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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Trucking Cases To Watch In The 2nd Half Of 2018

By **Linda Chiem**

Law360 (July 16, 2018, 4:56 PM EDT) -- A California wage dispute against North American transportation logistics giant J.B. Hunt and a duel at the nation's highest court over whether trucking company New Prime can enforce an arbitration clause in its independent contractor agreement are among the court battles that trucking industry attorneys are watching in the second half of this year.

With one case advancing toward trial in California district court and the other preparing for oral arguments before the U.S. Supreme Court this fall, industry observers say the employment fights, along with a misclassification case against GrubHub, have the potential to significantly shake up how trucking and logistics companies staff their operations and how the federal government has traditionally regulated certain facets of the sector.

Here's a look at some of the notable legal battles that trucking industry attorneys are tracking closely.

Ortega v. J.B. Hunt

An 11-year battle over allegations that J.B. Hunt Transport Inc.'s uniform piece-rate compensation system shorted thousands of drivers on wages and rest breaks is **headed for trial** this fall in California.

Attorneys for plaintiffs Gerardo Ortega and Michael D. Patton are currently **trying to fend off** a bid by J.B. Hunt **seeking summary judgment and to decertify** the 11,000-strong class of drivers alleging J.B. Hunt's piece-rate compensation system does not separately pay drivers for pre- and post-trip inspections, completing paperwork, detention time, breakdowns, fueling and washing trucks, waiting on dispatch, training, or rest breaks, as required by Golden State law.

"Everybody cares about Ortega because the chickens have come home to roost on Dilts v. Penske," Brad Hughes, a Los Angeles-based attorney with Clark Hill PLC, told Law360.

Dilts v. Penske is the Ninth Circuit's groundbreaking **July 2014 ruling** that California's meal and rest break laws are not preempted by the Federal Aviation Administration Authorization Act, or FAAAA, the federal statute that preempts any state law "relating to a price, route or service of any motor carrier."

The Ninth Circuit's stance conflicts with other federal circuits. Since then, the trucking industry has been trying to use other cases as vehicles to get Dilts overturned since the Supreme Court **declined to review** that case in 2015.

"Everybody who is a defense practitioner that practices in the Ninth Circuit still struggles with the fact that we are the outlier on how FAAAA gets used," Hughes said. "We're operating in one specific circuit court that applies United States law differently than every other circuit does."

J.B. Hunt's exposure to potential damages at trial is significant, Hughes said.

"It should be a very clear message to all the other carriers that are operating in California right now [that] this is the litmus test for all of the plaintiffs lawyers in this area of law to see exactly what the road map is to getting a huge judgment against a company that otherwise is fully compliant with

federal law and, arguably, very compliant with state law," he said.

The instant Ortega v. J.B. Hunt suit was first tossed by the district court in 2014, revived by the Ninth Circuit based on the Dilts precedent in 2017, and was **denied a review** by the U.S. Supreme Court this June, before making its way back to district court to get ready for trial.

Marc S. Blubaugh, co-chair of Benesch Friedlander Coplan & Aronoff LLP's transportation and logistics practice group, said the Ninth Circuit's "myopic view" of federal preemption under FAAAA creates problems.

After all, nearly 20 states have meal and rest-break rules that vary state by state, he said, and the purpose of the FAAAA is to help motor carriers and brokers avoid a patchwork of state laws governing rates and services.

"From a practical perspective, the cost of complying with this dizzying array of state laws and regulations results in a significant loss of productivity," Blubaugh said. "However, regrettably, the Ninth Circuit's and district court's decision regarding preemption stands."

Blubaugh added, "The techniques and arguments employed by the plaintiffs in this case — regardless of the outcome — will undoubtedly be exported to other states — particularly those located in the Ninth Circuit."

Meanwhile, the drivers' attorney Stanley Saltzman of Marlin & Saltzman has argued in court that the Ortega case has been delayed for far too long by the trucking industry's attempts to throw wage and hour claims under the umbrella of FAAAA preemption.

He's argued that the FAAAA is an economic deregulation measure that does not immunize motor carriers from the background state laws — such as the generally applicable wage-and-hour laws that all industries have to comply with — much less fundamental workplace protections.

The case is Geraldo Ortega et al. v. J.B. Hunt Transport Inc., case number 2:07-cv-08336, in the U.S. District Court for the Central District of California.

New Prime Inc. v. Oliveira

The U.S. Supreme Court will hear arguments on Oct. 3 in a class action accusing New Prime Inc. of failing to pay independent contractor truck-driver apprentices a proper minimum wage. The court **granted certiorari** in February.

New Prime wants the justices to determine whether the Federal Arbitration Act exemption for interstate transportation workers applies to independent contractors. Section 1 of the FAA exempts from arbitration "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

The company is seeking to overturn what it has described as a remarkably overbroad May 2017 First Circuit ruling that the applicability of the Section 1 exemption is always a question for the court and that the term "contracts of employment" should be read to also include independent contractor agreements, like the one that plaintiff Dominic Oliveira signed with New Prime when he joined its apprentice program.

New Prime said in its September 2017 petition that Oliveira, a former apprentice, could not sue the company in court for allegedly failing to pay minimum wage, because of an arbitration clause in a contract he signed to be an independent contractor.

"The gravamen and final judicial outcome of [this case] will have a lasting impact on the industry, particularly if the Supreme Court agrees with a carrier that co-employer claims by independent contractors must be arbitrated in accordance with the typical provisions in the contract for such services," said Hanson Bridgett LLP partner Bill Taylor.

Oliveira, meanwhile, has countered that the First Circuit's decision was unremarkable and should be left intact, saying it simply holds that before relying on the FAA to compel arbitration, a court must

determine whether the act even applies.

Oliveira's attorney, Jennifer D. Bennett of Public Justice, told Law360 that the Supreme Court has made very clear that laws are to be interpreted according to their ordinary meaning at the time they were passed.

"As the First Circuit's opinion demonstrated, the universal meaning of the term 'contracts of employment' at the time the Federal Arbitration Act was passed was simply an agreement to do work," Bennett said. "None of the amicus briefs provide any evidence to the contrary. We look forward to presenting our arguments to the Supreme Court soon."

Plaintiffs attorneys said that because protections for workers largely hinge on employment status — mostly because the current outsourcing craze wasn't an issue when such foundational protections were enacted — economic security for the middle and working class depends on strong application of employment laws.

"So the arm of big business that wants to tighten the screws on working folks aims to erode employment laws — through procedural schemes like arbitration and preemption," said Jahan C. Sagafi, a partner with plaintiffs firm Outten & Golden LLP. "Courts like the First Circuit in New Prime have crafted thoughtful checks on corporations' aggressive use of arbitration agreements."

The case is New Prime Inc. v. Dominic Oliveira, case number 17-340, in the Supreme Court of the United States.

Lawson v. GrubHub

Online meal delivery service GrubHub Inc. and a former driver accusing the company of misclassifying drivers as independent contractors to deny them minimum wage, overtime and expenses **are dueling** over whether the Ninth Circuit should force a lower court to re-examine its **February ruling** that the driver was indeed an independent contractor rather than an employee.

The driver, Raef Lawson, urged the Ninth Circuit in June to send his case back to the California district court to have it reconsider the independent contractor determination after the California Supreme Court **established a new test** in its groundbreaking Dynamex Inc. decision on April 30.

The California justices in Dynamex adopted a standard known as the ABC test that presumes workers are employees instead of independent contractors for purposes of state wage orders, which govern items such as overtime and meal and rest breaks. That **puts the burden on employers** to prove that workers aren't employees in the Golden State.

"Courts like the California Supreme Court have applied clear, easy-to-apply tests to prevent exploitation of workers through unsecure independent contractor arrangements in the gig economy," Sagafi said.

By embracing the more rigid **three-prong ABC test**, the California justices eschewed the use of the previous standard in misclassification disputes — an 11-factor test established by a 1989 ruling known as S.G. Borello & Sons v. Department of Industrial Relations, which emphasized an employer's control over workers claiming employee status and considered several secondary factors in analyzing a worker's classification.

Lawson's attorney said the new ABC test should be applied retroactively to U.S. Magistrate Judge Jacqueline Scott Corley's Feb. 8 order.

"In light of Dynamex, we think there's really no question that the drivers are employees," Shannon Liss-Riordan of Lichten & Liss-Riordan PC told Law360. "While we believe the district court erred in applying the Borello standard, this was the point of Dynamex: that Borello gave defendants too much latitude to try to justify independent contractor status."

GrubHub, meanwhile, has argued that the Dynamex ruling cannot apply retroactively to Lawson's case because it would raise particularly acute due process concerns, among other issues.

"Retroactively applying Dynamex would violate the United States Constitution, and any decision of the California Supreme Court on questions of federal law does not bind this court," GrubHub's attorney Theane Evangelis of Gibson Dunn & Crutcher LLP said in a June 25 letter to the Ninth Circuit.

As the Ninth Circuit ponders how to respond to Lawson's motion to remand, the so-called on-demand or gig economy and the broader commercial trucking industry are anxiously awaiting the outcome, attorneys say, especially since California Supreme Court in Dynamex left open the question as to whether the ABC test should be applied retroactively.

"Clearly, if given retroactive effect through the GrubHub gateway, the damage wrought by the Dynamex decision will further reverberate throughout many industries, not the least of which will be in the motor carrier sector here in California where nearly every interstate carrier contracting with independent contractors have direct or affiliated services," Hanson Bridgett's Taylor said.

Moreover, pending misclassification cases at the trial level, as well as those on appeal, could possibly be subject to the new legal and stricter standard imposed by Dynamex, Taylor added.

"While the Dynamex decision alone was a devastating blow to sustaining historic owner-operator relationships, imposing a new burden of proof on pending cases under the outcome sought by [the] plaintiff in GrubHub will drive a further stake into the heart of a common and essential business practice of the motor carrier industry, particularly in California," Taylor said.

The appellate case is Raef Lawson v. Grubhub Inc., case number 18-15386, in the U.S. Court of Appeals for the Ninth Circuit.

The underlying case is Raef Lawson v. Grubhub Inc. et al., case number 3:15-cv-05128, in the U.S. District Court for the Northern District of California.

--Additional reporting by Joyce Hanson and Vin Gurrieri. Editing by Brian Baresch and Alanna Weissman.
