CLIENT ALERTS & INSIGHTS

In Anticipation of Preemption: The U.S. Supreme Court Speaks (Sort Of . . . .)

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The transportation and logistics industry has been widely anticipating a decision from the U.S. Supreme Court as to whether or not it will accept for review two very significant cases involving the scope of the Federal Aviation Administration Authorization Act ("FAAAA"). The Court typically issues a decision with respect to certiorari on the Monday following its review of a case in "conference." Both cases were discussed at last week's "conference" of the justices. Today, however, the U.S. Supreme Court issued an order in which it denied certiorari in one case and remained silent with respect to the other. Each case is briefly summarized below.

Freight Broker Liability

In *Miller v. C.H. Robinson Worldwide, Inc.*, a shipper retained a freight broker to arrange for the interstate transportation of goods. The freight broker, in turn, retained a motor carrier to perform the actual transportation. The motor carrier's driver lost control of the vehicle while driving in icy conditions in Nevada. A third party suffered various injuries and commenced a lawsuit in federal court against, among others, the freight broker. The injured party claimed that the freight broker breached a duty to select a competent motor carrier.

The freight broker moved for summary judgment on the basis that such a claim was preempted by the FAAAA. The federal district court granted summary judgment in favor of the freight broker and concluded that the FAAAA preempted the plaintiff's claim because the claim had the effect of reshaping the level of service that a freight broker must provide in selecting a motor carrier to transport property. The federal district court also rejected an exception to preemption in the FAAAA for "the safety regulatory authority of a State with respect to motor vehicles."

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the federal district court. While the Ninth Circuit agreed with the lower court that the scope of the FAAAA was sufficiently broad to encompass the plaintiff's claim, the Ninth Circuit also broadly construed the so-called "safety exception" to save the plaintiff's claim from being preempted. The freight broker subsequently requested that the U.S. Supreme Court review the Ninth Circuit's decision.

Unfortunately, today, the U.S. Supreme Court declined to review the Ninth Circuit's decision. As a result of this extremely disappointing decision, the Ninth Circuit's decision remains the governing law in the Ninth Circuit, which encompasses Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington in addition to various U.S. territories. Freight brokers doing business in the Ninth Circuit will have to evaluate the implications of the *Miller* decision for their respective operations. However, as no other federal appellate court has spoken definitively as to the

scope of the so-called safety exception under the FAAAA and its effect upon freight broker liability, this issue will-and should-continue to be litigated in other courts across the country.

Independent Contractors

In contrast, the U.S. Supreme Court has not yet issued a decision regarding whether it will accept or deny review of the Ninth Circuit's decision in the case of *California Trucking Association, Inc., et al. v. Robert Bonta, et al*.

By way of background, AB5 codified into statutory law a rigid "ABC" test used for determining whether a worker is an employee or an independent contractor. On December 24, 2019, in a federal case brought by the California Trucking Association and others (collectively, "CTA"), CTA moved for a temporary restraining order to prohibit the enforcement of AB5 against motor carriers operating in California. Among other things, CTA argued that AB5 was preempted by the FAAAA. On December 31, 2019 (the day before AB5 was to become effective), Judge Roger T. Benitez issued a decision granting CTA's request for an emergency order enjoining the State of California from enforcing AB5 against motor carriers. The judge found that the "B" prong of the ABC test embodied in AB5 "is likely preempted by the FAAAA" because AB5 "effectively mandates that motor carriers treat owner-operators as employees, rather than as the independent contractors that they are." Judge Benitez later converted the temporary restraining order into a preliminary injunction. An appeal followed and, in April 2021, the United States Court of Appeals for the Ninth Circuit, unfortunately, reversed the district court's decision, finding that AB5 was not in fact preempted by the FAAAA. However, the appellate court stayed enforcement of its decision pending the outcome of CTA's request for the United States Supreme Court to review the appellate court's decision.

Surprisingly, the Court has not yet ruled one way or other as to whether it will accept or deny certiorari in CTA's case. That said, the legal and practical issues under FAAAA involved in CTA's case are quite different from the legal and practical issues under FAAAA involved in the *Miller* case. In other words, the destiny of the CTA's case is, naturally, not tethered to the Court's decision not to review the *Miller* case. Whether the Court will issue a decision with respect to certiorari in CTA's case later in the week before the Court recesses for the summer or instead waits until the autumn to make a decision, the status quo remains in place for the time being. In short, at least as of today, the State of California may not enforce AB5 against motor carriers operating in California.

For more information on these topics, contact a member of the firm's Transportation & Logistics group.

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