

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No.34,607

(Ct. App. No. 32,426)

SUPREME COURT OF NEW MEXICO  
FILED

EDWARD LUCERO, JR. and ELAINE LUCERO,

AUG - 5 2014

Plaintiffs-Respondents,



v.

NORTHLAND INSURANCE COMPANY,

Defendant-Petitioner.

**CONFORMED COPY OF THE TRUCKING INDUSTRY DEFENSE  
ASSOCIATION, AMERICAN TRUCKING ASSOCIATION, AND NEW  
MEXICO TRUCKING ASSOCIATION'S RENEWED MOTION FOR  
LEAVE TO PARTICIPATE AS AMICUS CURIAE**

The Trucking Industry Defense Association (TIDA), American Trucking Association (ATA), and New Mexico Trucking Association (NMTA), pursuant to Rule 12-215 NMRA, renew their motion requesting the Court for an order allowing them to jointly participate as *amici curiae* in this matter in support of the Brief in Chief filed by Defendant-Petitioner, Northland Insurance Company. As grounds for their Motion, TIDA, ATA, and NMTA state as follows<sup>1</sup>:

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<sup>1</sup> Pursuant to Rule 12-215(F) NMRA, no counsel for any party authored any portion of this Motion or the attached Brief, nor did counsel or any party make a monetary contribution intended to fund the preparation or submission of this Motion or the attached Brief.

*Statement of the Interests of Amici Curiae.*

1. TIDA is a nonprofit association with members devoted to sharing knowledge and resources for defense of the trucking industry. TIDA was founded in 1993 and has over 1,900 motor carriers, trucking insurers, defense attorneys and claims servicing companies as members. TIDA members share their knowledge and resources to promote risk management, operational economies, and the reduction of costs associated with accidents, claims, and lawsuits.

2. ATA is a federation of state associations, affiliated conferences and individual members. Since its founding in 1933, ATA has been the leading advocate for the trucking industry in the United States. ATA is committed to developing and advocating innovative, research-based policies that promote highway safety, security, environmental sustainability, and profitability. ATA's professional staff works to educate policymakers and the general public about the essential role trucking plays in the economy, promote responsible policies to improve highway safety, and advance the industry's environmental goals.

3. NMTA is the voice of commercial truck and bus operators in New Mexico. NMTA's mission is to be recognized as a leader in the New Mexico trucking community by promoting safe, efficient, and profitable industry while ensuring sound transportation policy and representation. NMTA represents its member carriers in legislative and regulatory matters before local, state and the

federal government, works to ensure laws and regulations affecting the industry are fair and balanced, and educates its members regarding laws and regulations.

NMTA seeks to promote safe operations and good business practices to ensure its members remain a healthy and viable part of the New Mexico economy. Through its Safety Management Council, NMTA serves the New Mexico trucking industry by advancing safety policies, practices and technology and promoting effective risk management by focusing on accident/injury prevention and driver health, wellness and moral.

4. TIDA, ATA, and NMTA believe the issues respecting construction of insurance contracts in the trucking industry raise matters of great significance to their members and to the trucking industry as a whole. They are well situated to address the issues presented by Defendant-Petitioner Northland Insurance Company's Brief in Chief to provide helpful information and argument to this Court on these issues, which are likely to have widespread impact, not only on the New Mexico trucking industry and economy, but also on nationwide trucking in interstate commerce.

**Request to Participate in Proceedings.**

5. This Court in its Order of April 8, 2013, when it denied the original request for leave to file an amicus curiae brief provided that if the Court grants the

Petition for Writ of Certiorari the parties seeking to participate as amici curiae may resubmit their request. The parties are doing so at this time.

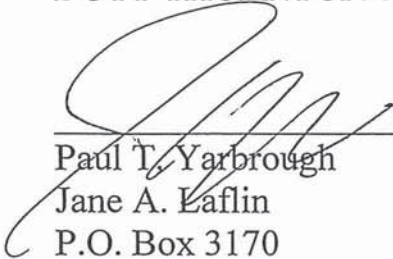
6. TIDA, ATA, and NMTA, request that this Court grant them leave to participate as *amici curiae* in the proceedings on the Petition for Writ of Certiorari. Pursuant to Rule 12-215(A), TIDA, ATA, and NMTA also request the Court grant them leave to file the attached brief in support of Northland Insurance Company's Brief in Chief. The attached brief is being submitted within seven business days after filing of the Brief in Chief as provided under Rule 12-215(C) NMRA.

**Notice to the Parties.**

7. As required by Rule 12-215(B) NMRA, on March 19, 2014, counsel for TIDA, ATA, and NMTA gave notice to all counsel of record for the parties in this matter of their intent to seek leave to participate and to file an amicus brief. No party or counsel expressed opposition.

*WHEREFORE*, pursuant to Rule 12-215(A), TIDA, ATA, and NMTA respectfully request the Court grant them leave to participate as *amici curiae* at the merits stage and to file the Brief attached as Exhibit A in support of Northland Insurance Company's Brief in Chief within seven days of the time for filing of Northland Insurance Company's Brief in Chief pursuant to Rule 12-215(C).

BUTT THORNTON & BAEHR PC



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Paul T. Yarbrough

Jane A. Laflin

P.O. Box 3170

Albuquerque, NM 87190

Telephone: (505) 884-0777

RODEY DICKASON SLOAN AKIN & ROBB PA

Thomas A. Outler

Seth L. Sparks

P.O. Box 1888

Albuquerque, NM 87103-1888

Telephone: (505) 768-7256

CIVEROLO GRALOW HILL & CURTIS PA

Lance D. Richards

P.O. Box 887

Albuquerque, NM 87103-0877

Counsel for *Amici Curiae*, TIDA, ATA,  
and NMTA

## CERTIFICATE OF SERVICE

I certify that the original was served on August 4, 2014, and I served a conformed copy on August 5, 2014, by email to:

Geoffrey R. Romero, Esq.  
Law Offices of Geoffrey R. Romero  
4801 All Saints Road NW  
Albuquerque, New Mexico 87120

Erin B. O'Connell, Esq.  
O'Connell Law LLC  
4801 All Saints Road NW  
Albuquerque, New Mexico 87120

Ray M. Vargas, II, Esq.  
The Vargas Law Firm, LLC  
807 Silver Avenue SW  
Albuquerque, New Mexico 87102

Kevin M. Sexton  
Andrew S. Montgomery  
MONTGOMERY & ANDREWS, P.A.  
Post Office Box 2307  
Santa Fe, New Mexico 87504-2307  
(505) 982-3873



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Jane A. Laffin

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 34,607

EDWARD LUCERO, JR. and ELAINE LUCERO,

Plaintiffs-Respondents,

v.

NORTHLAND INSURANCE COMPANY,

Defendant-Petitioner.

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On Writ of Certiorari to the New Mexico Court of Appeals

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**CONFORMED COPY OF BRIEF OF AMICUS CURIAE OF AMERICAN  
TRUCKING ASSOCIATIONS, INC., TRUCKING INDUSTRY DEFENSE  
ASSOCIATION AND NEW MEXICO TRUCKING ASSOCIATION  
AS AMICI CURIAE IN SUPPORT OF  
DEFENDANT/PETITIONER**

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BUTT THORNTON & BAEHR PC  
Paul T. Yarbrough  
Jane A. Laflin  
4101 Indian School Rd. NE, Suite 300S  
P.O. Box 3170  
Albuquerque, NM 87190-3170  
Tel. (505) 884-0777  
Fax: (505) 889-8870  
ptyarbrough@btblaw.com  
jalafin@btblaw.com  
*Counsel for Amici Curiae*  
American Trucking Associations,  
Trucking Industry Defense Association, and  
New Mexico Trucking Association

SUPREME COURT OF NEW MEXICO  
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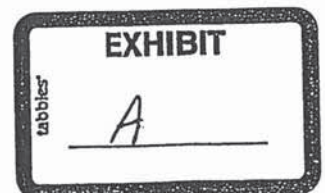


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<sup>1</sup> <a href="http://gis.rita.dot.gov/StateFacts/StateFacts.aspx?StateName=New%20Mexico">http://gis.rita.dot.gov/StateFacts/StateFacts.aspx?StateName=New%20Mexico</a>
<sup>1</sup> See 49 C.F.R. §§387.7 and 387.9.
<sup>1</sup> <i>Statement of William Downey, The Kenan Advantage Group, Before the Subcommittee on Railroads, Pipelines, and Hazardous Materials, United States House of Representatives Committee on Transportation &amp; Infrastructure, on behalf of the American Trucking Association (ATA), April 2, 2014.</i> <a href="http://transportation.house.gov/uploadedfiles/2014-04-02-downey.pdf">http://transportation.house.gov/uploadedfiles/2014-04-02-downey.pdf</a>
<sup>1</sup> <a href="http://www.truckinginfo.net">www.truckinginfo.net</a> › <i>Trucking Resources (1) U.S. Size Statistics.</i>
<sup>1</sup> See <i>Statement of Tilden E. Curl, Jr., before the Committee on Small Business, Subcommittee on Contracting &amp; Workforce, U.S. House of Representatives, Regarding the Impact of FMCSA’s Hours of Service Rule on Small Businesses November 21, 2013, on behalf of OOIDA.</i> <a href="http://smallbusiness.house.gov/curl">smallbusiness.house.gov/curl</a>
<sup>1</sup> Ryan N. Sutherland and Andrew C. Koepke, <i>Trucking Industry Update</i> , Stout Risius Ross, Inc., 2012. <a href="http://www.srr.com/article/trucking-industry-update">http://www.srr.com/article/trucking-industry-update</a>
<sup>1</sup> <i>Id.</i> , <i>Statement of William Downey.</i>
<sup>1</sup> <i>Small Business Profile, New Mexico</i> <a href="http://www.sba.gov/sites/default/files/nm12.pdf">www.sba.gov/sites/default/files/nm12.pdf</a> .
<sup>1</sup> <i>Small Business Profile. Id.</i>
<sup>1</sup> <i>The Department of Workforce Solutions.</i> <a href="http://www.dws.state.nm.us/careersolutions/occs/533032.html">www.dws.state.nm.us/careersolutions/occs/533032.html</a> .
<sup>1</sup> <a href="http://truckflix.com/stats/new-mexico">http://truckflix.com/stats/new-mexico</a> .
<sup>1</sup> <a href="http://www.valueline.com/Stocks/Industries/Industry_Analysis__Trucking.aspx">http://www.valueline.com/Stocks/Industries/Industry_Analysis__Trucking.aspx</a> .
<sup>1</sup> <a href="http://www.dws.state.nm.us/careersolutions/occs/533032.html">http://www.dws.state.nm.us/careersolutions/occs/533032.html</a> .
<sup>1</sup> <a href="http://www.ooida.com/OOIDA%20Foundation/RecentResearch/OOIDP.asp">www.ooida.com/OOIDA%20Foundation/RecentResearch/OOIDP.asp</a> . See also, <i>Testimony of James Zuber, before the Committee on Small Business Subcommittee on Economic Growth, Tax &amp; Capital Access, United States House of Representatives, on behalf of OOIDA, June 25, 2012, pdf p. 4</i> (hereinafter referred to as the “Zuber testimony”). <a href="http://smallbusiness.house.gov/uploadedfiles/zuber_testimony.pdf">http://smallbusiness.house.gov/uploadedfiles/zuber_testimony.pdf</a>
<sup>1</sup> Industry Analysis: Trucking, Value Line <a href="http://www.valueline.com/Stocks/Industries/Industry_Analysis__Trucking.aspx">http://www.valueline.com/Stocks/Industries/Industry_Analysis__Trucking.aspx</a>
<sup>1</sup> William B. Cassidy, <i>Trucking Companies Struggle to Balance Costs, Demand</i> , JOC.COM (June 7, 2013 10:00 AM) <a href="http://www.joc.com/trucking-logistics/ltl-shipping/trucking-companies-struggle-bal">http://www.joc.com/trucking-logistics/ltl-shipping/trucking-companies-struggle-bal</a>

ance-costs-demand_20130607.html
<sup>1</sup> Daniel P. Bearth, TT100: <i>Fleets Hauling More Freight Than Ever But Robust Profits Elusive</i> , Transport Topics, July 22, 2013; <a href="http://www.ttnews.com/articles/basetemplate.aspx?storyid=32492">http://www.ttnews.com/articles/basetemplate.aspx?storyid=32492</a> .
<sup>1</sup> <a href="http://www.actresearch.net/wp-content/uploads/2013/.../carrier-db-contents.pdf">www.actresearch.net/wp-content/uploads/2013/.../carrier-db-contents.pdf</a>
<sup>1</sup> <a href="http://www.irs.gov/Businesses/Trucking-Industry-Overview---History-of-Trucking">http://www.irs.gov/Businesses/Trucking-Industry-Overview---History-of-Trucking</a> .
<sup>1</sup> <a href="http://www.ccjdigital.com/trucking-analyst-e-logs-may-increase-the-risk-of-going-broke/">http://www.ccjdigital.com/trucking-analyst-e-logs-may-increase-the-risk-of-going-broke/</a>
<sup>1</sup> <i>See the Zuber testimony before the committee on small business subcommittee on economic growth, Tax &amp; capital Assess United States House of Representatives. June 25, 2012, smallbusiness.house.gov/.../zuber_te...</i>
<sup>1</sup> <i>Bottom Line = Profit Margin...</i> , TruckingInfo.net <a href="http://www.truckinfo.net/trucking/bottom-line-profit-margin.htm">http://www.truckinfo.net/trucking/bottom-line-profit-margin.htm</a>
<sup>1</sup> <a href="http://www.dat.com/Resources/~media/Files/DAT/Resources/Whitepapers/2013_Carrier_BenchMark_Surveyfinal.ashx">http://www.dat.com/Resources/~media/Files/DAT/Resources/Whitepapers/2013_Carrier_BenchMark_Surveyfinal.ashx</a> .
<sup>1</sup> Steven Graham, <i>Statement of Steven Graham on behalf of the American Trucking Associations, Inc. (ATA)</i> , HEARING ON ENERGY POSITION LIMITS AND HEDGE EXEMPTIONS (Aug.5, 2009) <a href="http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/hearing080509_graham.pdf">http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/hearing080509_graham.pdf</a>
<sup>1</sup> <i>High Fuel Costs Threaten Bankruptcy for Truckers: At \$1000 a Fill-Up, Independent Drivers Suffer, and Costs to Consumers Rise</i> , U.S. NEWS & WORLD REPORT (May 2, 2008) <a href="http://www.usnews.com/news/national/articles/2008/05/02/high-fuel-costs-threaten-bankruptcy-for-truckers">http://www.usnews.com/news/national/articles/2008/05/02/high-fuel-costs-threaten-bankruptcy-for-truckers</a>
<sup>1</sup> <i>Zuber testimony at testimony before the committee on small business subcommittee on economic growth, Tax &amp; capital Assess United States House of Representatives. June 25, 2012, smallbusiness.house.gov/.../zuber_te....</i>
<sup>1</sup> <i>Id.</i> at pdf p.3.
<sup>1</sup> <i>See Zuber testimony at testimony before the committee on small business subcommittee on economic growth, Tax &amp; capital Assess United States House of Representatives. June 25, 2012, smallbusiness.house.gov/.../zuber_te....</i>
<sup>1</sup>

<http://www.ccjdigital.com/trucking-analyst-e-logs-may-increase-the-risk-of-going-broke/>

<sup>1</sup> (April 17, 2014)

<http://www.ooida.com/MediaCenter/PressReleases/pressrelease.asp?prid=344>

<sup>1</sup> *Zuber testimony* at pdf p. 5.

## **I. INTRODUCTION**

American Trucking Associations (ATA), the Trucking Industry Defense Association (TIDA), and the New Mexico Trucking Association (NMTA), collectively referred to as “the amici,” petitioned the Supreme Court for leave to participate in the proceedings on the merits, including filing an amicus brief within the time provided by Rule 12-215(C) NMRA. Originally filed on April 4, 2014, and renewed on August 4, 2014. The amici herewith submit their brief in support of Defendant-Petitioner NORTHLAND INSURANCE COMPANY. All parties to this case received timely notice, on April 4, 2014, of amici’s intent to file this brief.

ATA is a federation of state associations, affiliated conferences and individual members. Since its founding in 1933, ATA has been the leading advocate for the trucking industry in the United States. ATA is committed to developing and advocating innovative, research-based policies that promote highway safety, security, environmental sustainability, and profitability. ATA’s professional staff works to educate policymakers and the general public about the essential role trucking plays in the economy, promote responsible policies to improve highway safety, and advance the industry’s environmental goals.

[www.truckline.com](http://www.truckline.com)

TIDA is a nonprofit association with members devoted to sharing knowledge and resources for defense of the trucking industry. TIDA was founded in 1993 and has over 1,900 motor carriers, trucking insurers, defense attorneys and claims servicing companies as members. TIDA members share their knowledge and resources to promote risk management, operational economies, and the reduction of costs associated with accidents, claims, and lawsuits. [www.tida.org](http://www.tida.org)

NMTA is the voice of commercial truck and bus operators in New Mexico. NMTA's mission is to be recognized as a leader in the New Mexico trucking community by promoting safe, efficient, and profitable industry while ensuring sound transportation policy and representation. NMTA represents its member carriers in legislative and regulatory matters before local, state and the federal government, works to ensure laws and regulations affecting the industry are fair and balanced, and educates its members regarding laws and regulations. NMTA seeks to promote safe operations and good business practices to ensure its members remain a healthy and viable part of the New Mexico economy. Through its Safety Management Council, NMTA serves the New Mexico trucking industry by advancing safety policies, practices and technology and promoting effective risk management by focusing on accident/injury prevention and driver health, wellness and morale. [www.nmtrucking.org](http://www.nmtrucking.org).

ATA, TIDA and NMTA believe the issues respecting construction of insurance contracts in the trucking industry raise matters of great significance to their members, to the trucking industry as a whole, and to the people of New Mexico. They are well situated to address the issues presented by Defendant-Petitioner Northland Insurance Company's Brief-in-Chief and to provide helpful information and argument to this Court on these issues, which are likely to have widespread impact, not only on the New Mexico trucking industry and economy, but also on nationwide trucking in interstate commerce. Interpreting the policy the way the Court of Appeals interpreted it will dramatically and adversely affect operating costs in a business that is already highly regulated, extremely competitive, and suffers from some of the narrowest profit margins of any industry in the United States. The Amici assert that the practical effect of the Court of Appeals opinion will be dramatically higher insurance premiums, likely resulting in trucking business failures. In light of the Amici's extensive involvement with many of the issues pertinent to this case, the Amici are uniquely positioned to explain the context the serious harm their industry will face if the Court of Appeals is affirmed. The Amici urge that the Court of Appeals opinion in this matter be reversed and the District Court affirmed.

## II. ARGUMENT

### A. The trucking industry is demographically ill-suited to bear the brunt of the Court of Appeals' unprecedented change to how semis are covered by insurance in this country.

This appeal arises out of a dispute concerning the interpretation of an insurance policy issued by Defendant-Petitioner Northland Insurance Company to H&J Hamilton, a small trucking company that had five tractors and six trailers. *See Defendant-Petitioner's Brief in Chief, p.2.* While the ruling of the District Court was consistent with the long-standing liability coverage expectation that exists in the trucking industry for tractor-trailer rigs, the Court of Appeals has now doubled that coverage, perhaps unaware of the harmful economic and practical effects of their unprecedented opinion. Unchecked, this opinion will likely have a serious and devastating impact on the operating costs for the trucking industry, especially in the state of New Mexico.

Tractor-trailer rigs are mobile and operate in all 50 states, and upon the thousands of miles of New Mexico roads. According to the U.S. Department of Transportation, New Mexico has 68,384 miles of public roads.<sup>1</sup>

As of 2011 (the last year for which these statistics are available), freight shipments by value in New Mexico equaled \$31,388,000,000. *Id.* Interstates 10, 25 and 40, along with US Highways 60 and 285, and others, serve as

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<sup>1</sup> <http://gis.rita.dot.gov/StateFacts/StateFacts.aspx?StateName=New%20Mexico>

important cross-country routes for the movement of freight in and out of New Mexico and across the nation. Carriers from all over the United States use New Mexico public roads on a non-stop basis. In so doing, these carriers are subject to the applicable laws of the state while operating within New Mexico's borders. When trucks are involved in accidents, a certain level of insurance is required by law to be available to compensate injured third parties. This Court is not hearing an uninsured truck case, however. The tractor-trailer rig in question had a million dollars in insurance coverage, \$250,000 more than required for tractor-trailer rigs by the Federal Motor Carrier Safety Regulations (FMCSR).<sup>2</sup> The FMCSR requirement sets the basis for the coverage expectation in the industry. It is up to legislative and rule making bodies whether this amount should be higher, not the courts. Yet the Court of Appeals has effectively usurped the legislative and rule marking process and doubled insurance coverages industry wide, unless carriers can avoid the roads in New Mexico. This is the practical effect of the *Lucero* opinion. The industry cannot afford this judicial mandate. The justification for this judicially imposed state regulation upon a federally regulated industry is that for insurance purposes a tractor-trailer rig is two vehicles, not one. The Court of Appeals fails to recognize that a tractor-trailer is *operated as one* vehicle, not two. A trailer cannot drive down the road by itself, and only becomes

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<sup>2</sup> See 49 C.F.R. §§387.7 and 387.9.



operational while being pulled by a tractor. It has always been the expectation in the trucking industry that the rig is subject to a single limit of liability insurance coverage.

The trucking industry is vital to the economies of New Mexico and of the entire nation. While there is some disparity in the exact figures, over 90% of all trucking companies in the United States are small businesses:

The trucking industry is an integral component of our Nation's economy, transporting more than 81% of our nation's freight bill and employing approximately 7 million workers in trucking-related jobs, including more than 3.2 million commercial drivers. It is important to note that the trucking industry is comprised primarily of small businesses, with 97.3% of trucking companies operating 20 trucks or less, and 90.6% operating six trucks or less. More importantly, about 75 percent of all U.S. communities depend solely on trucks to deliver and supply their essential commodities.<sup>3</sup>

According to another source, there are an estimated 1.2 million trucking companies in the United States, with 97% of those companies operating 20 or fewer trucks while 90% operate six or fewer trucks.<sup>4</sup> According to Owner Operator Independent Drivers Association (OOIDA), as of November last year, "the majority of the trucking industry in our country is made up of small businesses, as

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<sup>3</sup> *Statement of William Downey, The Kenan Advantage Group, Before the Subcommittee on Railroads, Pipelines, and Hazardous Materials, United States House of Representatives Committee on Transportation & Infrastructure, on behalf of the American Trucking Association (ATA), April 2, 2014.*

<http://transportation.house.gov/uploadedfiles/2014-04-02-downey.pdf>

<sup>4</sup> *www.truckinfo.net > Trucking Resources (1) U.S. Size Statistics.*

more than 93 percent of all motor carriers have less than 20 trucks in their fleet and 78 percent of carriers have fleets of just five or fewer trucks. In fact, *one-truck motor carriers represent nearly half of the total number of trucking companies operating in the United States.*<sup>5</sup> (Emphasis added.)

“Despite the decrease in industry profit margins due to competition, concentration – or the presence of a few large companies comprising the majority of the market – is very low; 69.5% of enterprises have fewer than four employees, and 81.6% of enterprises have fewer than 10 employees.”<sup>6</sup>

All Americans are affected by the trucking industry. It is almost a cliché to say, “If you got it, a truck brought it.” Approximately 81% of all freight in this country is moved by truck.<sup>7</sup>

Many tractor-trailer operators are known as “owner- operators” who support their families from very small operations. Owner-operators are small businesses. Small businesses have a significant impact on the economy of the state of New Mexico. Small businesses represent 95.7 percent of all employers in this state.<sup>8</sup> In 2010 there were 154,597 small businesses in the state of New Mexico employing 55.1

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<sup>5</sup> See Statement of Tilden E. Curl, Jr., before the Committee on Small Business, Subcommittee on Contracting & Workforce, U.S. House of Representatives, Regarding the Impact of FMCSA’s Hours of Service Rule on Small Businesses November 21, 2013, on behalf of OOIDA. [smallbusiness.house.gov/curl](http://smallbusiness.house.gov/curl)

<sup>6</sup> Ryan N. Sutherland and Andrew C. Koepke, *Trucking Industry Update*, Stout Risius Ross, Inc., 2012. <http://www.srr.com/article/trucking-industry-update>

<sup>7</sup> *Id.*, Statement of William Downey.

<sup>8</sup> *Small Business Profile, New Mexico* [www.sba.gov/sites/default/files/nm12.pdf](http://www.sba.gov/sites/default/files/nm12.pdf).

percent of the New Mexico labor force.<sup>9</sup> Trucking companies are an integral part of small business in this state. Trucking is as vital to this state as any of our historic and well established industries, like farming and ranching, technology, tourism, and health care. Trucking is the vital link that allows all industries in this state to operate. Every industry of every size needs goods shipped. Trucks and truck drivers do that. With over \$31 billion in freight shipments in New Mexico as of 2011, the importance of this industry cannot be questioned. The trucking business is central to New Mexico's health and well-being. Without enough trucks on the road, the economy of this state, and the entire nation, would collapse.

In 2011 there were about 9,610 workers working in the trucking industry in New Mexico.<sup>10</sup> The top 70 New Mexico-based trucking companies employ as many as 1480 drivers, such as MVT Services LLC (Mesilla Valley Transportation) to several employing as few as 16 drivers.<sup>11</sup>

The supply of available drivers often tends to be slim, resulting in intense competition for qualified talent.<sup>12</sup> Despite the driver shortage, the typical annual wage in New Mexico for tractor-trailer drivers is \$37,380.<sup>13</sup> Nationally, owner-operator average take home pay is between \$40,000 and \$50,000 per year

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<sup>9</sup> *Small Business Profile. Id.*

<sup>10</sup> *The Department of Workforce Solutions.*

[www.dws.state.nm.us/careersolutions/occs/533032.html](http://www.dws.state.nm.us/careersolutions/occs/533032.html).

<sup>11</sup> <http://truckflix.com/stats/new-mexico>.

<sup>12</sup> [http://www.valueline.com/Stocks/Industries/Industry\\_Analysis\\_\\_Trucking.aspx](http://www.valueline.com/Stocks/Industries/Industry_Analysis__Trucking.aspx).

<sup>13</sup> <http://www.dws.state.nm.us/careersolutions/occs/533032.html>.

according to Owner-Operator Independent Drivers Profile of 2012, the last available research from OOIDA.<sup>14</sup>

The industry as a whole has been wracked by skyrocketing fuel prices, a severe driver shortage, and increased regulatory pressures. If this Court upholds the Court of Appeals, such a ruling will likely have devastating effects on the industry in terms of significantly higher insurance costs. This would set us back at a time when the nation is still struggling to emerge from a terrible recession. The ripple effect across the economy nationally and across the State of New Mexico cannot be underestimated.

**B. The earnings and thin profit margins industry-wide and for small business truckers will be further eroded by the Court of Appeals new insurance coverage mandate.**

The cost to move freight affects the prices we pay for goods, yet not all motor carriers are equally situated to spread out or absorb cost increases suffered by the industry.

“This industry is competitive. Customers have numerous operators to choose from, including privately held carriers and companies outside the industry,

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<sup>14</sup> [www.ooida.com/OOIDA%20Foundation/RecentResearch/OOIDP.asp](http://www.ooida.com/OOIDA%20Foundation/RecentResearch/OOIDP.asp). *See also, Testimony of James Zuber, before the Committee on Small Business Subcommittee on Economic Growth, Tax & Capital Access, United States House of Representatives, on behalf of OOIDA, June 25, 2012, pdf p. 4* (hereinafter referred to as the “Zuber testimony”).  
[http://smallbusiness.house.gov/uploadedfiles/zuber\\_testimony.pdf](http://smallbusiness.house.gov/uploadedfiles/zuber_testimony.pdf)

such as air-transporters. Price competition is fierce, and the companies in this group generally operate with narrow margins.”<sup>15</sup>

“The drop in profit at other carriers, however, underscores how difficult it is for many companies to balance slow or uneven growth in demand and rising expenses. Sector average operating ratios show the impact of higher costs, with the average LTL (less than truckload) operating ratio ticking up 1.3 percentage points and the truckload ratio rising 1.9 points.”<sup>16</sup>

According to the July 22, 2013 edition of Transport Topics: “If a carrier is properly allocating its cost of capital, it should have a 10% operating margin,” said Derek Leathers, president of Werner Enterprises in Omaha, Nebraska, who noted that the *average profit margin in trucking now is only 2%*.<sup>17</sup> (Emphasis added.)

The Trucking industry as a whole operates with a 2% profit margin. That means that on every \$100,000 “earned” by a trucking company, it nets \$2,000. Werner is a large carrier. Most New Mexican trucking companies are small companies or owner operators. Eroding that 2% margin for the mom and

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<sup>15</sup> Industry Analysis: Trucking, Value Line

[http://www.valueline.com/Stocks/Industries/Industry\\_Analysis\\_\\_Trucking.aspx](http://www.valueline.com/Stocks/Industries/Industry_Analysis__Trucking.aspx)

<sup>16</sup> William B. Cassidy, *Trucking Companies Struggle to Balance Costs, Demand*, JOC.COM (June 7, 2013 10:00 AM) [http://www.joc.com/trucking-logistics/ltl-shipping/trucking-companies-struggle-balance-costs-demand\\_20130607.html](http://www.joc.com/trucking-logistics/ltl-shipping/trucking-companies-struggle-balance-costs-demand_20130607.html)

<sup>17</sup> Daniel P. Bearth, *TT100: Fleets Hauling More Freight Than Ever But Robust Profits Elusive*, Transport Topics, July 22, 2013; <http://www.ttnews.com/articles/basetemplate.aspx?storyid=32492>.

pop truckers with judicially imposed higher insurance costs is not the way to put more New Mexicans back to work or to keep small businesses operating. Profit margins even for the large publicly- traded truckload carriers have remained low, averaging around 4%.<sup>18</sup>

According to the latest statistics available from the IRS, during the period of rapidly rising costs in 2008, “over 3,000 trucking companies, mainly small companies and owner-operators, went out of business.”<sup>19</sup> In the first quarter of 2014 more than 10,000 trucks were taken off the road due to bankruptcies.<sup>20</sup>

*In Montano v. Allstate Indem. Co.*, 2004–NMSC–020, ¶16, 135 N.M. 681, 92 P.3d 1255, the court found:

By requiring insurers to offer UM coverage, *see* NMSA 1978, §66-5-301 (1983), the legislature wanted to encourage insureds to purchase such coverage. Requiring stacking for all vehicles would put the insured who owns multiple vehicles in the position of paying for all of the coverages or rejecting UM coverage altogether, rather than deciding how much coverage they can afford. This could result in some lower income insureds who own multiple vehicles being effectively “priced out” of UM coverage.

Similarly, if the Court of Appeals opinion is affirmed, it could conceivably price small trucking companies and owner/operators out of the market.

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<sup>18</sup> [www.actresearch.net/wp-content/uploads/2013/.../carrier-db-contents.pdf](http://www.actresearch.net/wp-content/uploads/2013/.../carrier-db-contents.pdf)

<sup>19</sup> <http://www.irs.gov/Businesses/Trucking-Industry-Overview---History-of-Trucking>.

<sup>20</sup> <http://www.ccjdigital.com/trucking-analyst-e-logs-may-increase-the-risk-of-going-broke/>

Add to that, the fact that as small business people, most owner-operators have no unemployment insurance available to them, and this could spell disaster for families in this state and around the Country..<sup>21</sup> As cited by this Court in *State v. Martinez*, 2011 -NMSC- 045, 270 P.3d 96, “When the Legislature first enacted the [Unemployment Compensation] Act in 1936, the legislators found it worthwhile to include ‘[a]s a guide to the interpretation and application’ of the Act, a ‘declaration of state public policy.’ 1936 N.M. Laws (Special Session), ch. 1, §2. The declaration stated that ‘[e]conomic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State....The achievement of social security requires protection against this greatest hazard of our economic life.’” Driving up costs for small business truckers is no way to help them avoid this “greatest hazard of our economic life.” Rather, it hastens it.

**C. An important industry already laboring under increased cost pressures associated with fuel prices and regulatory mandates will be further harmed by the Court of Appeals insurance coverage mandate.**

Insurance costs are a major business cost for the trucking industry. If you take the Court of Appeals opinion to its logical conclusion, the small trucking business owner with only one or two semis may barely be able to afford \$1 million

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<sup>21</sup> See the Zuber testimony before the committee on small business subcommittee on economic growth, Tax & capital Assess United States House of Representatives. June 25, 2012, [smallbusiness.house.gov/.../zuber\\_te...](http://smallbusiness.house.gov/.../zuber_te...)

in coverage, and certainly is in no position to afford \$2 million in coverage or possibly \$3 million if they are “pulling pups” meaning double trailers or . The small trucking business owner cannot simply pass along the costs of the increased premiums to the customers. So unlike fuel surcharges, the industry typically does not see insurance surcharges. The already thin profit margins may vanish along with their businesses.

Major carriers will also be dramatically affected if the Court of Appeals’ Opinion is not reversed. The major carriers often have far more trailers than tractors. Certainly, that is the case with MVT, the largest New Mexico based carrier. The effect of the Court of Appeals’ opinion is to make the cost of insurance for the trailers alone far more expensive and again reduce an already small profit margin. The major carriers who already carry higher coverage limits, whatever they may be, will be doubled or tripled in the case of double trailers. A \$2 million coverage limit now becomes a \$4 million coverage limit or a \$6 million coverage limit when there is a double trailer. Given the thin margins the doubling or tripling of coverages, the attendant dramatic increases in premiums will have a devastating economic effect on motor carriers of all sizes.

In an article discussing ways to help trucking companies operate at a profit, TruckingInfo.net states, “Drivers require daily attention and maintenance just as your equipment does. Turn your attention to other areas of your operation



that are not a constant daily time consumer, but so importantly impact your financial progress. **One of the most costly is insurance.**<sup>22</sup> (Emphasis added.) Monthly insurance premiums per truck are already high. The DAT Trucking Industry Survey (of 514 trucking companies) surveyed For Hire carriers and Owner Operators across the nation on average pay on a monthly basis for public liability and collision insurance coverage per truck.<sup>23</sup>

The survey found that For Hire carriers pay on the average of \$255 per month per truck while Owner-Operators pay on average of \$452 per month per truck. Premiums will rise dramatically with coverages now doubling if the Court of Appeals' ruling is affirmed.

We have some recent and painful experience that illustrates just how devastating rising costs can be in the trucking business. The rise in diesel costs dramatically affected the trucking industry. In an industry where a ten cent increase in the cost of fuel puts a thousand truckers, mostly smaller, out of business, imagine the effect of significant increases to the cost of insurance. In *Truck Industry Heavily Affected by Current Fuel Prices*, BUBBAJUNK.COM <http://www.bubbajunk.com/article/523> concisely set forth what happens when the cost of doing business increases in the trucking industry:

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<sup>22</sup> *Bottom Line = Profit Margin...*, TruckingInfo.net

<http://www.truckinginfo.net/trucking/bottom-line-profit-margin.htm>

<sup>23</sup> [http://www.dat.com/Resources/~media/Files/DAT/Resources/Whitepapers/2013\\_Carrier\\_BenchMark\\_Surveyfinal.ashx](http://www.dat.com/Resources/~media/Files/DAT/Resources/Whitepapers/2013_Carrier_BenchMark_Surveyfinal.ashx).

The trucking industry is one of the most affected with the current escalation of diesel fuel prices. Most representatives from this industry have confirmed that the situation is devastating and is attempting to tear down the economic stability of hundreds of families and relatives of the people that work in the truck field.

Related statistics from the American Trucking Associations estimate that 1,000 mostly smaller carriers go out of business each time diesel fuel spikes more than 10 cents. The majority of carriers set a fuel cost surcharge to make up for the spiking diesel prices, but sometimes it is more difficult for smaller carriers to require the charge because they cannot afford to lose customers who refused to pay for high fuel price.

Also, most trucking companies are struggling to keep their adjustments in line with their costs. They say the amount trucking companies are able to recoup often comes in well after the fuel is paid for. Trucking companies confirm that carriers will eventually pass more of the cost to shippers, who will ultimately pass that cost to consumers. The risk and the worry in this part is that, the consumer will resist that increase and the economy will slow down.

*People must remember that the trucking industry is primarily a small-business industry with relatively slim profit margins, but it is still one of the major bases of the U.S. economy.* The rapid escalation in the price of diesel fuel is devastating to the trucking industry and will result in failures, lower capital investment and negative employment trends. (Emphasis added.)

While this article is addressing the effect on the trucking industry when fuel costs rise, even slightly, it provides this Court with an objective lesson on how sensitive this industry is to cost increases, such as insurance premiums.

The ATA made this point to the Commodity Futures Shares Commission (CTFC) in 2009:

Trucking is a highly competitive industry with very low profit margins. This explains why many trucking companies are reporting that volatile fuel prices have greatly suppressed profits, if they are making a profit at all. Our industry cannot simply absorb this rapid increase in fuel costs. While some companies are able to pass some of these costs through to their customers, we rarely recoup the full additional expense....Not only do high fuel prices devastate truckers, but their customers as well. Ultimately, the consumer is forced to pay higher prices for food, clothing and other basic necessities.<sup>24</sup>

Similarly, *High Fuel Costs Threaten Bankruptcy for Truckers*.<sup>25</sup>

illustrated the problem of increasing costs in an industry that was already suffering a few years ago.

Trucks run on diesel fuel, a commodity in great demand globally just when clean air standards have made it harder to refine. The price has shot up nearly 25 percent since January to a \$4.18-per-gallon average, up 50 percent in a year....Big companies face falling profits. Small and independent truckers, some 20 percent of the industry, face devastation. Trucking firm failures jumped to “catastrophic levels” in the first quarter of the year, reports industry analyst Donald Broughton.

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<sup>24</sup> Steven Graham, *Statement of Steven Graham on behalf of the American Trucking Associations, Inc. (ATA)*, HEARING ON ENERGY POSITION LIMITS AND HEDGE EXEMPTIONS (Aug.5, 2009)  
[http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/hearing080509\\_graham.pdf](http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/hearing080509_graham.pdf)

<sup>25</sup> *High Fuel Costs Threaten Bankruptcy for Truckers: At \$1000 a Fill-Up, Independent Drivers Suffer, and Costs to Consumers Rise*, U.S. NEWS & WORLD REPORT (May 2, 2008)  
<http://www.usnews.com/news/national/articles/2008/05/02/high-fuel-costs-threaten-bankruptcy-for-truckers>

Big trucking companies can negotiate better fuel prices by buying in bulk and can deploy large fleets to minimize “empty miles,” the return trips driven without cargo, which kill the economics of the small trucker. Broughton sees an “ever widening gap between the ‘haves’ and the ‘have-nots’ in the industry.

Economies of scale may help the large carriers keep their costs lower than smaller carriers, which includes the cost of insurance. Small business truckers may not have the same multi-vehicle insurance discounts that large carriers often enjoy. Thus, the increased costs to result from the Court of Appeals’ insurance coverage mandate will not be born equally throughout the industry, and will disproportionately harm the smaller carriers.

The Zuber testimony June 25, 2012, on behalf of OOIDA discussed the impact of high fuel prices and new regulations on small business truckers. Mr. Zuber at the time was a professional truck driver of 25 years. His testimony illustrates in a very personal way what happens when costs increase for truckers in his position:

[T]he impact of a high fuel bill on small business truckers cuts far closer to home....My fuel costs last year were just under \$80,000. Whenever the price of a gallon of diesel fuel increases by a nickel, a trucker’s annual costs increase by \$1,000. Such price increases result in an enormous extra burden on the small business trucker whose average annual income is approximately \$40,000.

*Trucking is a hyper competitive business and each of us operates on extremely thin margins....In the short term, we*

can see decreased loads due to fuel price spikes as companies may have to hold back on replacing inventory due to decreased demand or a need to hold on to cash to meet their own fuel costs. For these reasons, the price of fuel represents one of the largest risks to the success of a small business trucker.

What does this risk mean?...Countless truckers over the years have felt the pain of high fuel prices on their business. Business expansions have been canceled, truck payments have been missed, and entire trucking companies have gone bankrupt due to high fuel costs....

For many small business truckers, *business income and family income are basically one in the same*. Even if a small business trucker is able to keep their business afloat during times of high fuel prices, money is not going towards family necessities, from health insurance to mortgage and car payments. And *unlike the majority of Americans, most small business truckers do not have unemployment insurance to fall back on should they go out of business....*Price spikes, which seem to be occurring more frequently as world political and economic instability continues, can have especially devastating impacts on truckers, with a few months of high prices taking trucking companies from a position of profitability to a position of bankruptcy.<sup>26</sup>

(Emphasis added.)

Mr. Zuber discussed the increasing the regulatory burdens on truckers. He argued that all motor carriers will face the increased cost of regulation. Again, it is a matter of which carriers will be in a position to bear these new burdens and which will not. He pointed out that the high cost of regulation would also prevent carriers from buying new trucks and creating new jobs: “Over the past few years,

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<sup>26</sup> Zuber testimony at testimony before the committee on small business subcommittee on economic growth, Tax & capital Assess United States House of Representatives. June 25, 2012, [smallbusiness.house.gov/.../zuber\\_te...](http://smallbusiness.house.gov/.../zuber_te...)

the trucking industry has been laboring under a steadily increasing amount of regulations from the Department of Transportation, the Environmental Protection Agency, and other agencies.”<sup>27</sup> Among these are new restrictions on diesel admissions, which have driven up the cost of new trucks, changes in hours of duty status, mandatory downtime requirements, and EOBR (electronic on-board recorder) mandates.<sup>28</sup>

Donald Broughton is managing director of analyst firm Avondale Partners, and has closely tracked trucking industry statistics for over 28 years. “The net result of regulation was forcing people out of business and constraining capacity even further.”<sup>29</sup> One of the new regulations being considered for the trucking industry is higher insurance coverage minimums. The opposition to the increases is well-justified and so far the federal government has not been persuaded that increases are necessary. Ironically, the Court of Appeals has done what the FMCSA has not done, and without any hearings from all the industry stakeholders. A three-judge panel effectively decided what liability insurance coverage limits would be nationwide.

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<sup>27</sup> *Id.* at pdf p.3.

<sup>28</sup> See Zuber testimony at testimony before the committee on small business subcommittee on economic growth, Tax & capital Assess United States House of Representatives. June 25, 2012, [smallbusiness.house.gov/.../zuber\\_te...](http://smallbusiness.house.gov/.../zuber_te...)

<sup>29</sup> <http://www.ccjdigital.com/trucking-analyst-e-logs-may-increase-the-risk-of-going-broke/>

“FMCSA acknowledges that more than 99 percent of commercial vehicle accidents are readily covered under current requirements and that they have not done an assessment of the financial impact that increased requirements would have on small businesses. ‘Even though the agency’s report confirms that fewer than one percent of all truck-involved accidents result in injuries or property damage that exceed current insurance requirements, it seems pretty clear they plan to raise those requirements anyway,’ ... *[A]n increase in insurance would be a death nail for the small businesses that comprise over 90 percent of the trucking industry.*” (Emphasis added.) *Truckers say the push to raise insurance minimums is an unnecessary attack on small business trucking: Federal agency supporting “a solution in search of a problem,”*<sup>30</sup>

“Like all businesses, small business truckers prefer predictability.”<sup>31</sup>

In their *Lucero* opinion, the Court of Appeals has created needless unpredictability in the trucking industry by mandating higher insurance coverages for tractor-trailer combinations. What a tragic shame for so many families who depend upon the trucking business if carriers began to avoid New Mexico rather than avail themselves of our good roads and direct routes. What a tragic shame it would be if New Mexico based intrastate carriers could no longer compete with large out of

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<sup>30</sup> (April 17, 2014)

<http://www.ooida.com/MediaCenter/PressReleases/pressrelease.asp?prid=344>

<sup>31</sup> *Zuber testimony* at pdf p. 5.

state carriers because our Courts made being a small trucking company in New Mexico cost prohibitive.

The Amici urge this court to return to predictability for insurance coverage limits by affirming the District Court and the long-standing understanding that a tractor-trailer combination is subject to one limit of liability coverage, not two.

### **III. CONCLUSION**

The Court of Appeals opinion is harmful to an entire industry and the people who work in it. It is harmful to New Mexico and the nation as a whole. This Court has a public policy interest in protecting the economy of this state. For all of the foregoing reasons, the American Trucking Associations, Inc., Trucking Industry Defense Association, and New Mexico Trucking Association respectfully requests that this Court (a) reverse the Court of Appeals' opinion; and (b) affirm the District Court's Order granting Summary Judgment.

Respectfully submitted,

BUTT THORNTON & BAEHR PC



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Paul T. Yarbrough

Jane A. Laffin

P.O. Box 3170

Albuquerque, NM 87190

Telephone: (505) 884-0777



## CERTIFICATE OF SERVICE

I certify that the original was served on August 4, 2014, and I served a conformed copy on August 5, 2014, by email to:

Erin B. O'Connell, Esq.  
O'Connell Law LLC  
4801 All Saints Road NW  
Albuquerque, NM 87120

Geoffrey R. Romero, Esq.  
Law Offices of Geoffrey R. Romero  
4801 All Saints Road NW  
Albuquerque, NM 87120

Ray M. Vargas, II, Esq.  
The Vargas Law Firm, LLC  
807 Silver Avenue SW  
Albuquerque, NM 87102

Kevin M. Sexton  
Andrew S. Montgomery  
P.O. Box 2307  
Santa Fe, NM 87504-2307  
(505) 982-3873  
*Attorneys for Defendant-Petitioner*  
NORTHLAND INSURANCE  
COMPANY



Jane A. Laflin