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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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FLASH NO. 54
FINALLY! PRONG 2 OF THE MASSACHUSETTS "ABC" TEST IS DEAD!

On May 11, 2016, the First Circuit Court of Appeals rendered a decision in *Massachusetts Delivery Association v. Healy* (the "*MDA* case") preempting Prong 2[1] of the Massachusetts Independent Contractor Law (the "Massachusetts "ABC" Test") based, in large part, on the First Circuit's February 2016 decision in *Schwann, et al. v. FedEx Ground*. Thus, we are pleased to report that it now appears that Prong 2 of the Massachusetts "ABC" Test is officially dead as to motor carriers. This is, of course, good news, albeit not necessarily *new* news.

Earlier this year in *FLASH No. 53*, we analyzed the First Circuit's decision in *Schwann*, in which the Court affirmed the District Court's ruling that Prong 2 of the Massachusetts "ABC" Test was preempted for motor carriers under FAAAA, but reversed the District Court's ruling as to preemption of Prongs 1 and 3. The First Circuit also returned the case to the District Court for further proceedings on Prongs 1 and 3, and we are continuing to monitor those proceedings for any new developments.

In reaching its recent decision in the *MDA* case, the First Circuit initially rejected a request by the Massachusetts Attorney General to reconsider *Schwann* on the grounds that it was wrongly decided. Noting a "law of the circuit doctrine" providing that the Court is bound by prior decisions "absent intervening authority," the Court wrote that the Attorney General provided no such authority. Moreover, authorities cited by the Attorney General as "inconsistent" with *Schwann* had already been considered and rejected by the Court in *Schwann*, and in the Attorney General's petition for rehearing, and in the Attorney General's petition for rehearing *en banc*.

The Court also summarily concluded that Prong 2 was preempted as to X Pressman Trucking & Courier, Inc. ("XPressman"), the member entity which had been offered by MDA as an exemplar for purposes of the case. The Court's analysis began with a finding that Prong 2 of the Massachusetts "ABC" Test "expressly reference[d] XPressman's services," and that "application of Prong 2 to XPressman would logically have a significant effect on XPressman's routes and services."

Rebuffing the Attorney General's attempt to draw a distinction between the FedEx drivers in *Schwann* and XPressman's drivers in *MDA*, the Court acknowledged differences but held that the reasoning of *Schwann* prevailed. XPressman drivers bore the expense of delivering packages and were compensated based on the number of packages delivered. XPressman's drivers were "free to decide what route[s] to follow in making deliveries."

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And, XPressman "structured its relationship with its [drivers] to incentivize its [drivers] to keep costs low and to deliver packages efficiently."

As a result, the Court decided that applying Prong 2 to XPressman would "deprive XPressman of its choice of method of providing for delivery of services and incentivizing the persons providing those services." In effect, the Court wrote, the application of Prong 2 would dictate the services XPressman provided to its customers and the manner in which those services would be provided.

While we wrote in *FLASH No. 53* that the *Schwann* decision was mildly disappointing, if the reasoning of *Schwann* continues to be applied favorably and uniformly in industry-related cases, as it was in *MDA*, these cases could potentially become the bellwethers of the industry, as a circuit court focuses on the application of market factors and forces to the logical effects of laws and regulations on a business's operational model. Bear in mind, though, that the saga of the Massachusetts "ABC" Test is not quite over. Prongs 1 and 3 of the Massachusetts "ABC" Test remain in play and are still being considered by the courts. We will continue to monitor further developments in *MDA* and *Schwann*. In the meantime, an "A—C" (or "1—3") test continues in place in Massachusetts. If you have any questions regarding this new development or how it may impact your independent contractor operations, the Benesch Transportation & Logistics team would be happy to have that conversation with you.

[1] We have referred to "Prong 2" as "Prong B" in previous editions of the *FLASH*. However, we use "Prong 2" here since the First Circuit officially adopted its use in the *MDA* decision.

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Richard is a partner with the firm's Litigation and Transportation & Logistics Practice Groups. He has been in the transportation and logistics industry, both as a businessman and an attorney, for over 40 years during which he has been heavily involved with the IC model within the trucking industry. His practice also includes advising and representing motor carriers, leasing companies, third party logistics providers, national shippers, large private fleets and water carriers in the domestic, non-contiguous trade lanes.

Allen is a partner with Benesch's Transportation & Logistics Practice Group. He focuses his practice on the representation of companies located throughout the country in virtually all segments of the transportation industry, including, among others, truckload carriers, overweight/over-dimensional carriers, bulk and tank carriers, dray carriers, and third-party logistics providers in matters involving, among other things, independent contractor/owner-operator issues, lost, damaged or stolen freight, freight charge collection, and transportation related service agreements.

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