MAKING TRACKS

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A Transportation and Logistics Law Firm

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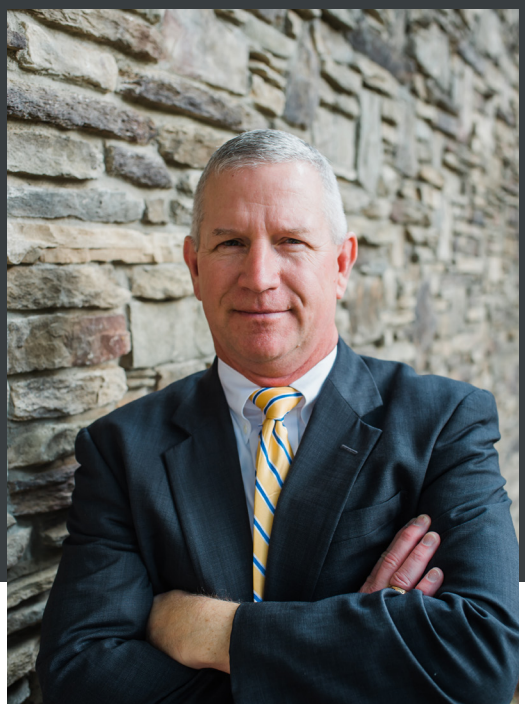
Moseley Marcinak Newsletter Contents



A Note From Rob Moseley

Supply Chain – seems to be a popular topic these days, and for all the wrong reasons. When people ask me what's wrong, I say that it's like 5 year old soccer. The market sees a shortage and all of our resources run to the ball, to the detriment of the rest of the field. Instead of having 2 trucks at each of ten plants, we have 20 trucks lined up at the plant that can solve the shortage. Those trucks wait longer to get loaded, and all of this creates inefficiencies in the supply chain. So like the 5 year-olds all running to the ball, it makes it hard to get to the goal. Rest assured, the market will recover, and there will once again be equilibrium. A couple more thoughts: (1) We live in the most wealthy world economy ever. The amount of disposable income we have is unprecedented. Most of the things the economy can't supply right now are things we don't "need." In fact, the means of production are so dedicated to things we want, it can create a strain on things we need. (2) Just because you can't buy it today doesn't mean there is a crisis. The "Amazon" mentality of being able to get it delivered tomorrow (or even this afternoon) has spoiled us. Remember that it wasn't long ago (ok, maybe longer than I admit) that the standard disclaimer for things we bought was "allow 6 weeks for delivery." So as we have just passed the Christmas season, we probably all have an empty box wrapped for that gift that didn't quite make it on time. That empty box symbolizes the hope of a gift to come. And Christmas reminds us of another future gift to come. So let's remember where we fall in the course of history and be amazed at how "the boundary lines for me have fallen in pleasant places." Ps 16:6.

Pre-Transport Limitation of Liability Approved Under Carmack

BY KRISTEN NOWACKI

A Western District of Washington court recently granted summary judgment in favor of motor carrier defendants dismissing the *pro se* plaintiff's Carmack Amendment claim. *Watson v. Moger*, No. 20-5344 RJB, 2021 U.S. Dist. LEXIS 150259, at *10 (W.D. Wash. Aug. 10, 2021). In this case, the plaintiffs asserted the motor carrier damaged their yacht on an interstate trip from California to Oregon. Prior to the transport, one of the plaintiffs executed a "Wood Boat/ Hull Release." The release included language stating plaintiff would hold the motor carrier harmless from damages attributable to latent or obvious defects to the boat. The release further provided plaintiff would relieve the motor carrier from "any liability or responsibility for damages that may result from the transport of my boat from time of loading to time of unloading on April 4, 2019." *Id.* at *5.

At delivery, the consignee (a Portland, Oregon boat yard) refused to accept the boat due to holes in the bottom. Plaintiff alleged the motor carrier caused the damage and eventually filed suit. In granting the motor carrier's motion for summary judgment, the court noted the Carmack Amendment, 49 U.S.C. § 14706(c)(1)(A), is the exclusive cause of action a claimant may bring for damage arising from interstate transport of property. The court further stated:

> [T]o limit its liability under the Carmack Amendment, a carrier must: (1) at the shipper's request, provide the shipper with a written or electronic copy of the rate, classification, rules, and practices upon which any rate applicable to a shipment, or agreed to between the shipper and the carrier, is based, (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.

Watson, 2021 U.S. Dist. LEXIS 150259, at *10-11 (internal quotation omitted) (*quoting OneBeacon Ins. Co. v. Haas Indus., Inc.*, 634 F.3d 1092, 1099 (9th Cir. 2011)). Applying this test, the court concluded the motor carrier effectively limited its liability from damages based on the signed release. Interestingly, the court held the motor carrier's refusal to ship the boat absent execution of the release met the requirement that plaintiff be given "a reasonable opportunity to choose between two or more levels of liability." The bill of lading reflected this release because it provided the carrier "is not responsible for damage caused by loading, unloading, or due to cradles, trailers, or other carrying devices . . ." *Id.* at *12. There was no dispute the release was executed, and the bill of lading issued prior to the shipment. Thus, the court concluded, the motor carrier defendants "properly limited [their] liability under the Carmack Amendment" and dismissed plaintiff's claims.

This case demonstrates the importance of obtaining a signed, pre-transport limitation of liability and issuing a bill of lading prior to transport. Where that is done, a motor carrier might be capable of fully insulating itself from liability under the Carmack Amendment. Another important aspect of this decision is that the Court found that refusal of the motor carrier to transport the shipment absent execution of the release satisfied the "reasonable opportunity" test, whereas traditionally that analysis has focused upon the shipper selecting between two different levels of liability on the face of the bill of lading. This ruling illustrates there are multiple ways to satisfy that requirement. Note, however, in this instance the plaintiffs were proceeding pro se so it remains to be seen whether these same Carmack defenses will be upheld if challenged by a skilled shipper's attorney.

Philadelphia Indemnity Insurance Co. v. Transit U, Inc.: Delaware court reaffirms the duty to request a MCS 90 is on the Motor Carrier, not the Insurer

BY ROBERT "ROCKY" C. ROGERS

A recent ruling from the United States District Court for the District of Delaware addresses the issues of federal court abstention, standing to seek reformation of insurance policies, right of contribution/indemnification between insurers, and most critically, who has the duty to ensure a policy issued to an interstate motor carrier contains the federally-mandated MCS 90 endorsement. The decision is in line with prior authorities and therefore serves as an important re-affirmation of longstanding principles for insurance coverage disputes involving MCS 90 endorsements.

The case arises from an October 2016 motor vehicle accident involving a truck towing a homemade trailer, which overturned and injured numerous passengers. Several personal injury lawsuits were filed in Delaware state court, which were consolidated into a single action ("the Underlying Action"). The following were defendants in the Underlying Action: (1) Jolly Trolley Transportation Service, LLC ("Transport"), who owned the truck and homemade trailer; (2) Transit U, Inc. ("Transit"), the parent company of Transport and who leased the truck and trailer from Transport; (3) Jolly Trolley Limousine Service, LLC ("Limo"), who was a separate subsidiary of Transit but who did not own, lease, or operate the truck or trailer involved in the Accident; (4) Jolly Trolley School Bus, LLC ("Bus"), whose connection to the Accident is unclear from the opinion; (5) Thomas Dowd, an employee of Transit and the driver of the involved truck and trailer; and (6) the owners of the various companies.

Transit and Transport insured the truck and trailer under a commercial auto liability policy issued by National Indemnity Company (the "National Indemnity Policy"). The National Indemnity Policy had liability limits of $1 million and did not contain any MCS 90 endorsement.

Limo insured its vehicles under a commercial auto liability policy issued by Philadelphia Indemnity Insurance Company (the "PIIC Policy"). Limo was listed as the first-named insured on the PIIC Policy, but Transit was also listed as an insured on the PIIC Policy. The PIIC Policy contained a MCS-90B endorsement in the amount of $5 million, which listed Limo as the carrier for purposes of the endorsement.

After various procedural maneuvers in the Underlying Action, including PIIC withdrawing the courtesy defense it had previously been providing to Transit pursuant to a full reservation of rights, the parties in the Underlying Action moved for entry of final judgment in the Underlying Action against all defendants, including Limo. PIIC moved to intervene in the Underlying Action and shortly thereafter

filed a separate complaint in federal court against Transit, Transport, Limo, Bus, the owners of the companies, Dowd, and National Indemnity. In the federal action, PIIC allege a number of different causes of action, including as is relevant here: (1) a claim seeking declaratory judgment that the policies issued by National Indemnity to Transit, Transport, and Bus cover the accident up to $5 million under each policy ; and (2) contribution and indemnification from National Indemnity for any judgment PIIC is required to pay in connection with the Underlying Action. National Indemnity moved to dismiss various counts alleged against it.

I. *The Federal Abstention Doctrine did not preclude the court from deciding the issues*

As an initial matter, the court focused upon whether it should even take up the declaratory judgment action. It applied the Third Circuit's test for abstention, which included consideration of the following eight factors:

(1) likelihood a federal court declaration will resolve the uncertainty of obligation that gave rise to the controversy;
(2) the convenience of the parties;
(3) the public interest in settlement of the uncertainty of the obligation;
(4) the availability and relative convenience of other remedies;
(5) a general policy of restraint when the same issues are pending in a state court action;
(6) avoidance of duplicative litigation;
(7) prevention of use of federal DJ action as method of "procedural fencing" or as a means to provide another forum in a race for res judicata; and
(8) in the specific insurance context, any inherent conflict of interest between an insurer's duty to defend in a state court action and its attempt to characterize that suit in federal court as falling within the scope of a policy exclusion.

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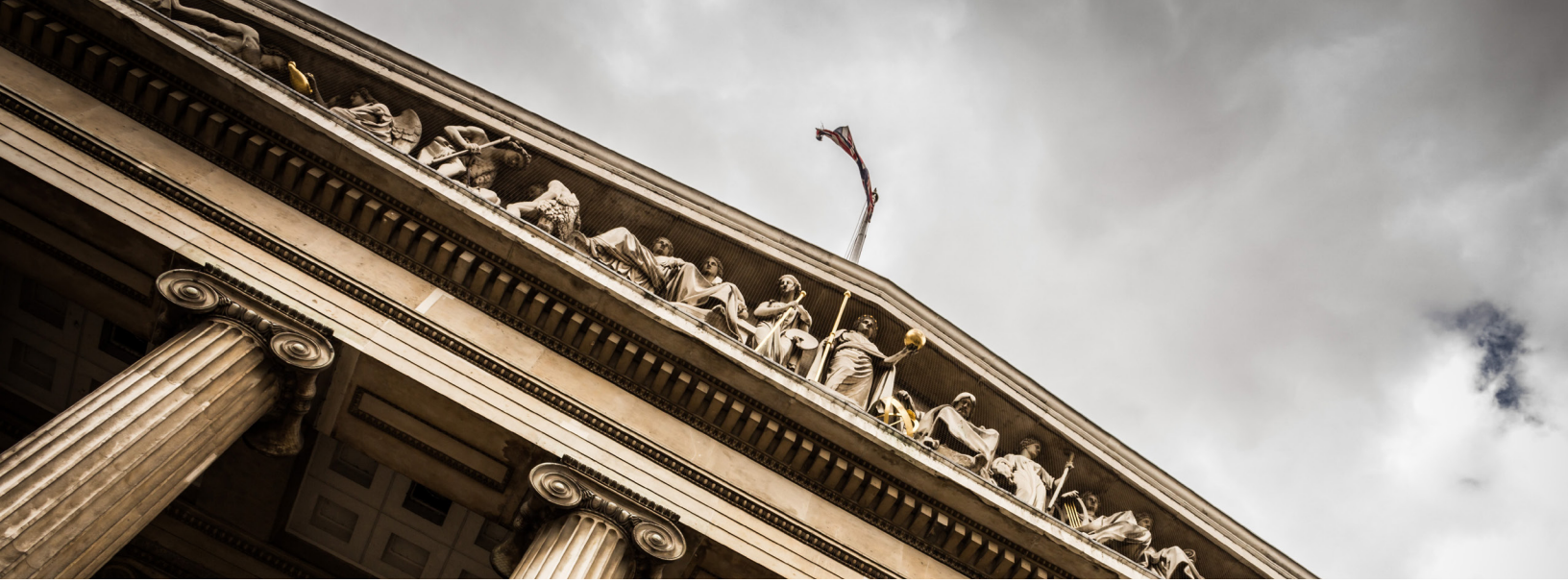
[1] It appears there may have been three separate policies, as opposed to a single policy with each entity listed as an insured, issued by National Interstate to Transit, Transport, and Bus; this issue is not clear from the opinion but is not a critical fact for purposes of the holdings of the case.



After considering those factors, the court evidently held it need not abstain from exercising jurisdiction over the dispute, though the decision does not contain much analysis of this particular issue.

II. *PIIC's claims were ripe for adjudication*

The court next considered whether PIIC's claims were ripe for adjudication. National Indemnity argued PIIC's claims were not yet ripe, and therefore the court addressing them would constitute an impermissible advisory opinion because PIIC had not yet been required to satisfy any judgment in the Underlying Action. In rejecting National Indemnity's argument, the court applied the Third Circuit's three-factor test for ripeness: (1) the parties must have adverse legal interests; (2) the facts must be sufficiently concrete to allow for a conclusive legal judgment; and (3) the judgment must be useful to the parties.

As for the first element, the court rejected the party seeking redress must have suffered a "completed harm" but instead must only show "there is a substantial threat of real harm that remains throughout the course of the litigation." Under the facts, the court held the judgment and the assignment of rights to the underlying tort plaintiffs to sue for satisfaction of the judgment from the MCS 90 was sufficient. For the second prong, the court focused upon the fact that the insurance contracts were "not hypothetical insurance contracts" and any decision on the issues would help to establish actual (as opposed to hypothetical) insurance obligations. Finally, for the last prong, the court held that a decision in the declaratory judgment action would serve a useful purpose by establishing the insurers' respective obligations and resolve legal uncertainty. For each of these reasons, the court held the dispute was ripe.

III. *PIIC lacked standing to seek reformation of the National Indemnity Policy*

National Indemnity next argued PIIC lacked standing to allege a claim, which National Indemnity characterized as asking the court reform the National Indemnity Policy's coverage from $1 million up to $5 million. National Indemnity argued reformation of a policy may only be sought by a party to the

insurance contract.

In addressing this argument, the court pointed out that PIIC was not simply asking the court to interpret the National Indemnity Policy as it existed, but instead was asking the court to reform the policy up to the federal financial responsibility minimum of $5 million. Considering this, the court agreed with National Indemnity that PIIC did not have standing to seek reformation, which is only available to a party to the insurance contract. Importantly, the court explained "[PIIC] is not a party to the contract and does not point to any regulation or statute that would grant standing to a third-party insurer to rewrite a MCS 90B endorsement into a separate insurer's policy."

IV. *The duty is on the motor carrier, not insurer, to request MCS 90 endorsement*

Last, the Court further clarified who bears the burden of requesting the MCS 90 endorsement and otherwise complying with the federal financial responsibility requirements under the Federal Motor Carrier Safety Regulations. Citing Delaware and federal law, the court concluded both place "the burden on motor carriers, not insurers, to maintain minimum amounts of financial responsibility." Going further, the court explained the rule as follows: "insurers have no duty to include a MCS 90B endorsement in their motor carrier policies or otherwise satisfy minimum amounts of financial responsibility for motor carriers under federal or Delaware law . . . ." Accordingly, the Court dismissed PIIC's claim seeking a declaration that the National Indemnity Policy must provide $5 million in coverage to meet the federal financial responsibility minimums.

V. *PIIC had no claim for contribution or indemnification from National Indemnity*

Finally, the court addressed PIIC's claim for contribution and indemnification from National Indemnity. Finding no specific rules applicable in the MCS 90 context, the court applied Delaware state law, which limited the right to seek contribution in the insurance context to "two basic circumstances": (1) an insurer of a joint tortfeasor has paid all, or a greater than its share, of a loss; and (2) a single insured is covered by concurrent or double insurance and one insurer paid all of a greater share of the loss. Since the court had previously ruled the National Indemnity Policy would not be reformed to include a MCS 90B and/or up to the $5 million liability limits required under the federal financial responsibility regulations, and National Indemnity had previously tendered its full $1 million in liability limits, the court held PIIC's indemnification and contribution claims fail as a matter of law.

UPDATES: COVID19 Vaccine Mandate in America

BY MEGAN M. EARLY - SOPPA

What is it? – Under the Emergency Temporary Standard (ETS), a rule published by the U.S. Occupational Safety and Health Administration on Nov. 5, businesses with 100 or more workers are to require employees to be vaccinated. If they are not, they would need to be tested weekly and wear masks while working, with exceptions for those who work alone or mostly outdoors. This includes truckers who are alone in their cab or who are not interacting with others at their point of departure or destinations, according to the Department of Labor. The ETS would be in effect until May 4, 2022.

When does it go into effect? The ETS went into effect on January 4, 2022.

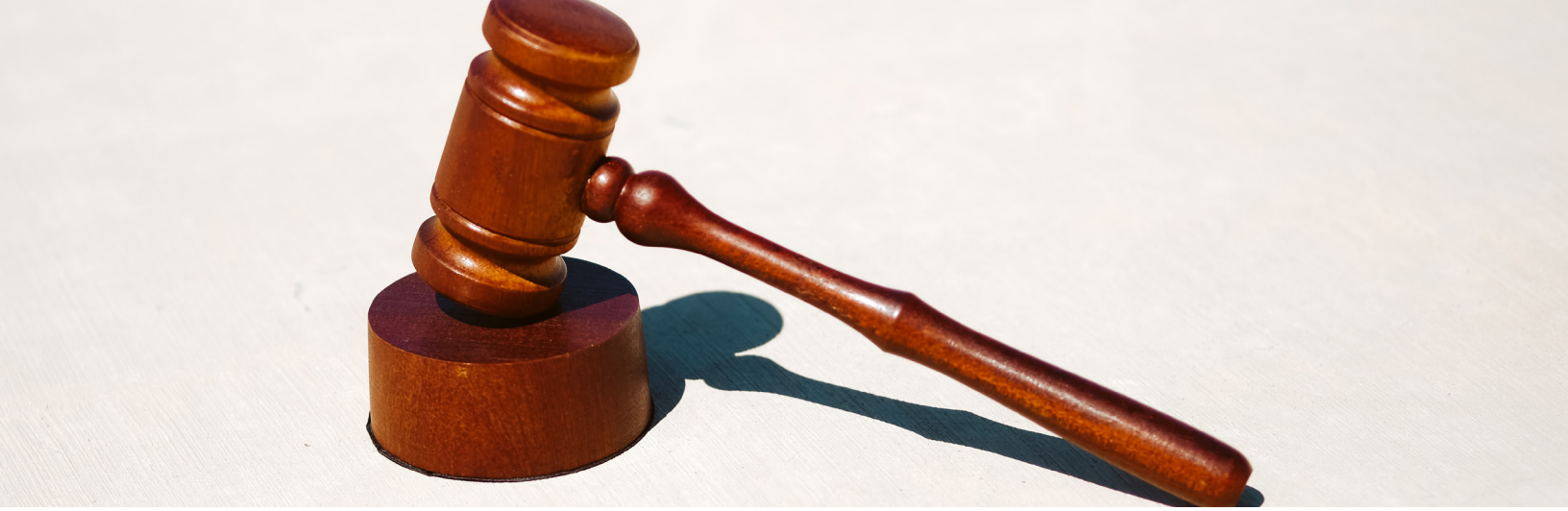
On Dec. 17, 2021, the 6th U.S. Circuit Court of Appeals lifted the stay on the federal government's rule requiring covered employers to ensure workers are vaccinated against the coronavirus or undergo weekly COVID-19 testing.

OSHA will not enforce any requirements under its Emergency Temporary Standard (ETS) until January 10, 2022. Additionally, the agency "will not issue citations for noncompliance with the standard's testing requirements before February 9, 2022, so long as an employer is exercising reasonable, good-faith efforts to come into compliance with the standard," according to an OSHA update.

The directive is expected to cover more than 80 million private-sector workers.

What Happens Now? It is very likely that the Supreme Court will weigh in on the ETS, however, most employers cannot await a court ruling to begin the process of developing a comprehensive policy to comply with the terms of the ETS. If you have begun preparations, we recommend that employers prepare to follow the requirements of the ETS while litigation continues. However, we also understand that some employers are taking a wait-and-see approach.

We will continue to monitor this issue closely, and provide updates.



Sutphen v. Midwest Construction Services, Inc.: Post-Judgment Veil Piercing

BY LESESNE PHILLIPS

Corporations and limited liability companies provide a level of protection for their owners from a personal liability standpoint. Formation of these entities is accomplished with filings at the State level. Once the corporate entity is formed, and if the owners keep up with the applicable corporate formalities, the owners of the entity should be protected from personal exposure when a lawsuit is filed against the corporate entity. In such a situation, a plaintiff will be limited to the collection of assets that are currently held by the corporate entity, not the personal assets of the owners of the corporate entity. However, this protection can be dissolved when the corporate entity does not follow the applicable laws in formation or upkeep of the limited liability entity. A plaintiff can seek to "pierce the corporate veil" to defeat the limited liability shield and establish personal liability on the owners of that entity. For obvious reasons, this potential for personal liability should be of great concern to any business owner.

When a corporate entity has been named as a defendant in a case, plaintiffs' attorneys will sometimes plead or claim a veil piercing argument at the initial stages of the case to put corporate defendants on alert. Often, counsel for the owners of the corporate entity (against whom the veil piercing claim is alleged) will seek to have the veil piercing claim dismissed, arguing that it is only properly alleged after a judgment has first been obtained against the corporate entity in the initial litigation and that if that occurs, the plaintiffs can file a separate action seeking to pierce the corporate veil. Court rulings on whether the veil piercing claims can be brought along with the initial litigation are varied and largely revolve around different, conflicting judicial doctrines (judicial efficiency, deference to corporate limited liability, etc.).

A recent case out of the United States District Court for the Northern District of Ohio deals with exactly these issues. *Sutphen v. Midwest Construction Services, Inc.*[1] was a standard personal injury tort action stemming from a motor vehicle accident involving a tractor-trailer. After filing an initial complaint as well as an amended complaint, the Plaintiffs sought to amend the complaint for a second time in order to add a veil-piercing claim alleging that the owners of the motor carrier should be personally liable for any judgment entered against the motor carrier in the action.[2] Since the deadline for amended pleadings under the federal court's scheduling order had already passed, the

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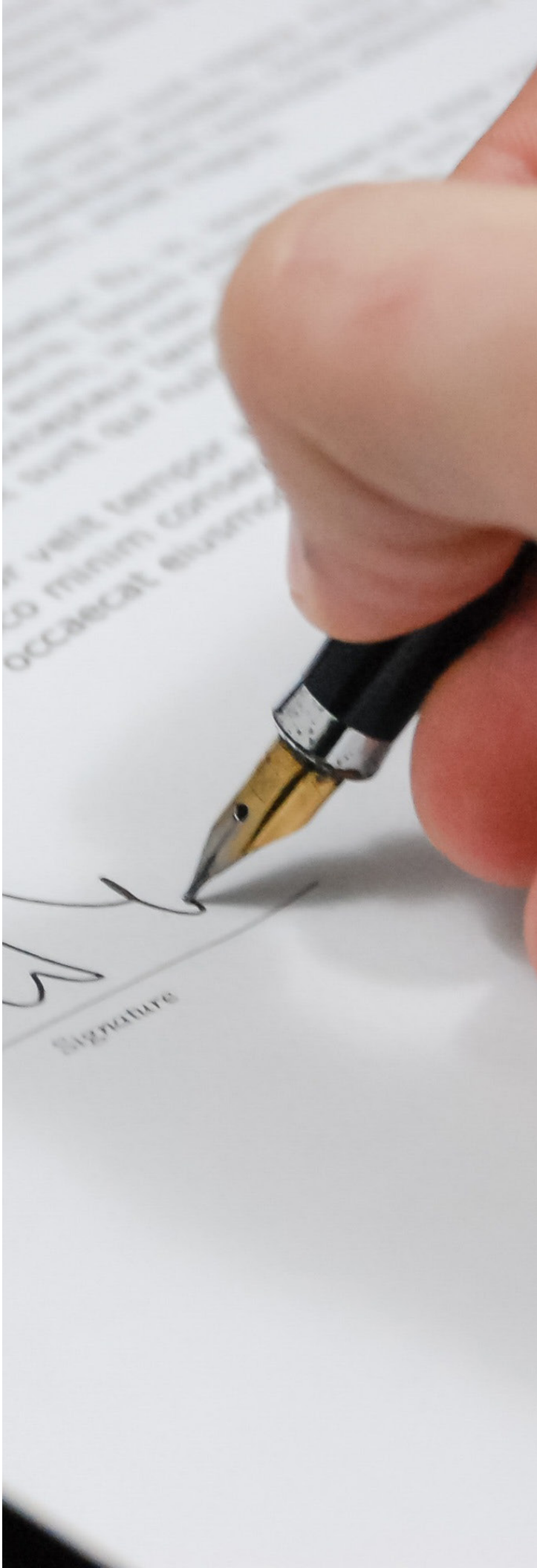
[1] 2021 U.S. Dist. LEXIS 181568 (N.D. Ohio September 22, 2021).

[2] Specifically, the Plaintiffs alleged the owners fraudulently transferred assets from the corporate entity and that the owners maintained a "contractually-deficient insurance policy" for the motor carrier.

Plaintiffs had to seek leave of the court to file the second amended pleading. In support of their motion to amend, the Plaintiffs alleged they had only recently learned of the acts giving rise to the veil piercing claim through the discovery process in the action.

Despite the Plaintiffs' pleas to the court to allow them to amend the Complaint to pursue these veil piercing claims within the underlying tort action, the court held those claims were "more traditionally appropriate for a post-judgment (or separate action)—if necessary . . . ." Certainly factoring into the court's decision was that the underlying tort action had already been pending for almost eighteen months when the Plaintiffs made their motion to amend, leaving only a few months before the close of discovery under the court's scheduling order. Federal courts, in particular, do not like to get in the habit of frequently modifying scheduling orders, particularly at the late stages of an action. In the court's view, the requested amendment would drastically change and broaden the scope of the case. Last, the court explained the Plaintiffs were not without recourse because they could always bring a second, separate action alleging these veil piercing claims against the owners of the motor carrier in the event judgment was entered against the motor carrier in the underlying tort case. Accordingly, the Plaintiffs' motion to amend was denied.

This case serves as yet another authority for personal defendants to argue: (1) any veil-piercing argument is inappropriate until liability is found against the corporate entity; and (2) including a veil-piercing argument early in the case will significantly broaden the scope of the case and should be carefully considered by the court before permitting such claims in the underlying action.



Lien Versus Release of Property From Recovery, Towing and Storage Services

BY G. TOM CHASE

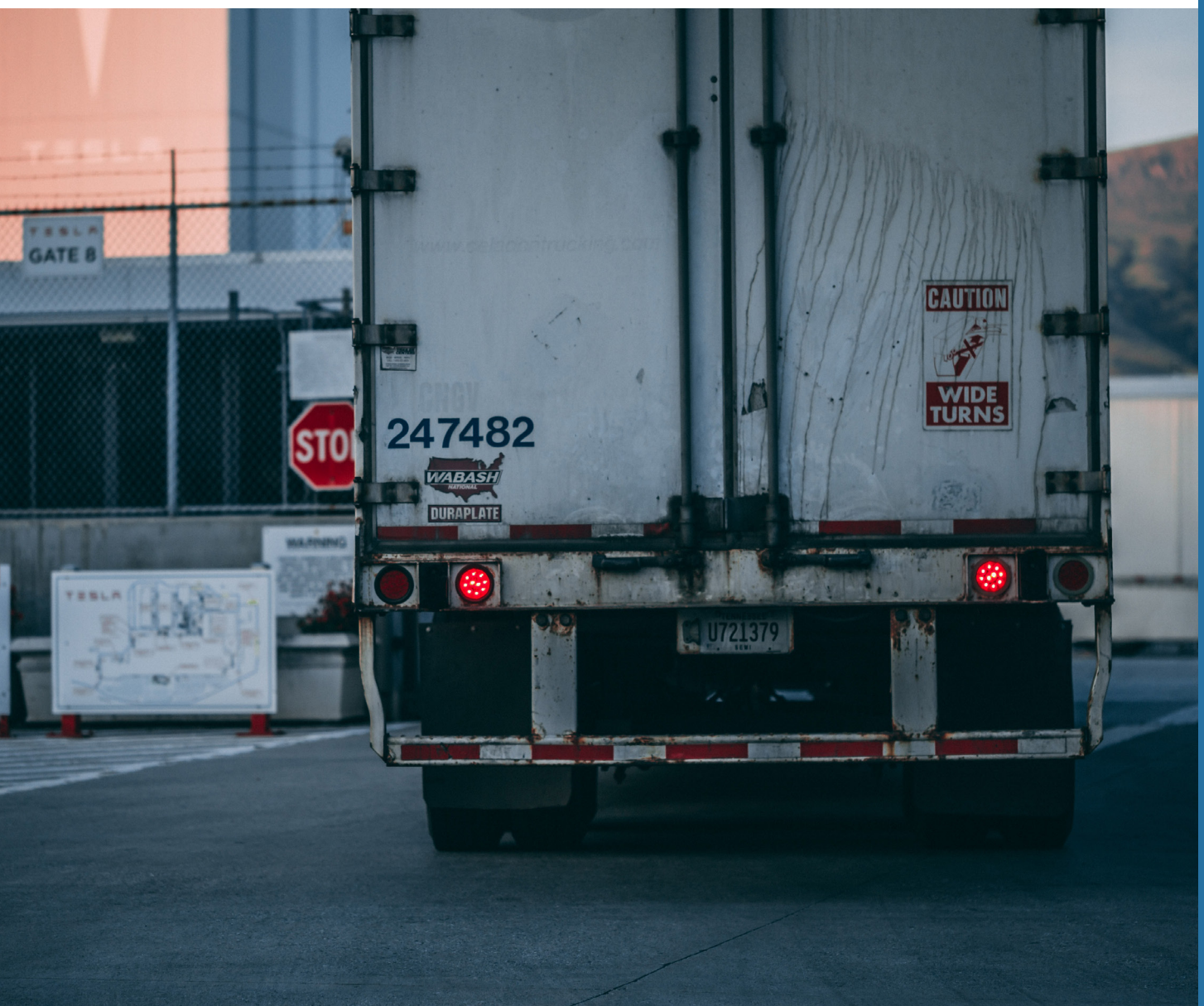
As previously noted, towing and recovery work by wrecker service companies for accidents involving commercial motor vehicles can be a complex and expensive endeavor, creating potential questions about what may be charged, when cargo may be retained pursuant to liens and how disputes regarding such issues can be resolved. *Crete Carrier Corp. v. Sullivan & Sons, Inc. d/b/a Sullivan's Garage*, 2021 WL 2685253 (U.S. Dist. Crt. Maryland 6/30/2021) provides another example of how fact and law specific these claims are. In Crete, the District Court issued a writ of replevin requiring the towing company to immediately release a tractor, a trailer and cargo after the towing company performed accident clean up, equipment removal and storage from a commercial vehicle accident in Maryland. This writ of replevin was issued despite the motor carrier having not yet paid for the services due to a challenge to the amount invoiced.

In *Crete*, the towing company was called by the Maryland Highway Patrol pursuant to a preapproved list of companies authorized to perform towing and recovery actions. Crete Carrier Corp. ("Crete Carrier") never expressly requested or authorized the use of Sullivan's Garage for the services, but the evidence confirmed Crete Carrier never challenged the assignment or the work performed, including the introduction of evidence of express communications between representatives of the companies at the scene. The single vehicle accident involved catastrophic damage to the tractor and trailer, which was transporting a load of clothing. The tractor, trailer and cargo were stored at the towing company's facility. Upon demand for the property by Crete Carrier, the towing company issued an invoice for recovery and storage fees, with the amount of the bill being challenged as excessive. Crete Carrier then requested a writ of replevin from the District Court for immediate delivery of the property held by the towing company. Generally, replevin allows a person or entity who claims a right to immediate possession of personal property to file an action for possession before a judgment. The towing company challenged the request for the writ of replevin claiming they had a lien on the property allowing for the property to be held until payment for the services under the Maryland Garageman's Lien Statute, Md. Code (2103 Repl. Vol.) §16-202(c) of the Commercial Law Article.

The District Court initially found that the towing company did have a lien for the recovery, towing and storage services under the Maryland Garageman's Lien Statute. However, the District Court found that the statute and the evidence in the case did not establish that the towing company had a superior right of possession to the property. Rather, the court found that the statute provided that a writ of replevin was required to be issued for the immediate return of the vehicle and load where a bond was issued in sufficient amount related to the claimed services costs. Therefore, the District Court required the immediate return of the tractor, trailer and cargo to Crete Carrier upon issuance of a bond in an amount determined by the court, with the action regarding the challenge to the amount charged for the services to be addressed in a separate claim.

Understanding the District Court was applying specific law for the jurisdiction where the claims were being made, the District Court's analysis and findings provide potential direction and reminders for future challenges to billing associated with recovery, towing and storage of commercial vehicles where the property is held pending payment. For example, applying the express language of the statute alleged to create the lien, the District Court indicated that a lien would not have been created where the request for services by the towing company was only requested by the highway patrol and no request or consent was given by the motor carrier, either direct or indirect. Additionally, the court indicated that while the statutory provisions did not create a superior right to possession of the property pending payment, it recognized that

the towing company could potentially establish such a right in this type of case. Furthermore, in establishing the amount of the bond required to be issued under the statute, the District Court used its discretion in determining the bond despite the express invoice amount claimed by the towing company. Therefore, the case provides a strong reminder that challenges may be available to commercial motor carriers whose property is held by towing companies while a bill for services is outstanding, including the potential to facilitate immediate release of property even while billing disputes remain outstanding. However, as is often the case, the law for the jurisdiction and the specific facts for the individual case must be examined closely to determine the viability and strength of such a challenge.



Temporary 100% Deduction for Meal Portion of Per Diem Reimbursement

BY J. ALEX TIMMONS

Motor carriers whose drivers are subject to the hours of service requirements can temporarily deduct the meal portion of the per diem expense at 100% instead of 80% for 2021 and 2022. This temporary relief was made available by the Taxpayer Certainty and Disaster Tax Relief Act of 2020, a division of the Consolidated Appropriations Act, 2021 (CAA 2021). Initially there was some confusion on whether the transportation industry using per diem reimbursements could take advantage of this tax relief, but the IRS clarified the confusion with Notice 2021-63, "Temporary 100-Percent Deduction Applies to Meal Portion of 2021 and 2022 Per Diem Rate or Allowance."

Section 274 of the Internal Revenue Code generally limits or disallows certain meal and entertainment expenses. Prior to the passing of CAA 2021, motor carriers and self-employed truckers using the Special Transportation Industry per diem could deduct 80% of the meal portion of the per diem expense as provided by 26 U.S. Code §274(n)(3). The temporary exception as provided by §274(n)(2)(D) allows for a temporary increase of the deduction for the meals portion of the per diem to 100% for meal expenses paid or incurred between January 1, 2021 through December 31, 2022. Section 274(n)(2)(D) provides that the limitation on meal expenses previously enacted shall not apply if such expenses are (1) for food or beverages provided by a restaurant, and (2) paid or incurred before January 1, 2023. This deduction applies only to meals and not to incidental expenses.

Normally, motor carriers and self-employed drivers must substantiate the expenses pursuant to 26 U.S. Code §274(d). Rev. Proc. 2019-48, which provides the rules for taxpayers that choose to use a per diem rate and requires taxpayers to substantiate the amount of ordinary and necessary business expenses paid or incurred while traveling away from home. Traveling away from home requires that 1) your duties require you to be away from the general area of your tax home substantially longer than an ordinary day's work and 2) you need to sleep or rest to meet the demands of your work while away from home. The sleep or rest is defined as substantial sleep which would be more than a break or a few hours at your turnaround point. Taxpayers who normally follow the rules in Rev. Proc. 2019-48 are deemed to have met the substantiation requirements. Notice 2021-63 set forth a special rule that a taxpayer who properly applies the rules of Rev. Proc. 2019-48 may treat the meal portion of the per diem as being attributable to food and beverages provided by a restaurant.

The per diem rate for meals and incidental expenses (M&IE) for the transportation industry is set by the IRS. The IRS updated the M&IE rate effective October 1, 2021 to $69 for travel within the continental United States and $74 for travel outside the continental United States. See IRS Notice 2021-52, Section 3. It is important to note that the M&IE rate from January 1, 2021 through September 30, 2021 for travel in the continental United States was $66 and $71 for travel outside the continental United States. Of the M&IE, $5 would be considered incidental.

What this means for the motor carrier is that for 2021 and 2022 the meal expense portion of providing the Special Transportation Industry per diem is fully, 100% deductible without the hassle of having to demonstrate that the meals were in fact purchased from a restaurant. For the owner-operator that uses the Special Transportation Industry per diem expense, you get to claim 100% of meal portion of the per diem as a tax deduction for each day you are away from your tax home. It is expected that the per diem deduction will return to 80% beginning in 2023 when the current temporary relief expires, unless Congress passes further relief legislation.

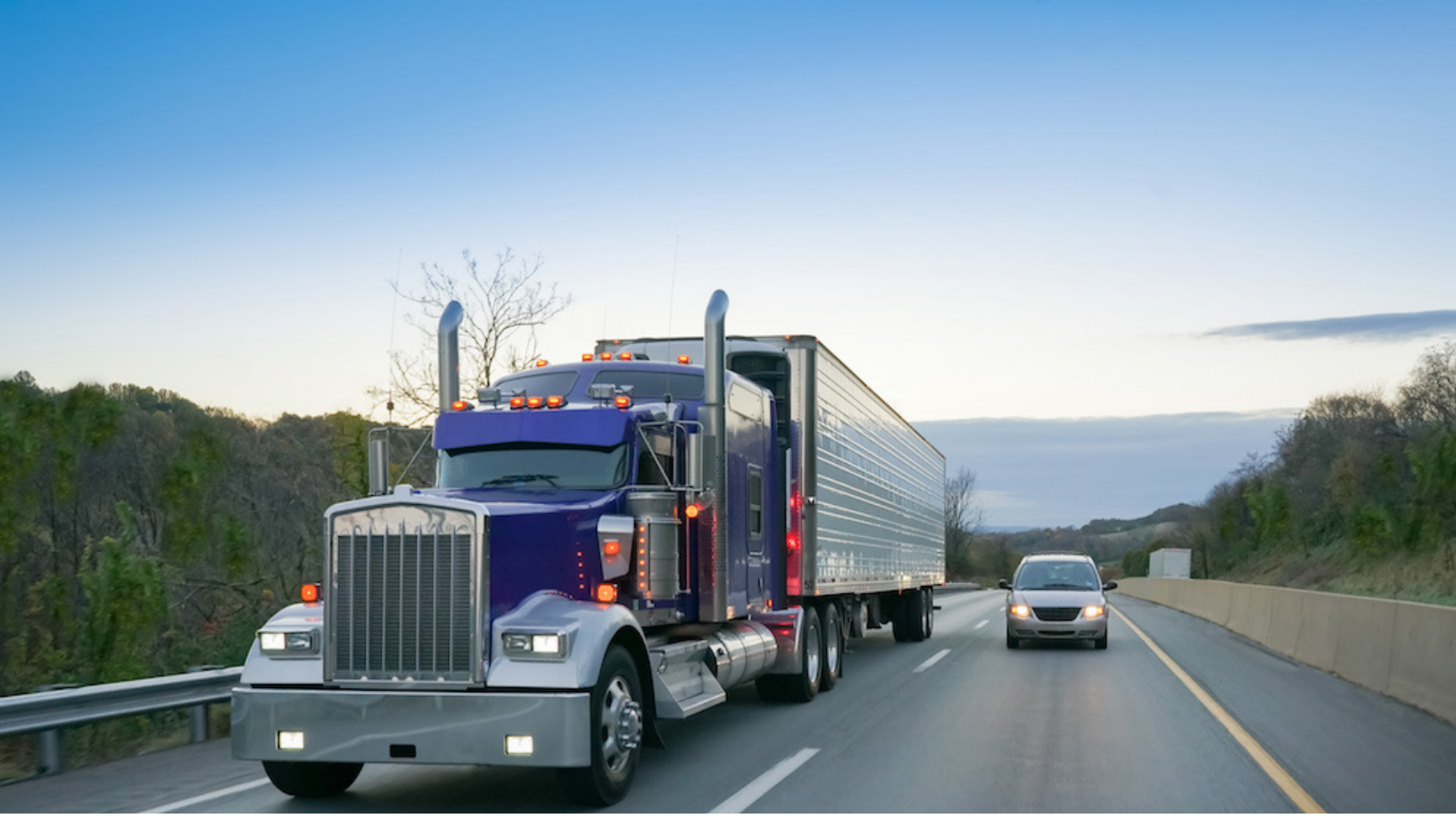
Not So Fast: Motor Carrier's Financial Information Not Discoverable

BY WILSON JACKSON

The discovery phase of litigation can be burdensome in trucking cases. Routinely, the plaintiff requests that the trucking company produce everything from the driver's orientation training up to and including the butt of the cigarette the driver was smoking at the time of the accident. Okay, while that last part might be a stretch, anyone who has dealt with discovery in a personal injury case involving a motor carrier knows just how tedious the standard discovery requests have become in recent years. These requests can also seek disclosure of the motor carrier's financial information, which aims to investigate the financial wherewithal of the motor carrier to pay any judgment in excess of the insurance policy limits.

Generally, parties to civil litigation may obtain discovery regarding "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case. . ." Fed. R. Civ. P. 26(b)(1). Almost all states have a rule similar to the federal rule. Courts are to construe broadly rules enabling discovery. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co.*, 967 F.2d 980, 983 (4th Cir. 1992) (internal citation omitted). However, "discovery, like all matters of procedure, has ultimate and necessary boundaries." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). "The scope and conduct of discovery are within the sound discretion of the district court." *Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 56 F.3d 556, 568 n.16 (4th Cir. 1995) (citation omitted).

In Akehurst v. Buckwalter Trucking, LLC, a South Carolina federal court recently dealt with a request for the motor carrier's financial information in a run-of-the-mill accident involving a tractor-trailer. Plaintiff's attorney claimed that Plaintiff had accumulated over $210,000.00 in medical expenses and actual damages would exceed the motor carrier's $1 million insurance policy. In contrast, the motor carrier argued that discovery had just begun, Plaintiff's discovery was not aimed at proving the causes of action listed in the Complaint, no depositions had been taken, and Plaintiff had not produced any evidence that the actual damages alone would exceed the applicable insurance policy.



The court first explained that currently, there is no standard to establish "what a plaintiff must show in order to discover a defendant's financial condition." *Id.* (internal citation omitted). However, federal courts in South Carolina have traditionally required "a plaintiff to make prima facie showing of his entitlement to punitive damages before he can discover the defendant's financial condition, albeit not necessarily during summary judgment." *Id.* (internal citation omitted). Stated differently, under South Carolina's standard, a plaintiff in a personal injury action is only entitled to the defendant's financial information if the plaintiff has made a showing they have a viable (i.e. likely) claim for punitive damages.

As with other states, in order to receive an award of punitive damages under South Carolina law, the "Plaintiff must prove by clear and convincing evidence Defendant's misconduct was 'willful, wanton, or in reckless disregard of the plaintiff's rights.'" *Id.* at *6–*7 (internal citation omitted). The court found that at this stage of the proceedings, Plaintiff had not yet made the requisite prima facie showing of entitlement to punitive damages. *Id.* at *8. Therefore, the court held Plaintiff was not entitled to the motor carrier's financial information at that time, but the ruling was without prejudice to the Plaintiff's right to seek the materials later, if and when the plaintiff succeeded in making a prima facie showing of entitlement to punitive damages. *Id.*

While personal injury plaintiffs allege punitive damages in almost every lawsuit, the standard is steeper than that—before ordering disclosure of a motor carrier's financial records, the court must first determine whether the plaintiff has, in fact, made a prima facie showing of entitlement to punitive damages. Accordingly, this ruling represents a well-reasoned restraint and limitation on the plaintiff bar's ability to get "whatever they want, whenever they want" simply because a case involves a trucking company.

Alston & Bird, LLP v. Hatcher Management Holdings, LLC: Discussion and Impact Upon Transportation Industry

BY BLAIR J. CASH

On August 10, 2021, the Supreme Court of Georgia issued another decision that could reverberate through the transportation industry. In the *Alston & Bird, LLP v. Hatcher Management Holdings, LLC*, 2021 Ga. LEXIS 568 (Aug. 10, 2021) (hereinafter "Hatcher") decision, the Court held that a defendant in single defendant cases are not allowed to apportion fault to non-parties. The Court found that O.C.G.A. § 51-12-33(b) does not apply to tort actions brought against a single defendant in large part because the subsection starts, "Where an action is brought against *more than one person* for injury to person or property." (emphasis added).

There was some doubt whether joint and several liability was abolished by Georgia's apportionment statute when it was passed in 2005. *See McReynolds v. Krebs, 307* Ga. App. 330 (2010). Joint tortfeasors who proximately cause a single injury are jointly and severally liable for damages caused by the injury. If only one joint tortfeasor is sued in an action for damages, the named joint tortfeasor may seek contribution from the unnamed joint tortfeasor. Yet, the *Hatcher* Court drops a footnote in its opinion that "[w]here apportionment does not apply, joint tortfeasors who both proximately cause a single injury are jointly and severally liable for damages caused by the injury, and a tortfeasor may seek contribution from its joint tortfeasor(s)." *Hatcher,* 2021 Ga. LEXIS 568, *12.

The decision ignores several critical parts of the apportionment statute. An analysis of apportionment cases, the history of the statute, and joint and several liability in Georgia could fill volumes. The defendant in *Hatcher* argued that there is no conceivable way that the General Assembly intended to exclude single-defendant cases from the apportionment scheme when the Tort Reform Act of 2005 was drafted. The Court in *Hatcher* attempts to say that perhaps excluding single defendant cases from apportionment and applying subsection (b) to single-defendant cases "may well advance some of the intentions behind the Tort Reform Act." *Id.* at *16.

Traditionally in the trucking world, we see accident lawsuits filed against the driver, the motor carrier, and the insurer, when allowed under Georgia's direct action statute. If the driver is acting under the course and scope of employment with the motor carrier, the doctrine of vicarious liability applies and the motor carrier is liable for whatever negligent acts its driver might commit.

Under this traditional scenario, Plaintiffs will many times assert claims of negligent hiring, training, retention, and supervision against the motor carrier. These claims are independent negligence claims against the motor carrier alleging that the motor carrier was negligent above and beyond the driver's

own negligence, claiming that the motor carrier should not have hired the driver due to red flags in the driver's history, failed to adequately train the driver, failed to respond to red flags in the driver's time with the motor carrier, etc. Plaintiffs assert these claims to increase the overall value of their claims and introduce evidence of the driver's history and other facts that are irrelevant to what happened in a particular accident.

In the land of unintended consequences, the Hatcher decision has now given way to the following scenario:

> Georgia personal injury lawyer tip of the day: here is an example of language we are including in our demands about the new Hatcher case - feel free to tailor it to your cases and use it.
>
> The Georgia Supreme Court recently issued an opinion in Alston & Bird, LLP v. Hatcher Management Holdings, LLC that has significant impact for cases like this one. Because of Hatcher, single defendants are no longer be able to apportion fault to non-parties. Pre-Hatcher, we would have filed a single lawsuit in this case against [defendant 1] and [defendant 2] and [defendant 3]. The jury would then allocate fault among all the defendants and any non-parties, and the defendants would only be responsible for their pro-rata share of the judgment.
>
> Now, post- Hatcher, we will file 3 separate lawsuits against [defendant 1] and [defendant 2] and [defendant 3]. At trial, the individual defendants will not be allowed to apportion fault to the each other or to any non-parties. This means that the sole defendant in each case will be responsible for the entire judgment. Plus, it means we have 3 chances to win, with the potential to win all 3 cases and triple our recovery. We cannot overstate how important the Hatcher decision is and how much more risk it puts on defendants and their insurance companies.

This is an excerpt from a LinkedIn post by a Plaintiffs' attorney in Atlanta. This lawyer is urging other Plaintiffs' attorneys to threaten multiple separate lawsuits against multiple separate defendants as a threat in their pre-suit settlement demands.

There are numerous defenses to three separate lawsuits filed against three entities for the same accident, but those defenses are limited. Consolidation under Georgia law requires the consent of all parties. Real party in interest objections may be raised, but rest within the discretion of the trial judge. Double, even triple, recovery objections can be raised, but likely only post-verdict.

Even if we are successful in moving to consolidate and/or dismiss the secondary and tertiary lawsuits, it will drive up litigation costs and increase the time, effort, and expense to defend truck accident cases in a world where the costs of defending these cases are already sky high and rising. On its face, the *Hatcher* decision does not appear to impact the transportation industry because so many truck accident lawsuits are multi-defendant cases. However, the unintended consequences outlined above show that the industry must call upon the Georgia Legislature to act swiftly and decisively to undo the harm done by Hatcher before more bad law is made. If a primary goal of Tort Reform is to curb frivolous lawsuits and reduce the number of these lawsuits, then the Hatcher decision has opened the door to doubling and even tripling the number of lawsuits that motor carriers and their insurers face.

One silver lining is that the *Hatcher* ruling seemingly does not impact the existing rule under O.C.G.A. 51-12-33(d) whereby a defendant can ask the jury to allocate fault of previously-named defendant who settled with the plaintiff prior to trial, provided a specific procedure is followed. However, the *Hatcher* ruling does state that this procedure cannot be used to reduce the amount of damages awarded against the remaining defendant at trial.

THE ROAD AHEAD- Past and Future Events

Past

- Rob spoke to the Tarwheels Captive on September 13-14 at the Grove Park Inn, but was Rob's talk all that captivating?
- Rob and Blair presented to the Marsh Fleet Solutions group in Nashville, TN September 15-17. Rob and Blair kept the honky-tonking to a minimum.
- Rob and Fred taught sessions at the Motor Carrier Insurance Educational Foundation in Orlando, FL on October 6-7. Rob talked about the latest threats to motor carriers, and Fred hit the high spots on independent contractors.
- Megan and Wilson headed to PA for the TIDA conference on October 13-15. They were sponges soaking up the wisdom of the group. Upon being admitted for membership, Megan was promptly appointed to a committee.
- On November 2, Rob collaborated with Jaki Ferenz of Avalon Risk Management on a lunch and learn webinar for the TIA. They discussed broker best practices.
- Rob presented at the GMTA Leadership Meeting at Battery Park in Atlanta, GA November 18-19. Rob spoke on ways good trucking companies make poor decisions. As usual, Blair kept Rob from having his Georgia visa revoked.
- Fred and Rocky attended the SCTA Annual Clay Shoot in Edgefield, SC in November. Rocky exercised extreme care to make sure all of his shots when downrange. He did admit that Moseley Rogers Law Group had a nice ring.
- Fred and Wilson stormed the beach for the SCTA Safety Council meeting in November. Fred spoke on independent contractors, and Wilson talked about dealing with unscrupulous tow companies.
- Megan presented on a TLA webinar on the Miller case in the US Supreme Court on December 16.

Future

- Megan will attend the Transportation Industry Defense Association Advanced Seminar in Nashville, TN on January 13-14.
- Fredric and Stephanie will attend the Transportation Lawyers Association Chicago Regional Seminar on January 20-21.
- Rocky will present "The New Tenets of Transportation Coverage" at the SMC3 JumpStart 22 meeting in Atlanta, GA on January 25.
- Rob and Lesesne will attend the Conference of Freight Counsel Winter Meeting on January 22 in CA.
- Blair will attend the 18th Georgia Defense Lawyers Association on February 3.
- Fredric will attend and speak at the Specialized Carrier & Rigging Association Symposium on February 23-25 in Glendale, AZ.
- Fredric will speak at the TIDA Cargo Seminar on March 30 in Tempe, AZ.
- MOMAR is excited to announce that beginning in early 2022, Rocky Rogers will take over preparing the case summaries for Central Analysis Bureau's ("CAB") monthly "Bits and Pieces" newsletter. The cases will focus on industry specific judicial decisions, with a heavy emphasis on insurance coverage and motor carrier accident litigation. CAB is an industry-leading resource for those in the motor carrier insurance industry, with Bits and Pieces reaching tens of thousands of subscribers monthly. More information on CAB and the services and products it offers can be found at https://cabadvantage.com/

MOMAR PAST AND UPCOMING WEBINARS

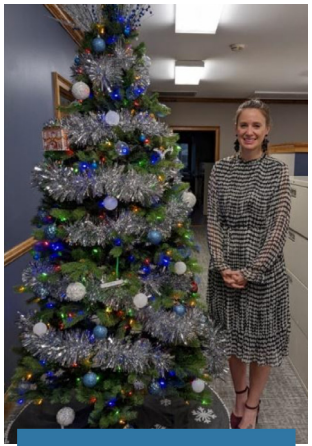
- We hope you will attend our upcoming webinars on January 12th and 19th. We will present a recap of industry changes in 2021.

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

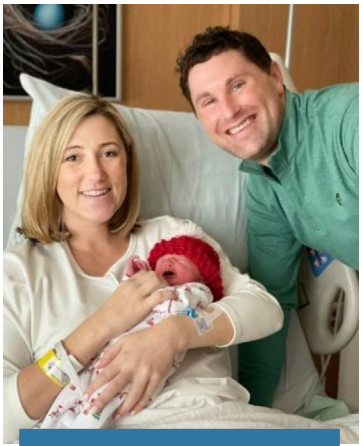
- Covid-19 "Vaccine Mandates and the Transportation Industry"
- "Fireside" Chat and Life Q&A with Rob Moseley
- "Fraud in the Transportation Industry"

CONGRATULATIONS CORNER

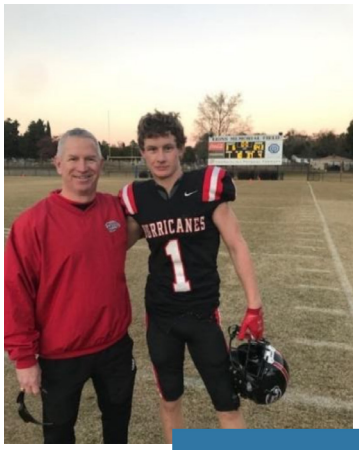
- Lesesne and Natalie were wed in North Carolina on October 10th.
- We are pleased to announce that attorney Stephanie Besselievre (Stephanie B for most of us) joined our Greenville office in December. Her practice will primarily focus upon casualty litigation.
- Holly and her husband, Bill, welcomed a grandchild, Alayna Rose, on November 15th.
- Rocky and his wife, Allison, welcomed a little girl named Jillian Rose on December 16th.
- Aaron Moseley's football team, Greenville Hurricanes, won the varsity state championship with a final score of 64-6. Aaron was named defensive player of the year for the team as a Sophomore. Here he is with proud dad after the win. Fred's son Cas Marcinak is following up as a defensive back on the JV team which was undefeated in its season. Both of them are proof of overcoming genetics.

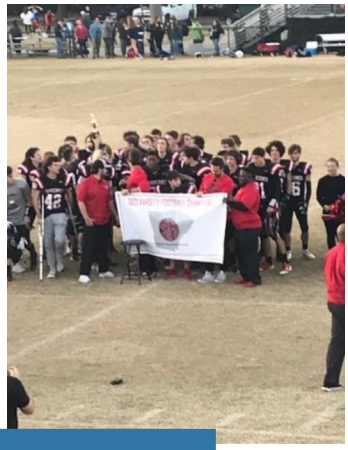


Welcome Stephanie Besselievre!



Rocky and wife, Allison pictured with new baby Jillian Rose

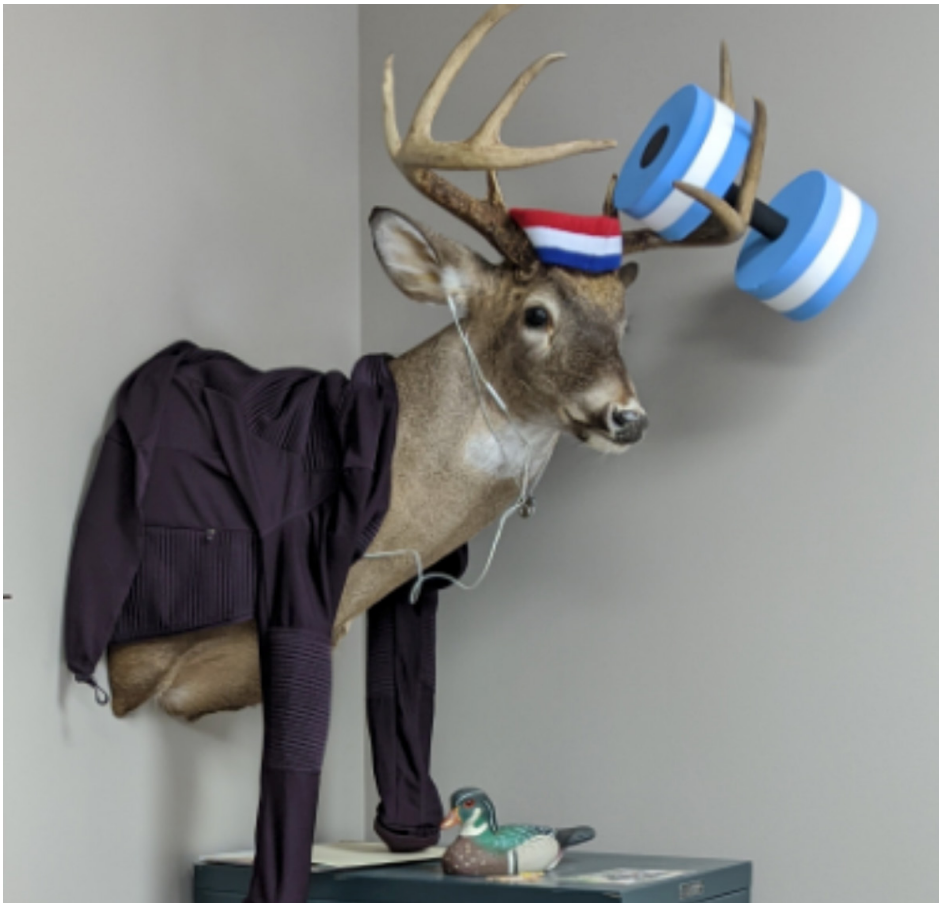




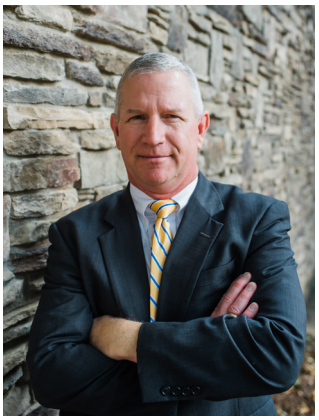
Rob Moseley pictured with son, Aarron after Greenville Hurricane's state championship win

NEW-- BUCKY'S REPORT

The holiday season having arrived, you might expect Bucky to be sporting an elf outfit. Unfortunately, he has too much work to do and he was worried that Santa might snag him to join the "team." Instead, he decided to get a head start on his New Year's resolution to become fit. He read that deer who exercise perform at a higher cognitive level, and he wants to be in great shape to provide assistance to our attorneys.



Your MoMar Team



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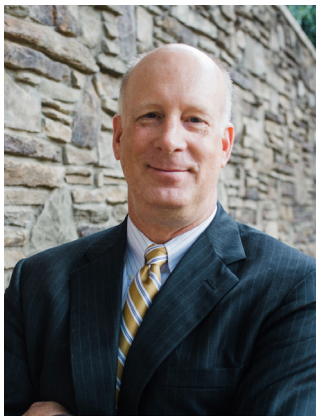

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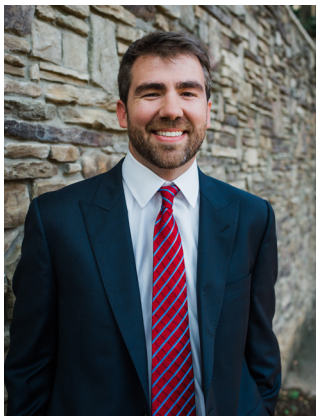

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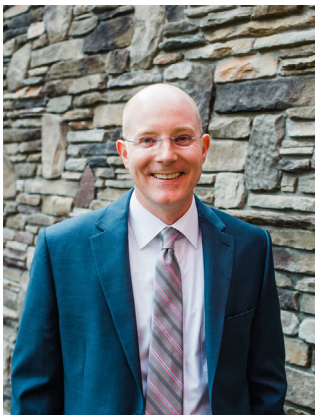

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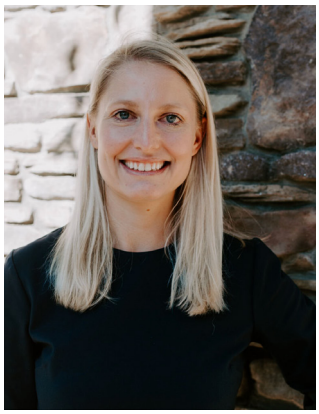

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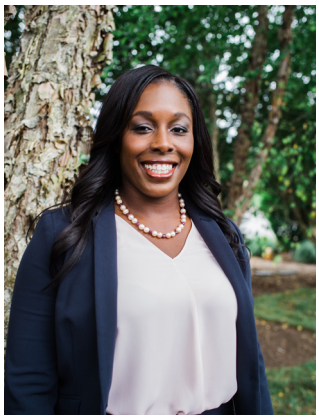

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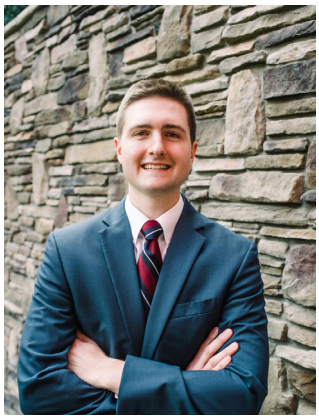

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