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TRANSPORTATION INDUSTRY NEWS

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CARRIERS BENEFIT AS FMCSA PREEMPTS
**CALIFORNIA'S MEAL &
REST BREAK LAWS**

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The Federal Motor Carrier Safety Administration (FMCSA) recently announced that it was exercising its authority under federal law to rule that California's meal and rest break laws are preempted and cannot be enforced against interstate motor carriers. The FMCSA's ruling was in response to a petition filed by the American Trucking Associations (ATA) and the Specialized Carriers and Rigging Association (SC&RA). A big win for the trucking industry, this decision helps define regulatory standards for interstate carriers.

California state laws require employers to provide breaks for their employees for meals and rest. Employees working more than five hours in a day are entitled to receive a 30 minute meal break and, if work extends beyond 10 hours a day, they must receive an additional 30 minute break. Further, every four hours the employee must receive a 15 minute break. For years, interstate motor carriers have argued that these laws, as well as other similar state laws, should not be enforced against them because they are governed by separate hours of service regulations set by the FMCSA.

The ATA and SC&RA first fought the state laws in court, arguing that the provisions of the FAAAA, 49 USC 14501(c), which generally preempts state laws that regulate the routes, prices and services of motor carriers. These cases failed in the Ninth Circuit. *See, e.g., Dilts v. Penske Logistics, LLC*, 757 F.3d 1078 (9th Cir. 2014). The carriers advanced their arguments to Congress, supporting a bill that would have expressly confirmed that California's laws are preempted. This bill passed in the House but failed in the Senate. Finally, the ATA and SC&RA petitioned FMCSA to use its authority under 49 U.S.C. 31141 to find that the state laws are preempted because they (1) have no safety benefit; (2) are incompatible with federal regulations; or (3) would cause an unreasonable burden on interstate commerce.

On December 21, 2018, the FMCSA announced that it would grant the petition and find the meal and rest break laws preempted. The agency concluded that the laws met all three criteria—they had no safety benefit, were incompatible with federal regulations and caused an unreasonable

burden on interstate commerce. The FMCSA's action was a big win for the ATA and SC&RA, who, in addition to filing the petition that led to the agency's action, also lobbied extensively for it to be granted. With California's meal and rest break laws preempted, carriers now have one standard to comply with: federal hours of service. Additionally, carriers are freed from the extensive damages they have faced in cases such as *Dilts*, in which class action plaintiff attorneys have collected for alleged violation of the now-preempted labor laws.

Unsurprisingly, not everyone is happy with the FMCSA's decision. The Teamsters Union has already filed suit to block its implementation, arguing that the agency's findings are arbitrary and not supported by facts. The Teamsters specifically characterized FMCSA's finding that California's laws have no safety benefit as "ludicrous." Notably, the union's suit is filed in the same court—the Ninth Circuit—that previously ruled in *Dilts* that federal law did not preempt the state laws. However, that decision was on a blank slate, while the new ruling by the FMCSA must be upheld unless deemed entirely unreasonable.

If they can keep it, the FMCSA's decision is undoubtedly a win for carriers and another recognition that transportation is a national industry that should not be subject to a patchwork of inconsistent state laws and regulations. ■



Labor, Liability and Laws

How California's New Labor Bill Will Begin Shipping Liability to 3PLs in 2019

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The California legislature passed Senate Bill 1402 (SB 1402) on August 31, 2018, which creates the possibility of shifting liabilities to third-party logistics that work with California port drayage motor carriers. Governor Jerry Brown signed the bill into law on September 22, and it has gone into effect on January 1, 2019. The legislation will be added to Section 2810.4 of the Labor Code, and will drastically change the relationships 3PLs have with these motor carriers and their drivers.

After January 1, the bill mandates that the Division of Labor Standards Enforcement post on its website the "names, addresses, and essential information for any port drayage motor carrier with unsatisfied final court judgment, assessment of the Employment Development Department, or any order, decision or award . . . finding that a port drayage motor carrier has engaged in illegal conduct including, but not limited to, failure to pay wages, imposing unlawful expenses on employees, failure to remit payroll taxes, failure to provide workers' compensation insurance, or misclassification of employees as independent contractors with regard to a port drayage commercial driver."

The bill also makes the customers of these port drayage motor carriers, such as 3PLs, jointly and severally liable for

unreimbursed expenses, future unpaid wages, damages and a range of penalties which are found to be owed to commercial drivers. However, the law does list a range of exceptions that allow these customers to escape liability, such as when it relates to an employee covered by a collective bargaining agreement that expressly provides for wages, work hours and conditions, a process to resolve disputes and a waiver of joint and several liabilities.

Prior to entering into any agreement with a customer, every port drayage motor carrier will be required to notify the customer, on a Division of Labor Standards Enforcement-approved form, about the website; any judgments against it for unpaid wages, expenses, damages and penalties; and the above-mentioned potential for joint and several liability for future judgments.

The bill itself cites a [USA Today Investigative Report](#), a four-part series that was released in the latter half of 2017 and focused on the exploitation of thousands of drayage drivers in California. The report compares these drivers to “modern-day indentured servants” who are forced to work for companies in an effort to get out of the debt they had no choice but to accrue by financing their own trucks.

“The report compares these drivers to ‘modern-day indentured servants’”

SB 1402 was created in the aftermath of *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, a California Supreme Court case that held that the “ABC” test is an appropriate standard to use when determining whether a worker is “properly considered the type of independent contractor to whom the wage order does not apply” under the suffer or permit to work definition. See 4 Cal. 5th 903, 916–17, 416 P.3d 1, 7 (2018),

reh’g denied (June 20, 2018).

Utilized in other jurisdictions, the ABC test considers a worker “an independent contractor to whom a wage order does not apply only if the hiring entity

establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity’s business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.” *Id.* ■



How Parties' Intentions Affect Contract Processes in Paper, Electronic and Smart Contracts

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How important is the process of negotiating contracts? And when a dispute arises, how important is the process of resolving what those negotiated contracts mean(t)? For those who affirm, to any degree, the presumption that these processes are important, how would the rule of law look without them? The purpose of this piece is to place in context negotiation processes by highlighting the significance of parties' intentions to contracts.

Negotiation and resolution processes focus on what parties agree(d) upon but from different directions in time (and correspond with differing perspectives; hence, in this piece I privilege intentions and not the standard contract emphasis on intent; losing either's role would have monumental consequences, but the priority of intentions and its direction, is the focus here). Note presumptions of these processes: the act of negotiating is often necessary in order to establish your best terms in

a contract (negotiating meaning to work through a difficult, often adverse, discussion); and determining if an agreement is legally enforceable depends, among other things, upon whether there was mutual intent by the parties. (If you remember one thing after trudging through this piece, it should be that contracts, to be contracts, must hold intention that can be legally bound... that's it; you can quit reading and check your latest feeds.)

But how often do parties, even sophisticated parties represented by counsel, intend all the terms of a contract? The answer partially depends upon whether intention and agreement are equivalents. If they are, the answer is most of the time, but if they are not, the task becomes one chiefly of interpretation—a topic for another day.

How important really is a party's intention? Consider one sticky metaphor and three consequential safeguards in the rules of contract construction. The



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Transport Topics' article "High Court Rules Independent Contractors May Bypass Arbitration, Challenge Fleets in Court" examines how arbitration agreements may no longer dictate dispute settlements between motor carriers and drivers who are independent contractors. Fox's Transportation Practice Group Leader Rob Moseley weighs in on how the Supreme Court's recent ruling will shape class-actions in the industry.

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modern contract requires a "meeting of the minds" to form a binding agreement. Judicial opinions view such unity as a necessary part of contract formation when interpreting a contract. But how often has such harmony occurred in your experience for the terms you wanted and those you didn't? More problematic tends to be the unclear, or ambiguous, terms governing consequences you may have expected and those you didn't.

Whether a "meeting of the minds" is a helpful fiction or actual consensus, the metaphor covers the requirement of delineating the parties' intentions. Principles of contract construction go so far as to protect those intentions. Consider these three safeguards in contraction formation: first, the terms are construed against the drafter. Nothing more accurately reflects the "intentions gap" and potentially unequal leverage between parties. Second, disclaimers must be conspicuous, a gentle eyesore that is all bolded or capitalized marking the release of a right. Third, the opportunity to have reviewed an agreement is acknowledged by check boxes and signature lines. All are designed to ensure what was intended by the parties.

My cursory attempt to reduce contract law to being all about parties' intentions (long before advocates argue and judges determine intent) is to encourage bolstering yours and understanding its importance in contracts.

Exercising intentions comes down to preparation and close review. Integrate sales and contract departments with procurement professionals and consistently train all three. Simply put, developing skills that get the best representation of your intentions in an agreement can yield long-term benefits. At a minimum, get organized by filing and tracking the terms of contracts and communicate information internally to present a unified front; and read, read and read again, more closely each time. While topics tend to overlap, their presentation varies, at times subtly. Be wary that if there is a chance to shift exposure, a party will look to do just that. Yes, your review will require industry specific knowledge to comprehend the jargon and, if not more importantly, the ability to translate terms of art into plain speech.

To paraphrase the takeaway, maximize intention through effort (e.g., spend the time to develop better negotiators). That's it. There's no substitute for work, now and in the future.

How would agreements look without intentions? Contracts today risk not being contracts without them. Will agreements in the future risk the same? What if the very processes of forming and interpreting contracts no longer reflect intentions? Future “Smart Contracts” may hold these risks.

Without mutual intention of the parties, smart agreements are no more a contract than they are smart. No more than machines learn, let alone deeply. It’s an aside, but a pertinent one: compare how IBM’s Watson learned through sorting schemes to diagnose patients to how Alex Honnold learned through touch to scale El Capitan. The marketing value of anthropomorphizing technology (after centuries of doing it to nature) seems clear—connect to human consumers’ emotions—but may have significant consequences if learning takes an undesirable paradigm shift or, while less significant but still consequential, misleads us to believe “meeting of the minds” is implied in “smart” agreements.

Yet Smart Contracts, programmed or computable agreements and authenticated contracts with unique IDs, like other technology, hold awesome potential. They can change the rule of law for the better (how

I do love them, let me count the ways...if there was only the space). However, if coding expectations of performance and templates without negotiation become enforceable agreements, then there will be solely leveraged deals generated (or drafted) by the party with more power. Additionally, if courts grant Smart Contracts the same status as contracts, those same courts have increased their responsibility to enforce the safeguards for intentions. Repercussions of this enforcement may result in programmed agreements and authenticated templates not having the force of law, or courts having to concede to something less than the rule of law applying to them—a foreboding development for the competition-driven market economy.

As contracting becomes more digital and streamlined into blockchains (could we have stomached the “thoughtful” ledger?) for future deals, negotiating those program agreements and templates will require far more effort and more expertise, not less, to realize the promised increase in contract transparency and efficiency. Whatever the improvements, they will be proportionate to having included your intentions. ■

Without mutual intention of the parties, smart agreements are no more a contract than they are smart.





Arbitration Out of Reach in Transportation Workers' "Employment Contracts" Disputes

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There's a war raging over the legal status of independent contractors in the transportation industry. A major battle for independent contractors was lost. But clear reasons from the same battle show the war is far from over in maintaining the legally recognized category of independent contractors in the transportation industry.

That battlefield was the Supreme Court, and the loss for independent contractors was its decision that determined all transportation workers were exempted under Section 1 of the Federal Arbitration Act (FAA) of 1925 in *New Prime Inc. v. Oliveira* on January 15, 2019. A decision forecasted in our previous newsletter by Fredric Marcinak.

The Court provided two answers in its decision. First, that a court should determine the applicability of the exemption under Section 1 of the FAA. Second, that "contracts of employment" in Section 1 included any agreement to perform transportation work.

The loss isn't the decision itself, but the decision's failure to stem the tide of enterprising class action lawyers seeking to profit from certain courts' erosion of the status of independent contractors in the transportation industry. *New Prime's* attempt to compel arbitration of disputes with independent contractors went beyond proper interpretation of the exemption in Section 1 of the FAA to the much larger conflict on the existential status of independent contractors where arbitration offered some relief.

On the critical front of the Supreme Court, its decision could not have been clearer on the valid status of independent contractors in the transportation

industry. The Court's very reasoning depended upon it. It explained that the meaning of "contracts of employment" in Section 1 covered both employee and independent contractors for any agreement to perform transportation work. The Court explained it was the expansive reach of "contracts of employment" that captured all work agreements, including those with independent contractors, and not that all workers were considered employees. *New Prime Inc. v. Oliveira*, 139 S.Ct. 532, 539-40 (2019). The Court highlighted proper definitions contrasting an employee, "in the service of another person," with that of an independent contractor, "entrusted to undertake a specific project... free to do the assigned work and to choose the method for accomplishing it," *id.* at 541, and noted that the category of employee eventually came to mean "those who work for a wage at the direction of another." *Id.*

The Court's attention to the difference between employees and independent contractors may be all the more significant in the context of removing arbitration as one of the last resorts for transportation companies seeking a haven to protect that difference. With its recent *New Prime* decision, the Supreme Court has more squarely identified its own responsibility for maintaining the difference it has relied upon.

Nowhere have these distinctions been under greater attack than in California where exactly two months earlier the labor differentiations were given new life in a federal district court decision, *Alvarez v. XPO Logistics*, 2018 WL 6271965 (C.D. Cal. Nov. 15, 2018).

The California federal district court addressed one

issue in *Alvarez*, whether plaintiff truck drivers' claims were preempted by federal law. It explicitly did not address whether plaintiffs were properly classified as independent contractors or employees. 2018 WL 6271965, at *3. The court maintained California precedent that wage laws were not preempted in line with *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 649 (9th Cir. 2014).

However, the court held that the ABC standard to determine whether workers were employees or independent contractors recently embraced in *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 955 (2018) was preempted. The court reasoned that “the ABC test—as adopted by the California Supreme Court—‘relates’ to a motor carrier’s services in more than a ‘[tenuous]’ manner and is therefore preempted by the FAAAA.” *Id.* at *5. This holding should serve as a touchstone for other California courts testing for independent contractor status.

Based on the Supreme Court’s *New Prime* decision relying upon, in part, the valid status of independent contractors, there should be little anticipation that they will get it correct again when they finally take up the division between the First and Ninth’s Circuit’s divide on recognizing that status. And when the Supremes weigh in, the decision should be nothing short of the unanimous upholding of that status included with all transportation workers exempt from arbitration under *New Prime*. ■

When Is a Claim a Claim?

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In recent years, one of the most litigated issues in cargo law has been what qualifies as a “claim” for purposes of the Carmack Amendment, which defines rights, duties and liabilities of shippers and carriers when it comes to cargo loss. The issue becomes important because the Carmack Amendment permits a carrier to limit the period for filing claims to as little as nine months after a cargo loss. And likewise, the time for filing suit begins to run when a claim is denied by the carrier.

Courts have waxed and waned in their determination to enforce Carmack’s claim filing limitations.[*Compare 5K Logistics, Inc. v. Daily Express, Inc.*¹ (“Were we to create some exception to the statutorily authorized, contractually mandated requirements of prompt filing, we would blow a hole in the balance struck by the Carmack Amendment and undermine Congress’s intent to protect carriers against stale claims.”) with *Williams v. N. Am. Van Lines of Texas, Inc.*² (holding that shipper’s demand letter presenting “estimated” damages is sufficient to state a claim).] But whether a communication from a shipper qualifies as a “claim” has importance for both the shipper and the carrier. If a timely filing is a “claim,” it will satisfy the nine month limitation period but its denial will also trigger the two year clock to file suit. Conversely, if it’s not a

claim, its denial has no effect on the time bar to filing suit, but, absent a later timely filed claim, the shipper may not comply with the nine month rule.

Both the nine month and the two year time limitations were in question in the recent case of *Whatley v. Canadian Pacific Railway Limited*.³ This Carmack Amendment case arose from the tragic train derailment in Quebec in 2013 that resulted in the deaths of over forty people. Not surprisingly, because that tragedy involved the transportation of valuable freight, it also led to Carmack Amendment litigation. While the litigation spawned many interesting cargo

The derailment occurred on July 6, 2013. On November 5, 2013, claimant Whatley sent a letter to Canadian Pacific (CP) stating that it was making a claim for damages under Canadian law and expressly stating that it was not making a claim under the Carmack Amendment, which it said it would present at a later date. Shortly after, on November 27, 2013, CP responded by denying the Canadian claim, noting that the November 5 claim was not a claim under the Carmack Amendment, and by saying:

Even if [the claimant] were to submit a proper Carmack Amendment claim, CP's liability, if any, could not exceed the value of the lading (crude oil) and would not encompass rail-car damage claims or indemnity against third-party tort or governmental environmental claims. Those matters unquestionably go beyond the value of the property that CP received for transportation.

On April 4, 2014, Whatley did indeed send a letter to CP making a claim under the Carmack Amendment. On April 24, 2014, CP again responded, noting that the April 4 claim was a Carmack claim but denied it.

On April 12, 2016, Whatley filed suit against CP alleging claims based on the Carmack Amendment. CP moved for judgment on the pleadings, contending that the suit was not filed within two years of its November 27, 2013 denial of Whatley's claim. The district court granted the motion and dismissed the suit as untimely. Whatley appealed.

While the litigation and the appeal touched on several matters, the core issue before the court was whether Whatley's original 2013 communication to CP constituted a claim and whether CP's denial constituted a denial for

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Our next Transportation Law Update Webinar, on March 19 at noon ET, will delve into the who, what and where of new and evolving data management regulations impacting the transportation industry. Transportation attorneys Marc Tucker and Jesse Elison will review security and privacy practices and policies to best protect transportation businesses from cyberattacks and regulatory penalties.

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purposes of the Carmack Amendment sufficient to start the two year clock for Whatley to file suit. Whatley argued that the 2013 exchange was a nullity for purposes of the Carmack Amendment and its time bars. In its view, the 2014 claim and its subsequent denial by CP—each of which expressly relied on the Carmack Amendment—was alone determinative of timeliness. CP, on the other hand, contended that its 2013 denial was sufficient to begin the time period for Whatley to file suit under the Carmack Amendment.

Predictably, CP relied on cases loosely interpreting the requirement for filing a claim under the Carmack Amendment. Because a claim need not use the words “Carmack Amendment” or provide much specificity beyond the facts necessary to identify the shipment, the claim and damages, CP contended that its denial—which specifically noted that the claim would be denied under Carmack—was effective.

The Eighth Circuit, in a fairly short analysis, ruled against CP. The court concluded that CP’s 2013 letter was an attempt to deny any future claim that might be filed under the Carmack Amendment and that nothing in the statute or past cases permitted a carrier to prospectively deny future claims. The court found statutory support for its holding by citing text from the Carmack Amendment itself that, according to the court, makes the time periods applicable only to Carmack claims:

A rail carrier may not provide by rule, contract or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice.

49 U.S.C. § 11706(e) (emphasis added). . . . The statute itself defines a Carmack Amendment claim as one being brought “under this section.”

And because Whatley’s 2013 claim was not brought “under this section,” it was not subject to the time bars in the statute.

Two other points are significant. First, not surprisingly, the court’s decision seemed to be motivated by “policy” concerns, and that perhaps explains the result. (“We think it would be unwise policy, and actually unfair in this unusually complicated multi-national case, to allow the carrier to start the two-year clock when the shipper had not yet broken the huddle”). Second, and more interestingly, is how the outcome might have been different had each shoe been on the other foot—

“...the outcome might have been different had each shoe been on the other foot...”

if the question had been whether Whatley’s 2013 communication qualified as a “claim” sufficient to meet Carmack’s nine month time bar. The court broached this subject: “[I]f [Whatley] had failed to make its April 2014 claim, CP might be arguing that the November notice did not assert a Carmack Amendment claim.”

Indeed, CP’s response to Whatley’s 2013 claim—expressly noting that the claim was not a Carmack claim—hints at that argument. But, it is even more likely that had a later, timely claim not been filed, Whatley would have argued that the 2013 claim was sufficient to meet Carmack’s nine month time bar. No doubt, Whatley would have relied on the many cases loosely interpreting the definition of a “claim” for purposes of Carmack’s requirements, (see *Williams, supra*) and Whatley probably could have found a court that would have agreed with it despite its express disclaimer of Carmack in the original claim.

The *Whatley* case will be one to remain on the radar as the song and dance continues between shippers and carriers on claim and denial under Carmack. ■

¹659 F.3d 331 (4th Cir. 2011). | ²731 F.3d 367 (5th Cir. 2013). | ³904 F.3d 614 (8th Cir. 2018).

The Road Ahead

- Fredric Marcinak will return to Texas to attend and speak on DOT regulatory updates at the Specialized Carriers & Rigging Association Specialized Transportation Symposium in Houston, TX on February 20-22.
- Marc Tucker and Jesse Elison will host the next Transportation Law Update Webinar on March 19 at noon ET.
- Fredric Marcinak will attend the Conference of Freight Counsel in Greenville, South Carolina on June 8-10.
- Rob Moseley will speak on broker liability to Minnesota Trucking Association in Minneapolis, MN on April 18.
- Rob Moseley will speak to Cottingham and Butler Risk Management Conference on April 30 in Nashville, TN about independent contractor relationships.
- Rob Moseley will speak at the Great West Leadership Conference in Knoxville, TN about managing corporate structure and operations to reduce risk on March 27-28. Rob will be joined at the conference by Marc Tucker, Jack Riordan and Tom Chase.

Making Tracks

- On November 2, Rocky Rogers and Fredric Marcinak participated in the SCTA clay shoot.
- On November 7 Marc Tucker spoke on Sirius XM's Road Dog Trucking "Talk for Truckers" show discussing cybersecurity issues in the transportation industry.
- On November 7, Rob Moseley traveled to Memphis, TN for a presentation at the Lipscomb & Pitts Refuel Trucking Conference.
- Rob Moseley headed to Myrtle Beach, SC for the SCTA Safety Council meeting on November 9.
- On November 5-7, Jesse Elison presented on technology contracts at the National Tank Truck Carriers' Tank Truck Week 2018.
- Fredric Marcinak spoke on the Managing Truck Accident Litigation at American Trucking Associations' SMC and TSC 2018 Safety, Security & Human Resources National Conference & Exhibition on November 13 in Long Beach, CA.
- Jack Riordan attended the SCDTAA Annual Meeting November 15-18 in Kiawah Island, SC.
- Fredric Marcinak attended the Conference of Freight Counsel in San Antonio January 5-7 and presented several cases to the group.
- Rob Moseley attended the SMC3 JumpStart meeting in Atlanta, GA on January 28-30.



Emergency Response Team

As part of the array of transportation services provided to firm clients, our 24/7 emergency response team is standing by to serve clients with urgent needs following a catastrophic accident. The team has handled numerous night time and weekend emergencies for our clients.

Members of the emergency response team take responsibility for preserving physical and electronic evidence, taking driver and witness statements, making arrangements for cargo salvage, and managing relations with law enforcement. Additionally, firm clients benefit from the team's knowledge of substantive experts and criminal defense counsel.

www.foxrothschild.com/transportation-logistics/emergency-response-team/

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