STATE OF CALIFORNIA TRANSPORTATION COMPENDIUM OF LAW

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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 does provide 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]

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 establishing his or her negligent entrustment claim. Plaintiff must also establish the accident in question was foreseeable by showing that the employer had

[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).

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. DEFENSES

(a) Traditional Tort Defenses

Depending on the facts of a particular case, traditional tort defenses such as lack of duty, no breach, no causation, 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 system of regulation with regard to the providers of transportation services, operating in intrastate commerce in this state, namely, and as here, pertinent, with respect to motor carriers and passenger carriers, as follows:

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 CVC §§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 Motor Carrier under CVC §3624. 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 arrangement with the prime carrier. See, CVC §3624.

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 & Prof. Code ("CBPC") §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 to different types of 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 safety jurisdiction over bus carriers which it exercises with strict and often aggressive diligence.

Essentially, under CPUC, the regulatory status of bus carriers is segmented between passenger stage corporations (per capita or individual fares) ("PSC" or "PSCs") (CPUC §1031, *et seq*.) and charter party carriers (who assess charter group

rates). (CPUC §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-side (designated as "TCP"), one aspect of the CPUC's authority extends 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. Notwithstanding this statutory requirement, most of the industry is unaware of this oversight which has been a fertile basis for regulatory conflict in terms of enforcement proceedings brought by the CPUC and/or the CHP.

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 CBPC §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 Regulations

Anyone providing transportation services (including brokers) to, from and within California must be mindful of and diligent about the authority and powers of the CARB. In 2009, California adopted the Truck & Bus Regulation ("TRB"), becoming the only state in the country to require the use of diesel particulate filters on heavy-duty diesel trucks and buses. The TRB applies to fleets 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 TRB.

CARB has stepped up efforts to enforce the TRB – and more recently the U.S. Environmental Protection Agency ("EPA") has initiated its own enforcement efforts. To date, the EPA has initiated enforcement actions against an out-of-state national transportation companies and has announced that there will be "many more" enforcement actions.

(b) EPA and the Yates Memo

On September 9, 2015, Deputy Attorney General Sally Yates issued a Memorandum entitled "*Individual Accountability for Corporate Wrongdoing*." The "Yates Memo" outlines several policy changes in the way the DOJ will investigate and prosecute white collar crime. One of the most significant, in DAG Yates's own words, is that the DOJ will now "require that if a company wants any credit for cooperation, any credit at all, it must identify all individuals involved in the wrongdoing, regardless of their position, status or seniority in the company and provide all relevant facts about their misconduct. It's all or nothing. No more picking and choosing what gets disclosed. No more partial credit for cooperation that doesn't include information about individuals." Of course, with Ms. Yates' departure from the DOJ, and the change in the Administration, the continued viability of the Yate Memo is unknown.

2. Misclassification Claims Related to Independent Contractors

It is common knowledge that California is a "hot-bed" for misclassification litigation. The focus on Uber, Lyft and other transportation network companies has received wide-spread publicity. 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. 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. However, all is not lost notwithstanding the uphill battle faced in sustaining contractual relations with independent contractors. For example, the recent administrative decision in RWI case cited below, resulted in a complete victory for the motor carrier against a claim that contracted owner-operators were, in fact, employees of the respondent. *RWI Transportation, LLC v. Employment Development Department,* California Unemployment Insurance Appeals Board, Case No. 5308590(T), Decision Filed August 28, 2014. (Not published, but a copy is available upon request).

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.

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.

Note that the California Trucking Association ("CTA") initiated a declaratory judgment action in the federal court, U.S.D.C., Southern District, with the expressed purpose of hitting *Borello* head on. Unfortunately, this strategy may have backfired as the court issued a strongly-worded order granting the

defendant's motion to dismiss in *California Trucking Association v. Julie Su.* (Case No.: 16-CV-1866 CAB MAD (DC SD CA 2017.)

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.

3. New, and Challenging, California Labor Laws Effective in 2017

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 2017 are no exception to the historical trend. Amongst the myriad of new laws now in effect this year, which dramatically impact employment practices in California, the more critical of these which deserves specific attention are:

(a) ***AB 2535 (Labor Code §226)***

Amongst other things, Labor Code *§226* requires employers to state the total number of hours that an employee worked on wage statements. AB 2535 amends Labor Code *§226* to limit the categories of employees for whom employers must provide the total number of hours worked. The amendment specifies, for example, that salaried employees exempt from overtime need not have hours included on wage statements.

(b) ***AB 908 Paid Family Leave and State Disability Benefits***

AB 908 , effective January 1, 2018, increases the amount of weekly benefits payable to employees who take leave under California' existing paid family leave law. State Paid Family Leave (PFL) and State Disability Insurance (SDI) wage-replacement benefits will increase from 55 percent to 60-70 percent depending on the participant's wages. In addition, effective July 1, 2018, the seven-day waiting period for PFL benefits will be eliminated.

(c) ***AB 1676 & SB 1063 – Wage Discrimination and Application to Race and Ethnicity* (*Labor Code §§ 1197.5 & 1199.5*)**

California's Fair Pay Act, which went into effect on January 1, 2016, generally prohibits an employer from paying an employee at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. The Fair Pay Act provides for exceptions such

as, the wage differential is based upon one or more of the following factors: (a) a seniority system; (b) a merit system; (c) a system that measures earnings by quantity or quality of production; (d) a bona fide factor other than sex, such as education, training, or experience. These amendments provide that an employee's prior salary cannot, by itself, justify any disparity in compensation under the bona fide factors set forth above.

(d) ***AB 2337 – Employment Protections for Victims of Domestic Violence, Sexual Assault, or Stalking (Labor Code § 230.1)***

Employers with 25 or more employees are now required to provide specific information in writing upon hire or others upon request relating to their rights to take leave under Labor Code § 230.1. The Labor Commissioner is also required, by July 1, 2017, to develop a form that employers may use in order to comply with this requirement.

(e) ***AB 2899 – New Requirements Relating to Appealing Citations by the Labor Commissioner (Labor Code § 1197.1)***

This Bill requires employers who wish to appeal a citation by the Labor Commissioner against an employer for violation of wage and hour laws to post a bond with the Labor Commissioner in an amount equal to the unpaid wages assessed under the citation.

(f) ***SB 1241 – Choice of Law and Forum in Employment Contracts (Labor Code § 925)***

This Bill prohibits employers from requiring California-based employees to enter into agreements (including arbitration agreements) requiring them to: (1) adjudicate claims arising in California in a non-California forum; or (2) litigate their claims under the law of another jurisdiction. It further provides that any provision of a contract that violates this law is voidable by the employee and that any dispute arising thereunder shall be adjudicated in California under California law and the employee is entitled to recover reasonable attorneys' fees.

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