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PERSPECTIVE

Keep on truckin' (for now): AB 5 may not apply to truckers

By Annette Mijanovic and Philip McDermott

For decades, the trucking industry has used owner- operators to provide the transportation of property in interstate commerce. Assembly Bill 5, which went into effect Jan. 1, as set out in Labor Code Section 2750.3, threatens to alter the course of the whole industry.

To be a truck driver, you can take one of two routes: be an employee for a company or be an owner-operator. Owner-operators can operate as independent motor carriers, but more often they are leased to a motor carrier, which requires the owner-operator to operate under the motor carrier's operating authority. If there is any doubt about whether there is a demand for owner- operators, just search for "truck freight loads" on any smartphone's application store and you will scroll through a long list of applications that help connect owner-operators to available loads.

Until AB 5, owner-operators maintained their independent contractor status, which kept costs low and competition high, the benchmark of Congress' goal when it enacted the Federal Aviation Administration Authorization Act to regulate the motor carrier industry.

AB 5, of course, began with *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal. 5th 903, in 2018 when the California Supreme Court adopted the "ABC" test for determining whether a worker is an employee or independent contractor. Under the test, an owner-operator is presumed to be an employee unless the motor carrier establishes each of these three requirements:

A. That the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the 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.

The trucking industry was quick to react after the bill was signed last September. On Sept. 30, 2019, in a case already pending in the Los Angeles County Superior Court, a motor carrier moved in limine as to whether AB 5's ABC test was preempted by the FAAAA. On Jan. 8, 2020, the trial judge granted the motion, ruling that the ABC test is preempted by the FAAAA as to motor carriers and independent owner-operators. *People of the State of California v. Cal Cartage Transportation Express, LLC*, BC689320.

Last week, the Southern District of California likewise found that the FAAAA preempts AB 5's ABC test, temporarily enjoining the enforcement of AB 5's ABC test as to any motor carrier operating in California. *California Trucking Association, et al. v. Becerra, et al.*, 3:18-cv- 02458-BEN-BLM.

Neither the superior court's ruling nor the district court's order is binding authority, but reading the two well-reasoned decisions, it is expected that AB 5's ABC test will ultimately be found to be preempted once the issue reaches the appellate courts. Regardless of what happens in the future, however, for now motor carriers and owner-operators are exempted from AB 5's ABC test.

From a personal injury litigation standpoint, it is yet to be seen how, and if, AB 5's ABC test will affect hirer, motor carrier, and independent owner-operator liability.

For example, in 2011, the California Supreme Court held that where an employer admits vicarious liability for any negligent driving of its employee, a plaintiff may not pursue an independent cause of action for direct liability against the employer. *Diaz v. Carcamo*, 51 Cal. 4th 1148, 1152 (2011). The reasoning is that the vicarious and direct liability claims are the same. As a result, evidence pertaining to direct liability of the employer is inadmissible at trial.

Diaz has no application to the general rule in California that a hirer is not vicariously liable for the torts of its independent contractors. *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations*, 48 Cal. 3d 341, 350 (1989). Famously, however, "the rule is now primarily important as a preamble to the catalog of its exceptions." *Privette v. Superior Court (Contreras)*, 5 Cal. 4th 689, 693 (1993) (internal citations omitted).

One such exception that has been used to impose vicarious liability on motor carriers for independent contractors' negligence is the nondelegable duty doctrine. *See, e.g.*, *Serna v. Pettey Leach Trucking, Inc.*, 110 Cal. App. 4th 1475, 1486 (2003). The nondelegable duty is based on the carriers' public franchise or authority with the Federal Motor Carrier Safety Administration. This is true even where the injured party is an employee of the independent contractor. *Vargas v. FMI, Inc.*, 233 Cal. App. 4th 638, 664 (2015).

What has remained unaddressed in any published decision in California is whether *Diaz* applies in the context of vicarious liability for an independent contractor as opposed to an employee. In any event, AB 5 may eventually make it more likely to find that a driver hired by an FMCSA-regulated carrier is termed an "employee." If so, there would be no doubt that *Diaz* applies.

AB 5 also raises new questions relating to the vicarious liability of an unregulated hirer of a driver, such as through a third-party application like Uber Freight. Generally, an unregulated carrier is not vicariously liable for the negligence of its independent contractor. *Millsap v. Federal Express Corp.*, 227 Cal. App. 3d 425, 434-35 (1991). The exception to this rule is the peculiar risk doctrine.

In the context of trucking, this doctrine is limited to true "peculiar risks" such as those involving loading, unloading, or hauling. *See, e.g.*, *American States Ins. Co. v. Progressive Casualty Ins. Co.*, 180 Cal. App. 4th 18, 31 (2009). An accident involving the "ordinary use" of driving a truck does not fall under the peculiar risk doctrine. *Bowman v. Wyatt*, 186 Cal. App. 4th 286, 30 (2010).

Therefore, the law before AB 5 was that an unregulated hirer would not be liable for an independent contractor unless the injury involved a "peculiar risk" associated with commercial trucking. A hirer would not be held liable for an independent contractor's negligence in an ordinary traffic accident.

If, however, AB 5 now requires the finding that a hirer in this context is an employer of the driver, then vicarious liability would apply. *Diaz*, 51 Cal. 4th at 1154 ("The respondeat superior doctrine makes an employer liable, irrespective of fault, for an employee's tortious conduct in the scope of employment."). The solace to find in that result is that the hirer may not be found directly liable for its employee's acts under *Diaz* just like a regulated carrier thereby limiting liability exposure. ■

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