STATE OF CALIFORNIA TRANSPORTATION AND LOGISTICS COMPENDIUM OF LAW

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Revised 2021

A. CALIFORNIA'S LAW REGARDING DERIVATIVE LIABILITY OF EMPLOYER FOR ACTS OF EMPLOYEES IN THE TRANSPORTATION CONTEXT

Leaving aside possible federal preemption defenses that may be otherwise available in a given liability scenario, California law provides that an employer may be held responsible for the torts of its employees pursuant to three theories: 1) Respondeat Superior; 2) Negligent Entrustment; and, 3) Negligent Hiring/Retention/Supervision.[1] California also may extend its jurisdiction to out-of-state defendants in an in-state liability scenario.

1. Respondeat Superior

Respondeat Superior provides that an employer is vicariously liable for any wrongful acts committed by an employee within the course and scope of that employment. *Ducey v. Argo Sales Co. (1979) 25 Cal.3d 707, 721*. See also California Civil Code Section 2338, which provides that a principal is liable to third persons for the negligence of its agent. Willful and malicious torts may fall within the scope of one's employment for purposes of the respondeat superior doctrine. The rationale for the doctrine lies in the fact that the employer derives the benefit from the service of the employee and is in a better position to insure itself against losses arising out of such service. The losses caused by employee torts are placed on the employer as a cost of doing business. In order to apply the doctrine, two criteria must be established. First, the employment or agency relationship must be proven. Second, it must also be shown that the employee or agent was acting within the scope of that employment. *Id*. at 721. Generally speaking, to hold an employer vicariously liable for the tortious acts of its employee, plaintiff must show a causal connection between the employee's act and his or her employment. However, plaintiff is not required to show that the employee's actions benefited the employer. See, *e.g*., *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.* (1995) 12 Cal.4th 291, 297.

2. Negligent Entrustment

The theory of negligent entrustment makes an employer liable for its own negligence in choosing an employee (or contractor, as the case may be), to drive a vehicle in the scope and course of the employer's business. However, in order to prevail on a negligent entrustment claim, plaintiff must prove that the harm was proximately caused by the driver's incompetence. See CACI No. 724. Often, a plaintiff will offer proof of prior accidents, moving violations, etc., as a means of

[1] The employer may also be held liable under a theory of permissive use, if it is the owner of the vehicle driven by its employee (California Vehicle Code ("CVC") section 17150). However, liability is limited to $15,000 per person, $5,000 for property damage, and $30,000 per accident (CVC section 17151).

establishing his or her negligent entrustment claim. Plaintiff must also establish the accident in question was foreseeable by showing that the employer had knowledge of the driver's prior accidents, moving violations, etc. *Flores v. Enterprise Rent-A-Car, Co*. (2010) 188 Cal.App.4th 1055, 1063.

3. Negligent Hiring, Retention and Supervision

Similar to negligent entrustment, the theories of negligent hiring, retention and supervision seek to impose liability on the employer for the employer's own independent acts or omissions which were negligent and contributed to or caused a plaintiff's injuries. The employer must have had reason to believe that an undue risk of harm to others would exist because of such employment. *Underwriters Ins. Co. v. Purdie* (1983) 145 Cal.App.3d 57, 69.

4. Specific Jurisdiction – California May Reach Out-of-State Defendants

On March 28, 2021, the United States Supreme Court unanimously affirmed the existence of personal jurisdiction over products liability claims by an in-state plaintiff for in-state injuries against an out-of-state defendant. (*Ford Motor Company v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021)). Defendant Ford had sought to extend the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017) (a case that arose from California courts), which rejected personal jurisdiction over claims by out-of-state plaintiffs against out-of-state defendants for out-of-state injuries. Ford has its headquarters in Michigan and is incorporated in Delaware. Ford assembled the vehicle in Kentucky, first sold it to a dealership in Washington, the dealership then sold it to an Oregon resident, who later sold the vehicle to a purchaser who brought it to Montana. The Court held that "this Court's precedents require only that the suit 'arise out of or relate to the defendant's contacts with the forum.'" The ruling broadly expands state courts' personal jurisdiction over foreign defendants.

Carriers that own vehicles that touch any inch of California roadway should be aware of the far reach of California courts through this recent Supreme Court decision as well as California's existing long-arm statute.

5. DEFENSES

(a) Traditional Tort Defenses

Depending on the facts of a particular case, traditional tort defenses such as lack of duty, no breach, no actual or proximate cause, failure to mitigate damages, superseding and intervening cause, etc. can be used in defense of an employer alleged to be liable for its employees' tort.

(b) Admitting Liability under Respondeat Superior

In *Diaz v. Carcamo* (2011) 51 Cal.4th 1148, the Supreme Court of California held that where an employer admits vicarious liability for any negligent driving by its employee, the plaintiff may not pursue his or her negligent entrustment claim and any evidence proffered solely to support such a claim is barred.

In *Diaz, supra*, plaintiff Diaz was involved in a multi-vehicle accident, including a vehicle being driven by Carcamo, a truck driver employed by defendant Sugar Transport. Plaintiff alleged that Sugar Transport was both vicariously liable for Carcamo's negligent driving and was also directly liable for its own negligence in hiring and retaining Carcamo. *Id.* at 1152. Sugar Transport offered to admit vicarious liability if Carcamo was found negligent, but the trial court admitted evidence of Carcamo's driving and employment history, both of which were very damaging to Sugar Transport. *Id*. at 1153. The Court of Appeal affirmed the trial court's decision. *Id*. at 1154. On appeal, the California Supreme Court found that evidence of Carcamo's driving and employment history should not have been admitted. The judgment of the Court of Appeal was reversed with directions to reverse the trial court's judgment and remand the case for a complete retrial.

B. ADMISSIBILITY OF PRIOR ACTS/OMISSIONS EVIDENCE WHERE PUNITIVE DAMAGES ARE SOUGHT

To date, the California Supreme Court has yet to address the question of whether or not evidence of prior acts or omissions by an employee, which can be excluded under California Evidence Code section 1104, are admissible for purposes of proving that punitive damages are warranted against the employer for its own negligence.

Generally, punitive damages claims against an employer in California for derivative liability are subject to the heightened "clear and convincing" standard. According to California Civil Code section 3294, an employer cannot be found liable for punitive damages based upon acts of its employee unless "the employer had advance knowledge

of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice." Regarding corporate employers, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice "must be on the part of an officer, director, or managing agent of the corporation."

C. SELECTED SYNOPSIS OF RELEVANT REGULATORY OVERSIGHT OF MOTOR AND PASSENGER CARRIERS IN CALIFORNIA

Unlike some states in the post-deregulatory era, California still maintains a complex system of regulation with regard to the providers of transportation services. These providers either operate in California as a component of interstate commerce, or they operate exclusively intrastate within California. The following is a brief synopsis of the legal and regulatory landscape in California that applies to motor carriers and passenger carriers.

1. Motor Carriers

Motor carriers are subject to the jurisdiction of both the Department of Motor Vehicles ("DMV") and the California Highway Patrol ("CHP"). In short, the DMV has licensing control as a condition of transporting intrastate freight within California, while the CHP governs the safety-related aspects of such operations. Of the two, the CHP can prove to be the most troublesome agency from an enforcement perspective. This reality is likewise true with respect to the CHP's safety oversight of commercial and private passenger carriers, both of which are also subject to stringent licensing jurisdiction under California's Public Utilities Commission ("PUC").

(a) California Department of Motor Vehicles ("DMV")

Pursuant to Cal. Veh. Code §§34601(c)(1) and 34601(A), motor carriers transporting product deemed to be intrastate in nature are required to first obtain a Motor Carrier Permit ("Permit") from the DMV in order to provide such services. Interestingly, the CVC includes a special category of license for statutory owner-operators who must also hold their own Permit under Cal. Veh. Code §34624. In this regard, California's licensing structure is different from federal regulation which allows independent contractors to operate under leases with interstate carriers without obtaining a separate FMCSA authority. Whereas, in California, an owner-operator

must have a separate Permit to operate under a lease agreement with the prime carrier. *See* Cal. Veh. Code §34624.

The consequences of failing to obtain and maintain a licensed in California, as well as violations of the safety compliance requirements of the CHP, including its unique BIT Inspection program, can be draconian, leading to the suspension of operations, as well as misdemeanor prosecutions and actions under the state's *Unfair Practices Act*, Business & Professions Code ("BPC") §17200, commonly referred to as a "17200 violation."

(b) California Public Utilities Commission ("CPUC")

At one time, the CPUC had exercised jurisdiction over motor carriers in California. As noted above, the Legislature shifted this authority to the DMV.

Still, the CPUC has considerable administrative oversight regarding other types of transportation-related activities, most particularly the services of passenger carriers, including both commercial and private enterprises.

2. Commercial and Private Passenger Carriers

Within its jurisdiction, the CPUC issues operating authorities (either a certificate or a permit) to different types of commercial and private passenger carriers under a system very reminiscent to the former Interstate Commerce Commission. In fact, bus companies are heavily regulated in California. Likewise, as with motor carriers, the CHP has patrol jurisdiction over bus carriers who either travel on city streets or California highways, which it exercises with strict and often aggressive diligence.

Essentially, under the CPUC, the regulatory status of bus carriers is segmented between passenger stage corporations (per capita or individual fares) ("PSC" or "PSCs") and charter-party carriers (who assess charter group rates). Cal. Pub. Util. Code §§1031, *et seq*. and 5352, *et seq*. The right to provide either type of service is subject to an extensive CPUC application process. In fact, applicants for a PSC certificate are subject to a somewhat traditional public convenience and necessity standard to support issuance of an appropriate authority.

On the charter-party carrier side (designated as "TCP"), one aspect of the CPUC's authority is that it formerly extended to private services most often related to the

passenger services provided by, for example, senior living communities who operate vans and mini-buses in the course of the amenities provided to residents of such facilities at no extra charge or private buses operated by churches or non-profit youth camps. However, in June of 2018, the California Legislature enacted SB 19 (Hill), which, among many other actions, stripped the CPUC of its regulatory authority over private carriers. *See* Cal. Veh. Code §34680, *et seq*. Notwithstanding this statutory overhaul, most of the industry is unaware of this redistribution of authority which has been a fertile basis for regulatory conflict in terms of enforcement proceedings brought by the CPUC and/or the CHP.

Please note that the CPUC asserts jurisdiction over the private transportation services provided by senior living communities to their respective residents, even though the California Legislature now vests such authority in the DMV. Be aware of the jurisdictional conundrum which has become a real operating problem by creating enforcement exposure to such entities.

Finally, and as a word of caution, regulatory transgressions by either motor or passenger carriers are deemed to be statutory misdemeanors subject to prosecution by local district attorneys who often pursue unfair competition law claims under California Business & Professions Code §17200, *et seq*., in order to enhance the adverse economic consequences of such transgressions. In this regard, citations issued to drivers of trucks and busses are generally treated as misdemeanors, requiring intervention in order to plead to a lower infraction standard upon negotiations with a local district attorney.

D. SELECTED COMPLIANCE OVERSIGHT

In addition to the DMV, CPUC and CHP, other agencies in California can have a profound impact on transportation-related services within this state, particularly with regard to environmental and labor issues.

1. The California Air Resources Board ("CARB") And Related EPA Enforcement Activity

(a) Truck and Bus Regulation

Anyone providing transportation services (including brokers) to, from and within California must be mindful of and diligent about the authority and powers of CARB. In 2009, California adopted the Truck & Bus Regulation

("TBR"), becoming the only state in the country to require the use of diesel particulate filters on heavy-duty diesel trucks and buses. The TBR applies to fleet owners and motor carriers operating or controlling the operation of vehicles in California, and logistics companies based in California. Where vehicles are provided by hire or dispatch, motor carriers must verify that the vehicles they use in California comply with the TBR.

CARB has stepped up efforts to enforce the TBR, as has the U.S. Environmental Protection Agency ("EPA") under the federal Clean Air Act. To date, both CARB and EPA have initiated enforcement actions against major, out-of-state, national transportation companies and have announced that there will be "many more" enforcement actions to come.

(b) Periodic Smoke Inspection Program and Heavy-Duty Vehicle Inspection Program

Aside from the TBR, CARB also operates the Periodic Smoke Inspection Program ("PSIP") and the Heavy-Duty Vehicle Inspection Program ("HDVIP"). The PSIP is an annual self-testing program for smoke opacity and is applicable to California-based fleets of two or more heavy-duty diesel vehicles. HDVIP is a roadside inspection program conducted by CARB enforcement staff and is applicable to diesel and gasoline heavy-duty vehicles operating in California over 6,000 pounds gross vehicle weight rating. CARB has not been shy about issuing notices of violation and settling enforcement actions in lieu of litigation. Please visit this website for a list of settled claims going back to 1990: https://ww2.arb.ca.gov/our-work/programs/enforcement-policy-reports/enforcement-case-settlements.

2. Misclassification Claims Related to Independent Contractors

It is common knowledge that California is a "hot-bed" for misclassification litigation. The state's administrative and judicial distain for independent contractor relations is well-known, leading to decisions at both the federal and state court levels which challenge the existence of this historic form of doing business in the transportation industry. The advent and proliferation of driver-based technology has further clouded the issue (as discussed in Section D(3)(c)). Certainly, the adverse results reached by the Ninth Circuit in *Dilts v. Penske Logistics, Inc*. 757 F. 3rd 1078 (9th Cir. 2014), and the California Supreme Court in

People ex rel. Harris v. Pac Anchor Transportation, Inc. (2014) 59 Cal. 4th 772, test the resolve of carriers to continue this model.

From a purely California perspective, the primary test for distinguishing an independent contractor from a direct employee is whether the principal has the right to direct and control the manner and means by which the persons carry out the job. As a corollary, the law looks to whether the principal may discharge the contractor at will and without cause. The leading case setting forth the evidentiary factors under the primary test is *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 342. However, the *Borello* test is no longer the standard for measuring whether an employment or independent contractor status exists between the motor carrier and the independent contractors with whom it tenders shipments for delivery.

In short, the *Borello* standard was supplanted by the so-called *Dynamex* test which adopted the stricter ABC threshold, including Prong B thereof whereunder a worker is presumed to be an employee and may be classified as an independent contractor only it "the worker performs work that is outside the usual course of the hiring entity's business." AB 5, as further amended by SB 2257, did provide for a "business-to-business" exception to the ABC test, leading to the so-called "Broker Model" as a platform to enhance this legislative carve out.

The industry has vigorously contested AB 5 as being preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"). A federal district court judge in San Diego agreed and enjoined enforcement of AB 5 as to motor carriers contracting with owner-operators. Unfortunately, the preemption issue recently came before the 9th Circuit. On April 29, 2021, in a 2-1 decision, the Ninth Circuit reversed the district court ruling, holding that as a matter of general applicability of labor law, AB 5 was not preempted. *CTA v. Bonta*, No. 22-55106. Because the result in CTA conflicts with contrary decisions in at least two other Circuit Courts of Appeals, the expectation is that the pre-emption question will reach the Supreme Court. For now, and if and when the Ninth Circuit lifts the current injunction against AB 5, the use of independent contractors in California has become very troublesome, although motor carriers have been innovative in meeting this challenge.

At the same time the California Department of Labor has its own "primary test" based on an economic analysis (*i.e*., does the worker depend economically on the principal or is she or he in business for her or himself?). In addition, the California

Legislature has been active in this area as well. Labor Code §226.8 provides for significant economic penalties for "each" misclassification of a person. Moreover, Labor Code §2810.3 addresses joint employer liability regarding companies and staffing agencies who provide temporary workers to a third-party customer.

In light of this unfavorable law, some motor carriers operating in California have resorted to the so-called "Broker Model" as an alternative service methodology: a strategy which was bolstered by the amendment to AB 5 as contained in SB 2257.

Lastly, on May 6, 2021, the U.S. Department of Labor ("DOL") withdrew a rule adopted in the final days of the Trump administration that was generally perceived to be favorable to motor carriers' use of independent contractors, and certainly more favorable than California's ABC test under AB 5. The rule, which revised the agency's interpretation of independent contractor status under the Fair Labor Standards Act, was set to take effect May 7, 2021. Among the reasons provided for withdrawal, the DOL stated that "the department is concerned, as a policy matter, that the rule's narrowing of the analysis would result in more workers being classified as independent contractors not entitled to the FLSA's protections, contrary to the act's purpose of broadly covering workers as employees."

3. New, and Challenging, California Labor Laws Enacted in Recent Years

As noted above, carriers operating in California must also be mindful of the crescendo of labor-related legislation that politicians continue to impose on employers in this state. Developments in recent years are no exception to the historical trend. In addition to AB 5 and the havoc it has created, an amongst the myriad of new laws enacted recently, which dramatically impact employment practices in California, the more critical of these which deserves specific attention are:

(a) ***AB 1008 (2018) (Government Code §12952)***

Prohibits employers with five or more employees from: (1) Asking on applications about criminal convictions; (2) Asking applicants about criminal convictions prior to making a conditional offer of employment; (3) If a conditional offer is made, and an employer wishes to rescind the offer based upon a criminal conviction, the employers must undergo a "fair chance process." To do so the employer must notify the applicant of the reason for rescinding the conditional offer, provide the applicant 5 or 10 days to challenge the decision as to whether the criminal history should disqualify the applicant, and provide the applicant written notice of his or her right to challenge the decision administratively.

(b) ***AB 168 Salary History of Applicants (2018) (Labor Code §432.3)***

AB 168, effective January 1, 2018, prohibits employers from asking about job applicant's salary history. This includes both requests for information about both compensation and benefits and employers may not seek this information through a third-party. Employers also may not rely on salary history information in deciding whether to hire an applicant or how much to pay an applicant. Finally, if applicants request, the employer must provide pay scale information for the position in question.

(c) ***Proposition 22 App Based Drivers (2020) (Business & Professions Code §7448 et seq.)***

Generically, and with certain self-imposed conditions, Proposition 22 permits app-based "gig" economy companies to classify workers as independent contractors, rather than employees. The proponents of Prop 22 consisted primarily of Uber, Lyft, Door Dash, Instacart and other driving-based gig companies who came together to spend over $200 million dollars in a successful effort to be exempted from application of the ABC test and AB 5. Under this new law, which became effective on December 16, 2020, an app-based driver is an independent contractor and not an employee if the following conditions are met:

(1) the networking company does not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which the app-based driver must be logged into the platform;

(2) the networking company does not require the app-based driver to accept any specific rideshare service or delivery service request as a condition of maintaining access to the platform; and

(3) the networking company does not restrict the app-based driver from working in any other lawful occupation or business.

A final important point to note is that Proposition 22 does nothing to address freight motor carriers who are still stuck in the crosshairs of AB 5. Pursuant to AB 5, a worker is presumed to be an employee, unless the company proves that he or she satisfies all three prongs of the ABC test.

As the law currently stands, this three-prong test will be applied to carriers operating in California in order to determine whether they are employees or independent contractors.