

2022 Cottingham & Butler Transportation Summit

# TRANSPORTATION LEGAL RISKS, HIGHLIGHTS AND ISSUES IN 2022

Presented by Greg Feary

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# Speaker

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# Broker Liability Update



# Theories of Broker Liability

- Vicarious Liability Theories
  - ✓ Agency – The motor carrier and/or truck driver were agents or employees of the broker and not independent contractors
  - ✓ Acting as more than a broker
    - ❖ A broker performing carrier services
  - ✓ Joint venture

# Theories of Broker Liability

- Negligent Selection/Negligent Retention
  - ✓ A broker selecting or entrusting a motor carrier that a reasonably prudent person would not have selected or entrusted under similar circumstances
  - ✓ Independent and direct negligence claim against broker

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# *Miller v. C.H. Robinson's History*

- 11/14/2018 – US District Ct. Nevada dismissed negligent selection claim against Robinson finding in favor of preemption under F4A.
- 9/28/2020 – 9<sup>th</sup> Circuit Court of Appeals overturned District Court's opinion ruling that although negligent selection claim is "related to" broker's services, within meaning of the F4A's preemption provision, negligent selection claims against brokers that stem from motor vehicle accidents are "with respect to motor vehicles" and so fall within the safety exception.
- 6/7/2022 – US Supreme Court denies Robinson's Petition for writ of certiorari.
- No ruling that Robinson was, in fact, negligent. Robinson now has to defend the case on the merits for the first time. Case is scheduled for jury trial on January 9, 2023.

# *Miller v. C.H. Robinson's Impact*

- *Miller* decision is binding precedent on federal courts in the 9<sup>th</sup> Circuit.
- *Miller* not binding precedent on other federal courts outside of the 9<sup>th</sup> Circuit or any state court.
- Other federal courts and state courts have used *Miller* in ruling F4A does not preempt negligent selection claims against brokers.
  - ✓ 13 of 14 reported cases since 9<sup>th</sup> Circuit's decision on 9/28/2020, have followed *Miller* in holding that F4A does not preempt negligent selection claims. 11 federal courts and 2 state courts.
- 1 reported case since 9<sup>th</sup> Circuit's decision still found in favor of F4A preemption
  - ✓ *Gauthier v. Total Quality Logistics*, 2022 WL 344557 (February 4, 2022 S.D. GA)
  - ✓ Plaintiff appealed to 11th Circuit. 11th Circuit remanded to district court to establish diversity jurisdiction

# Defending Negligent Selection Claims

- Still must argue that F4A preempts negligent selection claims.
- Win on the merits of the claim.
  - ✓ Broker has reasonable carrier selection process;
  - ✓ Broker followed its carrier selection process;
  - ✓ Broker's selected 3<sup>rd</sup> party motor carrier was safe;
  - ✓ Proximate Cause of accident was not broker's selection of an unsafe motor carrier

# Plaintiffs' Tactics Against Brokers and Defense Counter Strategies

- Plaintiff Selecting Favorable Jurisdiction
  - ✓ Immediately Challenge Venue AND Jurisdiction
  - ✓ Strategically Using Personal Jurisdiction Defense
- Plaintiff, Strategically Delaying Suing Broker
  - ✓ Using terms of Broker-Carrier Agreement to its advantage in catastrophic highway accident claims.
    - ❖ Demand 3<sup>rd</sup> Party Motor Carrier and its Insurer to include broker on any settlement and release agreement, particularly in pre-suit negotiations.
    - ❖ Use contractual language duty to defend and indemnify language to communicate with 3<sup>rd</sup> Party motor carrier's insurer.
    - ❖ Is broker an additional insured on 3<sup>rd</sup> Party Motor Carrier's insurance Policy?

# California AB 5 – What Does It Mean and What's Next?

# Legislature Steps In

- California codified *Dynamex* and extended the ABC test's application beyond Wage Order claims to claims under the Labor Code and the Unemployment Insurance Code with passage of AB 5 in September 2019 (effective Jan. 1, 2020); included a number of exemptions
- In September 2020, passed AB 2257, which recast, clarified, and expanded exemptions (but still no trucking exemption)

# ***California Trucking Association v. Bonta***

- CTA initially filed suit seeking a declaration that *Dynamex's* ABC test is preempted by 49 U.S.C. § 14501 (“FAAAA”); amended complaint after AB 5 enacted and sought preliminary injunction against enforcement.
- Preliminary injunction against enforcement of AB 5 against motor carriers operating in California. *CTA v. Becerra*, 433 F.Supp.3d 1154 (S.D. Cal. Jan. 16, 2020).
- State appealed and Ninth Circuit reversed. *CTA v. Bonta*, 996 F.3d 644 (9th Cir. 2021). Injunction ordered to remain in place pending appeal to Supreme Court.
- June 30, 2022, Supreme Court denied *certiorari*.
- Existing injunction will be lifted but case is not over.

# Retroactivity?

AB 5 codified *Dynamex* effective Jan. 1, 2020 and established ABC test for Labor Code and Unemployment Insurance Code claims.

- Claims rooted in the Wage Order subject to ABC test, even prior to 2018 (*Dynamex* is retroactive) – *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 478 P.3d 1207 (Cal. 2021).
- Claims under Unemployment Insurance Code (and presumably those not rooted in the Wage Order) are subject to ABC test post-Jan. 1, 2020 but *Borello* test for claims prior to enactment of AB 5 – *Vendor Surveillance Corp. v. Henning*, 62 Cal.App.5th 59 (Cal. Ct. App. 2021); *Salter v. Quality Carriers, Inc.*, 2021 WL 5049054, at \*7 (C.D. Cal. Oct. 27, 2021).

# Elements of B2B Exemption

## (Cal. Lab. Cod § 2776)

Business service provider (SP) must perform services as a sole proprietorship, partnership, LLC, LLP, or corporation and satisfy all of the following criteria:

1. SP is free from control and direction
2. SP provides services directly for contracting entity
3. SP's contract is in writing and specifies payment amount, timing
4. SP has all necessary business licenses/tax registrations
5. SP maintains business location separate from contracting entity
6. SP engaged in independently established business
7. SP can contract with other businesses
8. SP advertises and holds itself out to the public to provide similar services
9. SP provides own tools, vehicles, equipment
10. SP can negotiate rates
11. SP sets own hours and locations
12. SP not performing work for which license from Contractors' State License Board is required

# Elements of B2B Exemption - Potential Gotchas?

2. SP is providing services directly to the contracting business rather than to customers of the contracting business
4. SP has required business license or tax registration
7. SP can contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity
8. SP advertises and holds itself out to the public as available to provide the same or similar services

A man in a dark suit, white shirt, and tie is captured in mid-air, jumping over a hurdle on a red running track. The background shows a green field, trees, and a clear blue sky with a bright sun. The man's expression is one of determination and effort.

**The B2B Exemption  
Applies . . .  
Now what?**

# Is the Business Service Provider an IC?

## Multi-Factor *Borello* Test

- ✓ Distinct occupation or business
- ✓ Is work part of regular business of employer
- ✓ Who supplies the tools and place of work
- ✓ Investment in equipment
- ✓ Special skill required
- ✓ Whether parties believe they are creating an IC relationship
- ✓ Length of relationship
- ✓ Opportunity for profit or loss
- ✓ Level of supervision
- ✓ Degree of performance
- ✓ Method of payment

# Other States?

- Illinois
- New Jersey
- Washington
- States with ABC tests for wage and hour?



# Options for Carriers Operating in CA

# AB 5 – Key Options

- Strategic Dispatch
  - Freight origin in CA serviced by ICs with significant nexus to foreign domicile state
- B2B Compliance
  - Redraft IC agreement highlighting 11 elements (assuming FLRs do not conflict)
- CA Compensation Addendum
  - Restructure compensation to address the major wage and hour issues

# AB 5 – Key Options (cont.)

- Use Multi-Unit BECs that treat drivers as employees
- Settlement Carrier Model
- Prop 22 Model
- Conversion to Company Drivers
- Two-Check System

# Strategic Dispatch

- Key Question: Does AB 5 apply to the motor carrier's contractors?
- Contractor by contractor analysis v. Operational Situs of MC
- Analyze:
  - Where is contractor domiciled?
  - Compare freight pick up and delivery frequency within CA
  - Compare freight pick up and delivery frequency within a state of greater frequency

# Strategic Dispatch

- Determine: Is the state of contractor domicile also the state with the greatest pick-up and delivery frequency?
  - If CA – changes may be required
  - If not CA – argument that the foreign state’s law should apply is a reasonable defense
- Frequency of pick up and delivery should matter more than domicile
- Frequency of pick up should matter more than delivery

# CA Compensation Addendum

- Adjusting compensation to comply with CA wage and hour laws
  - Accessorial pay for non-driving activities
  - Additional pay for rest breaks
  - Identify expense reimbursement compensation
  - Minimize chargebacks/deductions
- Compliance reduces damages = Reduced litigation incentive
- Regulatory requirements might need to be separately addressed

# Multi-Unit BEC/Fleet Operators With Employees

- AB 5 does not apply to joint employment
- Drivers are treated in compliance with CA laws
- B2B exception applied to BEC/Fleet Operator
- Compliance reduces damages and litigation incentives

# Is the Defendant a Joint Employer of the Business Service Provider's Employees?

- Multiple courts have found neither *Dynamex* itself nor AB 5 applies in the joint employment context
- Instead, to be a joint employer, the defendant must have the ability to:
  1. To suffer or permit to work;
  2. Engage the worker, creating a common law employment relationship; or
  3. Directly *or indirectly* exercise control over wages, hours, or working conditions.
    - If “the putative joint employer . . . exercises enough control over the intermediary entity [e.g., a fleet owner] to indirectly dictate the wages, hours, or working conditions of the employee [e.g., a fleet driver], that is a sufficient showing of joint employment.” *Medina v. Equilon Enterprises, LLC*, 283 Cal. Rptr. 3d 868 (Cal. App. 4th Dist. 2021).

# Settlement Carrier Model

- Contractors obtain MC authority/freight source is Broker
- Each of the 3 prongs of ABC test more likely to be met

# Prop 22 Model

- Personal/passenger vehicles
- App-based
- 50 mile delivery radius
- No more than 12 distinct orders
- Provision of certain benefits and minimum wages

# Conversion to Company Drivers

- Convert ICs to employee drivers
- Will contractors agree?
- Will drivers then stay?
- Impact on enterprise regarding other state operations?
- 530 Safe Harbor jeopardy?
- How will trucks be addressed?

# Two-Check System

- Pay driver
  - (1) Employment wages; and
  - (2) Rent for truck
- Cost and income impact reduced
- Truck disposition addressed
- IRS perspective uncertain

# Ports Regulation

# California Air Resource Board “CARB”

## Drayage Truck Regulation Class 7 or Class 8 Trucks

- Emission standards deadline 12/31/2022
- Truck engine model years 2007-2009
- Trucks transporting cargo to and from California water ports and rail yards
- Northern California – estimated 1,600 trucks / 30% impacted
- Southern California – estimated 6,000 trucks / 27% impacted
- Advanced clean fleets (ACF) regulation will require 2014 truck or newer delayed to 11/2023

# Advance Clean Fleets Regulation – Drayage Trucks Timeline

Mar. 15, 2021 – Advanced Clean Trucks Regulation finalized

- ✓ requires manufacturers to sell an increasing percentage of zero emissions vehicles (e.g., electric trucks) over time

Sep. 9, 2021 – Advanced Clean Fleets Regulation – Drayage Truck Requirements proposed

- ✓ Was to impose requirements beginning Nov. 1, 2023

Apr. 26, 2022 – New Advanced Clean Fleets regulatory text proposed

- ✓ Would impose requirements beginning Jan. 1, 2024

# Advance Clean Fleets Regulation – Drayage Trucks

## Brief Summary

- Beginning Jan. 1, 2024, all drayage trucks registering in the Drayage Truck Registry (DTR) (required to enter ports and intermodal railyards) for the first time have to be zero-emission vehicles
- Legacy trucks (i.e., a drayage truck was registered on the DTR on or before Jan. 1, 2024) have to visit a regulated port or intermodal railyard at least once each year to remain in the DTR
- Beginning Jan. 1, 2025 (extended from Nov. 1, 2023), legacy trucks already registered with the DTR can continue to operate until the later of:
  - ✓ 1) 13 years from engine model year (EMY) first certified for use; or
  - ✓ The earlier of: x) the date that the drayage truck exceeds 800,000 miles traveled or y) 18 years from EMY first certified for use

# Advance Clean Fleets Regulation – Drayage Trucks Impact on Equipment Availability

- May create a rush to buy diesel trucks now to extend ability to register in the DTR and use as a legacy truck
- May impact capacity as new trucks after Jan. 1, 2024 will have to be zero-emission vehicles, which continue to suffer from scarce and unreliable charging facilities

# Detention and Demurrage – Federal Maritime Commission

“Demurrage and detention” broadly defined to “include any charges assessed by common (ocean) carriers, ocean transportation intermediaries, or marine terminal operators on the use of marine terminal space or shipping containers.”

- Aggrieved parties are: shippers, intermediaries, and truckers
- FMC began exploring the issue as a component of port congestion in 2014, opened a Fact Finding in March. 2018, proposed Interpretive Rule in Sep. 2019, and finalized rule in May 2020

# Detention and Demurrage – FMC Interpretive Rule

- Intended to *promote freight fluidity* by setting forth guidelines on how FMC will approach reasonableness of detention and demurrage charges to ensure they serve their purpose of *incentivizing cargo and equipment velocity*
- Example provided in the rule: practices that impose detention even when empty containers cannot be returned are likely to be found unreasonable

# Detention and Demurrage – FMC Billing ANPRM

- FMC's Interpretive Rule did not specifically address billing practices
- Feb. 15, 2022, FMC issued an Advance Notice of Proposed Rulemaking to seek comments and information on whether it should move forward with regulating minimum information included with detention and demurrage billings and/or regulating practices related to the timing of detention and demurrage billings

# Detention and Demurrage – Congress

Both House (H.R. 4996) and Senate (S. 3580) have passed slightly differing versions of amendments to the Ocean Shipping Reform Act

## House bill:

- ✓ Makes little statutory change but directs FMC to undertake a rulemaking on unjust and unreasonable detention and demurrage practices with direction on what to address

## Senate bill:

- ✓ Includes statutory changes requiring accurate invoices for detention and demurrage and the inclusion of certain information on the invoice
- ✓ Additionally, directs the FMCS to undertake a rulemaking further defining prohibited practices

# Speed Limiters – Not Port Specific FMCSA

- In 2016, FMCSA and NHTSA jointly proposed a rulemaking, which would require trucks to be manufactured with a speed limiting device set to an as yet determined maximum speed (NHTSA) and for carriers to operate trucks equipped with speed limiting devices that are set at said maximum speed (FMCSA)
  - ✓ Eventually stalled by opposition on specifics from ATA and to speed limiters in general from OOIDA
- Apr. 27, 2022 – FMCSA announced a Notice of Intent (yet to be published in Federal Register) to issue a supplemental proposed rulemaking (without NHTSA) that would imposed speed limitation on certain CMV by requiring them to set as yet determined maximum speed limits in truck with engine control units capable of setting limits (most trucks)
  - ✓ Notice of Intent asks a series of 12 question to inform the future proposed rule and will be accepting comments

# Cal. Labor § 2810.4

- DLSE will post list of port drayage motor carrier with unsatisfied judgments of wage violations
  - ✓ Failure to pay wages, imposing unlawful expenses, failure to remit payroll taxes, failure to provide WC, or misclassification
- Prior offenders don't get the benefit of due process
- Makes customers that use MCs that appear on the blacklist liable for wage violations that occur after the date the MC appeared on the list
  - ✓ Can have contractual indemnity agreements

# Cal. Labor § 2810.4

- Applies to port drayage drivers in California
- Port drayage services
  - ✓ Do NOT include intra-port or inter-port movement performed by employees
  - ✓ Do include point to point movement with origin or destination at a port
- Port drayage motor carrier =
  - ✓ Individual or entity that hires or engages commercial port drivers
  - ✓ Registered owner, lessee, licensee, or bailee of CMV
  - ✓ Successors in interest of the above

# California S 700

- Currently pending in California state legislature
- On inactive file – unlikely to pass
- Cherry-picks two unfavorable EDD decisions relating to port drivers and declares them the “correct statement of the law” with regard to classification

# West Coast Ports CBA Negotiation

- Port Longshoreman Labor contract – every 6 years
- 29 West Coast ports will renegotiate CBA in 2022
- May 12 set as negotiation start date
- July 1 expiration
- Protections against supply chain disruption are difficult due to current delays

# On the Horizon

# Federal Landscape

- Return of the Pro Act?
- DOL IC Rulemaking
  - Appeal to Fifth Circuit
  - Initiative to create new rule:
    - Notice of proposed rulemaking at OMB
- NLRA and Department of Justice (Antitrust Division) join forces



# The Transportation Market 2021 and 2022

- A seller's market due to high earnings and despite rising wages, higher fuel costs and rising interest rates
- Buyers are both strategic industry participants in growth mode as well as private equity investors – some PEs' finding add-ons
- Last mile and intermodal are “hot” sectors
  - ✓ E-tailer continues to gain strength through pandemic
  - ✓ Imports continue to gain strength as well as U.S. exports (despite pandemic restrictions that remain in China) continue to gain strength
- Freight rates increase but show signs of leveling off
- Fuel surcharges continue to help offset rising costs

# The Transportation Market 2021 and 2022

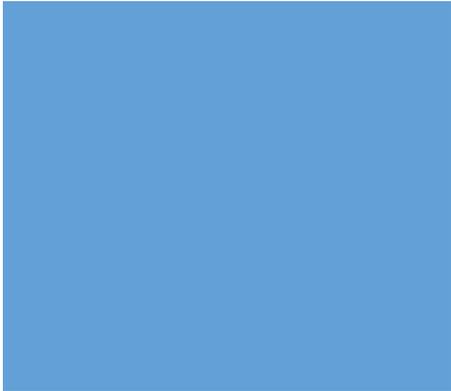
- Industry challenges persist as CPI rises
- ATA reports a driver shortage of 80,000 in 2021 with 300,000 drivers exiting industry annually
- Truck shortages due to semi-conductor chip production slow down reported at 100,000 trucks in 2021
- Spot market rates starting to slow in part driven by fuel surcharge avoidance by shippers – dry van probably impacted slightly
- War in Ukraine contributes to rising oil prices but U.S. oil exports have gained strength

# Technology, Drivers & Politics

- Autonomous vehicles raise the specter of potentially exacerbating driver shortage
- Government trending toward organized labor
- Aging out of traditional driver work force – now at 49 to 50 year old average age
- Pandemic accelerated retirements and pivots to different careers
- Millennials could be attracted back via:
  - a) Technology cockpit concepts;
  - b) Work week flexibility – “Gig” mindset;
  - c) Better pay;
  - d) Career mission mindset

# Young Driver Pilot Program

- FMCSA is establishing a pilot apprenticeship program for under 21 drivers to operate a CMV in interstate commerce (published Jan. 14, 2022)
- 3-year study of 3,000 drivers
- Strong safety components
  - 120-hour probation period (at least 80 hours driving) with performance benchmarks
  - 280-hour probation period (160 hours driving) with performance benchmarks
    - All driving complete with experienced driver in passenger seat
  - Safety tech required
- Successful drivers allowed to operate solo in interstate commerce.
- Driver compensation study also required within 1 year.



**leg-is-la-tion**

# Oversight and Enforcement

- ✓ Full compliance reviews moving off-site
  - 400% increase in off-site reviews since 2019
- ✓ Summer 2021 rule authorized FMCSA to issue safety ratings following off-site reviews
- ✓ More actively responding to complaints
  - 152% Increase from 2019
- ✓ ELD enforcement
- ✓ Highway Bill has significant funding increases to Federal and State Agencies





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