MAKING TRACKS

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Moseley Marcinak Newsletter Contents

Supreme Court of Indiana Reaffirms Interstate Requirement for MCS 90 Endorsement

BY ROBERT "ROCKY" ROGERS

The Supreme Court of Indiana wasted no time in reversing a lower appellate court ruling, which had held that the federally-mandated MCS 90 endorsement applied to a purely intrastate non-hazmat trip within the State of Indiana. In *Progressive Southeastern Ins. Co. v. Brown*, 182 N.E.3d 197 (Ind. 2022), the Supreme Court of Indiana reversed the Court of Appeals of Indiana's decision, rendered less than a year before in the case of *Progressive Southeastern Ins. Co. v. B&T Bulk*, LLC, 170 N.E.3d 1125 (Ind. Ct. App. 2021). The Supreme Court of Indiana's ruling serves as a reaffirmation that one of the conditions for the MCS 90 to be triggered is that the trip being undertaken at the time of a loss must be interstate in nature.

The facts of the accident are straightforward. In 2017, an employee of a Mishawka, Indiana-based trucking company was pulling an empty trailer to pick up a load of concrete (non-hazmat) in Logansport, Indiana for delivery to South Bend, Indiana when he crossed the median and collided with another vehicle, which resulted in fatal injuries to the occupant of the other vehicle. The motor carrier held interstate motor carrier authority and often performed work in Indiana and Michigan. The motor carrier's insurance policy was a scheduled auto policy—meaning that for a vehicle to be a covered/insured auto it must be specifically described on the declarations page or otherwise qualify as an after-acquired, replacement, or temporary substitute auto. The involved tractor and trailer were not specifically described on the policy and the evidence established they did not qualify as an after-acquired, replacement, or temporary substitute auto. However, the policy included the federally-mandated MCS 90 endorsement, which is required on all insurance policies issued to an interstate motor carrier intended to meet the federal financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980.

In the declaratory judgment action filed by the insurer, the trial court ruled the insurer had no duty to defend or indemnify the motor carrier under the terms of the policy because the accident did not involve an insured auto, but that the MCS 90 applied and required the insurer to satisfy any final judgment rendered against the motor carrier. The insurer appealed the portion of the trial court's ruling holding the MCS 90 applied. On appeal, the Indiana Court of Appeals affirmed the trial court's ruling that the MCS 90 applied. The Indiana Court of Appeals reasoned that despite a majority of the courts addressing the issue having held the MCS 90 only applies to interstate transportation of property (i.e. "trip specific" approach), the enactment of Indiana Code § 8-2.1-24-18(a) applied the same requirements to intrastate transportation.[1] The at-issue statute incorporated the same federal financial responsibility requirement to purely intrastate transport within Indiana. The Indiana Court of Appeals surmised that in light of the statute, "in order to write policies in Indiana, [an insurer] had to comply with Section 18(a)'s requirement that the minimum levels of financial responsibility in 49 C.F.R. part 387 apply to intrastate transportation." Accordingly, the Indiana Court of Appeals held the MCS 90 was applicable and required the insurer to satisfy any judgment rendered against the motor carrier arising from the accident up to the amount of the endorsement--$750,000.

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[1] The Indiana Court of Appeals also held that the MCS 90 could be triggered when a tractor-trailer, while empty, is on its way to pick up a load. That issue was not addressed on appeal by the Supreme Court of Indiana.

On appeal, the Supreme Court of Indiana reversed the lower courts' rulings on the interstate versus intrastate requirement. Specifically, the Court pointed out that Section 30 of the Motor Carrier Act only applies to motor carriers transporting non-hazmat property in interstate commerce or carriers transporting hazmat property in intrastate commerce. *See* 49 U.S.C. § 31139 & 49 C.F.R. part 387. Accordingly, the Court held "section 30's financial responsibility requirements apply in only two circumstances: first, when a motor carrier transports property in foreign or interstate commerce; second, when a motor carrier transports hazardous property in foreign, interstate, or intrastate commerce." Because under the applicable enacting statutes, the MCS 90 only applied to motor carriers subject to Section 30, the MCS 90 could only apply in those limited circumstances. With respect to the Indiana statute, the Supreme Court of Indiana specifically noted that it incorporated by reference 49 C.F.R. part 387 "in full and does not amend any subparts or provide alternate definitions for interstate or intrastate." Accordingly, the above-discussed limitations under the federal statute and regulation (i.e. only two instances where MCS 90 is triggered) were also incorporated in full into the Indiana statute. Therefore, the Indiana statute did not expand the situations in which the MCS 90 is triggered beyond those two limited circumstances. Since it was undisputed between the parties that the motor carrier was engaged in a purely intrastate trip[2] and was not transporting hazardous materials at the time of the accident, the MCS 90 did not apply.

This decision is important because it reinforces the limited circumstances in which the MCS 90 endorsement is triggered. It is not merely enough that an accident involves a motor carrier holding interstate motor carrier authority or that the motor carrier has an MCS 90 endorsement on its insurance policy. For the MCS 90 to be applicable, the motor carrier must have been engaged in interstate commerce or transporting hazardous materials intrastate at the time of the accident.[3] Of course, this ruling is limited to the MCS 90 endorsement and does not specifically address any obligations upon an insurer under Form E/F endorsements, which are typically issued to satisfy any state-mandated financial responsibility requirements.

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[2] The Court did leave open the possibility that a purely intrastate trip could nevertheless qualify as interstate transport under either the trip-specific approach of the fixed-intent-of-the shipper approach but held that under these facts the at-issue trip was purely intrastate under either approach. Notably, the Supreme Court of Indiana did not rule on whether the trip-specific approach or the fixed-intent-of-the shipper was the appropriate test under Indiana law, reserving that issue for another day. However, it did reject the "public-policy" approach, which holds that the MCS 90 is triggered for any accident involving a federally-licensed interstate motor carrier, explaining this approach ignores the clear language and limitations contained within the applicable federal statutes and regulations governing the MCS 90.

[3] There are also other important triggering conditions for the MCS 90 to be applicable, which were not at issue in this case; those requirements include but are not limited to: (1) there is no other insurance available for the motor carrier in at least the federal financial minimum; and (2) the motor carrier is operating as a "for hire" motor carrier meaning it is transporting property belonging to another for compensation at the time of the loss. *See Carolina Ins. Co. v. Yeates*, 584 F.3d 868 (10th Cir. 2009) (en banc); *Martinez v. Empire Fire & Marine Ins. Co.*, 94 A.3d 711 (Conn. 2014); *OOIDA Risk Retention Grp., Inc. v. Griffin,* 2016 U.S. Dist. LEXIS 57469, C.A. No. 2:15-cv-98 (E.D.Va. Apr. 29, 2016).

Forgot About Dray?

BY WILSON JACKSON

In this global market, ocean freight companies are responsible for moving most traded goods at some point between the manufacturer and consumer. Three global alliances work together and control almost all of the ocean freight shipping industry. Specifically, these alliances control 80 percent of global container ship capacity and 95 percent of the East-West trade lines. [1] These alliances are made up of foreign owned companies.

The ocean shipping carriers raised their prices by as much as 1,000 percent during the COVID-19 pandemic. These costs pass through to American businesses and families and contribute to inflation. The U.S. House and Senate have both introduced bills to address problems that the transportation and logistics companies face on a regular basis in the global shipping industry. On March 31, 2022, the Senate passed overwhelmingly bipartisan legislation to reform the ocean shipping industry and lower costs for American farmers, businesses, and consumers.

The Senate version has several new rules that appear beneficial to motor carriers. [2] First, ocean carriers are required to certify that detention and demurrage charges comply with federal regulations. Failure to certify compliance will result in penalties and the burden has shifted to the ocean carrier to the reasonableness of the charges. Second, ocean carriers are prohibited from unreasonably declining opportunities for U.S. exports and report to the Federal Maritime Commission (FMC) on how many empty containers they are transporting. Third, the FMC is authorized to self-initiate investigations of ocean carrier's business practices. Lastly, the FMC is granted new authority to register shipping exchanges.

The House version is slightly different from the Senate version. It does not require ocean carriers to adhere to minimum standards reflecting best practices in the shipping industry. Likewise, ocean carriers are not prohibited from failing to furnish or cause a contractor to fail to furnish the facilities and instrumentalities needed to perform transportation services. There is no explicit prohibition of ocean carriers from declining export booking. And, there is no authorization for third-parties to intervene in the FMC's actions against ocean carriers for anticompetitive conduct.

Two ways that the ocean shipping carries are impacting motor carriers are through demurrage and box rules. Demurrage charges are fees owed for failing to load or unload cargo from a container within an agreed upon time. Box rules require truckers to use a certain trailer or chassis when hauling containers.

Detention and demurrage charges have become a serious problem for the transportation and logistics industry. These fees are often levied on cargo owners even when they cannot get access to their containers and, thus, prevents the cargo owners from moving the cargo. The FMC estimates that from July to September of 2021 eight of the largest carriers charged customers $2.2 billion in fees, which was a 50 percent increase on the previous three-month period. [3]

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[1] https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-lowering-prices-and-leveling-the-playing-field-in-ocean-shipping/
[2] https://www.commerce.senate.gov/2022/3/cantwell-applauds-unanimous-senate-passage-of-ocean-shipping-reformact#:~:text=The%20bipartisan%20Ocean%20Shipping%20Reform%20Act%20of%202022%20aims%20to,rising%20shipping%20fees%20facing%20consumers.
[3] https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-lowering-prices-and-leveling-the-playing-field-in-ocean-shipping/

Also, preventing motor carriers from engaging with other chassis vendors outside of the ocean carriers "approved" vendor list is contrary to established law and likely an antitrust violation. In previous similar situations, the Department of Justice has brought cases against ocean carriers for violations of antitrust laws.[4] Based on the restraints on trade, requiring motor carriers to use certain chassis vendors could constitute an antitrust violation.

It is also contrary to established maritime law when the ocean shipping carriers suspend or terminate a motor carrier's interchange privileges based on its use of chassis vendors other than those that are preapproved and the provisions of the UIIA. As described in *Sinotrans*, an ocean carrier's unreasonable termination or suspension of a motor carrier's interchange privileges violates Section 10 of the Shipping Act.[5] The Shipping Act Section 10(d)(1) requires ocean common carriers to "observe … just and reasonable regulations and practices relating to … receiving, handling, storing, or delivering property." Under the Shipping Act, the ocean carriers' requirement to use certain chassis vendors and preventing motor carriers from using other chassis vendors is an unjust and unreasonable practice.

Moreover, the Department of Justice recently announced that it successfully stopped a merger between two companies that manufacture cranes that move shipping containers on and off of ships throughout ports in the United States.[6] The merger would have harmed American consumers by reducing competition in the supply chain and would have put our global supply chain at risk. It is worth monitoring what the Department of Justice will do when it comes to monitoring the ocean shipping industry moving forward. The latest developments are generally beneficial to the transportation and logistics industry. We will continue to monitor these developments and encourage our clients to reach out if they have any questions.

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[4] *See United States v. Federal Maritime Com.*, 694 F.2d 793 (D.C. Cir. 1982) (finding the Department of Justice case moot as the agreement expired but finding a justiciable controversy when a number of ocean carriers agreed to fix rates and the Department of Justice brought the action despite the FMC's approval of the ocean carrier's agreement).
[5] *Transport Express, Inc. v. Sinotrans Container Lines Company, Ltd.*, Docket No. 06-10 (Federal Maritime Commission, January 12, 2007).
[6] https://www.freightwaves.com/news/us-uk-regulators-sink-merger-of-finnish-port-crane-makers

Changes to FMCSA Guidance on What Constitutes "Medical Treatment" Creates Impact on Carrier Accident Registers

BY STEPHANIE BESSELIEVRE

The FMCSA recently changed its guidance on what is considered "medical treatment" required to be included in a motor carrier's accident register. A motor carrier's accident register reflects its accident record and is required to be maintained for a period of 3 years after each accident. A motor carrier's accident record is utilized by the FMCSA in its Safety Measurement System (SMS). The SMS assesses motor carrier performance and compliance utilizing the following factors: Unsafe Driving, Crash Indicator, Hours-of-Service Compliance, Vehicle Maintenance, Controlled Substances/ Alcohol, Hazardous Materials Compliance, and Driver Fitness. Each of these factors are referred to as "BASICs." Motor carriers are then grouped by performance in each BASIC, and ranked by percentile, with lower percentiles indicating better performance in each BASIC. The FMCSA utilizes motor carrier performance in BASICs to identify motor carriers who are at a high-risk for crashes and intervenes accordingly. The change as to what qualifies as "medical treatment" could impact the Crash Indicator BASIC.

Under 49 CFR 390.5T, an "accident" is an occurrence involving a commercial motor vehicle operating on a highway in interstate or intrastate commerce which results in (1) a fatality, (2) bodily injury to a person who, as a result of the injury, immediately receives "medical treatment" away from the scene of the accident, or (3) one or more motor vehicles is towed from the scene of the accident. The change in FMCSA guidance involves the understanding of "medical treatment" in scenario (2). Question 27 under 49 CFR 390.5 and 390.5T previously indicated that a person undergoing an x-ray examination, other imaging such as tomography or CT, or given a prescription has received "medical treatment." As a result, the motor carrier had to answer "yes" when including information about medical treatment for a specific accident in its accident register. Thanks to a petition urging the FMCSA to adopt the definition of "medical treatment" used by the Occupational Safety and Health Administration, "medical treatment" no longer includes such imaging because those are considered "diagnostic procedures." Under OSHA'S definition, medical treatment means the management and care of a patient to combat disease or disorder and does not include the conduct of diagnostic procedures, such as x-rays and blood tests. FMCSA's adoption of the OSHA definition means so there is no longer a need for motor carriers to include such treatment in their accident registers. The new guidance makes no change regarding prescriptions however—the receipt of which is still "medical treatment," requiring inclusion in the motor carrier's accident register.

This new guidance went into effect February 25 of this year and will remain in effect for 5 years. It should be noted, however, that FMCSA regulatory guidance provides clarity but does not carry the force of law. That being said, the exclusion of such imaging from the term "medical treatment" effectively narrows the definition of "accident," benefiting motor carriers by reducing the accidents required to be listed on their accident registers and improving their BASIC scores in the process. Of course, the discoverability and admissibility of accident registers remains unchanged and, if anything, the FMCSA's recent guidance only strengthens that position.

What's My Age Again?: FMCSA's Safe Driver Apprenticeship Pilot Program

BY LESESNE PHILLIPS

On January 14, 2022, the Federal Motor Carrier Safety Administration ("FMCSA") announced its Safe Driver Apprenticeship Pilot Program. The program would allow individuals aged 18 to 20 to drive commercial vehicles subject to specific restrictions. This program comes in response to the proposal by the FMCSA in September of 2020 by the Trump Administration, and the program is mandated by the Infrastructure Investment and Jobs Act ("IIJA"). Overall, the program allows for individuals aged 18 to 20 to drive a commercial motor vehicle in interstate transportation under a motor carrier's authority while participating in the program despite being under 21 and having a "K" restriction on their Commercial Driver's License. These drivers are referred to as "apprentices." While this program presents opportunities for motor carriers to expand their pool of drivers, there are specific requirements that motor carriers must follow in order to meet the program's requirements.

Before diving into the requirements of this program, participation in the program is limited to 3,000 apprentices within the program at any given time. Inevitably, apprentices will either leave the program voluntarily or "graduate", which will allow more openings. However, based on the small number of apprenticeships available, if motor carriers are interested in this program, they should immediately begin working on meeting the requirements. Once the program is implemented, the FMCSA will publish an announcement on its website that applications are being accepted, along with forms and links to information on the program. In addition to the limited number of apprenticeships available, this program will only last for three years. Any motor carriers wishing to participate in the program must register their apprenticeship programs with the U.S. Department of Labor. If motor carriers have serious interest in this program, the FMCSA suggests working with the Department of Labor while the FMCSA is finalizing the program and before the application period is opened. Approved motor carriers will be announced on the FMCA website to encourage potential apprentices to apply for employment directly with the motor carriers.

The requirements for this program are placed on both the motor carrier and the apprentice. First, the motor carrier must apply for the program, and after acceptance submit monthly data on the apprentice's driving activity, including miles traveled, duty hours, driving hours, off-duty time, and breaks. Additionally, the motor carrier must notify the FMCSA within 24 hours of (1) any injury or fatal crash involving the apprentice; (2) an apprentice receiving an alcohol-related citation in any vehicle; (3) an apprentice choosing to leave the program; (4) an apprentice leaving the motor carrier; or (5) an apprentice failing a random or post-crash drug/alcohol test.

Motor carriers must also only hire apprentices that meet the below requirements. If an apprentice becomes disqualified from the program for a major offense, serious traffic violation, railroad-highway grade crossing violation, or violation of an out-of-service order, the employer-motor carrier must notify the FMCSA immediately and remove the apprentice from the program. There are a multitude of disqualifying considerations established by the FMCSA limiting the types of motor carriers that can participate in the program. Some of the main disqualifications include: (1) motor carriers that have had any open enforcement actions in the previous 6 years; (2) motor carriers that have a driver Out-of-Service ("OOS") rate above the national average; (3) drivers that have a vehicle OOS rate above the national average; and (4) motor carriers that have a crash rate above the national average. After motor carriers have been accepted into the program, the FMCSA can disqualify any motor carrier upon violation of one of the above-disqualifications. Therefore, motor carriers entering into the program must closely monitor their crash rates and OOS rates to ensure they are not above the national average. It remains unclear whether the FMCSA will send a notice of disqualification to the motor carrier or whether the FMCSA will allow the motor carrier to contest any violations before disqualifying the motor carrier from the program. Based on this ambiguity in the rules, it will be important for motor carriers to monitor these requirements, and if found in violation of one of the requirements while in the program, understand what next steps must be taken.

As part of the motor carrier's implementation of the program, the motor carrier must ensure that the apprentice participates in two separate probationary periods. The first probationary period requires the apprentice to complete 120 hours of on-duty time, of which not less than 80 hours shall be driving time. After the first probationary period, the apprentice enters a second probationary period requiring completion of 280 hours of on-duty time, of which not less than 160 hours shall be driving time. During these probationary periods the apprentice must operate a CMV that has an automatic manual or automatic transmission, an active braking collision mitigation system, and a governed speed of 65 miles per hour at the pedal and under adaptive cruise control. The apprentice must also be accompanied in the passenger seat of the CMV by an experienced driver. As a practical matter, these requirements limit the number, type, and size of motor carriers that can participate in the program.

For the apprentice, there are many factors that can disqualify an individual from the program. This includes if the driver (1) had more than one license (except a military license); (2) had any conviction for a violation of military, State, or local law relating to motor vehicle traffic control (other than a parking violation) arising in connection with any traffic crash and the driver has no record of a crash in which they were at fault; (3) left the scene of a crash; or (4) has a conviction for reckless driving, texting while driving, or use of a telephone while driving. There are other disqualifications contained in the Federal Register, which warrant review if a motor carrier or driver contemplates participation in the program.

This program comes at the time of massive driver shortages throughout the country. While the program will get more drivers on the road, this amount is small compared to the needs of motor carriers throughout the country to fill their trucks with drivers. However, the data collected under the program could lead to expanded programs on a more permanent basis.

Requirements under the program are found in the Federal Register Notice accessible at the following link: https://www.federalregister.gov/documents/2022/01/14/2022-00733/safe-driver-apprenticeship-pilot-program-to-allow-persons-ages-18-19-and-20-to-operate-commercial

Rule Reversal Wreaks Ruin? Determination of Independent Contractor Under the Fair Labor Standards Act

BY G. "TOM" CHASE

The standards applicable to determining whether a worker is an employee or an independent contractor for purposes of the Fair Labor Standards Act ("FLSA") now involves application of a five-factor test. A Department of Labor final rule ("Rule") published on January 7, 2021, at the end of the previous administration was reinstated by a ruling issued March 14, 2022, by the federal court in the Eastern District of Texas.[1] While it remains unclear whether the Rule will be reinstated and followed on a wider basis across the country, the case bears following.

The Rule includes provisions clarifying the definition of "independent contractor" under the FLSA. The FLSA establishes fair labor standards for employment of workers in and affecting interstate commerce. However, while the FLSA applies to "any individual employed by an employer", it does not apply to independent contractors, who are not defined as employees under the FLSA.[2] The Rule uses five economic-reality factors to assist in the determination whether a worker is an employee or an independent contractor. The first two factors are considered to be "core" factors and carry greater weight in the determination. Those factors are (1) the nature and degree of the worker's control over the work, and (2) the worker's opportunity for profit or loss. The other three factors are (1) the amount of skill required for the work; (2) the degree of permanence of the working relationship between the worker and the potential employer; and (3) whether the work is part of an integrated unit of production.

Previously, the Rule did not take effect considering the current administration initially halted the Rule followed by the Department of Labor withdrawing it. However, Judge Marcia Crone of the Eastern District of Texas struck down the withdrawal as a violation of the Administrative Procedures Act. Therefore, the Rule was reinstated effective as of March 8, 2021, the original effective date. Under the current landscape, the Rule may still be utilized in the transportation industry as relates to the work of owner-operators with trucking companies within the trucking industry. It is important to keep in mind that the Department of Labor may still challenge the Rule or potentially issue a new rule. This will be something to watch for the transportation industry in the coming months.

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[1] *Coalition for Workforce Innovation, et al v. Marty Walsh, et al,* Civil Action No. 1:21-CV-130-MAC, United States District Court for the Eastern District of Texas, Doc. 32 (Mar. 14, 2022).
[2] FLSA 29 U.S. Code Chapter 8.

Not Hard to Stop? Federal Court Dismisses All Claims Against Freight Broker in Personal Injury Action

BY KRISTEN NOWACKI

In *Gauthier v. Hard To Stop LLC*, No. 6:20-cv-93, 2022 U.S. Dist. LEXIS 20564 (S.D. Ga. Feb. 4, 2022), a recent case out of the Southern District of Georgia, Judge R. Stan Baker dismissed all claims asserted against a national freight broker. The lawsuit arose out of a motor vehicle accident occurring on the night of May 28, 2020. The plaintiff's husband was killed when his vehicle struck a tractor-trailer blocking several lanes of highway traffic in both directions while the driver was making a U-turn. Plaintiff eventually filed suit against the motor carrier, the driver, the freight broker, and, because Georgia is a direct action state, the motor carrier's insurer.

At the pleading stage, the broker moved to dismiss all counts asserted against it including claims of negligence, negligent selection, hiring and retention; and negligent maintenance. The Court dismissed plaintiff's negligence claim, based on an agency and vicarious liability theory, concluding plaintiff failed to allege facts showing the broker exercised (or could exercise) "the kinds of control which characterize an agency relationship between a freight broker and a motor carrier or its employees." *Gauthier*, 2022 U.S. Dist. LEXIS 20564, at *8. In rendering its holding, the Court cited *Castleberry v. Thomas*, 2020 U.S. Dist. LEXIS 224238, *4 (M.D. Ga. Dec. 1, 2020), another case finding no agency relationship when the broker "did not tell the driver which routes to take, did not provide equipment to the driver, did not provide insurance for the driver, and did not 'exercise any control or input over the time, method and manner of the driver's work and driving.'" Similarly, the Court dismissed plaintiff's claim of negligent maintenance grounded on a joint liability theory, due to the lack of any factual support.

Further, while the Court concluded plaintiff *had* alleged facts sufficient to sustain a negligent hiring and retention claim, the court ultimately dismissed this claim as well. The Court held that a claim for negligent hiring and retention against a freight broker is preempted by Section 14501(c)(1) of the Federal Aviation Administration Authorization Act ("FAAAA"). The Court reasoned plaintiff's negligent hiring claim is related to the broker's "core" services: "hiring motor carriers to transport shipments." The court also noted the claim had an "impermissible significant and direct impact on the [broker's] services and prices because it seeks to impose heightened (and potentially costly) common law duties to investigate the motor carriers with which it contracts." *Gauthier,* 2022 U.S. Dist. LEXIS 20564, at *28. Finally, the Court concluded the "safety exception" in Section 14501(c)(2) was inapplicable to the negligent hiring claim, because the broker's alleged failure in not adequately vetting the motor carrier and/or driver was too "tenuously connected to motor vehicle safety" to fall within the exception. In other words, the negligent hiring claim attempted to impose a duty on the broker's services, not the motor vehicles themselves.[1]

The Supreme Court has yet to weigh in on the issue of FAAAA preemption in broker personal injury cases. The case of *Miller v. C.H. Robinson* is currently pending before the Court. However, the reasoning and holdings in *Gauthier* provides valuable support for motions to dismiss on behalf of freight brokers, particularly in the Eleventh Circuit. The case is also an important reminder that the more control the broker asserts over the motor carrier, the harder it will be for a broker to defeat vicarious liability claims after an accident.

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[1] *Coalition for Workforce Innovation, et al v. Marty Walsh, et al,* Civil Action No. 1:21-CV-130-MAC, United States District Court for the Eastern District of Texas, Doc. 32 (Mar. 14, 2022).

Georgia Court of Appeals Reverses Trial Court for Miscalculating Statute of Limitation in Applying Statewide Judicial Emergency Orders Suspending Deadlines

BY DONOVAN K. EASON

In 2020, Georgia, like most states across the country, was forced to consider how to reconcile the needs of litigants' access to the court system versus the ever-evolving public health crisis posed by COVID-19. Arguably the most widely known and readily consulted guidance to litigants was authored by the Supreme Court of Georgia in its Statewide Judicial Emergency Orders or COVID Emergency Orders. Beginning on March 14, 2020[1], the Court took the unprecedented step of suspending every deadline set forth under the force of state law. This open-ended suspension (also referred to as "tolling" in law) of the deadlines ended on July 14, 2020 under the Court's Fourth Order extending its original Order of March 14.[2]

In reimposing the previously-tolled deadlines, the Court explained how the COVID Emergency Orders affected the calculation of deadlines, outlining three basic scenarios: (1) cases pending on or before March 14, 2020; (2) cases filed between March 14 and July 13, 2020; and (3) cases filed on or after July 14, 2020. The effect of each is the same: The 122-day window between March 14 and July 13, 2020 is omitted from the calculation of pending deadlines.

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[1] See Order Declaring Statewide Judicial Emergency, Supreme Court of Georgia (March 14, 202), available at https://tinyurl.com/bdhje3w7.
[2] See Fourth Order Extending Declaration of Statewide Judicial Emergency, Supreme Court of Georgia (March 14, 202), available at https://tinyurl.com/6366rmc5. The Court would eventually enter 15 Orders in all.

In Scenario 1, litigants have the same amount of time to meet a deadline after July 14, 2020 as they had on March 14, 2020. So, for example, if plaintiffs had until March 20, 2020 to file a lawsuit, this means plaintiffs would have six more days to file suit as of March 14, 2020. And, consequently, this also means plaintiffs would have six more days to commence the suit as of July 14, 2020—setting a new filing deadline of July 20, 2020.

Under Scenario 2, any portion of a deadline that would have run between March 14 and July 14, 2020 is added to the end of the COVID tolling period. So, if a plaintiff filed suit on March 20, the 30-day period afforded defendants to answer is added to the end of the tolling period—setting a new answer deadline of August 13, 2020.

And lastly, under Scenario 3, litigants simply follow the otherwise applicable litigation deadlines. For example, if defendants were served with a summons and complaint on July 15, 2020, they would have 30 days to answer under the Civil Practice Act—setting a new answer deadline of August 14, 2020.
Those who practice law often quip the career suited them if only to avoid math. So, it should come as no surprise that the Georgia Court of Appeals recently confronted a case where a defendant successfully secured the dismissal of a plaintiff's complaint for failure to timely commence her lawsuit despite the tolling provisions of the COVID Emergency Orders.

On June 11, 2018, Tara Aiken collided with Deborah Beauparlant in a private parking lot. On June 2, 2020[3], Beauparlant filed a negligence action against Aiken seeking damages for personal injury. But Beauparlant did not perfect service on Aiken until August 9, just over two months later. When Aiken answered, she also filed a Motion to Dismiss arguing Beauparlant failed to file suit before the statute of limitations had run. Beauparlant disagreed, and the State Court of Effingham County was forced to interpret the COVID-19 Emergency Orders in assessing whether Beauparlant had timely filed suit. Judge Ronald Thompson held Beauparlant had not done so, and Aiken appealed the question to the Court of Appeals for review.

On appeal, Judge Trea Pipkin wrote the opinion on behalf of the three-judge panel reversing the trial court's decision. Applying Scenario 2 discussed above, Judge Pipkin noted the statute of limitations would have run on June 11, 2020. So, Beauparlant's deadline to comply with the statute of limitations was extended by 90 days—the number of days between March 14, 2020 and June 11, 2020. Put differently, if Beauparlant filed the complaint and perfected service by October 12, 2020, the action was timely. And here, it was.[4]

The Beauparlant decision underscores the virtue of the careful reading of orders and statutes. When in doubt, always be sure to consult with your team and counsel to confirm the proper calculation of deadlines and to take advantage of the additional time afforded under the COVID Emergency Orders. It may also be a good practice to include a copy of COVID Emergency Order in any calendar entries accompanied by the actual deadline calculations to reassure compliance. Otherwise, you find yourself immortalized in the next worn out math joke.

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[3] Generally speaking, personal injury actions must be brought within two years after the incident. O.C.G.A. § 9-3-33.
[4] Although Aiken also argued Beauparlant failed to exercise reasonable diligence in affecting service after filing her complaint, she failed to demonstrate any prejudice so as to influence the Court of Appeal's decision.

New Case Alert - Peanuts and Plaintiffs' Lawyers

BY BLAIR CASH

The Georgia Court of Appeals recently affirmed the significance of maintaining corporate formalities and structure in the event of an accident. While the decision should not come as a surprise, it serves as a reminder to motor carriers, freight brokers, shippers, and other related entities of the importance of respecting and maintaining corporate formalities between entities.

The case of *Golden Peanut Co. v. Miller*, 2022 Ga. App. LEXIS 116 (Mar. 4, 2022) addressed a fatal September 27, 2017 accident that occurred in South Georgia. Truck driver Lloy White was turning left onto a two-lane passenger road when a passenger vehicle driven by Kristie Miller struck White's trailer. Miller died in the accident and her son was seriously injured. White was hauling a load of green peanuts from a farm to a nearby drying facility in Camilla, Georgia. The Plaintiffs sued White, Golden Peanut Company, LLC (the owner of the trailer White was hauling), and Archer Daniels Midland Company ("ADM") (Golden Peanut's parent company).

The opinion omits certain key facts, but it appears as though the Miller family settled with White and his insurer for the policy limits of the underlying trucking liability coverage. White filed suit against Golden Peanut and ADM, arguing that they were liable under common law vicarious liability and statutory employment under the Federal Motor Carrier Safety Regulations (FMCSRs). The trial court denied the Motions for Summary Judgment filed by Golden Peanut and ADM, which they appealed.

The Court of Appeals agreed with ADM and Golden Peanut and reversed the trial court. The Court held that ADM and Golden Peanut were not liable under theories of vicarious liability or statutory employment.[1] Many of these cases turn on several key facts and this case was no different. The Court's reversal hinged on the ability of Golden Peanut and ADM to control the time, method, and manner of White's driving. [2] White had a sole proprietorship, Lloy White Trucking, which owned the tractor.[3] White contracted with Larry Wood Trucking, who issued White a 1099 for tax purposes.[4] Golden Peanut involved Larry Wood Trucking as a broker, but a Golden Peanut employee coordinated with drivers on where drivers needed to go, what they needed to do, etc.[5] However, in White's case, White coordinated directly with the farmers – not Golden Peanut – for pickup directions.

The Court stressed several facts in finding that Golden Peanut had no control over White's schedule:[6]

- Golden Peanut did not tell White which specific routes to take when driving;
- White picked up the peanuts and took them to Golden Peanut's Camilla facility;
- With the help of other Golden Peanut employees, White hooked the trailer up to a dryer;
- Golden Peanut did not provide any instruction to White on these tasks;
- Golden Peanut had no control over White's work schedule.

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[1] *Miller,* 2022 Ga. App. LEXIS 116, at *8-9.
[2] Id. generally
[3] Id. at *4
[4] Id.
[5] Id. at *55
[6] *Id.* at *5; see also *McLaine v. MeLeod*, 291 Ga. App. 335, 340 (2008) (finding that a truck driver was an independent contractor as a matter of law where although a distributor told the driver when and where to pick up and deliver cargo, the specifics of those pick-ups and drop-offs were ordered by the customer, not the distributor).

THE ROAD AHEAD- Past and Future Events

Past

- Megan attended the Transportation Industry Defense Association Advanced Seminar in Nashville, TN on January 13-14.
- Stephanie attended the Transportation Lawyers Association Chicago Regional Seminar on January 20-21.
- Rocky presented "The New Tenets of Transportation Coverage" at the SMC3 JumpStart 22 meeting in Atlanta, GA on January 25.
- Rob and Lesesne attended the Conference of Freight Counsel Winter Meeting on January 22 in Monterrey, CA.
- Blair attended the 18th Georgia Defense Lawyers Association on February 3.
- Fredric attended and spoke at the Specialized Carrier & Rigging Association Symposium on February 23-25 in Glendale, AZ.
- Fredric spoke at the TIDA Cargo Seminar on March 30 in Tempe, AZ.
- Rob and Donavan participated in the Spring Sporting Clay Shoot on April 8 in Garden City, GA sponsored by the Georgia Motor Trucking Association.
- Rob spoke at the Charleston Motor Carriers on issues related to the intermodal industry on April 21.
- Rob spoke at the University of Georgia Terry College of Business Trucking Profitability Strategies Conference on April 25-26.
- Blair attended the DRI Trucking Law Seminar in Austin, TX April 27-29.

Future

- Fred and Megan will attend the Transportation Lawyers Association Annual Meeting May 11-14 in Williamsburg, VA.
- Rob will attend the Truckload Carriers Association Safety Meeting in Nashville June 5-7 and will be speaking on a panel on safety and risk management.
- Fred, Rocky, and Kristen will attend and speak at the Conference of Freight Counsel Summer Meeting June 12-13 in Orlando, FL.
- Rob will be attending the SC Trucking Association Annual Conference and Board of Directors Meeting on June 12-15 on Hilton Head Island.
- Rob will be attending the GA Motor Trucking Association Annual Conference on June 19-22

MOMAR PAST AND UPCOMING WEBINARS

- We hope that you will attend our upcoming webinar on May 11, 2022. Topic TBD.

Check the Archive section of our website for previously recorded webinars, some of which include:

- Life Sentences and Legislatures
- 2021 Year in Review (Parts 1 and 2)

CONGRATULATIONS CORNER

- We are pleased to announce that attorney Donavan Eason joined our Savannah office in February.
- Megan and Philipp welcomed baby Sunday Soppa on April 4th.

NEW-- BUCKY'S REPORT

Bucky made it through March Madness and, as you can see, he goes all out for his favorite teams. He didn't do very well in his brackets this year, but happily looks forward to next year's battles. Some of us were worried he might be recruited, as he's a mighty fine player; however, his dedication to MOMAR won out and he's been busy doing research to help our attorneys prepare for upcoming webinars. He hopes you'll tune in!

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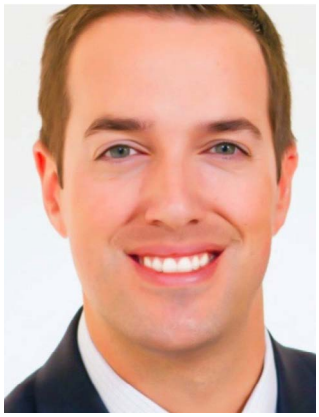

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