THE TRANSPORTATION BRIEF®

A quarterly newsletter of legal news for the clients and friends of Scopelitis, Garvin, Light, Hanson & Feary

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U.S. SUPREME COURT HEARS ORAL ARGUMENT IN *NEW PRIME*

On October 3, the U.S. Supreme Court heard oral argument in *Oliveira v. New Prime Inc.*, a case concerning the use of arbitration to resolve disputes with owner-operators. (A report from the Scopelitis partners who attended the argument appears in this issue of *The Transportation Brief*.) The plaintiff, who worked as an owner-operator, alleges that New Prime "misclassified" him as an independent contractor but in fact treated him like an employee. His independent-contractor operating agreement with New Prime contained a provision requiring the parties to submit any disputes to binding arbitration under the Federal Arbitration Act (FAA). The lower courts held that the plaintiff qualified under the FAA's exemption for "transportation workers." This meant that he could not be compelled to arbitration.

The "Transportation Worker" Exemption From the FAA

The FAA does not apply to "transportation workers" operating under "contracts of employment." Lower courts have grappled with the "independent contractor v. employee" issue in attempting to determine whether an independent-contractor operating agreement is a "contract of employment." In *New Prime*, the Supreme Court is considering the First Circuit's approach, which treats any "agreement to work" as a "contract of employment," including an independent-contractor operating agreement. The Court will also consider whether the exemption is an "arbitrability" issue that must be resolved in arbitration pursuant to a valid "delegation" clause. Put differently, where the parties have agreed that the arbitrator should decide whether the exemption applies (or other threshold issues), is that agreement enforceable, or must the court decide the exemption issue in the first instance? New Prime argues such questions have been delegated to the arbitrator. The plaintiff wants them decided by a court.

What's Next?

During the oral argument, even the more pro-arbitration justices appeared receptive to Oliveira's position on the exemption, reasoning that, when the FAA was enacted, the phrase "contract of employment" was sometimes used to describe independent-contractor relationships. An opinion is not expected until 2019. Whatever the Court decides, its opinion will have a direct impact on transportation companies that have existing arbitration agreements with owner-operators, as well as those that may be considering implementing them. However, even if the FAA does not apply to independent-contractor operating agreements, a transportation business may still be able to compel arbitration by invoking the provisions of state arbitration law. As such, it is imperative that transportation businesses carefully consider choice-of-law issues in arbitration agreements with owner-operators.

Braden K. Core,
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BRIEFLY

Direct Negligence Claims are Barred when Employer Admits to Driver's Employment Status

Injury and death claims made against motor carriers are typically premised on the motor carrier being vicariously liable for a driver's negligence while the driver was operating under the motor carrier's employment or placard. Plaintiffs' attorneys sometimes add direct negligence claims against motor carriers, contending the motor carrier has independent negligence for negligently hiring, training, retaining or supervising the driver. By doing so, plaintiffs attempt to admit evidence about the driver's background that may or may not have a causal relation to the underlying accident. The goal is to convince the jury the motor carrier made systematic, management-level decisions that contributed to the accident.

Whether a direct negligence claim against a motor carrier can be made, as matter of law, varies among the states. For example, in 2017 the Indiana Supreme Court, in the case of *Sedam v. 2JR Pizza Enterprises d/b/a Pizza Hut,* reconfirmed that an employer's admission of a driver acting on behalf of the employer at the time of the accident bars a direct negligence claim. The Supreme Court found that a direct negligence claim would unfairly allow for double recovery of damages from the same accident. However, if the employer's conduct was so egregious that punitive damages could be warranted (an extremely high threshold to meet), then a separate claim for direct negligence could be allowed.

Michael B. Langford, Indianapolis

Federal Court Decision Further Protects Brokers Against Negligent Hiring Claims

A recent federal court decision may limit the ability of a plaintiff to recover from brokers in highway truck accident litigation based on negligent selection of an unsafe motor carrier. In *Volkova v. C.H. Robinson Co.,* the U. S. District Court for the Northern District of Illinois dismissed plaintiff's claim against a broker holding that negligent hiring claims against brokers are preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA). The FAAAA prohibits states from enacting or enforcing "a law, regulation or other provision having the force and effect of law related to a price, route, or service of a motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property". In *Volkova*, the Court determined that because the negligent hiring claim related to the broker's core service — hiring motor carriers to transport shipments — enforcement of the claim would have a significant economic impact on the broker's service. Thus, the claim was preempted. While an appeal is still possible in *Volkova*, in *Krauss v. Iris USA, Inc.*, a federal court in the Eastern District of Pennsylvania relied on *Volkova* to dismiss a negligent hiring claim against a broker based upon FAAAA preemption.

Thomas E. Schulte, Indianapolis

SPOTLIGHT

Scopelitis Partners Attend Oral Argument at U.S. Supreme Court

Scopelitis partners Braden Core, Andy Butcher, and Prasad Sharma attended the oral argument in the *New Prime* case pending before the U.S. Supreme Court.

The argument focused on two questions: (1) whether the exemption from the Federal Arbitration Act for a "contract of employment" applies to *all* truck drivers, regardless of whether they are classified as employees or independent contractors; and (2) if not, what type of analysis should a court (or arbitrator) undertake in order to determine whether a given worker is subject to a "contract of employment" that invokes the exemption.

Chief Justice Roberts and Justice Gorsuch, who in the past have joined the majority in pro-arbitration cases, appeared receptive to Oliveira's argument that the definition of "employment" in contemporary usage at the time of enactment of the FAA included independent contractors. If Oliveira's position carries the day, it will mean that many (if not most) independent contractors will be exempt from the FAA.

Justice Ginsburg and Justice Kagan, who have been more hostile to arbitration over the years, made clear their view that the label chosen by the parties (i.e., independent contractor) cannot alone be dispositive of

whether the contract is one of "employment." Justice Ginsburg in particular seemed skeptical that Oliveira was properly classified as an independent contractor (she characterized his claim as New Prime having "rigged" his employment status), and her questions suggested a court must look beyond the contract to determine whether the individual is an employee.

Another issue that elicited significant discussion related to motor carriers that contract with business entities. Justice Kagan and Justice Alito both questioned Oliveira's counsel about whether the exemption would apply if an owner-operator had formed a business entity and directed it to enter into a contract with a motor carrier. At first, Oliveira's counsel said business entities would not fall under the exemption, but later clarified that courts would have to determine whether the contract was one for personal services (if so, she said, the exemption would apply), even if the person doing the work had created a business entity. It was not mentioned that well-drafted independent-contractor operating agreements do not obligate the owner-operator to personally perform services (they can always hire qualified workers to do so), perhaps leaving an opening for motor carriers to avoid the exemption by making clear the agreement is not one for personal services.

It is often difficult to predict the outcome of a case based on oral argument, but it does appear two of the justices that have joined the majority in pro-arbitration cases in the past (Chief Justice Roberts and Justice Gorsuch) were potentially sympathetic to Oliveira's position. That said, if the Court cannot assemble a majority for an opinion, they have the option of rehearing the case now that Justice Kavanaugh has been confirmed.

MILEPOSTS

FOR THE RECORD

Congratulations to Kiefer Light, J.D. Robinson and Jacy Rush, who began their law practice this fall as associates in the Indianapolis office.

Congratulations to the Scopelitis Firm for being recognized by *U.S. News & World Report*. Scopelitis was named to the publication's "Best Law Firms" list for the fifth consecutive year. Firms included in the list are recognized for professional excellence with persistently impressive ratings from clients and peers.

ON THE ROAD

Tim Wiseman and Braden Core presented "A View from the Outside: A Candid Conversation with Industry", covering ground and air transportation issues, at the quarterly meeting of U.S. DOT's Enforcement Practice Group, September 20, in **Washington, DC**.

Jay Starrett will present "Litigation Happens" at the National Tank Truck Carriers' 2018 Tank Truck Week, November 6, in Nashville.

Kathleen Jeffries and Fritz Damm will attend the Transportation Lawyers Association's Transportation Law Institute, November 8-9, and Fritz will also attend the Transportation Lawyers Association's Executive Committee Meeting as past President and Chair of the Membership Committee, November 10, in **Louisville**.

Becky Trenner, Shannon Cohen and Jannie Steck will attend the Women in Trucking Association's Accelerate Conference, November 12-14, in **Dallas**.

Jeff Jackson will attend Blockchain in Transport Alliance's MarketWaves 18/BiTA Fall Symposium, November 14, in **Grapevine, TX**.

Michael Tauscher will present at the Conference of Freight Counsel's Winter 2019 Meeting, January 5-7, in **San Antonio**. Kathleen Jeffries will also attend.

Chris McNatt will attend the California Trucking Association's Annual Membership Conference, January 23-27, in **San Diego**.

Kathleen Jeffries, Michael Tauscher and Bill Brejcha will attend the Transportation Lawyers Association's Chicago Regional Seminar, January 25, in **Chicago**.

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DISPATCHES

Jeff Jackson reports an increase in the number of motor carriers and third-party intermediaries, including property brokers, facing **premium assessments as a result of their workers' compensation insurer taking the unilateral action of assessing back premium for purportedly uninsured independent contractor owner-operators**. In the case of property brokers, the insurer may seek to assess third-party motor carriers. Companies should challenge these assessments by, among other arguments, strongly asserting the drivers' or carriers' independent contractor status, during the insurer's internal dispute procedures and then via the available state administrative channels.

Blockchain technology continues to be a hot topic throughout the transportation industry, as more and more companies consider whether it has the potential to positively revolutionize aspects of their future business operations. Jeff Jackson advises early adopters of this technology to carefully vet and review the governing terms and conditions as well as the underlying "smart" contracts of any blockchain before signing on.

Shannon Cohen reports that effective December 21, 2018 **California law holds customers (e.g., shippers) jointly and severally liable for unpaid wages for work performed by port drayage motor carriers who have a previous, unsatisfied judgment, tax assessment, or tax lien for failure to pay wages in the state and who are listed on a website maintained by the Division of Labor Standards Enforcement.** The law contains provisions permitting a port drayage motor carrier to challenge a proposed listing on the website and methods to remove a port drayage motor carrier from the website following payment of any outstanding judgment or assessment. It also includes provisions for a customer to avoid liability for up to 90 days following a port drayage motor carrier's inclusion on the list where the customer seeks to terminate the contract.

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