THE TRANSPORTATION BRIEF®

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

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UNCLAIMED PROPERTY: A LURKING LIABILITY FOR THE UNWARY

Despite widespread reports of burgeoning state coffers, the efforts of many states to disgorge businesses of funds—including accounts receivable, credit memos, and uncashed checks—that may be cast as "unclaimed property" have continued unabated into 2022. This is not too surprising given the extent to which some states rely on unclaimed property returns as a source of revenue. For example, Delaware collected nearly $560 million in unclaimed property in 2019. With results like Delaware's as the model, some states have become even more aggressive in their pursuit of so-called unclaimed property via widening use of third-party auditing firms, several of which work on a contingency basis.

Whether transportation companies realize it or not, the frequent rate adjustments transportation companies must make over the course of any given day often result in credit memos that unclaimed property auditors will regard as being subject to liability under various state unclaimed property laws. Often, state unclaimed property auditors will view credit items related to duplicate and unidentified customer payments as subject to reporting and remitting under state unclaimed property laws even though federal law governs how motor carriers must treat such payments.

For these and other reasons, third-party auditors seem increasingly apt to target transportation companies for multi-state unclaimed property law compliance reviews. The administrative burdens associated with participating in an unclaimed property examination may be substantial because the statute of limitations on such examinations is lengthy, often reaching back in excess of 10 years. And the potential for liability may be significant, particularly given the ability of the states to impose penalties and interest on unreported unclaimed property.

That said, federal laws governing regulated motor carriers, property brokers, and freight forwarders protect some of the unclaimed property held by those businesses from the reach of state unclaimed property laws under certain circumstances. Some states also exempt certain types of unclaimed property from reporting and remitting requirements. Transportation companies should ensure they have implemented specific, written protocols for handling various types of accounts receivable and accounts payable credit items. If care is not taken, a company may find it difficult (if not impossible) to limit its exposure in the event a state unclaimed property auditor comes knocking.

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BRIEFLY

M&A Considerations for Air and Ocean Forwarders

Freight forwarders that engage in air and ocean moves have become attractive targets for strategic and private-equity backed acquisitions over the past several years. Buyers should be aware that change-in-control notice and approval processes for these businesses are more complicated when compared to U.S. surface-transportation providers.

For air forwarders registered with TSA as Indirect Air Carriers (IAC), notice of a change-in-control must be provided to the agency. Depending on how the transaction is structured (e.g., changes to corporate form, EIN), a new IAC application may be required. A purchase transaction may also result in the creation of new "Principals" that require Security Threat Assessments and vetting by TSA. Similar considerations apply if the target is registered with TSA as a Certified Cargo Screening Facility.

Many IACs are also registered with CNS as Endorsed Cargo Agents. A specific form of notice must be provided to CNS. That notice triggers an amendment process that must be completed to ensure the target's information on file with CNS accurately reflects the new ownership.

Finally, in certain situations, IACs may need to be registered with the DOT as foreign air freight forwarders (FAFFs). Sometimes foreign ownership is obvious, such as when a foreign business buys a U.S.-based IAC. But in some cases, an IAC will be deemed "foreign" based on the presence of non-U.S. investors in a private-equity fund. There may be pre- and post-close processes associated with changes in control of FAFFs.

With respect to forwarders engaged in ocean moves, the Federal Maritime Commission (FMC) requires notice of change-in-control, as well as additional information submitted to the agency. FMC also requires that such entities have "Qualifying Individuals" on staff. If a transaction will impact the identity of the QI, the parties will need to plan accordingly. If a corporate conversion is contemplated that would result in a new entity form, prior approval is technically required as opposed to after the fact notice. Where an asset acquisition is contemplated, an entirely new applicable may be required (or advisable), which can take months to obtain, further complicating and delaying transactions.

Nathaniel G. Saylor
Braden K. Core,
Indianapolis

Transportation Worker Exemption from the FAA Requires a "Contract of Employment"

Employers have successfully used arbitration under the Federal Arbitration Act (FAA) to resolve disputes on an individual basis. Unfortunately for transportation providers, the FAA does not apply to "contracts of employment" of drivers and other transportation workers who are engaged in interstate commerce. But a recent decision from Massachusetts reminds that, if the arbitration provision is not in a "contract of employment," the FAA may still apply. In *Cuneo v. National Delivery Systems, Inc.*, the plaintiff entered into an agreement with Contractor Management Services (CMS) by which he was paid for delivery work performed for a carrier. The court held plaintiff's claims against CMS had to be arbitrated under the FAA because his agreement with CMS was not an agreement to perform work, and thus not a "contract of employment." The case is a useful reminder to consider all the elements of the FAA exemption. And recall - even if the FAA does not apply, arbitration may be available under state law.

Braden K. Core,
Indianapolis

Prasad Sharma,
Washington, D.C.

Supreme Court Stays and OSHA Withdraws Vaccine/ Testing Mandate

It appears that we have arrived at some finality in the on-again-off-again life cycle of OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS). On January 13, 2022, the U.S. Supreme Court ordered a stay of the ETS, holding that Congress had not given OSHA the authority to issue such a sweeping regulation addressing a general public health concern. In response, effective January 26, 2022, OSHA has withdrawn the ETS.

Given the Court's determination that OSHA had likely exceeded its authority here, large employers have understandably set aside their immediate plans to implement the ETS vaccine/testing protocols. However, important considerations remain because many carriers continue to face customer vaccination requirements as well as the Canadian vaccination requirement for drivers crossing the border into Canada. Although the ETS is withdrawn, OSHA has reserved the right to continue its normal rulemaking process that may result in a standard that

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SPOTLIGHT

Spotlight on
Cargo Claim Practice

Many people assume the Carmack Amendment (Carmack) exclusively controls their cargo claim disputes related to interstate shipments. However, due to certain contract provisions in shipper or broker/carrier agreements, Carmack may take a back seat. A contract that incorporates Carmack for handling cargo claims, but also contains clauses that conflict with Carmack can be a recipe for a dispute.

Depending on how they are worded, contract clauses such as claim-filing deadlines, limitations of liability, waiver of salvage value, seal policies, and choice of venue provisions can conflict with Carmack. When a cargo claim arises, one party to the dispute may attempt to invoke a specific contract clause. The other party may then refer to Carmack as a defense to negate the contract clause. The resulting standoff can fracture business relationships or lead to litigation.

Both parties to the contract should be on the lookout for inconsistencies between contractual cargo claim provisions and the law. Equally important, transportation providers should be careful to avoid inconsistencies within their own documents (such as tariffs, bills of lading, credit applications, and contracts). Unfortunately, it is often not until a court interprets the contract with conflicting provisions that the parties have a definitive answer to their dispute. The firm's Cargo Claim & Freight Charge group, led by Kathleen Jeffries, Thomas Gonzalez, and Clifford Lauchlan, helps clients navigate the cargo claims process, both pre- and post-suit and can be a useful resource for shippers and transportation companies for reviewing existing or potential contractual provisions.

MILEPOSTS

FOR THE RECORD

We are pleased to announce that Clifford Lauchlan has joined the Firm's Cincinnati Office and Andrew Ireland has joined the Firm's Indianapolis Office. Mr. Lauchlan's practice is primarily devoted to assisting third-party logistics clients on a wide array of issues including contracting and cargo claims issues. Mr. Ireland's practice will focus on complex litigation and class action issues.

ON THE ROAD

Ryan Wright will be attending the National Association of Trailer Manufacturers 2022 Convention & Trade Show, February 1-2, in **Tampa, Florida**.

Don Vogel will attend the North American Transportation Employee Relations Association's (NATERA) Annual Conference, March 1-3, in **Tampa, Florida**.

Steve Stanaszak, Jannie Steck, and Michael Roberts will present "How to Defend Your Fleet From the Tire and Wheel Related Litigation: A Mock Trial" at the American Trucking Associations' Technology and Maintenance Council Annual Meeting, March 6-9, in **Orlando, Florida**.

Kathleen Jeffries will serve on a Question & Answer Panel discussing Freight Claims at the Transportation & Logistics Council's Annual Conference, "Education for Transportation Professionals", March 20-23, in **Orlando, Florida**.

Renea Hooper and Andy Marquis will conduct a Mock Trial Presentation at the Captive Resources' Spring Summit Risk Control Workshop, March 30 – April 1, in **Charlotte, North Carolina**.

Renea Hooper will present "Experts, Experts Everywhere! An Update on Human Factors, Bio-Mechanics, and Trucking Experts" at the Defense Research Institute's Trucking Law Seminar, April 27-29, in **Austin, Texas**. Fritz Damm will also attend.

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***Briefly*, continued from inside**

directly addresses protections from COVID-19 in some form. While that rule is developed, we anticipate that OSHA may now pivot to a heightened focus on the enforcement of existing workplace safety standards to ensure employers are taking the necessary steps for the safety of workers. Therefore, we recommend that employers remain vigilant in their workplace safety protocols, which may include masking, social distancing, quarantining, and monitoring of CDC recommendations.

David D. Robinson
A. Jack Finklea,
Indianapolis

DISPATCHES

Prasad Sharma reports the Massachusetts Supreme Judicial Court (the state's highest court) held that the restrictive *ABC test in the independent contractor statute is not appropriate for determining whether an entity is an individual's joint employer for purposes of the Massachusetts Wage Act.* Instead, the Court in *Jinks v. Credico (USA) LLC* held the more amenable multi-factor Fair Labor Standards Act test for joint employment examining the power to hire and fire, supervise and control, determine payment, and maintain employment records is applicable. The decision continues a trend in other jurisdictions of courts rejecting the ABC test for determining joint employment.

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