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The new e-commerce/home delivery retail distribution paradigm

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THE NEW E-COMMERCE / HOME DELIVERY RETAIL DISTRIBUTION PARADIGM

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ABSTRACT

The purpose of this article is to set forth a basic outline of the new e-commerce home delivery retail distribution paradigm. Special attention will be placed on how it is being implemented and the as yet unresolved contracting, regulatory and risk transfer issues involving selection, retention, and use of motor carriers, particularly for the rapidly developing final delivery of consumer goods.

PART I: THE TRADITIONAL RETAIL DISTRIBUTION MODEL

Traditionally, most retailers used inbound truckload shipments from suppliers to regional and district distribution centers (first mile). From distribution warehouses, these retailers serviced their stores using private or dedicated carriers for stop-off truckload or pedal run deliveries based upon store inventory needs. This traditional model has been augmented by hot shot or expedited shipments of urgently needed out-of-stock items or by using integrated LTL carriers and/or parcel delivery providers like USPS, UPS and FedEx for store or consumer deliveries. As a distinct and separate model, local delivery services, couriers and private carriage has been used to make deliveries from stores, restaurants and grocers of locally sourced goods.

Because of economic regulation, there was a limited choice of carriers and little or no competition for rates and service levels. Transit times were designed to suit the needs of limited "regular route" certificate holders with high fixed costs. Retail distribution involved first mile inbound logistics, pooled shipments to LTL carrier-owned break bulk termination locations for deconsolidation into LTL shipments distributed over a network of cartage agents and authorized short haul carriers.

Before deregulation and the popularity of big box retailers and mega malls, Sears & Roebuck, Montgomery Ward and others offered catalogue sales which avoided in-store inventory costs by drop-shipping ordered items to rural consignment facilities for customer pickup and payment. With the advent of deregulation, price competition was introduced. Flexible truckload and stop-off truckload service providers altered the traditional model. This led to the demise of many regular route commodity carriers whose unionized labor costs were non-competitive.[1]

The New Old Fashioned Way

There is some irony in the fact that three decades later, the new retail paradigm is a "new old-fashioned way" utilizing retailer controlled inbound truckload, pooled outbound, and less-than-truckload or parcel delivery final mile delivery with important distinctions. Make no mistake, from a distribution point of view, increased competition and choice created by e-commerce, more efficient inventory control and quicker and more flexible deliveries all mandate a radical reevaluation of inventory control and management that the new paradigm permits. Yet, the model is not the same across all retailers, regardless of commodity or weight. The "cheese has been moved" and e-commerce with expedited final mile home delivery is no fad.[2] Yet this article will examine latent issues with the new paradigm which questions the sustainability of the "free freight and free return" concept.

The new paradigm increases not only the need for final mile delivery services, it is driving investment and speculation in new retail warehouses that "… can sort packages closer to urban consumers and deliver them more rapidly."[3]

Factors Creating the New Retail Distribution Paradigm

A number of concomitant factors have led to a reexamination of the traditional retail distribution model. They include: (1) internet sales have offered consumers increased choice and cost competition; (2) technological advances and shipment tracking has permitted quicker, more dependable delivery times which reduce inventory and store stocking needs; and (3) productivity issues with truckload and stop-off truckload deliveries caused by the ELD mandate and the hours of service strictures have resulted in scheduling and detention problems that have made the traditional truckload and stop-off truckload paradigm less responsive.

The new paradigm offers the ultimate consumer the convenience of comparison shopping on multiple websites for durable goods with the promise of "free freight and free returns" when the final delivery and return cost can be absorbed in the retailer's margin or offered as a loss leader to increase market share and foster website loyalty.

As a result, many established retailers are following their customers' buying preferences for internet purchases and home delivery by developing hybrid models using the new paradigm to reduce inventories and direct sales expenses. Commentators suggest that traditional department stores, grocery chains and big box retailers and specialty chains are all moving to offer e-commerce and home delivery as a complement if not a replacement for in-store sales.[4]

What are the Segments of the New Paradigm?

The new paradigm has variations based upon the retailer's product line, the size of its shipments and whether inside home delivery and installation is required. Yet regardless of these variables, the traditional inbound and outbound logistics model is being irrevocably altered.

(a) First Mile

Previous inbound logistics involved truckload movements from suppliers to multiple separately-stocked, retail, distribution warehouses for storage and store replenishment. Under the new model, inbound logistics is typically coordinated through a handful of fulfillment centers with upstream pressure on suppliers for tighter and more expedited delivery times (inbound or first mile leg).

These up-supply chain demands, particularly in the grocery and wholesale big box segments, have resulted in penalties for late deliveries, rescheduling fees, waiver of mitigation and unreimbursed detention fees which continue to present challenges for suppliers and the inbound truckload carriers which serve them.[5] Exacerbating the supplier and carrier predicament is ELD enforcement of hours of service, contractual waiver of Carmack in the name of the Food Safety Modernization Act, and the enforcement of tightly scheduled delivery appointments which can be coercive and inconsistent with reasonable dispatch.[6]

In some instances, retailers have pushed home delivery responsibility upstream to the suppliers, paying only for deliveries accepted by the consumer. This practice has led to free astray issues, which many suppliers or manufacturers are ill-prepared to handle. (See "Free Returns" p. 1.)

(b) Middle Mile

Under the new paradigm, technology is used to rapidly sort and segregate thousands of SKUs (or Stock Keeping Units) at fulfillment centers, down to the individual item (including its size and color) for ultimate consignment to retail stores or for direct customer delivery. So-called "middle mile" is the term for the use of regularly timed, consolidated shipments from fulfillment centers to break up or cross-dock locations for final mile delivery.

This important middle mile portion is typically controlled by the shipper through private carriage, or under contract with truckload carriers or through brokers. Frequently, dedicated pools of trailers either owned by the shippers or third parties are used. Trailer pools allow loading efficiency, avoid loading and unloading delays and decreases wasted drive time. Contracting issues involved include the use of necessary trailer interchange agreements, trailer tracking and recovery issues, the need for physical damage insurance, and seals and SLC (Shipper Load and Count) issues.

Middle mile pool service, unlike just-in-time (or JIT) deliveries to automobile assembly plants is particularly subject to seasonal customer-driven spikes. The Christmas "rush" can spike first mile and middle mile costs to obtain excess capacity, particularly when the customer expects same or next day delivery.

(c) Final Mile

The biggest change in the new paradigm and the source of the greatest confusion and controversy is the "final mile" segment. Depending upon the nature of the retailer and the product mix, after deconsolidation "final mile" deliveries are made for store replenishment, to stores for customer pickup of ordered items or for direct home or job site delivery to customers.

Under the new paradigm, small packages consigned for home delivery may be tendered to the post office (USPS) for mailbox deliveries. Consolidated or larger shipments including home delivery of furniture and appliances are typically tendered to operators of straight trucks weighing more than 10,001 pounds. Yet, much of the "final mile" home delivery service is now being provided in sprinters or cargo vans weighing less than 10,001 pounds (hereinafter referred to as Small Delivery Vehicles or SDVs). It is this new element of the e-commerce/ home delivery model which creates the greatest confusion and problems.

Variations of the New Paradigm

It is beyond the scope of this article to describe the model permutations most useful for specialty retailers but some examples of the variant models should be informative:

(a) E-Commerce Retailers

The so-called Amazon model began as primarily a pure e-commerce alternative to local brick and mortar retailers. "Mr. Bezos (Amazon's founder) saw that quick delivery could change how people buy things. Price and selection have always been important in retail but delivery would surpass store location as another critical factor." Amazon now has over 110 fulfillment centers in North American and is setting up warehouses in major cities to provide for same-day or one-day service of more products.

Amazon "… keeps working to add faster and even more convenient delivery options" becoming an expedited distribution company in competition with FedEx and UPS, providing not only a product sales platform with distribution and final mile delivery, but transportation services utilizing its own equipment for products not marketed through its website."[7]

In this context, Amazon is rapidly expanding its e-commerce home delivery niche, pushing its own delivery service in competition with FedEx and UPS.[8] With its acquisition of Whole Foods and local warehousing it evidences its intent to invade the grocery store delivery market previously provided by private retailers or local delivery services without much structure. It has become the retailing behemoth whose size and seemingly unlimited resources is allowing it to develop retail stores and to get manufactured and market its own proprietary products. As traditional retailers move to increase online sales, e-commerce retailers are moving to establish permanent store locations to attract new customers. Online retailers are predicted to open at least 850 stores in the next four years.[9]

Amazon's size and seemingly unlimited resources are allowing it to develop retail stores and to

FIGURE 1
PERCENTAGES OF U.S. RETAIL E-COMMERCE SALES

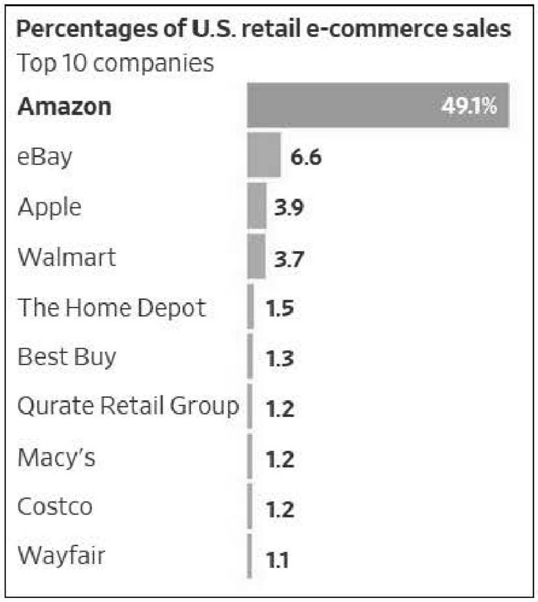
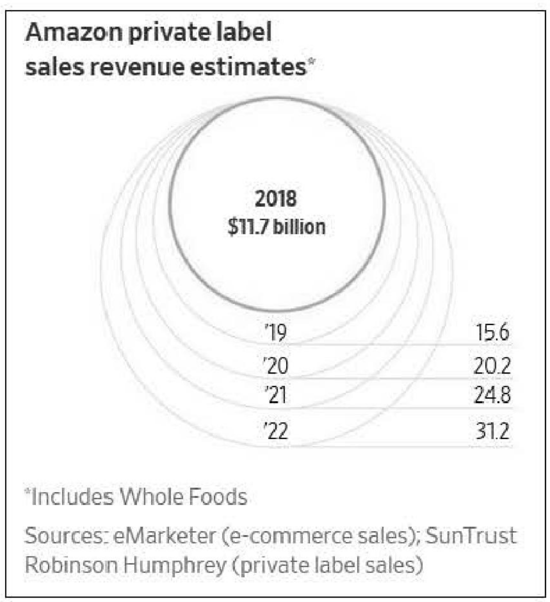


FIGURE 2
AMAZON PRIVATE LABEL SALES REVENUE ESTIMATES



produce and market proprietary items such as books.[10] Its e-commerce market share already totals approximately 50% of the total and private label sales are projected to increase as the following charts show in Figures 1 and 2:

(b) Department Stores

"To remain competitive for the ever-increasing expedited home delivery model, department stores are not only expanding their online website offerings, they are changing their store delivery models in an attempt to play offense," Marc Lore who runs Walmart's U.S. e-commerce, says.[11] These traditional retailers are trying to leverage their physical stores as a way for people to order online and make drive-by pickups as well as order non-stocked items requiring assembly for expedited focused delivery using the new fulfillment model.

E-commerce offers with a variety of color, style and size options to apparel consumers not available at a typical department store or shopping center boutique. With store inventories shifting and in-store fitting options, the new paradigm, like the old Sears and Montgomery Ward catalog stores, can bring customer ordered product to smaller footprint retail locations for customer pickup without excessive in-store inventorying. Online retailing with email advertising has become an effective marketing tool for chain retailers which can reduce marketing costs with easy to adjust promotional in-season sales to avoid overstocks.

"Many retailers with stores also touted a buy-online, pickup in store option available throughout Christmas Eve to fulfill last minute gift needs. Overall, sales in that category grew 47% from November to December 19 according to Adobe."[12] Online sales and pickups are credited by Walmart for increasing customer visits and per store revenue in the last quarter.[13]

(c) Hybrid Models

Grocery chains and shopping club warehouses have adopted portions of the new paradigm to reduce costs, compete with internet sales and the home delivery/final mile model. With the exception of mail order specialty items, grocers selling perishable commodities are typically serviced from locally stocked in-store inventories. Urban delivery services of groceries and fast food from store inventories is nothing new, nor an issue which has been subject to federal or state regulation.

Like Uber and Lyft services, final mile grocery and food order deliveries have traditionally been provided by part-time contractors in their own vehicles without addressing the federal and state labor overtime and worker's compensation issues. The proliferation of class action suits alleging misclassification of similarly situated contractors has a spill-over effect from issues being litigated in the "big truck" arena, suggesting possible unforeseeable future risks.

Clearly, the attractiveness of the in-store shopping experience, bulk pricing discounts and special promotional sales campaigns attest to the continued viability of the multi-item warehouse store that mixes bulk sale of grocery items with a vast array of consumer goods. Yet a recent survey by the Food Manufacturers Association notes that 77% of shoppers are price driven. This competition on prices has obviously put pressure on the suppliers and first mile inbound logistics. At the same time, consumers covet the convenience of home delivery of groceries and meals ready to eat.[14] As a result, grocery chains and shopper clubs are offering home delivery of locally stocked goods and where relevant, home delivery of vendor or fulfillment centered stocked electronics and more expensive durable products.

Fierce price competition has been reported as causing wholesale grocers and warehouse retailers to squeeze suppliers and trucking companies to offer more for less.[15]

(d) Hardware and Construction Supplies

Big box home and garden retailers offer a plethora of choices and convenience for handymen and professional contractors. E-commerce is viewed as complementing, not replacing in-store sales. These retailers can have as many as 200,000 different SKUs (Stock Keeping Units) ranging from multiple size bolts and screws to building supplies, lawnmowers, seasonal furniture and plant material. Construction projects may require scheduled job site deliveries with flatbed and forklift service.

Yet, the fulfillment center/e-commerce model allows a full array of SKUs to be advertised without inventorying slow moving or seasonal campaign material at every store. More centralized national purchasing and replenishment can reduce inventory costs. By using technology, interim distribution warehousing can be reduced to half a dozen or more fulfillment centers nationwide from which outbound pools can deliver specialty orders either to final mile providers for direct to customer delivery or to nearby stores for customer pickup. This fulfillment model, retailers claim, can offer one or two day delivery to as many as 90% of the population. Even with the redundancy of the final mile portion (be it in an SDV, straight box truck or flatbed), this model can allow for better inventory control, flexibility and customer satisfaction.

(e) New Furniture and Appliances

This retail segment has been under significant distribution changes since deregulation. Traditionally, case goods and upholstered furniture were among the most prized and expensive retail purchases. Yet new furniture is no longer considered a family heirloom. Production has been moved overseas. Comparative costs have dropped. Large showroom retailers with their own private fleets have emerged. Most new furniture is manufactured and boxed overseas and brought onshore for home delivery as well as in-store sales.

In-home delivery of new furniture and the installation of appliances and some electronics create specialized last mile service needs, including straight trucks (CMVs weighing more than 10,001 pounds gvw). Drivers may need helpers and assembly or installation expertise. As a result, this niche requires special handling and home delivery is now provided by established furniture specialists and by large truckload and LTL carriers which are expanding into the field.

In-home delivery creates the possibility of different tort related claims and insurance issues. Driver background checks and commercial general insurance for non-auto related personal injury and property damage liability is important. Home delivery of furniture and appliances typically requires expertise and special handling which creates a niche service with its own challenges. In addition to traditional furniture haulers, major truckload and LTL carriers are seeking to enter this area with expanded service for their core shippers.[16]

Lower Distribution and Transportation Costs is the Key

The goal of various e-ecommerce models is for the retailer to reduce its freight-on-board (FOB) delivered price while protecting or increasing its margin. Ultimately, the new distribution paradigm is a model which must be fine tuned. Retailers are attempting to reduce inbound first mile logistics costs by increasing demands for narrow expedited delivery windows on truckload shipments with penalties for late deliveries and no detention.

In the middle mile segment, expedited pool deliveries can be facilitated by avoiding live loading and using shipper-controlled trailer pools. Yet small carriers accepting "power only" moves complain being stranded at destination" with no alternative but to accept a noncompensatory return load to get back home. Otherwise, the transportation costs on these two legs are based on backhaul capacity and the limitations of federal safety regulation governing Hours of Service applicable to operators of straight trucks and semis.

For both first and middle mile segments, the use and survival of the independent contractor model offers a competitive cost advantage and encourages productivity.

The Importance of the Independent Contractor Model on Cost Reduction

Retailers in fierce price competition have typically avoided the expense of increased labor cost and liability of private carriage with company drivers. Since deregulation they have, to a great extent, used licensed, authorized and insured carriers which in turn retain owner-operators to provide flexible truckload and stop-off truckload services. The owner-operator model which utilizes "independent contractors" which lease equipment with drivers to carriers is supported by the so-called truth-in-leasing regulations. It provides a roadmap for how carriers should treat independent contractors which operate in interstate commerce. *See* 49 C.F.R. 376.

Also, there is a traditional federal control test applicable to interstate carriers that has been used to justify favorable small business tax treatment of blue collar entrepreneurs who own equipment and provide it with drivers to carriers. An estimated 800,000 small businessmen follow this model. Numerous states have recognized exemptions from state law employment treatment for owner-operators which comply with the federal leasing regulations and/or meet the 20 part federal control test. Yet, the independent contractor model is under great pressure under various state laws for alleged "misclassification." That is the argument that the owner-operator model somehow unjustly deprives the working man of employee benefits such as unemployment compensation, worker's compensation and other welfare benefits.

E-commerce retailers led by Amazon are attempting to hire third party delivery companies called "Independent Service Providers" or "ISPs" to provide final mile deliveries.[17] Under this model, the ISP accepts the liability for compliance with all federal and state safety, insurance and employment laws, shielding the retailer from up-supply chain exposure and acting as independently contracted carriers, in turn hire owner-operators as subcontractors who are paid based on the work performed, not by truckload.

The premise of hiring an ISP and shifting the compliance burden to qualified independent contractors is a practical model, particularly when the ISP can be vetted as a carrier under federal regulatory standards and has appropriate insurance. Yet systems must be in place to assure the retailer that it can be properly indemnified and held harmless from up-supply chain so-called "vicarious liability" and that it will not otherwise be held liable for negligent selection or co-employment status.

PART II
UNRESOLVED ISSUES WITH FINAL MILE DELIVERIES CREATE SIGNIFICANT ISSUES WHICH AFFECT THE EFFICACY OF THE NEW PARADIGM

FedEx, UPS and other established carriers with home delivery networks remain, and USPS provides significant last mile home delivery through zone skip mini pools delivered to mail centers for home delivery at volume rates. But the postal service is reexamining its discounted rate structure and increases are expected.[18]

In order to fully develop the new paradigm and compete on cost, offering "free freight and free returns" many retailers are being driven to set up and control their own less costly e-commerce delivery systems. With established first and middle mile transportation service providers readily monitored and subject to federal motor carrier safety regulations, it is the final mile piece that poses the greatest risk and challenges.

As a result, e-commerce retailers are encouraging new entrants to enter the home delivery market as independent service providers with not only straight trucks but non-commercial motor vehicles such as cargo vans, sprinters, pickups, and passenger vehicles (hereinafter referred to as "Small Delivery Vehicles" or "SDVs")

Vicarious Liability and the Vetting of Last Mile SDV Operators

By far the biggest issue in the selection and use of transportation service providers is the possible vicarious up-chain liability arising out of property damage and personal injury caused by the carrier. Under the commerce clause and the doctrine of preemption, federal law can trump state law in the name of uniformity with preemptive effect. Preemption can be so-called field preemption, implied by statute when the intent of Congress is evidence that state law shall have no effect, or expressly stated in a statute.

For the past 15 years, beginning with *Schramm v. Foster*, 341 F. Supp. 2d 536 (D. Md. 2004), the major issue facing the trucking industry has been the application of federal safety rules and their effect in exacerbating shipper and broker liability for accidents.

With respect to commercial motor vehicles weighing <u>10,001 pounds gvw or greater</u> (called a "Commercial Motor Vehicle" or "CMV"), it is clear the Federal Government has exercised preemptive effect and has established not only Federal Motor Carrier Safety Rules but also assigned the job of determining whether carriers are safe to operate on the nation's roadways to first, the ICC and then the Federal Motor Carrier Safety Administration.

While there has been much litigation over what vetting duties and obligations a shipper or broker must have in the carrier selection process, the FMCSA is charged only with determining that interstate operators of commercial motor vehicles are "safe to operate on the nation's roadways." See 49 U.S.C. 31144. These federal vetting requirements do not apply to operators of small delivery vehicles (SDVs) weighing less than 10,000 pounds.

On the one hand, major retailers expect final mile delivery service to meet federal insurance requirements applicable to larger trucks and comply with all federal and state laws including the standards set forth in the Federal Motor Carrier Safety Regulations. The following chart in Table 1 shows that there is no uniformity or consistency in the application of federal safety regulations to the transportation of interstate shipments based on the size of the vehicle used. In fact, SDVs weighing less than 10,001 pounds gvw are not subject to federal safety regulation with few exceptions. The equipment is not required to be placarded with the name of the owner. The drivers are not required to have driver qualification files. The equipment does not have to pass periodical maintenance and inspection standards, and importantly, there are no hours of service requirements to preclude fatigued driving.

Although Federal Motor Carrier Safety Regulations including hours of service do not apply to vehicles weighing less than 10,001 pounds gvw, whether SDV providers are handling interstate or intrastate freight otherwise can make important differences. The Truth-in-Leasing regulations applicable to owner-operators (49 C.F.R. Part 376) and cargo claims rules and statutes apply (49 U.S.C. 14706,

TABLE 1
FEDERAL MOTOR CARRIER REGUALTIONS BY TRUCK TUPE AND GVW

Truckload	Straight Truck	Small Delivery Vehicles
> 26,000	> 10,001	< 10,001
FMCSR regs apply	FMCSR regs apply	No safety/non-CMV
$750,000 BI&PD	$750,000 BI&PD	$300,000 BI&PD
49 CFR §376	49 CFR §376	49 CFR §376
HOS apply	HOS apply	HOS does not apply
		No placard

49 C.F.R. Part 370) to the SDV drivers handling these interstate shipments. Additionally, SDV operators in interstate must have a minimum of $300,000 insurance limits applicable to all equipment (49 C.F.R. 387.303).

FMCSA certification that an operator of a CMV in interstate commerce is fit to operate on the nation's roadways provides a simple vetting standard for operators using straight trucks and semis in interstate commerce. Evidence that a carrier has been vetted by the FMCSA and is properly licensed, authorized, and insured is the vetting standard customarily used by shippers and brokers. It offers the best defense against lawsuits based on state law causes of action such as negligent selection and negligent entrustment.

Yet with respect to operations of SDVs, the absence of federal preemptive fitness determination standards and enforced safety requirement creates confusion, vetting problems and the opportunity for the application of diverse and inconsistent state laws. This makes the qualification and use of SDV delivery services, and new entrants, in particular, a more difficult and risky proposition.

The following Federal qualification standards to not apply to SDV operators in interstate commerce: (1) driver qualification and background checks; (2) random drug and alcohol tests; (3) equipment, maintenance and repair standards; (4) enforcement of hours of service requirements to prevent fatigued driving; and (5) recordkeeping requirements. New entrants are required to pass a new entrant audit and a carrier loses its right to operate if its liability insurance is canceled. Commercial motor vehicles must bear the name of the licensed carrier and its docket number. Under the MCSAP program, the states are paid millions of dollars annually to inspect commercial motor vehicles in accordance with standards the FMCSA sets and to log carrier violations into a database for the agency to use as an enforcement tool leading to a possible safety audit and termination of the carrier's right to operate. None of these safety requirements or carrier vetting standards apply to use of SDVs. See 49 C.F.R. 386 *ff*.

So how does a shipper or broker vet an SDV carrier if the federal safety regulations do not apply and the SDV operator has not been certified by the FMCSA as safe to operate on the nation's roadways?

The different final mile contracts being circulated by retailers and their brokers belie any consistency or consensus. Many SDV shipper contracts track their interstate contract for operators of straight trucks and semis, ignoring both the intrastate v. interstate and the noncommercial motor vehicle issues discussed herein. These contracts typically include contractual requirements of compliance without treating the unique SDV issues discussed.

Some retailers, who appear to have no corporate expertise in transportation, apparently conclude that the legal issues are beyond them and attempt to hire third party logistics companies that will manage a suitable vetting program as they see fit and offer indemnity against up-supply chain liability including labor and safety issues if they fail to do so. The result of this approach is frequently contract terms which treat SDV providers as independent contractors under state law and which require up-supply chain indemnity. Insurance limits may be inserted, but independent vetting is costly and difficult to manage.

In some instances, a retailer or 3PL will insist that a third party contracting service historically involved in the courier industry review, vet and transmit payments to the SDV provider. These services, typically used to vet owner-operators for courier services, may offer information concerning state compliance issues and may assist with obtaining occupational accident insurance but do not indemnify the retailer or 3PL against misclassification or other employment and safety liabilities.

Finally, established 3PLs and motor carriers with final mile experience appear to be more sensitive to the SDV issue. So far, many have been able to hold off on their use of SDVs and limit their final mile offering to the straight trucks which are subject to

FMCSA safety regulations and use federal truth-in-leasing requirements for owner-operators.

Insurance Issues with SDVs

The typical risk transfer devices in shipper and broker contracts with motor carriers include broadly worded indemnity language and proof of applicable insurance to protect the customer from up-supply chain liability. Usual insurance requirements for carriers utilizing commercial motor vehicles is as follows:

(1) Auto Liability (called BIPD) in the amount of $1,000,000 per occurrence.
(2) Commercial General or General Liability Insurance in a similar amount.
(3) Cargo insurance in the minimum amount of $100,000 per occurrence.
(4) Worker's compensation as required by state law.

These requirements are often accompanied by a certificate of insurance and warranty of coverage. Unfortunately, obtaining and verifying similar coverage in these amounts for carriers using SDVs creates problems.

(1) Auto Liability

Federal insurance requirements applicable to CMVs operating in interstate commerce require a $750,000 minimum with coverage endorsement (MCS-90), confirmed by a federal filing which assures a retailer that a qualified insurer will pay any third party property damage or personal injury claim up to that amount for which the carrier becomes legally liable. The advantage of the endorsement is it ultimately applies to any commercial motor vehicle used by the carrier and no further examination of the service provider's individual policy is required.

This is not so for SDV operators, few of whom make filings. In this context, a systemic problem in vetting carriers which provide hot shot services or interstate expedited delivery utilizing SDVs has been liability insurance verification. Without the substantial federal filing requirements, there is no assurance from a certificate issued by an insurance agent (a COI) that the policy as written covers "any auto." Because non-CMV vehicles need not be placarded and the drivers are not required to be vetted, there are real issues determining whether the insurance is in place for subcontracted independent owner-operators.

In this context, although the risk of catastrophic loss is low, the premiums charged to SDV operators for $1,000,000 million per occurrence auto liability is frequently at or above the big truck cost and can total $18,000 per month – a major cost factor to be considered.

All too frequently, an SDV operator, assuming its same state operations are intrastate, will procure coverage meeting the state law minimums. This can be as little as $24,000 per occurrence. SDV operators utilizing cars and pickups frequently do not have coverage which extend to commercial uses. The result can be major coverage gaps which create defaults in promised coverage which sprinter and van operators lack the resources to make up.

(2) Commercial General Insurance

This type of insurance covers personal injury and property damage caused by a carrier which is not related to auto liability. While this type of coverage is frequently waived in contracts with licensed and federally regulated truckers, it is more important for final mile delivery when in-home delivery, installation and personal injury to homeowners and their property are more likely to occur.

Tort claims against carriers regardless of the size of equipment used poses real problems when in-home deliveries are made. Carriers and brokers entering the final mile arena report increased property damage and personal injury claims including assault and battery with unanticipated liability and insurance cost results which warrants insisting that final mile carriers maintain commercial general insurance.

(3) Cargo Liability

Unless special accommodation is made, a home delivery "free freight and free return" offered to the e-commerce/home delivery buyer can create an exacerbated cargo claims handling problem. The last mile delivery company may be making doorstep drops and not be present when the package is opened. Allocation of concealed damages between first, middle and final mile is a seemingly impossible task. As a result, insurers are particularly unwilling to underwrite cargo for final mile deliverers without high deductibles. Moreover, cargo policies often include exclusions for theft; and the claims handling expenses for parcel deliveries can be cost prohibitive.

(4) Worker's Compensation

A major labor law issue affecting the use of SDVs in final mile service is the application of state worker's compensation laws. In most states commercial drivers, acting as true independent contractors who own and lease their equipment to authorized carriers under Part 376 leases can be classified as independent contractors involved in a separate trade or business, if not subject to excessive control by the carrier. Led by California and Massachusetts, there is a trend to change the so-called ABC Test for determining whether a driver is an employee or contractor for worker's compensation purposes. Conflicting rulings on the preemptive effect of federal law in the 9th and 1st Circuits and the declination of the Supreme Court to decide the issue has left uniform treatment of inconsistent state laws in shambles. Potential greater exposure exists if final mile is deemed intrastate only and not otherwise affecting an SDV's routes, rates or services.[19]

In this context is the FMCSA finding that federal law trumps the California meal and rest break rule as a matter of federal preemption has been challenged by the California Labor Commission in the 9th Circuit.[20] The federal preemption argument is harder to make for operators of SDVs which cannot claim federal hours of service rules and uniform FMCSA safety rules apply.

Contracting with owner-operators in 49 C.F.R. 376 compliant leases gives structure and favorable federal tax law treatment based upon previous IRS rulings and establishes a compliance template if strictly adhered to.

Misclassification exposure and up-supply chain liability for worker's compensation can be a serious problem under state law for the customer who attempts to micromanage and control the operation of the SDV service provider which lacks the resources to make good on its contractual indemnity obligations. Retailers and brokers who retain operators of SDVs have been sued under "cut through" theories when SDV carriers were found to have failed to procure worker's compensation under state law. (See *Collins v. Seko Charlotte*, Case No. 27519 (SC 04/29/15); *Young v. Act Fast Delivery of W. Virginia, Inc.*, No. 5:16-CV-09788, 2018 WL 279996 (S.D.W. Va. Jan. 3, 2018)).

Are Typical E-Commerce Deliveries Shipments Moving in Interstate Commerce

A major contracting issue involving final mile delivery between points in the same state, regardless of the size of equipment used, is whether a final mile delivery between points in the same state is an interstate shipment when it is pooled into the state for ultimate customer delivery.

This issue was addressed by the Interstate Commerce Commission in 1992 in an Administrative Ruling entitled "Policy Statement – Motor Carrier Interstate Transportation – From Out of State Through Warehouses to Points in the Same State, *Ex Parte* MC-207." Therein, the Agency established guidelines to be used to determine if property "temporarily stored in a warehouse or distribution center before moving to its final destination" moves in interstate commerce rather than intrastate.

The Commission found: "The controlling element in determining whether traffic is interstate is if the shipper has a fixed or insistent intent to have the shipment continue in interstate commerce to its ultimate destination."

The Commission concluded that the presence or absence of any of the following factors did not constitute a break in the continuity of interstate commerce at the warehouse. Those factors included: (1) the shipper's lack of knowledge of the ultimate destination or consignee at the time the shipment leaves; (2) whether separate bills of lading for inbound and outbound movements are issues; (3) storage and transit tariff provisions; (4) storage receipts issued by the warehouse distribution center; (5) time limits on storage; or (6) payment of transportation charges by warehouse or distribution center.

Based on this precedent, final mile deliveries between points in the same state would be a continuation of interstate shipments. All FMCSA regulations (including safety, insurance and Hours of Service) would apply to straight trucks and semis. But SDVs have only uniform federal rules governing minimal insurance, cargo claims, and the truth-in-leasing regulations.[21]

Traditionally, the local pickup and delivery of passengers and packages have been provided within commercial zones and left to taxicabs, grocery and pizza delivery contractors without much regulatory attention. The lack of regulatory structure and the political environment surrounding class action overtime, worker's compensation and misclassification issues, results in additional risk of litigation for this segment of the new paradigm. As Uber and Amazon build out an independent contractor model based on application of state law principles, the field is ripe for class actions involving possible misclassification of drivers as independent contractors – an issue which is more easily defended against if there is strict compliance with federal truth in leasing requirements.[22]

Given the vicissitudes of state law, it would seem prudent for shippers and carriers to ultimately rely on an independent owner-operator model and to embrace the leasing regulations of §376 as an established template for retaining owners of SDVs whether directly or indirectly.[23]

Reliance on these federal standards gives some consistency to establishing uniform control, insurance and claims handling practices and a standard for distinguishing recognizable federal instrumentalities of transportation and permissive control issues which become particularly troublesome if left solely to state law.

In this context, it is to be noted that beginning approximately six months ago, some sophisticated shippers began including final mile carrier compliance with the federal leasing standards (Part 376) as a prerequisite for retaining independent contractors as final mile service providers.

Overtime and Hours of Service Issues with SDVs

Class action lawsuits seeking overtime pay for drivers are proliferating against carriers which are subject to the federal hours of service requirement. Particularly prevalent as part of misclassification suits are claims that the driver is an employee and not an independent businessman. The Fair Labor Standards Act which generally requires the payment of overtime after 40 hours, contains an exemption for commercial motor vehicles operating pursuant to the hours of service requirements established by the Secretary of Transportation. Yet the Department of Labor expressly provides that federal exemption from overtime pay that applies to equipment which weighs greater than 10,001 gvw does not apply to SDVs.[24]

Thus, drivers of CMVs in interstate commerce found to be employees are entitled to $1,050 per week when on duty 70 hours at $15 per hour. Yet, with SDV (vans or sprinters) drivers classified as employees would be entitled to $1,275 or $225 more due to the application of overtime pay after 40.

In *State of New York v. FedEx Ground Package*, Case No. 402966, the Attorney General entered a settlement for payment of overtime to 500 package delivery drivers which the state claim were misclassified as contractors rather than employees.[25]

Thus, overtime pay disputes and the possibility of class action liability would seem a great risk for those who hire drivers or misclassified owner-operators and their customers. Complicating the issue is the fact that final mile delivery drivers are frequently paid not an hourly wage, but by the number of packages delivered or the routes run, regardless of congestion and times spent. In *State of New York v. FedEx Ground Package*, Case No. 402960 / 2010, the Attorney General of New York entered a settlement on December 20 with FedEx for payment of overtime to 500 package delivery drivers which the state claimed FedEx misclassified as contractors rather than employees.

The Boston Globe has reported on retailer "flex offerings" which labor lawyers say "bank on the fact that workers are looking at that big number" but not deductions for equipment, insurance and fees.

Whether done directly or indirectly by encouraging new inexperienced ISPs, developing a dedicated home delivery system for parcels which ultimately relies upon the independent contractor status and favorable tax treatment of SDV operators is risky business. As final mile deliveries, including restaurant and grocery delivery of locally sourced items become more prevalent, litigation over the model will surely increase.[26]

As the new paradigm expands to include store to customer two hour service using route pricing overtime, worker's comp and state law benefits will undoubtedly create new challenges.

Major splits in the circuit over state law encroachment on the independent contractor model are focusing on whether state welfare and misclassification laws violate federal preemption and the requirements that states may not make rules which affect interstate routes, rates and services. See *Massachusetts Delivery Ass'n v. Coakley,* 769 F. 2d 11 (1st Cir. 2014); *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018).

Clearly, the systemic issue with use of SDV equipment for final mile delivery services is largely dependent upon the ultimate success of the independent contractor model. If the ultimate driver cost, whether borne directly by the retailer or a retained so-called Independent Service Provider (or ISP) as Amazon proposes, requires full driver wages, benefits, insurance, cost of equipment and fuel, the allocated up-supply chain cost of using SDV operators would be prohibitive. If state law applies to the use of SDV operators, retailers cannot count on a poor man's indemnity and must assume the risk of inconsistent state law.

In this context, Amazon reportedly is not hiring drivers but is hiring companies that will employ drivers following the model of hiring "independent service providers." The Journal of Commerce noted in this context: "This issue of are these contractors or employees is not going to go away, especially with union membership on decline."[27]

If final mile delivery, particularly where SDV equipment is used, is not considered interstate freight and subject to uniform treatment of independent contractor status, state and local labor laws will create major obstacles for the new paradigm. A harbinger of things to come may be Amazon's decision to withdraw its announced creation of 25,000 new jobs in the state of New York following the statement of New York Mayor de Blasio: "We are a union town," … "there is going to be tremendous pressure on Amazon to allow unionization and I will be one of the people bringing the pressure. I believe that ultimately that pressure will win the day."[28]

If home delivery costs are left to the vicissitudes of state labor laws and independent contractor issues, offering free freight to all on uniform pricing and slim margins will be difficult to sustain.

PART III
OTHER POTENTIAL PROBLEMS IN IMPLEMENTATION OF THE NEW PARADIGM

In addition to the serious vetting, regulatory insurance and contracting issues with final mile deliveries discussed above, a sober assessment of the model requires consideration of several remaining issues:

Reasonable Dispatch

The common carrier standard for interstate motor carrier service is "reasonable dispatch." That term is defined in the uniform bill of lading as, "No carrier is bound to transport said property in time for any particular market or otherwise than with reasonable dispatch."[29]

The public expects, and carriers are required to provide reasonable dispatch; however, expedited service beyond the carrier's standard holding out is usually provided at additional cost. In the retail environment, these additional costs for expedited service have traditionally been addressed in the e-commerce environment with higher delivery cost options charged and passed on by the retailer to the integrated national parcel delivery provider with whom it contracts.

The promise of "free freight and free returns" has proven to be an attractive marketing tool which presupposed that the real cost of premium carrier delivery services can be mitigated by reduced inventory costs.[30] The free freight and free return promise necessitates rock bottom pricing, guaranteed expedited service, and a system for handling free astrays.

The automotive industry has been following a lean logistics model for years, insisting on just-in-time (JIT) deliveries from suppliers to avoid inventory costs. Frequently managed by third party 3PLs, JIT automotive contracts can impose draconian penalties on their suppliers and carriers, including charter plane service requirements if scheduled appointments are missed. The retail industry, with overseas suppliers, difficult to forecast seasonal sales, and far more SKUs is pushing its suppliers and carriers to obtain consistent expedited service with far more variables including penalties without premium pricing. Excessive use of telemetrics and demand for time of delivery can be considered coercive and subject the shipper to additional contaminating "control" issues under state and federal law.

Free Returns

Under general principles of federal transportation law, the statutory obligation of carriers for cargo loss or damage claims is "the full actual value of the damaged or lost articles" subject to the consignee's obligation to mitigate damage, inspection of a damaged article, and salvage.[31] The "free returns" sale offerings of internet retailers is a reflection of a relatively new shipper-initiated contractual substitute for accepted statutory claims handling. Retailers and grocery houses in particular, increasingly insist their suppliers on prepaid or their carriers on collect shipments waive their duty to mitigate, permit the rejection of any shipment which fails to make an appointed delivery, and absorb or waive any detention to arbitrary restocking fees.

These contractual requirements outrun the cargo insurance terms available to most service providers, making hash out of established claims resolution procedures. When this right to simply reject delivery for any reason is extended downstream to the home consumer, established claims procedures become irrelevant.[32]

The following examples will demonstrate these risks:

Example 1: A substantial middle mile carrier specializing in expedited service under contract with an e-commerce retailer delivered thousands of home furnishing shipments to final mile carriers for home delivery. Each shipment was carttoned. The majority of shipments originated overseas and the contents were not examined. Without rejection, the delivering carriers accepted all tenders, marking on bills of lading any superficial damage to outside containers.

The e-commerce retailer filed no cargo claims and ultimate disposition of the shipment was not made known to the middle carrier. When the e-commerce retailer defaulted on its freight charge payment obligation, it filed notice of 3,048 claims totaling $2.7 million which it offset against freight charges otherwise due and owing. The ultimate disposition of the cargo and value of the claims was never determined due to the insolvency of the e-commerce retailer which in turn precipitated the insolvency of the carrier.

Example 2: Free Astrays. A big box retailer contracted with a high-end overseas furniture manufacturer to fulfill internet sales order FOB home delivery contingent upon the consumer's acceptance and payment of the order.

The manufacturer shipped furniture to the U.S. for subsequent distribution and hired an established furniture hauler to deliver consolidated shipments to a Canadian distribution carrier for delivery. Over a short period of time, $50,000 worth of furniture was rejected by consumers throughout Ontario for unidentified reasons. When the big box retailer rejected payment for failure to make delivery, the shipper learned that the Canadian carrier was holding the shipments as free astrays and asserted its lien for delivery, recovery and storage.

Example 3: Seasonality. Depending upon the items, product characteristics like seasonality, shelf life, and surge demand test the ability of the new model to offer the lowest cost and make expedited deliveries without paying premium pricing. In this example, a big box retailer, apparently after negotiating a substantially discounted price on lawn furniture, offered the home and retail delivery portions for bid to several experienced freight forwarders. The winning forwarder, relying on established relationships with established expediters, undertook the job at unsustainable rates. In response to slow pay inquiries, it stated that payment from its customer was slow. As a result, the carrier asserted their liens, stopped delivering the seasonal lawn furniture and notified the forwarder's customer. The forwarder filed for bankruptcy. Millions of dollars in unpaid freight charges were left outstanding. Scores of final mile expediters were left with hundreds of sets of lawn furniture lined up and ready for a yard sale pending amicable resolution of the issue with the retailer.

Clearly, engineering and cost-effective return programs for e-commerce is a major issue. The National Retail Federation reports 58% of all shoppers were expected to return holiday gifts. Shippers and retailers are working with their logistics providers to shore up their returns and restocking programs. Large technologically savvy 3PLs are testing technology solutions for viable reverse logistics programs.[33]

The large number of concealed damage claims and otherwise rejected home delivery shipments resulting from the "free returns" offering is forcing suppliers, retailers and carriers to rethink traditional claims adjustment programs and establish claims, rebates or allowance programs to benchmark and allocate risk and salvage without establishing thousands of claims for low value goods.

Transportation Costs is the Ultimate Issue

The cost to retailers of e-commerce home delivery model and the "free freight and free return" sales proposition is the ultimate issue. Amazon, the industry leader in the development of the new paradigm, is reported to have increased its gross sales by 20% and is now the largest capitalized corporation in the world yet its stock valuation has lost 25% in the last quarter. See "Amazon Takes Top Market Cap Crown," WSJ 1/8/19 at B3.

Whether the risk of increased labor costs and vicarious liability, the regulatory uncertainty by final mile deliveries and other issues set forth above have any effect on its market price is difficult to tell. Yet, Amazon has recognized a new acronym which is clearly a driving factor in its establishment of the new distribution paradigm. "CRaP" stands for "Can't

Realize a Profit." This is the term it applies when the delivery cost of low value items is too great to be absorbed in its sales margin, resulting in home delivery of many SKUs being loss leaders. Amazon's response, like the reported response of grocery houses and big box retailers with whom it competes is to increase its profit margin by recognizing additional supply chain and procurement savings at the expense of its vendors and carriers. As a result, suppliers are pushed to cut costs or increase the value of retail sales price of values shipped, with continuing pressure to reduce transportation costs of first, middle and final mile carriers.

Recent reports that Amazon intends to "insert its transportation spend" is adding to carriers' reluctance to serve it. Transport Topics reports Amazon is curtailing business with XPO losing \$600,000,000 annually and intends to set up its own competitive for-hire distribution network to compete with FedEx, UPS and other similar motor carriers. [34]

Retailer volatility and bankruptcies such as Toy-R-Us and Sears exacerbate the turbulence created by the new model clearly resulting in new risk and price pressure on suppliers and transportation service providers in particular. Many traditional truckload, LTL and expedited delivery carriers seem to believe that the CRaP acronym applies to them and have concluded that, as of now, the risks are too great; and the costs are too high to make a profit under the service terms and rates retailers demand, particularly for the SDV.[35]

In many instances, reasonable dispatch has been abandoned and penalties for failure to keep appointment times as well as uncompensated detention is being imposed. Traditional local pickup and delivery providers have largely eschewed participating in-home delivery services, particularly where SDVs are involved because under the prices offered for the service required, most believe they "Can't Realize a Profit." Substantial efforts are being made to enroll new "independent service providers" with the lure of equipment financing, help in obtaining insurance and the promise of unlimited growth potential.

Important distinctions are being drawn between Uber and Lyft, ride hailing services and home delivery of cargo. Stiff price competition, expedited delivery guarantees, coupled with promises of free freight and free return is driving retailers to propose non-compensatory service propositions. In one example, one established, licensed, authorized and insured SDV carrier was offered an average of 150 deliveries per day for \$225 or \$1.50 per stop. The delivery route would require a commute during rush hour across a major metropolitan city and require a minimum of 10 to 12 hour on duty per day. The experienced carrier quickly confirms that the amount was non-compensatory.

Technology, changing customer preferences and convenience have irrevocably changed retail sales and more changes are coming. Driving down delivery costs and the cost and risk associated with driver pay is a major impediment to the "free freight and free return promise." When and if bots, drones, and autonomous trucks will replace the need for drivers, whether employees or independent contractors remains to be seen.[36]

CONCLUSION

Technology, e-commerce and expedited home delivery is quickly grabbing market share and shifting retail distribution to a new paradigm which will replace or augment supply chain management for retailers. The model is not one-size-fits-all but retailers across product lines are making innovations in response. Price competition driven by comparison shopping and e-commerce options result in retailers squeezing suppliers and carriers to provide premium short notice guaranteed services.

The traditional final mile parcel delivery service – FedEx, UPS and USPS and others – are facing new competition as retailers attempt to take over management of final mile delivery to compete with the promise of "free freight and free returns." This oxymoron – neither freight nor returns are free –

assumes that the retailer's spread and increased efficiency can cover the cost of transportation as well as returns and restocking fees.[37]

The final mile segment of the new paradigm, particularly when non-commercial motor vehicles are used, is the most risk prone, problematical area involved in implementation of the new paradigm. Retailers understandably eschew establishing private carriage operations for final mile delivery and are left to recruit or hire service provider logistics companies to provide for independent contractors which can meet strict contractual requirements and offer meaningful indemnification against up-supply chain vicarious liability and employment law obligations under state law.

Vetting issues, the lack of verifiable safety compliance and insurance standards, and the vicissitudes of state laws creates added risk for the SDV segment. The consensus among carriers and 3PLs offering expedited services and those operating SDVs in particular appears to be that retailers' home delivery value/price options are not sustainable and that they Can't Recover a Profit at the transportation rates retailers expect to pay.

Currently there appears to be a lack of experienced, well qualified and truly independent carriers willing to take on final mile deliveries for the compensation offered. Traditional brokers and forwarders are experiencing shipper pressure to offer complete home delivery management, but many seem reluctant to take on the risk and challenges of arranging for SDV services. Creating new independent service providers to insulate retailers against class actions, misclassification and up-supply chain liability is problematical, particularly when the indicia of control by the retailer is ever present and the SDV operator is undercapitalized and difficult to vet.

The issues and risk with the e-commerce home delivery model discussed above will become more prominent as Amazon pushes the envelope to compete with FedEx and UPS providing warehousing and delivery of shipments it neither owns nor distributes.

Clearly, Amazon is the wild card in the future development of the new retail paradigm. From its e-commerce/home delivery model it is building its own expedited logistics/carrier network to compete with FedEx and UPS. It is building local warehouses throughout the country to offer same day deliveries and implementing an "Uber-like" contractor model to support it. After mixed results with its food delivery business, Amazon announced it is entering the retail grocery business, building and acquiring brick and mortar grocery stores. Shares of Kroger tumbled 4.5 % and Amazon gained 2% with the announcement.[38]

How it and other shippers will ultimately frame and vet their use of SDV equipment in conformance with federal and state safety, employment laws and insurance requirements is yet to be determined.

(Footnotes)

[1] Federal Express and UPS led the fight for deregulation and the F4A. The so-called "Filed Rate Doctrine" was repealed. By the early 1990s, shippers began dictating their own contract terms and utilizing neophyte truckload carriers with newly available nationwide authority. See 49 U.S.C. 13902. The list of 100 largest interstate carriers today is a testament to the competitive effect of deregulation.

[2] Johnson, Spencer. *Who Moved My Cheese?: An Amazing Way To Deal With Change In Your Work And In Your Life*. New York: Putnam, © 2002; 1998. "Department Store Makeovers Show Way to the Future," Wall Street Journal (December 27, 2018) at p. 2.

[3] Retailer Warehouses Get Taller, More Sophisticated," Wall Street Journal (January 23, 2019) at B7.

[4] "Winners in Traditional Retailing are also Winning Online," by Elizabeth Winkler, Wall Street Journal (June 8, 2018).

[5] *See* "Produce or Else: Wal-Mart and Kroger Get Tough With Food Suppliers on Delays" WSJ 11/27/17.

[6] This disruptive trend has led to retailers' insistence on waiver of any duty to mitigate damages, "free returns" push to the supply and wasteful destruction of perishable commodities as "free astrays."

[7] *See* New York Times 12/22/18 at B5.

[8] "Amazon Pushes Delivery Service," Wall Street Journal (1/24/19) at B1. "Amazon Pressures Suppliers," Wall Street Journal (12/17/2018) at A1, A11.

[9] Malls Devote Floor to E-tailers," Wall Street Journal (1/16/19) at B6.

[10] "Amazon Sets Up Shop in the Heart of the Publishing Industry," Alexandra Alter, New York Times (5/24/17).

[11] New York Times 12/22/18 at B5.

[12] "Retail Sales End on High Note," Wall Street Journal (12/24/18) at A2

[13] *See* "Walmart Posts Big Holiday Gains," WSJ (2/20/19), p. A1 and A2

[14] "Grocery robots are even being tested to pick call-in orders and replenish. "The Grocery Robot is Here," Wall Street Journal (January 5-6, 2019), B4

[15] "Produce or Else: Wal-Mart and Kroger Get Tough with Food Suppliers on Delays" Wall Street Journal 11/27/17.

[16] "J.B. Hunt Buys Cory to Expand in Final Mile Heavy Item Sector" Transport Topics (1/14/19) p. 1, 25.

[17] *See* "Amazon Recruiting Delivery Entrepreneurs" by Joseph Pisani, Inside Logistics (June 29, 2018).

[18] "Task Force on USPS Goes After Amazon," MKinnon and Ziobro, WSJ 12/5/18 at A1, A11.

[19] *Massachusetts Delivery Ass'n v. Coakley,* 769 F. 2d 11 (1st Cir. 2014); *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018); but see *Angel Omar Alvarez v. XPO Logistics Cartage, LLC* (2:18-cv-03736-SJO-E) (District Court, C.D. California); *Bedoya v. Am. Eagle Express*, Civ. No. 14-2811, 2017 WL 4330351 (D.N.J. Sept. 29, 2017).

[20] *See Labor Commissioner for the State of California v. Federal Motor Carrier Safety Administration*, Case No. 19-70329, in the U.S. Court of Appeals for the Ninth Circuit.

[21] 49 C.F.R. 387.303, 48 C.F.R. 376 and 49 C.F.R. 370.

[22] *See Raef Lawson v. GrubHub Inc*., Case No. 18-15386 in the U.S. Court of Appeals for the Ninth Circuit.

[23] The term "independent service provider" is not a term of art recognized or used to describe independent authorized carriers or leased operators under federal transportation standards and should be avoided as a "state law" term without defining precedent and militating need for uniformity in interstate commerce.

[24] *See* "Fact Sheet #19: The Motor Carrier Exemption under the Fair Labor Standards Act (FLSA)," U.S. Department of Labor Wage and Hour Division, November 2009.

[25] New York, Massachusetts, California and now New Jersey and Illinois have raised state minimum wage requirements to $15.00 per hour. See New Jersey Lawmakers reach deal to make state minimum wage $15 (NYT 1/18/19 at A19).

[26] *Raef Lawson v. GrubHub Inc*., Case No. 18-15386 in the U.S. Court of Appeals for the Ninth Circuit.

[27] "Amazon's third-party delivery network to redraw truck capacity," by William B. Cassidy, Journal of Commerce (June 30, 2018).

[28] *See* Wall Street Journal (February 14, 2019) at A16.

[29] *See* Standard Bill of Lading Section 2(a).

[30] In many instances big box and e-commerce retailers may use supplier inventories to further reduce inventory costs.

[31] *See* 49 U.S.C. §14706, the Carmack Amendment.

[32] "Produce or Else: Wal-Mart and Kroger Get Tough with Food Suppliers on Delays" WSJ 11/27/17.

[33] "Logistics Companies Aim to Ease Returns, Keep Costs Low Amid E-Commerce Rise," Transport Topics (1/14/19) at p. 1 and p. 18.

[34] See "Amazon Moves Supply Chain Evolution," (Transport Topics, 2/25/19) and "Amazon.com 'Insourcing' Roils Freight Industry, Analysts Say," (Transport Topics 2/21/19).

[35] "Amazon Pressures Suppliers," Wall Street Journal 12/1718 at p. A1 and A11.

[36] Robots are being tested for use in e-commerce warehousing. See "Warehouses Test a New Breed of AI Robots," Jennifer Smith (WSJ 1/08/19); "Amazon's Private Fleet Appears to be Testing Autonomous Trucks," Commercial Carrier Journal (February 1, 2019).

[37] "58% of holiday shoppers returned items," National Retail Federation says. See Transport Topics, 1/14/19, p. 1. 79% of e-commerce shoppers believe free returns is important, yet "not only moving the box but also testing, repairing, restocking and disposing of goods creates cost." Ibid.

[38] *See* "Amazon Pushes into Groceries" (WSJ 3/2/19) at p. A1, A4.

BIOGRAPHY

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