No. 09-3489

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

| | | |
|---|---|---|
| ALLIANCE LOGISTICS, INC. n/k/a ALLIANCE 3PL CORP., | ) | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 07 C 4944 |
| NEW PRIME, INC. d/b/a PRIME INC., | ) | Hon. Elaine E. Bucklo |
| Defendant-Appellant. | ) | |

**REPLY BRIEF OF DEFENDANT-APPELLANT NEW PRIME, INC.**

Jeffrey W. Sarles
Katherine E. Agonis
Kristin W. Silverman
MAYER BROWN LLP
71 South Wacker Dr.
Chicago, IL 60606
(312) 782-0600

*Attorneys for Defendant-Appellant New Prime, Inc.*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

ARGUMENT ..... 2

I. PRIME IS ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE CONTRACT IS UNAMBIGUOUS AND THE KEY FACTS ARE UNDISPUTED ..... 2

A. The back-solicitation clause is not ambiguous ..... 2

B. The evidence is unrebutted that Prime did not "solicit" Loders' "traffic." ..... 4

II. PRIME IS ENTITLED TO A NEW TRIAL BECAUSE THE JURY INSTRUCTIONS ON COUNT I WERE PLAINLY ERRONEOUS ..... 6

A. The district court's instruction was plainly erroneous ..... 6

B. Plain error review of the district court's jury instruction has not been "waived." ..... 8

III. PRIME IS FURTHER ENTITLED TO A NEW TRIAL BECAUSE ALLIANCE'S EXPERT WAS IMPROPERLY ALLOWED TO TESTIFY ABOUT THE MEANING OF THE CONTRACT. ..... 10

A. Alliance's expert improperly interpreted the contract for the jury ..... 11

B. Alliance's improper expert testimony unfairly prejudiced Prime. ..... 12

CONCLUSION ..... 14

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

*Alpha Tax Servs., Inc. v. Stuart*, 761 P.2d 1073 (Ariz. App. 1988) ..... 3

*Ammons-Lewis v. Metro. Water Reclamation Dist.*, 488 F.3d 739 (7th Cir. 2007) ..... 7

*Bourke v. Dun & Bradstreet Corp.*, 159 F.3d 1032 (7th Cir. 1998) ..... 2

*Consumer Prods. Research & Design, Inc. v. Jensen*, 572 F.3d 436 (7th Cir. 2009) ..... 9

*Higbee v. Sentry Ins. Co.*, 440 F.3d 408 (7th Cir. 2006) ..... 8

*Humphrey v. Staszak*, 148 F.3d 719 (7th Cir. 1998) ..... 6

*Int'l Prod. Specialists, Inc. v. Schwing Am., Inc.*, 580 F.3d 587 (7th Cir. 2009) ..... 9

*Iskander v. Village of Forest Park*, 690 F.2d 126 (7th Cir. 1982) ..... 8

*Jones v. Lincoln Electrical Co.*, 188 F.3d 709 (7th Cir. 1999) ..... 13

*McLaughlin v. State Farm Mut. Auto. Ins. Co.*, 30 F.3d 861 (7th Cir. 1994) ..... 6

*Mesman v. Crane Pro Servs.*, 512 F.3d 352 (7th Cir. 2008) ..... 9, 10

*Nat'l Tea Co. v. Commerce & Indus. Ins. Co.*, 456 N.E.2d 206 (Ill. App. 1983) ..... 6, 7

*Ryan v. Chromalloy Am. Corp.*, 877 F.2d 598 (7th Cir. 1989) ..... 2

*Timmerman v. Modern Indus., Inc.*, 960 F.2d 692 (7th Cir. 1992) ..... 6

*United States v. Olano*, 507 U.S. 725 (1993) ..... 8, 9, 10

*Westfield Ins. Co. v. Sheehan Constr. Co.*, 564 F.3d 817 (7th Cir. 2009) ..... 10

*William Blair & Co., LLC v. FI Liquidation Corp.*, 830 N.E. 2d 760 (Ill. App. 2005) ..... 3

**RULES**

Fed. R. Civ. P. 51(d)(2) ..... 8

Fed. R. Evid. 702 ..... 12

## INTRODUCTION

Prime's opening brief showed that Alliance's breach-of-contract claim never should have been submitted to the jury. Prime did not "solicit" Loders' business under the plain meaning of that term. The term "solicit" unambiguously means to approach with a request, and the unrebutted evidence established that it was Loders that approached Prime to request that Prime take on Loders' bulk transport business, not vice versa. Moreover, the term "traffic" unambiguously means things transported along a route, and the unrebutted evidence established that Prime independently knew of Loders' "traffic" well before Alliance worked with either Loders or Prime.

Alliance responds that "solicit" and "traffic" are ambiguous because the parties differ on their meaning. But courts consistently reject the notion that the mere positing of such a difference transforms clear terms into ambiguous ones. Alliance also suggests that, even if "solicit" and "traffic" are clear and unambiguous terms, disputes over their application to the facts of this case required jury resolution. But the posited factual disputes exist only if one accepts Alliance's deviations from the plain meanings of those terms. The evidence is undisputed that Loders initially approached Prime and that Prime carried loads for Loders before Alliance entered the picture.

Prime also showed that the district court's breach-of-contract jury instruction failed to guide the jury on what it should do. That omission was so glaring as to constitute plain error and warrant a new trial. Alliance makes no serious attempt to defend the instruction, instead relying on inapt procedural arguments and the difficulty of satisfying the plain-error standard. Prime recognizes that the standard is steep but has shown that it is satisfied by a jury instruction that amounts to no instruction at all, resulting in a faulty verdict that is manifestly unjust.

Finally, Prime's opening brief showed that the district court erroneously allowed Alliance's expert to tell the jury that the contract's back-solicitation clause implicitly requires Prime to carve out existing customers and notify Alliance when it is offered business. Allowing such expert testimony on the meaning of the contract, especially after excluding the countervailing testimony of Prime's expert, severely prejudiced Prime and prevented a fair trial. Alliance responds that its expert simply told the jury about custom and practice in the industry. But the sole function of that testimony was to convince the jury that the contract includes terms that do not appear in its text. That is not a proper purpose of expert testimony. Allowing such testimony severely prejudiced Prime and prevented a fair trial.

## ARGUMENT

### I. PRIME IS ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE CONTRACT IS UNAMBIGUOUS AND THE KEY FACTS ARE UNDISPUTED.

The back-solicitation clause states that Prime "shall not solicit traffic from any shipper" where Prime "first knew [of] the availability of such traffic as a result of [Alliance's] efforts" or the traffic "was first tendered to" Prime by Alliance. A17 ¶11. Because neither "solicit" nor "traffic" is ambiguous, the district court should have "declare[d] the meaning of those provisions" and entered judgment for Prime as a matter of law. *Ryan v. Chromalloy Am. Corp.*, 877 F.2d 598, 602 (7th Cir. 1989).

#### A. The back-solicitation clause is not ambiguous.

Alliance argues (at 28) that "[t]he terms 'solicit' and 'traffic' in the Back-Solicitation Clause are ambiguous." It relies (at 29) on the parties' "divergent views" on the meaning of those terms. But a contract is not "rendered ambiguous simply because the parties do not agree on the meaning of its terms." *Bourke v. Dun & Bradstreet*

*Corp.*, 159 F.3d 1032, 1036 (7th Cir. 1998). A contract term is ambiguous only if "it can *reasonably* be interpreted in more than one way due to the indefiniteness of the language or due to it having a double or multiple meaning." *William Blair & Co., LLC v. FI Liquidation Corp.*, 830 N.E.2d 760, 769 (Ill. App. 2005) (emphasis added).

Nothing about Alliance's proffered interpretation of "solicit" is reasonable. First, as Prime has shown, "solicit" unambiguously means to "approach with a request or plea." Opening Br. 23-24. As one court has noted, "The courts have not found the word 'solicit' to be vague nor had trouble defining it." *Alpha Tax Servs., Inc. v. Stuart*, 761 P.2d 1073, 1075 (Ariz. App. 1988). Surveying definitions of "solicit" from several authorities, the court explained that it "implies *personal* petition and importunity addressed to a [particular] individual to do some particular thing." *Id.*

Alliance emphasizes (at 30-32) that "seeking to obtain" something is enough to qualify as a "solicitation," even if merely in response to a prior request that Prime handle the customer's business or "participate in a bidding process." Alliance then argues (at 31-32) that, even if there was a bid process, Prime's ***response*** to a bid from Loders was nevertheless a ***solicitation*** by Prime. Alliance offers no support for such an Orwellian revision of the meaning of "solicit." Prime has never denied that it sought to obtain Loders' business—but only ***after*** Loders requested pricing and route information from Prime and told Prime that Loders was interested in replacing Alliance. Such a response is not a solicitation. Indeed, Alliance's own expert testified that back solicitation clauses protect against "direct communication *** ***from the carrier to the shipper*** that will seek to exclude the broker from his commissions and his revenue." Tr.IV:36 (emphasis added). They do not proscribe communications initiated by the shipper—nor could they, as the contract between the logistics broker and the

carrier does not bind the shipper. Nor do they bar responses to such shipper-initiated communications, even if enthusiastic. Thus, there is no reason why the Agreement would have to affirmatively authorize such conduct, as Alliance contends (at 31-32).

"Traffic" also is clear and unambiguous, meaning "things being transported to and from along a route" (see Opening Br. 24), a definition propounded by Alliance's CEO Dan Rimkus at trial (Tr.II:49). Alliance argues (at 33) that "'[t]raffic' is synonymous with 'business'" and "includes the logistics management that is required to transport the goods." Alliance offers no support for such an odd definition. The plain meaning of traffic does not include "logistics management," and even if all trucking traffic is arguably "business" in some sense, it need not be a "long-term, volume-based business," as Alliance asserts (at 34). Above all, Alliance offers no viable reason to deviate from the plain meaning of the Agreement itself.

### B. The evidence is unrebutted that Prime did not "solicit" Loders' "traffic."

If the disputed contractual terms are given their ordinary meanings, Alliance cannot establish a breach of contract. With respect to the supposed "solicitation," the evidence is unrebutted that Loders initiated the business relationship it ultimately developed with Prime. See Opening Br. 25-26. Alliance tries (at 31-32) to portray the disinterested witness testimony from Loders as equivocal. But Marcel Henneman, who along with his then-supervisor initially approached Prime, firmly maintained that Prime did not solicit Loders' business (Tr.IV:104); Karl Mueller testified that Prime's interest in Loders' business came in ***response*** to Loders' active attempt to replace Alliance, which "had nothing to do with" Prime (Tr.V:101-04, 112-113, 129-32); and Milena Green testified that "Loders did solicit Prime from the beginning" (*id.* at 169-70). Alliance

speculates (at 31) about secret meetings and trumped-up billing disputes, but the testimony of the only witnesses in a position to know whether Prime solicited Loders—those from Prime and Loders—uniformly swore that Prime did not.[1]

The record likewise refutes Alliance's assertion (at 34) that, prior to October 2005, "Prime had no idea of the availability of Loders' bulk tanker or logistics business." Alliance does not dispute that Prime hauled 124 loads to or from Loders before Alliance began acting for Loders, nor that at least 13 of those loads were carried by Prime's bulk tankers. Alliance Br. 3; see Opening Br. 4. Prime thereby knew of Alliance's "traffic," under any plausible definition of the term, independent of Alliance.

The supposed "disputed issues of fact" claimed by Alliance (at 34) are not factual disputes at all but rather disputes over how to characterize undisputed facts. For example, Alliance contends (at 35-36) that a jury "could have decided" that various meetings between Prime and Loders amounted to solicitation by Prime and that Prime did not learn "the volume of Loders' bulk tanker business" from its pre-2003 work for Loders. But the plain meaning of "solicit" would preclude a finding that those meetings evidenced solicitation if they were held in response to an invitation by Loders. Similarly, the "volume of Loders' bulk tanker business" is irrelevant to whether Prime's pre-2003 work for Loders constituted "traffic" under the plain meaning of that term.

In short, the district court should have construed the disputed but unambiguous contract terms according to their ordinary meaning, applied them to the unrebutted facts, and concluded that Prime did not breach the contract as a matter of law.

---

[1] At least two creditor lien actions are pending against Alliance. See R.186 (Motion to Spread Lien of Record by creditor Corporate Express Office Products); *Bank of America, N.A. v. Alliance Logistics, Inc.*, No. 09-CV-06014 (N.D. Ill. filed Sept. 25, 2009). These actions suggest that Loders' apparent concerns about Alliance's financial condition were not as far-fetched as Alliance suggests.

## II. PRIME IS ENTITLED TO A NEW TRIAL BECAUSE THE JURY INSTRUCTIONS ON COUNT I WERE PLAINLY ERRONEOUS.

Alliance's response brief does not seek to defend the district court's breach-of-contract jury instruction, apparently recognizing that such a facially inadequate instruction is indefensible. Instead, Alliance relies (at 28) on "the instructions as a whole" to cure the defective instruction. But it does not explain how the rest of the instructions, which do not address the requirements for finding a breach in these circumstances, cure the defect.

Alliance also asserts "waiver," which is inapposite on plain-error review, and attempts to alter the established plain-error standard. This case satisfies the proper standard because the instruction at issue was both plainly wrong and prevented a fair trial.

### A. The district court's instruction was plainly erroneous.

Alliance contends (at 26) that Prime should not have relied on Illinois law to establish the inadequacy of the court's breach-of-contract jury instruction. But this Court has made clear that in diversity cases, "state law determines the proper jury instructions." *McLaughlin v. State Farm Mut. Auto. Ins. Co.*, 30 F.3d 861, 868 (7th Cir. 1994); accord *Timmerman v. Modern Indus., Inc.*, 960 F.2d 692, 696 (7th Cir. 1992).

Illinois law makes clear that in contract cases, it is not sufficient to place the relevant contract language before the jury. *Nat'l Tea Co. v. Commerce & Indus. Ins. Co.*, 456 N.E.2d 206, 210 (Ill. App. 1983). Alliance nowhere attempts to show how the court's breach-of-contract instruction could "clarify issues for the jury" or "educate the jury about what factors are probative on those issues." *Humphrey v. Staszak*, 148 F.3d 719, 724 (7th Cir. 1998). Any such attempt would be futile because the court neither

interpreted the disputed contract terms nor, to the extent it found them ambiguous, informed the jury that it must resolve any extrinsic evidence as to their meaning. The court did not give the jury any meaningful guidance.

Instruction 19 simply reproduced the back-solicitation clause and told the jury to "decide whether New Prime failed to do what it was required to do under the contract." A37; Tr.VI:117-18. That wording is bizarre on its face because Alliance did not claim that Prime "failed" to do something required by the contract. Rather, it claimed that Prime did something—solicit certain traffic—that the contract forbade. On that issue, the court gave the jury no information and no roadmap to guide its decision, as required by the Illinois Pattern Instructions. See Opening Br. 29-30. A jury "should not be asked" to interpret an ambiguous contract "without guidance from the court in the form of an instruction stating what conclusion must be reached if the jury finds certain facts to exist." *Nat'l Tea Co.*, 456 N.E.2d at 210. The court erred by failing to provide such guidance, and that error is "plain" in the sense that, "in retrospect," it is "obvious." *Ammons-Lewis v. Metro. Water Reclamation Dist.*, 488 F.3d 739, 751 (7th Cir. 2007).

Alliance does not refute Prime's showing that the plainly erroneous instruction put its substantial rights at issue. See Opening Br. 32-33. Alliance claims (at 26) that Prime had to show that such rights were "surely," not just "probably," affected by the defective instruction. But assuming that anything can be shown "surely," Prime has done so. No reasonable (or adequately instructed) jury could have found that Prime breached its carrier contract with Alliance because (1) the contract is clear; (2) Loders approached Prime first; and (3) in any case, Prime already knew of Loders' traffic. There can be no doubt that the jury's deliberations would have taken a very different course if it had been instructed on the meaning of "solicit" and "traffic" or had been told how to

determine that meaning. Accordingly, the error affected Prime's substantial rights. See *United States v. Olano*, 507 U.S. 725, 732 (1993).

Finally, Alliance does not dispute that allowing the jury to impose liability and damages without judicial guidance affected "the fairness, integrity or public reputation of judicial proceedings." *Id.* Prime had a right to a fundamentally fair trial, and the erroneous jury instruction undermined that right by producing a verdict that was not based on a proper understanding of the law or the jury's role in assigning fault. Judges, not juries, should determine the meaning of contracts as a matter of law, absent some facial ambiguity in the contract. This settled principle would be overthrown if a verdict predicated on the jurors' construction of unambiguous contract terms (assisted only by Alliance's expert) were allowed to stand.

Some errors are simply too fundamental to stand. See *Iskander v. Village of Forest Park*, 690 F.2d 126, 130 (7th Cir. 1982) (holding that jury instructions "constitute plain error which affected the substantive rights of defendant and merit remand for a new trial"). Therefore, new trials based on plainly erroneous jury instructions are specifically authorized by the Federal Rules after the 2003 amendments. Fed. R. Civ. P. 51(d)(2); *Higbee v. Sentry Ins. Co.*, 440 F.3d 408, 409 (7th Cir. 2006). The obviously defective instruction in this case warrants a new trial.

### B. Plain error review of the district court's jury instruction has not been "waived."

Alliance claims (at 24) that Prime "waived" its right to challenge the district court's defective jury instruction by failing to object or offering an alternative jury instruction. But Prime acknowledged in its opening brief (at 28) that it failed to object, which is the very reason it is seeking plain error review pursuant to Fed. R. Civ. P.

51(d)(2). See *Consumer Prods. Research & Design, Inc. v. Jensen*, 572 F.3d 436, 439-40 (7th Cir. 2009) (Rule 51(d)(2) allows a court "to consider a plain error in the jury instructions that has not been preserved as required").

Alliance further asserts (at 24-25) that Prime waived appellate review by failing to contest the district court's breach-of-contract jury instruction in its post-trial motion papers. Alliance is simply wrong. Prime's brief in support of its post-trial motion for a new trial states: "The Court's failure to instruct the jury on one of the necessary elements to a breach of contract cause of action severely prejudiced Prime's ability to defend itself. *** This error was part of a larger failure to instruct the jury on the meaning of the contract." R.137 at 16. Prime's post-trial brief further states: "The unfair prejudice resulting from having only one side's expert testify was compounded by the court's failure to instruct the jury on the meaning of the contract." *Id.* at 13. Thus, Prime preserved this issue by raising it in its post-trial briefing. See *Int'l Prod. Specialists, Inc. v. Schwing Am., Inc.*, 580 F.3d 587, 600 (7th Cir. 2009) (issue preserved by reference in post-trial brief).[2]

Finally, Alliance contends (at 27) that Prime "waived" plain error review by failing to argue in its opening brief that the "costs of correcting the error mandate a reversal." But this is not an element of the well-established test for plain error. The Supreme Court's seminal plain-error decision sets forth the requirements that "[t]here must be an 'error' that is 'plain' and that 'affect[s] substantial rights.'" *Olano*, 507 U.S. at 732; see also *Mesman v. Crane Pro Servs.*, 512 F.3d 352, 357 (7th Cir. 2008) (explaining that plain-error standard in civil cases "was taken verbatim from the criminal rule."). If

[2] Whether the district court considered the argument is not clear because it denied Prime's request for post-trial relief in a two-sentence minute order. R.159.

these requirements are satisfied, the court has discretion to correct the error if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732. All of these elements were discussed in Prime's opening brief. Br. 28-32. By contrast, the cost of correcting an error is simply "*a* factor for the judge to consider" at the final, discretionary step of the plain-error test. *Mesman*, 512 F.3d at 357 (emphasis added). There is no "waiver" in omitting discussion of this one factor. Moreover, the only costs about which Alliance complains (at 27) are those to be incurred from a new trial—precisely the remedy required when the plain error standard is satisfied.

## III. PRIME IS FURTHER ENTITLED TO A NEW TRIAL BECAUSE ALLIANCE'S EXPERT WAS IMPROPERLY ALLOWED TO TESTIFY ABOUT THE MEANING OF THE CONTRACT.

As Prime's opening brief (at 34-35) shows, contract interpretation is not an appropriate subject of expert testimony because "what strangers to the parties' bargain would do is neither here nor there." *Westfield Ins. Co. v. Sheehan Constr. Co.*, 564 F.3d 817, 819 n.1 (7th Cir. 2009). Apparently accepting that principle, Alliance tries to recast the testimony of its expert, Robert Walters, to remove any taint of contract interpretation. But the only purpose of Walters' testimony was to tell the jury what the back-solicitation clause ***really means*** according to Alliance, as opposed to what it ***actually says***. Allowing that testimony was improper and severely prejudicial to Prime, especially in tandem with the court's exclusion of countervailing testimony from Prime's expert and the embellishment of Walters' testimony during summation by Alliance's counsel.

### A. Alliance's expert improperly interpreted the contract for the jury.

Alliance argues (at 36) that Walters did not interpret the Agreement but "simply explained the custom and practice in the trucking industry." But Alliance admits (at 37) that Walters told the jury that carriers often "provide the broker with a list of clients at the time the contract is signed" and that carriers generally "notify the broker at the time an account is offered or load is tendered by the broker that there is a preexisting account between the carrier and the shipper whose load has been offered."

Walters' testimony amounted to this: Back-solicitation clauses require the carrier to (1) explicitly "carve out" existing customers to whom the clause does not apply; and (2) notify the logistics manager of any pre-existing relationship with a customer it obtains through the logistics manager. Tr.IV:36-38. Alliance responds (at 36) that Walters did not say outright that those requirements are actually found in the Alliance-Prime contract. But Walters effectively said as much by opining that such provisions are industry practice. Illuminating the contract was the only purpose of his testimony, which otherwise would not have been relevant.

Alliance tries (at 36-37) to deny the relevance of Walters' testimony to the meaning of the contract, contending that his opinion testimony was limited to industry custom and practice. But even if that were true, Alliance offers no reason why such custom and practice testimony would aid the jury in determining the meaning of the carrier contract. Either that was its purpose or it wasn't relevant.

If there were any doubt about the purpose of Walters' testimony, it was resolved by Alliance's counsel in closing argument when he expressly linked Walters' testimony to the Alliance-Prime contract. According to Alliance's counsel: "If you want to exclude a

customer from [a] back solicitation clause, you tell the 3PL about the existence of that customer. You either do it at the time the contract is formed or when you get a load with a customer that you think is excluded from a back solicitation clause." Tr. VI:47-48. And that was true, according to counsel, because it was "Mr. Walters' expert testimony." *Id.* at 47. In short, it was Walters, as paraphrased by Alliance's counsel, who effectively instructed the jury on the meaning of the disputed contract terms.

### B. Alliance's improper expert testimony unfairly prejudiced Prime.

Walters' improper testimony undoubtedly influenced the jury, which could not have found for Alliance unless it believed that the contract contained requirements beyond those spelled out on its face. This inherent prejudice from Walters' improper contract interpretation was compounded by the exclusion of Prime's expert Lana Batts, whose trucking industry experience was at least as extensive as Walters'.

Alliance asserts (at 38) that Batts "was not qualified." But Alliance offers no response to Prime's argument that if Batts was unqualified, then so was Walters, and *neither* should have testified. See Opening Br. 33. If expert testimony was appropriate, Batts had the necessary industry background. See Opening Br. 14-15. Walters was no better positioned to discuss industry practice than Batts, who Alliance admits (at 39) has "broad familiarity with the trucking industry," or for that matter than the fact witnesses from Prime, Alliance, and Loders. Alliance argues (at 38) that Batts lacked sufficient personal experience in drafting this particular type of contract clause. But if that were the admissibility criterion, only practitioners, not scholars or researchers, could be qualified as experts.

That is not the law. Federal Rule of Evidence 702 provides that an expert may be qualified by "knowledge, skill, experience, training, ***or*** education." Batts' resume and

testimony showed that she had the necessary knowledge, professional training, and education. See Opening Br. 14-15. Alliance relies on *Jones v. Lincoln Electrical Co.*, 188 F.3d 709, 723-24 (7th Cir. 1999), but that case holds merely that, where an expert purports to be qualified based on "experience," it should be "hands-on experience over a meaningful period of time." *Id.* at 724. That is not the issue here. It cannot be denied that a tire expert can be helpful to the jury in a product liability case involving an exploding tire even if she has no prior experience with that particular brand of tire. Batts' industry experience with carrier-TPL (and broker)-customer relationships was sufficiently deep that she similarly could have assisted the jury here (insofar as custom-and-practice testimony was admissible at all).

Alliance's counsel capitalized on the admission of Walters' testimony and the exclusion of Batts' testimony by emphasizing to the jury that Walters' testimony was "unrebutted." Tr:VI:106. Alliance says (at 41) that this comment could not have been prejudicial because it was "the truth." But that "truth" resulted from the district court's unbalanced treatment of the parties' experts that unfairly left Alliance's expert testimony unrebutted. And Alliance's own description of the closing argument confirms the prejudice to Prime. According to Alliance (at 41-42), Walters testified "that it is custom in the industry for the carrier to notify the broker at the time an account is offered or load is tendered *** that there is a preexisting account between the carrier and the shipper whose load has been offered." That amounted to telling the jury that such a notice requirement is an implicit term of a back-solicitation clause. By allowing the sole admitted expert to instruct the jury on the meaning of the contract, the district court committed prejudicial error.

Alliance argues (at 40-41) that Prime cannot make this argument because it did not object during closing argument. But Prime has not raised the closing argument as a ground for a new trial. Prime simply points to it as further reason why Walters should not have been permitted to opine on the meaning of the Agreement and especially why allowing him to do so unilaterally was prejudicial. It is those grounds, as well as the independent ground of the court's plainly erroneous jury instruction, that warrant a new trial (to the extent that judgment as a matter of law is not entered).

## CONCLUSION

This Court should reverse the judgment against Prime on Count I and remand with instructions to enter judgment for Prime. Alternatively, a new trial should be ordered on Count I.

Dated: January 27, 2010

Respectfully submitted,

_____

Jeffrey W. Sarles
Katherine E. Agonis
Kristin W. Silverman
MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

*Counsel for Defendant-Appellant New Prime, Inc.*

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for Defendant-Appellant New Prime, Inc. certifies that the foregoing Reply Brief:

(i) complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 4,081 words including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type styles requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 SP1 MSO in 12-point Georgia.

_____

## CIRCUIT RULE 31(e) CERTIFICATION

Pursuant to Circuit Rule 31(e), the undersigned attorney certifies that a copy of the foregoing Reply Brief in native PDF format was filed electronically with the Court.

_____

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on January 27, 2010, two hard copies of the foregoing Reply Brief were served by hand delivery, and a digital version was served by e-mail, on the following:

William M. McErlean
James E. Michel
BARNES & THORNBURG LLP
One North Wacker Dr. Suite 4400
Chicago, IL 60606
wmcerlean@btlaw.com
jmichel@btlaw.com.

_____