The Transportation Practice Group of ALFA International has published the Transportation Update for about seventeen years. Please note that in addition to this issue of the Transportation Update we have an archive of many recent issues on the ALFA website at ALFA Transportation Update archives.

If your first contact with the Transportation Update is through our website, you can be added to our email distribution list by contacting us through Katherine Garcia (kgarcia@alfainternational.com). Please add the Transportation Update to the subject line, and we will email the current issue and each subsequent issue to you as it is published. If you want to receive the Transportation Update in hard copy format, contact an ALFA attorney listed at the end of this newsletter, and they can provide this service for you.

Our primary method of distribution of the Transportation Update is by email. Electronic publication allows us to include hyperlinks for the use of our readers. We encourage you to use the hyperlinks feature and our section headings to quickly get to the information that is most interesting to you. The section headings are as follows: ALFA Member Publications and Speaking Engagements, Cases, Regulations, and Statutes, Verdicts and Settlements, Practice Tips and Articles.

Our newest section is ALFA Member Publications and Speaking Engagements. If you are attending the ATA Seminar this August you will want to review this section. If the topic of the publication or of the speaker/ conference role of the ALFA member is of interest to you, please just contact the ALFA member directly (we have provided the contact information so that you can easily do so). Please note that ALFA’s Peter Doody, Greg Conforti, Jim Jarrow, Warner Fox, Bill McGowin and Andrew Gauen are all speaking at the ATA annual litigation seminar on August 13, 2008 in Lake Tahoe. Clark Aspy is speaking at the Lorman seminar in Austin, Texas on August 28, 2008, Trucking Litigation and D.O.T. Regulations in Texas.

Under the Cases, Regulations, and Statutes section of the Transportation Update, we report to you about developments in the statutory, regulatory, and common law around the country that are of general interest to the trucking community. The Verdicts and Settlements section addresses the results of litigation affecting the trucking industry. We encourage you to report to us about any verdict or settlement that you think is of interest to the trucking community.

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1 All hyperlinks are in blue. Hyperlinks can be activated by placing the cursor on them and left clicking with the mouse. Links in the contents go to specific points in the newsletter; links to websites take you to the website; and links to email addresses open an email addressed to that person.

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EDITORS’ NOTEPAD
(CONT.)

You may report all such results to the editors of the Update or to Michael K. Sheehy. Michael can be reached as follows: msheehy@plunkettcooney.com. In this issue of the Update, we have a verdict from Arizona and reports of cases from the U.S. Supreme Court as well as jurisdictions all over the country.

The Practice Tips section of the Update features articles which address matters of practical interest to those who manage litigation for motor carriers and those who represent them. The essays in this section generally have widespread application throughout the country. In this issue, we have four practice tips which are of considerable interest. Lee MacPhee has two offerings: Highway Robbery, Strategies for Dealing with Unreasonable Charges and Fees for Towing and Hazmat Services, and Responding to a Report of a Catastrophic Accident: A Primer coauthored with Cam Beck. Wally Sweek and Clark Aspy bring us a paper titled Preserving Evidence at the Scene of the Accident: A Checklist. Finally Joe Moore brings a discussion on Issues Regarding Fraudulent Joinder.

Articles provide in depth analysis of issues, developments, and concerns that are relevant to the transportation industry. In this issue, Jerry Stallings and Joe Swift present an article titled: The Implications of Criminal Actions Against a Truck Driver Involved in a Serious Truck Accident: Where Should the

Motor Carrier Stand? Jerry and Joe are particularly experienced in the area of motor carrier litigation. In addition Jerry Stallings has had extensive experience in the field of criminal law.

We welcome comments, suggestions for improvement, and topics which you would like for us to address in future issues. It is our goal to provide timely relevant information to members of the trucking community. Our editors can be contacted as follows:

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FUTURE EVENTS
The Transportation Practice Group of ALFA International is having a cocktail party from 5:00 to 7:30 pm on Monday August 8, 2008 at the American Trucking Association’s General Counsel Seminar in Lake Tahoe. The party will be held in the Lakeside Ballroom of the Hyatt Regency Hotel.

The Transportation Practice Group of ALFA International also presents a multi-day seminar for members of the Trucking Industry each year. The **2009 Transportation Seminar** will be held in Coronado (San Diego), California at the **Hotel del Coronado** from May 6, 2009 to May 8, 2009.

Our Chairman of the Transportation Practice Group for 2008-9 is Paul T. Yarbrough of Butt Thornton & Baehr PC, Albuquerque, New Mexico, who can be reached at (505) 884-0777 and ptyarbrough@btblaw.com. Our Vice Chair is Danny M. Needham of Mullin Hoard & Brown, LLP, Amarillo, Texas, who can be reached at (806) 372-5050 and dmneedham@mhba.com. Please contact any of these individuals or the editors with any suggestions for the program. The hotel web site can be accessed at the following link: [http://www.hoteldel.com/](http://www.hoteldel.com/).

Please contact: Katie Garcia at kgarcia@alfainternational.com for more information.

ALFA MEMBER PUBLICATIONS AND SPEAKING ENGAGEMENTS

The American Trucking Association is holding their annual Forum for Motor Carrier General Counsels from August 10, 2008 to August 13, 2008. Andy Gauen and Greg Conforti are both speaking on a panel on August 13, 2008. Their topic is: **Trading Places: Coordinating Claims and Safety Departments.** If you wish to reach them to discuss this topic, Andy is with Merrick, Hofstedt & Lindsey, Seattle, WA, 206-682-0610 and his email address is: agauen@mhlseattle.com. Greg is with Johnson & Bell, Chicago, IL, 312-372-0770, and his email address is: confortig@jbltd.com. Jim Jarrow, with Baker Sterchi, Kansas City, Missouri, jarrow@bscr-law.com, (816) 471-2121, will be on a panel at ATA titled “**Catch Me if You Can: Issues Related to Unknowingly Transporting Contraband.**” Warner Fox, Hawkins & Parnell, Atlanta, Georgia, wfox@hplegal.com, (404) 614-7400, will be on a panel at ATA titled “**Dude Where’s My Truck? Nonconsensual Towing Issues.**” Bill McGowin, Bradley Arant, Birmingham, Alabama, bmcgowin@bradleyarant.com, (205) 521-8000 Will be on a panel at ATA titled “**Because I Said So: FMCSA Activities and Opportunities for Carrier Input.**” Finally Clark Aspy, aspy@namanhowell.com, Naman, Howell, Smith & Lee, Austin, Texas, (512) 479-0300, is speaking at a Lorman seminar, **Trucking Litigation and D.O.T. Regulations in Texas** on August 21 2008, in Austin, Texas. Clark’s topic is “**Federal Motor Carrier Safety Regulations.**”
OF SPECIAL NOTE IN THIS ISSUE: ALFA’S GO TEAM HOTLINE

The ALFA Transportation Practice Group now presents a new service for its transportation clients. THE ALFA GO TEAM HOTLINE. ALFA knows that its transportation clients must often confront time-sensitive emergencies. The ALFA GO TEAM HOTLINE is designed to offer ALFA clients immediate legal and other support services, 24 hours a day and 7 days a week.

Here’s how the service works. An ALFA client needing immediate legal support calls the ALFA GO TEAM HOTLINE at 1-866-540-ALFA (2532), an ALFA operator will provide location-specific contact information about experienced transportation lawyers, accident reconstructionists, and other transportation industry experts. When you contact the ALFA GO TEAM HOTLINE, you are connected to a full-service emergency response team, when you need it. Contact your ALFA lawyer today for more details about the ALFA GO TEAM HOTLINE. But remember that number, 1-866-540-ALFA (2532).

FUTURE ISSUES OF TRANSPORTATION UPDATE

The fall issue of Transportation Update will be published in October.

CASES, REGULATIONS, & STATUTES

ALL JURISDICTIONS

LITTLE-NOTICED ASPECTS OF THE SUPREME COURT’S PRO-PREAMPTION DECISION IN ROWE CASE

In Rowe v. New Hampshire Motor Transport Ass’n (2008 U.S. LEXIS 2010), the Supreme Court unanimously held that the federal preemption provisions of the ICC Termination Act (“ICCTA”) precluded Maine from regulating the tobacco delivery procedures used by motor carriers. The most widely reported basis for this decision was that States cannot force motor carriers to provide particular services that the marketplace doesn’t demand and carriers don’t want to offer (see 2008 U.S. LEXIS at 2010 *13). Behind the headlines (and headnotes), however, the court made numerous other points that surface transportation providers can use to their advantage on a wide range of state regulatory issues. Here are some implications of Rowe:

1. ICCTA preemption is not limited to areas of “traditional” economic regulation, such as the pricing, service, and route controls formerly enforced by the old Interstate Commerce Commission (id. at *17). This was an implicit rebuff to a line of Ninth Circuit cases that have refused to enforce ICCTA preemption against state regulations that indirectly affected trucking prices and services, such as minimum wage orders and California’s unique “meal break” rules. In all likelihood, the trucking industry will use this holding to attack the “clean air” trucking concession rules proposed by the Port of Los Angeles, if the port makes good on its threat to limit concessions to carriers using employee drivers (not owner-operators).

2. Professed good intentions will not save state restrictions that violate the plain preemptive language of ICCTA (id. at **21-22). This holding would appear applicable to the stated environmental goals of the Port of Los Angeles, just as it covers Maine’s expressed desire to control underage tobacco use.

3. “Governmental commands” that carriers provide particular services are particularly unacceptable when “the State seeks to enlist the motor carrier operators as allies in its enforcement efforts” (id. at **13, 20). This holding appears to confirm the position we have argued on behalf of several clients when specialized “bounty hunter” auditing firms attempted to make them undergo multistate unclaimed property audits under the theory that any unapplied transportation revenues should be reported and ultimately escheated to the States. These bounty hunters are still around and continue to attack large carriers of all modes. The forced-enlistment language of Rowe should be very helpful in response.

4. A “state regulatory patchwork” of conflicting rules is especially “inconsistent with Congress’ major legislative effort to leave [service-related]
decisions, where federally unregulated, to the competitive marketplace” (id. at **15-16). The “patchwork” argument clearly applies to state unclaimed-property rules, among others.

5. Preemption should apply if a state requirement has a “significant impact” on “essential details of the carriage itself” (id. at **11, 16). The court did not explicitly equate “significant impact” to significant economic impact, and instead held that significant governmentally-commanded services were enough to invoke preemption. The court probably took this approach because the extent of the economic burden of Maine’s rules was disputed on the record before it. On reflection, we believe the court actually did the industry a favor by declining to transform every preemption case into a battleground for dueling economic experts. In situations where the economic burden of the state rules is undisputed, the industry still can argue that the case for preemption is even stronger than in Rowe.

6. Finally, the expanded scope of preemption after Rowe is not limited to motor carriers. The statutory provision construed in Rowe (49 USC 14501(c)) extends as well to transportation brokers and surface freight forwarders, which often are “hats” worn by third-party logistics providers (3PLs). One of the corollaries of ICCTA preemption is that state-law theories of liability (arguably including negligent selection of underlying carriers) are preempted except to the extent that the transportation provider’s contract with a customer voluntarily assumes a particular duty (such as a duty of care with regard to selection of carriers). See American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995). It would be appropriate for 3PLs to review their standard customer contract forms (if any) with this principle in mind.

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THE U.S. SUPREME COURT SPEAKS AGAIN ON PUNITIVE DAMAGES

On June 25, 2008 the Supreme Court of the United States rendered a decision in Exxon Shipping Co. v. Baker, 2008 WL 2511219 (U.S. 2008). The case arose out of the 1989 Exxon Valdez accident that resulted in millions of gallons of crude oil being spilt into Prince William Sound off Alaska. The pending suit was brought by claimants, namely those who depended on Price William Sound for their livelihood, who sought to recover damages for economic losses that resulted from the spill. The Supreme Court reviewed three issues of maritime law: (1) whether a ship-owner may be liable for punitive damages without acquiescence in the actions causing harm; (2) whether punitive damages have been barred implicitly by federal statutory law making no provision for them; and (3) whether the award of $2.5 billion was greater than maritime law should allow under the circumstances.

For the purposes of trial, Exxon stipulated to its negligence and liability for compensatory damages. The trial was conducted in three phases. The first phase determined the recklessness and potential for punitive damages of Exxon and Joseph Hazelwood, the captain of the ship. The second phase was to set the compensatory damages for commercial fishermen and Native Alaskans. The third phase was to determine punitive damages against Exxon and Hazelwood. In short, the jury awarded $287 million in compensatory damages and $5,000 in punitive damage against Hazelwood and $5 billion in punitive damages against Exxon.

The first issue on appeal was based upon a jury instruction given by the court in the first phase of trial which stated:

[a] corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment. The reckless act or omission of a managerial officer or employee of a corporation, in the course and scope of the performance of
his duties, is held in law to be the reckless act or omission of the corporation.” “[A]n employee of a corporation is employed in a managerial capacity if the employee supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation’s business.

Exxon claimed error in instructing the jury that a corporation “is responsible for the reckless acts of . . . employees . . . in a managerial capacity while acting in the scope of their employment.” In support of its argument, Exxon relied on Amicable Nancy, 3 Wheat. 546, 4 L.Ed. 456 (1818) and Lake Shore & Michigan Southern R. Co. v. Prentice, 147 U.S. 101 (1893). Exxon argued that the cases stand for the proposition that punitive damages are not available against a ship-owner for a shipmaster’s recklessness. An equally divided Supreme Court did not reverse the Ninth Circuit’s affirmation of the instruction.

The second issue on appeal was whether, although available under maritime common law, the Clean Water Act (CWA) preempts the awarding of punitive damages. The Supreme Court upheld the Ninth Circuit’s determination that the CWA did not preempt maritime common law on punitive damages. The CWA states that it is designed to protect “the navigable waters of the United States, adjoining shorelines, . . . [and] the natural resources” of the United States. The CWA also contains a “savings clause” which reserves “obligations . . . under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of oil.” Exxon argued that since the savings clause made no specific mention of preserving punitive damages, they were preempted. The Supreme Court, noting that the savings clause made no mention of a number of other categories of damages, found no Congressional intent to occupy the entire field of pollution remedies and, thus, no preemption.

Finally, Exxon challenged the amount of the punitive damages award. The Supreme Court’s reviewed the award for conformity with maritime law, instead of “the outer limit allowed by due process.” Federal maritime common law “precedes” and “obviates any application of the constitutional standard.” Thus, this case differed from the Supreme Court’s prior review of punitive damages awards which were based on state law and due process grounds.

In reaching their decision, the court looked at verbal and quantitative approaches. The verbal approach generally involves a list of factors, such as whether the amount will deter the defendant from similar conduct, that are used in analyzing the amount of a punitive award. In rejecting a verbal approach, the court determined that a quantitative approach was most likely to promote a consistent system leading to awards that are less arbitrary. The court analogized the quantitative approach to the use of federal criminal sentencing guidelines. To that end, the court adopted “pegging punitive to compensatory damages using a ratio or a maximum multiple.”

After examining several state statutes that allow for 3:1 punitive to compensatory ratios, statutes allowing for 2:1 recovery for treble damages, and studies that determined the median ratio of punitive to compensatory awards, the court determined that a 1:1 ratio “is a fair upper limit in such maritime cases”. The court felt that, in conjunction with the daily fines already imposed by the CWA in cases of this type, anything greater would be “excessive”. Thus, in the case at hand, the maximum punitive damages award could only equal the compensatory award. While the case arose in maritime law it is still a significant indication of the thinking of the majority of the court on this issue.

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COMMERCIAL DRIVER DRUG AND ALCOHOL TESTING ACT

DOT drug and alcohol testing regulations were designed to help identify drivers who have a history of drug and alcohol use. Unfortunately, the program’s value to carriers has been limited because it provides no accessible clearinghouse for test results. And some drivers who flunk drug or alcohol tests with one carrier manage to keep driving by simply waiting until they are “clean” before applying to a new carrier.

Act 637 of 2007, codified at Ark Code Ann § 27-23-201 et seq, is designed to overcome the limitations of the DOT scheme by creating an ever-expanding data base through which carriers must both report and access the alcohol and drug use history of current and prospective drivers.

The Act establishes reporting requirements for carriers, for drivers who work (or who have applied to work) for them, and for their Medical Review Officers (MROs). The new Act builds upon existing Federal Motor Carrier Safety Regulations (“FMCSR”) by requiring Arkansas employers who are already subject to the federal alcohol testing rules to promptly report alcohol screening test results to the Arkansas Office of Driver Services. MROs face similar reporting requirements for valid positive drug tests. Employers must then request from the Office test results for each employee/prospective employee who is subject to such testing.


Reporting Requirements. An employer “shall report to the Office of Driver Services within three business days the results of an alcohol screening test” if there is a valid positive result or if the employee refuses to provide an alcohol-screening specimen. Ark. Code Ann. § 27-23-205(a) (2008). An MRO has three business days to report: a valid drug test for five classes of drugs, for the refusal to provide a specimen, or for the submission of a suspect specimen. Ark. Code Ann. § 27-23-203(b) (2008).


Penalties. Penalties will be imposed for employers (1) who fail to check the data base, (2) who knowingly hire those who test positive (unless they have completed an appropriate treatment/educational program), and (3) who do not report required alcohol test results. MROs who fail to report face similar penalties. Ark. Code Ann. § 27-23-209 (2008).

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CALIFORNIA

DISTRICT COURT HOLDS THAT FEDERAL MOTOR CARRIER EXEMPTION TO BE USED AS “GUIDEPOST” TO DETERMINE WHETHER DRIVERS ARE SUBJECT TO CALIFORNIA’S MOTOR CARRIER EXEMPTION FOR OVERTIME WAGES

California employers are justified in looking to decisional law
interpreting the federal motor carrier exemption regarding overtime wages as a guide when determining whether a driver is covered by the California motor carrier exemption.

In *Wamboldt v. Safety-Kleen Systems, Inc.*, No. C 07-0884 PJH, 2008 WL 728884 (N.D. Cal. 2008), a former employee sued his employer for unlawfully failing to pay overtime as required by California Labor Code section 510. The former employee was employed as a customer service representative whose duties included customer sales, client collections, and various telephone responsibilities, as well as on-site servicing of equipment, transportation of hazardous waste, and driving of company vehicles in order to perform customer service calls. The court addressed the issues of (a) whether a disputed issue of fact existed on the question whether the former employee regularly transported hazardous materials such that the California motor carrier exemption is triggered; and (b) the legal standard that the court should employ in assessing the applicability of California's motor carrier exemption.

The motor carrier exemption states: that the provisions of the overtime section are not applicable to employees whose hours of service are regulated by (1) the United States Department of Transportation (“DOT”) Code of Federal Regulations, title 49, sections 395.1 to 395.13, Hours of Service of Drivers; or (2) Title 13 of the California Code of Regulations, section 1200, subchapter 6.5, section 1200 and following sections, regulating hours of drivers. In other words, the Industrial Welfare Commission's (“IWC”) motor carrier exemption applies to employees whose hours of service are regulated by either (1) federal regulations regarding hours of service of drivers; or (2) California state regulations regarding the hours of drivers.

Regarding the first issue, the employer maintained that the hours of its customer service representatives are regulated by 13 California Code of Regulations (“CCR”) §§ 1200 et. seq. These regulations contain certain provisions that limit the driving time of drivers of various vehicles, which vehicles are listed in California Vehicle Code section 34500, and include “trucks ... transporting hazardous materials.” According to the employer, its customer service representatives, including the plaintiff, drive vehicles that transport hazardous materials, and are covered by these CCR regulations, thereby triggering the IWC’s motor carrier exemption pursuant to the second prong of the exemption. The court originally found disputed facts on the basis of the employer’s evidence that the former employee transported hazardous materials approximately 85.7% of his workdays, and the former employee’s contrasting evidence that he did not transport hazardous materials on a regular basis, and never carried the two types of concentrate materials that defendant asserted were hazardous substances. On the plaintiff’s motion for reconsideration, the court held:

[o]n the whole . . . and given the lack of clarity that continues to exist with respect to this issue – despite [the employer’s] initial promise of a critical distinction between waste services – the court continues to find that a material dispute of fact exists as to whether [the former employee] was regularly engaged in the transportation of hazardous waste, such that the California motor carrier exemption applies.

The court then moved the second, and related, issue of what legal standard will ultimately apply in determining whether the former employee is covered by the California motor carrier exemption. Specifically, the employer requested that the court determine whether drivers are subject to California's motor carrier exemption on the days in which they do not transport hazardous materials. The employer contended that California’s motor carrier exemption should be construed similarly to the federal motor carrier exemption, which applies as long as drivers spend any portion of their time regularly engaged in safety-affecting activities, regardless whether there may be some entire days or weeks that go by without engaging in the activity. In response, the court concluded that the employer “is correct that the California motor carrier exemption parallels the federal motor carrier exemption” and that “this justifies looking to interpretations of the federal exemption for guidance.” However, the court noted, “it is equally true that federal guidance is only helpful to the extent that the parallel laws are ‘not inconsistent with state wage and

[8]
hour provisions . . . ’” Therefore, generally, the parallel nature of the two exemptions warrants using decisional law interpreting the federal exemption as a guide in interpreting the state exemption. However, where there is a material point of difference, or inconsistency, in the goals or aims of the two sources of law, federal law ceases to act as a meaningful guidepost.

California Supreme Court Overrules Past Decision That Allowed Courts to Decide Whether a Claimant Is Insured Under an Uninsured Motorist Provision, and in Companion Case Holds That an Arbitrator Must Decide Whether Default Judgments Bind Insurers

California law regarding what issues must be submitted to arbitration under Insurance Code section 11580.2, subdivision (f) just got clearer. A court, not an arbitrator, must determine whether an injured motorist is insured under an insurance policy, whereas an arbitrator, not a court, must decide whether a default judgment obtained against an underinsured tortfeasor binds an insurance company.

In Bouton, an injured motorist settled his claim against a third party driver for the other driver’s policy limits. He subsequently demanded arbitration with his sister’s insurer. His sister’s insurer denied coverage, claiming that the injured motorist was not a resident of his sister’s household, and was therefore not covered under her insurance policy. The insurer opposed the demand for arbitration on the ground that the claimant was not covered by the insurance policy.

The trial court denied the injured motorist’s motion to compel arbitration, finding that because the arbitration provision of the insurance policy was no broader than Insurance Code section 11580.2, subdivision (f), the parties were only bound to arbitrate the issues of liability and damages, not coverage. The injured motorist appealed the trial court’s denial of his motion to compel arbitration. The Court of Appeals held that the trial court erred in denying his motion to compel arbitration, and that the parties were required to arbitrate coverage as part of their agreement to arbitrate the liability and damages issues, consistent with this court’s decision in Van Tassel. The Supreme Court granted review.

The court reexamined its prior rulings in Van Tassel v. Superior Court, 12 Cal.3d 624, 526 P.2d 969 (1974) and Freeman v. State Farm Mutual Auto Ins. Co., 14 Cal.3d 473, 535 P.2d 341 (1975). In Van Tassel, the court relied on the broad language in Orpustan v. State Farm Mutual Auto. Ins. Co., 7 Cal.3d 988, 500 P.2d 1119 (1972) to conclude that whether an individual was covered under her stepfather’s insurance policy constituted a “jurisdictional fact” to be arbitrated despite the parties’ agreement to arbitrate only whether an uninsured motorist was liable to the insured, and the extent of the damages, if any. The court indicated in Freeman that its holding in Orpustan “was an invitation to misinterpretation,” but it did not expressly overrule Van Tassel’s overly broad interpretation of the Orpustan decision. It finally overruled Van Tassel in Bouton, holding:

To the extent that Van Tassel improperly permitted an arbitrator to determine issues other than liability and damages – the issues mandated by section 11580.2, subdivision (f) to be arbitrable, and the only issues the parties agreed to arbitrate – it is overruled.

Therefore, determining whether a claimant is insured under an uninsured motorist provision is not a question of the underinsured tortfeasor’s liability or damages owed to the insured, and is therefore not subject to arbitration under Insurance Code section 11580.2, subdivision (f). As such, a court, not an arbitrator, must determine whether an injured motorist is insured under an insurance policy.

In the companion case, O’Hanesian, the Supreme Court addressed the related question of whether an arbitrator or a court should decide if a default judgment obtained by the insured against the underinsured tortfeasor binds
the insurer. Insurance Code section 11580.2, subdivision (f) requires an insured and his or her insurer to arbitrate the tortfeasor’s liability and damages owed to the insured, and the binding nature of a default judgment obtained against that tortfeasor falls squarely within those questions of liability and damages statutorily subject to arbitration. Therefore, this issue is subject to arbitration.

In O’Hanesian, an injured insured motorist obtained a default judgment against a third party driver. The insured motorist sued his insurer for declaratory relief, breach of contract, and breach of the covenant of good faith and fair dealing, arguing that the default judgment obtained against the third party driver established the insured motorist’s damage and that the insured motorist was therefore not required to submit to the insurer’s evaluation of the dispute pursuant to the insurance policy.

The court held that the default judgment pertains directly to the underinsured tortfeasor’s liability to the insured and the amount of damages owed to the insured. Although the parties dispute that arbitration is the appropriate forum in which to address whether the insurer is bound by the default judgment obtained against the underinsured tortfeasor, that question – whether the insurer is bound – is subsumed within the arbitrable issues of liability and damages. The entire controversy – whether the insured is entitled to damages arising out of his accident with the underinsured tortfeasor, and the amount thereof – is arbitrable. Whether the default judgment binds the insurer is a part of the controversy between the parties regarding liability and damages, and must be resolved by the arbitrator in the course of addressing the two statutorily mandated arbitrable issues. As such, an arbitrator, not a court, must decide whether a default judgment obtained against an underinsured tortfeasor binds an insurance company.

CALIFORNIA COURT OF APPEALS HOLDS THAT GESTURING DRIVER OWES NO DUTY TO USE REASONABLE CARE IN SIGNALING OTHER DRIVERS TO INITIATE A TURNING MANEUVER

Good Samaritan drivers who yield to left-turning drivers have no legal duty to assure that all oncoming traffic is clear before signaling that he or she is yielding the right of way.

In Gilmer v. Ellington, 159 Cal. App.4th 190, 70 Cal. Rptr. 3d (2008), a motorcyclist was injured in a collision with a driver executing a left-turn. The turning-driver only proceeded with her turn after the driver of an oncoming vehicle stopped and gestured to her to proceed with the turn. The motorcyclist brought suit against both the turning-driver and the gesturing-driver. The motorcyclist alleged that the gesturing-driver had a duty to assure that all oncoming traffic was clear before signaling to the turning driver that he was yielding his right of way.

In its opinion, the court reviewed recent decisions and sample jury instructions to “glean the following rules:

1) approaching vehicles in oncoming traffic that are close enough to constitute a hazard to a left-turning vehicle, have the right-of-way over that left-turning vehicle;

2) a left-turning driver has a duty to ascertain whether an approaching vehicle constitutes a hazard and, if so, to yield the right-of-way to that approaching vehicle;

3) such duty continues throughout the turning maneuver and applies to each approaching vehicle in each successive lane of oncoming traffic; and
that the parties “may limit or alter the measure of damages recoverable under this chapter.” See I.C. § 28-2-719. The official comments to this section further explain: “Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect.” Id. cmt. 1.

Additionally, Idaho common law permits parties to limit their remedies, with certain limited exceptions. See Mitchell, 552 P.2d at 779. Moreover, under general contract principles, lost profits are only recoverable if they were within the parties’ contemplation at the time the contract was executed. See e.g. Brown’s Tire & Lumber Co. v. Chicago Title Co., 764 P.2d 423, 428 (Idaho 1988).

APPLICATION OF UCC TO FRANCHISE AGREEMENT IN IDAHO

While the aforementioned axiom holds true under both UCC and common law regimes, the application of either the UCC or general contract law may affect the interpretation and/or application of other franchise agreement provisions. As such, before interpreting a franchise agreement, it must be determined which legal regime governs the parties’ transaction. In some cases, a franchise agreement will specifically state whether common law or the UCC applies. However, this is not always the case. When the franchise agreement is silent
as to the type of law applicable, a court will review the contract to determine whether the transaction involves the sale of goods or the sale of services. Where the franchise agreement establishes that the parties’ transaction is for the sale of goods, the UCC will govern; and general contract law will govern transactions for the sale of services. See I.C. § 28-2-102; Steiner Corp. v. American Dist. Telegraph, 106 Idaho 787, 790, 683 P.2d 435, 438 (1984) (“[T]he Uniform Commercial Code applies only to contracts for the sale of goods, see I.C. § 28-2-102, and does not apply to a contract for services”).

However, if the contract involved both the sale of goods and the sale of services, Idaho courts will apply a test known as the “predominant factor” test to determine the applicable law. See e.g. Fox v. Mountain West Elec., Inc., 52 P.3d 848, 855 (Idaho 2002). Under this test, the court will evaluate whether the transaction’s gravamen or predominate purpose, “reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom). Id. (quoting Pittsley v. Houser, 875 P.2d 232, 234 (Idaho Ct. App. 1994)). The court will consider the contract in its entirety, “applying the UCC to the entire contract or not at all.” Id.

While many courts have found that a franchise or distributor agreement is for the sale of goods and is, thereby, governed by UCC, this is not always the case. See e.g. Am. Casual Dining, L.P., v. Moe’s Sw. Grill, L.L.C., 426 F.Supp.2d 1356, 1369-70 (N.D. Ga. 2006) (finding that franchise agreement was predominately for services). In each individual case, a court must examine the agreement at issue and determine whether that particular agreement is predominantly one for services or involving the transaction of goods. See Pittsley, 875 P.2d at 234. In doing so, the court will review whether it was the service or the goods which was the factor which induced the parties to transact business with one another. See e.g. id. at 235; Fox, 52 P.3d at 855. If a review of the contract establishes that the parties were more concerned with the rendition of services, then general contract law will apply; however, if the parties’ focus was on the sale of goods, then the UCC will apply. See e.g. Fox, 52 P.3d at 855; Am. Casual Dining, 426 F.Supp.2d at 1369-70.

2 The following are examples of cases where the court found that the purpose of the franchise agreement was the sale of goods: Pepsi-Cola Bottling Co. of Pittsburg, Inc. v. PepsiCo, Inc., 431 F.3d 1241, 1255 (10th Cir. 2005) (applying N.Y. law); Glacier Optical, Inc. v. Optique Du Monde, Ltd., 816 F. Supp. 646, 652-53 (D. Or. 1993), aff’d 46 F.3d 1111 (9th Cir. 1995) (applying Washington law); Sally Beauty Co. v. Nexxus Prod. Co., Inc., 801 F.2d 1001, 1005-06 (7th Cir. 1986) (Wisconsin law).
INDIANA COURT OF APPEALS DISCUSS AN INTERESTING FACT ISSUE INVOLVING ILLEGAL PLATES IN A TRUCKING DEATH CASE

In Walker v. Martin, 887 N.E.2d 125, May 30, 2008 the Indiana Court of Appeals affirmed a summary judgment for a logging company. It found that the driver was an independent contractor and not an employee and that there is no non-delegable duty owed to the decedent as hauling logs is not inherently dangerous and there was no joint venture between the logging company and the truck driver.

The log truck disregarded the red traffic signal and struck the decedent’s vehicle. The co-defendant was a logging company and the other co-defendant was in the business of producing veneer (woodworker). Martin was the truck driver who operated his own rig. He had been hauling logs for several companies for about 3-1/2 years but had been working more frequently for this particular logger. He considered himself an independent contractor. The driver owned the tractor-trailer, straps, and tools and paid for his own fuel, insurance and maintenance. He determined his own routes and secured his own loads. He had a CDL but procured a “log farm exemption” license plate for the tractor. That plate did not require that he purchase the $750,000 minimum interstate trucking insurance required by the Federal government. He was illegally operating over-the-road in violation of the exemption. He had placed the logging company’s logo on his tractor.

As a result of the crash, the estate filed suit against the driver, the woodworker and the logging company. The trial court issued summary judgment against the woodworker and logging company, and an appeal thereby ensued. The court reviewed the facts at length to confirm that the driver was an independent contractor. They covered Indiana’s ten-factor analysis described in the RESTATEMENT (SECOND) OF AGENCY §220. Only one of the ten factors would weigh in favor of Martin being an employee; therefore, he was an independent contractor.

The opinion discussed the exceptions to the independent contractor rule and quickly disposed of them based on its determination that logging and hauling logs was not intrinsically dangerous work.

The plaintiffs argued that Martin’s illegal acts with the improper license plates provided a cause of action against the logging company. However, the court stated that the driver’s illegalities were not directly related to the injury that occurred. It also noted that the cases cited by the plaintiff required the knowledge and sanctions of the illegal act at the time of contracting by the owner. It does not apply to owners who merely become aware of illegal acts during the course of the performance of a contract absent the owners/employers direct participation in the illegal act. Hauling the logs itself was not illegal, and even though the driver had put the logging company’s logo on the side of his truck the court found that the logging company was not liable for the negligence of the driver as the injury was not a foreseeable consequence of the violation. Thus the logging company was not liable for the illegal acts of the independent contractor.

The important language in this opinion is that the logging company was not aware of the illegal activity of the truck driver at the time they began their business together but learned of it later. They did not sanction the logging company even though its logo was on the side of the truck. Thus it may be surmised that the truck driver had little or no insurance coverage in this serious crash. In this case, as long as the illegal actions of the driver were not known to the logging company at the time of the formation of the contract, then the driver’s illegal acts cannot be imputed to the logging company absent any participation in the illegal acts by the logging company even with the company’s logo displayed on the tractor. Walker v. Martin, --- N.E.2d ---, 208 WL 2222045, Ind.App., May 30, 2008.

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have the capabilities to weld the fan, it asked Advanced to perform the repair.

Several weeks after the repair, the fan shaft broke into two pieces exactly where Advanced had performed the weld. After LG & E filed the lawsuit, it took possession of the two pieces of the fan shaft. One piece went to LG & E’s expert consultant, who lost the shaft after preparing an expert report. The other piece was left outside, where it gathered rust and wear. The defendants sought to examine the shaft, and when they found that neither piece was available in its original condition, they moved for summary judgment because of the alleged spoliation of evidence.

Because spoliation is defined as “the intentional destruction of evidence,” the court found that spoliation did not occur, as there was no evidence that the fan shaft was intentionally destroyed. Rather, it was destroyed through the negligence of LG & E and its expert. Further, a great deal of evidence suggested that the repair work itself was responsible for the damage. The court found that the defendants would likely spend more time arguing over who was responsible for the faulty repair work rather than that the repair work was not faulty.

Since spoliation did not occur, spoliation remedies such as negative inferences and dismissal were unavailable. Rather, a “missing evidence” instruction was given, which allowed but did not require the jury to make an inference favorable to the defendant. The court also precluded the defendants from arguing that the jury should find against LG & E simply because they lost the fan shaft.4

The Sixth Circuit in One Beacon Insurance Co. v. Broadcast Development Group, Inc. 147 Fed. Appx. 535 (6th Cir. 2005) (unpublished) came to a similar ruling on slightly different facts. In that case, a broadcast tower under construction collapsed in March of 2000. It was initially believed that the collapse was due to the failure of Broadcast Development Group (“BDG”), a subcontractor, to anchor guy wires. However, in June of 2000, BDG began to suspect that the collapse was caused by another defect. BDG found a broken leg of the tower and had it tested, but the leg was later lost. In September of 2000, Ryan Construction (“Ryan”), the general contractor, took the tower to a scrap yard, despite having possession of a report that suggested Ryan may have been responsible for the collapse due to faulty welds. In late 2000, Ryan Construction submitted a claim to One Beacon Insurance Company (“One Beacon”), and was paid approximately $325,000. In 2002, One Beacon filed suit against BDG, who subsequently filed a counterclaim against Ryan, alleging that Ryan was responsible for the collapse.

During trial, several experts who did not examine the tower testified on behalf of BDG. A jury instruction was given that allowed but did not require

4 Of note, the court refused to extend the economic loss rule to the provision of services. The court also dismissed LG & E’s third party beneficiary claim against Advanced, as there was not sufficient evidence of Continental’s intent that its agreement with Advanced specifically and directly benefit LG & E.
the jury to make a favorable inference for BDG because of the missing evidence, and the jury returned a verdict apportioning only 25% of fault to BDG. One Beacon appealed, claiming that the issuance of the jury instruction was improper.

The Court of Appeals first stated that a duty not to destroy evidence arises upon notice of an item’s possible relevance to litigation. Missing evidence instructions are sometimes proper when such a duty exists and evidence is destroyed or lost due to negligence. However, in order for a missing evidence instruction to be proper, the evidence negligently destroyed must be the type of evidence the adversely affected party believes that it is and must undermine the ability of the adversely affected party to prove its case.

Here, Ryan breached that duty and was negligent in destroying the tower, as Ryan had a report that suggested faulty welds were responsible for the collapse. Further, the evidence was the type of evidence BDG believed it was, as the parts of the tower destroyed could have proven whether faulty welds were responsible for the collapse. Finally, the missing evidence did hinder BDG’s ability to prove their case, as BDG’s experts were unable to examine the tower. Had the missing evidence instruction not been given, the jury may have completely discredited the testimony of those experts. Because the requirements for a missing evidence instruction were met, the instruction given was proper. The court also rejected One Beacon’s argument that a missing evidence instruction was improper because BDG had the opportunity to inspect the evidence before it was destroyed. Although pre-destruction inspection by the non-spoliating party will sometimes prevent a missing evidence instruction from being given, that inspection was insufficient in this case. BDG did not know that the welds would be an issue when they had an opportunity to inspect the tower, while Ryan Construction knew that the welds could be an issue when it destroyed the tower.5

A Federal District Court applying Kentucky law planned to issue a similar jury instruction after applying a test to determine the appropriate remedy in Ware v. Seabring Industries, Inc., No. Civ. A. 04-418-JBC, 2006 WL 980735 (E.D. Ky. 2006). In that case, Donald Ware (“Ware”) was injured when allegedly defective struts broke on a boat he purchased from the Seabring Marine Industries (“Seabring”), a boat distributor. Ware filed suit, claiming that the boat was unreasonably dangerous. Approximately a month after the incident, Seabring replaced and discarded the struts at issue. Ware sought “a ‘missing evidence’ instruction, exclusion of evidence regarding the safety of or tests conducted on similar struts, disallowance of a defense relying on the plaintiff’s lack of expert testimony regarding the design of the struts, and preclusion of testimony by the defendant’s own design expert.”

The court noted that five questions should be considered when fashioning a remedy for an alleged spoliation of evidence:

1. Was the spoliation prejudicial? (2) Can the spoliation be cured? (3) How important is the missing evidence? (4) Was the spoliating party acting in good or bad faith? (5) What is the deterrent effectiveness of the remedy compared with a lesser sanction?

The court determined that the spoliation was prejudicial to Ware’s manufacturing defect claim, as Seabring’s actions precluded Ware from examining the allegedly defective product. However, the spoliation was not prejudicial to Ware’s design defect claim, as such a claim is not product-specific. Further, there was no evidence that Seabring acted in bad faith. The court did not discuss the deterrent effectiveness of the remedy given. Based on that analysis, the court granted Ware’s request for a missing evidence instruction but denied the other requests, as they were too severe for Seabring’s actions.6

While the sanction for the negligent destruction of evidence is relatively minor, the intentional destruction of evidence can carry a much greater penalty. In Beaven v. United States Department of Justice, the court was confronted with the destruction of evidence in

5 The court of appeals also affirmed the trial court’s decision to admit the testimony of three of BDG’s experts. One Beacon’s arguments for all three experts centered on the weight of their respective testimony, not on the experts’ qualifications or the relevance of their testimony.

6 The court also granted Ware’s motion to compel Seabring to produce the name and contact information of everyone who had purchased the same model boat before Ware was injured.
bad faith. No. 03-84-JBC, 2007 WL 1032301 (E.D. Ky. March 30, 2007). In that case, an employee of the Federal Medical Center-Lexington (“FMC”), a prison, left a folder containing sensitive personal information (e.g. social security numbers and home addresses) of jail employees in an unsupervised area where prisoners worked. Employees whose personal information was in the file sued the FMC for claims under the Privacy Act and Federal Tort Claims Act. The folder and list containing sensitive personal information was destroyed before suit was filed but at a time that the FMC knew or should have known that it would likely be relevant to future litigation.

The trial judge found that the FMC destroyed the folder and list in bad faith and for the purpose of harming the plaintiffs’ cases. The destruction of such folders was not routine, and one employee of the FMC sought approval from another employee before destroying it. Further, relevance is automatically established when evidence is destroyed in bad faith. Because the bad faith destruction severely undermined the plaintiffs’ abilities to prove their cases, a missing evidence instruction was not enough “to level the evidentiary playing field.” Thus, the court held that the destruction requires the court to infer that had the folder been present, it would have provided proof that disclosure to an inmate actually occurred. In other words, the court inferred that one element of the plaintiffs’ claims was automatically met because of the folder’s destruction.\(^7\)

Although the destruction of evidence important to a party’s case can result in a missing evidence instruction or more severe sanctions, the mere repair of a vehicle in a standard car accident case is not considered spoliation of evidence. See McAuley v. R & L Transfer, Inc., No. 3:04CV-676-MO, 2006 WL 2348085 (W.D. Ky. Aug. 9, 2006). In that case, the plaintiff, Declan McAuley (“McAuley”) was struck by a vehicle operated by an employee of R & L Transfer (“R & L”). After the accident, McAuley had his vehicle repaired, which was documented by an appraisal of damages and the repair records.

At trial, R & L sought to exclude evidence of the vehicle damages, including the appraisal of damages and documents showing the repairs made. R & L argued that the evidence should be excluded because it did not have an opportunity to inspect the vehicle before the collision and that McAuley intentionally spoiled evidence. The trial court explained that the “doctrine of spoliation of evidence provides no basis for excluding highly probative evidence under the facts of this case.” Further, because there is no precedent in applying the doctrine of spoliation to motor vehicle accidents, R & L’s argument failed.

Similarly, neither sanctions nor missing evidence instructions are proper when evidence that is not crucial to a party’s case is spoiled. See Hays v. Alia, No. 2006-CA-001871-MR, 2007 WL 3036871 (Ky. Ct. App. Oct. 19, 2007). In that case, Alyssa Summers (“Summers”) was injured while jumping on a trampoline owned by Latif Alia (“Alia”). Summers sued Alia for the injuries sustained on the trampoline.

At trial, Summers moved for a directed verdict on liability, as Alia had disposed of the trampoline. However, the court refused to let Summers refer to this disposal, as it was a subsequent remedial measure prohibited under the rules of evidence. Further, any harm caused to the plaintiff by the trampoline’s destruction was eliminated because a similar trampoline was produced at trial. A defense verdict was ultimately rendered, and the trial court’s decision was affirmed on appeal.\(^8\)

Courts will also refuse to give missing evidence instructions when the evidence is not relevant to the non-spoliating party’s claim. See Jarrett v. Duro-Med Industries, No. 05-102-JBC, 2008 WL 89932 (E.D. Ky. Jan. 8, 2008). In that case, the Rose Jarrett died when the right brake on her wheelchair malfunctioned and she fell out of chair. Her personal

\(^7\) The court refused to award damages to any of the plaintiffs for identify theft or harassment, as the alleged incidents could not be linked to the disclosure of the folder. The court also deemed the plaintiffs’ claims for outrage to be preempted by their claims under the Privacy Act. However, the court did acknowledge that the protective measures the plaintiffs took (e.g. placing fraud alerts on their accounts and increasing security in their homes) were in response to the disclosure and allowed the plaintiffs to recover damages for the costs of those protective measures.

\(^8\) The court of appeals also found that the trial court properly considered Summers’ contributory fault and issued adequate jury instructions.
representative, George Jarrett ("Jarrett") filed suit against wheelchair distributor, Duro-Med Industries ("Duro-Med"). During testing of the wheelchair, Jarrett's expert unintentionally altered the condition of the previously undamaged left brake of the wheelchair. Based on this alteration, Duro-Med moved for summary judgment, or in the alternative exclusion of the evidence or a jury instruction pertaining to the altered brake.

The trial judge denied all of Duro-Med's requests. Spoliation did not occur, as the expert's actions were not intentional. Even when the court assumed that spoliation did occur, none of the remedies sought were proper, as "[t]he allegedly defective [right brake] is still available for examination [and Jarrett] still has the relevant evidence available to prove his case." Thus, because the missing evidence did not affect Duro-Med's case, no remedy was available. 9

The court in Barrister Farm, LLC v. Upson Downs Farm, Inc. was confronted with a similar situation. No. 2004-CA-002651-MR, 2006 WL 319344 (Ky. Ct. App. Feb. 10, 2006). In that case, Upson Downs Farm, Inc. ("Upson") was the boarder of three thoroughbred horses owned by Barrister Farm, LLC ("Barrister"). The horses were killed in a fire at Upson's property. The Police Department's report classified the cause of the fire as undetermined, but indicated that neither arson nor the weather appeared to be the cause. The day after the fire, two certified fire investigators from Upson's insurance company investigated and photographed the site, and the next day, the site was cleared. The fire investigators concluded that the cause of fire was "unknown." Barrister filed suit for damages arising out of the loss of the horses, and Upson filed a motion for summary judgment.

The trial judge granted Upson's motion for summary judgment, as Barrister was unable to produce any evidence of negligence. Barrister appealed, claiming that it could not prove negligence because of Upson's destruction of the fire site. Because there was "no evidence to suggest that [Upson] was negligent in clearing the fire site, that it did so with the intent of hiding evidence, or that the site was cleared after [Barrister's] request for preservation was received." Thus, there was no spoliation of evidence.

Unfortunately, if the trial court refuses to recognize that evidence has been spoiled, the non-destroying party is limited to appealing the trial court's remedy to spoiled evidence. Kentucky courts have consistently refused to recognize the independent tort of spoliation of evidence. In Bandy v. Norfolk Southern Railway Co., Nita Bandy ("Bandy") sued the Norfolk Southern Railway Company ("Norfolk") after Norfolk allegedly destroyed evidence with the intent to prejudice her claim.

Bandy originally sued Norfolk after her husband was killed in an accident involving one of Norfolk's trains. In that lawsuit, Bandy requested Norfolk's record retention policy, safety committee meeting minutes, and the train's "consist," a document that identifies the specific cars that made up the train at the time of the accident. Only the record retention policy was produced, and it was determined that the minutes and consist were destroyed before being stored for two years as required by the record retention policy.

Bandy moved to strike Norfolk's answer because of the spoliation of evidence, but the trial judge only issued a missing evidence instruction. Bandy lost at trial and appealed. The Court of Appeals agreed that Bandy was prejudiced by discovery abuses but held that the missing evidence instruction was an adequate remedy. Although the trial court could have stricken Norfolk's answer, it did not have to. Thus, the ruling was proper.

After Bandy's original case against the railroad was lost on appeal, she brought a second claim alleging spoliation of evidence. However, the Supreme Court of Kentucky had already refused to recognize a cause of action for spoliation of evidence. The fact that she couched as a claim under a Kentucky statute allowing the recovery of damages for tampering with evidence was irrelevant. Thus, Bandy's second claim was properly dismissed by the trial court.

9 The trial court also denied Duro-Med's motion for summary judgment based on Kentucky's "middleman" statute. However, the trial court dismissed Jarrett's manufacturing defect claim, design defect claim, gross negligence claim, and punitive damages claim. Thus, Jarrett was left with a failure to warn claim after the trial court's ruling.
MICHIGAN

COURT UPHOLDS NO-FAULT ACT’S $1 MILLION PROPERTY DAMAGE CAP

The Michigan Supreme Court issued an order on May 16 holding that the Motor Carrier Safety Act (“MCSA”) does not create an exemption from the $1 million property damage cap established by the Michigan No-Fault Act, reversing a published opinion from the Michigan Court of Appeals.

In Department of Transportation v. Initial Transport, Inc., 748 N.W.2d 239, 2008 WL 2066578, (Mich. 2008), the defendant, Initial Transport Inc., was the owner of a gasoline tanker, which detached from its semi-tractor, fell from a freeway overpass to the road below and exploded. The explosion resulted in severe damage to the overpass and adjoining structures. The Michigan Department of Transportation (“MDOT”) who was the plaintiff claimed that the cost to repair the damage totaled $3.5 million.

The defendant maintained a $1 million commercial general liability insurance policy, as well as an excess liability policy for an additional $4 million. The defendant-insurer declined to pay more than the $1 million limit for property protection benefits under Michigan’s no-fault law, MCL 500.3121(5). MDOT brought a suit to recover the damages exceeding $1 million, arguing that the MCSA, MCL 480.11 et seq., created an exception to the no-fault cap.

The trial court granted summary disposition to the defendants and MDOT appealed. The appellate court, in a two-to-one decision, Department of Transportation v Initial Transport, Inc., 740 N.W.2d 720, (Mich. Ct. App. 2007), reversed the trial court, holding that the MCSA did create an exception to the No-Fault Act’s $1 million cap on property damage benefits. The defendants appealed to the Michigan Supreme Court. In lieu of granting leave to appeal, the Supreme Court summarily reversed for the reasons stated in Judge Whitbeck’s dissenting lower court opinion.

The dissent maintained that the MCSA was merely a regulatory act that set forth the minimum amount of financial responsibility for certain carriers, and imposed a civil penalty should a carrier fail to maintain those requirements. Concluding that the MCSA did not create a private action for a third party to recover against an insured or insurer, Judge Whitbeck would have held that the No-Fault Act was the exclusive remedy available to MDOT for the property damage.

Neither the MCSA nor the No-Fault Act expressly state that the MCSA’s financial responsibility requirement is in addition to the $1 million cap imposed by the No-Fault Act. Furthermore, the MCSA’s minimum level of financial responsibility applies to both bodily injury and property damage, while the No-Fault Act’s cap concerns property damage only. Therefore, the dissent argued, MDOT’s recovery was still limited by the No-Fault Act’s cap on property damage. Judge Whitbeck concluded that it was the Legislature, not the court, which had the power to create an exception to the property damage cap. Without express direction from the legislature that such an exception was intended, the dissent maintained that the MCSA must be read within the framework of the No-Fault Act.

The Michigan Supreme Court, in adopting Judge Whitbeck’s dissent, has explicitly ruled that the MCSA does not create an exception to the No-Fault Act’s $1 million cap on property damages. The court also overturned the holding in Department of Transportation v North Central Co-operative LLC, 2008 WL 204117, (Mich. Ct. App. 2008), which had relied on the decision of the appellate court in Initial Transport.
RHODE ISLAND

RHODE ISLAND SUPREME COURT HOLDS THAT A VEHICLE OWNER’S LIMITING INSTRUCTIONS ABOUT ANOTHER’S USE OF THE OWNER’S VEHICLE, AFTER CONSENT HAS BEEN GIVEN, DOES NOT FREE THE OWNER OF LIABILITY UNDER RHODE ISLAND G.L. 1956 § 31-33-6

In Black v. Vaiciulis, 934 A.2d 216 (R.I. 2007), the Rhode Island Supreme Court held that an owner of a motor vehicle, who gives another consent to drive his or her vehicle, cannot avoid liability under G.L. 1956 § 31-33-6 simply by placing limiting instructions on the extent of the other’s use of that vehicle.

In 2002, Me & Debbie Construction, Inc. (hereinafter “M & D” or “defendant”), a Texas based company, was hired to perform construction work in Cranston, Rhode Island. Larry Stagner (hereinafter “Stagner”), an owner and officer of the company, hired Timothy Vaiciulis (hereinafter “Vaiciulis”) as a laborer. Stagner and Vaiciulis drove together to Rhode Island in a truck with an attached trailer, both owned by and registered to defendant M & D. They rented trailer space and were to reside there for the remainder of the project. Approximately three weeks into the project, Stagner had to return to Texas for the weekend. On September 27, 2002, Stagner drove himself and Vaiciulis to Rhode Island’s T.F. Green Airport. Stagner testified at trial that he instructed Vaiciulis to drive the truck directly back to the campground and then to pick Stagner up at the airport on September 29, 2002. Stagner also testified that he had repeatedly told Vaiciulis not to use the truck during the interim period.

The record indicated that Vaiciulis was given the keys to the truck and drove it back to the campground, where Vaiciulis stayed until the next afternoon. On September 28, 2002, Vaiciulis drove the truck to the nearby Stick’s Tavern, where he met plaintiff for the first time. The two shared some drinks and then decided to return to the campground in defendant’s truck. En route to the campground, Vaiciulis collided with a utility pole.

The plaintiff, who was sitting in the passenger seat, was injured in the collision. Vaiciulis was arrested and subsequently convicted for driving under the influence pursuant to G.L. 1956 § 31-27-2. Plaintiff later filed a personal injury action naming M & D, the owner of the vehicle, as a defendant under G.L. 1956 §§ 31-33-6 and 31-33-7.

The Rhode Island Supreme Court’s opinion cites to pertinent portions of §§ 31-33-6 and 31-33-7. Section § 31-33-6 provides:

Whenever any motor vehicle shall be used, operated, or caused to be operated upon any public highway of this state with the consent of the owner, lessee, or bailee, expressed or implied, the driver of it, if other than the owner, lessee, or bailee, shall in the case of an accident be deemed to be the agent of the owner, lessee, or bailee, of the motor vehicle unless the driver shall have furnished proof of financial liability in the amount set forth in chapter 32 of this title, prior to the accident. For the purposes of this section, the term ‘owner’ includes any person, firm, copartnership, association, or corporation having the lawful possession or control of a motor vehicle under a written sale agreement.

Section 31-33-7 provides:

In all civil proceedings, evidence that at the time of the accident or collision the motor vehicle was registered in the name of the defendant, shall be prima facie evidence
that it was being operated with the consent of the defendant, and the absence of consent shall be an affirmative defense to be set up in the answer and proved by the defendant.

At the close of all the evidence, plaintiff moved for judgment as a matter of law pursuant to Rule 50 of the Rhode Island Superior Court Rules of Civil Procedure, on the issue of Stagner’s statutory consent that Vaiciulis could operate defendant’s vehicle. Plaintiff argued that the limiting instructions that accompanied Stagner’s permission, that Vaiciulis could operate the vehicle in Stagner’s absence, did not invalidate the consent and thus defendant should be held liable under the applicable statutes as a matter of law. The trial justice reserved ruling on the Rule 50 motion and sent the case to the jury for deliberation. The jury returned a verdict in favor of defendant and found that although Vaiciulis was negligent, defendant was not liable because it did not provide express or implied consent for Vaiciulis’ use of the truck. After the verdict, the trial justice reconsidered and granted plaintiff’s Rule 50 motion, finding that the limitations accompanying defendant’s consent were insufficient based on established case law. He ordered a new trial on the issue of damages and proximate causation.

Defendant timely appealed and argued that the issue of consent was properly submitted to the jury and that the verdict should be upheld. The defendant further argued that the trial justice’s ruling contravened the clear language of the statute, the public policy behind the statute, and prior Rhode Island Supreme Court opinions holding that the issue of consent is one for the jury to decide. On appeal, the Rhode Island Supreme Court upheld the trial justice’s ruling.

The Rhode Island Supreme Court held that the controlling issue in this appeal was whether plaintiff introduced prima facie evidence of consent pursuant to § 31-33-7, and, if so, whether the defendant provided any evidence to contradict such evidence. The court ruled that since the vehicle operated by Vaiciulis was registered in defendant’s name at the time of the collision, and defendant failed to present any evidence to contradict consent, the trial justice’s ruling on the Rule 50 motion was proper.

This court quoted portions of the Rhode Island Supreme Court’s opinion in Kernan v. Webb, 148 A. 186 (R.I. 1929), wherein that court held “[T]he foundation of this statutory liability of the owner is the permission given to another to use an instrumentality which, if improperly used, is a danger and a menace to the public. The owner can avoid this liability by refusing to permit the use of his automobile by another. If he does permit such use, he cannot avoid the consequences of the operator’s negligence and escape liability therefore by secret restriction of the right to use the motor vehicle.” Id. at 188.

In the instant action, the court held that it is beyond dispute that Stagner consented to Vaiciulis’ operation of the vehicle, even though impositions were imposed. However, consistent with prior holdings of the court, this court concluded that Stagner’s limiting instructions about Vaiciulis’ use of the vehicle after consent do not free him of liability under § 31-33-6. The court further expressed that to hold otherwise would contradict settled law in this State and the legislative intent expressed in the controlling statutes. Accordingly, the court affirmed the trial justice’s granting of the Rule 50 motion and ordering of a new trial on the issues of causation and damages.
SOUTH CAROLINA

COURT REJECTS ARGUMENT TO LIMIT PLAINTIFFS’ ABILITY TO PROCEED ON NEGLIGENT HIRING AND ENTRUSTMENT CLAIMS AGAINST CARRIERS

In answering two questions certified by the United States District Court, South Carolina’s Supreme Court recently ruled that a plaintiff can maintain against an employer an action for negligent hiring, training, supervision, and entrustment, even where the employer admits respondeat superior liability for its employee’s acts. A collision between the plaintiffs’ passenger vehicle and the defendants’ tractor trailer spawned the litigation that led to the courts’ opinion in James v. Kelly Trucking Co., No. 26447 (S.C., filed March 10th, 2008).

The plaintiffs’ underinsured motorist insurer (“UIM”)—which assumed the defense when the insurer for Kelly Trucking and its driver, co-defendant Alvino Hymes, paid the limits of its policy to resolve the claims against the defendants—stipulated both that Hymes had been negligent in causing the collision and that Hymes’ negligent acts had transpired within the course and scope of his employment. So stipulating, the UIM insurer moved for summary judgment as to plaintiffs’ negligent hiring, training, supervision, and entrustment theories, arguing that such causes of action should not be allowed when a defendant employer’s vicarious liability is admitted. The United States District Court certified to the South Carolina Supreme Court the question of this argument’s viability.

The insurer’s argument relied, first, on the idea that negligent hiring, training, supervision, or entrustment liability is in its nature derivative, and that once the employer’s derivative liability is established through an admission of respondeat superior liability, the plaintiff should not be permitted to proceed directly against the employer. Rejecting this argument, the court held that, contrary to the insurer’s assertions, negligent hiring, training, supervision, and entrustment is conceptually distinct from derivative or vicarious liability theories. Whereas an employer’s derivative liability—that is, respondeat superior liability—is founded upon the employee’s negligent act, the court reasoned, “the employer’s liability under [a negligent hiring, training, supervision, and entrustment theory] does not rest on the negligence of another, but on the employer’s own negligence.” Because the two theories are distinct conceptually and because a plaintiff is permitted to proceed on as many alternate theories as he pleases, the court saw no reason to preclude a plaintiff’s proceeding on the direct claim against the employer.

Jury prejudice concerns underlie the insurer’s perhaps erroneously styled “public policy” argument. The argument went thusly: If a plaintiff is allowed to proceed on a negligent hiring, training, supervision, and entrustment theory, the evidence relevant to that claim would include evidence of the employee’s past negligence—driving record, criminal record, etc—which potentially would be inadmissible if the sole theory against the employer were respondeat superior. The insurer’s argument posited that juries would infer from the employee’s past negligence, quite naturally, that the employee had been negligent in the circumstances alleged in the present lawsuit. Because this prejudice against the employee would be unfair—as well as unnecessary, given the employer’s stipulation to liability—the plaintiff should be barred from pursuing the negligent hiring, training, supervision, and entrustment claim.

Unfortunately for the insurer, the court found that procedural safeguards already in place sufficiently addressed this consideration. Pointing out that trial courts can exclude evidence, the unfair prejudice of which outweighs its probative value, and that trial courts can instruct juries as to how evidence shall be considered, the South Carolina Supreme Court essentially found that an appellate court pronouncement on the issue is unnecessary.

A dissenting opinion pointed out that the insurer would have prevailed under the majority rule, and that the adoption of a common exception for instances of gross negligence by the employer would ensure that an employer’s unilateral stipulation cannot altogether foreclose a legitimate cause of action. Ultimately, though, because the majority rejected the proposition that negligent hiring, training,
supervision, and entrustment is derivative by its nature, the insurer’s other arguments were bound to fail.

The majority’s ruling confirms, first, that carriers will be unable to avoid the distasteful task of defending their hiring and supervision practices even if they are willing to stipulate to liability and, second, that drivers will continue to see evidence of their past misfeasance entered into evidence against their current employers, potentially to the driver’s detriment. The lesson for the industry, as always in these cases, is that due diligence on prospective employees is always advisable.

**U. S. DISTRICT COURT ADDRESSES NEGLIGENT ENTRUSTMENT POST-GADSON V. ECO SERVICES OF SOUTH CAROLINA**

In one of the first significant decisions following the South Carolina Supreme Court’s recent opinion addressing the elements of negligent entrustment, the United States District Court for the District of South Carolina, Anderson/Greenwood Division, has ruled such claims are not limited to situations involving an intoxicated driver.

On March 13, 2007, Jeff Becker, as the personal representative of the estates of his wife and son, filed suit against Estes Express Lines, Inc. and driver Oliver Mitchell arising out of an accident in which Mitchell’s tractor-trailer lost control, crossed the median of Interstate 85, and collided with the vehicle being operated by Daniel Becker. Both Daniel Becker and his mother Pamela Becker died in the collision. The actions alleged a negligence cause of action against Mitchell and causes of action against Estes for negligent entrustment and negligent hiring, supervision, and retention. At the heart of the negligent entrustment claim was the allegation that Estes “knew or should have known that Mitchell was subject to having fainting and/or dizzy spells while driving it trucks” and that Estes was therefore negligent in entrusting Mitchell with the operation of its tractor-trailer. Among the affirmative defenses raised by Estes was sudden incapacity, alleging Mitchell was suddenly and unforeseeably incapacitated immediately preceding the collision, causing him to lose control of his vehicle.

Estes thereafter filed a motion for partial summary judgment on both the negligent entrustment and negligent hiring, supervision, and retention claims. Estes argued that Becker’s claim for negligent entrustment was barred as a result of the South Carolina Supreme Court’s decision in *Gadson v. ECO Services of South Carolina*, 374 S.C. 171, 648 S.E.2d 585 (2007). Estes took the position that Gadson limited claims of negligent entrustment to situations involving an owner’s entrustment of a motor vehicle to an intoxicated driver. The district court was asked to determine the precise effect of the holding in *Gadson*.

In *Gadson*, the South Carolina Court of Appeals affirmed a jury’s finding that a truck operator was liable for negligent entrustment in allowing a family member to operate his vehicle. In doing so, the Court of Appeals first adopted § 308 of the RESTATEMENT (SECOND) OF TORTS (1965). This section states:

It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Noting that the truck operator 1) knew that his cousin had been
drinking alcoholic beverages; and 2) was apparently familiar with his cousin’s character based on their familial relationship, the Court of Appeals concluded that the truck operator “knew or should have known that [the cousin’s] use of the vehicle was likely to cause harm.” Gadson v. ECO Services of South Carolina, Op. No. 2005-UP-130 (S.C. Ct.App. filed February 18, 2005).

On further appeal, the South Carolina Supreme Court reversed. The Supreme Court explicitly declined to adopt § 308 of the RESTATEMENT (SECOND) OF TORTS “based on this set of facts.” Instead, the court discussed the test for negligent entrustment by stating:

According to our case law, the elements of negligent entrustment are: (1) knowledge of or knowledge imputable to the owner that the driver was either addicted to intoxicants or had the habit of drinking; (2) the owner knew or had imputable knowledge that the driver was likely to drive while intoxicated; and (3) under these circumstances, the entrustment of a vehicle by the owner to such a driver

Gadson, 648 S.E.2d 585, 588 (citing Jackson v. Price, 288 S.C. 377; 342 S.E.2d 628 (Ct. App. 1986)). The court determined that under the proper analysis, even in the light most favorable to Gadson, there was no evidence presented to support the contention that the truck operator knew his cousin was intoxicated, had a habit of being intoxicated, or was likely to drive while intoxicated.

Based upon the Supreme Court’s refusal to adopt § 308 of the RESTATEMENT and the court’s statement of the applicable test, Estes argued that Gadson essentially limited the negligent entrustment cause of action to situations involving an owner’s entrustment of a motor vehicle to an intoxicated driver.

The district court ultimately denied Estes’ motion for summary judgment, finding that the language of Gadson did not necessarily cast aside the traditional notion that the owner of a vehicle can be liable for negligently entrusting it to another. Becker v. Estes Express Lines, Inc., No. 8:07-715-HMH, 2008 U.S. Dist. LEXIS 20395 (D.S.C. Mar. 13, 2008). The district court noted that the negligent entrustment claim in Gadson involved entrustment to an intoxicated driver, and that the court in Gadson refused to adopt the broader Restatement test “based on this set of facts.” As a result, the district court concluded that Gadson appeared to require application of the stringent test from Jackson v. Price only in those situations involving allegations of an intoxicated driver, rather than all situations involving allegations of negligent entrustment. The district court observed that this conclusion was bolstered by the fact that the Supreme Court had “never explicitly held that the Gadson elements must apply in every negligent entrustment case.” Based on its findings, the district court denied summary judgment.

Since the issuance of the Gadson opinion, there has been speculation regarding the scope of its application. Certainly if Gadson was intended to limit negligent entrustment claims to intoxicated driver situations, it would be welcomed by all employers and transportation companies who depend upon employees to operate company vehicles, as it would preclude claims based upon allegations that the employer knew or should have known the employee was a poor driver. It appears that at least the district court for Anderson/Greenwood has rejected such an interpretation of Gadson. While it is unknown whether the state courts of South Carolina will reach the same conclusion, they will certainly be asked to do so in the near future. Only time will reveal the final results.

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FEDERAL REGULATION PUTS PRIMARY DUTY ON CARRIER TO SEE THAT CARGO LOADED PROPERLY

Plaintiff truck driver was sent by his employer to pick up a load. The cargo was loaded by the shipper and the plaintiff knew his trailer had not been loaded properly. When plaintiff arrived at his destination in Georgia, several cases of product had fallen. He began restacking and injured his back. Additionally, a stack of product fell on him.

Plaintiff sued the shipper. The shipper/defendant filed for summary judgment claiming the plaintiff’s violation of 49 CFR 392.9 precluded any recovery. As the accident occurred in Georgia, applicable Georgia law reflects that assumption of the risk may bar plaintiff’s recovery.

The Tennessee appellate court concluded that plaintiff had actual knowledge of the improper loading and that plaintiff had violated 49 CFR 392.9 which states in pertinent part:

(a) General. A driver may not operate a commercial motor vehicle and a motor carrier may not require or permit a driver to operate a commercial motor vehicle unless—

(1) The commercial motor vehicle’s cargo is properly distributed and adequately secured as specified in §§ 393.100 through 393.136 of this subchapter.

(b) Drivers of trucks and truck tractors. Except as provided in paragraph (b)(4) of this section, the driver of a truck or truck tractor must—

(1) Assure himself/herself that the provisions of paragraph (a) of this section have been complied with before he/she drives that commercial motor vehicle.

The appellate court sustained the summary judgment holding that the carrier has the primary duty to ensure safe loading. Because of this duty, established in 49 CFR 392.9, plaintiff had the primary responsibility and his negligence trumps any negligence of the shipper. Case against the shipper dismissed. Herring v. Coca Cola Enterprises, 2008 WL 787871.

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ADMISSIBILITY OF EXPERT TESTIMONY

The United States Court of Appeals for the Sixth Circuit recently affirmed a decision from the Middle District of Tennessee excluding expert testimony in a products liability action due to the lack of testing performed by the proposed expert, and because the opinions of the proposed expert were developed solely for litigation purposes. Johnson v. Manitowoc Boom Trucks, Inc. 484 F.3d 426 (6th Cir. 2007).

The action arose after Michael Gilfeather was injured by a boom truck crane manufactured by Manitowoc Boom Trucks. Johnson v. Manitowoc Boom Trucks, Inc. 406 F. Supp.2d 852 (M.D. Tenn. 2005). This boom truck crane was mounted on a truck that could be transported to work sites. Johnson, 406 F. Supp.2d at 855. The truck was equipped with two front “outriggers” and two rear “stabilizers” that stabilized the truck while the crane was in operation to keep the crane from turning over. Id. On the day of the plaintiff’s injury, one of his co-workers retracted one of the front “outriggers” to drive his vehicle past the boom truck crane. Id. With one of these “outriggers” still partially retracted, another co-worker attempted to operate the boom truck crane. Id. The crane then fell over and injured the plaintiff. Id.

The issues facing the Middle District of Tennessee upon the motion of Manitowoc were whether to exclude the proposed expert testimony of the plaintiff and whether, if the expert testimony proffered by the plaintiff was excluded, summary judgment should be granted for Manitowoc. Id. at 854. Gary Friend, who was the proposed expert, was expected to testify that the Manitowoc crane should have an “outrigger-boom
interlock system” that would prevent operation of the crane unless the outriggers were firmly extended on the terrain. *Id.* at 855-56.

The district court first looked at whether the consumer expectation or prudent manufacturer test should be used to determine whether the crane was “unreasonably dangerous.” *Id.* at 857. Because the “appropriate design of a boom truck crane and the safety features of such a crane are not within the ‘common knowledge of laymen,’” the court and the parties agreed that the prudent manufacturer test should apply. *Id.* at 858. The court further noted that expert testimony was essential in evaluating a product under the prudent manufacturer test. *Id.* at 857.

The Middle District of Tennessee then examined the requirements of expert testimony under *Daubert* and Rule 702 of the *Federal Rules of Evidence*. *Id.* at 859. Under Daubert, the four non-exclusive factors that may be helpful to courts in assessing the reliability of expert testimony are: 1) whether a theory can and has been tested, 2) whether the theory or technique has been subjected to peer review and publication, 3) the known or potential rate of error and the existence and maintenance of standards controlling the technique’s operation, and 4) the extent to which a known technique or theory has gained general acceptance within a relevant scientific community. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993). An additional factor recognized by the Sixth Circuit in the context of reliability is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying because the former provides important, objective proof that the research comports with the dictates of good science. *Johnson*, 406 F. Supp.2d at 860.

While the district court found that the proposed expert testimony was relevant under Rule 702, the problem arose upon examination of the reliability of the testimony. *Id.*. The court first took issue with the proposed testimony because Mr. Friend had never implemented or tested his design concept, the first prong of the *Daubert* analysis. *Id.* at 861. The basis for his proposed alternative design was a similar interlock system that was used on a 1978 Asplundh truck that Mr. Friend had neither inspected nor operated. *Id.* Further, Mr. Friend had only a schematic drawing purporting to show how the Asplundh interlock system could be linked to the hydraulic and electrical systems of the Manitowoc crane, a much larger vehicle. *Id.* In addition, Mr. Friend had never designed an interlock system for any manufacturer or consulted with any manufacturer regarding any interlock system. *Id.* While the court did not find these deficiencies under the first prong of the *Daubert* test determinative, they brought into question the reliability of his expert testimony. *Id.* at 862.

In examining the peer review and publication factor under *Daubert*, the Middle District also noted that there were no other expert opinions or publications to support Mr. Friend’s theory that mobile boom truck cranes are defective if they do not have an interlock system. *Id.* at 863. Further, the “publications” relied upon by Mr. Friend to support his theory consisted of sales brochures indicating that boom truck cranes from other manufacturers had these interlock systems. *Id.* The Middle District found that these brochures were not the type of publications contemplated under the *Daubert* analysis. *Id.* Also, the district court found that there was no evidence that the engineering or manufacturing communities generally accepted that a boom truck crane was defective without an interlock system, which was further bolstered by Mr. Friend’s own testimony that interlock systems were not the industry standard in 1999, when this particular boom truck crane was manufactured by Manitowoc. *Id.* at 865.

Finally, the district court examined whether the plaintiff’s proposed expert was testifying about matters arising “naturally and independently of litigation” or whether his opinions were developed solely for the litigation. *Id.* at 865-66. Because the expert retained by the plaintiff was a “quintessential expert for hire” and developed his opinions exclusively for the litigation, this factor also weighed in favor of exclusion. *Id.*
After a thorough analysis, the Middle District of Tennessee excluded the testimony of Mr. Friend, as his proposed opinions failed to meet any of the reliability factors considered by the court. *Id.* at 866. Although the plaintiff attempted to rely on portions of the testimony of the expert for Manitowoc that indicated that the company had considered this type of system, but had decided not to implement it, the court held that the plaintiff could not rely on such to save his case. Rather, the burden remained on the plaintiff to produce expert testimony that the subject boom truck crane was defective or unreasonably dangerous, which it failed to establish. *Id.* As a result, the Middle District of Tennessee granted summary judgment to Manitowoc. *Id.* at 867.

On appeal, the Sixth Circuit found that the trial court did not abuse its discretion in excluding the plaintiff’s proposed expert testimony about whether the crane was defective and affirmed the ruling of the Middle District. *Johnson*, 484 F.3d 426. While the district court considered only three of the four Daubert factors and emphasized an additional factor of whether the opinions were prepared only for litigation purposes, the Sixth Circuit found the analysis of the admissibility of the proposed expert testimony “quite lucid and quite correct.” *Id.* at 435. The Sixth Circuit noted that the district court properly utilized its “gatekeeper” function to exclude the proposed testimony from Gary Friend, taking into account the testing, general acceptance, and “prepared-solely-for-litigation” factors. *Id.* at 436. Finally, the Sixth Circuit considered Mr. Gilfeather’s argument that he could still survive summary judgment based on portions of the testimony of Manitowoc’s expert and noted that, “An appellant cannot overcome summary judgment . . . by simply cherry-picking statements from an appellee’s expert opinions, when the overall conclusions of those experts run contrary to the appellant’s position. *Id.* at 436. Therefore, the decision of the Middle District of Tennessee to exclude the proposed expert testimony of the plaintiff, resulting in a grant of summary judgment for Manitowoc, was affirmed. *Id.*

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**TEXAS**

**SUPREME COURT OF TEXAS FINDS WAIVER OF ARBITRATION AGREEMENT**

The Supreme Court of Texas recently held that an otherwise enforceable agreement for binding arbitration had been waived as a result of the parties engaging in extensive litigation and discovery before being ordered to arbitration. *Perry Homes v. Cull*, No. 05-0882, 2008 WL 1922978, 51 Tex. Sp. Ct. J. 819 (Tex. May 2, 2008). The plaintiffs sued their builder and warranty companies alleging various structural and drainage problems with their home. The warranty companies immediately requested arbitration, which was strongly opposed by the plaintiffs. However, after discovery was largely completed, and on the eve of trial, the plaintiffs changed their mind and asked the trial court to compel arbitration. Because the defendants did not show any prejudice, the court ordered the parties to arbitration.

After another year of litigation, the arbitrator entered an award in favor of the plaintiffs. All of the defendants moved to vacate the award, arguing that the case should never have been sent to arbitration in the first place. The trial court affirmed the award, as did the appellate court. However, The Supreme Court of Texas reversed, vacated the award and remanded the case back to the trial court.

The court held that gateway matters, such as waiver, are...
issues for the court and not the arbitrator. While there is a strong presumption against waiver of arbitration, the court must look at the totality of the circumstances on a case-by-case basis, considering such factors as: (1) when the movant knew of the arbitration clause; (2) how much discovery was conducted; (3) who initiated it; (4) whether it related to the merits rather than arbitrability or standing; (5) how much of it would be useful in arbitration; and (6) whether the movant sought judgment on the merits.

The court held that a party who enjoys substantial, direct benefits by gaining an advantage in the litigation process should be barred from later seeking arbitration. In this case, The court found that the plaintiffs had manipulated the system by conducting extensive discovery and then leaving that forum in favor of arbitration. The court held that such manipulation is the precise kind of inherent unfairness that constitutes prejudice.

This case is significant for those transportation companies who may have contracts or leases with owner-operators that contain arbitration agreements. Disputes often arise on course and scope issues, vicarious liability, purchase of vehicles and reimbursement among others. This case sends a message to seek enforcement of arbitration agreements early and often. Engaging in significant discovery may result in waiver.

On the night of November 8, 1999, a truck driver was driving a tractor-trailer for a Transportation company up N. Val Vista Drive in Gilbert, Arizona when he crossed a median into oncoming traffic. The truck collided with a van resulting in the van driver’s death.

The van driver’s widow and his two grown children filed suit against the truck driver and transportation company. Defendants admitted negligence before trial, which was held in January, 2003. At that trial, the jury awarded a total of $7 million in compensatory damages to the plaintiff, and $4 million punitive damages against the truck driver and transportation company. The verdict was appealed. In March, 2005, the Arizona Court of Appeals upheld the compensatory damage award but reversed the punitive damage award as having been the product of an improper jury instruction. On April 29, 2008, the parties retried the case on punitive damages only. Following a seven day trial and four hours of deliberation, the jury returned a unanimous verdict in favor of the truck driver and transportation company awarding no punitive damages.

Plaintiffs’ counsel had contended that they were entitled to recover punitive damages because they believed there was clear and convincing evidence that the truck driver had “consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others.” Under Arizona law, this is the state of mind a plaintiff must establish in order to be entitled to punitive damages. Plaintiffs further argued that the transportation
company had engaged in a pattern of deception through both its own employees and its attorneys.

Defendants’ case featured testimony from the two investigating officers from the Gilbert, Arizona Police Department, both of whom corroborated the account the truck driver gave the night of the accident, that he was driving within the posted speed limit and that he lost control of his truck while trying to avoid a car that was drifting into his lane from his right. Defendants also rebutted plaintiffs’ contentions regarding deceptive practices by the transportation company by showing the company’s responsive conduct, as well as plaintiffs’ own failure to obtain available information.

The lawyers for defendants were William W. Drury, Jr., Michael D. Wolver, and Steven A. Adelman, of Renaud Cook Drury Mesaros, PA in Phoenix. Plaintiffs were represented by P. Richard Meyer of Meyer and Williams in Jackson, Wyoming, and M. Paul Fischer of the Law Office of M. Paul Fischer in Mesa, Arizona.

PRACTICE TIPS

HIGHWAY ROBBERY: STRATEGIES FOR DEALING WITH UNREASONABLE CHARGES AND FEES OF TOWING AND HAZMAT SERVICES

The problem is a familiar one to any motor carrier: a commercial vehicle is unexpectedly involved in a collision severe enough to render it inoperable and to cause a discharge of fuel or other hazmat. While the motor carrier’s initial focus must be on safety and accident reconstruction issues, it is soon left to deal with “governmentally imposed vendors:” tow services, storage yards and environmental “emergency response” firms. Unlike the case with traditional vendors, governmentally imposed vendors are thrust upon a motor carrier by law enforcement or other governmental agencies, typically with no opportunity to negotiate charges, fees or scope of services. The result is often an expensive battle over the right of access to and possession of the motor carrier’s equipment as well as over what must be paid to whom. Because the motor carrier typically has no leverage with which to deal, the results can amount to a substantial financial penalty without right of recourse.

Meet the Enemy. To begin, as in any battle, it is important to understand one’s adversary and to fully appreciate what one is up against. Towing is “big business” in America, and operators are well organized. The Towing and Recovery Association of America (“TRAA,”) headquartered in Alexandria, Virginia, is the umbrella trade group and national voice of the towing and recovery industry, which is estimated to include more than 35,000 towing businesses in the United States. (www.towserver.net) Tow operators also typically belong to a state organization, such as the Southwest Tow Operators (www.swtowop.org) or the Virginia Association of Towing and Recovery Operators (www.vatro.org). Tow operators attend annual trade shows,
such as the Baltimore Tow Show and the New Hampshire Tow & Trade Show, among many others. Tow Times is a monthly magazine “dedicated to helping towing company owners and managers throughout the United States, Canada and around the world run a more successful towing business. Each month, articles address challenges and opportunities facing today’s towing services and offer realistic solutions and strategies to immediately increase profits and streamline operations.” (www.towtimes.com) Last (but hardly least,) the International Towing & Recovery Hall of Fame & Museum “recognizes individuals who have made substantial contributions to the towing and recovery industry. The tradition started in 1986 when the towing and recovery industry realized it was time to display the roots of the profession.” (www.internationaltowingmuseum.org).” What might appear to be a “mom & pop operation” is likely far more. Environmental “emergency response” firms are no less organized, with their own series of trade associations and a morass of governmental regulation. However, they generally present a lesser threat because they usually do not take possession of a motor carrier’s equipment and attempt to hold it for ransom.

No uniformity. While environmental spill and clean up obligations are largely governed by federal law, there is neither federal law nor state-to-state uniformity as to how charges and fees of tow services, salvage and storage yards and environmental firms are regulated. For example, in Massachusetts, while maximum storage charges for private passenger vehicles are set by state regulation, commercial vehicle storage charges may be imposed at “prevailing rates,” a term the regulations fail to define. Also in Massachusetts, there is no regulation regarding fees and charges for the towing of commercial vehicles. Across the border into Rhode Island, however, regulations set maximum rates and fees in some detail, depending on the length of the vehicle subject to tow and nature of storage (indoor v. outdoor; secure v. non-secure, etc.) State regulation (if, in fact, any regulation applies) varies widely in application and degree. In addition, in many states, individual municipalities are free to establish their own rules. A motor carrier should never assume that any particular set of regulations apply.

Managing the problem. Despite the circumstances, motor carriers are not completely defenseless and, with planning and protocol, can protect themselves from unexpected and exorbitant expenses, at least to a degree.

First, it is necessary to “chose one’s battle” with some care. It is generally futile to challenge the right of law enforcement authorities order towing, storage and/or clean-up; case law usually grants such authority where a statute or regulation fails to do so. The motor carrier is obligated to the tow service for the fair value of the tow of its equipment and/or to the emergency responder for the fair value of the clean-up effort. Generally, some charge for some short period of equipment storage is usually unavoidable. In almost any circumstance, at least some financial obligation will inevitably be incurred.

Second, it is critical that a motor carrier not “consent” to pay for the services provided by a governmentally imposed vendor. Most state regulations grant governmentally imposed vendors far more latitude to impose charges and fees where the equipment owner “consents” to the tow, storage and/or clean-up. It is important that a motor carrier’s field personnel understand the necessity of refusing to “sign-off” on boiler-plate forms presented for signature by such vendors. The “back side” of the boiler-plate often includes obligations to which no rational person would ever agree. Often, “consent” creates a lien benefiting the governmentally imposed vendor where it would not otherwise exist by operation of law. Courts generally recognize a tow operator’s statutory lien on the stored equipment only when it finds that the motor carrier has “consented” to the services.

Third, be certain to take responsibility for your own equipment and only your own equipment. To the extent that the clean-up, tow and storage charges relate to cargo, the expense is generally attributable to the owner of the cargo, a business entity often distinct from the motor carrier itself.

Fourth, the law of many states discourages financial obligation imposed in the form of charges and fees which are, in actuality, penalties. Often, an excessive fee or charge
multiplies exponentially when not paid forthwith. When the ultimate total is grossly disproportionate to the original financial obligation, courts are more likely to consider fees to be an unenforceable penalty. To the extent that storage charges are imposed solely because a tow yard refuses to release the equipment until a disputed tow charge is paid, a motor carrier can effectively argue that the storage charges imposed after the first disputed invoice is presented are nothing more than penalties to which it never agreed to be subjected.

Fifth, challenge the governmentally imposed vendor to document the basis for the disputed charges. Consider seeking a temporary restraining order compelling the imposed vendor to show cause for its retention of the equipment and the imposition of arbitrary charges. Often the threat of litigation is enough to cause an imposed vendor to become more reasonable, particularly where the motor carrier has made a firm offer of settlement of the disputed charges.

Sixth, consider issues of spoliation. If a motor carrier cannot control access to its equipment and protect and preserve it appropriately, it may be subjected to spoliation claims. Put the governmentally imposed vendor on formal notice that the motor carrier intends to hold it financially responsible for any spoliation damages. Insist that the governmentally imposed vendor preserve and protect the equipment, rather than merely store it. If the governmentally imposed vendor comes to understand its legal exposure, it may be far more willing to negotiate a fair resolution of any disputed charges and fees.

Conclusion. While it is unrealistic to expect to escape unscathed from the clutches of a governmentally imposed vendor, the damages can, to a degree be controlled. Appreciation of the problem and timely attention to possible solutions can only help the motor carrier “held up” by a highway robbery.

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RESPONDING TO A REPORT OF A CATASTROPHIC ACCIDENT

A PRIMER

From time to time (and usually when it is most inconvenient), a lawyer may receive a client’s “Go Team” or “Rapid Response” instruction, usually by telephone, following a catastrophic accident. The initial response of the lawyer is critically important and the lawyer is expected to “do the necessary” promptly and efficiently. But what is “the necessary”? How “prompt and efficient” must one be? The following is a catalogue of tasks for the first 24 hours post-accident.

Assembling the Team. The lawyer’s first duty is to assemble a small, coordinated team consisting of 1.) the client’s claims representative, counsel and/or risk manager, 2.) a field adjuster or investigator, 3.) an accident reconstruction opinion witness and 4.) him/herself. Each has a discrete role.

1.) The client’s claims representative, counsel and/or risk manager is, first and foremost, the client. It is the client who makes the ultimate command decisions, after being appropriately informed of the facts, the law, the risks and the available options.

2.) A field adjuster or investigator should obtain the required documents, locate the Claimant’s vehicle, locate witnesses, and take statements and/or photographs. In short, the field adjuster or investigator needs to gather the facts, at the direction of the lawyer.

3.) The accident reconstruction opinion witness needs immediate access to the accident scene, the Company vehicle and the Potential Claimant’s vehicle, preferably before the debris field is clear, for inspection, measurement and photography.

4.) The lawyer needs to direct the efforts of the team to establish and maintain the attorney work-product and attorney/client privileges, to
responding typically prepares a “Crash Report”, detailing information about the drivers, vehicles, road and weather conditions and witnesses. Often, a separate “accident reconstruction” report is written. Where a commercial vehicle is inspected by a law enforcement “truck team,” a third official report, concerning the condition of the vehicle itself, is prepared. It is necessary to obtain the records of all agencies involved (including firefighters, where applicable.)

Investigation. Once the attorney has arranged to secure the Physical Evidence and has begun the process of assembling Records, he/she should ensure that appropriate investigatory efforts are underway.

Driver interview. This is the responsibility of the attorney, not the investigator. A written statement may or may not be appropriate. Criminal charges may or may not follow.

Witness Statements. Statements of all witnesses should be secured by the investigator but delivered to the attorney for distribution to the client.

Photographs. There are many sources of photographs: the Driver, the Field Adjustor or Investigator, the Accident Reconstruction Opinion witness, each law enforcement agency, some fire departments, and the media, including freelancers who monitor law enforcement radio transmissions. The attorney should ensure that he/she has secured the images taken by each.

ensure that the necessary is done (and in a timely manner) and to coordinate activity and document assembly.

The Physical Evidence. Once the Team is assembled, instructed and in action, the lawyer needs to focus on preservation of the physical evidence.

The Accident Scene. In an optimal situation, the accident scene should be inspected, photographed and measured by the accident reconstruction opinion witness before the vehicles are moved and the debris field cleared. In any situation, the accident reconstruction opinion witness needs an opportunity to search for skid or gouge marks, evidence of paint transfer, and physical damage to stationary objects. While the work can be done from photographs, a timely inspection is far preferable.

The Company Vehicle. In an optimal situation, the Company Vehicle should be photographed and inspected by the accident reconstruction opinion witness before the vehicle is moved. In any situation, the accident reconstruction opinion witness should have an opportunity to photograph and inspect the Company vehicle before it is repaired.

The Potential Claimant’s Vehicle. Typically, the Potential Claimant’s Vehicle is towed from the scene and stored by a towing company. Often, it is difficult to gain access to the vehicle for photography and inspection. Sometimes, permission of the vehicle’s insurer must be secured; sometimes permission of the claimant or his/her survivors is required. Often, the towing company will attempt to compel payment of towing and storage fees. The Field Adjustor or Investigator needs to be specifically instructed how to proceed in securing access.

Assembling Records. Once the process of securing the physical evidence is underway, the attorney’s attention should turn to the assembly of critical records. Records generally fall into one of three broad categories.

Records regarding the Company Vehicle. There are several types of records maintained for the typical commercial vehicle, each of which should be promptly obtained.

DVIRs: the Visual Inspection Report completed by each driver before the vehicle begins its work day. The same record has a number of colloquial descriptions, including “circle check” or “walk around.”

Service records: each vehicle has a distinct file documenting its maintenance and service history.

Registration file: typically, stored separately are records concerning the vehicle’s acquisition records, registration history and inspection history.

Records regarding the Company Driver. Typically, a “Qualification file” is maintained for each driver, including evidence of licensure, physical examination, toxicology screening, etc.

Records of Law Enforcement Authorities. Each responding law enforcement agency has its own records. The local police or first
Media Reports. Media reports, typically secured by the use of the internet, are sometimes helpful, although often misleading.

Reporting Protocol. While each client has a preferred format for reporting, a catastrophe demands immediate reporting of information to coordinate activity, avoid duplicate efforts and ensure that the necessary documentation is completed. Often, the available information changes from hour to hour. The attorney should maintain “running notes,” to be updated and revised hourly and e-mailed to the client and the investigator (but not the accident reconstruction opinion witness, whose file is discoverable) to ensure that everyone concerned is “on the same page.”

Traps for the Unwary.

1. Do not believe First Reports! The situation is rarely as simple, minor and favorable as initially reported.

2. Often, inexperienced attorneys will be “penny wise and pound foolish” in their approach to the response. Attorneys are called only where there is a catastrophe; therefore, efforts and expenses must be appropriately incurred in the first 24 hours. There will never be a “second chance.”

3. Unsophisticated field adjusters sometimes attempt to curry favor with the client by reporting directly, rather than through the attorney. This practice, of course, destroys the legal privileges the attorney was hired to maintain.

4. While the attorney is usually called upon to represent both Company and Driver, where criminal charges are brought, the interest of the parties may diverge. Under no circumstances should the Company’s attorney offer to defend the Driver against criminal charges, although he/she should assist in locating and retaining suitable criminal defense counsel.

5. Often, there is an interest in having the company vehicle repaired and restored to service as soon as possible. While the interest is understandable, it must be balanced against the need to avoid claims of evidence spoliation by the potential Claimant’s counsel and the need to have the vehicle photographed and inspected by the accident reconstruction opinion witness.

6. Do not permit the field adjustor or investigator to interview the company driver! Counsel (and counsel alone) should conduct the interview and determine whether a statement should be taken.

7. Rushing to the accident scene may not be the attorney’s highest priority. The attorney needs to direct operations, usually by telephone, e-mail and facsimile. The attorney is most valuable when he/she is in a position to channel information, give advice and direct operations. Sometimes this is better done before leaving for the scene.

8. Help is sometimes necessary. Catastrophic accidents never occur at a convenient time when the most experienced lawyers, opinion witnesses and investigators are available. If the attorney is in “over one’s head,” he/she should not be concerned about discussing with the client the need for assistance. Often, there is no second chance!

Conclusion. Responding to a client’s “Go Team” or “Rapid Response” request following a catastrophic accident is never routine. There is no single protocol or pattern applicable to all situations. However, attention to the basic elements of a prompt and efficient response should position the Company to best evaluate its exposure and prepare its defense.

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that investigated an accident and preserved facts that are negative to its defense are fairly rare. More often, we have found that if the defendant does not perform a thorough investigation and preserve relevant and potentially important information, the plaintiff makes the claim anyway, the jury might believe it anyway, and the defendant is disadvantaged by being unable to bring evidence to establish the truth of a circumstance that would likely benefit its defense or possibly swing the case completely in its favor. So, we come down solidly in favor of doing the best you can to fully investigate and preserve all potentially relevant evidence for future evaluation and presentation of the case.

The list of items at a typical scene that need to be gathered or checked off (not in any order of importance or recommended steps) as unavailable are as follows.

1. **Photos/Videos**
   Obtain professional quality photos for scene preservation. This would typically include landmarks, measurements, physical evidence (skids, pavement scratches and cuts, debris, stains, etc.) and vehicle location and positions. Lack of physical evidence can be as important as evidence you do preserve.

   Identifying pictures/videos possibly taken by:
   - the truck driver
   - plaintiff or representative
   - independent witnesses (cell phone camera)

2. **Plaintiff’s Vehicle**
   With respect to any vehicles other than your truck, we want to obtain photos, notes or other record of:
   - damage, crush patterns
   - status of headlights/brake lights
   - tires, tread wear
   - airbag deployment
   - computer data (EDR and ABS)

3. **Your Truck**
   We want to preserve as much information as possible about the physical condition of the truck before anything takes place that the opponent will argue altered or destroyed the data. This would include photos, notes or other record of:
   - physical damage, crush patterns
   - status of lights, reflectors, cargo and any safety equipment (usually the subject of separate FTC
ISSUES REGARDING FRAUDULENT JOINDER

I. WHAT IS FRAUDULENT JOINDER AND HOW IS IT ESTABLISHED?

One of the many important strategic decisions that defense attorneys face in litigating a matter is whether to remove a case from state court to federal court. Generally, a defendant may remove a civil action from state court to federal court if the case could have been filed originally in federal court. See 28 U.S.C. § 1441(a). This most often occurs when there is complete diversity of citizenship between the plaintiff and all defendants and the plaintiff has sued for more than $75,000.

Plaintiff’s attorneys often prefer trying a case in state court rather than federal court for several reasons, including that state court jury pools may give larger verdicts, state court has fewer procedural rules and requirements, and state
court is less expensive. For this reason, plaintiff’s attorneys will take steps to try to prevent a case from being removed to federal court. One way to do this is to name a non-diverse defendant, such as a store manager or other employee, who may have had nothing to do with the accident. When this occurs, the defense attorney’s recourse is to remove the case to federal court on the grounds of “fraudulent” joinder.

The fraudulent joinder doctrine arises when a plaintiff attempts to prevent removal to federal court by naming a non-diverse defendant in the Complaint. The term “fraudulent joinder” is slightly misleading because the doctrine requires neither fraud nor joinder. The word “fraudulent” is a term of art and is not a statement regarding the integrity of counsel. Courts generally view a plaintiff’s efforts to prevent removal as a permissible tactical decision. However, the fraudulent joinder doctrine permits a federal court, under certain circumstances, to retain a case even though there is not complete diversity between the parties.

The exact definition of fraudulent joinder varies slightly depending on the jurisdiction, but it is generally applied consistently throughout the federal system. The removing party must show that the non-diverse defendant was “fraudulently” named or joined solely to defeat diversity jurisdiction and prevent removal. To do this, the removing party must demonstrate either (1) actual fraud in the plaintiff’s pleading of jurisdictional facts or (2) that there is no reasonable basis for a cause of action against the non-diverse defendant.

The majority of courts have concluded that the plaintiff’s motive in asserting the claim is immaterial. However, other courts have found fraudulent joinder when there is no real intention in good faith to prosecute the action against the non-diverse defendant. This often occurs when the plaintiff sues a corporate defendant and names a low-level employee from whom the plaintiff never intends to collect any judgment. Although this is a valid argument to pursue, most courts will not find fraudulent joinder on this basis alone without a showing that there is no reasonable basis for the claim against the low-level employee.

Since outright fraud in the pleadings is rare, courts generally focus on whether there is “no reasonable basis” for the plaintiff to recover against the non-diverse defendant. This is determined by the law of the state in which the action was originally brought. There is a presumption against finding fraudulent joinder and the removing party bears a heavy burden. All issues of fact and law are viewed in the light most favorable to the plaintiff. Similar to a motion for summary judgment, federal courts may look beyond the pleadings and consider evidence such as affidavits and any depositions accompanying either a notice of removal or a motion to remand.

II. WHAT HAPPENS WHEN A PLAINTIFF ATTEMPTS TO JOIN A NON-DIVERSE DEFENDANT AFTER REMOVAL?

When a plaintiff attempts to join a non-diverse defendant after the case is properly removed, the court’s analysis begins with 28 U.S.C. § 1447(e), which provides: “If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.” Thus, the court has two options when faced with a post-removal attempt to join a non-diverse defendant: deny joinder and retain the case, or permit joinder and remand the case. A court cannot retain jurisdiction once it permits a non-diverse defendant to be joined in the case.

III. WHAT HAPPENS WHEN A NON-DIVERSE DEFENDANT IS NAMED BUT NOT SERVED?

Federal courts are split on whether the naming of an unserved, nondiverse defendant prevents removal.

In Pullman Co. v. Jenkins, 305 U.S. 534, 539 (1939), the Supreme Court of the United States held that where all the parties named in the pleadings were not citizens of different states, diversity jurisdiction was not created merely by the failure to serve the resident defendant prior to removal. Before Pullman, several courts held that an action based on state law cannot be removed to federal court if any non-diverse defendant is joined in the complaint, even if the non-diverse defendant was never served. See Pecherski v. General Motors Corp., 636 F.2d 1156, 1160-61 (8th Cir. 1981); Worthy v. Schering Corp., 607 F. Supp. 653 (E.D.N.Y. 1985) (holding that when the nondiverse defendant
has not been served, the action cannot be removed unless and until that defendant has been formally dropped from the case).

Since Pullman, however, Congress amended the removal statute to provide that an action “shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which the action is brought.” 28 U.S.C. § 1441(b) (emphasis added). Based on this language, several courts have held that removal is appropriate when the non-diverse defendant has not been served. See, e.g., Duff v. Aetna Casualty & Surety Co., 287 F. Supp. 138 (N.D. Okl. 1968); Robertson v. Nye, 275 F. Supp. 497 (W.D. Okl. 1967).

Even despite the amended language, the existence of a non-diverse, unserved defendant will not require a remand when the removing party can show that joinder of the non-diverse defendant was a fraudulent effort to defeat removal by proving that there is no reasonable basis for a claim against the non-diverse defendant. If the non-diverse defendant was improperly joined, its citizenship would be disregarded for purposes of determining diversity jurisdiction and the fact that it was never served would be irrelevant.

IV. WHAT IS THE EFFECT OF A “JOHN DOE” DEFENDANT?

Prior to 1988, several federal courts, particularly in the Ninth Circuit, had adopted a bright-line rule where the presence of an unnamed or “John Doe” defendant destroyed complete diversity and precluded removal. See, e.g., Bryant v. Ford Motor Co., 832 F.2d 1080, 1083 (9th Cir. 1987).

In recognition of that practice, Congress amended 28 U.S.C. § 1441(a) in 1988 to specify that “for purposes of removal... the citizenship of defendants sued under fictitious names shall be disregarded.” Since the amendment to section 1441(a), courts have consistently held that the citizenship of fictitious or “John Doe” defendants is disregarded for removal purposes. See, e.g., Soliman v. Philip Morris, Inc., 311 F.3d 966, 971 (9th Cir. 2002); Lundy v. Clibum Truck Lines, Inc., 397 F. Supp. 2d 823, 828 (S.D. Miss. 2005); Controlled Env’t Sys. v. Sun Process Co., 936 F. Supp. 520, 522 (N.D. Ill. 1996); Lederman v. Marriott Corp., 834 F Supp 112 (S.D.N.Y. 1993); Howell v. Circuit City, 330 F. Supp. 2d 1314 (M.D. Ala. 2004).

As a practical matter, however, the naming of a “John Doe” defendant may still prevent removal if the defendant is able to identify the “John Doe” defendant and determine that he/she is not diverse. If the John Doe defendant is not diverse, the plaintiff will likely seek to amend the Complaint to add the non-diverse defendant. The query then reverts back to whether the plaintiff has a reasonable basis for a cause of action against the non-diverse defendant.
**ARTICLES**

*EDITORS INTRODUCTION*

While the Editors of Transportation Update do not ordinarily include an introduction to any of the materials we publish our first article in this issue is a particularly difficult problem. Criminal investigations and prosecutions of commercial drivers in connection with an accident do not arise regularly. As a result this issue was addressed in our 2008 seminar. The following article accompanied the presentation by the authors in the 2008 Course Book. As our readership is much larger than the group who attended the seminar, the Editors decided to republish this article. It is one you should save.

Jerry Sallings and Joe Swift are particularly experienced in the area of motor carrier litigation. In addition Jerry Sallings has had extensive experience in the field of criminal law. *The Editors*

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**THE IMPLICATIONS OF CRIMINAL ACTIONS AGAINST A TRUCK DRIVER INVOLVED IN A SERIOUS TRUCK ACCIDENT**

**WHERE SHOULD THE MOTOR CARRIER STAND?**

**Introduction**

This article focuses on the occasional trucking accident where the police are performing a criminal investigation concerning the driver of a commercial vehicle. As these types of cases do not arise frequently many motor carriers and their counsel do not deal with them often. Considerations which may appear counterintuitive should ideally be addressed by motor carriers before they arise in accidents so that the motor carrier can decide what its likely policies will be if these issues ever come up.

1. **Employer Obligations After Accident**
   The federal motor carrier safety regulations impose duties on employers following certain types of accidents.
   - **Post-Accident Testing:** 49 C.F.R. § 382.303
     i. **Alcohol Testing**
        - (1) After an accident, employer must test surviving drivers for alcohol in the following contexts:
          (a) “Human fatality”: must test regardless of whether citation issued to driver.
          (b) “Bodily injury with immediate medical treatment away from scene” or “Disabling damage to vehicle requiring tow away”: must test only if citation issued to driver within 8 hours.
        - (2) If test not given within 2 hours, employer must state and record reasons why test not properly administered.
        - (3) If test not given within 8 hours, employer must cease attempts at testing and prepare and maintain the same record.

   ii. **Controlled Substances Testing**
      (1) After accident, employer must test surviving drivers for controlled substances in the following contexts:
      (a) “Human fatality”: must test regardless of whether citation issued to driver.
      (b) “Bodily injury with immediate medical treatment away from scene” or “Disabling damage to vehicle requiring tow away”: must test only if citation issued to driver within 32 hours.
      (2) If test not given within 32 hours, employer must cease attempts at testing and prepare and maintain record stating reasons that test was not properly administered.

   iii. **Employer must provide driver with necessary post-accident information, procedures, and instructions prior to operation of vehicle.**

   Failure to fulfill these duties does not comprise criminal offenses. However, in order to insure that these duties are performed, the employer would need to have immediate involvement with the driver following an accident. This would be an appropriate time to assess the need for involvement of criminal counsel if that assessment had not already been made.

**II. Tactical Reasons To Assist Driver In Criminal Case**

The absolute necessity of getting adjusters, accident
reconstructionists, and attorneys involved early on is accepted practice with every significant case, regardless of any potential criminal investigation. Involving a criminal attorney on behalf of the driver should be seriously considered as an essential participant where a criminal investigation is involved.

In every instance where criminal charges arise from an accident, the issue of potential conflict of interest between the driver and the employer must be seriously considered. The driver must receive counsel representing his best interests independently of the company, with any potential conflicts addressed by both the employer and driver. All ethical rules and considerations should be consulted, and must be followed, where the dual representation of driver and employer is being considered. Nothing discussed in this article is meant to suggest otherwise.

A. ISSUE PRECLUSION IN CIVIL CASE

When an accident gives rise to both a serious criminal charge and a civil lawsuit, the outcome of the civil case likely will depend on the outcome of the criminal charge because of the doctrine of collateral estoppel. The doctrine of collateral estoppel refers to the idea that “[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”

This means that, for example, if the driver is convicted of negligent homicide arising from the automobile accident, he may not be allowed to contest liability in a civil lawsuit for wrongful death arising from the same accident. If he is not able to contest liability, then the only question at the civil trial will be the amount of damages to be awarded the survivors or the estate of the deceased. The value of retaining the opportunity to contest liability in the civil case, under these circumstances, is immeasurable. Thus, to the extent an aggressive criminal defense could avoid the criminal charge, lessen the charge, or resolve the case in a manner that avoids collateral estoppel, the benefits will be reaped by the company and the driver in the civil case as well. The best way to improve the chances of success in the criminal case is to involve a competent and respected criminal defense attorney for the driver.

i. Collateral estoppel.

To establish collateral estoppel, four elements must be shown: (1) the issue to be precluded must be the same as the issue involved in the prior litigation, (2) the issue must have been actually litigated, (3) the issue must have been determined by a final and valid judgment, and (4) the issue must have been essential to the judgment.

Collateral estoppel may be used either defensively or offensively.

Defensive collateral estoppel is asserted when a defendant attempts to preclude a plaintiff from relitigating an issue previously decided against the plaintiff. Offensive collateral estoppel is used when a plaintiff “seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party.”

The rules of evidence govern the admissibility of a prior conviction. However, it is the doctrine of collateral estoppel that determines whether, in a civil suit, a prior criminal conviction will conclusively bar the relitigation of issues touched by the criminal conviction. Historically, a criminal conviction could not be introduced in a subsequent civil proceeding to conclusively prove liability, and an acquittal in a criminal trial could not be used in a subsequent civil suit to conclusively establish lack of guilt or liability. Thus, regardless of whether a person was convicted or acquitted in a criminal proceeding, he would again be allowed, and in some cases, required to provide


13 Id.

14 Parklane, 439 U.S. at 326, n. 4.

15 F.R.E. § 609, F.R.E. § 803(22); see also, Ark. R. Evid. § 608, Ark. R. Evid. § 803(22).

evidence of his innocence in a subsequent civil proceeding.  

The modern view has changed the effect of criminal convictions but not of acquittals. Under the modern view, a criminal conviction precludes the defendant from denying his guilt in a subsequent civil suit.  

Most states have adopted this view. With regard to the use of acquittals in a subsequent civil suit, nothing has changed, most jurisdictions, continue to hold that an acquittal has no preclusive effect and cannot be used to prove the truth of any facts in a later civil suit.

Jurisdictions that have adopted the view that collateral estoppel applies to criminal convictions and subsequent civil proceedings vary regarding which criminal convictions are included. Many jurisdictions have adopted a rule that for a criminal conviction to have a preclusive effect, the criminal proceedings must have involved a “serious offense.”

These jurisdictions employ the reasoning that misdemeanor and other minor convictions should not have a preclusive effect because defendants have less of an incentive to fully litigate the charge initially, causing the convictions to fail to meet the “full and fair opportunity to litigate” requirement of collateral estoppel.

In a few jurisdictions, courts have applied collateral estoppel to minor offenses, including traffic offenses.

The law of each jurisdiction could vary as to the breadth of the doctrine of collateral estoppel for criminal convictions and underlying civil lawsuits, but there likely is some degree of preclusive effect. The greater the preclusive effect, the more important it is to the company to consider criminal defense counsel for the driver.

ii. Guilty plea.

Two separate issues in the civil context arise when the driver enters a plea of guilty to the underlying criminal charge. First, will the guilty plea collaterally estop the driver from contesting liability in the civil case? Second, even if he is allowed to contest liability, will his plea of guilty be admissible into evidence in the civil case? In reality, the chances of succeeding in the civil case are no better even if liability can be contested if the jury is permitted to hear the driver’s guilty plea admitting the illegal conduct that led to the accident.

a. Collateral estoppel and guilty pleas.

The law is less clear as to whether collateral estoppel applies to a guilty plea to a criminal offense, as opposed to a conviction after trial on the merits. Some jurisdictions have held that entry of a guilty plea satisfies the “actually litigated” requirement of collateral estoppel, thereby preventing the defendant from contesting liability in the civil lawsuit. For example, in Ideal Mutual Insurance Co. v. Winker, the Iowa Supreme Court so held and based its decision in part on the fact that the trial judge was required to determine that a factual basis existed for the plea before he accepted the plea.

On the other hand, in Aetna Casualty & Surety Co. v. Niziolek, the Massachusetts Supreme Court held that a conviction upon a guilty plea did not collaterally estop the defendant from relitigating the issues. The court held this way even though Massachusetts requires the judge to find a factual basis for a guilty plea before accepting it.

There are several arguments that could be made as to why a guilty plea should not be given collateral estoppel effect. First, collateral estoppel requires that an issue be actually litigated, and under the common sense definition of actually litigated, a guilty plea does not meet the
could monumentally influence the exposure in the civil case.

B. CRIMINAL EXPOSURE TO EMPLOYER

While it is by far not the foremost concern in most cases, an added consideration is the potential criminal exposure to the company. This is not to say that companies involved in illegal conduct should seek methods to perpetrate this conduct; instead, law-abiding companies should simply be aware that they may come into the cross-hairs of an aggressive police agency under the right circumstances.

The State, through the police, prosecutor, crime lab, and immediate access to the judicial system, has daunting power that can secure statements, confessions, and agreements that may doom any defense in the criminal case and, consequently, in the civil case. Further, the unprotected interview of the driver could steer an investigation toward the company.

For example, consider the scenario where an intoxicated driver causes an accident that results in the death of a family. The immediate focus, of course, would be on the conduct of the driver but questions about qualifications or fitness of the driver may shift the investigation to the employer. In fact, the outcry from the community would likely be, “Who let this guy behind the wheel?”

The driver, seeking leniency, could detail to the authorities about how shoddy the company

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27 Schlegel, 54 Ark. L. Rev. 127 at 146.
28 Schlegel, 54 Ark. L. Rev. 127 at 144.
29 Id.
30 Id.
is with record-keeping; how he chronically failed to keep up his log books; how he was not drug tested as required by regulations; that these short-comings were wide-spread; that his vehicle was not properly maintained, and that he would be willing to testify against the company. A driver facing penitentiary time without criminal representation, who feels abandoned by his employer, would need little prompting to cross over from being the accused to being the prosecution’s witness.

Again, the cases where criminal exposure to the company arising from an automobile accident would be rare, still it is important to be aware that the tools for prosecuting a company criminally do exist. See, 18 U.S.C.A. § 1001; U.S. v. Mc Cord, Inc., 143 F.3d 1095 (1998)(President of trucking company fined $15,000 and sentenced to 12 months in prison; corporation fined $100,000.00 for substantial violations of the driver logs rules.); and U.S. v. Sandhu, Criminal Action No. 02-247 (E.D. Pa. 11-15-2006)(Driver indicted for 42 counts of making false statements in his driver log book under 18USC § 1001 arising out of an investigation following the death of four family members).

C. ACCESS TO INFORMATION.

Long before ----maybe even years before--- interrogatories, requests for production, depositions, and document exchanges occur in the civil case, the criminal investigation file has been finalized, and provided to the criminal defendant’s attorney. The police are the first investigators on the scene of most accidents. They have the authority to preserve, or not preserve, the evidence at the scene. Where merited, the police refer the case to detectives or investigators, submit evidence to the crime lab, submit the deceased for an autopsy, perform reconstructions of the accident, and collect any documentation----personal phone records, medical records--that they deem pertinent to the investigation. The police agencies have access to the National and State Crime Information Centers (NCIC) data. Only police agencies, and a very limited number of other entities, have access to this information and it is illegal to disclose the contents of this data without authority.

Criminal defendants have a Constitutional right to receive any and all evidence that may be used against them at trial, and any evidence that may be exculpatory. See, Dennis v. U.S., 384 U.S. 855 (1966); and Brady v. Maryland, 373 U.S. 83 (1963). The breadth of this Constitutional guarantee is vast. It certainly includes the right to discover any prior convictions of witnesses to be called against the defendant. In fact, some States adopt within their criminal procedure rules a specific list of information that the prosecutor must disclose and make available to the defendant. For example, Rule 17.1 of the Arkansas Rules of Criminal Procedure states:

Rule 17.1. Prosecuting attorney’s obligations.
(a) Subject to the provisions of Rules 17.5 and 19.4, the prosecuting attorney shall disclose to defense counsel, upon timely request, the following material and information which is or may come within the possession, control, or knowledge of the prosecuting attorney:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial;

(ii) any written or recorded statements and the substance of any oral statements made by the defendant or a codefendant;

(iii) those portions of grand jury minutes containing testimony of the defendant;

(iv) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations, scientific tests, experiments or comparisons;

(v) any books, papers, documents, photographs or tangible objects, which the prosecuting attorney intends to use in any hearing or at trial or which were obtained from or belong to the defendant; and

(vi) any record of prior criminal convictions of persons whom the prosecuting attorney intends to call as
witnesses at any hearing or at trial, if the prosecuting attorney has such information.

(b) The prosecuting attorney shall, upon timely request, inform defense counsel of:

(i) the substance of any relevant grand jury testimony;

(ii) whether, in connection with the particular case, there has been any electronic surveillance of the defendant’s premises or of conversations to which he was a party;

(iii) the relationship to the prosecuting authority of persons whom the prosecuting attorney intends to call as witnesses.

(c) The prosecuting attorney shall, upon timely request, disclose and permit inspection, testing, copying, and photocopying of any relevant material regarding:

(i) any specific searches and seizures;

(ii) the acquisition of specified statements from the defendant.

(d) Subject to the provisions of Rule 19.4, the prosecuting attorney shall, promptly upon discovering the matter, disclose to defense counsel any material or information within his knowledge,

possession, or control, which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefore.

It is clear that the access to information is broader for police agencies than even for the most aggressive and savvy civil litigant. For example, grand jury minutes are off limits to civil litigants, absent extreme circumstances. Criminal convictions may be uncovered but usually only if the jurisdiction of the conviction is known; otherwise, it is hit-and-miss. NCIC instantaneously provides a nationwide criminal record search.

On the other hand, written discovery and depositions in criminal cases are not permitted absent extreme circumstances. Thus, the criminal defendant would benefit from the association of a civil attorney. Accordingly, the development of an information sharing relationship early on could be beneficial in the defense of the civil case; and the criminal defense counsel likely would welcome the opportunity.

D. ALIENATION OF THE DRIVER.

The most important witness for the company in every accident is the driver. While ideally the facts and his recall should remain a constant, the reality is that his willingness to cooperate, stake in the outcome, and commitment to defend his and the company’s actions, are influenced by his feeling about the company. In fact, where he feels abandoned by the company, he likely will have no hesitation dumping on the company.

Even short of fabrications, the driver might exaggerate, spin or selectively recall facts in a manner that would detrimentally affect the civil case. Further, the line of communication between the driver and the company would be terminated so that an informed evaluation of the civil case would be impossible.

Where the company steps up to assist the driver in his criminal case, it is more likely that the driver will continue to respect the company and cooperate through the civil matter.
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