MAKING TRACKS

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A Transportation and Logistics Law Firm

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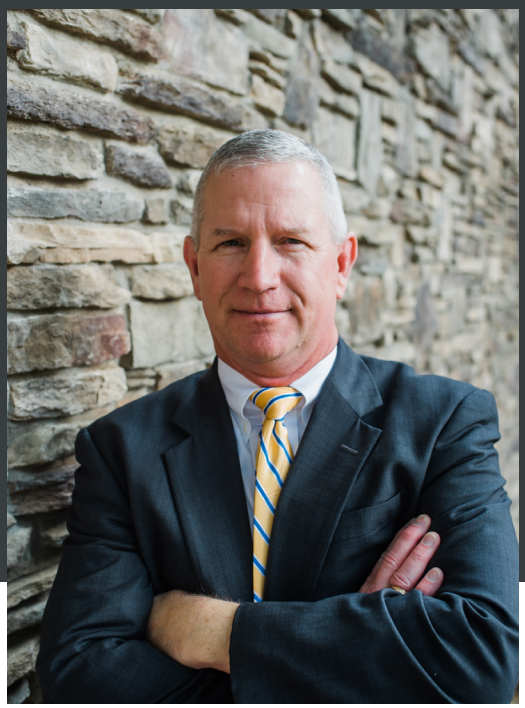
Moseley Marcinak Newsletter Contents



A Note From Rob Moseley

Usually, people think of Spring as the time for beginning fresh. For me, it's usually the fall season when my favorite college football team is still undefeated, and hope springs eternal for a successful season. I think that applies whether you're a fan of the college sport or professional football (although those two are becoming more indistinguishable). Maybe fans of other sports understand that feeling too, although it seems to me that soccer never starts or ends. I think this year is especially a sign of starting over because we've at least gotten past masks.

Whether it's something eternally insignificant like sports or something bigger, we should always enjoy a fresh start and take advantage of those opportunities. It may be a damaged relationship that needs some attention, or maybe some long fought battles you've been fighting and not winning. Here is where we see Grace, and whether your team wins or loses, that's a big enough gift for the season.

Georgia Legislative Alert – Does HB 389 Threaten the Independent Contractor Model for the Transportation Industry in Georgia?

BY BLAIR J. CASH

The Supreme Court's refusal to hear the challenge to California's AB 5 could have far-reaching effects across the country. As many people know, AB 5 is a California law that codifies a stringent "ABC" test that ultimately reclassifies many independent contractors as employees. This law has far-reaching effects on many labor forces, including the transportation industry and its independent contractor model. Many states are pursuing similar laws that will have an impact upon the transportation industry and its use of independent contractors and owner operators versus company drivers.

For instance, on May 2, 2022, Governor Brian Kemp signed a bill that purports to provide more clarity to employers on how to classify employees and independent contractors when it comes to unemployment contributions. Effective July 1, 2022, Georgia law presumes that an individual who provides a service for a wage is an employee unless the company can establish that the individual is free from control or direction over the performance of those services.

Much like the ABC test set forth by AB 5 in California, HB 389, codified in O.C.G.A. § 34-8-35, provides some level of clarity to the distinction between employees and independent contractors. Unlike AB 5, however, HB 389 does not place the burden on the employer to show that an independent contractor is not an employee. Under AB 5, the burden is on the employer to demonstrate that such a person is not an employee.

That burden is not the employer's to bear in Georgia. Rather, HB 389 provides that these independent contractors "have been and will continue to be free" from control over the performance of their services as demonstrated by whether the individual:

- Is not prohibited from working for other companies or holding other employment contemporaneously;
- Is free to accept or reject work assignments without consequence;
- Is not prescribed minimum hours to work or, in the case of sales, does not have a minimum number of orders to be obtained;
- Has the discretion to set his or her own work schedule;
- Receives only minimal instructions and no direct oversight or supervision regarding the services to be performed, such as the location where the services are to be performed and any requested deadlines;
- When applicable, has no territorial or geographic restrictions; and
- Is not required to perform, behave, or act, or, alternatively, is compelled to perform, behave, or act in a manner related to the performance of services at issue.

HB 389 provides that unless an exception outlined in Georgia law applies, these factors determine whether an individual qualifies as an employee or an independent contractor. HB 389 added two exceptions to those already codified in O.C.G.A. § 34-8-35, one of which excepts rideshare networks from the definition of "employment." Companies who incorrectly classify employees as independent contractors are subject to fines.

The big question now is whether this test changes the landscape for the transportation industry in Georgia. Specifically, does HB 389 magically transform independent owner operators who lease on with a motor carrier into the employees of that motor carrier? The good news is that, on its surface, HB

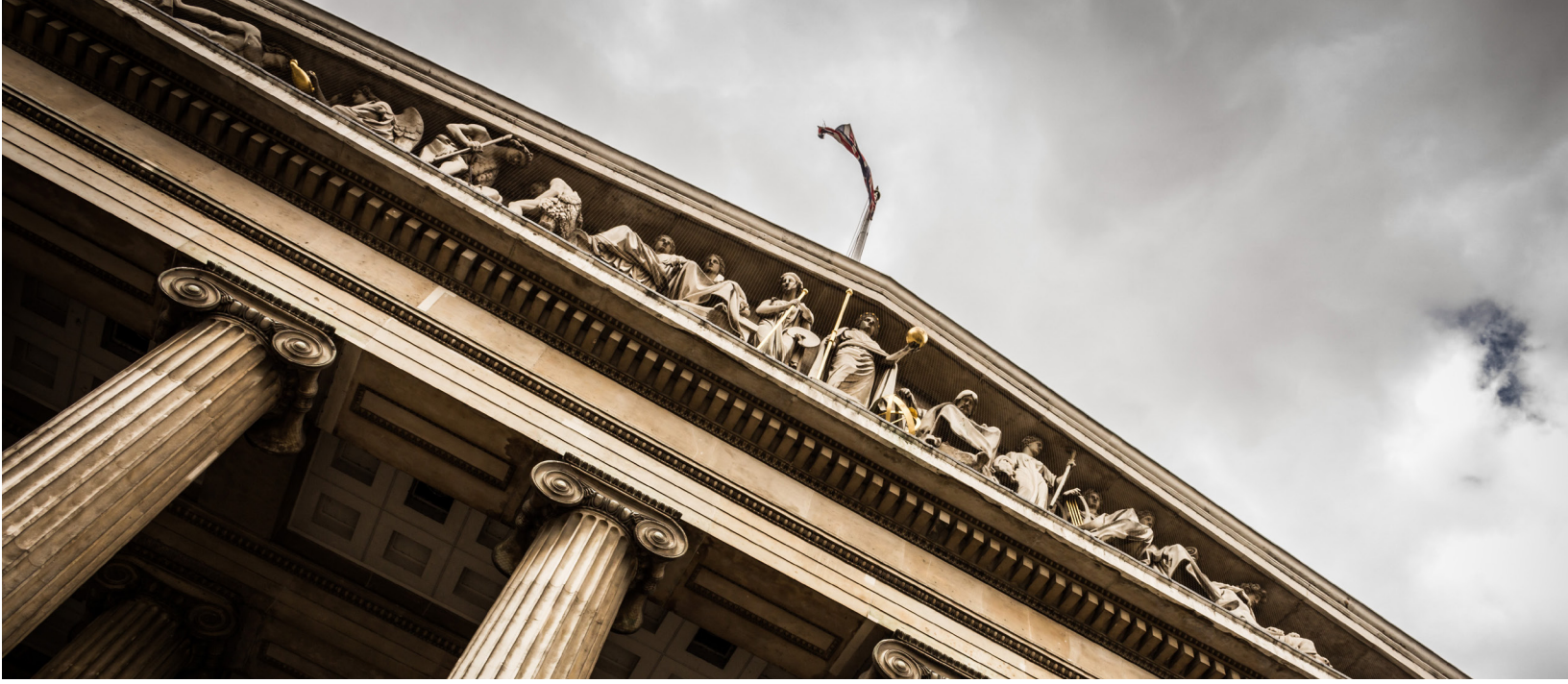
389 does not change the existing Georgia law with respect to independent contractor truck drivers in Georgia. Whether it will be challenged in the courts remains to be seen.

Specifically, O.C.G.A. § 34-8-35(n)(17) remains unchanged and states that employment does not include services performed for an employer who is a common carrier of persons or property. If the services include the pickup, transportation, and delivery of property, persons, or property and persons, provided that:

- The individual is free to accept or reject assignments from the common carrier;
- Remuneration for the individual is on the basis of commissions, trips, or deliveries accomplished;
- Such individual personally provides the vehicle used in the pickup, transportation, and delivery;
- Such individual has a written contract with the common carrier;
- The written contract expressly and prominently states that the individual knows;
    - Of the responsibility to pay certain estimated taxes;
    - That the social security tax the individual must pay is higher than the social security tax the individual would pay if they were an employee; and,
    - That the work is not covered by the unemployment compensation laws of Georgia; and,
- The written contract does not prohibit the individual from the pickup, transportation, and delivery of property or persons for more than one common carrier or entity.

Perhaps the most important consideration in this statutory framework is the importance of a written contract. Gone are the days of handshake agreements between motor carriers and drivers. Gone also are the days of simple one-page contracts between carriers and the drivers who wish to maintain their independent contractor status. The contract must expressly delineate each parties' rights and responsibilities in order to keep an independent contractor from being classified as an employee.

The independent contractor model is under attack in California with AB 5. Other states like New Jersey and New York have proposed similar proposed legislation. Even with the passage of HB 389, the independent contractor trucking model in Georgia appears safe. For now.



You Can't Handle the Truth ... In Leasing Regulations: *Porter v. T&T Farms, Inc.*

BY LESESNE PHILLIPS

As we all know, independent contractor programs and lease-to-own programs are currently under strict scrutiny from courts and legislatures throughout the country. While many of the recent court decisions involve employee misclassification issues, other dangers exist to these programs if not properly implemented. These dangers exist even if these programs are implemented in jurisdictions with favorable independent contractor laws. Any motor carrier seeking application of an independent contractor program should become familiar with the Truth In Leasing Regulations ("TIL"). These federal regulations are found in 49 C.F.R. § 376 and provide basic provisions that must be included in independent contractor agreements and lease purchase agreements. The TIL was initially designed to "prevent large carriers from taking advantage of individual owner-operators due to the individual's weak bargaining position." *Owner Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co., Inc.*, 367 F.3d 1108, 1110 (9th Cir. 2004). While each independent contractor program or lease-to-own program should be catered to each individual company, all of these programs—and the contracts used to apply them—must follow the TIL. A recent case out of the Northern District of Indiana confirms this requirement and stands as a warning for motor carriers to closely analyze their contracts and ensure compliance with the TIL.

In *Porter v. T&T Farms*, a driver, Michael Porter, sued T&T Farms, Inc. and the owner of T&T Farms individually for its lease-to-own program. Mr. Porter alleged in his complaint that T&T Farms offered drivers the option to enter into a lease-to-own program where a driver could haul loads for T&T Farms and own the tractor and trailer used to haul these loads at the end of a four-year lease. In order to recruit drivers to this four-year lease program, T&T Farms representatives told drivers they would make between $1,200 and $1,500 per week all while earning ownership of the tractor and trailer through the lease program. Importantly, no contracts were signed as part of this program. After beginning the program, Mr. Porter was surprised when T&T Farms began deducting amounts for insurance and various other expenses from his settlements. After driving for T&T Farms for approximately one year, Mr. Porter filed suit against T&T Farms and the owner of T&T Farms alleging violations of the Truth-In-Leasing Regulations among other allegations. T&T Farms filed a Motion to Dismiss the violations of the Truth-In-Leasing Regulations, which the court ruled on in its opinion.

T&T Farms' sole argument was that the TIL did not apply to its lease-to-own program based on a strict reading of the regulations. Under the first section of the TIL it states "the authorized carrier may perform authorized transportation in equipment it does not own only under the following conditions . . . ." Those conditions include requirements that the lease agreement be in writing as well as provide certain other basic requirements. Based on the reading of the regulations, T&T Farms argued that because T&T Farms owned the equipment that was being leased to Mr. Porter, the TIL did not apply. The court agreed with T&T Farms to some extent, finding both Mr. Porter and T&T Farms dually owned the truck. However, the Court rejected the idea that ownership of the truck by T&T Farms placed T&T Farms outside of the liability imposed by the TIL. Citing another case, the Court stated:

> The purpose of the regulations is to protect owner-operators from abusive practices and promote the stability and economic welfare of the independent trucker segment of the motor carrier industry. This purpose does not support distinguishing between truck drivers who own their trucks outright, and truck drivers who must lease their trucks from carriers who then contract for their services, both of whom are vulnerable to large carriers.

Therefore, the court rejected T&T Farms' narrow reading of the TIL Regulations, finding applicability of the TIL even if the motor carrier owns the equipment that is being leased. Furthermore, the Court found the TIL specifically encompasses a lease-back program, in which the driver leases the truck from the company, the company retains the title to the truck, and the driver leases the use of the truck and their driving services back to the company. Based on this the court denied T&T Farms' motion to dismiss the alleged violations of the TIL. While the court did not determine whether T&T Farms actually violated any of the TIL Regulations, this case presents an example of the scope and applicability of the Truth In Leasing Regulations.

There are multiple considerations for motor carriers implementing an independent contractor or lease-to-own program. Aside from the misclassification issues currently facing the transportation industry, motor carriers must also remain mindful of the types of contracts utilized and the specific provisions contained within them. Additional examples of pitfalls with the Truth in Leasing Regulations include the failure of the motor carrier to disclose chargeback items, deductions, or provide documentation for deductions in lease agreements. See *Niiranen v. Carrier One, Inc.*, 2022 U.S. Dist. LEXIS 5123 (N.D. Ill. Jan. 11, 2022) (chargeback items); *Luxama v. Ironbound Express, Inc.*, 2021 U.S. Dist. LEXIS 16130 (D.N.J. Jan. 27, 2021) (deductions); *Cunningham v. Lund Trucking Co.*, 662 F. Supp. 2d 1262 (D. Or. 2009) (documenting deductions). Unfavorable provisions in contracts are inevitable, but unlawful provisions in contracts can expose motor carriers to liability down the road.

Important Update – Supreme Court Refuses to Hear AB 5 Challenge

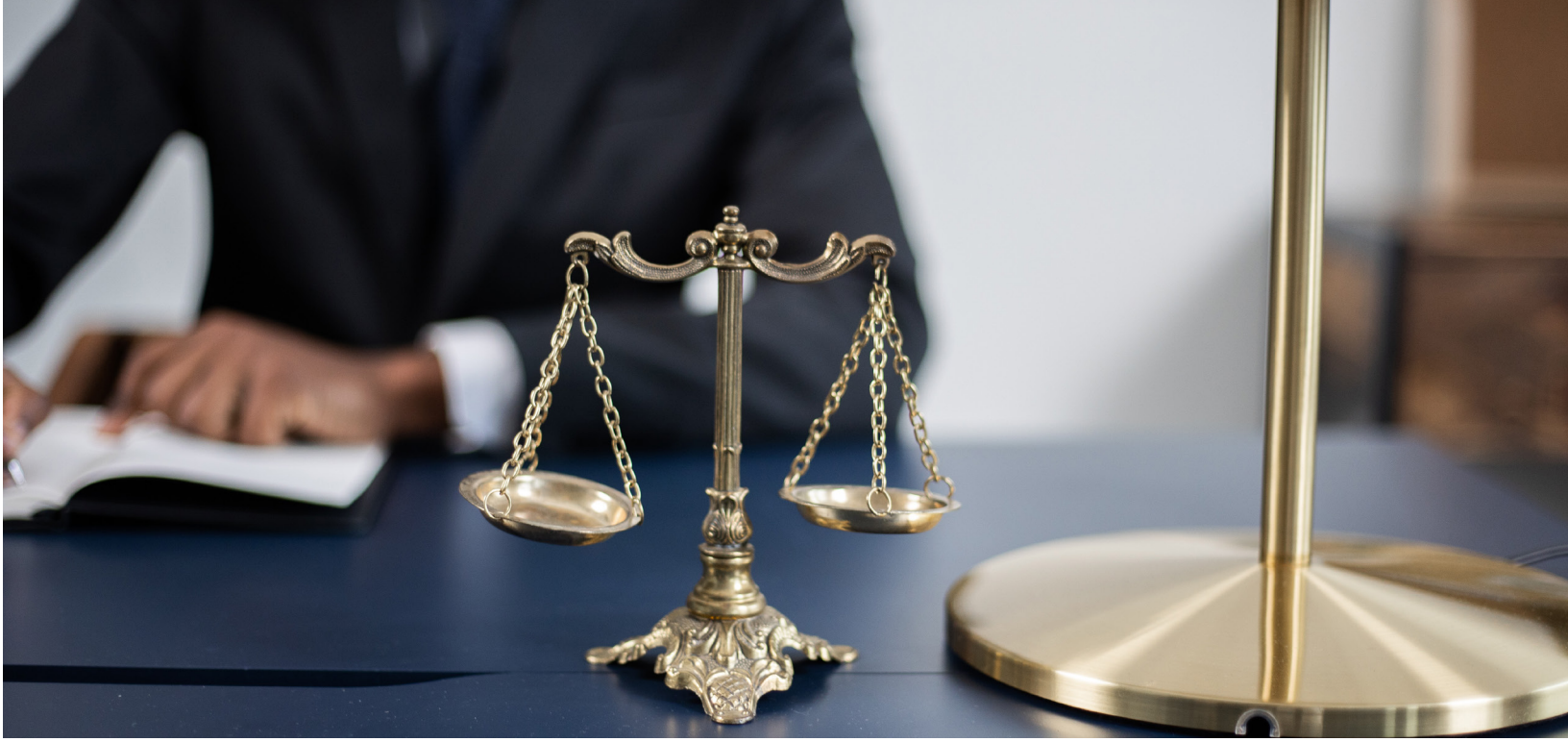
BY C. FREDRIC MARCINAK

Just about everyone in the trucking industry has heard of—and shuddered at—the term "AB5." AB5 is the California law, passed in 2020 that essentially ended the owner-operator/ independent contractor model for trucking in California. Rather than using the traditional test to determine whether a worker is an employee or independent contractor, AB5 provides that, to classify a worker as an independent contractor, a hirer must show the worker: (1) is free from control; (2) performs work outside the company's usual business; and (3) independently performs work of the same nature as the work for the company. Motor carriers cannot meet the second prong with respect to owner-operators because independent contractors hauling goods for motor carriers by their very nature are only performing work for the carriers' business. Thus, under AB5 drivers must now be classified as employees in California, which leads to a host of new driver entitlements: the right to unionize, workers compensation, unemployment benefits, etc. Drivers, too, often prefer independent contractor classification so they can operate as independent business people, building their own equity and business while benefiting from favorable tax treatment for self-employed persons.

Federal law appeared to provide relief. Congress provided that states cannot enforce any law that affects a motor carrier's routes, prices, or services. What could more effect a carrier's routes, prices, or services than a new law imposing significant additional costs on carriers while destroying a longstanding driver model used in the trucking industry (and recognized by federal laws such as Truth in Leasing and equipment leasing regulations)? A federal trial court in California agreed, granting the California Trucking Association's ("CTA") request to stop enforcement of the law. But the Ninth Circuit appellate court reversed, and the CTA asked the Supreme Court to hear the case. On June 30, the Supreme Court—after the Biden administration recommended it decline the case--denied that request, meaning the Ninth Circuit's decision allowing the law to be enforced stands.

There might be a glimmer of hope that CTA can make headway in further proceedings before the lower courts using some of AB5's exceptions. But the big opportunity to end AB5 for trucking has past. Not only will this hurt carriers who benefit from the efficiencies of the contractor model, but it will also hurt drivers and, ultimately, consumers as higher carrier costs are passed on to shippers and their customers.

Carriers who hire drivers in California should take note that AB5 is now being enforced. There are ways to restructure to avoid the effects of AB5. These workarounds are not always easy, but carriers should review their existing corporate and regulatory structure and contracts as a first step to either complying with AB5 or modifying their operations to fall outside its terms.



Say What You Need to Say: Avoiding Familiar Pitfalls in Settling Claims

BY DONAVAN EASON

Sophisticated parties settle hundreds of claims every day. Yet the sheer volume and familiarity of forging and finalizing agreements can create headaches when not approached thoughtfully. Some parties mistakenly assume the standard terms of their agreements are generally understood and accepted without even mentioning them amid negotiations. And others accept offers similarly assuming certain conditions are a given or will only become firm when reduced to writing. Naturally, neither are a given, and assumptions lay at the root of many avoidable disputes. The Georgia Court of Appeals recently decided the case of *Progressive v. Butler*, A22A0322, 2022 WL 2236137, 2022 Ga. App. LEXIS 320 (June 22, 2022), providing an instructive reminder to parties of the double-edged sword of negotiating agreements with vague assumptions.

In March 2019, a tractor-trailer driven by Julio Maden side-swiped a personal auto driven by Ernest Butler. Butler hired counsel Sarah Jett to negotiate settlement of his negligence claim with Progressive, the insurer for Maden's motor carrier, Carrier Compliance Service. After having discussed the matter with Progressive, Jett emailed Progressive the following:

> Attached is the hold harmless letter. Please send the check and settlement documents to [law firm name and address].

Also attached to the email was a letter:

> Please allow this letter to confirm that Ernest Butler accepts Progressive Mountain Insurance Company's offer of $17,500 as full and final settlement of the above-referenced claim. This settlement is for the bodily injury claim ONLY. Please make the check payable to Ernest Butler and The Law Offices of Gary Martin Hays & Associates, P.C. Further our firm agrees to address any statutorily valid liens filed prior to the distribution of the settlement funds.

The letter went on to repeat the email's request for the check and settlement documents to be forwarded to the firm's address. But eight days later, Jett informed Progressive her firm no longer represented Butler and provided notice of her firm's lien against any settlement proceeds or verdict.

About a month later, Butler resurfaced with new counsel and, surprisingly, a new demand for $350,000. Despite being reminded of the prior agreement with Jett to resolve Butler's claim for $17,500, Butler's new counsel did not respond. So Progressive filed suit against Butler asking the Superior Court of Gwinnett County to declare the claim had been settled with Butler's original attorney, Jett. The trial court, however, disagreed, finding Jett's hold harmless letter (1) did not include any specific terms; (2) had not been made available to Butler by Jett; and (3) that neither Butler nor Jett ever signed any release or settlement agreement.

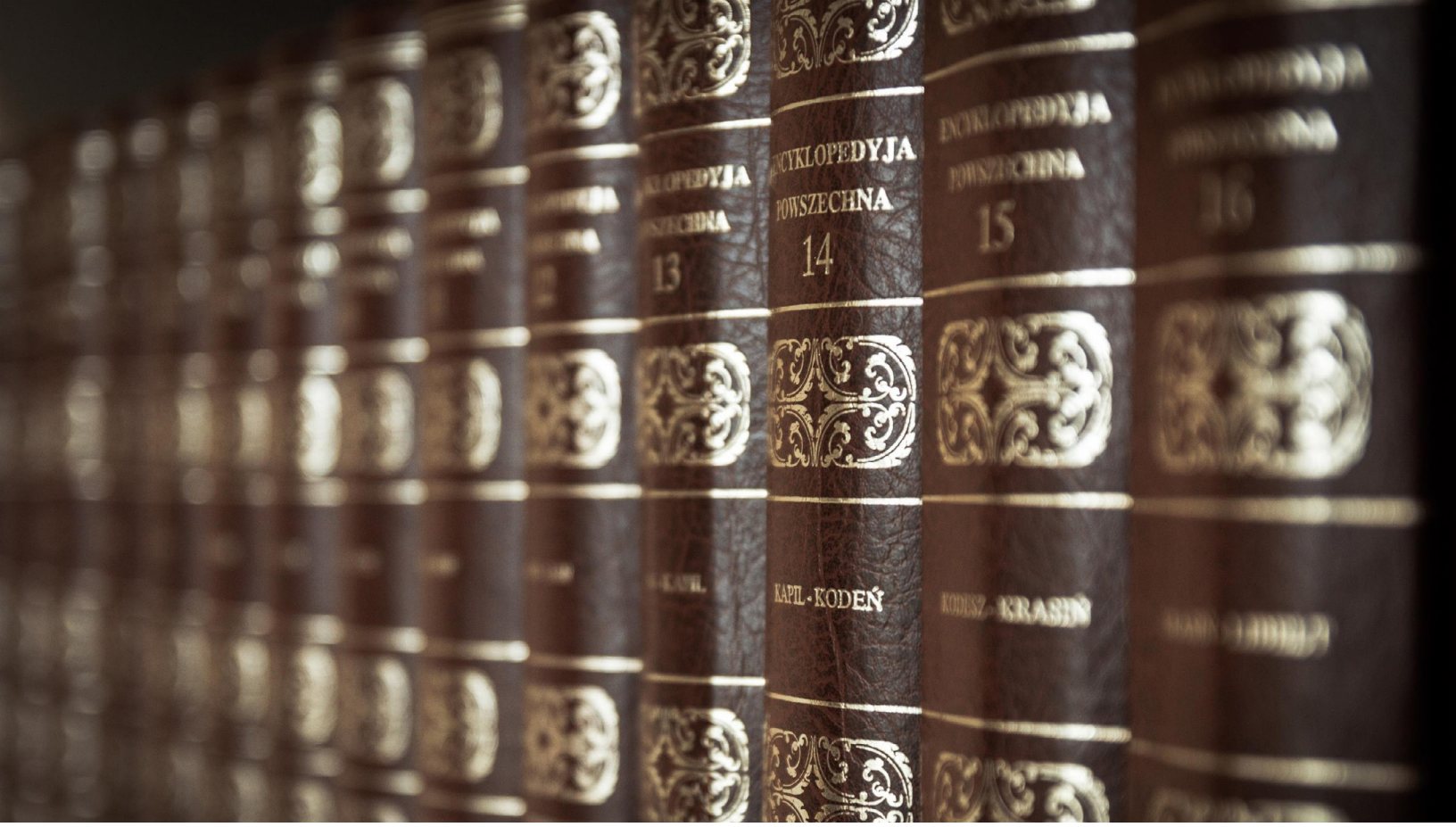
On appeal, the Georgia Court of Appeals disagreed with every finding made by the Superior Court, and its reasoning for doing so bears some thoughtful review for anyone negotiating settlement of a claim or suit.

First, attorneys acting on behalf of their clients have "apparent authority" to broker settlement agreements. This means adverse parties can rely on attorneys' offers and acceptance in reaching a compromise even if those attorneys overstep the authority provided by their clients. The only exception to this general rule is if the adverse party knows the attorneys' clients have expressly restricted their attorneys from extending or accepting the offers at issue. Put another way, if attorneys overstep their authority and reach a settlement, that mistake does not implode the settlement; it simply creates a cause of action for those attorneys' clients to pursue against them for doing so.

Second, at base, settlement agreements are contracts, and courts will analyze them as such. In this case, Progressive extended an offer via phone to settle Butler's claim for $17,500. In turn, Butler's counsel accepted and then memorialized that acceptance in a hold harmless letter, asking for the check and settlement documents to be completed. Simply put, Progressive made an offer, and Butler's counsel accepted the offer, so a settlement was reached. Had Butler's counsel neglected to memorialize acceptance of the offer in writing, the fact remains: a settlement was reached, and he could not renege on his counsel's negotiated agreement.

Now, consider this wrinkle: Suppose the settlement agreement proposed by Progressive and its insured contained a confidentiality provision. And further assume the word "confidentiality" was never mentioned during negotiations. After all, Butler's counsel agreed to sign the "settlement documents," right? This most likely will not be considered part of the bargain, and a careful reading of the court's opinion sheds some guidance on the difference between such "terms" and "purely informational" requests.

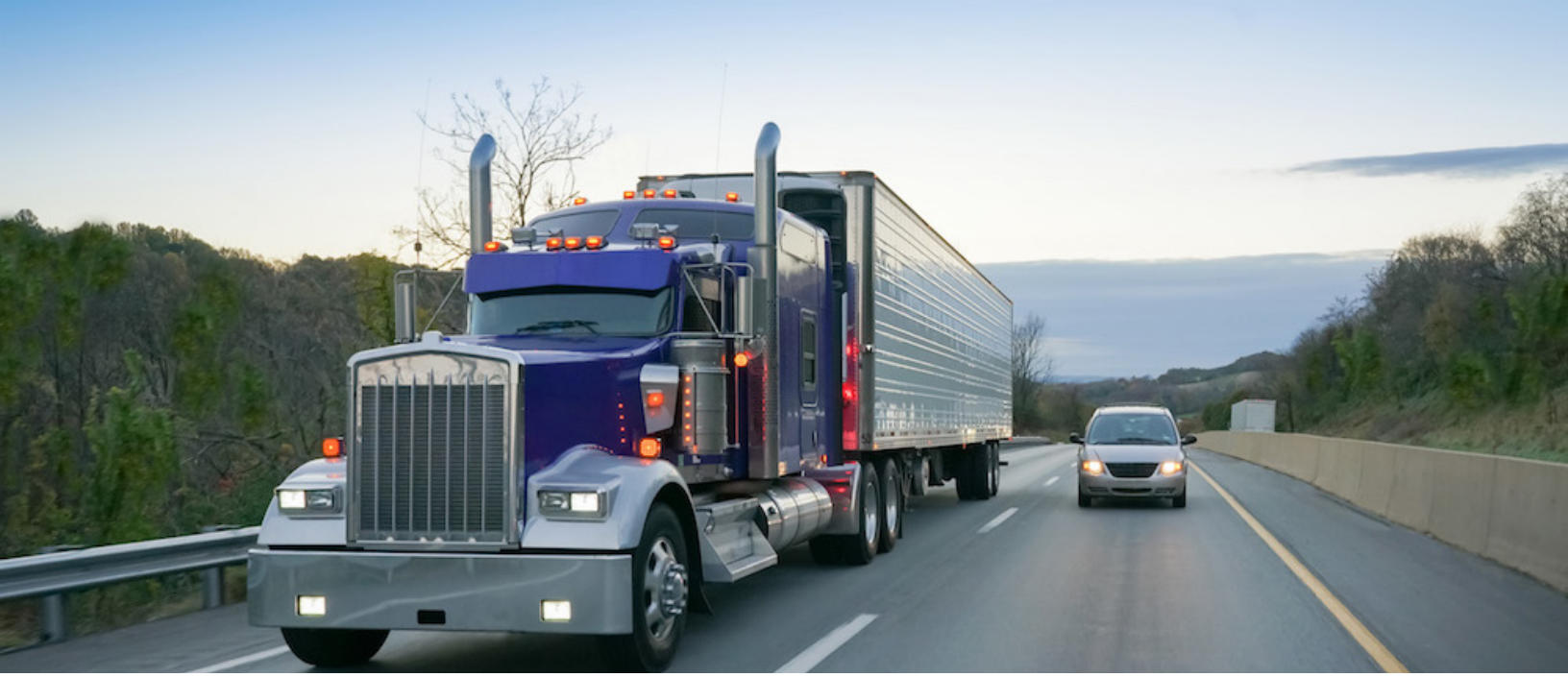
For example, Butler's counsel provided instructions on how to submit payment and how liens would be handled, but these points do not add a condition to the bargain itself. Consider this versus Butler's counsel sending an email agreeing to settle but adding, "And, I assume you will be satisfying the liens?" This would likely be considered an effort to add a term to the agreement. Compare *Torres v. Elkin*, 317 Ga. App. 135, 142–43(2) (2012) (acceptance letter expressing assumption that offerer would satisfy liens held as counteroffer) with *Herring v. Dunning*, 213 Ga. App. 695, 689–99 (1994) (letter



asking about the existence of liens held not to be counteroffer but simply confirmation of counsel's belief). And similar to the confidentiality clause example above, had Progressive insisted on Butler signing a general release as opposed to a limited-liability release after Butler's counsel accepted its offer, a court would likely view Progressive's requirement of a specific release as too little, too late. Compare *Turner v., Williamson*, 321 Ga. App. 209, 213(1) (attorney's letter proposing use of a different release form was a counteroffer rather than an acceptance where offer was condition on execution of a particular release) with *Vildibill v. Palmer Johnson of Savannah, Inc.*, 244 Ga. App. 747, 749(1) (2000) (letter accepting offer to settle in return for "any release you deem appropriate" created a binding settlement agreement).

A common tactic used by savvy attorneys is to offer to resolve a case in exchange for a "standard release and settlement agreement" or similar loose language. Of course, a "standard release" or "standard settlement agreement" is anyone's guess. But one can readily assume the language will be most favorable to the drafter. The word of wisdom is to be certain about the non-negotiable terms a client wants to see in a settlement and that those terms and conditions are expressed clearly, simply, and then ultimately put in writing to prevent the opposing party's sudden amnesia of deal-breaking provisions to the agreement.

On the other hand, perhaps limited details are favorable to the client's position. In such a case, some merit might be placed in making an agreement and reflecting those few details in a memorialized writing, fully anticipating and leveraging against the other party's failure to specify all the terms of their offer. Taking such an approach may likely trigger some frustration from the other parties and additional legal expenses to have a court affirm the client's position, but depending on the circumstances of a claim or case, those costs may be a small price to pay on balance.



Is the Motor Carrier Insured for the Claim from the Sleeping Independent Contractor?

BY ALEX TIMMONS

Another decision on independent contractors that did not get as much attention as the Supreme Court's ruling refusal to hear the challenge to AB5 was a recent decision by the United States District Court for the Middle District of Pennsylvania which recently decided that a sleeping independent contractor was an employee, and therefore, the motor carrier's insurance policy did not cover the claims against the motor carrier and driver. Although the decision is not surprising, this could create an issue for the motor carrier being uninsured for a claim under the standard commercial auto policies issued to motor carriers.

The case of *United Financial Casualty Company v. Mid State Logistics and Charles Rankin*, 2022 U.S. Dist. LEXIS 104532 (June 10, 2022) decided a coverage action filed by United Financial arising out of a May 2018 accident that occurred on Interstate 4 in Florida. Driver Charles Rankin was team driving with Clay Rosenbrooks when Rankin ran into a guardrail and overturned the truck. At the time of the accident, Rosenbrooks was asleep in the sleeper and suffered injuries during the accident. Rosenbrooks and his wife sued Rankin and the trucking company, Mid State Logistics, for their damages in Pennsylvania Court of Common Pleas.

At the time of the accident, Rankin was driving a tractor owned by Rosenbrooks which was leased to Mid State Logistics. As part of the lease agreement, Rosenbrooks was responsible for his own workers compensation insurance, and he also assumed complete responsibility for his own drivers or employees. A disputed fact in the case was whether Rankin was working for Mid State or Rosenbrooks. [1]

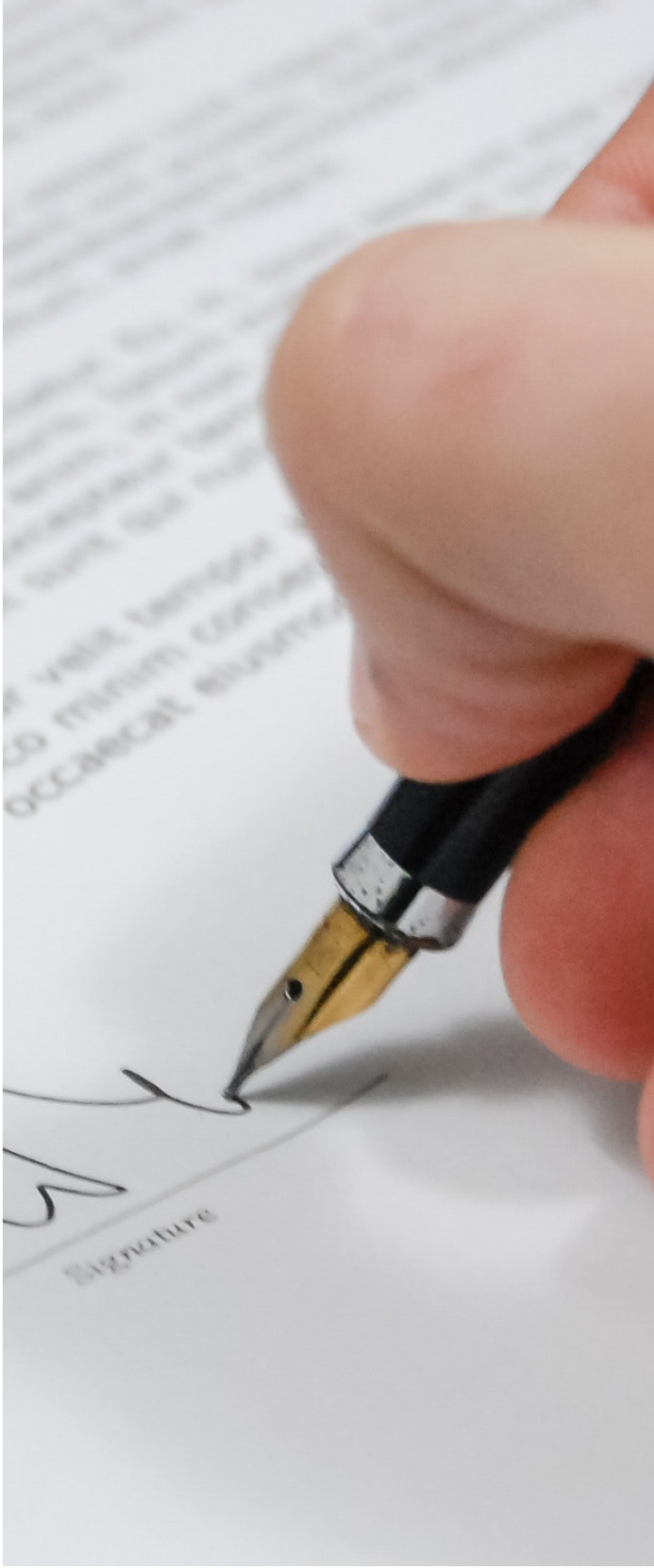
A year after suit was filed, United Financial filed a declaratory judgment action on whether it had a duty to defend and indemnify Mid State Logistics and Rankin for the claims from Rosenbrooks. United Financial argued that its insurance agreement with Mid State included an exclusion against claims brought by employees. The question to the Court was whether Rosenbrooks, an independent contractor, ceased to be an employee when he moved to the sleeper and Rankin began driving.

The court looked at two specific exclusions in the insurance agreement excluding coverage for bodily injury to employees arising out of the employee's employment and bodily injury to a fellow employee while in the course of employment or while performing duties related to the trucking company's business. Lastly, the Court looked at the MCS-90 Endorsement which does not apply to injuries of the insured's employees while engaged in the course of employment. The question came down to whether Rosenbrooks was an employee.

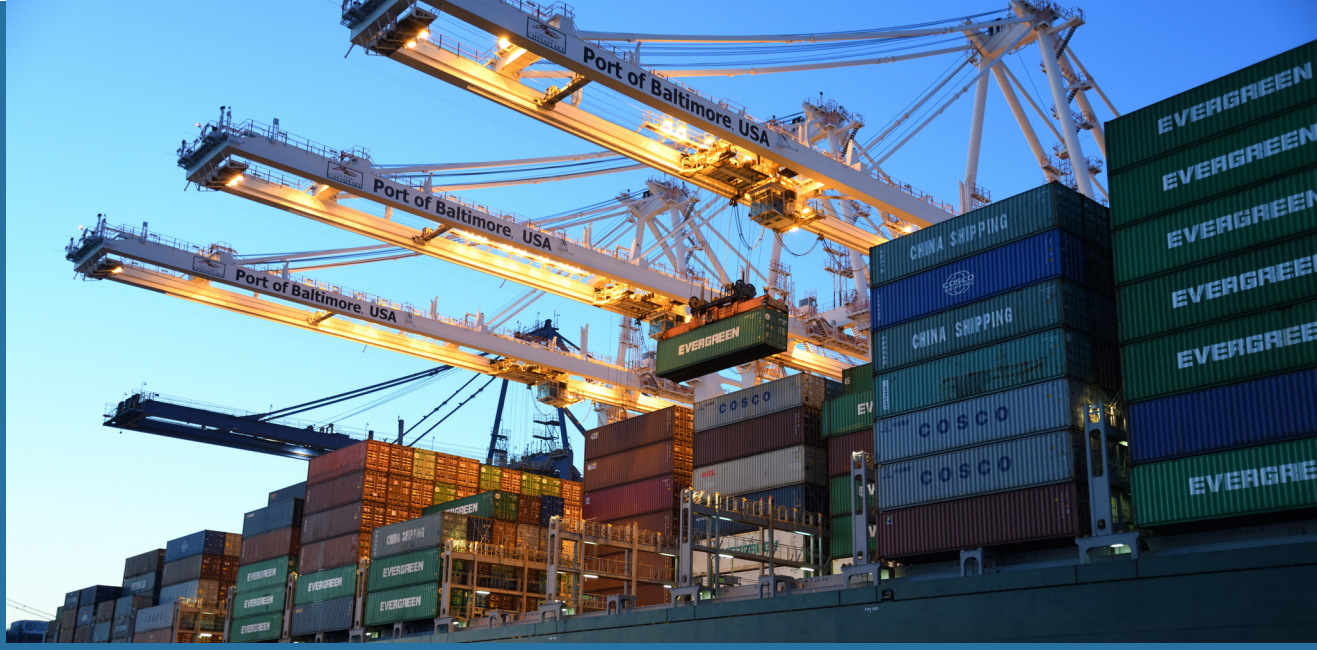
Because the policy did not define the term "employee," the Court looked to 49 C.F.R. § 390.5 for the definition of employee. 49 C.F.R. § 390.5 defines an employee as an individual employed by employer and within the course and scope of employment affects commercial motor vehicle safety. The definition further notes that the term includes drivers of commercial motor vehicles including independent contractors while in the course of operating the commercial motor vehicle. The argument came down to whether Rosenbrooks was considered an employee because he was sleeping and not actively operating the commercial motor vehicle when the accident occurred.

The Court applying the definition of employee from 49 C.F.R. § 390.5 determined that Rosenbrooks was an employee because he was employed by an employer, Mid State Logistics, and when he was injured, he was directly affecting commercial motor vehicle safety as one-half of a driving team. Because Rosenbrooks was determined to be an employee, the United Financial policy exclusions for injuries to employees applied, and it had no duty to defend or indemnify the driver or the trucking company against any claims from Rosenbrooks. [2]

The decision is important because the motor carrier who believes it is covered by insurance may end up being uninsured on a claim from their independent contractor drivers.



[1] *United Fin. Cas. Co.*, 2022 U.S. Dist. LEXIS 104532, at *6 (M.D. Pa. June 10, 2022).
[2] *United Fin. Cas. Co.*, 2022 U.S. Dist. LEXIS 104532, at *13.



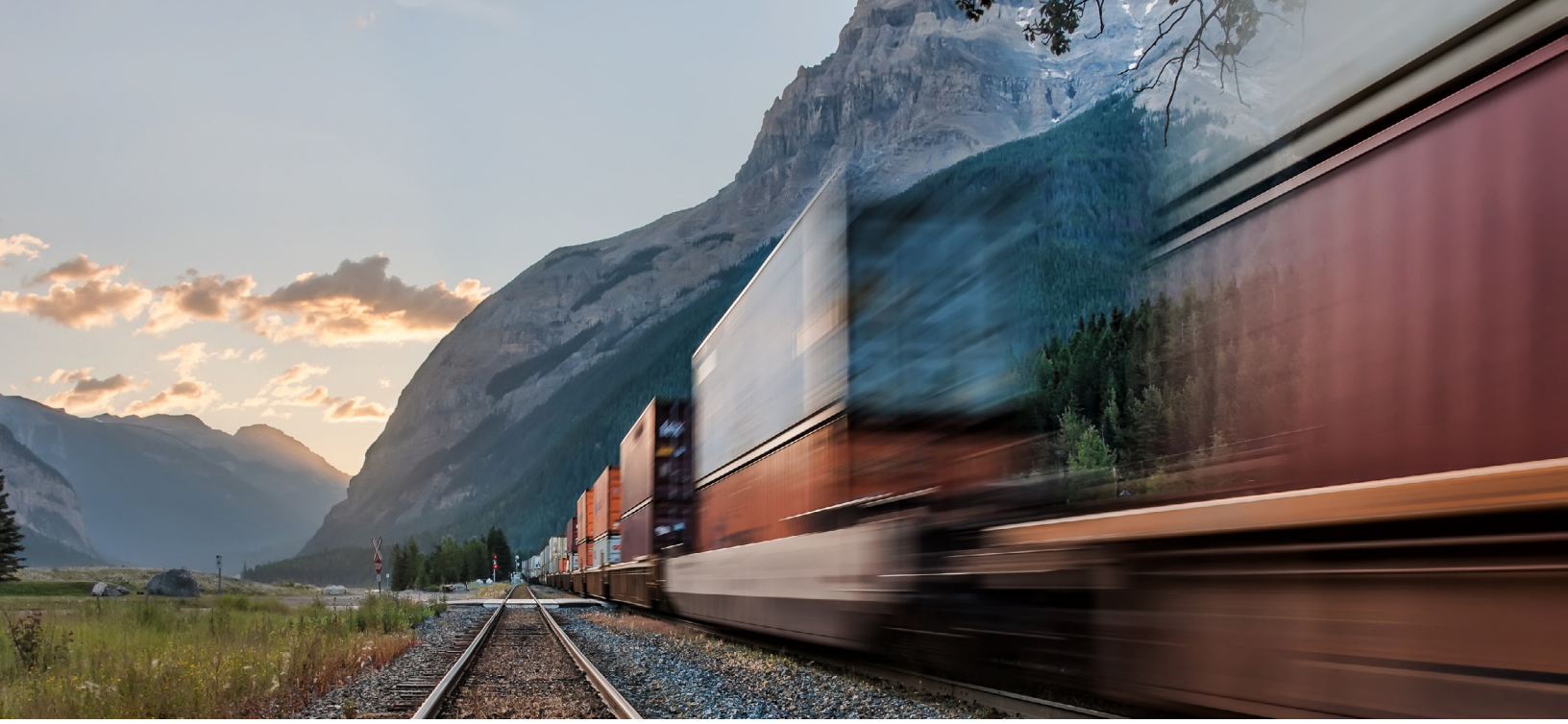
FMCSA Indicates Lack of Data From Insurance Companies and Increased Settlements Limit Its Ability to Evaluate Appropriate Minimum Financial Responsibility Levels for Motor Carriers, Brokers, and Freight Forwarders

BY STEPHANIE BESSELIEVRE

The FMCSA's newest Congressional Report ("the Report") regarding the adequacy of the current minimum financial responsibility levels of motor carriers, brokers, and freight forwarders indicates that an increase in settlements and the proprietary nature of the insurance industry prevents the FMCSA from adequately evaluating the appropriate level of minimum financial responsibility. Under Section 32104 of the Moving Ahead for Progress in the 21st Century Act (MAP-21), the Secretary of Transportation is required to issue a report to the Senate Committee on Commerce, Science, and Transportation and the House Committee on Transportation and Infrastructure regarding minimum financial requirements for motor carriers and bond and insurance requirements for freight forwarders and brokers every four years, following the initial report that was required six-months post-enactment of MAP-21 in 2012.

The Report provides the statutory history of the FMCSA's financial responsibility authority beginning with the Motor Carrier Act of 1935, through the Fixing America's Surface Transportation (FAST) Act, signed into law in 2015. The Report summarizes the current levels of financial responsibility for motor carriers of property that took effect on January 1, 1985 under 49 CFR § 387.9, current levels of financial responsibility for motor carriers of passengers that took effect on November 19, 1985 under 387.33T, and security requirements for brokers and freight forwarders that took effect on October 1, 2013, under Section 32918 of Map-21. The FMCSA noted it continues to review feedback on the security requirements for property brokers and freight forwarders.

Following the statutory history and current financial responsibilities, the Report named several sources it utilized in its finding that insufficient data exists to evaluate the appropriateness of the current minimum financial responsibility levels. The FMCSA cited its own November 2014 Advance Notice of Proposed Rulemaking (ANPRM), which included a potential increase in minimum financial requirements. The Report notes the referenced ANPRM received 2,200 public comments, but it was later withdrawn due to insufficient data. Next, the Report summarized an FMCSA funded study conducted in 2013 by



the DOT's John A Volpe National Transportation Systems Center (Volpe). The major takeaways from that study noted in the Report were that catastrophic motor carrier crashes that exceed the current minimum financial responsibilities account for less than one percent of all CMV crashes, but that costs associated with severe and critical crashes can quickly exceed $1 million (primarily due to increased costs of medical care), but that insurance premiums have actually decreased in real terms. The Report found this study preliminarily supports an increase in current financial responsibilities.

The Report also cited several external studies, including studies by the Pacific Institute for Research and Evaluation (PIRE) (2013), the Alliance for Driver Safety and Security, Inc. (Trucking Alliance) (2013), the American Trucking Associations (ATA) (2013), and the American Trucking Research Institute (ATRI) (2020). Relying on these external studies, the ANPRM, Volpe study, and their own data, the FMCSA found that in the rare instance of catastrophic crashes, minimum levels of financial responsibilities may be significantly exceeded. Despite what the data shows from the respective studies, the FMCSA wrote that its ability to accurately evaluate current minimum financial responsibility is limited by its inability to access data regarding settlements. Interestingly, in the March 2018 FMCSA Motor Carrier Financial Responsibility Report to Congress, the FMCSA similarly stated that the lack of insurance claims data hinders its ability to evaluate minimum levels of financial responsibility for motor carriers. The present Report indicates access to anonymous claims data might be the solution to a more accurate evaluation, but that efforts thus far to obtain that information have failed.

If access to confidential claims data is the key to a financial limits evaluation and insurance companies either can't or won't provide it, the FMCSA may eventually be forced to evaluate limits relying solely on studies with publicly available or volunteered data. With nuclear verdicts on the rise, this may be a problem for motor carriers and insurers. The American Transportation Research Institute's 2020 study, "Understanding the Impact of Nuclear Verdicts on the Trucking Industry" indicates that in the first five years of its 2006 to 2019 study, there were 26 cases over $1 million but in the last five years of data, there were nearly 300 cases over $1 million and that the number of verdicts over $10 million doubled. Additionally, the size of verdict awards increased 51.7% percent from 2010 to 2018. This data begs the question—if the FMCSA can't access far more conservative confidential settlement data, will they eventually be forced to rely on big verdicts that unfavorably skew the overall costs?

Denied: US Supreme Court Denies Cert in *Miller vs. C.H. Robinson*

BY MEGAN M. EARLY-SOPPA

Personal injury lawsuits against freight brokers have been on the rise. Industry experts offer a variety of possible explanations for this increase in claims. At their core, these claims sound in negligent selection and/or hiring of a motor carrier by a freight broker. Much like negligent hiring, training, and supervision claims against motor carriers, plaintiffs making negligent selection claims against motor carriers argue that but-for the broker's selection of ABC Trucking, Inc., an accident would never have happened. Many courts have held negligent selection claims were preempted under federal law.

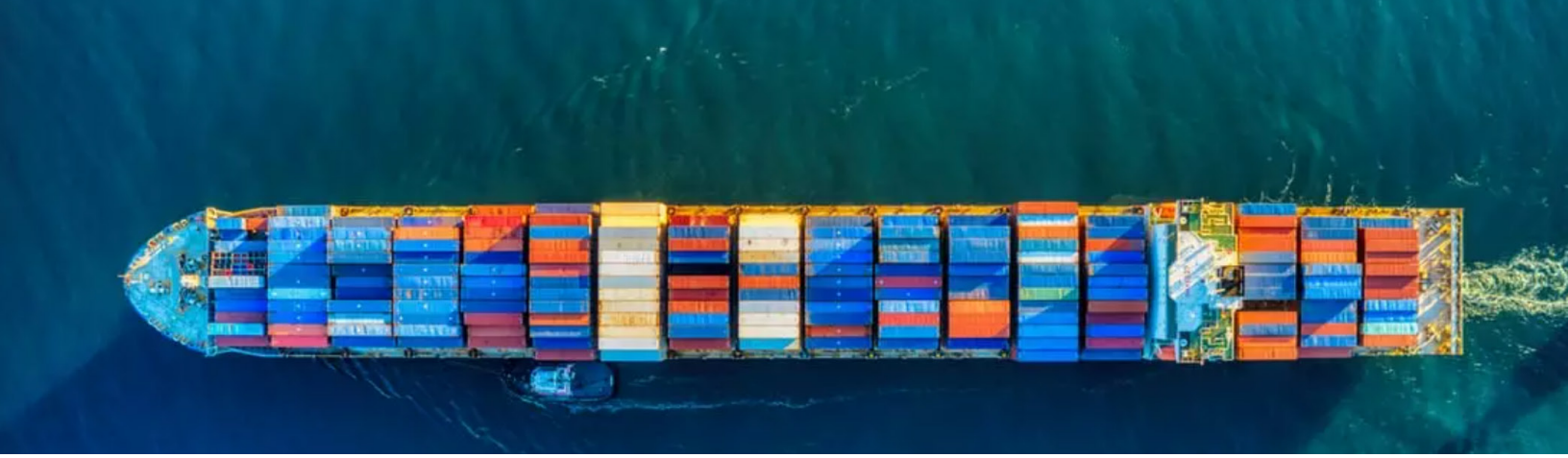
The U.S. Supreme Court has declined to review the Ninth Circuit Court decision involving a personal injury suit alleging that freight broker C.H. Robinson Worldwide Inc. was negligent in its selection of motor carrier. The Plaintiff, Allen Miller, sued C.H. Robinson, claiming that it had liability for the accident because it breached its "duty to select a competent contractor to transport the load." The U.S. District Court in Reno, Nevada dismissed Miller's claim in November 2018, finding that the claim against C.H. Robinson was preempted under the Federal Aviation Administration Authorization Act (FAAAA), and no exceptions applied. The Ninth Circuit Court of Appeals overruled that decision, finding that the claims did fall within the safety exception and ordered that Miller could proceed with his claims.

C.H. Robinson appealed the decision to the U.S. Supreme Court. C.H Robinson asked the Court to grant certiorari and hear the case for the express purpose of reviewing and overturning the Court of Appeals' decision on the FAAAA preemption issue. A number of industry groups filed Amicus Briefs in support. On May 24, 2022. the Solicitor General filed a brief recommending the Supreme Court deny certiorari.

However, on June 27, 2022, the Supreme Court unceremoniously and without comment denied certiorari in the case. The decision has caused heartburn in the freight brokerage industry and will continue to do so in the coming years unless and until it is addressed by the Court. What does this decision mean for freight brokers going forward?

First, the *Miller* decision is the law in the Ninth Circuit. The Ninth Circuit encompasses Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington in addition to various U.S. territories. Freight brokers arranging for transportation of goods through these states, either passing through or as points of origin or destination, will need to factor this into their risk assessment when selecting motor carriers for particular loads. The amount of freight coming into the country from the west coast ports makes this decision more critical to the industry.

Second, no other federal appellate court has ruled on this matter yet. Other courts have upheld FAAAA preemption arguments as barring claims against freight brokers. However, the Court's refusal to hear the *Miller* case is already being used as persuasive authority in state courts across the country. We can expect that this issue will—and should—continue to be litigated in other courts. It appears only a matter of time before the Court is petitioned again to resolve the apparent split in authority between the ninth circuit and other courts across the country.



Update: Remember Dray?!

BY FREDRIC MARCINAK & WILSON JACKSON

On June 16, 2022, President Biden signed the Ocean Shipping Reform Act (OSRA) into law. This bipartisan legislation is aimed at providing relief to companies in the ocean shipping industry, which have experienced shipping cost increases and supply chain disruptions since the beginning of the COVID-19 pandemic. It will equip the Federal Maritime Commission (FMC) with additional oversight and enforcement tools to cut down on exorbitant shipping costs and prejudice toward U.S. shippers, such as agricultural exporters.

These new changes include, but are not limited to, the following:

- Common carriers must certify that demurrage and detention charges comply with federal regulations. Additionally, OSRA requires invoices to provide the following details: (1) applicable demurrage and detention rule on which the daily rate is based; (2) applicable rate or rates per the applicable rule; (3) total amount due; (4) contact information for questions about fees; and (5) a statement that the common carrier's performance did not cause or contribute to the underlying invoiced charges.
- FMC will publish on its website: (1) all findings and penalties for false demurrage and detention invoice information by common carriers and (2) a quarterly report describing the total import and export tonnage and the total loaded and empty 20-foot equivalent units per vessel operated by each ocean common carrier.
- Expanded prohibited common carrier retaliation activities, to include unreasonable refusal of otherwise available cargo space, improperly assessed charges, and inaccurate/incomplete detention and demurrage invoicing.
- FMC maintaining an Office of Consumer Affairs and Dispute Resolution Services to provide non-adjudicative ombuds assistance, mediation, facilitation, and arbitration to resolve challenges and disputes involving cargo shipments, household good shipments and cruises subject to FMC's jurisdiction.
- New provisions for data collection, which will require the FMC to publish new reports on regulated ocean common carriers.
- New provisions for a National Shipping Exchange Registry, which would require shipping exchanges to register with the FMC, among other new requirements.

These changes should encourage regulatory oversight through FMC as the ocean shipping industry. We anticipate that the ocean shipping reform bill will prompt some changes that will benefit the impacted companies. We will continue to monitor the application of OSRA developments to best serve our clients.

THE ROAD AHEAD- Past and Future Events

Past

- Blair kept it weird and attended the DRI Trucking Law Seminar in Austin, TX April 27-29.
- Fred and Megan avoided a revolt and attended the Transportation Lawyers Association Annual Meeting May 11-14 in Williamsburg, VA.
- Rob attended the Truckload Carriers Association Safety Meeting in Nashville June 5-7 and spoke on a panel on safety and risk management.
- Fred, Rocky, and Kristen invaded Florida for the Conference of Freight Counsel Summer Meeting June 12-13 in Orlando, FL.
- Rob attended the SC Trucking Association Annual Conference and Board of Directors Meeting on June 12-15 on Hilton Head Island.
- Rob attended the GA Motor Trucking Association Annual Conference on Amelia Island, June 19-22.
- Rob attended the NC Trucking Association, where he was elected to the Board. The meeting was close by at the Grove Park Inn in Asheville on July 24-16.
- Rob and Fred taught a session for the SC Trucking Association on navigating independent contractor relationships post AB5 on August 12.
- Rob attended and presented at the American College of Transportation Attorneys in Chicago on August 18-19.

Future

- Rob will join friends at The Machinery Haulers Association meeting in Lake Geneva, WI on September 7-9.
- Rob will be joining the Marsh Fleet Solutions Captive in Green Bay, Wisconsin on Sept 14-15.
- Rob is attending the inaugural meeting of the Transportation Defense Advocates Council on September 21-22 in northwest Arkansas.
- Fred and Rocky will speak at the SMC^3 LTL Online Education Hybrid Series regarding Contracting for the Modern Supply Chain September 22 and 29.
- Wilson will attend and speak on Predatory Towing at the Oklahoma Trucking Association's Annual Meeting on September 21-23 in Durant, Oklahoma.
- Rob will be speaking at the Cottingham Butler client meeting near the Field of Dreams in Dubuque, Iowa on October 5.
- Rob will speak to the Auto Haulers Association of America on October 6 in Orlando, Florida.
- Also in Orlando, Rob and Fred will be joining the annual meeting of the Motor Carrier Insurance Education Foundation on October 6-7. Rob is speaking on trends and coverages.
- Rob will be in Indianapolis, Indiana on October 12-13 for the Protective Insurance Claims and Safety Seminar.
- Megan, Blair, Tom, Alex, and Wilson will attend the Trucking Industry Defense Association (TIDA) 30th Annual Seminar on October 12-14 in Orlando, Florida.
- Donavan will attend the Transportation Law Institute on November 18 in Boston, Massachusetts.

MOMAR PAST AND UPCOMING WEBINARS

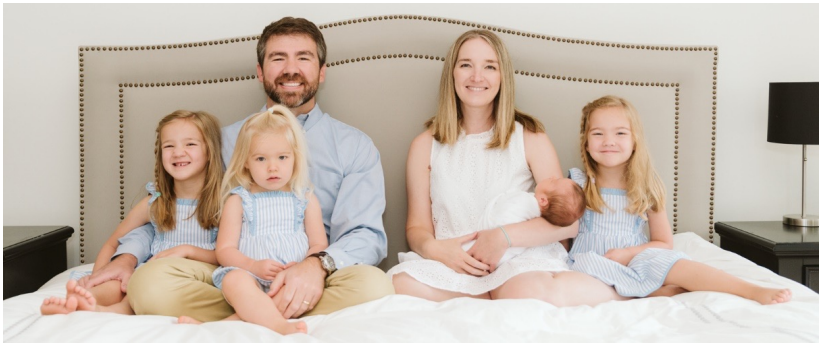
- We hope you will attend our upcoming lunchtime webinar on September 14th. The topic will be responding to AB5 and independent contractor issues.

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

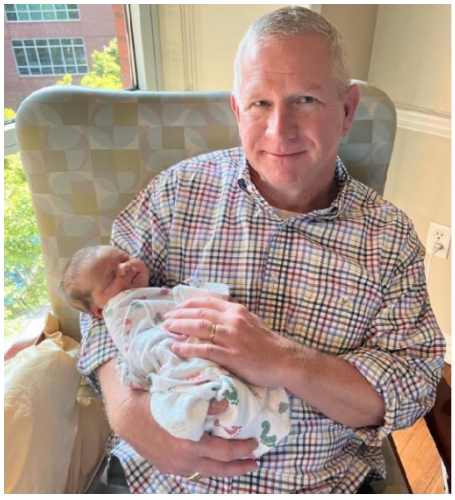
- Life Sentences and Legislatures
- 2021 Year in Review (Parts 1 and 2)

CONGRATULATIONS CORNER

We are pleased to announce that attorney Martin Cain will be joining our firm in the Greenville office on September 1st. Martin graduated from the University of South Carolina (B.A., Political Science and Criminal Justice, *summa cum laude*, 2018) (J.D., *cum laude*, 2021). Prior to joining the firm, Martin worked as a law clerk for Judge Maddox in Anderson, SC. After office hours, Martin enjoys collecting bow ties, duck hunting, skeet shooting, fishing, and watching collegiate sports.



Blair and Amanda Cash welcomed their son, Bennett Richards Cash, on June 9th. Congratulations on no. 4!

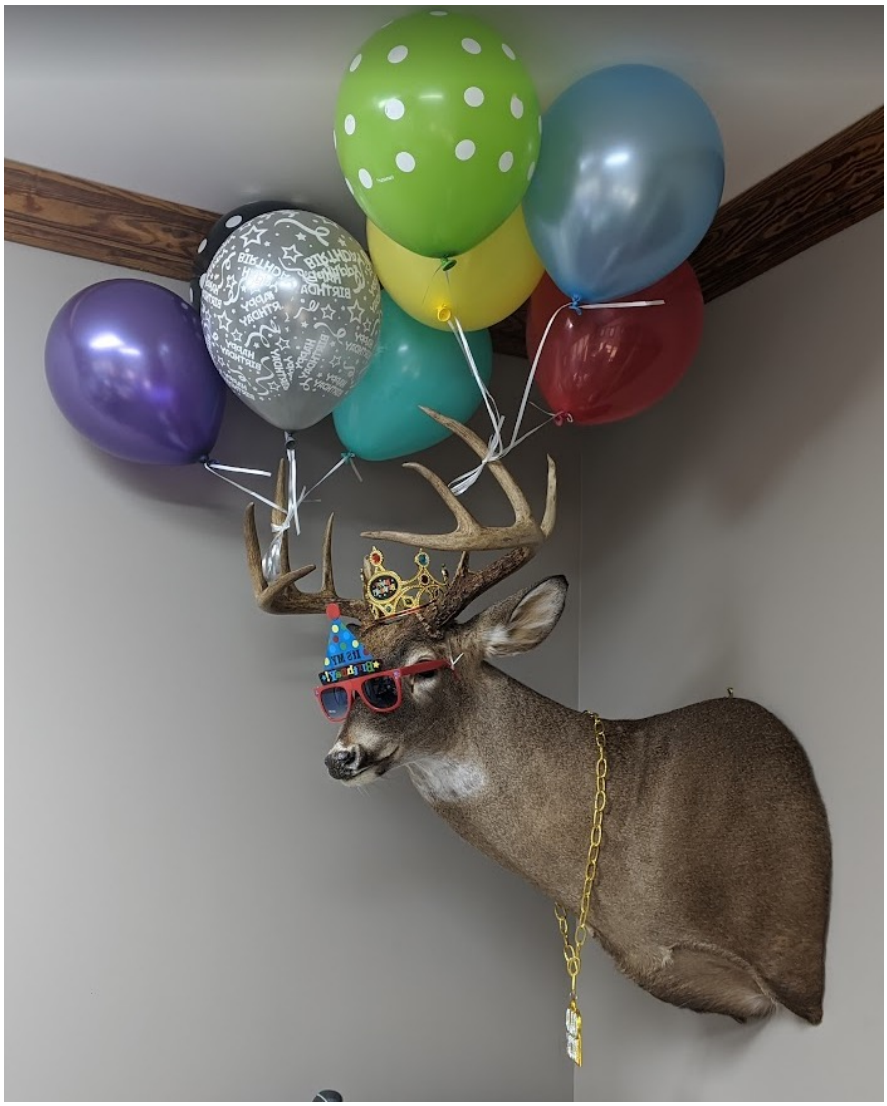


Rob and Robin Moseley became grandparents for the first time when their eldest daughter, Anna, gave birth to Madeline Scout Wartak on the evening of August 1st.

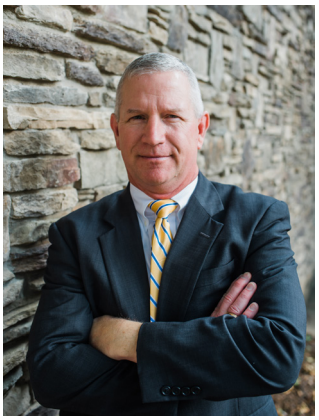
Fred tried his hand at ax throwing. Looks like he's mastered the skill!

NEW-- BUCKY'S REPORT

Bucky celebrated his birthday in style this year. He's so popular that everyone wanted an invitation, but the organizers had to turn down people like the Kardashians because Bucky is a no nonsense kind of deer. The party was rare time off, as Bucky was back hard at work the next morning. He never seems to age, so MOMAR hopes he can hang around for many years to come continuing to make important contributions to help our lawyers shine.



Your MoMar Team



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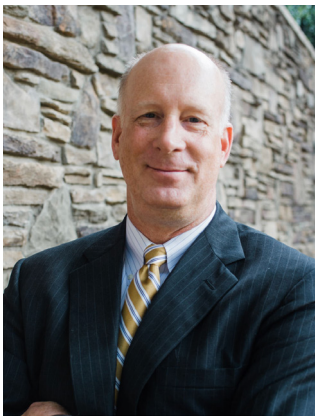

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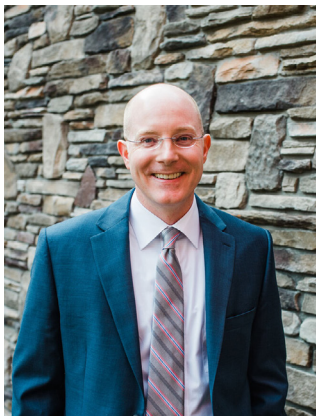

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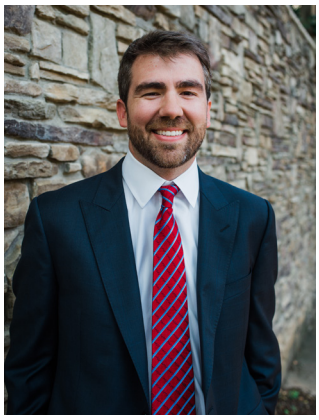

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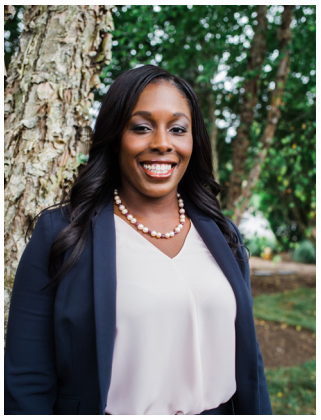

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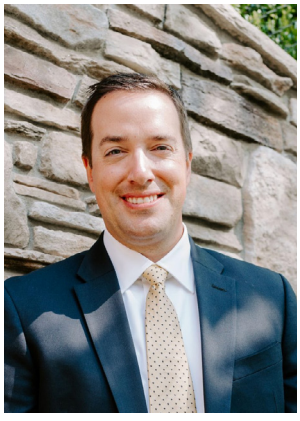

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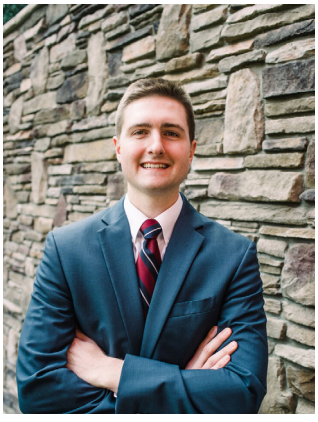

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