A WORD FROM THE PRACTICE CHAIR

Best wishes to you and your family this holiday season!

We are pleased to provide you with our Fall 2022 Trucking Newsletter, tackling three timely and important issues. But before I get to the articles, I am incredibly excited to introduce Adam Konopka, the newest member of our growing trucking team. Adam joined us in our Chicago office on September 12. Shortly after joining us, he was recognized at the TIDA Annual Meeting in Orlando in mid-October as the TIDA Emerging Leader. Adam has handled complex cases with some of Chicago's most talented plaintiff lawyers. His passion for defending the interests of the trucking industry match well with the overall attitude of our trucking practice. He recently spoke at the American College of Transportation Attorneys (ACTA) and has participated in the Trucking Claims Boot Camp. He is extremely active in the Chicago community and currently serves as president of the Chicago Society of the Polish National Alliance.

Alex Rives of our Peoria, Illinois office has written an excellent article entitled *More Villainization of the Trucking Company: What McQueen Means for the Trucking Defense*. Her article addresses the recent Illinois Supreme Court opinion in *McQueen*, which resulted in a substantial change to Illinois law associated with the independent liability of the motor carrier.

Next, Garner Berry and Weathers Virden of our Jackson, Mississippi office authored *Damned if You Do, Damned if You Don't!! The Paradox of Technology and Distracted Driving*. Aside from being entertaining, the article makes us question the impact of driver technology and reinforces the importance of driver education.

Lastly, Matt Kouri of our St. Louis office has written an article entitled *Brokers' Long Road To Avoiding Liability*. The article addresses the status of broker liability in light of the U.S. Supreme Court not accepting the Petition for Writ of Certiorari in the *C.H. Robinson v. Miller* matter from the Ninth Circuit Court of Appeals.

As you may know, Federal Rule of Evidence 702, which governs the admissibility of expert witness testimony, is one step closer to significant change. The Judicial Conference Committee on Rules of Practice and Procedure passed the proposed Rule 702 Amendment in June, which states as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if **the deponent has demonstrated by a preponderance of the evidence that:**

- the expert scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in the issue
- the testimony is based on sufficient facts or data
- the testimony is the product of reliable principles and methods
- **the expert's opinion reflects a reliable application of** the principles and methods to the facts of the case

In light of the amendment to FRE 702, it is anticipated the courts will take their gatekeeping role more seriously in making admissibility determinations instead of allowing the jury to determine the impact of the expert testimony at trial. As a practical matter, the amendment should not be a hurdle when offering reliable testimony from qualified and experienced experts. If approved by the Judicial Conference, U.S. Supreme Court, and Congress, the amendment will take effect on December 1, 2023.

We hope 2022 has been an excellent year for you and your team. We cannot thank you enough for our meaningful relationships as we work together to serve America's greatest industry. Thank you all for your trust and confidence, and we look forward to strengthening our relationship as we move into 2023.

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MORE VILLAINIZATION OF THE TRUCKING COMPANY: WHAT MCQUEEN MEANS FOR THE TRUCKING DEFENSE

By: Alex Rives, arives@heylroyster.com

Trucking companies face a new reality when defending lawsuits for commercial vehicle accidents venued in the State of Illinois–but other jurisdictions should take note of what is likely ahead. Before the state supreme court's recent decision in *McQueen v. Green*, 2022 IL 126666, Illinois law barred plaintiffs from maintaining direct negligence claims against trucking companies (*i.e.*, negligent hiring, training, supervision, and retention claims), where a company's actions were not considered willful and wanton, and where the company conceded that its driver was acting within the scope of their employment at the time of an accident. However, following *McQueen*, trucking companies can now be held vicariously *and* directly liable in Illinois for ordinary negligence, even when agency is admitted with respect to their drivers involved in commercial vehicle accidents. What's more, *McQueen* means trucking companies can now be held directly liable for negligence, even if juries decide that their drivers are not.

In *McQueen*, truck driver Lavonta Green was employed by a general contracting company, Pan-Oceanic Engineering, Inc., and hauled heavy equipment utilized by the company in its construction jobs. *Id.* ¶ 3. Green was directed by his supervisor to pick up a skid steer from a local industrial manufacturer. The skid steer–weighing upwards of 6,000 pounds–was loaded onto Green's trailer by employees of the local manufacturer. *Id.* ¶ 4. Upon observing the loaded equipment, Green believed it was loaded improperly, reporting it appeared "crooked" on the trailer. *Id.* After the manufacturer's employees refused to reload the equipment, Green notified his supervisor at Pan-Oceanic of his concerns as to the load, yet he was instructed to proceed with delivery. *Id.* Collision later ensued when Green lost control of the tractor-trailer, striking the plaintiff. *Id.* ¶ 5. The collision resulted in injuries sustained by Fletcher McQueen, who brought negligence claims against both Green and Pan-Oceanic directly. *Id.* ¶ 6. McQueen alleged that Green, as a Pan-Ocean employee, was negligent for operating his vehicle on the highway with an improperly secured load. At the same time, Pan-Oceanic was negligent for failing to train Green on responding to an unsafe load, ordering Green to take the load onto the highway despite its knowledge of safety concerns, and rejecting the load to prevent it from traveling on the highway. *Id.* In response to the direct negligence claims brought against the company, Pan-Oceanic acknowledged Green as its agent and that he was working within the scope of his employment at the time of the accident. *Id.* ¶ 7.

At trial, the jury returned a verdict for McQueen against Pan-Oceanic, but not against Green. *Id.* ¶ 22. The jury awarded approximately $163,000 in compensatory damages and $1 million in punitive damages. *Id.* ¶¶ 22-23. The jury found that Green acted as a reasonably careful person under the circumstances, while Pan-Oceanic acted with utter indifference toward the safety of others in directing Green to deliver the load. *Id.* ¶ 22. On appeal, the verdicts were ruled legally inconsistent based upon the precedent established in *Gant v. L.U. Transport, Inc.*, 331 Ill. App. 3d 924 (1st Dist. 2002), that an employer's liability for negligence cannot exceed the liability of its employee, and direct negligence claims are duplicative where an employer has admitted liability for the actions of its employee in response to superior claims. *Id.* ¶¶ 29-30. On review, and in its case of first impression, the Illinois Supreme Court expressly rejected the state's long-standing precedent and held, in relevant part, that an employer's acknowledgment of vicarious liability for its employee's conduct does not bar a plaintiff's direct negligence claim against the employer. *Id.* ¶ 45. The court concluded that a plaintiff may plead and prove multiple causes of action, and so long as there is a good-faith factual basis for a plaintiff's claim of direct negligence against an employer, the plaintiff may pursue that claim in addition to a claim of vicarious liability. *Id.* The court further concluded that the jury verdicts against Green and Pan-Oceanic were not legally inconsistent, as the jury could have reasonably concluded that the company employer was negligent at the same time it concluded that the driver-employee was not. *Id.* ¶¶ 51-53. As a result, the $1.163 million jury award against Pan-Oceanic was reinstated.

Pre-*McQueen*, Illinois courts followed the legal precedent established in *Gant* and derived from the rationale of the Missouri Supreme Court in *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995), in what is widely known as the "*McHaffie* rule." Under *McHaffie* and its progeny, it is well settled that plaintiffs are generally barred from pursuing independent negligence claims against companies where an agency relationship to employees is admitted. At the time of its ruling in *McQueen*, the Illinois Supreme Court acknowledged that while most courts across the country adhere to the *McHaffie* rule, the gap in the majority is narrowing.

Shortly after *McQueen* was decided in Illinois in April of 2022, the Louisiana Supreme Court issued a similar ruling in the case of *Martin v. Thomas*, 346 So.3d 238 (La. 2022), when it held that a plaintiff's direct negligence claim against a defendant employer is not automatically foreclosed merely by the employer's stipulation as to agency. The court did not, however, go so far as to hold that an employer may still be liable in negligence where its employee is not, as the Illinois Supreme Court did in *McQueen*. Perhaps even more significant is recent legisla-

tive action in Colorado overriding the Colorado Supreme Court and codifying a plaintiff's right to pursue direct negligence claims against an employer, despite the employer's acknowledgment that its employee acted within the scope of employment. In 2021, the Colorado General Assembly reversed the Colorado Supreme Court's decision in *Ferrer v. Okbamicael*, 390 P.3d 836 (Colo. 2017), which had adopted the majority *McHaffie* rule. Beyond these most recent trends demonstrating a growing departure from *McHaffie*, other state supreme courts that have issued similar rulings include those in Kansas, Kentucky, Ohio, Alabama, Tennessee, Rhode Island, Vermont, and Wisconsin. Lower state and federal court rulings suggest direct negligence claims against employers would similarly be permitted despite admissions as to agency.

Courts that do not permit direct negligence claims against employers who have already admitted liability for the actions of its employees have reasoned that allowing such claims would be unduly prejudicial, unnecessary, and irrelevant to the contested issues in accidents involving commercial vehicles. The movement towards rejecting the *McHaffie* rule and its progeny leaves clear implications for trucking companies and their insurers nationwide. In the status quo landscape of nuclear verdicts, reptile tactics, and the villainization of the trucking industry, decisions like *McQueen* are plaintiff-friendly rulings that will allow for amplified attacks on trucking companies by plaintiffs and their attorneys. Naturally, this will result in increased litigation costs for the defense, as the scope of discovery in ordinary negligence actions will be expanded and subject trucking companies to greater scrutiny regarding internal policies, safety procedures, and drivers' prior bad acts and driving histories. Where the *McHaffie* rule was a shield against attempts to introduce inflammatory evidence designed to distract and play on the emotions of jurors, abandonment of the majority rule and rulings similar to *McQueen* will also very likely increase the chances of disproportionate jury verdicts awarded against the "villainous" trucking company, even in circumstances of jury empathy or a finding of no liability for truck drivers.

DAMNED IF YOU DO, DAMNED IF YOU DON'T!! THE PARADOX OF TECHNOLOGY AND DISTRACTED DRIVING.

By M. Garner Berry and G. Weathers Virden, Jr.

It doesn't take statistics, bulletins, or public service announcements to clue us in that distracted driving is on the rise. Just turn a few corners on any given day, and you are bound to see the latest idiot streaming the new Cobra Kai season with his phone glued to his hand while he parades down the street doing 67 mph! Next thing you know, ole' Johnny Come Lately can't figure out how he ended up in Des Moines when he could've sworn he just left Omaha ten minutes ago. When Chris Ledoux said that riding a bull was the equivalent of driving down the highway doing 80 and throwing the steering wheel out the window, he clearly didn't have cell phone use in the car as a frame of reference!

Equally on the rise is the technology that helps fight against distracted driving. Whether in tractor-trailers or even run-of-the-mill passenger cars, vehicles are equipped with front-end collision avoidance, adaptive cruise control, lane departure warning and correction, self-parking, blind spot alerts, etc. Hell, it's like a full-blown wrestling match to change lanes in an ordinary consumer car without using a blinker.

But this is good, right? Like most things in life that we over-indulge in, something comes along to bail us out because we can't help but give in to our vices. Welcome technology for sure, but what about when it's not?

Let's talk about a few basics first.

Distracted Driving

Distracted driving accounts for the death of nine people every day on United States roadways.[1] At least one study indicates that nearly 80% of motor-vehicle crashes involved some form of driver inattention.[2] For motor carriers, the risk of being involved in a "near accident" jumps by 72% for the most distracted truck drivers.[3] Likewise, the most distracted truck drivers are 2.3 times more likely to drift out of lane.[4]

A 2009 study sponsored by the U.S. Department of Transportation found that truck drivers interacting with or looking at a dispatching device are 9.93 times more likely to be involved in a safety-critical event. Those looking at a map are 7.02 times more likely, and those using or reaching for an electronic device are 6.72 times more likely to be involved in a safety-critical event.[5] This study also determined that 71% of motor carrier accidents occurred because the truck driver was doing something other than driving the truck.[6] In other words, they were distracted.

Generally, driving distractions can be divided into three categories: (1) visual, (2) manual, and (3) cognitive. Visual, of course, involves taking your eyes off the roadway; manual is taking your hands off the wheel, and cognitive is taking your mind off driving. Cellular phone use is likely the most well-known, better studied, and legislated against, cause of distracted driving.

Similarly, the technology existing today aimed at reducing distractions or their effects are well known and becoming more and more standard. Clearly, a deliberate effort is being made to reduce distracted driving dangers, but is the cure becoming worse than the disease?

Distracted By Something Shiny

In the quest to find some catchy heading here, low and behold, Google revealed something involving Pokémon Go called "Distracted By Something Shiny." Apparently, you can add one of these silly little gremlin things to some game. Google was less than clear on what this game was, but everyone probably remembers when this Pokémon Go game came out several years ago. News reports were everywhere about people walking around cities and towns using their phones to play this goofy game (sorry if this offends any Pokémon fans) and blindly walking in front of cars. I mean, what the hell?! So come to think of it, this does have some relevance.

The purpose of any technology is to gain a net positive for the end user and society as a whole. For vehicles, one of these positives is safety. The Federal Motor Carrier Safety Administration ("FMCSA") has recognized this and even recently launched its Tech-Celerate Now program to accelerate the adoption of advanced driver assistance systems in the commercial motor vehicle industry. Undoubtedly, some of these technologies have and will prevent accidents.

But has anyone stopped to ask whether these technologies are distracting in and of themselves? Are they so shiny and pretty and attractive that they actually distract us?

The potential for visual and cognitive distraction in trucks is astounding. An entire article could be written on the various in-cab, advanced driver assistance systems, and other safety-related technologies available, from touchscreen displays to a dashboard with the capacity to display the informational equivalent of a jet cockpit. Combined, these "safety related technologies" create the potential for enough flashing lights and audible warnings to rival a row of red-hot penny slots on the Vegas strip. Today's drivers are operating rolling supercomputers compared to their predecessors. Let's face it: the beeps, bells, whistles, and vibrations from these devices feel like we are driving a pinball machine sometimes.

The visual impact of these technologies is relatively straightforward—anything that takes a driver's eyes from the roadway is a visual distraction. The only question is whether its benefits outweigh the risks of distraction. A vehicle traveling 55 miles per hour will travel about 403 feet in five seconds; at 75 miles per hour, it will travel 550 feet. That is the equivalent of a football field and nearly two football fields, respectively. According to the FMCSA, a loaded truck's stopping distance in ideal conditions is 196 feet. In short, a five-second lapse in vigilance creates an enormous opportunity for disaster. Generally speaking, visual distraction is a readily recognizable danger and one that can be trained. Keep your eyes on the road. Safety meeting concluded.

I'm Too Tired to Adult and Think Today

However, the cognitive impact of these technologies is more nuanced than a visual distraction. As a vigilant task, driving requires a high level of alertness. Cognitive fatigue is the antithesis of alertness and causes deterioration across several levels of attention, deteriorated task performance, reduced motivation, and an increase in the amount and severity of errors.[7] Further, a 2012 study concluded that cognitive fatigue's effect on selective attention was not so much related to the processing of relevant stimuli but the inability to suppress irrelevant stimuli.[8]

That is to say, as a driver's cognitive fatigue increases, so does the likelihood of distraction based on a growing ability to ignore irrelevant information. The cognitively fatigued driver does not fail to recognize the important details; he fails to ignore the unimportant. From a pragmatic perspective, this means that technology could compound the dangers of cognitive fatigue.

Cognitive fatigue, caused by the technologies relevant to this article, can be described as task-related fatigue rather than sleep-related fatigue. Primarily, task-related fatigue is relative to either cognitive overload or cognitive underload.[9] Cognitive overload is best described as increased task demands requiring continued attention. A commonly recognized form of cognitive overload is decision fatigue. Decision fatigue subscribers posit that an individual can only make so many decisions on any given day; once that point is exceeded, the needle dips into the red, and the boiler blows. At least one United States President has bought into this school of thought, telling *Vanity Fair* that his decision to wear only gray or blue suits is a targeted attempt to reduce the number of decisions he has to make in a day to maximize his performance.

With all the warnings, notifications, and other informational displays available in today's trucks, it begs the question: is performance suffering based on an overwhelming number of decisions and information processing? How many decisions does a truck driver make during a typical day? How many more will he be required to make as more technology is introduced into the equation? How many decisions can he make, or how much information can he process before his ability to ignore irrelevant information becomes compromised?

On the other hand, cognitive underload results from continuous and monotonous conditions where little attention and user input are required. Anyone driving for an hour or more on a relatively straight roadway while using cruise

control has probably suffered cognitive underload, whether that person recognized it or not. At least one study has made a novel and perhaps semantically disjunctive conclusion that driving impairment is greater relative to cognitive underload versus cognitive overload.[10]

In other words, not having to pay attention causes more significant cognitive fatigue in the context of driving than that caused by having to be too attentive. One study by researchers at the University of Toronto parallels this finding in that it concluded that automated vehicle technologies create a false sense of security among drivers and that their attention to the roadway took a significant downturn.[11] Extrapolating from these conclusions, one could deduce that technology that essentially makes decisions for a driver may result in an accident for that driver. For example, as advanced driver assistance systems and collision avoidance technology increase, drivers may—at least according to current research—become less attentive to the roadway.

Cognitive distraction—and task-related cognitive fatigue—is not quantifiable like a manual or visual distraction. Taking one's hands from the wheel or eyes from the roadway is obvious, both in the act's nature and the problems it could pose. Cognitive distraction is likely different for each individual and the point at which it becomes a significant issue.

Conclusion

It is not illogical to conclude that, at some point, safety technology will become the very thing it seeks to prevent. Motor carriers should recognize the inherent risks that come with all of today's technology, both as to the apparent potential for visual distraction and the less obvious, but arguably more problematic, cognitive distraction, by staying on guard for the siren call of technology. As technology changes, so should motor carriers' ongoing education of their drivers.

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[3] Omnitracs, LLC. 2021, *Data Insights for Transportation - Trucking*.

[4] *Id.*

[5] U.S. Department of Transportation, Olson, Rebecca L. *Driver Distraction in Commercial Vehicle Operations*, Federal Motor Carrier Safety Administration, 2009.

[6] *Id.*

[7] Faber, L.G., Maurits, N.M., Lorist, M.M., "Mental Fatigue Affects Visual Selective Attention." *PLOS ONE*, vol. 7, no. 10, 2012, https://doi.org/10.1371/journal.pone.0048073.

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[9] Ma, J., Gu, J., Jia, H., Yao, Z. Chang, R., "The Relationship between Drivers' Cognitive Fatigue and Speed Variability during Monotonous Daytime Driving." *Frontiers in Psychology*, vol. 9, 2018, https://doi.org/10.3389/fpsyg.2018.00459.

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BROKERS' LONG ROAD TO AVOIDING LIABILITY

By: Matt Kouri, mkouri@heylroyster.com

It is not unthinkable why plaintiffs sue as many entities and people as possible. Money. When a plaintiff's lawyer accepts a client who was in an accident with a tractor-trailer, they think: Money. Not only are the driver and motor carrier sued, but the broker can be sued as well for negligently selecting the motor carrier.

The Federal Aviation Administration Authorization Act

The broker may be sued even if it selected the motor carrier with due diligence through verification of its good standing, adequate rating, and adequate crash history. The plaintiff will sue the broker even if they have no proof of any wrongful conduct. Whether through a motion to remand, motion to dismiss, motion for judgment on the pleadings, or a motion for summary judgment, brokers seek release from the case by arguing that the Federal Aviation Administration Authorization Act (FAAAA) prevents plaintiff's state-law negligence claims. Until recently, brokers were successful with this argument. FEDERAL AVIATION ADMINISTRA-

TION AUTHORIZATION ACT OF 1994, PL 103–305, August 23, 1994, 108 Stat 1569.

The FAAAA applies to "any motor carrier," "broker, or freight forwarder" and preempts States from "enact[ing] or enforce[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service … with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Brokers argue that imposing each state's laws on its selection of a motor carrier relates to one of its "core services": arranging transportation. *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016, 1024 (9th Cir. 2020), cert. denied, 142 S. Ct. 2866 (2022). Courts tend to accept that argument, but then plaintiffs argue for an exception under the FAAAA. 49 U.S.C. § 14501(c)(2)(A) states that the FAAAA "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." Even when a court finds that § 14501(c)(1) preempts state common law claims against a freight broker, a court may still find that the freight broker's involvement in the transportation of a load falls within the state's safety regulatory exception. If the court construes "safety regulatory authority" broadly and determines the act of picking a motor carrier is "with respect to motor vehicles," plaintiffs are allowed to pursue the negligence claim against the broker. *Miller*, 976 F.3d at 1030.

The Federal Court System's Stance on the Issue

The federal district courts are split and have ruled on this issue in three different ways: (1) negligent hiring claims are not preempted because they are not sufficiently related to the services of the broker; (2) negligent hiring claims are not preempted because they fall under the state's safety regulatory exception; and (3) state law common law claims against a broker are preempted and do not fall under the safety exception. *Bertram v. Progressive Southeastern Insurance Co.*, 2021 WL 2955740 at *2 (W.D. La. July 14, 2021).

In September 2020, *Miller v. C.H. Robinson Worldwide, Inc.* reached the Ninth Circuit Court of Appeals. The Ninth Circuit permitted the plaintiff's claims against C.H. Robinson for its motor carrier selection. The Ninth Circuit held that brokers' services fall "squarely" within the scope of the FAAAA. *Miller*, 976 F.3d at 1025. However, it permitted the claims because it held the safety exception applies. *Id.* at 1029. The Ninth Circuit construed the exception broadly "[b]ecause a narrower construction of this clause would place a large body of state law beyond the reach of the exception." *Id.* at 1028. It construed the safety exception's language of "with respect to motor vehicles" to mean safety regulations that "have a connection with" motor vehicles, whether directly or indirectly. *Id.* at 1030.

In April 2022, the Third Circuit agreed with the Ninth Circuit. *See Lagrange v. Boone*, 337 So. 3d 921 (3rd Cir. 2022). These are the only two U.S. Court of Appeals to rule on this issue.

The Ninth Circuit is comprised of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. The Third Circuit is comprised of Delaware, New Jersey, and Pennsylvania.

Following the Ninth Circuit's ruling, C.H. Robinson filed a writ of certiorari before the Supreme Court. Unfortunately, in June 2022, the Supreme Court denied the petition. *C.H. Robinson Worldwide, Inc. v. Miller*, 142 S. Ct. 2866 (2022).

Where Does the Supreme Court's Denial Leave Brokers?

Since *Miller v. C.H. Robinson Worldwide, Inc.* was decided in September 2020, the Third Circuit, as mentioned, and 17 other federal district courts have weighed in on this issue. *See generally Lagrange*, 337 So. 3d 921; *Bertram*, 2021 WL 2955740; *Gerred v. FedEx Ground Packaging System, Inc.*, 2021 WL 4398033, (N.D. Tex. Sept. 23, 2021); *Popal v. Reliable Cargo Delivery, Inc.*, 2021 WL 110526, (W.D. Tex. Mar. 10, 2021); *Reyes v. Martinez*, 2021 WL 2177252, (W.D. Tex. May 28, 2021); *Gilley v. C. H. Robinson Worldwide, Inc.*, 2021 WL 3824686, (S.D.W. Va. Aug. 26, 2021); *Taylor v. Sethmar Transportation, Inc.*, 2021 WL 4751419, (S.D.W. Va. Oct. 12, 2021); *Mendoza v. BSB Transport, Inc.*, 2020 WL 6270743, (E.D. Mo. Oct. 26, 2020); *Morrison v. JSK Transport, Ltd.*, 2021 WL 857343, (S.D. Ill. Mar. 8, 2021). *Montgomery v. Caribe Transport II, LLC*, 2021 WL 4129327, (S.D. Ill. Sept. 9, 2021); *Crouch v. Taylor Logistics Company, LLC*, 563 F.Supp.3d 868, (S.D. Ill. 2021); *Ortiz v. Ben Strong Trucking, Inc.*, 2022 WL 3717217, (D. Md. Aug. 29, 2022); *Mata v. Allupick, Inc.*, 2022 WL 1541294, (N.D. Ala. May 16, 2022); *Dixon v. Stone Truck Line, Inc.*, 2021 WL 5493076, (D.N.M. Nov. 23, 2021); *Moyer v. Simbad LLC*, 2021 WL 1215818 (S.D. Ohio Jan. 12, 2021); *Covenant Imaging, LLC v. Viking Rigging & Logistics, Inc.*, 2021 WL 973385, (D. Conn. Mar. 16, 2021); *Gauthier v. Hard to Stop LLC*, 2022 WL 344557, (S.D. Ga. Feb. 4, 2022).

Heyl Royster represented the originator of a double-brokered load in the case of *Crouch v. Taylor Logistics Company, LLC*, cited above. In this case, the Southern District of Illinois held that the FAAAA did not preempt claims for the estates of the two decedents. Additionally, Heyl Royster represented the motor carrier in the Southern District of Illinois case, *Montgomery v. Caribe Transport II, LLC*, cited above.

The Third Circuit and district courts in Louisiana, Texas, West Virginia, Missouri, Illinois, Alabama, New Mexico, Ohio, and Connecticut hold that the FAAAA does not preempt

state claims. In these states, Plaintiffs will likely be allowed to pursue a claim against motor carriers based on state law for motor carrier selection.

A district court in Georgia is the only court since September 2020 to hold that the FAAAA preempts state claims and does not fall within the exception. *Gauthier*, 2022 WL 344557, at *10. The court held that a negligent hiring claim against a broker only falls within the exception if it "concerns or is genuinely responsive to motor vehicle safety." *Id.* (citing to *Galactic Towing, Inc. v. City of Miami Beach*, 341 F.3d 1249, 1251–52 (11th Cir. 2003)). The court reasoned that the selection of a motor carrier is "too tenuously connected to motor vehicle safety." *Id.* The plaintiff filed an appeal in March 2022, and the issue will be heard by the Eleventh Circuit (Alabama, Georgia, and Florida).

After the Eleventh Circuit's decision, the losing party will likely file a Petition for Writ of Certiorari before the Supreme Court, much like C.H. Robinson *Miller*, 976 F.3d 1016. A long period of time will elapse before the Supreme Court's ruling, assuming a Petition for Writ of Certiorari is filed and granted.

The Southern District of Ohio states that the Ninth and Third Circuits' holdings represent "the growing majority." *See Moyer*, 2021 WL 1215818 at *6. The growing trend suggests that compliance with federal law does not shield a broker from liability if the motor carrier is at fault for an accident.

At this juncture, brokers need to be vigilant upon learning of an accident. Brokers should hire experienced counsel to conduct meaningful accident investigations along with evaluate relevant state law. Seasoned counsel can assist in properly evaluating the risk while strategies are implemented to minimize exposure. Ultimately, the Supreme Court may address the issue. Until then, brokers need to be aware of potential pitfalls.

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