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Transportation Annual Year in Review

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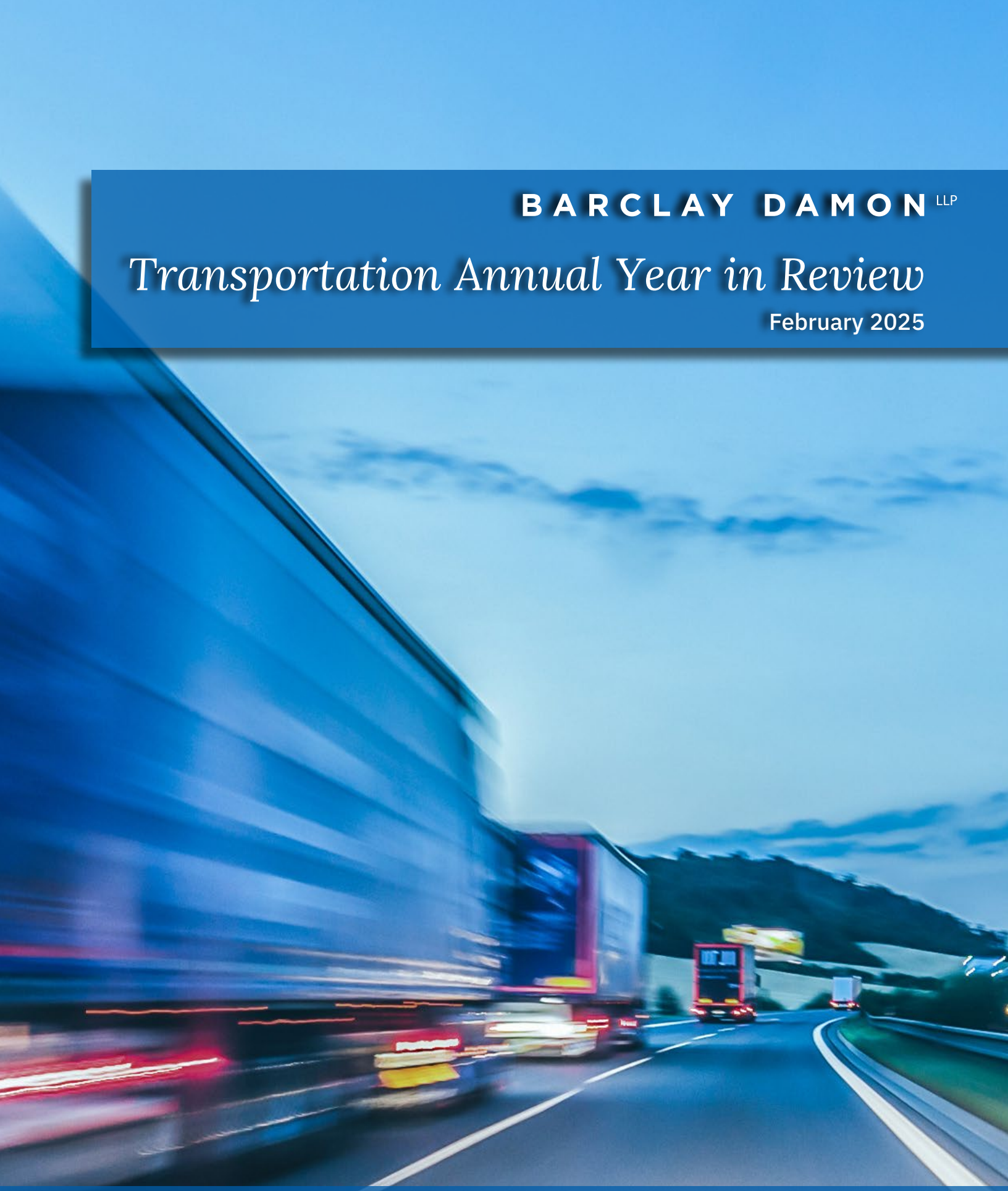

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2025 Transportation Law Update

On behalf of the Barclay Damon Transportation Team, it is my pleasure to once again present our annual transportation law update. As always, we have selected some of the interesting cases decided in the last calendar year and provided summaries with occasional commentary. With a new administration in Washington DC, we can expect regulatory changes in the near future, and we will be following them along with the development of the case law as we begin to prepare for next year's update.

One piece of statutory or regulatory change that has been anticipated for some time is an increase in the mandatory insurance requirements for interstate motor carriers. The current limit requirements have been in place since the early 1980s. Perhaps tired of waiting for FMCSA to act, New Jersey enacted new legislation increasing the required insurance for New Jersey–based commercial vehicles weighing over 26,001 pounds to $1.5 million (Section 19). Will anyone else follow suit?

Among our entries this year is an assessment by Mario Paez of Marsh McLennan of the threat that cyber criminals pose to the trucking industry (Section 6). We thank Mario for his work and Marsh for making his assessment available to our readers. Kaitlyn McClaine has taken over the cargo desk (Section 4), and Lee Jacobs, one of the firm's employment lawyers, takes on the driver classification problem and related issues (Section 2). As always, we look forward to hearing from you.

Larry Rabinovich

1. Freight Brokers

The trend of the case law in recent years has been to protect transportation brokers from lawsuits by parties seeking redress for injuries or damage caused in trucking accidents. What appears to now be the majority view (at least with respect to claims against brokers for negligent selection of motor carriers) is based on an interpretation of the Federal Aviation Administration Authorization Act (FAAAA or F4A, 49 U.S.C. §14501 (c)(1)). The statute, created in 1994, ostensibly to prevent states from introducing economic regulation of motor carriers or brokers as the federal government got out of the business of economic regulation, has been used more recently to shield brokers from traditional negligence claims. (Economic regulation was a feature of the Interstate Commerce Commission's approach and included preventing motor carriers from competing on price. That approach lost favor by the late 1970s and was banished along with the ICC itself in the mid '90s). The blanket protection of brokers has frustrated plaintiff's lawyers and reassured brokers and third-party logistics companies, reversing developments of recent decades in which brokers and third-party logistics, frequently much larger than the motor carriers they hire, had become a favorite deep pocket target.

As we discussed in last year's update, two federal appellate courts (the Seventh and Eleventh Circuits) have accepted the principle that claims against brokers for negligent selection are preempted by the statute; their view is in conflict with that of the Ninth Circuit which held in 2020 that a safety provision in the statute protects a state's tort law and, in turn, the right of plaintiffs to sue brokers for negligence. Typical of the new majority approach was *Gauthier v. Hard to Stop LLC*, 2022 US Dist., LEXIS (S. D. Ga), now affirmed by the Eleventh Circuit. The plaintiff's estate alleged that the broker Total Quality Logistics was vicariously liable for the negligence of the truck driver who caused the fatal accident (count 1); had failed to exercise due care in selecting the motor carrier (count 2); and was engaged in a joint venture with the motor carrier and thus liable for the latter's failure to properly maintain its vehicles (count 3). The trial court found that plaintiff had failed to adequately plead by plausible allegation that TQL controlled the time, manner and method of the carrier's operations, nor was their sufficient allegation of mutual control to sustain a cause of action for joint venture. Thus counts 1 and 3 were dismissed on traditional state grounds of insufficient pleading.

Count 2, negligent selection of the motor carrier was, to the contrary, sufficiently pleaded and so, under state law, would have been permitted to proceed. However, the court dismissed that count, as well, because it was preempted by F4A. In so holding, the court cited a long line of cases that hold that hiring a motor carrier is related to "a price, route or service" of a broker with respect to transportation of property, and also held that the safety regulatory clause did not apply.

In July, the Eleventh Circuit affirmed the District Court's exhaustive analysis. 2024 US App. LEXIS 16696. That was hardly surprising in light of the court's decision last year on preemption. The Gauthiers appealed to the US Supreme Court; one basis for the court to add a case to its docket is that federal appellate courts have split on the legal question at issue. Since the Ninth Circuit has held that the safety exception permits negligent selection claims against brokers, and the Seventh and Eleventh Circuits have held that it does not, plaintiffs have a plausible basis for asking the Supreme Court to review the decision. Of course, the court has had other opportunities in recent years and turned them down to the frustration of both claimants and freight brokers; both sides are interested in a definitive ruling which they hope will settle the question once and for all. To that end, even though TQL won the case, it has separately petitioned the court to accept the case for review. Nobody, though, should hold their breath.

Other cases decided last year included *Farfan v. Old Dominion Freight Lines*, 2024 US Dist. LEXIS 156972 (S.D. Tex). Old Dominion, one of the country's best known and successful motor carriers (headquartered in North Carolina, in spite of its name) added a broker authority alongside its carrier authority in 2002. Old Dominion has now been sued for wrongful death in a case brought

by the estate of the victim of a crash with a truck which plaintiff alleged, in one count, was being operated under Old Dominion's authority. However, the complaint also alleged that Old Dominion, acting as a broker, had contracted with Just Van, a motor carrier, to haul the load at issue. The court found that there was no evidence that Old Dominion had accepted the load as a motor carrier and concluded as a matter of law that Old Dominion had been acting as a broker. That left the question of whether, as broker, Old Dominion was potentially liable.

The relevant provision of the FAAAA for broker preemption reads as follows:

a State … may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of any motor carrier … or any broker…with respect to the transportation of property.

Note that the provision refers to motor carriers as well as brokers. For good reason (fear of being laughed out of the profession) no lawyer, to our knowledge, has argued that this precludes a negligence claim against a motor carrier. However it is now well-established in various jurisdictions that claims against brokers—at least claims for negligent selection of a motor carrier—are precluded by this federal statute. Finding no 5th Circuit precedent, the *Old Dominion* court reviewed case law from around the country. Not surprisingly in line with recent case law, the court concluded, in prong one of the analysis, that claims relating to negligent hiring by a broker of a motor carrier are related to "price, route, and service" of the broker and thus preempted.

The second prong of the test relates to the "safety exception" as is referred to in the case law. A state law, such as the common law of torts, can be enforced against a broker if the law relates to the state's legitimate concerns about motor vehicle safety. (It is on this second prong that a difference of opinion exists among the federal circuit courts.) Preemption, the statute continues, does not "restrict the safety regulatory authority of a State with respect to motor vehicles." The question was whether the actions or alleged negligence of a freight broker sufficiently relates to motor vehicles to trigger the safety exception. Since the statute did not explicitly mention brokers in the context of the safety exception the court concluded that preemption applied and granted Old Dominion's motion to dismiss. Based on the applications to the US Supreme Court in the *Gauthier* appeal, if the court takes the case it is likely to focus on the second prong. We wonder whether any of the friend of the court briefs filed by outsiders to the case will also deal with the first prong, in the event that the court accepts the case for review.

One other related area of dispute among the courts, of which the Supreme Court may someday take notice, is whether the nature of the claim (bodily injury as opposed to property damage or cargo) leads to a different result with respect to applicability of the safety exception. Citing last year's Eleventh Circuit decision in *Aspen* (65 F.4th 1261), the court in *Pinder v. Lancer Ins. Co.*, 2024 US Dist. LEXIS 176253 (M.D. Ga.) (subject to 11th Cir. precedent), held that the safety exclusion was not applicable even in a bodily injury context, and that there was no difference between claims for cargo loss/property damage, and those for bodily injury. However, the court in *Hawkins v. Milan Express, Inc.*, F. Supp. 3d., 2024 US Dist. LEXIS 94014 (E.D. Tenn.), noting the absence of controlling Sixth Circuit precedent, held that the safety exception *does* apply to bodily injury cases and declined the broker's motion for summary judgment on the basis of F4A.

Another Tennessee federal court, in *McElroy Truck Lines, Inc. v. Moultry*, 2024 US Dist. LEXIS 195337 (M.D. TN), while expressing a general concern that under the preemption theory freight brokers are not being held responsible even when they act negligently, granted the broker's motion for summary judgment, in a case involving cargo loss.

Many complaints seeking damages allege, in the alternative, that a particular entity has acted either as a motor carrier, and is liable for the acts or omissions of a negligent driver, or as a broker. Our sense is that with the FAAAA defense increasingly available to brokers, plaintiffs will improve their pleadings to try to reverse the trend. We have been seeing, and will likely continue to see, more pleading in the alternative that could lead to additional expenditures in defending such cases. This past year some decisions (including *Gauthier* and *Old Dominion* discussed above) acted quickly to address this, granting the defendant summary judgment because the complaint alleging that it had acted as a carrier had lacked specific allegations. Expect to see more specific allegations in future complaints. If there are no credible allegations, though, summary judgment is appropriate.

Thus, in *Fast Post Shanghai Logistics v. B612 Tima, Inc.*, 2023 US Dist. LEXIS 186204 (Cent. District, Cal.) the plaintiff amended its complaint to allege that defendant Best Bay was liable under the Carmack Amendment for loss of plaintiff's shipment of microinverters (used to convert electricity from solar panels into electricity compatible with the electrical grid). The shipment had been in defendant B612's warehouse; B612 hired Best Bay to broker the load and Best Bay selected a carrier named Rail Dog. A driver purporting to be from Rail Dog arrived at the warehouse and he was given the cargo which was never delivered to the consignee. (Thieves spoofing motor carriers are an increasing problem.) Since the plaintiff could not support its allegations that Best Bay was the motor carrier, the Carmack claim was dismissed.

The line between brokers and carriers seems clear enough in theory and in the statutes and regulations (see the definition of "broker" at 49 C.F.R. § 371.2) but in the real world that line often harder to draw. That is true particularly if a dual authorized entity is not eager to highlight the fact for its customer that it is sending another motor carrier to pick up the load. (Once an accident occurs, of course, that approach quickly changes.)

Thus, in *Allied Prop. & Cas. Ins. Co. v. Dupre Logistics, LLC*, 2024 US Dist. LEXIS 165979 (M.D. Fla.), an interior design company arranged with Dupre, a motor carrier and a broker, for a shipment of furniture from Florida to a customer in New York. Dupre then hired another motor carrier to actually haul the goods. En route, the rig hit a bridge, exposing the cargo to the elements, and the customer ultimately declined to accept the furniture. The shipper's insurer paid for the ruined shipment, then sued Dupre on various grounds including that Dupre was the motor carrier and responsible for the loss, and that it was liable as the broker. Here (unlike in some of the cases summarized above), the court found that there were sufficient allegations that Dupre had accepted legal responsibility for the shipment. Accordingly, Dupre's motion to dismiss the motor carrier counts were denied. Savvy plaintiff lawyers will certainly learn to fortify their allegations so that an early grant of summary judgment will become more unlikely.

The plaintiff in *Indemnity Ins. Co. v. Whitehorse Freight LLC*, 2024 U.S. Dist. LEXIS 205371(S.D. TX) did allege with enough specificity that the defendant was a motor carrier to survive a motion to dismiss. That was so even though the defendant had only broker authority from the USDOT; citing decades of case law, the court noted that an entity that holds itself out as a carrier, even if it lacks carrier authority, can be held liable as a carrier.

Since, in many cases, the customer has an existing business relationship with the broker, brokers will sometimes pay the shipper for any loss or damage to maintain good customer relations, then seek recovery from the motor carrier. In *BVB Express, LLC v. Straight Logistics, Inc.*, 2024 US Dist. LEXIS 179975 (W.D. Wash.), plaintiff, freight broker, and defendant motor carrier entered into a contract pursuant to which the latter would procure cargo insurance and agreed to indemnify former for losses to cargo. A shipment of beer was damaged while in Straight's possession. BVB paid the brewery for the loss. (The court asserted without explanation that BVB was liable to the shipper; we wonder whether in some similar scenarios it could be argued that the broker had made a "voluntary payment.") Since Straight declined to pay BVB back, BVB filed suit seeking recovery for breach of contract and under the Carmack Amendment. Straight did not appear so a default judgment was entered.

The court had to work a bit harder in *Apiary Indus. LLC v. C&M Logistics*, LLC, 2024 US Dist. LEXIS 189846 (E.D. Mo.). Plaintiff (broker) and defendant (motor carrier) entered into a broker-carrier agreement. A shipper contacted Apiary to arrange shipment of a load from Kennedy Airport to a warehouse northwest of New York City. Apiary hired C&M to haul the load. C&M's driver picked up the load at JFK but it was stolen from C&M's trailer prior to delivery. Apiary paid the owner of the goods and demanded reimbursement from C&M pursuant to the terms of the broker-carrier agreement.

Prior to delivery of the cargo to JFK, Kuwait Airlines had issued air waybills which C&M now argued controlled the terms of transportation for final destination. The air waybills set Hong Kong as the venue of any litigation. C&M argued that because Apiary had made a voluntary payment and stood in the shoes of the owner, and any claim for relief could only be brought in Hong Kong.

The court disagreed. The broker-carrier agreement required C&M to issue a bill of lading for each shipment it accepted, required that the terms of 49 U.S.C. §14706 (the Carmack Amendment) controlled, and required C&M to indemnify and hold Apiary harmless from and against claims by shippers or other third parties. Interestingly, the agreement also provided that if Apiary paid a claim—even though it did have the legal responsibility to do so—C&M would reimburse Apiary. The court concluded that the language of the broker-carrier agreement provided Apiary with a clear right to recover, that the airway bills did not control, and that Apiary was entitled to reimbursement as a matter of law.

Larry Rabinovich

2. *Employment Law and Independent Contractors*

Employment issues affecting the trucking industry continue to evolve under increasing scrutiny from courts and regulators, with significant implications for worker rights, wage compliance, and employer liability. The legal landscape is poised for further transformation with the anticipated changes a new administration under President Donald Trump may bring in. Potential regulatory changes include revisiting joint employer standards under the National Labor Relations Board (NLRB), narrowing the Federal Arbitration Act (FAA) exemptions, and potentially relaxing worker classification rules, all of which could significantly impact the trucking industry. Key rulings, settlements, and regulatory changes in 2024 highlight critical challenges and opportunities for industry stakeholders, while the anticipated policy shifts under a Trump administration add an additional layer of complexity. As trucking companies adapt to these shifting landscapes, a central theme emerges balancing operational efficiency with legal compliance.

ARBITRATION DETOURS: EXPANDING DEFINITIONS IN WORKER DISPUTES

In *Lopez v. C.H. Robinson Company*, the California Court of Appeals, Fourth District, evaluated whether non-driving roles in the trucking sector fall under the transportation worker exemption of the FAA. *Lopez v. C.H. Robinson Co.*, 2024 Cal. App. Unpub. LEXIS 7087, at *1. Lopez, a logistics coordinator, sought to bring a private action under California's Private Attorney General Act against C.H. Robinson. *Id.* The employer moved to compel arbitration under a Mutual Arbitration Agreement, but the court found Lopez exempt from arbitration due to his integral role in interstate commerce, even though he did not physically handle goods. *Id.* The Court of Appeals affirmed. *Id.* Moreover, the US Supreme Court expanded on this exemption in *Bissonnette v. LePage Bakeries Park St., LLC*, holding that workers need not be directly employed

by a transportation company to qualify. *Bissonnette v. LePage Bakeries Park St., LLC*, 601 US 246, 144 S. Ct. 905 (2024). This decision highlights the growing judicial trend of limiting mandatory arbitration for roles integral to interstate commerce, broadening the scope of worker protections beyond traditional transportation roles. This ruling broadens the definition of "transportation workers" to include non-driving roles like logistics coordinators and dispatchers, emphasizing their direct impact on interstate commerce. For trucking companies, this necessitates revising arbitration clauses to exclude such roles, clarify the scope of disputes, and ensure enforceability under evolving legal standards. Additionally, businesses must navigate differing state and federal regulations, which may require alternative dispute resolution mechanisms to mitigate risk.

Under the Trump administration, arbitration practices could shift significantly in favor of broader enforceability of arbitration agreements. Legislative changes might refine the FAA to explicitly limit exemptions to roles directly engaged in the physical transportation of goods, while executive orders could direct federal agencies to reinterpret exemptions or issue regulations that align with business-friendly policies. Judicial appointments favoring stricter interpretations of arbitration clauses might further influence case law, while regulatory adjustments through agencies like the US Department of Labor (USDOL) could narrow the scope of exemptions for non-driving roles. Federal preemption arguments might also be used to limit the impact of state-level restrictions, such as those in California, on arbitration agreements. Revisiting cases like *Bissonnette* could provide an opportunity to reshape federal policies and reduce litigation risks for trucking companies, reinforcing arbitration as the preferred dispute resolution mechanism. However, such changes might come at the expense of worker protections, as access to courts could be curtailed for many employment disputes. In response, companies would need to focus on drafting more robust arbitration clauses capable of withstanding judicial and regulatory scrutiny in this shifting legal landscape.

WORKER CLASSIFICATION CHALLENGES: LESSONS FROM PANTOJA AND KUMAR

In *Pantoja v. Atomic Transport*, the Kentucky Court of Appeals addressed the classification of a truck driver as an independent contractor. *Pantoja v. Atomic Transp., LLC*, 2024 Ky. App. LEXIS 99, at *1. Pantoja, the only female driver at Atomic Transport, reported extensive sexual harassment by male colleagues and alleged retaliation from her supervisor after raising complaints. Atomic Transport argued that Pantoja's claims under the Kentucky Civil Rights Act were invalid because she was classified as an independent contractor, not an employee. *Id*. Applying the *Darden* factors, the court focused on control, financial independence, and contractual terms, ultimately upholding Pantoja's classification as an independent contractor, which barred her from accessing employment protections under the state law. *Id*. (*relying on Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992)).

Similarly, in *Rajat Kumar v. Eagle Trucklines LLC*, the US District Court for the District of New Jersey evaluated allegations of worker misclassification, with Kumar and other plaintiffs claiming they were improperly denied overtime and minimum wage protections under the FLSA. 2024 US Dist. LEXIS 229049 (D.N.J). The plaintiffs argued that Eagle Trucklines exerted significant control over their schedules, routes, and branded equipment, undermining their classification as independent contractors. *Id*. They further alleged that the company imposed operational guidelines more typical of employer-employee relationships, including standardized delivery times and adherence to client requirements. *Id*.

The court applied New Jersey's stringent "ABC" test, which presumes workers are employees unless the employer can prove that (A) the worker is free from control in performing their work; (B) the work is outside the usual course of the employer's business or performed offsite; and (C) the worker is customarily engaged in an independent trade or business. *Id*. While the court found substantial evidence of employer control, it denied conditional certification for a collective action under the FLSA, citing insufficient evidence from the plaintiffs to meet the standard for group certification. Despite this outcome, the ruling exposed significant weaknesses in the company's classification practices, emphasizing the critical need for compliance and transparency in contractor relationships. *Id*.

Taken together, *Pantoja* and *Kumar* illustrate the complexities of worker classification across jurisdictions. Kentucky's reliance on the common-law *Darden* factors contrasts sharply with New Jersey's more employee-centric ABC test, highlighting the challenges for companies operating in multiple states. These cases underscore the need for precise contract drafting that reflects the realities of working relationships, as well as proactive workforce management strategies to mitigate legal risks. For trucking companies, maintaining compliance across varying legal standards is essential to ensuring equitable treatment of workers and avoiding costly litigation.

Under a Republican-led administration, national efforts to streamline worker classification rules through a unified federal standard that favors independent contractor models could arise. This could involve revisiting existing DOL regulations to adopt a broader interpretation of the economic reality test or even introducing legislation to preempt stricter state laws like New Jersey's ABC test. Executive orders could direct federal agencies to create more business-friendly frameworks, while judicial appointments might shift court interpretations toward limiting the scope of worker protections. These actions would reduce compliance complexities for businesses operating across multiple states but might simultaneously undermine worker protections in

jurisdictions that have historically enforced more stringent standards.

WAGES IN TRANSIT: LESSONS FROM THE TRANSAM SETTLEMENT

In July 2024, TransAm Trucking settled a class-action lawsuit for $3.75 million over allegations of unpaid wages and overtime during orientation and training. *Roberts v. TransAm Trucking, Inc.*, 2024 US Dist. LEXIS 191694 (D. Kan.). This case highlights the pivotal role of aligning onboarding practices with the FLSA requirements. TransAm's settlement underscores a growing consensus among courts and regulators that even initial training periods, frequently perceived as merely preparatory, must be treated as compensable work time under the law, ensuring companies maintain compliance and mitigate risks. For trucking companies, the lesson is clear: ensure transparency and compliance in onboarding procedures.

Missteps in compensating employees for mandatory training can expose firms to costly litigation and reputational damage. Furthermore, this case underscores a broader trend in the industry: heightened scrutiny of wage and hour practices. Regulators are increasingly targeting companies that exploit ambiguities in compensation policies, with a focus on ensuring fair treatment for workers at all stages of employment. For example, the USDOL's recent actions against companies with unclear training compensation practices highlight the importance of proactively addressing potential wage violations during onboarding. The settlement also emphasizes the role of proactive wage compliance audits in mitigating legal risks. Beyond monetary penalties, such cases can erode trust among employees, highlighting the importance of fostering a culture of fairness and accountability.

If the Trump administration revisits the USDOL worker classification rule, wage compliance issues may also take a different trajectory. A narrower definition of "employee" under the FLSA could reduce litigation risks for trucking companies but may exacerbate challenges in regions with stricter state laws such as those in New Jersey discussed above, or California's AB5, a state law enacted in 2019 and discussed in previous issues of this publication, which codifies a stringent "ABC" test for determining worker classification. This law has significantly impacted the trucking and logistics industries, where many workers have historically been classified as independent contractors only to be found to be traditional employees through the lenses of this stricter review. Companies must carefully balance these federal and state obligations to avoid compliance gaps.

HEAVY LOAD OF LIABILITY: AMAZON'S JOINT EMPLOYER CASE

In September 2024, the National Labor Relations Board (NLRB) issued a consolidated complaint against Amazon, asserting that Amazon was a joint employer for delivery drivers contracted through its Delivery Service Partner (DSP) program. Consolidated Complaint, Amazon.com Services, LLC, NLRB Case No. 31-CA-319781 (Sept. 30, 2024). The complaint highlights Amazon's extensive control over drivers' working conditions, including dictating delivery schedules, monitoring performance via technology, and requiring the use of branded uniforms. If sustained, this could mark a pivotal moment in the ongoing debate over joint employer liability in the trucking and logistics industries.

The consolidated complaint emphasizes the critical legal and operational risks for companies that heavily oversee subcontracted or independent contractor labor. For Amazon, this control has triggered expanded obligations under labor laws, including the duty to recognize and negotiate with unions representing these workers. The NLRB's position in this case underscores the growing scrutiny of indirect control mechanisms in employment relationships. This scrutiny aligns with broader trends to hold companies accountable for labor practices, even when using third-party contractors.

The implications for the trucking and logistics industries are significant. Smaller firms reliant on subcontractors may face pressure to clarify the boundaries of control and responsibility within their contracts to avoid similar findings. Larger corporations, like Amazon, that exercise substantial oversight over labor practices may need to revisit their business models and contractual agreements. The case could also prompt more robust worker protections, influencing both state-level policies and private-sector employment contracts.

In the context of shifting political landscapes, the interpretation of joint employer standards remains fluid. A Republican-majority NLRB could potentially revisit decisions like this one, raising the threshold for proving joint employer status. Historically, Republican-led boards have narrowed worker protections and favored business interests by requiring more direct control to establish liability. Such changes could benefit companies like Amazon while posing compliance challenges for those operating under stricter state laws, such as those in California and New Jersey.

For now, the Amazon case sets a precedent for increased worker protections under federal labor law. Employers across industries should monitor developments closely and consider proactive adjustments to their employment practices to mitigate potential liabilities. The broader lesson is clear: companies must balance operational oversight with compliance strategies that protect both their business interests and their workforce.

REGULATORY RECALIBRATION: SHIFTING WORKER CLASSIFICATION RULES

In March 2024, the USDOL implemented a new rule refining the economic reality test for worker classification, as an independent contractor or a traditional employee, under the FLSA. *Employee or Independent Contractor Classification Under the Fair Labor Standards Act*, 89 Fed. Reg. 1588 (Jan. 10, 2024) (to be codified at

29 C.F.R. pt. 795). The rule adopts a totality-of-the-circumstances approach, focusing on factors such as control, financial dependence, and the degree to which a worker's role is integrated into a company's operations. Id.

This nuanced framework contrasts with more rigid state standards like California's AB5 previously discussed. Notably, the implementation of this rule marked a departure from earlier expectations under the Biden administration, which initially signaled the potential for a stricter worker-friendly classification standard. Instead, the final rule reflects a more balanced approach, preserving flexibility for businesses while still aiming to protect workers in cases where their economic reality aligns more closely with traditional employment.

This backtracking from an anticipated more stringent framework underscores the competing priorities within the labor regulatory environment: the need to address misclassification concerns while maintaining a business-friendly landscape. For the trucking industry, the rule's implications are significant. Independent owner-operators, who traditionally enjoy flexibility, may face reclassification as employees under the new framework. Companies must carefully evaluate contracts and operational practices to ensure compliance. Failure to do so could result in wage and hour litigation, including claims for overtime and benefits. The USDOL's rule also signals an evolving federal approach to balancing worker protections with industry-specific challenges, raising questions about how these changes will interact with existing state laws. Additionally, the rule's retrospective application could amplify the risks of non-compliance, compelling companies to reassess historical practices.

However, with the Trump administration's stated priorities of deregulation and business advocacy, this rule could face revisions or repeal. Narrowing the classification standard to favor independent contractor models would reshape the labor landscape, offering trucking firms more flexibility but potentially clashing with stricter state laws.

THE ROAD TO THE FUTURE: PREPARING FOR 2025 AND BEYOND

As the trucking industry navigates the complexities of 2024, one thing is certain: the legal landscape is becoming increasingly multifaceted. Arbitration disputes, worker classification challenges, wage compliance issues, and joint employer liability are converging to reshape the industry's regulatory framework. Companies must not only address these immediate challenges but also anticipate future trends, such as the growing adoption of autonomous vehicles and evolving environmental regulations, both of which could introduce significant new legal considerations.

The overlap between classification disputes and wage compliance is particularly evident in cases like Pantoja and the TransAm settlement. Worker classification determines not only eligibility for legal protections but also the scope of wage entitlements, such as overtime and benefits. As courts continue to scrutinize worker status under frameworks like the FAA, the FLSA, and state-specific standards like California's AB5, trucking companies must adopt comprehensive compliance strategies to address both classification and wage obligations effectively. These cases also underscore the critical need to understand and navigate the interplay between federal and state laws, particularly in regions with stricter worker protections. For companies operating across multiple jurisdictions, aligning practices to meet divergent regulatory standards will be key to maintaining operational efficiency and avoiding costly legal disputes.

Proactive engagement with legal and compliance teams is essential for trucking firms seeking to thrive in this evolving environment. By addressing these challenges head-on, companies can build more resilient and adaptable business models that position them for success in an increasingly regulated industry. Emerging technologies such as predictive analytics and AI can play a vital role in these efforts. Predictive analytics, for example, can help forecast regulatory risks and identify compliance gaps before audits occur. Similarly, partnerships between trucking firms and technology providers have already facilitated the integration of AI-powered tools to monitor driver hours, ensuring adherence to federal regulations, reducing instances of wage violations, and enhancing operational efficiency.

Collaboration with policymakers and industry groups is another critical strategy for ensuring that future regulations strike a balance between fostering innovation and maintaining compliance. Such partnerships not only help companies anticipate regulatory changes but also allow them to contribute to shaping policies that support sustainable industry practices. By leveraging advanced technologies, adopting robust legal frameworks, and fostering strategic collaborations, trucking firms can position themselves as leaders in navigating the intersection of innovation and regulation. This proactive approach will be essential as the industry adapts to the demands of a complex and rapidly changing legal landscape.

CONCLUSION: NAVIGATING THE ROAD AHEAD

The legal developments of 2024—spanning arbitration, classification, wages, and liability—reflect a trucking industry at a critical crossroads. Companies face the dual challenge of maintaining operational efficiency while adapting to heightened compliance demands. By addressing worker rights and legal responsibilities proactively, trucking firms can mitigate risks and build a sustainable, legally sound business model.

As the industry looks toward 2025, the regulatory landscape is poised for potential upheaval under the new administration. Expected changes may include revisiting worker classification standards, narrowing the Federal Arbitration Act's exemptions, and rolling back joint employer liability thresholds. These shifts

could introduce both opportunities and chaos, reducing regulatory burdens for businesses but creating significant uncertainty for workers and companies operating in states with stricter laws like California's AB5.

These developments underscore that the future of the trucking industry will depend not just on operational innovations like autonomous vehicles but on the ability to navigate evolving legal frameworks. By anticipating these changes and aligning strategies accordingly, companies can ensure long-term stability and competitiveness in an increasingly complex and dynamic environment.

Lee Jacobs

3. Nuclear Verdicts

Since the 1980s, excessive damages awards nationwide have grown in frequency and size. In 2021, 24 jury verdicts exceeded $100 million, including a staggering $300-plus billion Texas verdict. Although these so-called nuclear verdicts often contain a multi-million-dollar compensatory damages award, they also typically contain a massive punitive damages component.

Nuclear verdicts have plagued the trucking industry over the last several years. These verdicts have had a marked impact. "Large verdicts typically reduce motor carriers' access to capital otherwise used to invest in safety technologies," thereby increasing the costs of insurance and limiting "general driver training budgets." (Source: American Transportation Research Institute [ATRI], *Understanding the Impact of Nuclear Verdicts on the Trucking Industry*, 2020.) The ATRI report analyzed roughly 600 trucking lawsuits from 2006 to 2021. The report noted that 26 cases involved verdicts of $1 million or more from 2005 through 2010; approximately 300 cases involving verdicts of $1 million or more from 2017 through 2021.

This trend has several potential consequences, including increased costs to procure and maintain insurance. In the trucking industry, for example, annual insurance payments increased 22.5 percent between 2019 and 2020. (Source: ATRI, *An Analysis of the Operational Costs of Trucking: 2021 Update*, 2021.)

There are other factors that could impact nuclear verdicts in the trucking industry. For example, as the demand for interstate trucking increased to historic levels since the COVID-19 pandemic, the number of drivers has dropped. There is a driver shortage of almost 80,000. In 2020, the trucking industry lost slightly less than 100,000 jobs and more than 3,000 motor carriers went out of business.

With fewer drivers, less money for training, and greater demand, the number of accidents involving tractor-trailers has increased. In 2021, for example, there were more than 520,000 truck accidents in the United States, including a 17 percent increase in fatalities from 2020. Almost as startling is the statistic that nearly ten percent of the total accidents involved a fatality, an all-time high. More accidents mean more lawsuits, and, if the last few years are indicative of the future, more nuclear verdicts. 2024 did not disappoint in this department. We discuss two such cases here.

The first case highlights a truck driver's duty of care and a legal doctrine, the so-called admission rule: when a motor carrier admits vicarious liability arising from one of its driver's negligence, the carrier cannot also be found liable for direct negligence claims, such as negligent training, supervision, retention, entrustment, or hiring.

On December 3, 2024, the Texas Supreme Court heard oral argument in a case involving a judgment against a motor carrier, which at the time of the jury's verdict in 2018, was the largest against a motor carrier in history. A Harris County, Texas, jury hit Werner Enterprises with a roughly $90 million verdict. At the end of 2024, interest has pushed the judgment to over $100 million. The Court is reviewing the decision by the Fourteenth Court of Appeals in *Warner Enterprises v. Jennifer Blake*, 672 S.W. 3d 554 (2023).

The accident at the center of the case occurred on Interstate 20 near Odessa, Texas, in late December 2014 in wintry weather and icy road conditions. Zaragoza Salinas was driving his pickup truck eastbound at a speed of between 50 and 60 miles per hour. His girlfriend and her three children were in the car. Salinas lost control of the vehicle, crossed the median, and collided with a westbound Werner tractor-trailer driven by Shiraz Ali. Salinas' girlfriend's 7-year-old son Zachary Blake was killed in the accident, her daughter Brianna Blake suffered severe brain injuries and is now quadriplegic, and the girlfriend and a second son were seriously injured.

The jury concluded that Werner was 70 percent liable, Ali 14 percent liable, and Salinas 16 percent liable. Regarding Ali, the jury determined that he was going too fast given the road's icy conditions, even though he was driving within the posted speed limit. The jury was persuaded by plaintiffs' arguments that if Werner had trained Ali better, he would not have been driving as fast. Moreover, the jury was also persuaded that if the truck had been equipped with a CB radio, Ali might have received more information about the road's condition, possibly leading him to slow down even more. The jury awarded the plaintiffs $90 million. The Texas Court of Appeals affirmed the verdict in May 2023. As readers of this report know the case has generated an enormous amount of handwringing in the industry because Werner is a well run company conscientious about following the rules and the objective evidence for negligence by Werner or Ali was not particularly convincing.

The Texas Supreme Court is considering two questions, each of which could have an impact on future cases around the country. The first is whether a driver owes a duty of care to motorists traveling in the opposite direction the second, whether Texas courts should apply the admission rule in commercial motor vehicle accident cases.

Regarding the duty question, the defendants argued it would be unreasonable to impose such a duty on drivers to vehicles traveling in the opposite direction of a highway, especially a road with a wide median. Defense counsel conceded that a truck driver owes a duty to another vehicle when traveling in the same direction or to react appropriately once another vehicle enters his or her lane. The plaintiffs agreed with the defendants that Ali reacted quickly and safely in this case.

The plaintiffs' attorney argued, though, that a cross-median collision was foreseeable in light of the icy conditions, citing to the commercial drivers' license manual, which recognizes that drivers should slow down to about 15 miles per hour in poor weather conditions.

The second question also has implications far beyond Texas. Under the "admission rule", plaintiffs may not pursue theories of direct negligence against motor-carrier employers once the employer has acknowledged that the driver was acting in the course and scope of his employment for the carrier. Evidence of negligent hiring, training, retention, etc., becomes irrelevant and inadmissible once the employer concedes vicarious responsibility for the acts of its driver.

The defendant argued that introducing evidence of the motor-carrier's training and hiring practices prejudices the jury against the carrier. Rather than focusing on the accident sequence and who is directly responsible for causing a plaintiff's injuries, courts that do not apply the admission rule allow the introduction of irrelevant information, which undoubtedly contributes to inflated verdicts in these cases. The admission rule, it is argued, would protect against this. The plaintiffs responded that the admission rule has dangerous implications, because it disincentivizes motor carriers from training and supervising employees. In the end, they insisted, employers' and employees' conduct can contribute to a plaintiff's injuries. We will update our readers next year about the *Werner* court's decision.

A second nuclear verdict, even more shocking, emphasized the role of federal safety regulations in commercial automobile accidents. A St. Louis, Missouri, jury issued a $462 million verdict against Wabash National Corporation following a two-week trial in a case brought by the families of two men, Taron Tailor and Nicholas Perkins, who were killed in a May 2019 collision with the rear of a Wabash-manufactured trailer on Interstate 44 and 55 in St. Louis. Traveling between 45 and 55 miles per hour at impact, the decedents' passenger car went underneath the trailer. The jury awarded each family $6 million and a staggering $450 million in punitive damages. *L.P. v. Wabash National Corp.*, Case No., 2022-CC00495 (Circuit Court of the City of St. Louis, Nov. 22,).

At impact, the trailer's rear underride guard failed, likely due to the vehicle's speed. The underride guard on the Wabash trailer, sold in 2004, was designed to comply with the federal minimum 30-mph standard then in place. Nevertheless, plaintiff's attorneys claimed that Wabash ignored research and warnings about underride failures. They argued that had Wabash's trailer had the newer rear-impact-guard design with four protective posts instead of the older two-post design, Tailor and Perkins would have survived the crash.

In 2022, the National Highway Traffic Safety Administration finalized a rule upgrading requirements for rear underride guards. The agency updated two Federal Motor Vehicle Safety Standards "to improve protection for drivers and passengers in light vehicles in the event of a rear underride crash" with a trailer. The 2022 rule upgraded safety standards by adopting similar requirements to Canada's standards for rear impact guards. These standards address the impact on the full range of passenger vehicles down to the subcompact level. The NHTSA stated at the time:

"Adopting these standards will require rear impact guards to provide sufficient strength and energy absorption to protect occupants of compact and subcompact passenger cars impacting the rear of trailers at 56.2 kilometers per hour (35 mph). … Upgraded protection will be provided in crashes in which the passenger motor vehicle hits: (a) the center of the rear of the trailer or semitrailer; and, (b) in which 50% of the width of the passenger motor vehicle overlaps the rear of the trailer or semitrailer." The previous safety rules required rear impact guards that would protect smaller passenger vehicles up to 30 mph.

Further, the plaintiffs presented evidence at trial that the passenger vehicle had been travelling at effectively 45 mph at the time of the collision. They claimed that the vehicle would not have gone under the trailer had it been equipped with newer guards. The jury heard arguments that Wabash failed to properly test the two-post guards, even though the company used it for roughly thirty years. The company chose not to upgrade to the more expensive four-post guards to save money, notwithstanding evidence from other accidents that the older design was not as safe.

Wabash argued, however, that the accident occurred nearly two decades after Wabash manufactured the trailer, and it complied with the regulatory standards in force at the time. Wabash attorneys argued at trial that the outcome of the collision would not have changed even if the trailer had the up to date four-post rear impact guards. Wabash focused on the driver's actions: rear-ending a trailer in the middle of a clear day. Wabash presented testimony estimating the speed of the crash at 55 mph, 10 mph higher than the estimate presented by the plaintiffs' attorneys. Wabash claims that there was other relevant evidence that the jury should have heard, but the court held it was inadmissible. The driver's blood alcohol content was apparently over the legal limit at the time of the accident and neither Tailor nor Perkins was wearing a seatbelt, which is especially significant because the plaintiffs argued the decedents would have survived a 55-mile-per-hour collision had their vehicle not broken through the trailer's rear impact guard. Wabash will likely appeal the verdict.

Ian Linker

4. Cargo Losses and the Carmack Amendment

CLASSIFICATION OF KEY PLAYERS

In *Fast Post Shanghai Logistics Co. v. B612 Tima Inc.*, 2024 US Dist. LEXIS 154959 (C.D. Cal.), the central issue was the definition of a "freight forwarder." There, the plaintiff argued that the defendant was a freight forwarder under the Carmack Amendment because it contracted with the plaintiff to provide transportation services for the goods and handled the shipment; however, a defendant must meet *all* statutory definitional elements under 49 U.S.C. §13102(8) to qualify as a freight forwarder, which includes requirements that the freight forwarder "assembles and consolidates, or provides for assembling and consolidating, shipments and performs or provides for break-bulk and distribution operations of the shipments." Lacking a statutory definition, the court defined "assembles and consolidates" as "putting together or combining smaller shipments into larger ones." Per this definition, the court held that the defendant was not a freight forwarder because there was no indication that the defendant assembled the shipment or consolidated it with other shipments, nor evidence that it advertised or presented itself as a business that consolidated or assembled shipments. (Other elements of this decision are discussed in Section 1 of this publication).

In *Ronate C2C, Inc. v. Express Logistics, Inc.*, 2024 US Dist. LEXIS 92013 (S.D. Cal.), the issue was whether the classification of a party centered around how the plaintiff classified that party in its complaint. There, a plaintiff attempted to defend its state law claims against a motion to dismiss for Carmack preemption by arguing that the Carmack Amendment didn't apply because the defendant was a broker, not a carrier. However, the plaintiff's complaint failed to allege facts sufficient to support a finding that the defendants were brokers and not carriers. In fact, the plaintiff's complaint unambiguously referred to both defendants as "carriers" and never alleged that the defendants acted as brokers. Therefore, taking the plaintiff's allegations in the complaint as true, the court found the Carmack Amendment preempted the plaintiff's negligence claims against the defendants. (For other cases on brokers and preemption see Section 1).

In *Minder LLC v. Real Int'l SCM Corp.*, 2024 US Dist. LEXIS 84046 (C.D. Cal.), the issue was whether Carmack Amendment applies only to a carrier-defendant who physically transports the cargo at issue. There, the court disagreed that the Carmack Amendment limited "carriers" to entities that physically carried the cargo at issue. Instead, it reaffirmed the "carrier" analysis's central focus: whether a defendant legally bound itself to transport and accepted responsibility for ensuring delivery of the goods. Given this analytical framework, a defendant could be liable as a carrier in some circumstances even if that defendant subcontracted out its assumed responsibility for transportation of the cargo.

In *Godonou v. Allied Transp. Grp. LLC*, 2024 US Dist. LEXIS 142980 (S.D. Fla.), the issue was whether a defendant which is authorized as both broker and carrier could insulate itself from strict liability under the Carmack Amendment by clearly stating in writing that the company is merely acting as a go-between to connect the shipper with a suitable third-party carrier. There, the plaintiff made the conclusory statement that both defendants were "'carriers' by law," without further factual support, and attached the contract between defendants and plaintiff to their amended complaint. Importantly, that contract explicitly stated twice that the defendant is not a carrier but instead is acting as the "go-between" connecting the shipper with a carrier, which the court held made it abundantly clear that the defendant served the plaintiff as a broker, not a carrier, and was not subject to Carmack Amendment liability.

PREEMPTION OF STATE LAW CLAIMS

A. The "Broker" Exception

In *Coyote Logistics, LLC v. Bee World Inc.*, 2024 US Dist. LEXIS 105065 (N.D. Ill.), the court analyzed whether a broker which paid a shipper's claim could file an action for reimbursement against the motor carrier under a breach of contract theory or whether the only ground to sue the carrier was under Carmack. Coyote Logistics, LLC, the freight broker, entered into a Broker-Carrier Agreement (BCA) with Sunrise, a carrier, to deliver a load of cargo on behalf of its customer (the shipper). During transport, the cargo was lost, and Coyote paid the shipper $137,906.13 for the lost cargo. Subsequently, Coyote asserted a breach of contract claim against Sunrise after it demanded indemnification from Sunrise under the BCA's indemnity clause and Sunrise refused. Sunrise thereafter argued for dismissal of the breach of contract claim as preempted by the Carmack Amendment.

To determine whether Coyote's state law breach of contract claim against Sunrise would be preempted under the Carmack Amendment, the court first analyzed what entities are entitled to recover under the Carmack Amendment. Per the Carmack Amendment, carriers are "liable to the person entitled to recover under the receipt or bill of lading," which is the shipper. Therefore, a broker has no independent right to recovery under the Carmack Amendment unless it has been assigned those rights from a shipper.

Following Seventh Circuit precedent, which held that the "Carmack Amendment only preempts state and common law remedies inconsistent with the federal Act," the court reasoned that if Coyote's breach of contract claim is not inconsistent with the Carmack Amendment, then its claims cannot be barred by the Carmack Amendment. With this rule in mind, the court determined that: (1) as a broker, Coyote would not be entitled to an independent right of recovery under the Carmack Amendment; and (2) Coyote alleged no assignment of a right to recovery under the bill of lading from the shipper. Applying Seventh Circuit precedent, the court concluded that Coyote's breach of contract claim was not preempted.

B. "Separate and Distinct" Causes of Action

In *Q1, LLC v. Assembly*, 2024 US Dist. LEXIS 132346 (M.D. Fla.), the issue was whether a cross claim for fees pursuant to a broker carrier agreement would be preempted by the Carmack Amendment, or if the claim arose from "separate and distinct conduct" from the cargo loss at issue and would survive preemption. Because the Carmack Amendment encompasses all losses resulting from a carrier's failure to discharge its duty regarding the agreed transportation, separate and distinct conduct apart from the injury must exist for a claim to survive the preemptive scope of the Carmack Amendment.

The court noted that conduct is separate and distinct if it includes contractual obligations independent from a specific shipment, such as those in an ongoing business relationship. In this case, the indemnity provision in the parties' broker carrier agreement extended beyond any one shipment and would obligate the carrier to pay for the broker's defense costs for claims arising out of the agreement, regardless of liability. Therefore, because the contractual relationship between the sophisticated parties was independent of the specific loss at issue and not impacted by either party's liability for the specific cargo loss involved in the suit, the court held that the cross claim for indemnity arose from separate and distinct conduct from the cargo loss and fell outside the scope of Carmack preemption.

However, in *Azzil Granite Materials, LLC v. Canadian Pac. Ry. Co.*, 2024 US App. LEXIS 10167 (2d Cir.) the federal Second Circuit held that the Carmack Amendment preempted a shipper's breach of contract claim against its broker and rail carrier because the basis of the breach of contract claim related solely to alleged delays or failure to deliver goods, which are preempted by the Carmack Amendment. There, the shipper alleged that the broker had breached its contract which required that the broker would make the "best commercially reasonable efforts to return all cars within 2 to 4 days," when its railcars were not returned a timely manner. Therefore, the court noted that the shipper's breach of contract claims rest on the same facts and seek the same damages as its Carmack claims, which necessitated preemption.

PROCEDURAL ISSUES RELATED TO REMOVAL

In *Consol. Elec. Distribs., Inc. v. Midway Logistics, LLC*, 2024 US Dist. LEXIS 143087 (N.D. Cal.), the issue was whether a plaintiff is required to be in federal court where it has pleaded a Carmack claim alongside a state claim. There, the plaintiff argued that its Carmack Amendment claim did not create a basis for federal question jurisdiction because it was pleaded in the "alternative," and because the defendant alleged it was not a "carrier" that could be liable under the Carmack Amendment in its answer. The court held that, as the master of the claim, the plaintiff could have avoided federal jurisdiction by relying only on state claims. However, the plaintiff's inclusion of a Carmack Amendment claim opened itself to federal jurisdiction.

In *Vegas Fab & Finish v. AMG Freight LLC*, 2024 US Dist. LEXIS 7418 (D. Nev.), the issue was whether a party can remove a suit to federal court based upon the "artful pleading doctrine," when the complaint has not undeniably implicated the Carmack Amendment by classifying a defendant as a carrier instead of a broker. Pursuant to the "artful pleading" doctrine, even well-pleaded state law claim may present a federal question when a federal statute, such as the Carmack Amendment, has completely preempted that area of law. In this case, the court noted that the Carmack Amendment's applicability depended upon whether the complaint characterized the defendant as a "carrier" or a "broker." The complaint's language alleged that the defendant agreed to keep the shipment under its "watch" and failed to "facilitate" and "protect" the shipment. The defendant argued that these allegations defined it as a "carrier." However, the court held that this language did not, in and of itself, automatically identify the defendant as a carrier as opposed to a broker because those duties would also be consistent with brokers' role in "providing, or arranging for, transportation." Therefore, because the Carmack Amendment governs interstate carriers but does not apply to brokers, the suit was remanded to state court due to a lack of federal question jurisdiction under the Carmack Amendment.

CARMACK AMENDMENT DAMAGES

In *Whatley v. Canadian Pacific Railway Ltd.*, 2024 US Dist. LEXIS 3275 (D.N.D.), the first issue was whether freight charges are recoverable under the Carmack Amendment. In deciding what the ordinary measure of damages is, the court followed Supreme Court precedent instructing it to look to the difference between the market value of the property in the condition in which it should have arrived at the place of destination and its market value in the condition in which, through the fault of the carrier, it did arrive. This "ordinary measure of damages" rule operated to put the shipper back in the position it would have been in had the carrier properly performed, including recovery for lost profits. However, under this measure of damages, the shipper is still obligated to pay freight charges to the carrier and will not be allowed to recover those charges as part of its damages. Accordingly, the court held that freight charges were not recoverable as damages under the Carmack Amendment. The second issue reviewed by the court was when pre-judgment interest accrued. There, the court held that the date of expected delivery was the appropriate date for beginning the prejudgment interest calculation because it was the date of the actual loss.

CARRIER LIMITATION OF LIABILITY

In *VCI, Inc. v. TForce Freight, Inc.*, 2024 US Dist. LEXIS 199281 (D.P.R.), the issue was whether the existence of a published tariff gave the shipper, a sophisticated enterprise, a reasonable opportunity to choose between levels of liability. Per the precedent, in order to limit liability, a carrier must: give the shipper a reasonable opportunity to choose between levels of liability,

provided that the shipper is a substantial commercial enterprise capable of understanding the agreements it signed.

In this case, it was uncontested that the bill of lading and the carrier's published tariff were available to the shipper and that the tariff included limitations terms that specified "custom countertops" as requiring specific pre-authorization. Under the Carmack Amendment, a tariff may provide that a shipment's value is set at a maximum amount *unless* the shipper declares otherwise. When a tariff provides as such, leaving the declaration space blank on a bill of lading indicates the shipper's agreement to the maximum valuation or limitation of liability listed in the tariff because the shipper is charged with knowledge of the tariff. The court held that the carrier gave the shipper a reasonable opportunity to choose between levels of liability with the blank value spaces on the bill of lading and by its subjection to the published tariff.

In response, the shipper argued that the carrier prepared the bill of lading, decided upon the shipping class and liability, and did not inform the shipper of a need for a pre-authorization to raise liability coverage. Despite this argument, the court noted that, although the shipper argued the carrier did not explicitly inform them of its pre-authorization requirement, they were a sophisticated shipper with presumed substantial knowledge of the enterprise given the number of shipments it arranges per year. Thus, upon being presented the bill of lading subject to the carrier's tariff, the shipper had a fair opportunity to opt for more coverage in exchange for a higher rate.

In *Triax, Inc. v. TForce Freight, Inc.*, 2024 US Dist. LEXIS 127448 (D. Md.), the issue was whether a carrier's limitation of liability binds the shipper when a broker, rather than the shipper, generated and filled out the bill of lading. (We observe that bills of lading are supposed to be "issued" by the motor carrier, but in reality are actually prepared in many or most cases by the shipper). Because the text of the Carmack Amendment imposes full liability on carriers, without regard to which party prepared the bill of lading, when an intermediary contracts with a carrier to transport goods, the cargo owner's recovery against the carrier is limited by the liability limitation to which the intermediary and carrier agreed. To determine whether a carrier has limited its liability consistent with the Carmack Amendment, courts have applied a four-part test, under which carriers must: (1) provide the shipper, upon request, a copy of its rate schedule; (2) give the shipper a reasonable opportunity to choose between two or more levels of liability; (3) obtain the shipper's agreement as to [their] choice of carrier liability limit; and (4) issue a bill of lading prior to moving the shipment that reflects any such agreement.

In this case, the shipper hired the carrier through a broker, and the carrier's transportation of the cargo was subject to a bill of lading generated by the broker. Importantly, the bill of lading included a class designation for the value assigned to the freight, which the broker filled in, and also included the following warnings: (1) that "Liability Limitation for loss or damage in this shipment may be applicable" per the Carmack Amendment, (2) advised that the shipment was "subject to individually determined rates . . . that have been agreed upon in writing between the carrier and shipper, if applicable, otherwise to the rates, classifications[,] and rules that have been established by the carrier and are available to the shipper, on request," and (3) a sticker stating: "LIMITATIONS OF LIABILITY APPLY, SUBJECT TO LIMITS OF LIABILITY OF THE CARRIER'S RULE TARIFF." At the time of the shipment in this case, the carrier maintained a tariff, which was made available to shippers upon request. The tariff provided that certain commodities may be offered to be shipped at less than full value, and that the carrier "will not be liable for any damages in excess of the limitations," or for "any indirect, incidental, consequential, loss of profit, loss of income, special, exemplary, or punitive damages."

There, the shipper's representative admitted that he did not request a copy of the tariff, he understood from the bill of lading that the transportation was subject to the tariff, and the shipper provided the weight of the cargo to the broker to include in the bill of lading. However, the court held that even without the shipper's admission of those material facts, the bill of lading's warnings visibly advised the shipper that limitations of liability apply pursuant to the tariff. Therefore, the court held that the carrier properly limited its liability per the bill of lading and the tariff.

FORUM SELECTION CLAUSES IN A CARGO CONTRACT

In *Atain Ins. Co. v. Swick Logistics, LLC*, 2024 US Dist. LEXIS 167268 (N.D. Ill.), the issue was whether the Carmack Agreement's special venue provision in 49 U.S.C. §14706(d)(1-2) is permissive or restrictive. A permissive reading would allow for forum selection clauses to determine where civil actions may be brought under the Carmack Amendment, while a restrictive reading would preempt the forum selection contract clause at issue. The court reasoned that the provision was permissive, given that the language of §14706 does not reflect a congressional intent to insist that the civil action can only be brought where the special venue provision allots, especially in view of Congress's amendment to certain parts of the Carmack Amendment relating to rail cars to contain the language that the relevant civil suit "may only be brought" in a list of certain jurisdictions. The court held that the special venue provision in §14706 is permissive and transferred the suit to the contract selected forum.

INTERNATIONAL CARRIAGE

In *C.A.T. Glob. Inc. v. OTT Transp. Servs.*, 2024 US Dist. LEXIS 108107 (E.D. Mich.), the issue was whether transportation of cargo through a state is sufficient "purposeful availment" for a federal court to exercise specific jurisdiction over a suit involving two Canadian companies. In this case, both the plaintiff, a transportation logistics company, and the defendant, a motor

carrier, were Canadian entities. The Michigan court applied the three-part test to determine whether it could exercise specific jurisdiction over the defendant: analyzing the defendant's purposeful availment of the forum state, whether the cause of action arose from or related to the defendant's activities in that forum state, and whether the exercise of jurisdiction would be reasonable.

The court ultimately decided in favor of exercising specific jurisdiction over the defendant motor carrier. In reaching this conclusion, the court reasoned that the defendant motor carrier purposefully availed itself of the privilege of conducting activities in the United States by engaging in interstate commerce as a delivering motor carrier, and the plaintiff's cause of action directly related to the defendant's Michigan activities because the defendant transported the subject shipment through Michigan. Therefore, the court was able to exercise specific jurisdiction over the defendant because, by virtue of its business model as an interstate motor carrier, the defendant knowingly transported goods interstate and availed itself of the protection and obligations of United States laws, including the Carmack Amendment.

However, in a subsequent case, *C.A.T. Glob. Inc. v. Gill X Transp. Grp.*, No. 24-cv-10319, 2024 US Dist. LEXIS 196470(E.D. Mich. Oct. 29, 2024), the court observed that its previous holding in Ott, which recognized that a defendant carrier's transportation of a shipment through Michigan established specific personal jurisdiction under Michigan law, did not explain why that was true, but instead only stated the relevant test of personal jurisdiction is "lenient." Because of this, the court requested briefing on personal jurisdiction. We will follow the case for further developments.

In *Indem. Ins. Co. of N. Am. v. Unitrans Int'l Corp.*, 98 F.4th 73 (2d Cir. 2024), the issue was whether the Montreal Convention applies only to damage that occurs while the cargo is in the care of an actual carrier or if it also applies while cargo is in the custody of a contracting carrier. The Montreal Convention applies to all international carriage of cargo performed by aircraft, and Article 18 of the convention provides that a carrier is liable for damage to cargo if the event which caused the damage took place during the carriage by air. Per the Montreal Convention, a "contracting carrier"—a company that arranges for the international transportation of cargo by engaging third-party carriers such as airlines and truckers to perform the actual carriage—is a "carrier" for purposes of the Montreal Convention if, as a principal, it enters into the contract of carriage with a consignor. Therefore, the court held that the provisions of the Montreal Convention extend to "contracting carriers" when cargo is damaged in international carriage while in their charge.

GOVERNMENT REGULATIONS UPDATE

On September 18, 2024, the House Transportation and Infrastructure Committee passed two bipartisan Amendments in the Nature of a Substitute to H.R. 8505 and H.R. 3356, the Household Goods Shipping Consumer Protection Act and the Motor Carrier Safety Screening Modernization Act, respectively. These bipartisan bills expanded FMCSA's available enforcement tools by providing the agency with explicit authority to assess civil penalties for violations of commercial regulations, including household goods consumer protection requirements, and to withhold registration from applicants failing to provide verification details demonstrating that they intend to operate legitimate businesses.

In 2024, Operation Protect Your Move resulted in 60 investigations and over 30 enforcement actions. Operation Protect Your Move (OPYM) is a nationwide enforcement initiative focused on investigating the household goods (HHG) carriers and brokers with the most egregious records of complaints in FMCSA's National Consumer Complaint Database (NCCDB), as well as those with serious safety deficiencies, as identified by the HHG Top 100 Carriers list. FMCSA investigators also addressed complaints against moving companies and *brokers* that are not in compliance with Federal safety and consumer protection regulations and statutes while transporting household goods. The initiative targeted both movers *and the brokers* that claim to connect consumers to local movers but instead take advantage of consumers and facilitate fraud by promoting scams.

On Sep. 11, 2024, the US District Court for the Central District of California issued a final judgment against USA Logistics, Inc., ordering the company to pay $25,000 in fines to resolve multiple violations of FMCSA statutes and regulations. This landmark judgment stems from a lawsuit filed by the US Department of Justice against USA Logistics for repeated unauthorized transportation of household goods.

Kaitlyn M. McClaine

5. *Predatory Towing*

In last year's edition, we discussed a November 2023 report published by the American Transportation Research Institute (ATRI), entitled "Causes and Countermeasures of Predatory Towing." The impetus for the study was the heightened public awareness of egregious towing practices, including grossly excessive charges, and the seizure, withholding, or damaging of assets. We reported that several states' legislatures had taken steps to combat the problem.

The federal government is now involved, and in a big way, though it will be interesting to see what the incoming administration does. Apparently in response to the ATRI report, President Biden's Federal Trade Commission has proposed new rules, which will penalize companies guilty of predatory towing. Specifically, the new rules will ban junk fees and prevent predatory fees. The USDOT and the FMCSA have jointly announced their support for

the FTC proposed rules, and proposed modifications, summarizing the problem as follows:

> Once [a] vehicle has been towed, truckers are in a very vulnerable position and highly susceptible to predation. FMCSA is concerned that predatory towing companies can and do use their possession of the vehicle as leverage to prey upon truckers who are in no position to push back.

The FMCSA suggested the FTC:

> add[] a provision that prohibits companies from charging any fee for an ancillary good or service that has no value, costs nothing extra to provide, or that reasonably would be assumed to be included in the upfront price of the good or service. For example, towing companies often charge "equipment fees" for using equipment that they already own and use routinely to provide the towing service.

The FMCSA also stated that the FTC should:

> consider prohibiting or imposing restrictions on excessive fee practices. These practices include charging an excessive number of fees, charging excessive amounts for a fee, or charging variable fees for fixed costs. The provision on excessive fees could focus on consumers who have little to no ability to avoid, negotiate, decline, anticipate, or limit the number or cost of the fees, or consumers who are vulnerable, in distress, or otherwise limited in choice by their circumstances.

And then getting into the mechanics of the rule, the FMCSA suggested:

> that the final rule treat each illegal junk fee as a separate violation and that the rule expressly prohibit companies from charging or collecting mandatory fees that are not appropriately disclosed, are not included in the total price, and/or cannot be fully calculated upfront.

Multiple states have powered up their efforts to combat predatory towing. Specifically, Maryland, Florida, and Missouri have stepped up their efforts to protect truckers. Maryland's legislature has enacted new laws aimed at non-consensual, i.e., police-ordered, towing and even set maximum towing rates and storage fees. Florida's legislature is debating a bill that would also set maximum fees among towing company requirements making it more difficult for these companies to impose higher fees. Missouri's legislature is also debating legislation that would require towing companies to itemize invoices and make it easier for cargo owners to retrieve their property.

This year, in our practice, we were asked by clients to opine on several outrageous towing(and clean up and storage) bills, both for purposes of liability (something the government is now studying) and coverage (which turns on policy language. Some insurance companies are offering endorsements picking up towing charges that may otherwise not be covered.) For example, is there property damage when police close off a roadway following a spill? And if so who has suffered the damage—the towing company or the municipality? Of course, other forms of damage, such as damaged guardrails, would trigger coverage. But does that create coverage for what is essentially a contractual claim by the towing company? No matter how it is phrased it seems impossible for storage charges (which are often unconscionable, particularly when the towing company is holding the trucker's rig ransom) to be property damage. And, if it is a quiet day, might not the towing company send all of its vehicles to the scene of an accident and charge for them all, plus labor charges for the drivers, regardless of how many were actually needed? In one claim we saw, for example, a towing company sought a staggering fee of more than 1,500 percent over what the ATRI report considered excessive.

With the groundswell of new rules at both the federal and state levels of government, there is reason to hope that some of the abuse in this industry will be reduced.

Ian Linker

6. The Cyber Threat to Trucking Companies – Guest Article by Mario Paez

Technological advancements have made it simpler for trucking companies to track and monitor cargo, manage a fleet of vehicles, and use modern tools and software to enhance communication, safety and compliance adherence, and customer satisfaction. However, these dependencies create new risks as the traditional rig evolves into a quasi "computer on wheels." Just how significant are these risks? For many businesses, bad actors have the potential to put them out of business. In 2024, the average total cost of a data breach in the transportation industry was $4.88 million, a 10% year-over-year increase. However, there are steps that can be taken to prevent such a situation.

THE HIDDEN RISKS

The trucking industry is increasingly reliant on advanced technologies such as driver safety monitoring systems, e-logging devices, and fleet management software, which, while enhancing operational efficiency and safety, also expose businesses to significant cyber risks.

Cybercriminals can exploit vulnerabilities in these systems to gain unauthorized access to sensitive data, disrupt operations, or even take control of vehicles. For instance, collision mitigation systems, dynamic routing systems, and autonomous trucks rely heavily on interconnected sensors and software, making them potential targets for hackers who could manipulate these technologies to cause accidents or create chaos on the roads. Similarly, mobile apps, e-logging devices, and e-payment methods can be compromised, leading to fraudulent transactions or the theft of critical operational data, which can severely impact a company's financial health and reputation.

Trucking leaders must recognize that the implications of these cyber exposures extend beyond immediate financial losses; they can disrupt supply chains, erode customer trust, and lead to regulatory penalties.

THE ROLE OF INSURANCE

Trucking leaders can significantly enhance their business resilience against cyber threats by leveraging first- and third-party cyber insurance coverage before an incident occurs. First-party coverage protects against incidents affecting a system owned by the affected company. It can reimburse lost revenue and additional expenses incurred due to technology failures or cyberattacks, including contingent business interruption stemming from supply chain disruptions and Internet of Things (IoT) services used in distribution, inventory, and warehouse operations. Additionally, data asset protection coverage ensures that costs associated with recreating or reconfiguring critical data and systems are covered, allowing companies to recover more swiftly from incidents. Incident management coverage is also vital, as it addresses the costs of notifying affected parties and investigating breaches, which can be particularly complex in the trucking industry, where sensitive customer and operational data is often at stake.

Ransomware attacks are a significant first-party threat to trucking operations, with 76% of attacks involving data exfiltration, and the average ransom payment increasing 23% in Q2 2024. The extortion insurance agreement in cyber policies can cover the ransom demand and investigative expenses associated with threats to steal confidential information, introduce malicious code, corrupt computer systems or hinder system access. On the other hand, third-party cyber coverage protects companies from liabilities arising from incidents affecting third-party stakeholders, including clients, vendors, suppliers, employees, and partners. These risks are rapidly growing in severity and frequency. In fact, 60% of organizations work with over 1,000 third parties, and 71% of organizations say that their third-party network contains more vendors than it did just three years ago. There's an overwhelming amount of potential third-party exposures to account for.

Privacy liability coverage is an essential third-party program for safeguarding against breaches of confidential information exposed by a vendor, which can lead to significant reputational damage and financial penalties. Network security liability coverage ensures that companies are protected against claims related to the failure of their vendor's cybersecurity measures, particularly as they rely on IoT devices and interconnected systems. Furthermore, regulatory defense coverage helps trucking leaders manage the costs associated with defending against regulatory actions and potential fines related to their vendor's breach, which are becoming more common as data protection laws evolve.

Trucking organizations should also be mindful of the potential bodily injury and property damage risks stemming from a cybersecurity incident directly caused, or by a failure of, a third-party technology, for example. Coverage can be tenuous in the traditional property/casualty marketplace as well as in the cyber insurance market, but there are options to consider. Transportation and cyber specialist brokers can assist in identifying the appropriate coverages to address this emerging risk.

PROTECTING YOUR BUSINESS

It can be overwhelming for trucking leaders to understand all of their exposures and how to defend against them. Working with a partner who has seen nearly all scenarios, with trucking industry expertise, can be the key differentiator between a company that recovers quickly from a loss and one that takes months to recover, if at all.

A broker partner can help you implement specific security controls and help prepare for, or even prevent, incidents before they happen. Such protections include multifactor authentication for remote access and admin/privileged controls; patch management and vulnerability management; end-of-life systems replaced or protected; vendor/digital supply chain risk management; and more. They can also advise you on the best insurance program structure for your unique business, as well as act quickly on your behalf if an incident does occur, minimizing the impact.

As the industry moves toward greater digitization and automation, the potential for cyberattacks increases, making it essential for leaders to prioritize cybersecurity measures. By investing in robust security protocols, insurance coverage, and fostering a culture of awareness among employees, trucking companies can safeguard their operations against cyber threats, ensuring both the safety of their drivers and cargo and also the long-term viability of their business.

An experience insurance agency will take a comprehensive approach to helping those in the trucking industry manage cyber risk, considering the entire enterprise—operations, compliance, legal, finance, communications, and IT. After all, everyone in trucking has a stake in keeping corporate data and customer information as secure as possible.

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7. *Negligence*

In *Rivas v. Martinez*, 2024 US Dist. LEXIS 166366 (W.D. Tex.), the plaintiff brought suit against defendant tractor-trailer driver and sole proprietor after a sideswipe collision where defendant left his lane and struck the plaintiff's vehicle. After removing the case to federal court, the defendant moved for partial summary judgment under Federal Rule 12(b)(6), arguing that the plaintiff's negligence *per se* cause of action failed to state a claim upon which relief could be granted.

The defendant argued that the plaintiff's negligence *per se* allegations were conclusory and failed to specify which sections of the FMCSA they were based on. The court noted that a legislative duty of care which only imposes a reasonable person standard is no different than a standard negligence claim and, therefore, cannot support a negligence *per se* claim.

Turning to plaintiff's negligence *per se* claim based on the Texas Transportation Code, the court found that the duty imposed by the Code was no different than the typical reasonable person standard. Therefore, the state code could not support the plaintiff's claim. Addressing the plaintiff's FMCSA claim, the court noted that the plaintiff only cited one specific provision, C.F.R. §383.113, which sets forth the general standard for testing CDL applicants. The court held that this provision did not set forth a duty of care and therefore could not support a negligence *per se* claim.

The court further found that none of the plaintiff's general references to the FMCSA alleged a standard of care set by the statute. The court, however, did speculate, that the plaintiff's allusions to FMCSR §391.11 could support a negligence *per se* claim. Accordingly, the court permitted the plaintiff to amend his complaint to cure its deficiencies.

Brent v. T.G. Baker Trucking, Inc., 2024 US Dist. LEXIS 162910 (D.N.M.), arose out of a collision in which a motor carrier rear-ended the plaintiff's car at a high rate of speed on the highway. The defendant driver and trucking company removed the case to federal district court and then moved for judgment on the pleadings under Federal Rule 12(c). Accepting as true Plaintiff's allegations, the court first turned to the gross negligence cause of action. The court declined to dismiss this cause of action because the plaintiff's complaint alleged that he turned on his hazard lights before the collision to alert drivers behind him of slowing traffic. The defendant nevertheless hit him, which could show "conscious indifference to harmful consequences."

Turning to the ratification claim, the court noted that the plaintiff failed to plead any allegations that the defendant trucking company ratified the actions of its driver. Accordingly, this cause of action was dismissed.

The court then addressed the plaintiff's claims of negligent hiring, training, retention, supervision, and entrustment. The court applied substantive New Mexico law, noting that claims for negligent hiring, training, retention, supervision, and entrustment required the plaintiff to show that the employer knew or should have known that their employee was incompetent or unfit. The plaintiff's allegations on this point were merely conclusory.

Finally, the court turned to the negligence *per se* claim and found that the plaintiff had sufficiently pled the claim under New Mexico's transportation statute. The plaintiff did not plead negligence *per se* based on the FMCSA or FMCSR. The court found that allowing the plaintiff to amend his complaint regarding the dismissed causes of action would be futile.

Guillory v. Crete Carrier Corp., 2024 US App. LEXIS 23002 (5th Cir.), arose out of an unusual collision in which a tractor-trailer's rear tires scraped the side of a passenger car travelling the opposite direction at a sharp turn in a road as both drivers were travelling at a very low rate of speed. The tractor-trailer's rear wheels were over the yellow line and the driver was trying to avoid contact with the car.

The car driver brought suit in state court and defendant trucking company and driver removed the case to federal court. At trial, the jury found the truck driver was negligent and each driver was comparatively 50% at fault. The jury awarded only $11,541 in total damages. The plaintiff appealed and argued that defendant truck driver never rebutted the presumption of fault negligence against him and therefore she was entitled to 100% of the total damages. The plaintiff also argued that the damages should be increased substantially in line with other Louisiana cases.

The Fifth Circuit Court of Appeals found that the plaintiff had forfeited her right to challenge the sufficiency of supporting evidence for the jury's allocation of fault for procedural reasons. The court further found that the jury was properly instructed regarding the presumption of negligence against the driver because part of his vehicle was over the yellow line. The court further opined that the jury's allocation of damages was not clearly erroneous in light of the evidence, which included the fact that the plaintiff failed to ever undergo physical therapy and misrepresented her past income.

In *Quezada v. MDS Trucking V Inc.*, 2024 US Dist. LEXIS 131684 (W.D. Tex.), a commercial tractor-trailer driver allegedly made an unsafe lane change, impacting the side of passenger car on the highway, and causing the passenger car to impact the center barrier. The plaintiff brought suit in state court and the defendant driver and trucking company removed the case to federal district court after filing an answer in state court. The defendants then individually moved to dismiss.

The plaintiff failed to respond to the defendant driver's motion but responded to defendant trucking company's motion. Because their motions to dismiss were almost identical, the court treated the plaintiff's response to one motion as a response to both. First, the court turned to the issue of gross negligence.

The court found that under Texas law, gross negligence is not an independent cause of action, but only relevant to an assessment of punitive damages. Therefore, the heightened pleading standard for a cause of action in federal court was inapplicable to the plaintiff's gross negligence demand for relief. The plaintiff's argument that defendants were grossly negligent, although conclusory, was a permissible requested remedy. The court also noted that at this initial stage, plaintiff's conclusory language should be given "the benefit of the doubt" as all material relevant to the gross negligence issue was still in the sole possession of the defendants.

Finally, on the issue of plaintiff's negligence *per se* claim, the court found that the specific sections of the Texas Transportation Code referenced by the plaintiff did not provide a specific duty. The plaintiff further failed to address defendants' arguments for dismissal of the negligence *per se* claim in his response. Therefore, that claim was dismissed.

In *Brown v. RLC Trucking LLC*, 2024 La. App. LEXIS 1500 (La. Ct. App. 5th Cir.), the plaintiff was injured when defendant tractor-trailer driver stuck plaintiff's vehicle while making an unsafe turn. The defendants brought a pretrial motion in state court to exclude evidence of direct negligence by defendant trucking company and evidence of lost wages. After the trial court ruled for the defendants, the plaintiff brought this emergency appeal.

The defendants sought to prevent the plaintiff from using evidence concerning the trucking company's hiring and training practices on the grounds that the plaintiff's complaint did not allege that the company was directly negligent. The plaintiff argued that he did not know that defendant driver was never given any training until defendant driver was deposed 21 months after the complaint was filed. The appellate court found that a claim against the trucking company based on *respondeat superior* and a claim based on negligent hiring and training were separate theories of liability. Accordingly, the fact that the negligent hiring claim was not included in the complaint meant that the trial court erred in denying the defendants' pretrial motion concerning evidence of direct negligence.

Turning to the plaintiff's lost wage claim, the court found that all of the defendants' arguments that the plaintiff's lost wage evidence should not be admitted went to the strength and credibility of the evidence. Therefore, the defendants' pretrial motion was properly denied because the evidence should have been reviewed by a jury.

Newson v. Hernandez, 2024 US App. LEXIS 25691 (11th Cir.), arose out of a motor vehicle collision on Interstate 75 in Georgia. An unknown truck clipped the front of the plaintiff driver's tractor-trailer, causing his vehicle to jackknife on the interstate. Another tractor-trailer driver came around a curve in the interstate and did not have time to stop after she saw the jackknifed truck. As a result, the second driver's truck struck the plaintiff's driver's truck, injuring him.

The district court granted summary judgment to defendant driver because she had no way to avoid the collision and did not act negligently. The accompanying negligence claims against her employer were therefore also dismissed. On appeal, the plaintiff argued that a jury could have reasonably found that defendant driver was negligently driving too fast, driving in violation of her employer's rules by having a child in her cab, or driving with a suspended license.

The appellate court did not consider the plaintiff's second and third arguments because they were not properly raised at the summary judgment stage. Because the plaintiff had no evidence that the defendant driver could have avoided the collision by driving more slowly, the appellate court affirmed summary judgment for the defendants.

In *McElroy Truck Lines, Inc. v. Moultry*, 2024 US Dist. LEXIS 195337 (M.D. Tenn.), the plaintiff was a trucking company whose truck was struck by defendant tractor-trailer driver. The plaintiff sought to recover for damage to its tractor-trailer and cargo. The defendant driver was carrying a shipment of appliances for Lowe's. Retail Direct was the broker which arranged for transportation of the appliances. Defendant driver was hired by a subcontractor of a subcontractor who both went out of business. Lowe's and Retail Direct moved for dismissal of the claims for vicarious liability and negligent hiring.

Turning first to the vicarious liability claim, the court found that neither Lowe's nor Retail Direct was in a principal-agent relationship with the driver, who was merely supplied with a truck and instructed where to deliver. The court found that defendant driver was an "employee" within the meaning of the FMCSR, which sees no distinction between employees and independent contractors. The court further found that Lowe's could be an "employer" within the meaning of the FMCSR because Lowe's was engaged in interstate commerce and leased vehicles in connection with that commerce.

Turning to the plaintiff's common law negligence claims against Retail Direct and Lowe's, the court found that they were preempted by the FAAAA, which preempts state law negligence claims against transportation brokers. Unlike the Ninth Circuit Court of Appeals, this district court found that the "safety exception" to FAAAA preemption did not apply to the selection of a motor carrier by a broker, because such conduct was only tangentially related to the regulation of motor vehicle safety. Therefore, the plaintiff's common law negligence and property damage claims were preempted. (See the section on Brokers for a full discussion of the preemption issue).

The court in *Boyance v. United Fire & Cas. Co.*, 2024 La. App. LEXIS 650 looked to the relevant case law, which holds that "[w]here there are two permissible views of the evidence, the factfinder's choosing one of them cannot be manifestly erroneous. *Stobart v. State, Dep't of Transp. & Dev.*, 617 So.2d 880 (La.1993). Further, when the factfinder's findings are based on determinations

regarding the credibility of witnesses, the manifest error standard demands that great deference be given to the findings of fact. *Rosell v. ESCO*, 549 So.2d 840 (La.1989)." The court also looked to La. R.S. 32:81(A), which provides that unless a rear-ending driver presents exonerating evidence, they are presumed negligent. The court reasoned that the Fresh Produce driver, either before or during trial, failed to produce any evidence refuting the presumption of negligence against him. Explaining that the testimony of the parties, drivers, and experts conflicted in different respects, the court found the jury was free to accept or reject each witness's testimony, assess their credibility, determine the plausibility of each party's theory as to how the accident occurred, and assess the fault of the parties. The court, therefore, upheld the jury's finding that Fresh Produce's driver was 100% at fault.

The *pro se* plaintiff in *Allen v. Nunez Trucking Logistics*, 2024 US Dist. LEXIS 70481 (N.D. Ga.) brought this action alleging that, while she was traveling on I-75 in Georgia, a motor vehicle swerved into her lane; this forced her to turn into the emergency lane where she collided with defendant's truck, which she claims was negligently parked. The defendants served a request for admission on the plaintiff, to which she failed to reply. Therefore, the plaintiff was deemed to have admitted that: (1) she was operating her vehicle without ordinary diligence and was traveling over the speed limit, (2) the accident occurred after she failed to maintain her lane and rear-ended the defendant's tractor-trailer, (3) the incident was solely caused by plaintiff, and (4) she suffered no damages as a result of the collision. Defendants moved for summary judgment and based upon the failure to respond to notice to admit, the court granted the defendant's motion dismissing the complaint.

In *Trujillo v. Moore Bros Inc.*, 2024 US Dist. LEXIS 51355 (D. Col.), the plaintiffs allege that defendant Myers was driving a semi-truck which struck their vehicle in Greeley, Colorado. At the time of the accident, Myers was an employee or independent contractor of Falcon Express, which owned the semi-truck and/or Moore Brothers, which owned the attached trailer. The plaintiffs alleged that Myers was an unqualified and incompetent commercial driver and that Falcon Express and Moore Brothers had duties to ensure that the drivers they employed (e.g., Myers) adhered to USDOT driver regulations. The defendants moved to dismiss claims alleging negligent hiring, supervision, retention, training and entrustment.

With respect to negligent hiring, Colorado law requires proof that an employer has or should have "antecedent knowledge" that the specific employee posed a risk of harm at the time they were hired. Implicit in this is an employer's duty to investigate a commercial driver's driving record and safety qualifications. The magistrate recommended dismissal of the negligent hiring claim as plaintiff's conclusory allegation that Falcon and Moore failed to investigate Myers's driving and safety record were without any factual support. It is insufficient to merely allege a breach of the duties to investigate without detailing how the duties were breached. The magistrate also recommended dismissal of the claim for negligent selection of an independent contractor be dismissed on the same grounds.

Analyzing the claims of negligent supervision, retention, and training together, the magistrate found that the plaintiffs had sufficiently pled allegations of negligent supervision, retention, and training. The plaintiff's allegations that Myers and Moore Brothers failure to comply with federal regulations requiring systematic inspections and repair of vehicles coupled with the specific allegations of Myers's inadequate pre-trip inspections and Moore's implicit approval of these practices make it plausible that Moore should have known of the potential risks of Myers's actions.

Likewise the magistrate found that the plaintiffs had sufficiently pled a claim for negligent entrustment. Under Colorado law, liability will apply to an actor who allows a third person to use that actor's equipment if the actor knows that person is likely to create an unreasonable risk of harm to others. Here, Moore should have known, based on the allegations of Myers's inadequate pre-trip inspections, that his operation of any equipment would cause an unreasonable risk of harm to others.

In *Jenkins v. Gulf Intermodal Servs., LLC*, 2024 US Dist. LEXIS 61940 (E.D. La.), the plaintiff alleged that a container he was towing had been improperly loaded by Gulf and caused his truck to shift while he was making a turn which led to the overturn of the rig. Gulf moved for summary judgment arguing that the plaintiff had not provided any evidence showing Gulf's negligence. Gulf alleges its role was brokering the load and that it had no part in the actual loading or transportation of the load.

The court outlined the many instances of the plaintiff's failure to comply with discovery obligations and procedural rules and further noted that the plaintiff had provided no evidence to refute Gulf's position that it only brokered the load. Further, the court disagreed with the plaintiff's *res ipsa loquitur* argument that the accident could not have happened in the absence of the defendant's negligence, as the plaintiff failed to eliminate any other potential causes of the accident. Nor was plaintiff able to prove Gulf had exclusive control over the container. Finding no material facts in dispute, the court granted Gulf's motion.

The plaintiffs filed suit in *Hernandez v. Ventura Sys. LLC*, 2024 US Dist. LEXIS 24773 (N.D. Tx.), alleging that their vehicle had collided with a tractor-trailer owned by defendant Ventura Systems, LLC. Ventura's driver, Herrero, had parked on the shoulder of the highway to investigate a mechanical issue. Herrero was alleged to have been negligent, negligent *per se*, and grossly negligent; the plaintiffs also claimed that Ventura is vicariously liable for Herrero's negligence; that Ventura acted negligently in hiring, training, retaining, supervising, and entrusting operation of the tractor-trailer to Herrero; and that Ventura was grossly negligent. Ventura

removed the case to federal court and moved to dismiss the negligent entrustment, hiring, training, supervision, retention, and gross negligence claims for failure to state a cause of action.

Applying Texas law, the court dismissed the negligent entrustment claim, concluding that there was insufficient evidence that Herrero was unlicensed, incompetent or reckless, and that the collision itself was insufficient to prove recklessness. Further, the plaintiffs failed to rebut the presumption that Herrero was competent or to provide evidence that the driver was not competent.

The court also dismissed the claims of negligent hiring, training, supervision, and retention, based upon the plaintiffs' failure to provide evidence of negligent training or that Ventura's hiring procedures were inadequate and relied solely on conclusory allegations in this regard. The plaintiffs additionally failed to allege any facts indicating that Ventura knew its driver was incompetent or unfit, and could not support a claim for negligent retention.

The court also dismissed the gross negligence claim against Ventura, explaining that in order to bring a claim for gross negligence, a plaintiff must satisfy the elements of a negligence claim and also prove the act or omission when viewed objectively from the standpoint of the actor at the time of its occurrence involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety or welfare of others. The court held that the plaintiffs failed to adequately plead facts to support the "conscious indifference" element of gross negligence but afforded the plaintiffs the opportunity to amend.

On the date of his accident, Lemoine was driving a concrete truck when he rear-ended the plaintiff's vehicle. *Carmouche v. National Union Fire Ins. Co. of Pittsburgh*, 2024 La. App. LEXIS 244. Just prior to his rear-ending the plaintiff, Lemoine noticed that a third vehicle had entered the roadway in front of him which, in his telling, caused the accident. An accident reconstructionist, though, concluded that Lemoine was traveling at about 75 mph in a 55 mph zone and, as a result, was charged with a count of negligent homicide and negligent injuring. In the personal injury action, the defendants appealed a grant of summary judgment in favor of the plaintiff, holding that defendant Lemoine was solely responsible for the accident at issue. The defendants did not argue that Lemoine was not a cause of the accident, just that he was not the *sole* cause. In support of their position, the defendants presented an expert's affidavit which was intended to explain the role of the non-party in the accident. The appellate court however, ruled that the affidavit was merely a conclusory assertion regarding the ultimate legal issue. Instead the court agreed with the plaintiffs and concluded that the defense expert's conclusions were speculative and conclusory at best. The court affirmed the decision to grant partial summary judgment on the issue of liability to the plaintiffs.

Whaley v. Amazon.com, Inc., 2024 US Dist. LEXIS 17843 (D. S.C.), involved an accident in which defendant Yahia, driving a tractor-trailer, ran a red light and collided with the plaintiff's vehicle. At the time of the accident, Amazon managed a transportation network comprised of other transportation companies. In selecting partners, the Amazon defendants purportedly "do not conduct any safety investigation into motor carriers or truck drivers beyond verifying current operating authority, proof of insurance, and that the motor carrier does not have a safety rating of 'Unsatisfactory.'" Amazon moved to dismiss the complaint for failure to state a claim, arguing that the complaint did not meet the requirements under the Federal Rules of Civil Procedure: that each allegation must be simple, concise, and direct; rather, the complaint contained over 240 vague, conclusory, and immaterial paragraphs which at times asserted contradictory allegations. The court, however, disagreed, holding that, although significant analysis of the allegations may be required, the complaint does allege discernable claims and supporting facts.

The court then analyzed whether the individual claims may survive a motion to dismiss. Starting with the claims for negligent entrustment, hiring, training, retention, and supervision, the court denied Amazon's motion to dismiss, holding that based on Amazon's direct and exclusive control over its transportation network, the plaintiff had adequately pleaded those claims.

Likewise, the court denied the motion with respect to the claims of negligent selection of a subcontractor, holding that the plaintiff's injuries could have been caused, in part, by the alleged negligent selection of the transportation company by Amazon. The plaintiff's claims for joint and several liability also survived a motion to dismiss, as the plaintiff had made sufficient allegations that Amazon and defendant Carcast pooled resources and profits, and jointly controlled the logistics network.

The court granted Amazon's motion with respect to negligent maintenance since, the court did not recognize a tort for negligent maintenance outside of a general negligence claim and because Amazon was not required to maintain Carcast's trailer as Amazon did not own, lease or operate the trailer.

The plaintiffs in *Agwaramgbo v. Seals*, 2024 La. App. LEXIS 217 appealed an order granting the defendants' motion for summary judgment related to a multi-vehicle collision. The plaintiffs alleged that defendant Seals rear-ended a second vehicle causing a chain reaction collision resulting in several vehicles, including the plaintiff's, being rear-ended. In support of their motion for summary judgment, the defendants submitted among other things: a dash-cam video of the incident and the affidavit of an accident reconstructionist. The dash-cam footage showed a scene of the accident in which an Acura makes a quick lane change in front of Seals' tractor-trailer and immediately brakes. The plaintiffs' vehicle is not visible in the footage. Further, the driver of the vehicle who allegedly struck the plaintiffs testified there was no damage

to the front end of his vehicle. This brought into question the plaintiffs' claim. The plaintiffs opposed the motion, citing conflicting testimony, providing their own expert reconstruction, and challenging the admissibility of testimony obtained in a different proceeding. The trial court granted the defendant's motion.

The appellate court noted though, that even though plaintiff's vehicle was not visible from the dash cam, there was glare from the headlights of oncoming traffic, which could have hidden the plaintiff's vehicle. A finder of fact must resolve any issues of material fact. The court reinstated the plaintiffs' case, holding that the conflict in testimony and expert reports required an evaluation of the weight of the evidence and assessment of credibility, not appropriate on summary judgment.

Gillespie v. Wagner (2024 Conn. Super. LEXIS 71), arises from an accident in which the plaintiff's vehicle was struck by a flatbed truck driven by defendant Scoppetto. Scoppetto testified that he had veered into the plaintiff's lane to avoid a disabled box truck driven by defendant Wagner. Wagner moved for summary judgment arguing there was no evidence of his negligence.

The court denied summary judgment to Wagner, concluding that there were questions of fact and noting that whether a party was the proximate cause of an accident is left to the trier of fact and only becomes a conclusion of law "when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement the question is one to be determined by the trier [of fact]." Specifically, there were questions as to how visible Wagner's vehicle was and if Wagner could have taken additional steps to prevent the accident.

In *Laun v. Knightbrook Ins., Co.*, 2024 US Dist. LEXIS 106289 (W.D. La.), the plaintiff moved for summary judgment alleging that a collision with the defendant's tractor-trailer caused a neck injury and necessitated neck surgery. In opposition, the defendants argued that a genuine dispute exists to explain the cause and duration of the plaintiff's neck injury. The plaintiff met her burden by citing to testimony of the defendant's IME expert who opined that she suffered an injury to her neck in the accident, and that injury led to her need for surgery. The defendant argued that the plaintiff did not notice the injury until five days after the accident, her VA medical records reflect that she has previous back issues, she did not receive medical treatment until 21 days after the accident, she has not shown any evidence to prove her neck pathology prompting surgery was not degenerative, and none of her treatment providers were made aware of her prior back issues. The court ruled that defendants' assertions alone were insufficient to demonstrate a genuine issue of fact for trial as it pertains to the causal relationship between the accident and the plaintiff's neck injury. The court granted the plaintiff's motion, finding that the accident caused her to sustain a neck injury that required surgery. The plaintiff's motion was denied to the extent that she seeks judgment that the accident caused her to continue to have neck pain beyond the surgery and that neck pain required further medical treatment.

In *Manson v. B&S Trucking of Jackson*, LLC, 2024 US Dist. LEXIS 94790 (W.D. Tx.), the plaintiff was involved in an accident with defendant driver who was driving a commercial motor vehicle within the scope of her employment with defendant motor carrier. Citing new evidence that the driver had falsified her time sheets and had worked more than the permitted hours, the plaintiff moved for the court to reconsider its prior grant of summary judgment motion dismissing the gross negligence and direct negligence claims against the motor carrier. The court adhered to its dismissal of the gross negligence claim against the motor carrier since there was no evidence that defendant motor carrier knew of any alleged hours-of-service violations.

Baker v. Williams, 2024 Tex. App. LEXIS 2884 (Ct. App. 3d Dist. Tx.), involved a personal injury lawsuit arising out of a collision between two tractor-trailers. The jury found no liability against defendants. The plaintiffs appealed, arguing that the trial court abused its discretion in not excluding expert testimony by the investigating officer. The plaintiff struck the back of defendants' tractor-trailer which was parked on the shoulder of the interstate. The first officer at the scene of the collision determined that the defendant's truck was disabled, and that the defendant's failure to place emergency reflective triangles behind his disabled trailer was not a contributing factor to the collision. According to Texas case law, even when an evidentiary ruling is erroneous, the reviewing court may only reverse if the error "probably caused the rendition of an improper judgment."

Whether the error was harmful is a matter of judgment based on an evaluation of the whole case, including all of the evidence before the factfinder, the strengths and weaknesses of the case, and the ultimate verdict. The error is harmless if that evidence is cumulative of other evidence or "if the rest of the evidence was so one-sided that the error likely made no difference." Upon review of the record, the appellate court was unable to determine that the admission of the investigating officer's testimony was so harmful as to probably cause an improper judgment. The testimony presented to the jury consisted of his conclusions, contained in the post-collision report, about what may have contributed to the collision. The court determined that, contrary to the plaintiff's contentions, the investigating officer's testimony was not crucial to the jury's determination of the key issues and was largely cumulative of other evidence. The appellate court affirmed the judgment.

Harrison v. J.B. Hunt, 2024 US Dist. LEXIS 81909 (W.D. Tex.), arose out of a motor vehicle collision between the plaintiffs' car and the defendant's 18-wheel truck. The plaintiffs alleged that the truck veered into the left lane occupied by their vehicle and struck their car and then fled the scene. The defendant moved to dismiss the direct negligence claims against it, arguing that the plaintiffs' allegations are conclusory and devoid of any facts or allegations

to support an inference of negligence. The plaintiffs argued that "evidence will show that drivers of 18-wheeler trucks who are properly hired, supervised, and trained should not cause collisions by swerving into other lanes of traffic." The court noted that these allegations merely recite the language of direct negligence claims; conclusions must be supported by factual allegations, and the plaintiffs offered none for their direct negligence claims. The plaintiffs relied solely on the inference that, because the driver negligently swerved into their lane, the defendant must be liable in some manner for hiring, training, or entrusting him with the vehicle. As such, the court granted the defendant's motion to dismiss.

In *Dove v. Gainer*, 2024 US Dist. LEXIS 82016 (N.D. Al.), the plaintiff contended that defendant's tractor-trailer driver merged into her vehicle. The defendants moved for summary judgment on the plaintiff's claims for wantonness, negligent training, and supervision. The court ruled that a reasonable jury could not infer from the plaintiff's testimony that the defendant knew he was engaging in a maneuver likely or probable to injure the plaintiff. The plaintiff testified that she locked eyes with defendant driver before he swerved into her lane causing the accident. The court found that this testimony cannot prove that the defendant driver knew the plaintiff was in the left lane prior to making eye contact while he was swerving into her lane because she could not know his state of mind. Regarding the negligent training and supervision claims, the court held that there was not sufficient evidence to support an issue of material fact regarding the defendant's competence as a driver. Thus, the court granted defendant's summary judgment.

Alec Herbert, C. J. Englert, and Bridget Daley Atkinson

8. Jurisdiction

Jones v. Bucci Express, Inc., 2024 US Dist. LEXIS 142042 (S.D. Ala.) arose out of a collision in Mobile County, Alabama, when the defendant driver crashed his tractor-trailer into the plaintiff's vehicle. The defendants removed the action to federal court based on diversity jurisdiction, and the plaintiff moved to remand on the basis that the amount in controversy did not exceed $75,000.

On a motion to remand, the removing party has the burden of showing federal subject matter jurisdiction. The defendants attempted to meet their burden by relying on the nature of the complaint's allegations, a letter from plaintiff's counsel describing his injuries and settlement discussions, the plaintiff's short term disability lien, and the plaintiff's request for punitive damages. The defendants also attached 200 pages of the plaintiff's medical records to their response to the motion to remand.

The court found that the allegations in the complaint were too vague to establish the amount in controversy was greater than $75,000. The court also found that the letter from the plaintiff's counsel did not establish any specific amount in controversy, and the short-term disability lien was relatively small. Although a federal court may consider punitive damages as part of its assessment of the amount in controversy, there was no specific amount attached to the request for punitive damages here. Accordingly, the court found that the defendant failed to prove the amount in controversy was greater than $75,000 by a preponderance of the evidence.

In *Nationwide Agribusiness Ins. Co. v. Penn-Star Ins. Co.*, 2024 US Dist. LEXIS 174648 (E.D. Cal.) a tractor driver T-boned a pick-up truck in heavy fog. The occupants of the pick-up truck sued the driver of the tractor and the farm he was contracted to. The tractor driver was working for a farm labor contractor which was contracted by a farm.

There was a dispute over which company's policy should apply to the collision depending on whether or not the tractor was classified as an automobile. Nationwide Agribusiness filed an action in state court for a declaration of rights, which Penn-Star removed to federal court. Nationwide then sought remand whereas Penn-Star sought dismissal.

Even though Penn-Star's codefendants, the farm and the driver, were both citizens of California, Penn-Star argued that the federal court had diversity jurisdiction in spite of the forum-defendant rule, which prevents a case from being removed from state to federal court if any defendant is a citizen of the state where the case is filed. Penn-Star argued that the codefendants should be realigned as plaintiffs because they "plainly shared" Nationwide's interest in establishing coverage under Penn-Star's policy.

The court stated that it could realign the parties if it would be in the primary interest of the suit according to the parties' ultimate interests. The court declined to realign the farm and driver as plaintiffs because Nationwide's primary purpose in bringing the suit was avoiding obligations to its insureds. As a result, those parties were already properly aligned against Nationwide. Therefore, the court lacked diversity jurisdiction under the forum-defendant rule.

In *First Star Logistics, LLC v. Wholestone Farms Coop.*, Inc., 2024 US Dist. LEXIS 171260 (S.D. Ohio), a cooperative hired a logistics company to broker transportation of its goods. As part of the agreement, the logistics company agreed to indemnify the farm for certain losses, such as losses to freight tendered to the logistics company. The two parties also signed the logistics company's credit application which provided that their relationship be governed by the logistic company's Rules Circular. While en route to its destination via a motor carrier hired by the logistics company, a load of the farm's pork products was allegedly stolen.

The motor carrier alleged that the truck to which the pork had been tendered was not their truck but rather belonged to a different motor carrier to which they had subcontracted the load. The logistics company sought declaratory judgment in state court against the cooperative stating that the cooperative's only mode of recovery would be against the motor carrier pursuant to the

logistics company's Rules Circular. The cooperative removed the case to federal court, arguing that federal jurisdiction was proper as the case invoked questions of federal law under the Carmack Amendment.

The Carmack Amendment created a national scheme of carrier liability when goods transported in interstate commerce were lost or stolen. Brokers are not entitled to sue under the Carmack Amendment, but the amendment does not preempt claims by or against brokers. Because the logistics company was indisputably a broker, the court found that its complaint could not be based on the Carmack Amendment. Accordingly, there was no federal question jurisdiction over the case. Although there was complete diversity of citizenship amongst the parties, the cooperative failed to satisfy the rule of unanimity when removing the case by obtaining permission from the motor carrier. Therefore, the case was remanded to Ohio state court. (See Section 4 for a full discussion of this year's Carmack and other cargo cases).

In *Hicks v. New Millennium Building Sys., LLC*, 2024 US Dist. LEXIS 168764 (D. Minn.), the plaintiff, a commercial truck driver, brought suit in state court against the defendant, a manufacturer of steel joists, after he was crushed under the joists while unloading them from the back of his truck. The defendant removed the case to federal court, arguing that the plaintiff's claims arose under federal law.

The defendant argued that the plaintiff's claim implicated the FMCSA, whereas the plaintiff argued his claims were only based on common law negligence. Although the plaintiff's complaint did not mention the FMCSA or any other specific federal regulations, the defendant argued that the plaintiff used "artful pleading" to avoid any federal issues.

The court reasoned that there was no single overarching test for determining federal jurisdiction over federal issues which are embedded in state law claims between non-diverse parties. The court stated that federal-question jurisdiction was appropriate if a federal issue is: (1) necessarily raised, (2) actually in dispute,

(3) substantial, and (4) capable of resolution in federal court without disrupting the balance between federal and state courts established by Congress.

The court acknowledged that the plaintiff would most likely try to prove common law negligence by showing that the defendant violated federal regulations. However, the court held that the mere use of a federal statute in establishing negligence was not a substantial enough federal question to justify federal-question jurisdiction. Moreover, federal regulations are so common in regulated industries where tort liability frequently arises that basing federal-question jurisdiction on mere allegations of a federal violation without a more substantial question of federal law being raised would risk tipping the balance of tort litigation away from state courts. Therefore, the court remanded the case.

In *Brown v. Powers*, 2024 US Dist. LEXIS 180258 (D. Mo.), a *pro se* plaintiff brought suit against a driver and a commercial trucking company for injuries he sustained when the truck driver drove into the side of his pickup truck. As plaintiff was proceeding *pro se*, the court liberally construed his complaint to find that he appeared to assert a claim based under the FMCSR and a claim of negligence *per se*, also based on the FMCSR.

The court applied the well-pleaded complaint rule, which requires that the federal question be apparent on the face of the complaint in order to find federal-question jurisdiction. Although the plaintiff had successfully invoked the FMCSR, the court followed the majority of jurisdictions in holding that the FMCSR and FMCSA do not create a private federal right of action. The court likewise followed the majority of courts in the Eighth Circuit in holding that a negligence *per se* claim based on the FMCSR does not invoke substantial questions of federal law. Therefore, federal-question jurisdiction was again inappropriate.

The court found that the plaintiff had failed to properly allege the citizenship of all defendants in order to invoke diversity jurisdiction. Therefore, the federal district court lacked jurisdiction and dismissed the case.

In *Hayle v. J.B. Hunt Transp. Inc.*, 2024 US Dist. LEXIS 188412 (W.D. Wash.), the plaintiff sued the defendant trucking company in state court. The defendant removed to federal district court, arguing that the court had diversity jurisdiction and federal question jurisdiction because the plaintiff's common law negligence claims implicated the FMCSR. The court emphasized the strong presumption against removal jurisdiction. The court noted that in Washington, the violation of a statute is not considered negligence *per se* but may be considered by the trier of fact merely as evidence of negligence. The court explained that federal question jurisdiction was appropriate if a federal issue is: (1) necessarily raised, (2) actually in dispute, (3) substantial, and (4) capable of resolution in federal court without disrupting the balance between federal and state courts established by Congress.

The court held that defendants failed to meet their burden in showing that federal law created the cause of action or that the cause of action implicated substantial questions of federal law. Turning to diversity jurisdiction, although plaintiff alleged that the defendant-driver was domiciled in Washington, the court accepted the driver's Colorado license as evidence that he was domiciled there. However, the defendants failed to prove by a preponderance of the evidence that the $75,000 amount in controversy threshold was met. Therefore, the federal district court remanded the case to state court.

Revis v. Murphy's Logistics, LLC, 2024 US Dist. LEXIS 191238 (E.D. Missouri), concerned a delivery driver who sued his former employer after being struck head-on by a tractor-trailer in the course of his employment. The plaintiff argued that the delivery

vehicle, a car, that the defendant-employer provided to him, did not have adequate safety features for driving in icy conditions. During discovery, plaintiff amended his complaint to add the motor carrier that struck him as a defendant. The motor carrier defendant then removed the case to federal district court, alleging both diversity and federal question jurisdiction. Although the defendant employer was a citizen of Missouri, the motor carrier argued the forum-defendant rule did not apply because the employer was never served with the second amended complaint.

The court first found that there was no federal question jurisdiction based on the FMCSA or FMCSR because negligence *per se* claims based on those statutes did not raise substantial questions of federal law. The court then found that the motor carrier's "snap removal" of the case—before the plaintiff could serve the employer with the second amended petition—did not justify disregarding the employer's Missouri citizenship for purposes of jurisdiction. Accordingly, since the plaintiff was also a Missouri citizen, the federal court lacked jurisdiction and the case was remanded to state court.

In *Supra Nat'l Express, Inc. v. Penske Truck Leasing Co., L.P.*, 2024 US Dist. LEXIS 67705 (C.D. Cal.), the plaintiff sought relief for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, negligent interference with prospective economic benefit, and violations of California Business and Professions Code §17200, all arising from a truck-leasing dispute. Penske removed this case to federal court in California. However, the plaintiff and the two individually named defendants, Castro and Wilson, were both California citizens; therefore there was no diversity jurisdiction. Penske argued that the court should ignore their citizenship for Castro and Wilson were "sham" defendants who were fraudulently joined to defeat removal.

When jurisdiction is premised on an allegation of a fraudulently joined defendant, a district court must remand the case if there is "a possibility of recovery" against that defendant. The court held that Penske needed to show that the fraud claim was frivolous as alleged and that Supra National could not possibly state a claim, even if given leave to amend. Here Penske failed to prove that there was no possible recovery against the individual defendants under a cause of action separate from the breach of contract claim. Instead the court agreed with the plaintiff that the fraud claim against the individual defendants was based on the theory that they fraudulently induced plaintiff into the lease agreement.

A plaintiff-insurance carrier filed a declaratory judgment action in *Lancer Ins. Co. v. B3 Logistics LLC*, 2024 US Dist. LEXIS 31568 (S.D. Alabama) in federal court. B3 was one of many defendants in an underlying Louisiana lawsuit regarding a motor vehicle accident that occurred in Mississippi. The defendant, Baker (as representative of her husband's estate), was a resident of Louisiana, as was her deceased husband, Baker moved for dismissal for lack of personal jurisdiction.

The court held that it lacked personal jurisdiction, finding that Baker, a resident of Louisiana, had no connection with Alabama. Further, the accident occurring in Mississippi also had no connection with Alabama. The court also noted that Baker was an indispensable party, so the declaratory judgment action could not proceed without her.

In *Hardisty v. Fam. Moving Servs. Inc.*, 2024 US Dist. LEXIS 51182 (N.D. Texas), the plaintiff moved to remand the case from federal court back to state court. The case arose from a claim for personal property damaged during transit. The plaintiff had made numerous attempts to serve the defendant, Family Moving Services (FMS), all of which were unsuccessful. In February 2023, FMS removed this action to federal court as the claim arose under the Carmack Amendment (49 U.S.C. §14706(a)(1)) governing the interstate shipment of goods. The plaintiff argued that removal was defective as it was not done within 30 days of service and that FMS did not obtain the consent of the codefendant, Texas Moving Group. With respect to service, the court found that FMS was not properly served. The evidence on the motion showed that although the plaintiff served FMS by way of the Secretary of State, the document were returned and the plaintiff did not establish reasonable diligence in attempting to serve FMS or its agent. Accordingly, the 30-day removal period was not triggered.

With respect to the argument that FMS failed to obtain the consent of all defendants prior to removal, the court agreed with the plaintiff, noting that removal statutes must be strictly adhered too, and the failure to obtain the codefendant's consent for removal is fatal. FMS argued that its notice to codefendant 53 days after removal should cure the defect, but the court was not convinced. The court therefore granted the plaintiff's motion to remand.

In *Shaw v. UPS Inc.*, 2024 US Dist. LEXIS 61984 (N.D. Texas), the plaintiff moved to remand the action from federal court to state court. The case involved claims for negligence, negligent misrepresentation, tortious interference with existing contract, and tortious interference with prospective business relations with respect to shipping services provided to the plaintiff by the defendant. The plaintiff argued that the Carmack Amendment did not apply as the amount in controversy was less than $10,000, and federal common law does not apply as the shipments were not transported by air.

With respect to the Carmack Amendment, the court found that the threshold was met. While the plaintiff, in his motion papers, argued that the damage will not exceed $10,000, his initial state court petition alleged damages of $70,000. The court reasoned that the amount in controversy was governed by the original pleading, not the motion papers.

The plaintiff's arguments under the common law also failed. The court held that the Airline Deregulation Act's preemption provision applies to a carrier affiliated with a direct air carrier through

common ownership, which UPS is. Further, UPS was able to identify at least three parcels shipped by plaintiff that went via air service. Thus, the court denied the motion to remand.

In *Caribbean Solar Energy LLC v. Evolution Caribbean*, 2024 US Dist. LEXIS 27812 (D.P.R.), the plaintiff brought a breach of contract action against defendant related to an agreement for defendant to arrange for shipping containers to transport solar panels from California to Puerto Rico. The complaint sought $375,935 in damages, and invoked Puerto Rican law. The plaintiff moved to remand this action from the federal court to the San Juan Superior Court, arguing that there was no federal question and no preemption of plaintiff's state law claims.

The court held that there is no federal question at issue and rejected the defendant's argument that the Harter Act created a federal question, as the Harter Act only applies to the violation of contract obligations which are maritime in nature. Here, the plaintiff alleges they were damaged because their product did not make it to a ship. Accordingly, there were no violations of maritime obligations. Further, the defendants were unable to articulate how the Harter Act would preempt any state law claims. Accordingly, the court granted the motion to remand.

In *Sheppard Logistics, LLC v. Progressive N. Ins. Co.*, 2024 US Dist. LEXIS 142130 (E.D. OK), the insurer removed the action based on diversity jurisdiction, as the plaintiff was a resident of Oklahoma and the company was incorporated in Wisconsin with its principal place of business in Ohio. Although a codefendant had been formed in Oklahoma and its principal place of business was in Oklahoma, the insurer asserted that codefendant was fraudulently joined to defeat diversity jurisdiction and, therefore, codefendant's domicile should not be considered for diversity jurisdiction purposes. The court explained that to establish fraudulent joinder, the removing party must demonstrate either: (1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court. The court denied the motion to remand, finding that the codefendant had no duty to the plaintiff and that the plaintiff had no possibility of recovery under state law.

In *Bubba's Towing & Recovery, LLC v. Big Eagle Transport, Inc.*, 2024 US Dist. LEXIS 94826 (N.D. Ohio), defendant Vista, the shipper of a load being hauled by Big Eagle, filed a motion to dismiss based on lack of personal jurisdiction in a breach of contract and unjust enrichment case that had been removed to federal court. A tractor-trailer operated by Big Eagle's driver had been involved in an accident. The plaintiff was contracted by state law enforcement for the removal of the tractor-trailer. Bubba's claimed that it had provided an important service to Vista, rescuing its products, and that Vista had refused to pay the towing and clean up bills.

Was Vista, a New York food supplier, subject to jurisdiction? The court explained that in order to find jurisdiction it was necessary that (1) Ohio's long-arm statute applied to defendant and (2) that exercise of personal jurisdiction over defendant must "comport with constitutional due process" requirements. The plaintiff argued that because "[The defendant's] product was literally scattered on the Ohio Turnpike. . . and the work performed related to [the defendant's] goods was also performed in Ohio," the defendant has "transact[ed] business and/or suppl[ied] goods within Ohio" to a degree sufficient to confer personal jurisdiction. The court held though that Vista had done no more than place a product into the stream of commerce and that did not satisfy the test; the motion to dismiss was granted and the court denied the plaintiff leave to amend the complaint because any amendment would be fruitless in this case.

In *Landstar Glob. Logistics, Inc. v. Perfection Plus Trucking, Inc.*, 2024 US Dist. LEXIS 71182 (D. N.J.), the plaintiff sued the defendant for allegedly stealing the plaintiff's unique freight identifier. The plaintiff, a holding company of federally licensed interstate motor carriers, freight forwarders, and freight brokers, with a principal place of business in Florida, moved for a default judgment. The defendant was a trucking company in Connecticut. The plaintiff asserted claims for conversion, fraud, and unjust enrichment. The court explained that due to the plaintiff's insufficient pleadings, it could not ascertain whether it had personal jurisdiction over the defendant. The plaintiff failed to establish the extent of the defendant's business, as well as the basis for general personal jurisdiction. Without more, the court was unable to determine whether the defendant's contacts within the state were sufficient to establish jurisdiction and, accordingly, denied the default motion.

Alec Herbert, C. J. Englert, and Bridget Daley Atkinson

9. . *Evidence*

McKeon v. Bank of Am., 2024 US Dist. LEXIS 33569 (D. Col.) arose from an accident involving multiple cars and a semi on Interstate 70 in Colorado. Various parties brought motions to preclude expert witnesses and animation exhibits. The defendant moved to preclude the plaintiff's expert, an engineer and accident reconstructionist, on the grounds that he was not qualified to opine on "human factors" that may have contributed to the accident. In denying the motion to preclude, the court noted that the rejection of expert testimony is the exception rather than the rule, and that the defendant had not presented any authority for the proposition that opinions related to human factors are categorically distinct from those that the expert could present based on his expertise as an engineer and accident reconstructionist. Further, the defendant did not challenge his qualifications as an expert in accident reconstruction or make any showing that his opinions were unreliable.

In another motion, the defendants sought to preclude an

engineer and accident reconstructionist retained as an expert by a codefendant, contending that the expert should not be allowed to offer his opinion that defendant driver "was driving too fast for conditions, inattentive, distracted, impaired or a combination therein if his report of avoiding a collision with a slower moving vehicle prior to his loss of control is true." In denying the motion to preclude, the court noted that the defendants did not challenge the expert's qualifications as an engineer or accident reconstructionist. Rather, they contended that he used no methodology in reaching his opinion that the defendant was driving negligently. However, the court noted that the expert's opinions are based on his review of over 25 different sources, including forensic engineering inspections of the car at issue and the incident site, accident reports, deposition testimony, and weather reports. In denying the motion, the court explained that, as a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination.

On another issue, the plaintiff moved to preclude a demonstrative animation created by a defense expert, arguing that it would mislead the jury because it did not accurately represent the accident. The court granted the motion, finding that any probative value of the animation was substantially outweighed by the danger of unfair prejudice and misleading the jury. The animation purported to depict the accident from the defendant's perspective. However, the court pointed out that numerous aspects of the animation lacked any factual basis in the record, including the speed depicted in the animation, its color, its lack of reflective tape or inoperable taillights. In granting the motion to preclude, the court rejected the defendants' contention that those were irrelevant or superficial details pertaining to the tractor-trailer's appearance in the animation.

Alec Herbert, C. J. Englert, and Bridget Daley Atkinson

10. Discovery

In *Hernandez v. Rodriguez*, 2024 US Dist. LEXIS 170857 (M.D Fla.), the plaintiff collided with a tractor-trailer operated by defendant Rodriguez who was hauling a load for Macy's collectively contracted by UPS Ohio. The plaintiff alleged that UPS Ohio was the motor carrier responsible for the shipment, and that it then utilized Coyote Logistics to broker the load to a second motor carrier, defendant BIH. From the outset, UPS Ohio disputed its involvement in the accident and Coyote disputed its degree of involvement. Both defendants identified UPS Supply Chain Solutions, Inc. as the broker, and asserted that Coyote merely permitted UPS Supply Chain Solutions to use its proprietary Bazooka software platform for logistics tracking.

The plaintiff rejected the defendants' assertions and served requests for production and interrogatories on defendants UPS Ohio and Coyote. The defendants served the plaintiff with its responses, which included a preliminary statement, stating again that they were not proper parties to the action because they "did not transport, agree to transport, and/or arrange transportation for, the subject load that [defendant] Rodriguez was hauling for [defendant] BIH at the time of the accident," but that UPS-SCS, a registered broker and separate entity in the UPS family of companies, brokered the subject load. In its responses, UPS Ohio and Coyote therefore objected to specific requests relating to their involvement as a motor carrier or broker of the load on the basis that such requests were irrelevant since they were not the motor carrier or broker. The plaintiff took the position that the responses were incomplete and moved to compel complete responses.

In denying the motion to compel, the court held that evidence clearly demonstrated that UPS Ohio and Coyote were not the motor carrier or broker responsible for the transaction at the time of the accident, but rather UPS-SCS was the party that brokered the subject load. The court based this decision in part, upon affidavits from vice presidents of Coyote and UPS Worldwide Forwarding, Inc. stating that UPS-SCS brokered the load to BIH which, in turn, transported the load under its own motor carrier operating authority. Thus, the court found UPS Ohio and Coyotes' responses to this interrogatory to be adequate.

Allen v. Cam's Transp. Co., 2024 US Dist. LEXIS 146628 (E.D. Tenn.), demonstrates the severe consequences that can arise when parties ignore a court's scheduling order. The case involved an accident between the plaintiffs' car and the defendants' tractor-trailer. The original scheduling order imposed a discovery deadline of September 15, 2023. The court extended the deadline on two occasions, with the final deadline being moved to April 1, 2024, to be followed by a trial on August 27, 2024.

After an unsuccessful mediation in April 2024, the parties scheduled the remaining depositions, despite the expired discovery deadline. Over two months after the discovery deadline expired, and just shortly before the scheduled trial date, the plaintiffs and the defendants brought numerous discovery motions, which each side arguing that the other was too late in seeking the discovery. The plaintiffs also sought sanctions against defendant motor carrier due to its alleged failure to preserve electronically stored information. The court noted that it may properly deny a motion to compel filed after the close of discovery, especially where a party had the information it needed to file the motion, and its late filing would prejudice the other party. The court, however, also pointed out that it has discretion to authorize discovery beyond the close of discovery if there is a good cause or if the circumstances of the case warrant. The court ultimately denied each side's motions, holding that neither party established good cause or excusable neglect for the discovery that they sought. The court also noted that the plaintiffs did not show that any evidence had been spoliated so sanctions were not warranted.

In *Garza v. Bray Fast Freight, LLC*, 2024 US Dist. LEXIS 136722 (D. N.M.), a case involving a collision between the plaintiff's tractor-trailer and the defendant's tractor-trailer, the defendant moved to compel discovery, in particular the plaintiff's employment records for more than a month prior to the accident; the plaintiff supplied only a month's worth. Agreeing with the defendant that past employment records were necessary to evaluate the lost wage claim, the court compelled the plaintiff to produce employment records for ten years prior to the accident. The court also granted the motion to compel plaintiff's tax returns, which would be relevant to the lost wage claim. The court noted that the plaintiff's privacy concerns could be addressed by a confidentiality order and redaction of protected personal information such as social security numbers. However, the court denied defendant's motion to compel the plaintiff's "work schedule capacity" records, pointing out that defendant had not defined the phrase and that the phrase was vague.

Finally, the court granted the defendant's motion for a further interrogatory response from the plaintiff regarding a prior tractor-trailer accident resulting in medical treatment. The plaintiff identified the state where the crash occurred but claimed that he had no recollection of the city where the crash occurred or the names of the people involved in the crash, nor did he provide a description of his injuries as requested. In granting the motion to compel a further response, the court agreed with the defendant that, given the recent timing and apparent severity of the January 2023 accident, plaintiff likely could gather the requested information following a modest investigation.

Alec Herbert, C. J. Englert, and Bridget Daley Atkinson

11. Vicarious Liability

Dingess v. Sygma Network, Inc., 2024 US Dist. LEXIS 135444 (S.D.W.V.), arose out of a collision that occurred when the plaintiffs swerved to avoid defendants' tractor-trailer after an unsafe lane change. The plaintiffs brought suit against the driver; Sygma, a motor carrier; and MSS, a contractor who provided labor to Sygma, including the defendant driver.

The labor contractor moved to dismiss the plaintiffs' claim of vicarious liability, arguing that defendant driver was not their employee, but rather an employee of Sygma. The plaintiffs attempted to show that the driver was either their common law employee or statutory employee under FMCSR §390.5.

The court first found that the plaintiffs could not independently establish an employee-employer relationship under the FMCSR alone because it does not provide a private cause of action. However, the court could use the FMCSR's definitions of "employer" and "employee" to supplement its common law agency analysis. The court noted that there was no reason a driver could not have two employers within the meaning of the regulations.

Supplementing its common law agency analysis with the FMCSR definitions, the court found there was conflicting evidence over whether the defendant driver was MSS's employee. Accordingly, MSS could possibly be vicariously liable for the driver's actions, but the issue needed to go to a jury.

Schriner v. Gerard, 2024 US Dist. LEXIS 143701 (W.D. Okla.), arose out of a motor vehicle collision in which defendant tractor-trailer driver left the roadway and struck the plaintiff's vehicle parked on the side of the road. The plaintiff brought suit against a variety of entities associated with the motor carrier and broker. One of these entities was Flex, against which the plaintiff asserted vicarious liability based on numerous theories.

After the case removal to federal court, Flex sought dismissal of the complaint. The plaintiff argued that Flex was responsible for the standards used in hiring by the entity which hired defendant driver. The court found that the plaintiff's allegations that Flex was a statutory employer under the FMCSA were conclusory. The plaintiff further failed to establish that Flex was an employer under a common law principal-agent theory. Accordingly, the complaint was dismissed against Flex.

Applying substantive Oklahoma law, the court further found the plaintiff did not establish any elements of a joint venture between Flex and the other defendant entities.

Alec Herbert

12. Spoliation

In *Allen v. Cam's Transp. Co.*, 2024 US Dist. LEXIS 146628 (E.D. Tenn.), the defendant tractor-trailer driver struck the plaintiffs' vehicle. The plaintiffs brought an action for negligence against the driver and a variety of related claims against his employer. Mediation was unsuccessful and the parties then engaged in a variety of discovery disputes which led the trial to be delayed. Among these disputes, the plaintiffs argued that defendant motor carrier failed to preserve electronically stored information, and they moved for sanctions.

Specifically, the plaintiffs alleged that defendants failed to preserve ECM and hard-braking data. At deposition, the motor carrier's representative recalled preserving a variety of documents related to the crash but was unsure if anyone was ever instructed to download the ESI for preservation. The plaintiffs argued that the evidence was subsequently destroyed when the truck in question was repaired.

The plaintiff's expert testified that the hard-braking data was most likely destroyed because the system defendants used was set up to wipe data from the previous hard brake each time the truck experienced a hard brake. However, the court declined to issue sanctions against the defendants because the plaintiffs failed to show that the data was permanently destroyed, as required by Rule 37 to impose sanctions. Both parties' pleadings implied that

the data was kept in the cloud by a third-party app administrator.

De Leon v. Trahan, 2024 US Dist. LEXIS 154608 (W.D. Tex.), arose out of a multiple-vehicle crash during Winter Storm Uri in 2021. During discovery, the parties had a lengthy dispute over the unavailability of Omnitracs data from the defendants' vehicle.

The plaintiff sought sanctions against the defendants for spoliation of the Omnitracs data. Under Federal Rule 37, a party has a duty to preserve relevant evidence from the time it reasonably anticipates litigation. Under the FMCSA, motor carriers generally must preserve certain kinds of data for six months.

The court reasoned that the plaintiff brought this suit after the six-month preservation period under the FMCSA. The court further found that the defendants were not on notice of litigation because the plaintiff did not send a litigation hold letter for more than six months after the accident. The plaintiff also failed to prove that the defendants had a culpable state of mind when deleting the electronically stored information. Accordingly, the court found that sanctions were not warranted against defendants.

Alec Herbert

13. *Experts*

In *Thurman v. Sedlak*, 2024 US Dist. LEXIS 185554 (E.D. Va.) the defendants moved to exclude the plaintiff's expert witnesses. The case arose out of the collision of two motor vehicles. The plaintiff failed to disclose experts until one month after the court's scheduling order deadline, and the defendant moved to exclude the experts.

FRCP(a)(2)(D) provides that parties must make expert "disclosures at the times and in the sequence that the court orders." FRCP 37 (c)(1) provides that when "a party fails to provide information or identify a witness as required by Rule 26(a) . . .the party is not allowed to use that information or witness to supply evidence . . . unless the failure was substantially justified or is harmless." While district courts have broad discretion over this determination, they are guided by the following factors: (1) the surprise to the party against whom the witness was to have testified; (2) the ability of the party to cure that surprise; (3) the extent to which allowing the testimony would disrupt the trial; (4) the importance of the testimony; (5) the non-disclosing party's explanation for its failure to disclose the evidence.

The court analyzed the facts in accordance with the above statutes and determined that exclusion pursuant to FRCP 37 (c)(1) was unwarranted. First, the court determined that the plaintiff's late disclosure was not justified, but did not harm the defendants. The court reasoned that the defendants were not harmed by the late disclosure because the defendants should not have been surprised that the plaintiffs would call certain experts based on the facts of the case. Second, the testimony at issue would not disrupt the trial. Finally, testimony from the treating physicians would be important to the jury in their determination of the case. However, the court did exclude portions of the plaintiff's safety expert that could potentially confuse the jury.

Bridget Daley Atkinson

14. *Statute of Limitations*

In *Walker v. ACAM Transp. Inc.*, 2024 US Dist. LEXIS 114111 (E.D. Pa.), the plaintiff exited his employer's parking lot at 6:15 a.m. in his own vehicle. At that time, a Jane Doe driver operating a tractor-trailer owned by her employer struck Walker's vehicle. The Jane Doe driver fled the scene of the accident without providing any information. Walker filed his complaint in Pennsylvania state court against the driver and ACAM Transport, Inc., which he believed to be the employer of the driver at the time of the crash. The plaintiff subsequently filed an amended complaint in which he added C.R. England Trucking as a defendant and averred that the tractor-trailer the Jane Doe driver operated was owned by her employer, defendant ACAM Transport, Inc. and/or C.R. England. C.R. England moved for summary judgment alleging that the statute of limitations had expired.

In response, the court held that the statute of limitations may be "equitably tolled." Under the theory of equitable tolling, a plaintiff may be afforded a toll of the statute of limitations if there is evidence a defendant actively misled the plaintiff with respect to their involvement. The court found that there was a factual dispute as to whether C.R. England actively misled the plaintiff since the Jane Doe driver, as an agent of C.R. England, fled the scene, did not alert Walker to the company's involvement, and took no steps to inform him of C.R. England's potential liability.

The court further held that the amended complaint related back to the original complaint pursuant to FRCP Rule 15(c)(1)(B), since the claim in the amended complaint arose out of the same incident as the original complaint, and there was evidence that C.R. England, through its employee, the tortfeasor, knew about the accident the day it occurred and should have had a reasonable expectation it could be sued. Accordingly, the court denied C.R. England's motion for summary judgment.

Weddington v. Central Express LLC, 2024 US Dist. LEXIS 36501 (E.D. Va.) arose from a dispute over recovery for an insurance claim related to a stolen 1999 Freightliner Classic XL. The plaintiff alleged that after an arrest in 2015, he lost possession of his truck, which was towed to an impound lot and subsequently went missing. The plaintiff reported the theft to his insurance carrier which denied his claim in 2016. In 2018 or 2019, the truck was found stripped of its parts. Based on identifying features of the truck, it was determined that the defendant had possession of the truck at the time, and the plaintiff asserted a claim for conversion.

Here, the court held that the statute of limitations had expired. In Virginia, one can bring a claim for conversion within five years from the date the cause of action accrues. As plaintiff lost possession of his truck in 2015, the claim for conversion would accrue in 2015. Accordingly, plaintiff had until 2020 to bring suit to recover on his claim. Since plaintiff did not bring suit until 2021, one year after the limitations period expired, the court dismissed his complaint.

C. J. Englert

15. Punitive Damages

Drake v. Old Dominion Freight Line, Inc., 2024 US Dist. LEXIS 200521 (E.D. Missouri), arose from a motor vehicle accident involving defendant's semi-truck. The defendants moved for summary judgment dismissing the claim for punitive damages.

The court explained that when a defendant knew or had reason to know that there was a high degree of probability that its action would result in injury, punitive damages may be appropriate in a negligence action. The defendant's conduct must be tantamount to intentional wrongdoing where the natural and probable consequence of the conduct is injury. With such a showing, a plaintiff can recover for aggravating circumstances based upon the defendant's complete indifference to or conscious disregard for the safety of others. Under Missouri law, evidence of failure to follow motor carrier regulations and industry standards is permitted to support an award of punitive damages against commercial motor carriers.

Here, however, the court ruled that the plaintiffs had not presented any evidence upon which the court could conclude that clear and convincing evidence would support a finding that the defendant acted with reckless disregard for the safety for others under the circumstances. The defendant merely did not see the plaintiff's vehicle when he was crossing the intersection. The plaintiffs did not allege any facts suggesting the defendant engaged in any reckless conduct that resulted in his failure to see the plaintiff. For example, the plaintiff does not claim that the defendant was distracted by any activity inside his cab at the time of the accident. For these reasons, the court concluded the plaintiffs could not establish claim for punitive damages.

In *Bussa v. Ace. Am. Ins., Co.*, 2024 US Dist. LEXIS 180312 (N.D. Ind.), the defendant's semi-truck driven rear-ended the plaintiffs, who sought punitive damages and requested to amend their complaint to include allegations that the driver falsified his hours, exceeded his allotted hours, and ignored cautionary construction zone signs prior to the accident. The court found that a driver who purposefully falsifies driving records and drives in excess of allowable hours could plausibly be found to have acted willfully and wantonly, or even grossly negligent. Thus, the court permitted amendment of the complaint.

Booker v. P.A.M. Transp., Inc., 2024 US Dist. LEXIS 104069 (D. N.M.), arose out of an accident in which the plaintiff was struck by the defendant's semi-truck while at a truck stop in New Mexico. The defendants moved for summary judgment dismissing the claim for punitive damages, arguing that there was no evidence that defendant driver acted with a culpable mental state. Under New Mexico law, punitive damages may be awarded if the conduct of an individual defendant is found to be malicious, willful, reckless, wanton, fraudulent or in bad faith. Punitive damages may also be awarded against an individual's employer if the individual defendant was acting in the scope of his employment at the time of the conduct. The court determined that the motion was premature, as the evidence was not available or sufficiently developed, and denied the motion without prejudice to refile after discovery.

Bridget Daley Atkinson

16. Forum Non Conveniens

In *McDonald v. Transco, Inc.*, 2024 Tex. App. LEXIS 6875, the Texas Court of Appeals affirmed a ruling that plaintiff's lawsuit arising from a Florida accident should be dismissed on *forum non conveniens* grounds, as Florida was deemed a more convenient forum for the case. Defendants Transco, Inc. and McLane Company, Inc, both Texas corporations, had sought dismissal of the case on the grounds that the plaintiff, a Florida resident, had no standing to bring the suit. The court ruled that, although the plaintiff had standing, Florida law would apply to the case, and, based on an analysis under Texas Civil Practice and Remedies Code §71.051(b), the case should proceed in a Florida court.

Analyzing the six factors in the code, the court reasoned: (1) an alternative forum existed in Florida, and the defendants not only consented to jurisdiction in Florida, but the Florida long-arm statute made them subject to jurisdiction as the alleged negligent act occurred in Florida; (2) Florida state courts could provide an adequate remedy to the negligence alleged in the action; (3) as the most relevant witnesses (law enforcement officers, medical doctors, etc.) were located in Florida and not Texas, the defendants would suffer a substantial injustice in defending against these claims as those witnesses could not be subpoenaed under Texas law; (4) Florida could easily exercise jurisdiction over the defendants; (5) both the private (i.e., cost of litigation) and public (i.e., state) interests favored Florida as the correct forum, given that most, if not all, witnesses were located in Florida and; (6) the accident giving rise to the action occurred in Florida and involved Florida residents so that, by proceeding in Florida, claims against all potential defendants could be consolidated, thus avoiding duplicative litigation.

C. J. Englert

17. Default Judgments

The plaintiff, HWS, is a company that provides towing and recovery services. BWE is a duly licensed motor carrier authorized in interstate operations by the FMCSA. In *HWS, LLC v. Bwe Inc.*, 2023 US Dist. LEXIS 231830 (E.D. Va.) a BWE tractor-trailer caught fire while operating in Virginia. Virginia State Police called HWS to help remove the burned tractor and trailer.

Thereafter, HWS stored BWE's tractor and trailer at their own cost. HWS's efforts to return the equipment to BWE were not responded to. HWS sued BWE seeking reimbursement, which BWE did not answer. Accordingly, HWS sought a default judgment against BWE and the court found that HWS was entitled to the reimbursement costs plus interest and attorney's fees under Virginia law. (See the section on Predatory Towing for other towing cases.)

Agcs Marine Ins., Co. v. At Trucking Corp., 2023 US Dist. LEXIS 233305 (E.D. Tenn.) began with a shipment of resin bound to a client of the plaintiff in Pennsylvania. The defendant, a trucking company, was hired by the plaintiff for the shipment. The defendant's truck suffered a flat tire in transit. The defendant thereafter hired a third party to finish the shipment. The third party was involved in a collision and the cargo was damaged. The defendant had contractually agreed to be responsible for the cargo and to insure the cargo against any losses and was forbidden from contracting out the shipment to a third party. The court, applying Tennessee law, found that the defendant had breached its contract with the plaintiff, and, as the defendant never answered the complaint, a default judgment was entered and upheld.

United Specialty Ins. Co. v. Portillo, 2024 US Dist. LEXIS 181135 (E.D. Cal.) arose out of an incident where one of the drivers for Portillo's unincorporated trucking company asked permission to divert his Kenworth truck away from an area with high winds. The company denied permission and the driver's truck overturned, injuring him. The driver sued Portillo's unincorporated company and its incorporated successor.

The insurance company assumed the defense of the trucking company subject to a reservation of its rights. The insurance company then filed this action seeking a declaratory judgment that the driver's injury was not covered by the trucking company's policy under an "employee exclusion." No defendant ever responded in the case and the insurance company moved for a default judgment.

The court expressed the general disfavor for default judgments. It then examined the possibility of default under the following factors from the Ninth Circuit Court of Appeals: (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's claim, (3) the sufficiency of the complaint, (4) the sum of money at stake, (5) the possibility of a material dispute, (6) whether the defendant's failure to answer was excusable negligence, and (7) the strong public policy favoring decisions on the merits. Applying these factors, the court found that default judgment was appropriate. (Barclay Damon was one of the firms involved in the case for the insurer.)

Alec Herbert

18. Graves Amendment

There were a few notable decisions in 2024 concerning the Graves Amendment, named for Congressman Sam Graves, a Democrat from Missouri. This discrete amendment to the 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, limits the liability of companies in the business of leasing vehicles by preempting state law vicarious liability claims. Specifically, the amendment precludes such claims asserted against an owner or lessor of a motor vehicle for the lessee's wrongdoing. However, the Graves Amendment has a key limitation: it will not preempt state law if liability is based on the owner's or lessor's negligence or fault.

We discuss two cases below. In *Estate of Dotson v. Viewpoint Leasing Inc.*, Civil Action No. 24-255, 2024 US Dist. LEXIS 214433 (D.N.J. Nov. 25, 2024), the court considered application of the Graves Amendment in deciding defendant Viewpoint's motion to dismiss. Viewpoint was in the business of leasing dump trucks.

The case concerned a New Jersey motorist who was killed when his car was hit head-on by the driver of a rented dump truck.

According to the operative complaint, GWG Trucking leased trucks from Viewpoint. On May 2, 2022, GWG Trucking employee Brandon R. Loyle, operating a Sterling dump truck, which GWG Trucking leased from Viewpoint, failed to maintain control of the truck, crossed the double-yellow line of a two-way street, and hit the plaintiff's decedent's vehicle head-on. The decedent passed away from his injuries. The plaintiff alleged that poor maintenance and defective mechanics caused the accident. The plaintiff also alleged that Viewpoint was responsible for the death because it leased the truck to GWG Trucking and negligently allowed Loyle to operate the vehicle. The plaintiff asserted claims against Viewpoint for wrongful death, negligence, and gross negligence. Viewpoint then moved to dismiss, arguing, among other things, that the Graves Amendment preempted the plaintiff's claims that Viewpoint is liable for the conduct of its lessee.

The Graves Amendment states:

[a]n owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if

(1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and

(2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).

49 U.S.C. § 30106(a).

In considering whether the Graves Amendment precluded the plaintiffs' claim against Viewpoint, the court noted that the amendment does not totally absolve rental vehicle companies of liability but merely eliminates vicarious liability based on ownership alone. The court held that the plaintiffs' claims against Viewpoint were not barred because they were expressly predicated on allegations of negligent maintenance which were supported by an expert's opinion. "[T]he owner of a vehicle can be liable without offending the Graves Amendment if there is negligence or wrongdoing on the part of the owner," the court summarized. At this preliminary stage of summary judgment, the court found that plaintiffs had pleaded sufficient facts to meet their initial burden.

The court held that the Graves Amendment does not preempt the plaintiff's negligence and gross negligence claims against Viewpoint, because the plaintiff expressly alleged that the truck that killed the decedent had not been properly maintained, which Viewpoint knew or should have known about, and that the vehicle had been neglected. The court noted that the plaintiff was not alleging Viewpoint was vicariously liable, but rather specifically alleged that Viewpoint breached its duty of care "regarding their maintenance of the equipment and their inaction on issues regarding the trucks that they leased to GWG Trucking." The Graves Amendment expressly permits such claims.

The court recognized that the Graves Amendment would preempt state law claims that sought to impose liability on a lessor for the lessee's or its employees' negligence. However, the plaintiff alleged "sufficient facts that [Viewpoint] failed to maintain or properly service the trucks, allegations that plausibly support a claim for negligence." Accordingly, the court held that "[a]t this stage of the proceedings, the Court need not inquire further into whether [Viewpoint was] negligent. Rather, the Court conclude[d] that Plaintiff met her burden under [relevant federal pleading standards] to plead plausible claims, and application of the Graves Amendment does not warrant dismissal" of the complaint.

In the second case, the court considered a motion for summary judgment. In *Brown v. Brooks*, Civ. Action No. 23-2966, 2024 US Dist. LEXIS 199611 (E.D. Pa. Nov. 4, 2024), the court analyzed how the Graves Amendment affected a plaintiff's state-law claims for negligent entrustment and failure to inspect and maintain a truck leased by Penske to Mayflower Textiles.

The case arose out of a motor vehicle collision on I-95 in Philadelphia. Defendant Dashawn Brooks, an unlicensed driver, was operating a truck rented by his employer, Mayflower Textile Services, from Penske. Penske moved for summary judgment. In opposition, the plaintiffs argued that: (1) Penske knew or should have known that Brooks was incompetent to operate the tuck and (2) Penske negligently maintained the truck, resulting in a brake defect that contributed to the collision.

Because the plaintiffs pled negligent entrustment on the part of Penske, the court examined the claim without regards to the Graves Amendment because the complaint alleged Penske was directly negligent. For Penske to prevail on this point, the court noted that the plaintiffs would have needed to limit their allegations to claims of vicarious liability against Penske. After ruling against Penske on the Graves Amendment issue, the court discussed whether the plaintiff presented sufficient evidence to defeat Penske's summary judgment motion. Reviewing the elements of plaintiffs' Pennsylvania state-law claims, the court granted Penske's summary judgment motion because plaintiffs presented insufficient evidence to create any genuine issue of material fact, even though the Graves Amendment was inapplicable.

Penske argued that the plaintiffs failed to present sufficient evidence that Penske knew that Brooks was an unlicensed driver. The plaintiffs argued that Penske had a longstanding relationship with Mayflower Textile and, therefore, should have known and intervened. The court held that the plaintiffs' claim that Penske had any control over Mayflower's drivers was merely speculation and dismissed their negligent entrustment cause of action.

Turning to the failure to maintain claim, the court again examined the cause of action without regard to the Graves Amendment, which only bars suits based solely on ownership of a rental vehicle. The court found that Penske complied with maintenance schedules established by the Department of Transportation. Because the vehicle was not equipped with any mechanism to continuously and systematically transmit vehicle information to Penske, the only way Penske could have had notice of a dangerous condition was from the lessee. As Mayflower had not put Penske on notice of a dangerous condition in the vehicle's brakes, Penske again succeeded on summary judgment regarding the plaintiffs' failure to maintain claim.

The *Brown* decision illustrates that a Graves Amendment analysis is limited to the four corners of the operative pleading, i.e., it is akin to a motion-to-dismiss analysis, not a sufficiency-of-the-evidence analysis. Put simply, if the complaint fails to allege direct negligence claims against a lessor of vehicles, courts will apply the amendment to preclude a plaintiff's state-law vicarious liability claims, even if the underlying motion is one for summary judgment.

Alec Herbert and Ian Linker

19. Insurance Coverage

In January, New Jersey statute P.L. 2023. C. 276 was signed into law by the governor. Taking a step that USDOT has been considering for some years but has not yet acted upon, the New Jersey legislation increases the required insurance for certain commercial motor vehicles (as defined at N.J.S.A. 39:3-10.11) to $1.5 million, well in excess of the federal requirement for most motor carriers. The $1.5 requirement applies to trucks with a gross vehicle weight rating of over 26,001 pounds garaged in New Jersey. Those with a GVW rating of 10,0001 to 26,001 pounds will require limits of $300,000. We are not aware of any other states that have followed New Jersey's lead as yet but if USDOT does not do something similar soon we can expect other states to act individually. So far as we can tell no court decisions have weighed in as yet as to how the legislation is to be interpreted. The statute permits aggregation of different forms of financial security. The statute is directed to the owner or registrant of the vehicle; what will happen we wonder if the insured employs two policies to meet the limit and one of them , for whatever reason, is not in effect on the date of loss. Will the remaining insurer be obligated to provide the full mandatory amount?

Perhaps the most opaque provision of the ISO motor carrier coverage form is what we call the "reciprocity clause," which is found immediately after the "Who is an Insured" section which it modifies. That provision was the subject of a decision by the Ninth Circuit Court of Appeals in *American Sentinel Insurance Company v. National Fire & Marine Ins. Co.*, 2024 U.S. App. LEXIS 7289 (9th Cir.). Although there is a paucity of cases discussing the reciprocity clause, the Ninth Circuit opted not to publish the decision in the formal reporter and denied it precedential value.

American Sentinel insured Big Brother Transportation; National insured Tengfei Trucking. Big Brother leased a trailer to Tengfei that Tengfei attached to one of its covered tractors. As such, under the Who is Insured clause, Big Brother was an additional insured under the National policy.

National, though, argued that the reciprocity clause removed Big Brother from the status of an insured. The provision reads as follows (there are some differences in language depending on which edition of the ISO form is used.)

However, none of the following is an "insured":

> (1) Any "motor carrier" for hire and his or her agents or "employees"…
>
> (b) If the motor carrier is not insured for hired "autos" under an "auto" liability form that insurer on a primary basis the owners of the "autos" and their agents and "employers" while the autos are leased to that "motor carrier" and used in his or her business.

National argued (as we have on behalf of other clients in similar cases over the decades) that Big Brother failed the reciprocity clause because its policy with American Sentinel did not include hired car coverage. National's understanding of the policy language was that Big Brother could not qualify for coverage in this case if, in a reciprocal case, (Tengfei or some entity leasing a vehicle to Big Brother) would not be entitled to primary coverage under the American Sentinel policy. Since American Sentinel did not cover hired autos, Big Brother failed the reciprocity test.

The Ninth Circuit, though, interpreted the clause very differently, finding that it simply did not apply in this scenario. The provision applies, the court held, only where Tengfei actually loans or leases one of its vehicles to another trucker. (Here, remember, Tengfei was the borrower.) In such a case, that trucker which borrows or leases *from* Tengfei is entitled to coverage only if it has reciprocal coverage covering Tengfei on a primary basis. Since Tengfei was on the receiving end here, the provision did not apply.

Our firm had been hired to present oral argument on behalf of National before the court opted to decide the case on the papers alone. Had we the opportunity to argue, we would have attempted to establish, based on prior case law, that the provision applied whichever side of the transaction the named insured was in. The court firmly rejected that approach.

Not that many years ago truck drivers, as a class, were viewed by society as a careful and professional cadre. (Some of those good feelings returned, if only temporarily, during the Covid epidemic.) With the retirement of experienced drivers and the struggle in recent years to replace them (the famous driver shortage) the overall quality of truck drivers has, in common estimation, diminished. Underwriters have not missed this development.

Until the adoption of the ISO motor carrier form, almost any driver operating a covered auto with the motor carrier's permission would have qualified as an insured. Coverage was somewhat constricted when the motor carrier form replaced the truckers form in common use. And more recently, underwriters have been demanding the right to refuse coverage when someone other than an approved driver is operating the unit. Such limitations can manifest in named driver exclusions or in a list of approved drivers. In order to motivate the motor carrier to engage only such drivers' coverage for all insured is voided if a non-approved driver is operating even a covered auto at the time of the accident.

There is a potential tension here, though, since nearly all states have financial security statutes which ostensibly require coverage for permissive users of covered autos, at least up to certain mandatory limits. We can anticipate that some courts will question or limit the enforceability of driver exclusions. In our practice we have encountered several state statutes which could interfere with this type of requirement.

However, to date, most of the decisions on point have enforced the requirement for approved drivers.

In *Prime Property & Cas. Ins. Co. v. Coexi Trucking, LLC*, 2024 US Dist. LEXIS 98688 (M.D. Fla.) the court addressed an endorsement that has become popular in recent years among more than few insurers. The endorsement excludes coverage, even for the named insured, if (even) a covered auto was operated at the time of the loss by someone other than a driver listed on the endorsement and, by implication, approved by the insurer.

The Prime policy provision does not stop there. (Many similar provisions do essentially stop there.) Prime's goes on to provide that excluded drivers (presumably those not listed as approved drivers) are entitled to coverage required by law. In other words Prime is carefully attempting to avoid any collision with mandatory insurance laws. The court found that since the Coexi driver was not listed on the schedule of authorized drivers, Prime was excused from any duty to defend or indemnify the insureds. The court made no reference to the minimum limits language.

Most of the decisions relating to this sort of exclusion have upheld the insurer's position denying coverage; with the increasing use of this sort of language, whether incorporated into the coverage grant of the policy or in a separate endorsement, we expect to see many opportunities for courts to consider the issue in the near future. Several states, on the face of things, have statutes which could make it difficult to enforce this sort of limitation to coverage.

In *America Sentinel v. Day & Night Trucking*, 2024 US Dist. LEXIS 171037, (W.D. Mo.), the well-known freight broker TQL claimed that in light of the broker-carrier agreement it had entered into with named insured motor carrier Day & Night, it was entitled to insured status under the American Sentinel policy. The insurer denied that, and argued in the alternative that since it had interpleaded its limits and the money had been distributed, TQL's claim was moot. American Sentinel also asserted that having exhausted its limits by paying the bodily injury limits it had no duty to defend Day & Night's against TQL's claim: The court found for the insurer on the basis that the policy limits had been exhausted.

Cases that make ostensibly basic but important principles rarely make it through multiple appeals and receive the imprimatur of a state supreme court, but that is what happened in *Kuhn v. Owners Ins. Co.*, 241 N.E. 3d 397 (Ill.). A driver for Farrell Trucking negligently collided with a school bus containing members of a student basketball team, killing the coach and an adult volunteer and injuring several of the players. The Farrell policy with Owners provided liability limits of $1 million. The policy scheduled three semi-tractors and four trailers.

The plaintiffs argued that the limits of the seven vehicles should be stacked, meaning that $7 million, not $1 million, would be available to the various claimants. Astonishingly (or perhaps not), the trial judge agreed.

The intermediate appellate court reversed the trial court's decision, and the Illinois Supreme Court agreed that only $1 million was available for the loss. The standard language of ISO forms (which were involved in the case) and other forms, preclude this kind of stacking.

Ortez v. Penn National Security Ins. Co., 2024 N.C. App. LEXIS 1017, enforced a standard employee exclusion. Ortez, an employee of named insured was driving the employer's covered auto negligently and caused an accident (also involving a second vehicle) in which a fellow employee, Estes, was killed.

The estate sued Ortez as well as the driver and owner of the other vehicle. Judgment was entered against Ortez in the amount of $9.5 million. Ortez then sued Penn National adding claims for unfair and deceptive trade practices and the court applied treble damages and entered judgement against the insurer for just under $29 million.

The appellate court reversed the judgment. In light of the fellow employee exclusion, there was no duty to defend Ortez. There was an interesting twist in the case. For tactical reasons (now surely being rethought) the only claim plaintiff filed against Ortez was for "reckless, willful, and wanton conduct." Under North Carolina law if reckless, willful, and wanton conduct is found, an injured worker can recover both under worker's compensation and in tort. That is, the normal worker's compensation shield does not protect the fellow employee whose acts fall within this category.

Intentional torts, though, can be excluded from coverage. Worker's compensation provides protection to workers injured through negligence. Under North Carolina law, an auto liability policy can exclude coverage for employee injuries so long as there are worker's compensation benefits available. Here the estate alleged only willful acts against Ortez and make no allegations against the employer of Ortez and Estes. The allegations against Ortez fell outside the worker's compensation law and thus outside Penn National's coverage.

The decision reversed a preposterous trial court ruling but raises more questions of its own. We wonder why the court did not address the intentional tort exclusion, for one. We assume, in addition, that what the court meant was that, had the complaint alleged regular negligence against Ortez, the employee exclusion would not have been enforceable because the employer failed to provide worker's compensation coverage. However, because worker's compensation would not have covered the willful tort anyway, the fellow employee exclusion was enforceable in this case.

Plaintiff insurer in *Prime Ins. Co. v. Berkshire Hathaway Homestate Ins. Co.*, 2024 US Dist. LEXIS 21334 (W.D. Okl.) made a mistaken argument that we often encounter and that the court called it on. Prime insured the motor carrier lessee, while Homestate insured the lessor—which had agreed in the lease agreement to indemnify and defend the lessee. The vehicle qualified as a covered auto under the Homestate policy and the policy had an exception to its

contractual liability exclusion which meant that Homestate had coverage for its own insured. Prime was wrong, though, in asserting that its insured was directly entitled to defense and indemnification under the Homestate policy.

Canal Ins. Co. v. Sammons, 2024 US Dist. LEXIS 210172 (S. D. W.V.) held that no coverage was available under Canal's motor carrier policy when a road rage incident led to a violent confrontation with the respective vehicles stopped, and ended with the truck driver fatally shooting the other motorist.

Zurich Am. Ins. Co. v. Lakew, 2024 US Dist. LEXIS 182346 (W. D. Mo.) involved Zurich's $10 million auto liability coverage for Amazon, one of whose trailers was being hauled in interstate commerce by a motor carrier engaged by Amazon. At issue was the question of which state's law was to be used in interpreting the Zurich policy. Since Amazon's trailers are constantly moving across state lines, the choice of law determination is to be made not pursuant to Section 188 of the Restatement (Second) of Conflict of Laws, which provides the general rule, but under §193 which gives weight not only to the place of contracting and primary place of garaging, but also to the local law where a vehicle constantly on the move may be at the time of loss.

Ramos v. Progressive Specialty Ins. Co., 2024 US Dist. LEXIS (E. D. Pa.), drew a line between auto liability losses and general liability losses. Since the underlying complaint did not allege any connection between the auto and the loss, the court granted Progressive's motion that it had no duty to defend or indemnify its insured. And, in light if that, the court also dismisses the insureds allegation of bad faith.

Larry Rabinovich

All automobiles are vehicles, but, are all vehicles automobiles? Not in New Jersey, according to the state Supreme Court (*Goyco v. Progressive Ins. Co.*, 257 N.J. 313), which was presented with an increasingly common scenario—a collision between a "low speed electric scooter" and an automobile—and faced the deceptively simple question of whether the scooter rider was a "pedestrian" under New Jersey's No-Fault Act.

When Plaintiff Christian Goyco was struck by an automobile while using a Segway Ninebot KickScooter Max, a "low speed electric scooter," in November 2021, he turned to his automobile insurer for personal injury protection benefits, claiming that he was a "pedestrian" akin to a bicyclist under the New Jersey No-Fault Act while using his electric scooter and was thus entitled to coverage as a "pedestrian."

The New Jersey Act requires coverage in two scenarios: 1) when the claimant is "occupying, entering into, alighting from or using an automobile," and 2) when the covered individual is a "pedestrian," which is defined as "any person who is not occupying, entering into, or alighting from a vehicle propelled by other than muscular power and designed primarily for use on highways, rails, and tracks."

Goyco's arguments failed at trial, on appeal, and at the Supreme Court. Though Goyco was "occupying" his scooter when he got into the subject accident, the fact that the scooter was "propelled by other than muscular power"—by a "low speed electric motor"—Goyco was neither in an automobile nor a pedestrian—just a guy in a "vehicle" and without any insurance coverage for his injuries.

In *Sheppard v. Progressive Classic Ins. Co.*, 333 Ore. App. 39, the court addressed the question of "how much use is too much use?" if a policy contains a "regular use" exclusion. Kristina Sheppard, a wildland firefighter, was using a Oregon Department of Forestry vehicle provided only for employment purposes when, in 2018, she was injured by an uninsured motorist. Her personal insurance policy had $100,000 in uninsured motorist coverage, but, the same policy had a "regular use" exclusion, excluding from the policy any injury incurred while using a vehicle "owned by or furnished for the regular use of you."

Sheppard sought coverage under the UM portion of her personal policy, which was denied based on the "regular use" exclusion. On summary judgment, Sheppard showed that the vehicle was only provided to her for "the specialized use of fighting wildfires," was "required to keep a mileage log of the vehicle and was not allowed to use the vehicle for personal purposes." On the other hand, Sheppard did not have to ask her supervisor every time she needed to use the vehicle and could use it "as needed" for her official duties.

Analyzing the "regular use" exclusion—which tracked Oregon's statutory minimum requirement for UM coverage—the Court drew on an existing case denying coverage under similar circumstances under an identical provision. Concluding that Sheppard had a "right to the regular use of the vehicle in the sense that there is an expressed or implied understanding with the owner of the vehicle that the insured could have the use of the particular vehicle at such times as the insured desired, if available." In other words, the court of appeals held, the issue of whether a vehicle is "furnished for regular use" depends not on the context it's furnished, but the existence of the right to regularly use the vehicle.

Ben Zakarin

20. MCS-90

In a year filled with courts insisting that declaratory judgment actions filed by insurers were premature, the insurer in *Progressive Mt. Ins. Co., v. Yaobin Chen*, 2024 US Dist. LEXIS 21074 (N.D. Ga.), managed to litigate a declaratory judgment action to a successful conclusion against the one defendant who did not default. Yaobin was a truck driver for the insured trucking company who was severely injured after losing control of his rig and crashing head on into oncoming traffic. We gather that he was unsuccessful in any attempt to collect damages from the operator or insurer of the vehicle he crashed into.

Instead, Yaobin sued the trucking company he was working for, Season Seafood, insured by Progressive. Progressive filed a declaratory judgment action relying on various policy exclusions. For our purposes, the court held that Yaobin could not recover under the MCS-90 (even if he managed to win a judgment against Season) because the MCS-90 does not apply to injury to company drivers.

Progressive Cnty Mut. Ins. Co. v. Keechi Transp. LLC, 2024 US Dist. LEXIS 77696 (M.D. Fla) addressed whether a federal question is presented simply by virtue of the fact that the court will need to consider the applicability of the MCS-90. There was no diversity of citizenship, so federal question was the only way to establish subject matter jurisdiction for the federal court. Like others who have looked at the issue over the years, the magistrate concluded that the MCS-90 issue does not itself create a federal question and ordered that the case be dismissed. (See the Jurisdiction section for similar decisions.)

Even where a case is properly before a court, judges are not rushing to rule on whether an MCS-90 can be triggered. In *Lancer Ins. Co. v. L&Y Trucking LLC*, 2024 US Dist. LEXIS 102167 (N.D. Tex.), Lancer sought judgment declaring that since the accident involved a non-covered auto there was no coverage under the basic policy, that it therefore had no duty to defend or indemnify, and that there was no exposure under the MCS-90.

In response to plaintiff's motion to dismiss for lack of subject matter jurisdiction, the court delivered a split decision. Lancer was awarded judgment on its motion that it had no duty to defend its insured in the ongoing underlying tort action. Applying Texas law, though (*Erie v. Tompkins* for those who went through first year law school), the court held that the question of indemnification—as well as any exposure under the MCS-90—was not ripe for adjudication until the tort trial was completed, and granted plaintiff's motion to dismiss on these counts.

For much the same reason the court in *Hudson Ins. Co. v. Townsell*, 2024 US Dist. LEXIS 112330 (N. D. OK) declined to rule on Hudson's MCS-90 exposure. The court raised the issue itself. (Interestingly, unlike the *Lancer* judge, this court did grant judgment to the insurer on the question of indemnity under the basic policy, but insisted that the tort case be concluded before it would rule on the MCS-90.)

Of course, this reluctance by the courts affects both sides. In *Baca-Rios v. A-One Commercial Ins. RRG*, 2024 US Dist. LEXIS 84748 (W. D. Tex.) the claimant filed a declaratory judgment action against the insurer of the motor carrier whose driver had allegedly caused the underlying accident. The tort action was still active. Claimants in Texas have no privity with the insurance company of the defendant (no direct actions are allowed), at least not until they have won a judgment against the defendant. (There are a few states which do permit "direct actions.") Accordingly, the magistrate recommended that the declaratory judgment action be dismissed.

These cases express what we see as an increasing tendency on the part of many courts to limit the scope of declaratory judgment actions. These days, when an insurer contemplates filing a declaratory judgment action it needs to weigh the possibility that the court will refuse to hear the most important issue(s) until after the tort case is decided.

To be sure, there were some decisions this year in which courts granted summary judgment to an insurer, including with respect to the MCS-90, on the basis of default even though the tort case had not been concluded. These included *A-One Commercial Ins. RRG v. Merino*, 2024 US Dist. LEXIS 67535 (C.D. Cal.) and *Knight Specialty Ins. Co. v. Rapid Freight Hauler, LLC*, 2024 US Dist. LEXIS 78632 (W. D. Tex.). Of course, the defaults in those cases were entered against the named insured and its driver only, not the claimant. We assume that there would be no *res judicata* effect as to the claimant.

Elsewhere in this update (Section 5) we discuss the plague of excess towing charges and steps being taken to mitigate the problem. One puzzling and disconcerting (for insurers) decision relating to a tow claim involved the MCS-90 and a default in favor of the towing company. The towing company sued for services provided (righting the overturned rig, cleaning up the spill,and ~~hijacking~~, I mean storing, the tractor and trailer). The motor carrier defaulted. There is no indication that the motor carrier's insurer was notified about the lawsuit. The court granted a default judgment which included a finding that the award (including the storage charges!) were within the definition of "public liability" as that term was used in the MCS-90. The insurer was not a party to the action, but this was clearly an attempt by the plaintiff's counsel, assisted by the court, to prevent the motor carrier's insurer from later arguing (in the plaintiff's recovery action against the insurer) that the MCS-90 does not require payment for some or all of the charges. This is rather an unsettling result and, at the very least should make insurers think twice before declining to defend their insured motor carriers in suits filed by towing companies.

An insurer's obligation under an MCS-90 endorsement is triggered by a final judgment against the named insured. (Not just any judgment of course; there are other pre-requisites.) In *Woldehawariat v. Trisura Specialty Ins. Co.*, 2023 US Dist. 238453 (S.D. Tex.) the issue was whether there had been a final judgment. The plaintiff had sued motor carrier JLT to recover damages suffered in a multi-vehicle accident and JLT defaulted. He then brought an action against the insurer to recover under the MCS-90. The insurer moved to stay the second action as it attempted to have the default in the state tort action reversed. The federal court administratively closed the recovery action until the state court fully resolved questions surrounding the default, including any appeal.

Larry Rabinovich

21. Bad Faith

In our annual update we tend to try to identify national trends. And much of our reporting involves federal statutes, regulations, and cases. However, it is important to remember the local factors, and perhaps that is most true when we think about bad faith litigation. The decision in *Yacullo v. AIG Property Cas. Co.*, 2024 US Dist. LEXIS 104758 (S.D. Cal), involved a first party claim for a lost engagement ring and had nothing to do with transportation. Nonetheless, we cite it because the insured claimant added a count to his complaint for bad faith in claims handling because the insurer had not completed its investigation within the time span mandated by state regulations. The insurer moved to dismiss the bad faith count because, it argued, any such violation involved no private right of action for the insured; the court rejected that out of hand. Violations of claims handling regulations may be considered by the jury in deciding whether the insurer's actions were unreasonable or without proper cause. Along the same lines in a third-party coverage dispute was the rejection by the court in *Rockefeller Univ. v. Aetna Cas. & Sur. Co.*, 217 N.Y.S. 3d 562 (1st Dept.) of the insurer's motion to dismiss; the court permitted the bad faith claim (failure to provide discovery to plaintiffs, failure to make prompt coverage decisions, etc.) to proceed.

Those who litigate or adjust claims for bodily injury against motor carriers are aware of the increased pressure caused by early policy limits demands by counsel for plaintiffs. Such demands are difficult enough to respond to when there is a single claimant and a single primary defendant. The matter becomes geometrically more complex when there are multiple plaintiffs each seeking limits and multiple insureds (some of whom have their own insurance but who are ostensibly insureds under your policy as well) seeking protection. See *Garcia v. GEICO Cas., Co.*, 2024 US App. LEXIS 26507 (9th Circuit) which found no bad faith where the insurer declined to settle on the grounds that plaintiff was refusing to release all potential insureds.

In some states it is permissible to select the most aggrieved plaintiff or to favor one insured over another under certain circumstances and failure to do so could be bad faith. In other states if you *do* so it could be bad faith. Some states permit the insurer to throw up its hands and deposit its limits with the court. In *Cutting Edge Tree Pros v. State Farm Fire Claims Co.* (E.D. Pa), the insured argued that the insurer had committed bad faith by failing to interplead its limits. The court found for the insurer in that setting. But in *Baldwin v. Standard Fire Ins. Co.*, 238 N.E. 3d 655 (Ind. App.) the court assessed the insurer's interpleader filing as done out of self-interest.

Traulsen v. Cont'l Divide Ins. Co., 2024 Wash. App. LEXIS 1350, arose out of a trucking accident causing severe and permanent injuries to the pedestrian plaintiff in the underlying tort action. The defendant insurance company had issued a commercial auto liability policy to its named insured with a $1 million liability limit. (Our firm was involved in this matter at an early stage for another insurer).

Almost a year after the accident, the insurer offered to pay the plaintiffs the policy limits in exchange for a full release of all claims against the insureds and "dismissal of the lawsuit." The plaintiff rejected the offer. The parties then stipulated to arbitration. The arbitrator entered an award in excess of $10.5 million against the insured, which the court confirmed. Shortly thereafter, the insurer again offered the plaintiff the $1 million policy limits but insisted on a full release, which would have made it impossible for the plaintiff to collect the rest of the judgment. The plaintiff's counsel declined the offer. The insurer interpleaded its limits and filed a declaratory judgment action in federal court which was quickly stayed pending the result of the state court decision.

Plaintiff then reached an agreement with the insureds, who agreed to assign to the plaintiff their rights under the policy. Suit was filed against the insurer. After reviewing competing motions for summary judgment, the lower court granted the plaintiff's motion in part. The insurer was found to have acted improperly when it did not pay its limits promptly after the court endorsed the arbitration award and judgment was entered against the insured. However, the court denied the third-party bad faith claims. Both parties appealed.

The Court of Appeals affirmed. The decision is long and complex, and we offer only a cursory summary. Like insurers in other states, "[i]nsurers in Washington have a duty to act in good faith and to deal fairly with their insureds. To establish bad faith, an insured must prove that the insurer owed a duty, that it breached its duty, that the breach was unreasonable, frivolous, or unfounded, and that the breach proximately caused the insured damages." (In our experience, and in the view of colleagues in other firms, Washington State is a particularly difficult venue for insurers.)

The plaintiff argued on appeal that the insurer's conduct constituted bad faith for the following reasons: (1) refusing to disclose its insureds' policy limits; (2) unreasonably delaying settlement for policy limits and refusing to allow its insureds to settle absent a full release from liability; and (3) failing to pay the policy's limits once the trial court confirmed the arbitration award. The plaintiff thus demanded that the full arbitration award should be paid by the insurer. On the first issue (declining to disclose policy limits) the court agreed with plaintiff that this failure could have constituted bad faith as the insurer seems to have placed its own interests above those of the insured. The court reversed summary judgment on that issue and sent the case back to the trial court. It also reversed the lower court's holding that on the evidence the plaintiff could not show that it had been harmed by the handling of the claim. The trial court will now need to consider whether the insurer's actions will require it to pay the significant excess judgment.

The insurer had a happier result in *Chiaccheri v. Zurich Am. Ins. Co.*, 2024 US Dist. LEXIS 130488 (D.N.J.), which arose out of a motor vehicle accident. At the time of loss, plaintiff was driving a motor vehicle, owned by his employer and insured by a policy issued to the employer. The driver of the other vehicle in the accident maintained insurance on his own auto.

The plaintiff sought underinsured motorist coverage under his employer's policy with Zurich which had liability limits of $2 million, but which reduced UM/UIM limits to $15,000 by endorsement. Since the tortfeasor had limits of $100,000 which was offered to the plaintiff and accepted, Zurich insisted that it had no exposure. (When the tortfeasor's limits exceed the UM/UIM limit no UIM payment is owed.) The plaintiff insisted, though, that Zurich's UM/UIM limits were $2 million—which would have resulted in a $1.9 million UIM payment. The plaintiff asserted that by insisting that it had reduced UIM limits, it had acted in bad faith.

Under New Jersey common law, a plaintiff asserting bad faith must show that there were no "debatable reasons" for the "denial of the benefits." The plaintiff had also asserted a bad faith claim pursuant to the New Jersey Insurance Fair Conduct Act., N.J. Stat. Ann. §17:29BB-1 ("IFCA"). Under the IFCA, a plaintiff who is entitled to underinsured motorist benefits "may sue the insurer for 'an unreasonable delay or unreasonable denial of a claim for payment of benefits' under the policy."

In denying the plaintiff's summary judgment motion and granting the insurance company's motion, the court held that the plaintiff's bad faith claim failed as a matter of law, because there was no underinsured motorist coverage available to plaintiff under the policy, a "predicate for bad faith," and the company acted reasonably in denying coverage throughout the claims process. (The court alluded to the ongoing issue of step-down clauses in UM policies but held that the Zurich provision reducing the UM limits to $15,000 was perfectly legal.) Under the circumstances there was no possibility of sustaining a bad faith claim.

For a close call, a $29 million judgment against an insurer largely made up of a bad faith case reversed because of a finding of no coverage, see the *Ortiz v. Penn National* case discussed in the "Insurance Coverage" section (Section 19).

Ian Linker and Larry Rabinovich

22. FMCSA Watch

On the regulatory front, 2024 was another busy year for the Federal Motor Carrier Safety Administration (FMCSA or "agency"). Highlights of actions taken by the agency are summarized below.

FMCSA issued several orders declaring various motor carriers and drivers to be imminent hazards to public safety and ordered the carriers to immediately cease all interstate and intrastate operations. These actions were taken as a result of violations of safety standards, including drivers driving under the influence of alcohol, ignoring directives made after vehicle inspections, and driving erratically. FMCSA punished the drivers and/or carriers depending on the severity and nature of the violation.

FMCSA also issued numerous rulings removing devices from the agency's list of registered electronic logging devices, or ELDs. These devices were placed on the Revoked Devices list due to the companies' failure to meet the minimum requirements established in the agency's regulations. FMCSA stated that it would send industry-wide emails to inform motor carriers that all who use these revoked ELDs must take the following steps:

- Discontinue using the revoked ELDs and revert to paper logs or logging software to record required hours of service data; and
- Replace the revoked ELDs with compliant ELDs from the Registered Devices list by a date certain.

Motor carriers have up to 60 days to replace the revoked ELDs with compliant ELDs. If the ELD providers correct all identified deficiencies for their devices, FMCSA will place the ELDs back on the list of registered devices and inform the industry of the update. Motor carriers who continue to use the revoked devices will be considered as operating without an ELD. Safety officials who encounter a driver using a revoked device on or after February 9, 2025 should cite 395.8(a)(1), and place the driver out-of-service (OOS) in accordance with the Commercial Vehicle Safety Alliance OOS Criteria.

In addition, FMCSA issued several Final Rules in 2024, including the following:

89 Fed. Reg. 13, 3577 (Jan. 19) – FMCSA updated the Medical Advisory Criteria published as an appendix in the Code of Federal Regulations (CFR). The appendix provides guidance for medical examiners listed on FMCSA's National Registry of Certified Medical Examiners (National Registry) on the applicability and interpretation of the physical qualification standards for operators of commercial motor vehicles. The advisory criteria in the appendix are also intended to provide recommendations and information to assist medical examiners in applying the standards, basic information related to testing, and matters to consider when making a qualification determination.

89 Fed. Reg. 115, 50235 (June 13) – FMCSA amended the Federal Motor Carrier Safety Regulations (FMCSRs) to incorporate by reference the most recent edition of the American Association of Motor Vehicle Administrators, Inc.'s Commercial Driver's License Information System (CDLIS) State Procedures Manual (SPM), version c.0. This rule requires all state driver's licensing agencies (SDLAs) to use this edition of the manual to follow standard administrative practices required by the states, and other jurisdictions using the SPM when participating in CDLIS. Version c.0 of the CDLIS SPM provides users with instructions on the

processes and procedures for using the information system.

89 Fed. Reg. 117, 51266 (June 17) – FMCSA amended the regulations governing the annual registration fees that participating states collect from motor carriers, motor private carriers of property, brokers, freight forwarders, and leasing companies for the Unified Carrier Registration Plan and Agreement for the 2025 registration year and subsequent registration years. Following a reduction in fees of an average of 37.3 percent over the two prior years, the fees for the 2025 registration year will be increased above the fees for the 2024 registration year by an average of 25 percent overall, with varying increases between $9 and $9,000 per entity, depending on the applicable fee bracket.

89 Fed. Reg. 162, 67560 (Aug. 21) – FMCSA amended its Hazardous Materials Safety Permits regulations to incorporate by reference the updated Commercial Vehicle Safety Alliance handbook containing inspection procedures and Out-of-Service Criteria (OOSC) for inspections of shipments of transuranic waste and highway route-controlled quantities of radioactive material. The OOSC provide enforcement personnel nationwide, including FMCSA's state partners, with uniform enforcement tolerances for inspections. Previously, the regulations referenced the April 1, 2023, edition of the handbook, and through this final rule, FMCSA incorporated by reference the April 1, 2024, edition.

In addition to these regulatory actions, FMCSA was involved in various litigations in 2024. In one of these lawsuits, the agency won a landmark judgment against a moving company for unauthorized transportation of household goods, in violation of FMCSA's registration requirements. On September 11, 2024, the US District Court for the Central District of California issued a final judgment against USA Logistics, Inc., ordering the company to pay $25,000 in fines to resolve multiple violations of FMCSA statutes and regulations. The final judgment stems from a lawsuit filed by the US Department of Justice, on behalf of the Department of Transportation against USA Logistics for repeated unauthorized transportation of household goods. As part of the final judgment, USA Logistics admitted all violations and agreed to obey the law in the future.

Another lawsuit involving FMCSA involved a notable procedural issue that was addressed in a decision by the United States Circuit Court of Appeals for the District of Columbia. *See Harris v. United States DOT*, 2024 US App. LEXIS 30915. The case involved a claim by a plaintiff alleging fraud and abuse of process by FMCSA based on certain actions taken by the agency. The plaintiff initially brought the suit in a District of Columbia Superior Court, which dismissed the case *sua sponte* (i.e., on its own without the need for a motion).

The plaintiff appealed to the DC Court of Appeals, and the agency filed a notice of removal of the case to federal court. The plaintiff asserted that the agency could not remove the case from a state *appellate* court because it was not pending in the state trial court. The United States Circuit Court for the DC Circuit disagreed and held in favor of the agency, affirming the dismissal of the claims. The court interpreted the removal statute, 28 U.S.C.S. §1442(a), to allow removal from state appellate courts based on the statute's text, purpose, and persuasive caselaw. The court reasoned that barring such removal would frustrate Congress's intent to provide a federal forum for federal officers and agencies. The court further held that the timeliness requirements of 28 U.S.C.S. §1446 are procedural claims-processing rules and not jurisdictional. Thus, the Court held, the dismissal of the plaintiff's claims was correct.

Finally, in other recent developments related to consumer protection in household goods, the House Transportation and Infrastructure Committee introduced a bipartisan bill in September to expand FMCSA's available enforcement tools by providing the agency with explicit authority to assess civil penalties for violations of commercial regulations, including household goods consumer protection requirements, and to withhold registration from applicants failing to provide verification details demonstrating that they intend to operate legitimate businesses. This bill has yet to be passed by either the House or the Senate.

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