bore the entire risk of loss. A&Z was paid a set amount, not a share of profits. Accordingly, the Fifth Circuit held, there was no joint venture.

The court then turned to the question of whether KLLM could be liable for the negligence of A&Z and its driver. The court found that A&Z was an independent contractor under Louisiana law, and that since there was no evidence of operational control by KLLM Logistics, it had no vicarious exposure.

Finally, the court found that KLLM had not acted negligently as a broker. See §8, *infra*.

Along the same lines – the same types of allegations, the same result – was *Bowman v. Benouttas*, 2016 Tenn. App. LEXIS 668, decided under Tennessee law.

How does one tell whether any entity is a broker or a motor carrier (with their very different standards for liability for both cargo claims and bodily injury and property damage claims)? In *National Union Fire Insurance Co. v. All American Freight*, 2016 U.S. Dist. LEXIS 93302 (S.D. Fla) (a cargo claim), the court found that an entity that has held itself out as a carrier to the shipper has a carrier's liability, even if it ended up brokering the load to another carrier without telling the shipper.

Sompo Japan Insurance Co. of America v. B&H Freight, Inc., 2016 U.S. Dist. LEXIS 47802 (N.D. Ill.) involved a complaint which pleaded in count one that defendant was liable as a motor carrier under the Carmack Amendment and, in count two, that defendant was liable under state law as a broker. The court held that the pleading was proper, denying defendant's motion that the Carmack Amendment preempted the opportunity to argue that defendant was liable as a broker.

The line dividing brokers and freight forwarders is also not always apparent at first sight. In *Edelbrock v. TT of Naples*, 2016 U.S. Dist. LEXIS 103195 (M.D. Fla), plaintiff hired TT to arrange transportation of his Aston Martin DB9 from Florida to Michigan. The dealership hired a motor carrier to transport the vehicle. Although the court did not make the point, the dealership has no USDOT authority of any kind so far as we can tell. However, an employee of the dealership apparently issued a bill of lading to its customers, an action which is difficult to understand. The dealership then executed a second bill of lading with Gulf Coast Auto, which actually undertook to transport the vehicle. The auto was damaged in transit. The claimant alleged that TT is a freight forwarder and, as such, liable under the Carmack Amendment. TT responded that its role was more akin to that of a broker and therefore that it had no Carmack exposure.

Defendant moved to dismiss on the ground that it was not a freight forwarder, but the court found that the alleged facts could support a conclusion that TT was liable as a freight forwarder and thus declined to dismiss the Carmack claim. At the same time, plaintiff was also entitled to try to prove that the dealership was liable as a broker and the court permitted that claim to proceed as well.

Finally, *Zumba Fitness, LLC v. ABF Logistics*, 2016 U.S. Dist. LEXIS 116298 (W.D. Ark.), considered the full range of options – whether defendant was a motor carrier, a freight forwarder or a broker. The case involved exercise equipment which was stolen from a trailer en route to destination; the shipper had called ABF Logistics, a third party logistics company to arrange the transportation.

Although ABF Logistics was corporately related to a large motor carrier, the court concluded that ABF Logistics had held itself out as a broker and had acted as a broker. (The court observed that there is some uncertainty in the case law as to whether the crucial question is how the entity holds itself out generally, or how it held itself to this particular shipper in this particular instance.) Here the bills of lading showed "Oliva Delivery Corp." as the motor carrier and identified ABF as a licensed property broker. Similarly, ABF did not use its own vehicles, had no role in packing or loading the cargo, and made it clear to the shipper just who would be moving the goods. In light of these factors the court found that ABF had acted as a broker.

The court also rejected plaintiff's argument that ABF was a freight forwarder. There has not been much advance in freight forwarders law since the 1940's. The court observed that ABF had not arranged the consolidation of small shipments into a large truck-load shipment, nor did it hold itself out as a freight forwarder. The evidence showed that ABF was a broker.

Larry Rabinovich

8. Negligent Hiring

In *Dennis v. Collins*, 2016 U.S. Dist. LEXIS 155724 (W.D. La.), a Greyhound bus collided with another vehicle while the bus was on the way from Louisiana to Texas. A passenger in the other vehicle sued Greyhound's driver, alleging negligent driving, and Greyhound, alleging negligent supervision, teaching, and training of the driver. Greyhound moved for partial summary judgment, arguing that under Louisiana law, the plaintiff could not simultaneously pursue both a negligence cause of action against an employee for which the employer is vicariously liable *and* a direct negligent supervision and/or negligent training cause of action against the employer when the employer stipulates that the employee was in the course and scope of employment when he committed the alleged negligence.

Finding no binding authority on point, the court ruled in favor of Greyhound, finding that the relevant Louisiana precedent could be distilled to the following statements of law:

A plaintiff may simultaneously maintain independent causes of action in tort against both an employee *and* an employer for the same incident when:

(1) the plaintiff alleges both

(a) an *intentional* tort by the employee and

(b) negligent hiring, training, and/or supervision by the employer;

OR

(2) the plaintiff alleges both

(a) negligence by the employee and

(b) negligent hiring, training, and/or supervision by the employer; and

(c) the employer does not stipulate that the employee acted in the course and scope of employment.

The plaintiff could not simultaneously maintain independent causes of action in tort against both an employee and an employer for the same incident when the plaintiff alleged both negligence by the employee and negligent hiring, training, and/or supervision by the employer; *and* the employer stipulated that the employee acted in the course and scope of employment.

Dragna v. KLLM Transport Services, L.L.C., 638 Fed. Appx. 314 (5th Cir.), arose from a motor vehicle accident in which the driver of a tractor-trailer struck the plaintiff's vehicle, causing plaintiff injuries. The driver worked for a transportation company (A&Z) and was en route to transport a freight load from Louisiana to Michigan. A&Z had been hired for this load by a logistics company (KLLM). Prior to the accident, KLLM had hired A&Z to transport loads in March and June 2011 without incident. The plaintiffs sued, among others, the driver of the tractor-trailer, KLLM, and A&Z for personal injuries.

Aspects of the decision are discussed in the "Transportation Brokers" section. Here we discuss only the claim for negligent hiring of the motor carrier. Under Louisiana law, the plaintiffs were required to show that KLLM had knowledge "at the time of the hiring that the contractor was irresponsible." Notably, the District Court held that the law in Louisiana is that *actual knowledge* is required in Louisiana to support a negligent hiring claim. The Court of Appeals did not go this far, holding it did not need to decide whether actual knowledge is required because the plaintiffs failed to show that KLLM even *should have known* of information to disqualify A&Z from being hired. Specifically, the plaintiffs failed to meet their burden to offer evidence demonstrating that KLLM knew or should have known at the time A&Z was hired that A&Z was unsafe.

Sanjeev Devabhakthuni

9. USDOT Leasing Regulations

As the Tenth Circuit noted in *Fox v. Transam Leasing, Inc.*, 839 F.3d 1209, when the federal leasing regulations were promulgated by the Interstate Commerce Commission in the early 1950's the I.C.C. itself enforced those regulations. Since the end of 1995, with the regulations now under the jurisdiction of the Federal Motor Carrier Safety Administration ("FMCSA") of the USDOT, Congress, at least in the view of some courts, has given truck drivers the right to file private actions against trucking companies to demand enforcement and damages. That is the basis for a new front in the ongoing war between drivers and trucking companies over legal status and benefits.

Three drivers sued Transam on their own behalf and on behalf of others, hoping to be recognized as a class. Transam's business model was to have its drivers enter into lease/purchase agreements for rigs that were owned by Transam, then have the drivers lease the rigs back to Transam. The drivers alleged that Transam misrepresented how much money the drivers could make as "independent truckers". A number of actions have been filed against Transam along these lines.

The decision involving the *Fox* plaintiffs focused on the requirement that Transam drivers pay $15 per week for access to Transam's satellite communications system. The Tenth Circuit agreed with the District Court that the $15 fee violated 49 C.F.R. §376.12(i) of the leasing regulations which forbids a lessee from requiring its lessors to purchase or rent products, equipment or services from the lessee motor carrier. Transam argued that the communication equipment was being made available to drivers at less than cost. The Tenth Circuit found that the carrier was in technical violation of the regulations since it did not give the drivers the options to rent the equipment from others, but found that the drivers had failed to provide any evidence that they suffered any financial loss.

A common practice by counsel for plaintiffs in making a "Truth in Leasing" claim is to attempt to create a class action, presumably to make the effort worth their time. In *Mervyn v. Westerberg*, 2016 U.S. Dist. LEXIS 42865 (N.D. Ill.) the class representative Mervyn, who claimed that the motor carrier had failed to pay him in accordance with the term of the lease agreement, was found to have waived his rights by failing to raise an objection within the time set by the lease. The attorneys representing the class were given a month to name a new class representative.

On the defense side of these cases, the goal is often to move for summary judgment as early in the process as possible. In *Al-Anazi v. Bill Thompson Transport, Inc.*, 2016 U.S. Dist. LEXIS 86987 (E.D. Mich.) the plaintiff made various claims relating to deductions that the carrier took out of his pay and to the fact that the carrier insisted that it do any and all repair work on the leased rig. The carrier moved for summary judgment. The court found for the carrier on several of the claims, but permitted the case to continue with respect to the alleged requirement that the carrier itself make any necessary repairs, repairs for which the drivers are charged.

Other courts reject the idea that the regulations provide for a private cause of action. In *C&H Trucking, Inc. v. New Orleans Trucking and Rental Depot*, 2016 U.S. Dist. LEXIS 92128 (E.D. La.), the plaintiff owner-operator brought an action claiming that the defendant motor carrier violated the terms of the lease by charging the plaintiff for workers compensation insurance premiums, and then not purchasing such insurance. Plaintiff complained that the defendant had violated federal "truth-in-leasing" regulations by failing to provide plaintiff with documents that would demonstrate whether defendant had purchased the insurance. The court found that violation of the regulations did not give rise to a private cause of action, and the owner-operator's federal action was dismissed.

In *Drake v. Old Dominion Freight Line, Inc.*, 2016 U.S. Dist. LEXIS 46322 (D. Kan.), the court found that violations of the federal Motor Carrier Act and the FMCSR do not give rise to private causes of action, and dismissed the plaintiff's claims. (Interestingly, though, the court noted the decision in *OOIDA v. New Prime, Inc.*, 192 F.3d 778 (8th Cir. 1999), in which the Eighth Circuit, contrary to the district court in the *C&H Trucking* case above, suggested that violation of the "truth-in-leasing" statutes and regulations could give rise to a private right of action.)

Similarly, in *Leon v. Fedex Ground Package System, Inc.*, 2016 U.S. Dist. LEXIS 30281 (D.N.M.), the plaintiff alleged that Fedex, as motor carrier, aided and abetted its leased driver in his violations of the FMCSRs which contributed to the accident and plaintiff's injuries, in contravention of 49 C.F.R. § 390.13, which provides that "[n]o person shall aid, abet, encourage, or require a motor carrier or its employees to violate the rules of this chapter." The court held that no federal private right of action exists for violation of the FMCSRs. The court also found no New Mexico precedent for creating a state cause of action for violation of the FMCSRs. (Since, at most, plaintiff alleged only that Fedex failed to train the driver adequately, the plaintiff's state law claim of aiding and abetting also failed.)

Larry Rabinovich

10. Liability – Loading and Unloading

In *Lasley v. Running Supply, Inc.*, 2016 U.S. App. LEXIS 21605 (8th Cir.), the plaintiff truck driver volunteered to assist the consignee's employee in unloading his truck, and was injured when the cargo fell on top of him. In the subsequent bodily injury action filed by the driver against the consignee, the trial court rejected

plaintiff's request to instruct the jury that a landowner has a duty to protect invitees against harm from dangerous activities, and not merely harm from defective conditions on the land. Since the driver had read and understood the shipper's warnings about the dangers involved in unloading the cargo, and had volunteered to assist, the appellate court found that he had clearly assumed the risk and the trial court's refusal to give the requested instruction was not an abuse of discretion.

The truck driver in *Adamson v. Canam Steel Corp.*, 2016 U.S. Dist. LEXIS 171488 (N.D. Ill.), had asked, but had been denied, permission by the shipper to tarp his load indoors at the shipper's facility, and was rather directed to tarp the load outside in the rain and wind. The wind caused the tarp to blow up and knock the driver off his truck onto the ground. The shipper argued for dismissal of the complaint on the grounds that it had no duty to assist the driver in tarping his vehicle. The court, applying Illinois law, denied the motion to dismiss, noting particularly that, having denied him access to its loading bay and use of its forklift, the shipper could reasonably have foreseen that the driver would climb onto his truck and attempt to tarp the load in the storm. The court noted that the possibility that the driver could have waited until the storm passed went only to his comparative fault, but did not warrant dismissal of his negligence claims against the shipper. Finally, the court found that it would not be unreasonable to place the burden on the shipper to allow an independent truck driver to use its loading bay to tarp its product loaded onto his truck.

Philip A. Bramson

11. Punitive Damages

Punitive damages are generally disfavored in Virginia as they are in most states, and therefore, are awarded only in those cases "involving the most egregious conduct." In *Brown v. Seay Logging & Hauling, LLC*, 2015 Va. Cir. LEXIS 240 (Va. Cir. Ct.), plaintiff alleged that defendants had violated at least twelve federal regulations leading up to the accident. However, each of these regulations required that the carrier avoid negligence; the carrier had already acknowledged that it needed to meet that standard. The court found that the "cumulative nature of this conduct" still did not amount to willful and wanton conduct or malice under the applicable standard. Accordingly, the punitive damages count was dismissed.

In *Holder v. Suarez,* 2016 U.S. Dist. LEXIS 17388 (M.D. Pa.), the motor carrier Evans leased a truck from Suarez, an owner-operator. When Suarez was involved in an accident, the plaintiffs sued both Suarez and Evans for compensatory and punitive damages. The court framed the punitive damages issue as whether Suarez "knew or had reason to know of facts which create[d] a high degree of risk of physical harm to another," and whether he "deliberately proceeded to act, or failed to act, in conscious disregard of, or indifference to, that risk." There was evidence that Suarez, a professional driver, disregarded several well-known provisions of the Federal Motor Carrier Safety Regulations, including those prohibiting drivers from operating vehicles at dangerously low speeds, on flat tires, or without functioning tail and hazard lights. Moreover, Suarez had pled guilty to reckless driving. Additionally, there was testimony by Suarez from which a jury could conclude that he knew, prior to the accident, that his hazard lights were not working properly. While the court recognized that plaintiffs would have an uphill battle, given the disputed issues of fact, the court denied Suarez's motion.

Under Pennsylvania law, punitive damages may be also imposed on an employer "based entirely on an employee's conduct, even without any direct evidence of misconduct by the employer," and "the employer may be held vicariously liable for the punitive damages of its agents if the actions of the agent were clearly outrageous, were committed during and within the scope of the employee's duties, and were done with the intent to further the employer's interests." There was evidence that Evans received "multiple warnings" regarding Suarez's reckless driving and knew or should have known that Suarez's tail lights were not working because the truck remained in Evans' yard almost daily. There was evidence to support the conclusion that Evans instructed Suarez to return to the service station after learning that he had sustained a flat tire. While the "proffered evidence, standing alone," did "not support a claim for punitive damages," insofar as there was "a dispute of material fact regarding whether or not Suarez acted on his own or upon advice of [Evans] before the accident, the punitive damages claim survive[d] summary judgment."

Jonathan Bard

12. Spoliation

The plaintiff in *Rhodes v. Risinger Bros. Transfer, Inc.*, 2016 U.S. Dist. LEXIS 116083 (W.D. Ky.), sued the motor carrier Risinger alleging that debris from the tire and wheel on one of its trailers struck her car, causing her serious personal injuries. Risinger commenced a

third-party action against Intermodal, which two days earlier had replaced the trailer's left side rear axle brakes, left side front axle dual tires, and right side rear axle dual tires. Following discovery, Intermodal moved for summary judgment on Risinger's third-party complaint, arguing that because Risinger failed to retain the damaged wheel, tire, and other trailer parts for investigation and inspection after the accident, the cause of the accident – including whether Intermodal's repairs had a primary role in the accident – ultimately could not be determined. The court determined that Risinger's expert proof – that Intermodal did not properly torque the lug nuts that eventually loosened – amounted to "an unsupported theory" insofar as they could not inspect the component parts to determine what actually occurred.

On the other hand, the court found that Risinger should have known that any evidence remaining from the accident could be relevant to future litigation; indeed, Risinger's own emails referred to this as a "very serious" accident. Second, it was determined that Risinger negligently disposed of the trailer parts, a fact that was supported by its driver having taken photographs of the damaged wheel hub assembly while the parts themselves were discarded. Finally, since the missing pieces of the trailer would certainly be relevant to resolving Intermodal's involvement, if any, in the accident, Risinger's failure to keep the trailer's component parts accessible after the accident was highly prejudicial to Intermodal. In the absence of this evidence, the cause of the accident could not be determined, and summary judgment was granted in favor of Intermodal.

Roberts v. CRST Van Expedited Inc., 2016 U.S. Dist. LEXIS 86125 (W.D. La.), arose out of a motor vehicle accident between plaintiff and Nolan, a commercial truck driver for CRST. The plaintiff asserted that CRST had a policy requiring a mandatory alcohol and controlled substance test when "any vehicle incurs disabling damage and must be towed from the scene." CRST was asked in discovery for the results of such testing of Nolan, and responded, "No test required or performed."

Pursuant to Louisiana law, no cause of action exists for negligent spoliation of evidence. Roberts alleged that CRST was guilty of intentional spoliation when it failed to test Nolan pursuant to its own internal policies. Roberts, however, failed to show that evidence was intentionally destroyed, but only that such evidence was not created. Accordingly, the claim for intentional spoliation was dismissed as a matter of law.

In *Terrell v. Central Washington Asphalt, Inc.*, 2016 U.S. Dist. LEXIS 29662 (D. Nev.), plaintiffs asserted that the defendant drivers' hours-of-service records and logbooks had been lost or destroyed, and that such documentation would have shown a "pattern or practice of violating federal hours-of-service rules." There was no dispute that CWA destroyed or failed to reasonably protect and preserve evidence; its own truck manager testified that such evidence was destroyed even though it was not the practice of CWA to destroy such evidence. CWA knew that it was likely going to be sued based on its drivers' alleged conduct as of December 2010, when plaintiffs' counsel sent a letter to CWA advising it of the facts of the accident and the vehicles at issue, and not, as CWA contended, in 2014 when the plaintiffs moved to amend to add aiding and abetting claims against CWA. Thus, the three drivers' pre-accident records were potentially relevant to a range of claims against CWA, as well as potential defenses for CWA.

Accordingly, the court agreed to instruct the jury that CWA knew it was going to be sued, but nevertheless lost or destroyed that evidence, and that CWA's conduct created a rebuttable presumption that, had the evidence been preserved and produced, it would have been unfavorable to CWA. Nevertheless, the court denied the plaintiffs' request that the jury be instructed to find that if the documents had been produced, they would show CWA and its three drivers had a pattern or practice of violating the hours-of-service rules.

In *In re J.H. Walker, Inc.*, 2016 Tex. App. LEXIS 483 (Tex. Ct. App.), Graham was operating a tractor-trailer in the course of his employment with Walker Trucking, when the vehicle slipped off the road into a ditch and hit a concrete cistern. Graham died of injuries sustained in the accident. Nothing at the scene indicated that Graham applied the brakes or tried to avoid driving off the road. The tractor trailer was eventually towed to a salvage yard. After it was determined that none of the burned vehicle was salvageable, Walker Trucking's president, John Walker, decided to have the remains of the tractor and part of the trailer cut in half and crushed because he did not believe anything of value survived the exploration. Walker Trucking received a preservation of evidence letter from an attorney on January 18, 2011, but the tractor had already been destroyed by then.

In the suit filed by Graham's family against Walker Trucking alleging negligent maintenance of the tractor and gross negligence, plaintiffs alleged that Walker

Trucking intentionally and purposely destroyed the tractor and some maintenance records immediately after the incident in an attempt to eliminate evidence. The trial court signed a spoliation order against Walker Trucking which struck the company's pleadings and awarded default judgment on liability as to Graham's negligence and gross negligence claims.

The appellate court agreed that Walker Trucking "had a duty, as a matter of law, to preserve the wrecked tractor trailer," and that the defendant's unilateral understating that Graham's claims against the company were limited to workers' compensation benefits, and that it had not reason to believe it might be accused of gross negligence (an exception to the workers' compensation bar), did "not relieve [it] of its duty to preserve evidence." Furthermore, the court was unpersuaded by Walker Trucking's argument that they had not received a litigation preservation letter prior to the destruction of this evidence; considering Walker Trucking's experience in the industry, as well as the severity of the accident at issue, the defendant should have anticipated litigation "at the time it destroyed the evidence." Nevertheless, the Court of Appeals found that the trial court's sanction was excessive in that it "put Graham in a better position by allowing her to pursue a cause of action to which she[was] not statutorily entitled" under the workers' compensation bar. Accordingly, the case was remanded to the trial court.

In *Florilli Transportation, LLC v. Western Express, Inc.*, 2015 U.S. Dist. LEXIS 183176 (W.D. Mo.), Gentry was driving a tractor-trailer for Florilli Transportation, and Waters was driving a tractor-trailer for Western Express. Florilli alleged that Waters negligently operated her vehicle and forced Gentry's rig off the road, where it overturned.

At the time of the accident, Gentry's truck contained a PeopleNet electronic device, which provided operational data for Florilli's fleet, including the vehicle operated by Gentry. If there is a triggering event such as a hard brake or accident, the device records the truck's speed on a second-by-second ("SBS") basis. Shortly after the accident, Florilli's safety manager Thayer reviewed the SBS data and found that his speed was 25-30 mph seconds before he applied a hard brake. Thayer only reviewed the data, and did not print it or electronically forward it to anyone for preservation. PeopleNet itself only preserved SBS data for 6 or 12 months, depending on the customer company's retention policy. Thayer, however, believed the data could be retrieved indefinitely and believed it was "automatically archived." Because of this misunderstanding, Florilli did not instruct PeopleNet to preserve the data. Moreover, Thayer admitted at his deposition that the data should have been preserved, and agreed that a SBS breakdown of Gentry's speed would have been far more valuable to assess the accident than any other document Florilli produced to defendants.

Although the court found that Thayer may have been negligent, his actions in failing to preserve the SBS data were not intentional, nor was there evidence that he "desire[d] to suppress the truth." Furthermore, the court found that defendants had failed to establish they were prejudiced. In evaluating prejudice, the court looks to "whether an allegedly harmed party took other available means to obtain the requested information." In this case, the defendants failed to show that they attempted to obtain the SBS data directly from PeopleNet, or that they requested (informally or by subpoena) any information directly from PeopleNet. Under these circumstances, a spoliation sanction was not warranted.

Jonathan Bard

13. Jurisdiction

A. Personal Jurisdiction-Minimum Contacts Analysis

In *Brown v. Ceballos*, 2016 U.S. Dist. LEXIS 69282 (D. Kan.), the plaintiffs were allegedly injured when their vehicle was struck by a tractor-trailer rig operated by Ceballos in the course of his employment with GM Cargo, Inc., on Interstate 70 in Kansas. Plaintiff sued Ceballos, GM Cargo and Castlepoint, a Florida insurer, pursuant to a Kansas statute that allowed for a "direct action against an insurer arising out of a tort by an insured commercial trucker." K.S.A. § 66-1, 128. Castlepoint argued that it did not have sufficient "minimum contacts" with Kansas to support personal jurisdiction. Specifically, Castlepoint had no office or agent in Kansas, did not transact business in Kansas, did not cause any tortious injury in the state, and had no other ties to the state, such as owning property. The court determined that Castlepoint purposely provided commercial liability insurance to GM Cargo to cover its operations in Kansas and in other states, and that Castlepoint had fair warning it could be subject to suit in Kansas as a result of the direct action statute.

Turner v. Syfan Logistics, Inc., 2016 U.S. Dist. LEXIS 51460 (W.D. Va.) involved the issue of whether jurisdiction may be exercised over a broker that arranges for the transport of interstate goods through a particular

state but has no other contacts with that state. Plaintiff's decedent was killed by a truck driven by Patterson, an employee of DD Logistics, Inc., who had an extensive criminal past, was driving in excess of eleven hours at the time of the incident, and drugs were found in the cabin of the truck. Information on the FMCSA website (presumably a reference to SMS BASIC scores) also revealed that DD Logistics, Inc. ranked in the fourth percentile for driving safety and in the bottom ten percent for hours of service compliance.

Plaintiff filed suit against the transportation broker Syfan, a Georgia corporation which maintained no employees, offices, bank accounts, physical assets, or real property in Virginia, alleging that it negligently hired DD Logistics, Inc. The court noted that plaintiff could not establish general jurisdiction over Syfan because its contacts with the state were not so "continuous and systematic" with the state of Virginia so as to render it "essentially at home." (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 [2011]). Nevertheless, the court found that specific jurisdiction was present in this case because Syfan "plainly contemplated" that the truck would drive through Virginia in mapping out its route to and from its destination.

B. Absention

In *Fortenberry v. Scottsdale Insurance Co.*, 2016 U.S. Dist. LEXIS 142476 (E.D. La.), the injured claimants brought an action for damages in Louisiana state court against the tortfeasor truck driver, two motor carriers potential responsible for the driver (JYD Trucking and B&R), and Western World which provided liability insurance for B&R. Western World denied coverage on the basis that the vehicle was not listed on the policy, and the claimants filed a declaratory judgment action in federal court to determine whether the Western World MCS-90 needed to be exhausted before the claimants could seek coverage under their UM/UIM policies. (See discussion in Section 1.)

In determining whether to exercise jurisdiction over or stay the declaratory judgment action, the district court noted that the pending state court action could fully resolve the issues between the parties. The court also found that plaintiffs had engaged in forum shopping to expedite the state action, and that federal court was not a convenient forum since discovery and motion practice had taken place in the state court action. Finally, the court noted the federal preference for abstention under these circumstances, "because it assures that the federal action can proceed without risk of a time bar if the state case, for any reason, fails to resolve the matter in controversy."

Star Insurance Co. v. TLC Trucking, LLC, 2016 U.S. Dist. LEXIS 49185 (D. Kan.), also involved federal abstention in the context of an MCS-90 endorsement interpretation issue with a companion action pending in state court. The claimants sued the insured motor carrier TLC and its driver in Kansas state court and, after rejecting a $1,000,000 policy limit offer from the motor carrier's insurer, entered into a "covenant not to execute" with the defendants and obtained a $10,482,974.60 judgment. Star, the motor carrier's insurer, disclaimed coverage on the grounds that the agreement breached its policy's cooperation provisions, but paid $79,500 to a different claimant whose vehicle was also damaged in the same accident pursuant to its perceived obligations under its MCS-90 endorsement.

Star then brought a federal action against its insured seeking reimbursement of the MCS-90 payment. TLC Trucking filed a motion to dismiss, or in the alternative for abstention in deference to the pending state court action in which the claimants were seeking to compel Star to pay the excess judgment. The district court found that there was clearly federal jurisdiction as Star's claims were based on a reimbursement obligation under a federally mandated endorsement, and that the court's obligation to hear the case was "virtually unflagging." As a result, the court denied TLC Trucking's motion, allowing Star's claims to move forward. In this context, it is significant to note that although the federal Declaratory Judgment Act affords a remedy and not jurisdiction, it does not afford the courts discretion to decline jurisdiction when it blatantly exists.

C. Direct Actions Against Insurers

At issue in *Irvan v. Golodnykh,* 2016 U.S. Dist. LEXIS 82354 (E.D. Okla.), was whether registering with the Unified Carrier Registration System under the federal Motor Carrier Act is the functional equivalent of registering in a particular state. Plaintiffs alleged they were injured by a vehicle operated by Golodnykh during the course of his employment with VG Trucking LLC, and brought a direct action against VG Trucking's insurer Great West. Great West moved for summary judgment on the basis that the direct action against it was not proper under Oklahoma law, which allows for a direct action against domestic insurers and prohibits a direct action absent statutory authority. In opposition to the motion, plaintiffs contended that VG Trucking's filing with federal Unified Carrier Registration System under

the Motor Carrier Act was the functional equivalent of registering with the state of Oklahoma because in the age of the internet the documents were readily available to the state of Oklahoma, and thus a direct action was warranted. In rejecting plaintiffs' arguments and granting Great West's motion, the court concluded that "under plaintiffs' theory, a person who incorporated a business in Oklahoma also incorporated that business in all other 49 states because the incorporation documents are publicly available via the Oklahoma Secretary of State's website."

D. Complete Preemption

The Federal Aviation Administration Authorization Act ("FAAA"), 49 U.S.C. § 14501, provides that states may not enact or enforce laws ***related to*** a "price, route, or service of any motor carrier … with respect to the transportation of property." 49 U.S.C. §14501(c)(1) (emphasis added). The issue in *Jordan v. Blackwell Towing*, 2016 U.S. Dist. LEXIS 149821 (S.D. Ala.), was whether the Act provided for complete preemption (and thus created federal subject matter jurisdiction) despite the fact that there was no diversity or federal jurisdiction on the face of plaintiff's complaint. Plaintiff filed suit in federal court against defendant as a result of its towing of her vehicle to its lot, asserting state law claims of conversion, intentional infliction of emotional distress, and negligent supervision, but premising federal jurisdiction on the preemption of the FAAA. The court found that the situation at hand could fall into one of the exceptions listed in the statute, specifically the non-consent tow exception governed by state law. The court adopted the broad construction of that exception recently applied by other federal courts, and held that the exception now includes all "tow-truck operations" related to non-consent tow. Based on this broadening of the exception, plaintiff could not demonstrate complete preemption as a basis for federal question jurisdiction.

In *Ramos v. Hatfield*, 2016 U.S. Dist. LEXIS 136705 (M.D. Pa.), the plaintiff was injured by a tractor-trailer operated by Ricky L. Hatfield, owner of Hatfield Trucking. Hatfield Trucking had been retained by J.B. Hunt Transport, notwithstanding the fact that the company had a safety rating of "none," Hatfield had been convicted of a DUI, had been was arrested for grand theft auto, and was terminated from a prior position due to excessive speeding and a failed alcohol test. (Hatfield was also intoxicated at the time of the subject incident.) J.B. Hunt argued that it had no obligation under the Federal Motor Carrier Safety Regulations (FMCSRs) to investigate Hatfield's driver records, and that the plaintiff's negligent hiring/contracting claims under Pennsylvania common law were preempted. In rejecting J.B. Hunt's preemption arguments, the court noted that the intent of the FMCSRs was not to preempt state law, but to "act as the minimum safety standards for commercial motor vehicles." See 49 C.F.R. § 390.9. The court further rejected J.B. Hunt's contentions that under the FMCSRs they had no duty to review driving records or criminal backgrounds of the Hatfield drivers because it was "freight broker," and thus insulated from liability. The court noted that preemption was not applicable in this case, and thus Pennsylvania law imposed a duty on behalf of J.B. Hunt to employ a competent, careful contractor. This is potentially a significant decision. As we go to press a motion for reconsideration has just been denied.

In *Schwann v. FedEx Ground Package System, Inc.*, 2015 U.S. Dis. LEXIS 13826 (D. Mass.) (discussed in last year's review), the district court determined that the Massachusetts Independent Contractor Law was preempted by the FAAA. The second prong of the state law, which labeled as independent contractors those who perform services outside the usual course of the employer's business, was held to be in direct conflict with the FAAA because it governed "the classification of the couriers for delivery services, [and] [i]t potentially impacted the services the delivery company provides, the prices charged for the delivery of property, and the routes taken during this delivery." As a result, the court held that "[t]he law clearly concerns a motor carrier's 'transportation of property,'" and thus summary judgment was granted for FedEx; the company's drivers were held to be independent contractors and not regular employees. The district court also held that the second prong was not severable from the remainder of the statute.

On appeal, 813 F.3d 429 (1st Cir. 2016), the First Circuit upheld the district court's determination that the second prong of the state law was preempted by the FAAAA. The court agreed with FedEx that "[t]he decision whether to provide a service directly, with one's own employee, or to procure the services of an independent contractor is a significant decision in designing and running a business," and that allowing for such decision-making to be under the ambit of a state law ran completely afoul of the FAAA's purpose to promote a competitive market. On the other hand, the court of Appeals also found that the second prong of the state law was severable from the rest of the

Massachusetts statute, and remanded the case to the district court for further findings.

Similarly, the district court held in *Remington v. J.B. Hunt Transport, Inc.*, 2015 US Dist. LEXIS 13825 (D. Mass.), that the Massachusetts Independent Contractor Law was preempted by the FAAA, and that holding was upheld by the First Circuit on appeal. Subsequently, 2016 U.S. Dist. LEXIS 126487 (D. Mass), J.B. Hunt argued that the Massachusetts independent contractor and wage laws were preempted by the federal Truth-in-Leasing regulations and Congress intended that the regulations occupy the entire field of owner-operator compensation. *See* 49 C.F.R. Part 376. J.B. Hunt's leases with its independent truckers were in compliance with the federal regulations which permitted J.B. Hunt to make the authorized deductions with respect to operational expenses, *see* 49 C.F.R. §§ 376.12, but those terms were in direct conflict with the Massachusetts state laws which prohibited such deductions. The district court agreed that the federal regulations preempted state law regarding the operational expenses deductions set forth in the leases with plaintiffs. However, the court declined to adopt defendant's arguments that the regulations were adopted to occupy the field of owner-operator compensation. In rejecting that contention, the court noted provision (c)(4) of § 376.12, which provides:

> Nothing in the provisions…. of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements.

The court finally noted that J.B. Hunt did not make the argument in its renewed motion to dismiss that the remaining prongs of the Massachusetts independent contractor law were preempted by the FAAA. As a result, defendant's motion to dismiss was granted as to the deductions, but was denied on all other bases.

E. Removal to Federal Court

In *Larson v. Fed Ex Ground Package System, Inc.*, 2016 U.S. Dist. LEXIS 155090 (D. Mont.), the decedent's estate brought a state court action against the owners and operators of two trucks involved in the fatal accident, as well as the State of Montana which maintained the icy stretch of Interstate 90 where the accident occurred. Although the other defendants were served in April, 2015, the state was not served until December of that year, and did not answer until March 8, 2016. Plaintiffs settled with the state on July 13, 2016, seeking non-monetary relief that the state implement variable speed-limit signs throughout the subject area.

The remaining defendants removed the action on August 11, 2016, and plaintiffs filed a motion to remand on the basis that the removal was untimely. In granting plaintiffs' motion to remand, the court noted the one-year timeline for removal absent bad faith on the part of plaintiffs, and the heavy burden on the proponents of removal. Although plaintiffs' negotiations with the state were not fully disclosed to the remaining defendants at the outset, and plaintiffs sought non-monetary relief from the State, the court declined to find bad faith on the part of plaintiffs that would obviate the one-year removal deadline.

The court also declined to exercise jurisdiction on the basis of federal question jurisdiction because the Complaint only identified state law negligence claims. Although the federal Motor Carrier Safety Act could be implicated in that the state law claims could raise evidentiary issues requiring interpretation of the Act, plaintiffs' relief did not necessarily depend on the resolution of a substantial question of federal law. Further, the court concluded that plaintiffs could establish the essential elements of their state law claims without any federal interpretation. In ordering remand, the court determined that "the mere presence of a federal issue in a state clause of action does not automatically confer federal-question jurisdiction" without demonstrating that interpretation of federal law was necessary.

Arianna E. Kwiatkowski

14. Coverage

In *Canopius US Insurance, Inc. v. RN'G Construction, Inc.*, 2016 Md. App. LEXIS 958 (Md. Ct. Spec. App.), Canopius issued the commercial general liability policy to RN'G; Pennsylvania National Mutual issued the commercial auto policy. The loss occurred when RN'G's employees, utilizing a power crane permanently mounted on a truck, lifted a steel beam which swung out onto a highway and struck tractor-trailer. The Canopius CGL policy excluded coverage for injury arising out of the "transportation of 'mobile equipment' by an 'auto,' and defined "mobile equipment" to include "[v]ehicles … maintained primarily to provide mobility to permanently mounted … [p]ower cranes…." Since the evidence demonstrated that the RN'G truck in question

was used at least 90% of the time for the sole purpose of transporting the attached crane, the appellate court did not disturb the trial court's finding that the vehicle in question was "mobile equipment," and that coverage was due under the CGL policy but not the auto policy. The court held further that the auto insurer, which had assumed the defense of the insured, was entitled to recover its attorneys' fees and defense costs from the CGL insurer.

We often face the procedural question of whether a pending bodily injury action or a parallel declaratory judgment action should be stayed until the other action determines questions of fact which are relevant to both. In *Infinity Auto Insurance Co. v. Snow Butlers, LLC*, 2016 U.S. Dist. LEXIS 166449 (E.D. Pa.), Snow Butlers was sued as the owner of the dump truck which caused the subject accident. Infinity, which issued a commercial auto policy to Snow Butlers, asserted that Snow Butlers had leased or loaned the dump truck to Victory Gardens, and the truck driver was operating the vehicle in the course of his employment by Victory Gardens at the time of the loss; thus placing the loss squarely within an express policy exclusion. Since the existence and scope of the alleged lease was also at issue in the underlying bodily injury action, the federal court stayed discovery in the declaratory judgment action until the damages action was resolved.

Alabama Code section 27-23-2 provides that a person may proceed against both an insured tortfeasor and its insurer "[u]pon the recovery of a final judgment against" the insured. The district court in *Canal Insurance Co. v. INA Trucking, LLC*, 2016 U.S. Dist. LEXIS 170800 (M.D. Ala.), applied this statute to dismiss a counterclaim asserted by the bodily injury claimant against Canal in a declaratory judgment.

The policy at issue in *Progressive Northwestern Insurance Co. v. Handshumaker*, 2016 U.S. App. LEXIS 20135 (10th Cir.), defined "auto" to exclude "cargo cutaway vans or other vans with cabs separate from the cargo area." The district court had no trouble concluding that the box truck involved in the loss fell within this exclusion. The policy's "other insurance" clause, however, provided that "any insurance we provide for a vehicle or trailer, other than a covered auto, will be excess over any other collectible insurance…." The injured claimant argued that this language obligated Progressive to provide at least excess coverage, whether or not the vehicle involved in the loss was a covered "auto." Alternatively, the claimant argued that the "other insurance" language rendered the policy ambiguous. Both the district court and the Court of Appeals found otherwise, noting that the "other insurance" language was applicable only where the Progressive policy and another policy both provided coverage in the first place.

Falls Lake National Insurance Co. v. Martinez, 2016 U.S. Dist. LEXIS 177909 (W.D. Va.), addressed a myriad of issues. A tractor owned by motor carrier SMC, with a second disabled tractor utilized by motor carrier Salinas in tow, caused a collision when it blocked the road while attempting to enter the highway. Falls Lake, which insured the Salinas tractor being towed, argued that the loss did not "arise out of the use" of that tractor. The court disagreed, since (1) being towed is a an expected and natural use of a vehicle; (2) the roadway was within the vehicle's natural territorial limits; and (3) the accident would not have occurred if the tractor had not broken down and needed to be towed.

On the other hand, the Falls Lake policy excluded from the definition of "who is an insured" any motor carrier for hire if the motor carrier "is subject to motor carrier insurance requirements and meets them by a means other than 'auto' liability insurance…." SMC's own policy issued by United Specialty did not cover its tractor (which was not scheduled), and the court found that MCS-90 endorsement attached to the policy did not constitute "insurance". Accordingly, SMC was did not qualify as an additional insured under the Falls Lake policy. (See discussion of this same case in our Miscellaneous section, §18, as well as the related case of *Lester v. SMC Transport, LLC*, 2016 U.S. Dist. LEXIS (W.D. Va.), in our section on Motor Carrier Liability for Driver Conduct, §5.)

The court rejected an expansion of "temporary substitute" coverage in *Titan Indemnity Co. v. Gaitan Enterprises, Inc.*, 2016 U.S. Dist. LEXIS 156941 (D. Md.). Gaitan operated a fleet of trucks, but would refer jobs to other truckers with whom he shared a parking lot when he did not have enough trucks to meet a customer's needs. For each referred job Gaitan would charge a small fee (less than $1) for processing costs and pay the lion's share of the job price to the trucker which actually performed the work. The loss in question occurred when Gaitan referred a job to Garcia, and Garcia's driver ran over a customer's employee with Garcia's truck. Gaitan argued that, since one of his own five trucks was unavailable due to repairs (the others were on assignment elsewhere), the Garcia truck was covered under the Titan policy issued to Gaitan as

a temporary substitute for the otherwise covered truck under repair. The court looked to the fact that the Garcia truck was earning $228 dollars for Garcia, out of which Gaitan was taking only a minimal processing fee. Moreover, Gaitan frequently referred jobs when his own trucks were unavailable for reasons other than disrepair, and the court refused to find "temporary substitute" coverage for every vehicle performing a referred job simply because one of Gaitan's trucks happened to be out of commission. Since the loss did not involve a covered auto, Titan had no duty to defend.

A cautionary tale on careful drafting is presented in *Westchester Surplus Lines Insurance Co. v. Keller Transport, Inc.*, 382 Mont. 72, 365 P.3d 464 (also discussed in Section 1, regarding the MCS-90 endorsement). Westchester's excess policy was written over a primary Carolina Casualty policy (identified in Item 5 of the Westchester declarations) that had a $2 million general aggregate limit for occurrences and a $2 million products/completed operations aggregate. Item 6 in the Westchester declarations ("Limits of Insurance") provided for "$4,000,000 Each Occurrence; $4,000,000 General Aggregate $4,000,000 Products/Completed Operations Aggregate excess of the limits indicated in Item 5 of the Declarations." The court found that the Westchester policy was ambiguous in that it did not define "general aggregate," but provided "follow-form" coverage over an underlying policy with more than one coverage and more than one stated aggregate limit. As a result of the ambiguity, the Montana Supreme Court found $8 million in excess coverage for the loss in question. (Of course, one wonders why there was no discussion whatsoever of a pollution exclusion where the loss arose out of a 6,380 gallon spill of gasoline from an overturned tanker truck.)

The Great West policy in *Great West Casualty Co. v. Robbins*, 833 F.3d 711 (7th Cir.). was issued to the entity which loaned a trailer to a motor carrier which was subsequently involved in an accident. The "who is an insured" clause of the policy (apparently a standard ISO truckers liability policy) provided, at subsection 1.b., that permissive users of a covered auto may qualify as additional insureds, with certain enumerated exceptions. The Great West policy, however, also included an endorsement which, on its face, added to "Section II – Liability Coverage – Paragraph A.1.b. – Who Is An Insured: 1. Anyone who has leased, hired, rented, or borrowed an 'auto' from you that is used in a business other than yours…." The court concluded that the endorsement unambiguously added categories to the exceptions from permissive user coverage, and that the borrower of the trailer did not qualify as an additional insured under the Great West policy.

In *National Liability and Fire Insurance Co. v. Ledbetter Excavating*, 2016 U.S. Dist. LEXIS 152348 (W.D. Va.), a towing company employee was driving a customer's tractor-trailer when the vehicle overturned, injuring the tractor-trailer driver. The towing company employee sought liability coverage as a permissive user under the policy covering the tractor-trailer. The court found that the policy exception for permissive users working in the businesses of "selling, servicing, repairing, [and/or] parking," did not apply to the business of towing; accordingly, the towing company employee could qualify as an additional insured under the tractor-trailer policy.

Philip A. Bramson

15. Bad Faith

The claimant in *Shaheen v. Progressive Casualty Insurance Co.*, 2016 U.S. App. LEXIS 22422 (6th Cir.), asserted that Progressive had acted in bad faith, in violation of Kentucky's Unfair Claims Settlement Practices Act, by conditioning its policy limits settlement offer on the claimant's agreement to release Progressive's insured. The court disagreed, finding that Progressive's offer struck the proper balance between its statutory duty to the claimant to reach a fair and equitable settlement once the insured's liability becomes clear, and its obligation to protect the interests of its insured. (The court also noted that the claimant had consistently demanded payments by Progressive in excess of the policy limits.)

In *Allegheny Plant Services, Inc. v. Carolina Casualty Insurance Co.*, 2016 U.S. Dist. LEXIS 35189 (D.N.J.), Carolina did not settle a claim against Allegheny arising out of a motor vehicle accident, and the verdict against Allegheny exceeded Carolina's liability limit. In seeking summary judgment on Allegheny's bad faith claim, Carolina argued only that New Jersey, rather than Pennsylvania, law should apply. The court found that both states recognized the insurer's right to refuse a policy-limit settlement demand if there was a "reasonable basis" (in the New Jersey formulation) to dispute coverage (i.e., if coverage was "fairly debatable," in the Pennsylvania formulation). (The court did not, however, address the merits of the bad faith claim or the insurer's defenses.)

Philip A. Bramson

16. Non-Trucking

Hudson Insurance Co. v. Miller, 2016 U.S. Dist. LEXIS 50892 (D. Nev.), arose from an auto accident involving a truck owned and driven by an independent contractor who rear-ended another vehicle. At the time of the accident, the contractor had already delivered a load for a trucking company, and was en route to the truck stop to rest while he waited to receive his next dispatch from the same trucking company. The contractor was the named insured on a Non-Trucking Automobile Liability Insurance policy issued by Hudson Insurance Company, which provided liability coverage but excluded coverage for "bodily injury or property damage arising from the use of a covered auto . . . while used to carry property in any business or en route for such purpose."

Hudson sued the insured contractor seeking a declaration from the court that it owed no duty to defend or indemnify the contractor under the policy as a result of the accident because at the time of the accident, the trailer was in use and operation to carry out the business purposes of the contractor and the trucking company, thereby triggering the above exclusion in the policy. The contractor counterclaimed for breach of contract and bad faith. Both sides moved for summary judgment.

The court ruled in favor of the insured contractor, finding that the facts, viewed in a light most favorable to Hudson, demonstrated that the contractor was not furthering the business of the trucking company at the time of the accident. It was undisputed that the contractor had completed his load before the accident occurred and, at the time of the accident, had not accepted another load, was not under dispatch, and was not on a "call back" status. Further, the contractor was not obligated to accept another load for his return trip and was not acting at the direction of the trucking company. Thus, the court held, the exclusion in the policy did not apply, and the contractor was entitled to coverage.

Sentry Select Insurance Co. v. Drought Transportation, LLC, 2016 U.S. Dist. LEXIS 147122 (W.D. Tex.), involved a claim for coverage under a Non-Trucking policy for an accident involving a tractor-trailer being driven by a driver in the scope of his employment with a bar (which had leased the truck from a transportation company). Sentry Select had issued a business auto policy to the transportation company, which provided liability coverage for anyone driving a covered auto with permission (such as the subject driver), and the policy contained "business use" exclusion, which provided that the insurance did not apply to covered auto "while used to carry property in any business."

Sentry Select sought a declaratory judgment that it had no duty to defend or indemnify for the underlying lawsuit because the accident occurred while the driver was conducting business for the bar. The court granted Sentry Select's motion for summary judgment, holding that the record clearly established that the subject tractor-trailer was leased to the bar; the bar dispatcher instructed the driver to pick up and drop off frac sand for several days leading up to the accident; at the time of the accident, the driver had been instructed by the bar dispatcher and was en route to pick up another load of frac sand for the bar. Thus, the court concluded, the tractor-trailer was being used to further the commercial interests of the bar, thereby triggering the "business use" exclusion in the policy.

Notably, in reaching its decision, the court considered testimony from the driver and from the transportation company's fleet manager. The general rule is that such extrinsic evidence should not be considered when assessing an insurer's duty to defend, and courts should look only to the underlying lawsuit and insurance policy to determine whether coverage is available. Here, however, the court, applying a limited exception under Texas law, ruled that it was appropriate and necessary to look outside the underlying complaint and the policy because it was initially impossible to discern whether coverage was potentially implicated by the underlying complaint, and Sentry Select's evidence went solely to a fundamental issue of coverage which did not overlap with the merits of or engage the truth or falsity of any facts alleged by the underlying plaintiff.

Sanjeev Devabhakthuni

17. UM/UIM

A recurring issue in uninsured/underinsured motorist ("UM/UIM") coverage litigation is the appropriateness of an insurer's declination of coverage based upon various exclusions. For example, in *Carolina Casualty Insurance Co. v. Mountain States Hotshot, LLC*, 2016 U.S. Dist. LEX1S 12032 (D. Colo.) a district court addressed whether an employee driving a personal vehicle was entitled to UM/UIM benefits through an employer's insurance policy. Carolina commenced a declaratory judgment action against a trucking company, Mountain States Hotshot, LLC and its

employee Jon Brach who sought UM/UIM benefits following an accident in 2014. Brach was involved in an accident while operating his personally owned motorcycle. For the sake of the declaratory judgment action, the district court assumed that Brach was not at fault and was within the course of his employment with Mountain States.

The District Court analyzed the CCIC policy and found that Brach was not an "insured" under the policy. According to the CCIC policy, the definition of an insured excluded an employee or partner if the auto was personally owned by that employee or partner. Further, a "covered auto" under the policy for UM/UIM coverage was limited to vehicles specifically described and listed autos owned by Mountain States, and Brach's Motorcycle was not listed as a covered auto. Therefore, summary judgment was granted to CCIC as Brach was not an insured at the time of the accident and was not entitled to UM/UIM benefits.

In *Empire Fire And Marine Insurance Co. v. Frierson*, 49 N.E.3d 1075 (Ind. Ct. App.), UM/UIM coverage was denied to a plaintiff involved in a car accident while operating a rental vehicle. While operating a vehicle rented from Enterprise, plaintiff was involved in a car accident in 2011 in Indiana. Following the tender of all available underlying insurance coverage, plaintiff then sought UM/UIM benefits from a policy issued to Enterprise by Empire Fire and Marine. Plaintiff had completed a rental agreement with Enterprise under which she purchased optional Supplemental Liability Protection. The rental agreement provided that Enterprise did not provide UM/UIM benefits through the rental agreement, except as required by law. The Supplemental Liability Protection provided excess insurance through the Empire policy but specifically excluded UM/UIM benefits.

Empire argued that its policy provided excess insurance, and the policy clearly and unambiguously excluded UM/UIM coverage except in five states, not including Indiana. Further, Enterprise paid no premium for UM/UIM coverage for vehicles rented and operated in Indiana. The Court of Appeals found that the Empire policy was indeed an excess liability policy that did not provide UM/UIM coverage. The court further found that as an excess liability policy, and not an automobile policy, Empire was not required to provide UM/UIM coverage under a state statute.

In response to plaintiffs' argument that the UM/UIM exclusion was not clear and unmistakable with conspicuous and plain positioning in the Rental Agreement, the Court of Appeals noted that the alleged "fine print" of the rental agreement was only two and one-half pages in length, and the rental agreement clearly stated that Enterprise "does not extend any of its motor vehicle financial responsibility or provide insurance coverage to Renter," and Enterprise "does not provide Personal Injury Protection, No Fault Benefits or Medical Payment Coverage (collectively 'PIP') or Uninsured/Underinsured Motorist Protection ('UM/UIM') through this Agreement." Further, the Rental Agreement and Supplemental Liability Protection did not purport to provide broad coverage only to list certain exclusions further down the policy. Therefore, the Court of Appeals found that that the Empire policy did not provide UM/UIM coverage.

In *King v. US Xpress, Inc.*, 2016 U.S. Dist. LEXIS 117988 (E.D. Pa), plaintiff sued U.S. Xpress, Inc. and Mountain Lake Risk Retention Group, Inc., seeking third-party UM/UIM benefits under a Mountain Lake commercial policy issued to Xpress. While working for Xpress and driving an Xpress truck that was principally garaged in Pennsylvania, plaintiff was injured in a motor vehicle accident in Nebraska. At the time of the collision, Mountain Lake provided coverage to Xpress under a Truckers Automobile Liability insurance policy.

Pennsylvania has a statue statute that governs UM/UIM benefits and requires insurers to offer UM/UIM for all policies delivered in Pennsylvania, but the coverage is optional and can be waived with a written waiver. When it bought the Mountain Lake Policy, Xpress, through an executive, executed a written waiver form rejecting UM/UIM coverage. Mountain Lake, accordingly, denied plaintiff's claim for UM/UIM benefits because Xpress had not purchased UM/UIM coverage.

The district court granted summary judgment to the defendants because Xpress validly waived UM/UIM coverage, and, therefore, Mountain Lake was not obligated to provide UM/UIM benefits to plaintiff. The form executed by Xpress rejecting UM/UIM coverage included all of the language required by statute with an additional two clauses. In opposition to the motion, plaintiff argued that the form did not comply with the state statute because of these extra clauses. The district court found that the extra language did not render the entire waiver null and void as the form simply added language confirming that the insured was rejecting coverage as a business, not an individual. The district court analyzed the relevant case-law and found that the additional language actually enhanced the clarity of the waiver, and the added language was not only permissible but

essential for Xpress to exercise its right to reject UM/UIM coverage for its employees and drivers.

Another recurring issue in UM/UIM coverage litigation is the validity of disclaimers based upon the agreement the injured plaintiff was not an occupant in the insured vehicle at the time of the accident. This issue was addressed in *State Farm Mutual Automobile Insurance Co. v. Bailey*, 2016 Fla. App. LEXIS 16623 (Fla. Dist. Ct. App.). Plaintiff was injured by an uninsured motorist in an accident in 2012 while acting within the scope of his employment with Claim Jumper, Inc. Plaintiff had been operating a crane truck—a flatbed vehicle with a crane attached—but at the time of the accident plaintiff was standing between ten and twenty feet away from the truck. The engine of the truck was running in order to permit the crane to be operated, but the truck was not moving, and plaintiff had been monitoring the operation of the crane by a co-worker for about 30 minutes.

Plaintiff sued State Farm, Claim Jumper's insurer, for UM/UIM benefits. Both parties moved for summary judgment with State Farm arguing that plaintiff was neither a named insured nor otherwise covered because he was not occupying the insured vehicle at the time of the accident. Plaintiff argued that he was an insured under the policy and was also occupying the insured vehicle.

The Florida Court of Appeals analyzed prior decisions defining "occupying," which focused on proximity to the insured vehicle at the time of injury and the relationship between the person and the vehicle, obviously of time and in distance, to determine whether a person is in, on, entering or alighting from the vehicle. The court granted summary judgment to State Farm finding that plaintiff was not "in, on, entering or alighting from" the insured truck at the time he was struck as he had exited the truck about thirty minutes prior to being struck and was standing at least ten feet away from the vehicle. The separation between plaintiff and the truck in both time and distance precluded a finding that plaintiff was occupying the vehicle at the time of the accident.

A contrary result was reached in *Spruill v. Westfield Insurance Co.*, 2016 N.C. App. LEXIS 1177 (N.C. Ct. App.) where a plaintiff was found to be an occupant of the insured vehicle despite being physically outside of the vehicle and, in fact, never having been inside the vehicle.

Plaintiff, an employee of a construction company, was directing traffic on a highway when he was hit by a car in 2012. At the time of the accident, plaintiff was acting in the course and scope of his employment and assisting a co-worker with backing a truck and trailer onto the highway from a work site. Plaintiff wore an orange and yellow reflective vest and was directing traffic while standing within the median of the highway when he was hit and injured.

Westfield Insurance Company had issued a commercial package policy to the employer in Virginia, which included business auto coverage with a $1,000,000 limit for UM/UIM coverage. Plaintiff also had a personal automobile liability policy with Allstate that afforded up to $250,000 in UM/UIM coverage. Plaintiff sued Westfield and Allstate seeking the recovery of UM/UIM benefits.

Westfield moved for summary judgment arguing that plaintiff should not be considered an "insured" under its policy because he was not "occupying" the truck at the time he was injured. The Court of Appeals of North Carolina relied on case-law from Virginia (where the policy was issued) and found that plaintiff was using the vehicle at the time of the accident because he was acting to assist the driver of the vehicle. Plaintiff was directing traffic for the truck and helping the driver to safely back the vehicle onto the roadway. There was a clear causal relationship between the incident and the employment of the insured vehicle as a vehicle. This reasoning, which is not uncommon, misses the distinction between "using" a vehicle, which Spruill certainly was, and "occupying" it, which he arguably was not.

The court also went on to find that both the Westfield and Allstate policies result in two different excess providers and no primary insurer. Since both policies purported to be primary, the court pro-rated their limits.

In *Goss v. Green*, 2016 U.S. App. LEXIS 21590 (6th Cir.), the Allstate personal UIM policy at issue contained an express exclusion for injury to the named insured while in "a vehicle … furnished or available for the regular use of [the insured] … which is not insured for this coverage." The insured was injured while driving his motor carrier employer's tractor-trailer, which he drive five days a week and 90% of the time he was working for the motor carrier. The Court of Appeals agreed with the district court that, since the tractor-trailer was not covered under the driver's Allstate policy, the loss fell squarely within the exclusion and no UIM coverage was available. (Since motor carriers rarely elect UM or UIM coverage in states where it can be rejected, one wonders whether a driver like Mr. Goss with an underinsured loss is ever likely to find compensation.)

Matthew J. Rosno

18. Miscellaneous

In *Acuity v. Southwest Spring, Inc.*, 2016 Ill. App. Unpub. LEXIS 100 (Ill. Ct. App.), a driver for a repair shop was involved in an accident while operating a customer's vehicle. Auto-Owners insured the repair shop; Acuity issued a policy to the vehicle owner. Auto Owners assumed the defense of the driver, the repair shop, and the vehicle owner, without issuing a reservation of rights. Auto-Owners subsequently accepted a formal tender of that defense from Acuity, without advising Acuity that Auto-Owners reserved its right to seek recovery from Acuity. After actively defending the bodily injury action for three years, however, Auto-Owners tendered the defense back to Acuity. Under the circumstances, the appellate court agreed with the trial judge that Auto-Owners had knowingly waived its right to any contribution from Acuity.

In *Century Surety Co. v. Jim Hipner LLC*, 2016 U.S. App. LEXIS 21029 (8th Cir.), the Supreme Court of Wyoming answered a certified question by holding that prejudice to the insurer is required before coverage can be denied for late notice of a loss. The insured notified its primary insurer on the date of the loss, but failed to notify its umbrella carrier at that time. The umbrella carrier first learned of the loss indirectly four months later, when the insured's agent forwarded the application to renew the policy. The court found that it would have been "practicable" for the insured to notify the umbrella insurer at the same time it notified the primary carrier. On the other hand, since the umbrella insurer decided not to further investigate the loss once it received investigative materials from the primary insurer, the court determined that the umbrella insurer's ability to investigate the loss had not been prejudiced by the insured's delay in giving notice.

The parties in *Certain Underwriters at Lloyds of London v. Illinois National Insurance Co.*, 2016 U.S. Dist. LEXIS 153527 (S.D.N.Y.), argued over priority of coverage for a construction site accident, involving the unloading of steel from a truck and bodily injuries to the truck driver and also to the architect. Illinois National paid its policy limit toward settlement of one of the actions; excess insurer Lloyds paid a combined $19,850,000 to settle the two actions; and the two insurers collectively incurred $246,588.87 in defense costs. Insurance Company of the State of Pennsylvania ("ICSOP") insured the trucking company, and agreed that it was obligated to contribute its $1,000,000 policy limit to the settlement, but disputed its obligation to reimburse the other insurers for any portion of the defense costs, since exhausting its policy limits would end any duty to defend. ICSOP had not originally tendered its limits, however, and since ICSOP had a primary duty to defend and Lloyds had no duty to defend, the court ordered ICSOP to reimburse Lloyds for its defense costs. In the absence of any relevant evidence, the court refused to apportion the defense costs between defendants covered under the ICSOP policy and defendants who were not covered.

The plaintiff trucking company in *Drive Logistics Ltd. v. PBP Logistics LLC*, 2016 U.S. Dist. LEXIS 94392 (E.D. Mich.), sued the defendant broker to collect unpaid charges for freight transportation services. Alternatively, however, plaintiff sought to collect the same fees from the shipper. The trucking company argued that the shipper's signature on, and in some cases issuance of, the bills of lading bound the shipper to pay the transportation charges (a default position supported by the Federal Bill of Lading Action, 49 U.S.C. § 80101 *et seq.*, absent any contrary agreement). The court, however, found that the shipper could be a beneficiary of the contract between the trucking company and the broker which provided that the trucking company waived the right to recover freight charges from the broker's customers. (Material questions of fact regarding execution of the contract, however, so the shipper's motion for summary judgment was denied.)

Falls Lake National Insurance Co. v. Martinez, 2016 U.S. Dist. LEXIS 100844 (W.D. Va.), raised the frequently-heard question of whether an underlying bodily injury action may be stayed while the declaratory action over coverage is pending. The court rejected the insurer's motion to stay the underlying action pending in the same court because the various parties disagreed on whether a stay should be imposed, and noted that a stay would depend on an agreement on a global schedule for resolving both matters. (See discussion of this same case in our Coverage section as well as the related case of *Lester v. SMC Transport, LLC*, 2016 U.S. Dist. LEXIS (W.D. Va.), in our section on Motor Carrier Liability for Driver Conduct.)

Kansas Statutes §60-19a02 mandates a $250,000 cap on non-economic damages, such as pain and suffering, in a personal injury action. The constitutionality of the statute was upheld by the Kansas Supreme Court in *Miller v. Johnson*, 295 Kan. 636, 289 P.3d 1098 (2012), in the context of a medical malpractice claim. In

Hilburn v. Enerpipe, Ltd., 52 Kan. App.2d 546, 370 P.3d 428 (Kan. Ct. App.), an intermediate level Kansas appellate court applied *Miller v. Johnson* in a case involving a rear-end hit from a truck, and affirmed the lower court's ruling reducing the plaintiff's verdict for non-economic loss from $301,509.14 to $250,000. The *Hilburn* court found that the purpose of the damages cap – to keep liability insurance affordable – was equally applicable in the area of motor vehicles subject to mandatory coverage under both federal and state law.

The size of a jury award was also at issue in *Hill v. J.B. Hunt Transport, Inc.*, 815 F.3d 651 (10th Cir.), a case involving a fatal injury caused by a driver hired by J.B. Hunt. The driver refused to appear at the trial, J.B. Hunt moved unsuccessfully to compel his appearance or, alternatively, admit his video deposition testimony, and the jury returned a verdict of $3.332 million. Oklahoma law permits recovery in wrongful death cases of mental pain and anguish suffered by the decedent, as well as grief and loss of companionship for the parents or children of the decedent. The court in this case found ample evidence from which the jury could assess the decedent's conscious pain and suffering, as well as the survivors' grief and loss of companionship, and acknowledged the jury's wide latitude in fashioning an appropriate award.

The plaintiff in *Navana Logistics Ltd. V. TW Logistics, LLC*, 2016 U.S. Dist. LEXIS 21822 (S.D.N.Y.), a company incorporated and headquartered in Bangladesh, acted as freight forwarder for a shipment of garments to the Port of Los Angeles. When payment for the garments was not forthcoming, Navana sued the buyer, the buyer's "delivery agent," and the buyer's bank which issued letters of credit to facilitate the purchase. In the absence of any evidence that Navana entered into a contract with the defendants – either in its own name or as agent for the garment suppliers – the court dismissed plaintiff's breach of contract claims. Navana's unjust enrichment claim failed, absent allegations that the defendants were actually enriched at Navana's expense; and the quantum meriut claim failed absent allegations that Navana, as the freight forwarder for the suppliers, actually performed services for the recipients.

United Financial Casualty Co. v. Associated Indemnity Corp., 2016 Ariz. App. Unpub. LEXIS 1389 (Ariz. Ct. App.), addressed the oft-asked question of whether the primary duty to defend should be imposed on the commercial general liability insurer or the business auto insurer. The claimant was transported to a medical appointment from her assisted living facility in a van operated by the facility and driven by a facility employee. She exited the vehicle, crossed a sidewalk, and fell face first into a snowbank. The evidence showed that the accident occurred about a minute after she exited the van, when she was approximately 10-12 feet from the vehicle. Under the circumstances, the court determined that the loss did not arise out of the use of the van, and found that the CGL carrier had the primary duty to defend.

Iowa Code section 325B.1(2) prohibits indemnification clauses in a "motor carrier transportation contract" or any provision or agreement collateral to or affecting a motor carrier transportation contract. "Motor carrier transportation contract" is defined as a contract, agreement or understanding related to "[t]he transportation for hire of property by a motor carrier." In *United Suppliers, Inc. v. Hanson*, 876 N.W.2d 765 (Iowa), a tractor-trailer leased by a supplier of agricultural fertilizers and chemicals to transport its own products overturned. The supplier's insurer paid $974,366.20 for the damage to the tractor-trailer, the lost product, and for the environmental cleanup; the supplier then brought an action on behalf of itself and the insurer for indemnification against the lessor of the tractor-trailer and the lessor's driver. In a case of first impression, the Supreme Court of Iowa held that section 325B.1(2) was not applicable to a private carrier such as United Suppliers. The court held further that the language in the lease giving the private carrier "exclusive control and responsibility" over the leased vehicle did not negate the lessor's promise to indemnify the lessee against losses arising out of the negligence of the lessor or its driver.

Nevertheless, since the supplier's business auto insurer Nationwide had paid for virtually all the damage (less the supplier's $5,000 deductible), the question became whether the lessor or its driver qualified as an additional insured. The definition of "who is an insured" contained an exception for "[t]he owner or anyone else from whom you hire or borrow a covered auto," but that exception did not apply to the driver, who otherwise qualified as a permissive user of the covered tractor-trailer. (The court noted that other policies specifically exclude employees of the vehicle owner as well.) Remarkably, the court went further and extended additional insured coverage to the lessor as a party liable for the conduct of the insured driver, without addressing the policy exception that should have excluded the lessor as the provider of the leased vehicle. On this last point only, our view is that *United*

Suppliers was wrongly decided.

In *Sayles v. Knight Transportation Co.*, 2016 U.S. Dist. LEXIS 166528 (E.D. Mo.), the plaintiff, as motor carrier, and the defendant, as broker, entered into a brokerage agreement. The agreement obligated the motor carrier to obtain insurance, and the motor carrier alleged that the broker had tortuously interfered with the motor carrier's attempts to do so. The court found that the tortious interference claims all effectively arose out of the insurance provisions of the brokerage agreement, and that the dispute would therefore be transferred to the District of Arizona pursuant to the agreement's forum-selection provisions.

Philip A. Bramson

19. FMCSA Watch

This past year saw litigation in response to various actions taken by the Federal Motor Carrier Safety Administration ("FMCSA"). In *Owner-Operator Independent Drivers Association, Inc. v. United States Department of Transportation*, 831 F.3d 961 (8th Cir. 2016), a motor carrier association petitioned for review of FMCSA's regulatory guidance exempting "attenuator trucks" from reporting certain types of accidents. Attenuator trucks are highway-safety vehicles equipped with an impact-absorbing crash cushion designed to protect workers in construction zones. FMCSA advised that crashes involving such trucks while deployed in work zones would not be considered accidents that would count against the safety performance records of the motor carriers responsible for the operation of the attenuator trucks. OOIDA argued that its motor carrier members compete for business, to some extent, based on their safety ratings, and that the regulatory guidance created an uneven playing field. The court, however, found that OOIDA lacked standing to challenge the regulatory guidance.

The same parties tangled over the scope of FMCSA's regulations requiring electronic logging devices in commercial motor vehicles used in interstate commerce. *Owner-Operator Independent Drivers Association, Inc. v. United States Department of Transportation*, 2016 U.S. App. LEXIS 19558 (7th Cir.). The devices record data relevant to FMCSA's hours of service regulations: whether the engine is running, the hours that the driver is on duty, and the vehicle's approximate location. The court rejected OOIDA's arguments that the regulations would not adequately protect drivers from harassment by motor carrier employers, and that the devices unconstitutionally invade drivers' privacy. The court held further that use of the devices did not violate the drivers' constitutional right to be free of unreasonable searches and seizures, because interstate trucking is a pervasively regulated industry, and the gathering of hours of service data is a reasonable exercise of governmental power.

On a smaller scale, the plaintiff motor carrier in *Transam Trucking, Inc. v. Federal Motor Carrier Safety Administration*, 2016 U.S. Dist. LEXIS 94682 (D. Kan.), alleged FMCSA had breached a settlement agreement by failing to provide an amended compliance review report omitting any reference to a prior safety violation and by lowering plaintiff's safety rating. In response to FMCSA's motion to dismiss the complaint, the court found that the Administration had entered the settlement agreement in its sovereign capacity, and the breach of contract claim was not cognizable under either the Administrative Procedures Act or the "Little Tucker Act" (which waives federal sovereign immunity for certain contract claims, but does not authorize non-monetary damages). Nevertheless, the court agreed that the plaintiff had (at least arguably) a protected property interest in the report allegedly promised in the settlement agreement, and the court allowed the plaintiff's action to go forward on a claim of denial of due process of law.

It was also a busy year for FMCSA on the regulatory front:

81 Fed. Reg. 3,562 (Jan. 21). Proposing a broad amendment of the Federal Motor Carrier Safety Regulations to revise the methodologies used by FMCSA to determine motor carrier fitness to operate commercial motor vehicles in interstate commerce, based on all of the on-road safety data on the carrier available through the Motor Carrier Management Information System.

81 Fed. Reg. 9,117 (Feb. 24). Establishing the New Mexico commercial zone in Dona Ana and Luna counties, New Mexico. (A commercial zone is a designated area in which FMCSA's economic regulation of motor carriers does not apply, even if travel within the zone involves interstate commerce.)

81 Fed. Reg. 12,642 (Mar. 10). Requesting data and information concerning the prevalence of moderate-to-severe sleep apnea among individuals performing safety-sensitive functions in highway and rail operations, with an eye towards potential regulatory action to address the problem. (Also announced public listening

sessions to discuss the problem, 81 Fed. Reg. 25,366 (Apr. 28); extended the comment period, 81 Fed. Reg. 36,858 (June 8); announced a meeting of FMCSA's Medical Review Board, 81 Fed. Reg. 52,608 (Aug. 9).)

81 Fed. Reg. 13,998 (Mar. 16). Extending to January 1, 2018, the date to comply with FMCSA's new rules on leasing of passenger-carrying vehicles (published on May 27, 2015, and discussed in last year's Review). (In response to 37 petitions for reconsideration, FMSCA announced, 81 Fed. Reg. 59,951 (Aug. 31), that it was considering four changes to the rules: excluding "chartering," i.e., subcontracting, from the leasing requirement; amending the requirements for location of temporary markings for leased/interchanged vehicles; changing the requirement that carriers notify customers within 24 hours when they subcontract service to other carriers; and expanding the 48-hour delay in preparing a leasing to include emergencies when passengers are not actually on board a bus. FMCSA announced a roundtable discussion to be held on October 31 to discuss petitions to reconsider these rules, 81 Fed. Reg. 66,243 (Sept. 27).)

81 Fed. Reg. 14,052 (Mar. 16). Proposing a rule to extend the period of time for military veterans to apply for a waiver of the commercial driver's license skills test from 90 days to 1 year after leaving a military position requiring the operation of a commercial motor vehicle. (The rule was finalized at 81 Fed. Reg. 70,634 (Oct.13).)

81 Fed. Reg. 24,769 (Apr. 27). Announcing that FMCSA is considering a rulemaking that would require states to establish a program for annual inspections of commercial motor vehicles designed to carry passengers.

81 Fed. Reg. 33,144 (May 25). Finalizing an interim rule expanding the commercial zone for the City of El Paso, Texas.

81 Fed. Reg. 36,474 (June 7). Enacting a rule requiring passengers in property-carrying commercial motor vehicles to wear seatbelts, and holding motor carriers and drivers responsible for ensuring that passengers do so when the vehicles are operated on public roads in interstate commerce. The rule went into effect August 8. (The rule was also corrected to clarify that drivers of passenger-carrying vehicles will continue to be required to wear seat belts, 81 Fed. Reg. 43,957 (July 6).)

81 Fed. Reg. 41,453 (June 27). Revising civil penalties to adjust for inflation; notably, some penalties increased while others were reduced, since in certain cases prior inflationary increases have been discounted under the new methodology.

81 Fed. Reg. 47,722 (July 22). Amending the Federal Motor Carrier Safety Regulations (in response to petitions from the Commercial Vehicle Safety Alliance and American Trucking Association, as well as recommendations from the National Transportation Safety Board) to, among other changes, add a definition of "major tread groove" and an illustration to aid in identifying major tread groove; eliminate the requirement for an operable rear license plate lamp on vehicles where no rear license plate is present; and prohibit the operations of a vehicle with speed-restricted tires at speeds which exceed those restrictions.

81 Fed. Reg. 47,732 (July 22). Clarifying that a roadside inspection of a commercial motor vehicle is not an acceptable substitute for the thorough annual inspection which is required under the regulations.

81 Fed. Reg. 61,942 (Sept. 7). Announcing a joint proposal by FMCSA and the National Highway Traffic Safety Administration for regulations mandating that every commercial motor vehicle over 26,000 pounds (transporting property or passengers) be equipped with devices limiting the speed of the vehicle to a maximum that will be set in the final rule. Manufacturers would be required to include such devices in new vehicles, and motor carriers operating the vehicles would be required to maintained them for the service life of the vehicle. The announcement indicates that the agencies are considering, but have not yet settled on, a requirement that existing vehicles be retrofitted with speed governing technology. Comments were requested no later than November 7, 2016; the compliance date would likely be the first September 1 three years after publication of the final rule.

81 Fed. Reg. 65,568 (Sept. 23). Although 49 C.F.R. 393.60(e) generally prohibits anything which would constitute an obstruction on the driver's point of view, the amendment allows mounting of "vehicle safety technology" on the interior of the windshield. Permitted technologies include video event recorders, lane departure warning systems, transponders, and sensors that are part of a hands-free driver aid equipment package.

81 Fed. Reg. 68,336 (Oct. 4). Amidst a wide-ranging series of technical corrections, FMCSA removed all remaining instances of the terms "common carrier" and "contract carrier," as required by the ICC Termination

Act and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users.

81 Fed. Reg. 71,002 (Oct. 14). Enacting a series of non-discretionary, ministerial changes to FMCSA regulations as mandated by the Fixing America's Surface Transportation Act (discussed in last year's review). The changes include restructuring several programs involving grants to states for motor carrier safety programs and development of technology.

81 Fed. Reg. 86,673 (Dec. 1). Proposing to establish a process by which qualified physicians employed in the Department of Veterans Affairs can be certified to perform medical examinations of commercial motor vehicle operators.

81 Fed. Reg. 87,686 (Dec. 5). FMCSA is creating the Commercial Driver's License Drug and Alcohol Clearinghouse, a database identifying commercial motor vehicle drivers with drug and/or alcohol violations that render them ineligible to operate a CMV. Employers will be required to report any driver who fails a drug/alcohol screening test, or if the employer has actual knowledge that the driver used drugs/alcohol while performing safety-sensitive functions. The datatbase is expected to be online by January 4, 2017.

81 Fed. Reg. 88,732 (Dec. 8). Establishing new minimum training standards for certain individuals who are applying for their commercial driver's license for the first time, or upgrading their CDL license, or seeking to obtain a hazardous materials, passenger, or school bus endorsement for the first time. The final rule will become effective February 6, 2017; the compliance date is February 7, 2020. Among other regulations, "behind the wheel" instructors will need to hold a CDL of the same or higher class, with all endorsements necessary, to operate the CMV for which training is being provided; have a minimum of two years' experience driving such a CMV; and meet all applicable State requirements for CMV instructors.

Philip A. Bramson