Benesch

August 2019

The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

Best Lawyers BEST LAW FIRMS U.S.News & WORLD REPORT TRANSPORTATION LAW TIER 1 NATIONAL 2019

Benesch has been ranked in the First Tier nationally in Transportation Law in the 2019 Edition of U.S. News & World Report/ Best Lawyers® "Best Law Firms" ranking.

The U.S. News & World Report/Best Lawyers® "Best Law Firms" rankings are based on an evaluation process that includes the collection of client and lawyer evaluations, peer review from leading attorneys in their field, and review of additional information provided by law firms as part of the formal submission process.

For more information on Best Lawyers, please visit www.bestlawyers.com.

www.beneschlaw.com

FLASH NO. 74
TRANSPORTATION WORKER ARBITRATION: It May Not Be Bullet-Proof, But It's Like Chicken Soup (can't hurt; might help)

Richard A. Plewacki

Jonathan Todd

As we reported in our January 2019 *FLASH #71*, the U.S. Supreme Court unanimously ruled that transportation workers engaged in interstate commerce are exempt from the Federal Arbitration Act ("FAA") regardless of whether they are classified as independent contractors or employees (the *New Prime* decision).[1]

Since then, many in the trucking industry have been considering and evaluating alternative ways to maintain a mechanism of dispute resolution through arbitration on an individual basis so as to avoid class actions, collective or representative actions.

Interestingly, several courts have addressed the issue coming down on both sides based on very similar underlying facts. Nonetheless, through these conflicting decisions, there seems to be a pathway developing whereby motor carriers can indeed preserve arbitration on an individual basis.

As a background to the activity within courts regarding the issue of arbitrability, it is important to remember that the U.S. Supreme Court expressly noted that its decision was limited to the application of the FAA and did not explore other potential avenues for compelling arbitration including state arbitration statutes. As a result, the Supreme Court left open the possibility that a truck driver working for an interstate trucking company suing under various state or federal statutes who had signed an arbitration agreement could still be compelled to arbitration, but merely held that the FAA did not provide the authority to do so (see the *Merrill* decision).[2] The guidance of the *Merrill* decision makes sense because the FAA displaces state law only to the extent it *disfavors* arbitration and like the FAA, many state statutes favor arbitration and have expressly stated that a state law or rule that singles out arbitration agreements for disfavored treatment is preempted by the FAA. Thus, the U.S. Supreme Court's decision in *New Prime* does not provide authority supporting an inverse policy of *not enforcing* arbitration agreements in the context of the FAA's Section 1 exclusions. The majority of both pre- and post-*New Prime* courts are in accord that the FAA's Section 1 exclusion which does not mean that arbitration provisions are unenforceable, but only that the particular enforcement mechanism of the FAA are not available.

With that background courts across the country dealing with the effect of the *New Prime* decision and alternatives available under it are looking at the issue of when a contract

(continued)

with an arbitration provision falls beyond the reach of the FAA, whether courts should look to state law to decide whether arbitration could be compelled nonetheless. Or stated another way, it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the FAA itself.

Recently, two cases were decided within a day of each other by the Appellate Division of the Superior Court of New Jersey, landing on both sides of the issue. The first case was *Colon et al vs Strategic Delivery Solutions*,[3] and the second one, decided the following day was *Arafa vs. Health Express Corporation*.[4]

In the Health Express case, the trial court dismissed the Complaint in December 2017 and sent the dispute to arbitration because the contract between the motor carrier and the independent contractor contained an arbitration provision that referenced the FAA. But in light of the January 2019 New Prime decision, the Appeals Court reversed the decision and remanded the case back to the state court, finding that the arbitration agreement was unenforceable between the parties for lack of mutual assent.

In the Strategic Delivery case delivery drivers suing a freight broker, Strategic Delivery Solutions, for wage and hour violations and the Court determined that the drivers must arbitrate their claims under state law even if they were found by the trial court on remand to fit FAA's transportation worker exemption.

It is the Strategic Delivery decision that provides a bit of a roadmap that may be helpful in preserving the ability to arbitrate disputes with independent contractors on an individual basis and avoid court class actions or collective actions holding that even though the parties' contract stated the FAA would apply and was silent as to whether a state arbitration would apply, the plaintiffs were still required to arbitrate their wage and hour claims under the New Jersey wage and hour statute.

The facts are as follows: Strategic Delivery is licensed by the U.S. DOT as a freight forwarder and freight broker. It arranges for local delivery of pharmaceutical products and general merchandise to customers. Plaintiffs signed identical Independent Vendor Agreements for Transportation Services with Strategic in which they said they owned and operated a business that provided transportation services. Plaintiffs agreed to provide transportation services as independent contractors for Strategic's customers.

The Agreement provided that the law of the state of the residence of the "vendor" (the independent contractor) would apply. Thus, in this particular instance, New Jersey law governed the Agreement, "including its construction and interpretation, the rights and remedies of the parties, and all claims, controversies or disputes between the parties".

The Agreement also provided a waiver of any right to trial by jury in any suit filed related to the Agreement and agreed to adjudicate any dispute pursuant to an arbitration provision and a waiver of class actions.

The Plaintiffs who worked out of a Strategic facility in New Jersey performed truck driving and delivery functions and claimed that Strategic made unlawful deductions from their compensation in violation of the New Jersey wage payment law. They contended they were misclassified by Strategic as independent contractors, and should have been classified as employees. The Plaintiffs also alleged that they should have been paid time and a half for work in excess of 40 hours and Strategic's failure to do so violated the New Jersey Wage and Hour Law. The Plaintiffs filed a class action on behalf of other "similarly situated persons" for violation of the Wage and Hour Law and the Wage Payment Law and demanded a jury trial.

Relying on the express terms of the Agreement, Defendants filed a Motion to Dismiss, arguing that Plaintiffs agreed to (1) waive a jury trial, (2) proceed on an individual (non-class) basis, and (3) have their claims heard in binding arbitration.

The trial court granted Defendants Motion, concluding that Plaintiffs waived their right to a jury trial pursuant to the provisions in the Agreement and that the agreement to arbitrate was "clear and unambiguous" and constituted a "valid and enforceable arbitration agreement". Similarly, the waiver to join a class provision was clear and unambiguous, valid and enforceable. Thus, the trial court's Order required the Plaintiffs to adjudicate their claims through mandatory binding arbitration.

The Court of Appeals vacated the Order of Dismissal, and reinstated the Complaint since the trial court did not specifically address the issue whether Plaintiffs were engaged in transportation services in interstate commerce, and thus, exempt from the FAA. Interestingly, the Court of Appeals simultaneously held that if the FAA does not apply to the Plaintiffs, then the New Jersey Arbitration Act shall apply and require arbitration of their claims. The Appeal Court also held that the Plaintiffs waived a trial by jury and the ability to proceed as a class action under their agreements with Strategic.

Essentially, the Appellate Court found that the trial court missed the mark only by failing to analyze whether the FAA exemption for transportation workers engaged in transportation services in interstate commerce applied, but ultimately found that the parties were going to arbitration their dispute one way or the other.

How did the Appellate Court reach their decision, and how can that help those in the transportation industry reach a similar outcome?

In reviewing the arbitration provision in the Agreement, the Court made it clear that arbitration is a matter of contract. An agreement to arbitrate, like any other contract, must be the product of mutual assent as determined under customary principles of contract law. Parties are not required to arbitrate when they have not agreed to do so. The agreement to arbitrate within the contract provided that the parties agreed to provide services and be bound by the FAA, from which the Plaintiffs contend they are exempt. Because the contract does not recognize the New Jersey Arbitration Act, Plaintiffs contend they are not required to arbitrate their claims. The Appellate Court included the New Prime decision in its analysis and expressly stated that an agreement where the parties agree to provide transportation services on an

interstate basis falls under Section 1 of the FAA whether or not the agreement is to provide the services as an employee or an independent contractor.

Step #1: A clear expression of the Parties' mutual intention to arbitrate any dispute involving the agreement.

The Complaint alleged that Plaintiffs perform services as truck drivers for customers throughout New Jersey and surrounding areas. The Court's position was if the drivers are engaged in interstate commerce they would be exempt from arbitration under the FAA. Then the issue becomes whether the exemption preempts application of the New Jersey Arbitration Act ("NJAA"), which the Court held it does not since (1) the FAA contains no express preemptive provision nor does it reflect a congressional intent to occupy the entire field of arbitration and (2) the contract between the parties clearly expressed a mutual agreement to arbitrate disputes related to the Agreement.

Step #2: If the FAA is not applicable, then the arbitration will be governed by law.

Finding no preemption the Court articulated the following analysis to reach its conclusion that arbitration should occur, one way or the other. The NJAA governs arbitration agreements in New Jersey. The Agreement expressly provided that as governed by state law where the vendor resided, which in this case meant New Jersey. Therefore, the parties should have understood that the NJAA would apply to their Agreement. The Agreement did not say that the NJAA would not apply. The detailed arbitration provision showed that the parties intended to arbitrate disputes.

Other than for Plaintiffs' contention that they are exempt under the FAA, there is no reason to include any reference to the NJAA. Because the FAA does not preempt application of the NJAA in this context, the Court concluded that even if Plaintiffs are exempt under Section 1 of the FAA, they are still required to arbitrate their claims under the NJAA as applicable state law.

The Court's analysis regarding arbitration, one way or the other, could be viewed as a bit of a gift to the Defendant. However, given the Court's guidance a well drafted arbitration provision should include the affirmative statement to the effect that if the FAA does not apply state law will apply.

Step #3: A clear and unambiguous statement regarding a waiver of any right to a jury trial.

The Agreement provided that the parties voluntarily agreed to both waive any right to a jury trial in any suit filed under the Agreement and to adjudicate any dispute pursuant to the arbitration provision. Plaintiffs contended they are entitled to a jury trial on their wage claims because those claims are based on statute, not contracts. Thus, they argued that if they must arbitrate under their agreements, they should not be required to arbitrate the wage and hour or wage payment claims. The Appellate Court disagreed finding that an effective waiver requires the parties to have full knowledge of their legal rights and intent to surrender those rights. Arbitration is an alternative method of resolving disputes and substitutes for the right to have one's claim adjudicated in a court of law, and the waiver of such rights must be clear and unambiguous. The Court found that Plaintiffs clearly and unambiguously waived their right to a trial by jury, and agreed to adjudicate disputes pursuant to the arbitration provision.

Further the Appellate Court found that the two concepts--jury trial waiver and arbitration--were linked in the same sentence by the conjunction "and", the Court found the Plaintiffs to have waived their rights to pursue a jury trial based on, or made in conjunction with, the provisions of binding arbitration.

Again, given the Court's guidance on the issue of waiver, a well drafted arbitration provision should specifically call out the application of arbitration to all disputes related to the agreement by its express terms of by statute.

Step #4: A clear and unambiguous statement to arbitrate only on an individual basis.

The Plaintiffs took the similar position in arguing that the trial court's order of mandatory binding arbitration on an individual basis was incorrect because they did not waive their ability to pursue claims as a class.

The Appellate Court found that the waiver with respect to class-wide, multiple plaintiff, collective or similar actions were clearly unambiguously waived.

So what are the lessons learned from this case?

The first lesson is that it appears courts are not inclined to spend their time on scholarly transportation law related analyses as to the determination of the commerce in play (interstate vs intrastate). This makes sense given the rapid paced, ever changing supply chain it would be a burdensome task to do so. Thus, the "if it looks like a duck; walks like a duck; and sound like a duck" analysis to the issue of interstate commerce seems to be sufficient.

The second lesson is that the four steps incorporated in the Strategic decision provide sound guidance when drafting an arbitration provision in an independent contractor service agreement between a motor carrier and an independent contractor: (1) a clear expression of intention; (2) an agreement that if for some reason the FAA exemption applies, then a state law arbitration should apply;[5] (3) a clear and unambiguous waiver with respect to jury trial; and (4) a clear and unambiguous waiver for dispute resolution on a class, collective or representative basis coupled a clear agreement to proceed only on an individual basis.

This may not be a bullet-proof solution to guaranty dispute resolution through arbitration on an individual basis involving transportation worker in interstate commerce, but like chicken soup, it may not cure the aliment, but it can't hurt.

The Benesch Transportation & Logistics Group team of lawyers are well positioned to craft innovative solutions customized for any transportation companies in any segment if the industry regarding this particular issue or any other that may relate to an IC program.

(continued)

Richard A. Plewacki at rplewacki@beneschlaw.com or (216) 363-4159

Rich, formerly a Partner of the Firm has transitioned to the position of "Of Counsel" within the Firm as he continues to focus on sharing with his colleagues, our clients, and friends of the Firm his 49 years in the industry, nine as a businessman and 40 as a lawyer, the last 30 of which have been involved providing innovative solutions to transportation companies in all segments of the industry that use independent contractors

Jonathan Todd at jtodd@beneschlaw.com or (216) 363-4658

Jonathan is a Partner of the Firm whose transportation industry background and experience propels client interests in complex transactional and regulatory matters, including creative yet compliant operating structures.

[1] *InterConnect FLASH!* No. 71—*Independent Contractor/Owner-Operators: Exempt From Arbitration for Dispute Resolution*

[2] *Merrill v Pathway Leasing LLC*, No. 16-CV-02242-KLM, 219 WL 1915597 (D.Colo. Apr. 29, 2019).

[3] *Colon v. Strategic Delivery Sols., LLC*, No. A-2378-17T4, 2019 WL 2345086 (N.J. Super. Ct. App. Div. June 4, 2019)

[4] *Arafa v. Health Express Corp.*, No. A-1862-17T3, 2019 WL 2375387 (N.J. Super. Ct. App. Div. June 5, 2019)

[5] The fact that the Strategic Agreement provided that the arbitration would be governed by the law of the independent contractors residence may appear to be just another fact contained in this particular agreement, but given the disparity and bargaining power between a motor carrier and an independent contract under an independent contractor service agreement, such fact is viewed typically very favorably by courts since it is "independent contractor friendly" rather than a more overbearing provision to have arbitration occur in one particular locale.

Additional Information

For additional information, please contact:

Transportation & Logistics Practice Group

Eric L. Zalud, *Chair* at (216) 363-4178 or ezalud@beneschlaw.com
Marc S. Blubaugh, Co-*Chair* at (614) 223-9382 or mblubaugh@beneschlaw.com
Michael J. Barrie at (302) 442-7068 or mbarrie@beneschlaw.com
Dawn M. Beery at (312) 212-4968 or dbeery@beneschlaw.com
Kevin M. Capuzzi at (302) 442-7063 or kcapuzzi@beneschlaw.com
Kristopher J. Chandler at (614) 223-9377 or kchandler@beneschlaw.com
David A. Ferris at (614) 223-9341 dferris@beneschlaw.com
John C. Gentile at (302) 442-7071 or jgentile@beneschlaw.com
Joseph N. Gross at (216) 363-4163 or jgross@beneschlaw.com
Matthew D. Gurbach at (216) 363-4413 or mgurbach@beneschlaw.com
Jennifer R. Hoover at (302) 442-7006 or jhoover@beneschlaw.com
Trevor J. Illes at (312) 212-4945 or tilles@beneschlaw.com
Whitney Johnson at (628) 600-2239 or wjohnson@beneschlaw.com
Thomas B. Kern at (614) 223-9369 or tkern@beneschlaw.com
Peter N. Kirsanow at (216) 363-4481 or pkirsanow@beneschlaw.com
David M. Krueger at (216) 363-4683 or dkrueger@beneschlaw.com
Charles B. Leuin at (312) 624-6344 or cleuin@beneschlaw.com
Jennifer A. Miller at (628) 216-2241 jamiller@beneschlaw.com
Michael J. Mozes at (614) 223-9376 or mmozes@beneschlaw.com
Kelly E. Mulrane at (614) 223-9318 or kmulrane@beneschlaw.com
Margo Wolf O'Donnell at (312) 212-4982 or modonnell@beneschlaw.com
Steven A. Oldham at (614) 223-9374 or soldham@beneschlaw.com
Lianzhong Pan at (86 21) 3222-0388 or lpan@beneschlaw.com
Martha J. Payne at (541) 764-2859 or mpayne@beneschlaw.com
Joel R. Pentz at (216) 363-4618 or jpentz@beneschlaw.com
Richard A. Plewacki at (216) 363-4159 or rplewacki@beneschlaw.com
Julie M. Price at (216) 363-4689 or jprice@beneschlaw.com
Matthew (Matt) J. Selby at (216) 363-4458 or mselby@beneschlaw.com
Peter K. Shelton at (216) 363-4169 or pshelton@beneschlaw.com
Verlyn Suderman at (312) 212-4962 or vsuderman@beneschlaw.com
Clare R. Taft at (216) 363-4435 or ctaft@beneschlaw.com
Jonathan Todd at (216) 363-4658 or jtodd@beneschlaw.com

www.beneschlaw.com