HISCOCK & BARCLAY

ALERT

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Transportation: Annual Year in Review

Hiscock & Barclay's Transportation Team

We are delighted to present our annual survey of what is new in the field of transportation law.

This year's lead article focuses on the liability of transportation brokers as reflected in several recent court decisions. Brokers are also the focus of Section 19 by co-editor Phil Bramson which sets out some of the highlights of MAP-21.

Not long after the sunsetting of the I.C.C. in 1995, the USDOT indicated that it was working on a modernization of the registration system for motor carriers and other transportation industry players. Finally this past August, new rules were issued, and they are summed up below in Section 20.

As always, Alan Peterman has thoroughly reviewed and analyzed the key cargo cases of the year (Section 4). This year also featured an unusually large number of cases dealing with punitive damages, some of which are summarized in Section 8.

Our Transportation Team has some new members since last year including Yvonne Hennessey, from the firm's energy practice who is one of the country's leading experts on laws and practices related to hydraulic fracturing or fracking. In Section 2 she provides an overview in which she explores the close connection between the fracking industry and the trucking industry. Scott Rogoff brings to the team his strong background in the area of labor and employment, an issue of great significance in the trucking world because of the often unspecified nature of a driver's relationship with the motor carrier for whom he or she is hauling. Also on board are Melle Xu and Michelle DeKay who specialize in tort defense matters and Sanjeev Devabhakthuni who does both defense work and coverage work.

We hope that you enjoy this year's survey and look forward to hearing any comments or responses.

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Transportation Annual Year in Review
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1. Transportation Brokers

As set out below in Section 19 of this year's summary, the USDOT's MAP-21 regulations modify the legal requirements for transportation brokers in various ways, and impose penalties for motor carriers without broker authority which nonetheless attempt to broker loads to other carriers. In the meantime, courts continue to wrestle with the legal implications of how brokers and logistics companies actually do business.

In the late 1940's, the Interstate Commerce Commission investigated the common practice by licensed motor carriers to hire "independent contractors" over whom they claimed to assert no control. In response Congress passed legislation requiring a motor carrier to lease, and to bear responsibility for, any non-owned vehicle used in its business, and the I.C.C., in turn, issued the leasing regulations (now re-numbered as the USDOT leasing regulations at 49 CFR Part 376). Has the rise of the mega-logistics companies, which are generally registered with the USDOT as brokers, torn a hole in the protective fabric of the leasing regulations?

Scheinman v. Martin's Bulk Milk Service, Inc., 2013 U.S. Dist. LEXIS 172599 (N.D. Ill.) describes the complex web of business relationships increasingly common in the contemporary transportation industry. Jeffrey Scheinman was severely injured when his car was rear-ended by a tractor-trailer rig as he waited at a red light. His guardian brought suit against the truck driver (Franke), Franke's employer Martin's Bulk Milk Service, the shipper International Paper (IPC) and Universal Am-Can (UACL) which had a transportation contract with IPC. UACL, the successor to Overnight Express had a long-standing contract with IPC to delivery IPC shipments to various locations around the country from IPC's Hammond, IN facility. The load in this case was en route from Indiana to Wisconsin, which was Franke's standard route.

The written agreement between IPC and UACL identified IPC as the shipper and UACL as the carrier. The drafters were sophisticated enough to insist that the arrangement called for contract carriage, not common carriage by UACL. There is no hint, at least in the portions of the contract cited by the court, that UACL was authorized as part of the agreement to broker the loads to some other carrier. To the contrary, the agreement, using language that echoes the leasing regulations insist that "CARRIER shall solely direct all persons performing services performed by CARRIER under this Agreement, and such persons shall be and remain subject to the exclusive control and direction of CARRIER." Nonetheless, IPC's facility manager testified that he saw no problem with UACL getting a different carrier to actually haul its shipments, although if something went amiss he would seek satisfaction from UACL, not that other carrier. We are not convinced that the court was correct in seeing this testimony as consistent with that of UACL's president who testified that his company was permitted under the contract to be "both a contract carrier and a broker." If the contract had indeed permitted UACL to act as a broker, then IPC would have had no right to demand satisfaction from UACL for the negligence of some other carrier to which UACL had brokered the load. (A separate question, also not addressed by the Court, was whether UACL was authorized by the USDOT to broker loads in interstate commerce. A glance at the USDOT Licensing and Insurance database makes clear that UACL has both carrier and broker authorities.)

Plaintiff Schienman, in any event, was not convinced that UACL had acted as a broker, and sought judgment against UACL as a carrier. UACL insisted, though, that it had merely brokered the load to Martin's. It was undisputed that Martin's owned the tractor and employed Franke. (Martin's gave Franke a W-2 each year.) The court also examined a "Master Brokerage Agreement" between UACL and Martin's under which Martin's as carrier agreed to comply with all relevant laws and to maintain insurance in amounts required by UACL. The agreement stated that Martin's was not an agent, employee or joint venturer with UACL. However, Martin's is licensed by USDOT only as a broker, not as a carrier. None of the parties appear to have alerted the court to this important fact. The fact that Martin's lacked carrier authority ought to have put a serious roadblock in UACL's attempt to argue that it was merely a broker. (Alternatively, it could suggest that UACL had acted negligently as a broker in selecting a trucker lacking authority, again creating potential liability.)

There is a second point that the parties, and the court, ignored when they assumed that so long as the shipper did not object to UACL brokering loads rather than hauling them, there is nothing further to discuss. In fact, this is not so. The definition of broker set out at 49 CFR §371.2 provides that:

> . . . [m]otor carrier, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport.

Since UACL had, in fact, bound itself to carry IPC's loads, the regulations, which the court does not cite to, ostensibly should have precluded UACL from asserting that it was only a broker. (See the discussion of this issue in the *Cobra Trucking* decision, below.)

The court ruled on two separate summary judgment motions, one filed by IPC and one by UACL. Both defendants argued that Franke, the Martin's driver was not their agent, citing to the traditional analysis of who maintained control over the driver, and the related checklist of indicia of agency.

The court had a relatively smooth road in granting IPC's motion that it was not responsible for Franke's negligence. This was clearly the correct result, although there was one shaky moment in the court's analysis when it suggested (based on what we see as a misreading of a 1998 Eighth Circuit decision relating to non-trucking coverage) that when IPC contractually required drivers to comply with local, state and federal law, it itself was benefitted thus satisfying one of the criteria of agency. Ultimately, though, the court found that Franke had an independent duty to follow the law and the court granted IPC's motion.

The court followed a similar methodology – analyzing the various indicia of control and agency – with respect to UACL's motion. The court essentially concluded that UACL was not much different in this regard than IPC, as neither exercised, or could have exercised, control over Franke. The court concluded that there was no basis upon which UACL could be responsible for Franke's negligence.

The court's error here may have been to treat this as a typical principal/agent case without taking into consideration the special statutory, regulatory and case laws history that impacts upon the liability of players in the transportation industry. At the very least, the court should have examined whether UACL had agreed to haul the shipment and, if so, whether it was liable as a carrier for the actions of owner-operators hauling under its authority.

Great West Cas. Co. v. Cobra Trucking, Inc., 2013 U.S. Dist. LEXIS 15036 (D. Mont.), concerned an insurer's attempt to exclude from coverage its insured's "brokerage operations." Great West insured Cobra Trucking under a truckers policy which included the following exclusion:

> Liability Coverage shall not apply to transportation broker or freight forwarder operations of the "insured."

Cobra is an authorized interstate trucking company which has contracts with Halliburton and other service companies to haul fracking sand to well sites in Wyoming, Montana and Colorado. Cobra did not have enough of its own trucks or drivers to keep up with the demand and so it contracted with various owner-operators. Cobra was not licensed as a broker.

One of the owner-operators, Randall Dwyer d/b/a Dwyer Trucking was involved in a fatal accident with a passenger vehicle near Billings, MT. Dwyer was returning to his home in Caspar, Wyoming after delivering a load of fracking sand for Halliburton in Roundup, MT. Dwyer carried his own insurance (the decision does not tell us what his limits were), and had a USDOT number. (The court did not mention that Dwyer had no MC number and was not authorized to haul non-exempt loads interstate – this load could only have moved legally under Cobra's authority.)

Cobra issued the bill of lading for the load hauled by Dwyer, and the bill of lading identified Cobra as the motor carrier.

Great West filed an action for declaratory relief against Cobra and against the plaintiffs, and asked the court to find that as a matter of law it has no duty to defend or indemnify Cobra in any action for bodily injury and wrongful death. (We are not told whether such an action has been filed as yet.) Great West's view was that by assigning an owner-operator to haul the load, Cobra was engaged in "brokerage operations" thus triggering the exclusion set out above. Great West argued that the USDOT regulations permit a motor carrier to broker loads even if it has no broker authority. On this point the court agreed, but Great West was, in fact, not correct. Even before the changes imposed by MAP-21, motor carriers without broker authority were not permitted to broker loads. (As set out in the section below on MAP-21, a carrier trying to do so in the future will be hit with a hefty fine.)

The court correctly pointed out, though, that under the regulations, an entity with carrier authority that accepts a load and legally binds itself to carry is a carrier and not a broker. Here Cobra agreed to handle the Halliburton load and even identified itself as the carrier on the bill of lading that it completed.

Under the circumstances, the court concluded that the "brokerage operations" exclusion did not apply. The court rejected as illogical the argument that the loss arose out of brokerage operations even if Cobra was not acting as a broker. Accordingly, it granted plaintiffs' motion and found that coverage was available.

The court describes the arguments raised by the insurer and the claimant, but only alludes to the position of Cobra itself which appears to have agreed with the plaintiff that coverage would be available if Cobra is found liable. Cobra's president described the load as "not a brokered load" but if it was not brokered, just what was it? Had the load been carried under Cobra's authority there should have been a lease complying with 49 CFR Part 376, but no mention is made of a lease. Is it too cynical to think that had Great West not brought up the broker exclusion, Cobra would have itself taken the position that this was a brokered load (thus reducing the chance that it would be found liable to plaintiffs)?

Some logistics companies are involved in arranging international shipments. In *Olympus Dairy USA Corp. v. Pavil Assoc., Inc.*, 2013 U.S. Dist. LEXIS 176097 (E.D.N.Y.), Pavil Associates arranged the shipment of cheese from Greece to a warehouse in California and then on to two customers in that state. Pavil hired Sataria Acquisitions for the U.S. portion of the trip – New Jersey to California. Sataria d/b/a Flagship Logistics was licensed as a transportation broker, not a carrier, and it in turn hired Sunline Logistics – which was at the time an authorized motor carrier – to haul the cheese cross-country. The shipper had specified that the product be kept at 36° F but the refrigerator in the Sunline trailer was set at 10° F. The cheese froze en route and was rejected by the customer. The shipper sued Pavil for the damage, Pavil sued Sataria and Sataria sued Sunline. By the time the case was heard Sunline had been liquidated under Chapter 7 of the Bankruptcy Code.

It was Sataria's motion for summary judgment that occupied the court's attention. Sataria argued that it had acted as a broker and was not responsible for any negligence by Sunline or its driver. Neither the shipper nor, oddly, the third party plaintiff Pavil opposed the motion but the court nonetheless examined the substance of Sataria's motion before granting it. The court cited to case law holding that the Carmack Amendment, which protects shippers, does not apply to brokers. (See the section on preemption in Alan Peterman's Carmack Amendment discussion below.)

Since Sataria's statements that it was a licensed broker and that it never took control over the cargo were not challenged, the court granted Sataria's motion. It is noteworthy, but perhaps not surprising, that the court added that in most(!) cases the difference between a broker and carrier is "blurry," and summary judgment is rarely appropriate on this issue. Since so far as USDOT is concerned there is a clear bright line separating carriers and brokers – or carrier operations and broker operations in a single entity – it is apparent that the theoretical constructs set out in the statutes and regulations are frequently ignored in actual practice.

Further proof, if any is needed, that real life is not always modeled in the USDOT regulations, may be found in *In re: GMJ Global Logistics, Inc.*, 498 B.R. 290 (D. Kan.). From 2002 until 2011, IGT, a manufacturer of gambling products, shipped its products pursuant to a transportation contract with GMJ under which GMJ was defined as the motor carrier. In fact, virtually every shipment was brokered out to other carriers, and IGT found itself on the hook for hundreds of thousands of dollars in unpaid transportation fees to the actual carriers which had not received their share from GMJ of payments made by IGT itself to GMJ. Interestingly the court found that the shipper was liable to pay the various carriers for transportation services even where the contracts with the carriers were executed by the broker, not the shipper. The court thus rejected the argument of the trustee in bankruptcy that IGT ought not have paid the carriers and had made a voluntary payment.

The court ultimately accepted the shipper's argument that it was entitled to reimbursement from the estate in bankruptcy for the payments it had made to the motor carriers.

- Larry Rabinovich

2. Hydraulic Fracturing: Its Impact on the Trucking Industry

Shale development across the continental United States has skyrocketed in recent years, resulting in an energy boom, and all estimates suggest decades more of significant natural gas development. The reason for this energy renaissance is the combination of horizontal drilling and hydraulic fracturing (or fracking).

This combination of technology and the resulting surge in natural gas development is creating once-in-a-lifetime business opportunities for the trucking industry (and new risks for insurers whose insureds are involved in this growing industry). And while the natural gas industry has seen, and continues to see, technological advances that reduce the level of trucking, so long as there is drilling and fracking, there will always be considerable trucking needs. These needs include both bringing materials to drill sites and carrying away resulting waste.

Horizontal drilling is not a new technology. The process begins with vertical drilling to the desired depth in the geological formation to be tapped. The drill rods are then turned horizontal in order to drill perpendicular to naturally occurring vertical fractures. After the drill hole is completed, hydraulic fracturing is performed. The process involves the introduction of large amounts of water and proppant (a material that will keep an induced hydraulic fracture open), typically sand. The water and proppant are then mixed together at which point significant pressure is used to introduce the mixture, coupled with certain chemical additives, to the geological reservoir.

Horizontal drilling creates waste of several kinds including drill cuttings that often must be taken away and disposed of offsite, either because of regulatory requirements or a landowner's refusal to allow on-site application or burial. Offsite disposal usually occurs at solid waste landfills. Drill cuttings are the broken bits of solid material removed from a wellbore as it is drilled. They are produced as the rock is broken by the drill bit advancing through the rock and are usually carried to the surface by drilling fluid circulating up from the drill bit. For some geological formations, like the Marcellus Shale in the Northeast, drill cuttings can contain naturally occurring radioactive material. Drilling mud, the fluid mixture used during drilling operations to carry rock cuttings to the surface and also to lubricate and cool the drill bit, is another waste product that may need to be disposed of offsite, typically at solid waste landfills.

Hydraulic fracturing requires high volumes - millions of gallons - of water for each wellbore that is drilled, as well as significant quantities of chemical additives in the range of 15 to 60 thousand gallons per wellbore, all of which must be transported to a well site. It also produces significant quantities of wastewater. Data that the natural gas industry reported for Pennsylvania alone during a six month period in 2010 established that the industry produced approximately 235 million gallons of wastewater.

Wastewater that is recovered from hydraulic fracturing operations is generally high in total dissolved solids (TDS), salts, and other parameters and may contain sand, heavy metals, oils, grease, manmade organic chemicals that aid in the hydraulic fracturing process, radioactivity from contact with radioactive rocks underground, or other unknown or trace contaminants. Disposal options include municipal sewage treatment facilities, also known as Publicly Owned Treatment Works, specialized disposal facilities, and injection wells. Disposal options are dependent on a variety of factors, including the availability of suitable injection zones, the capacity of commercial and/or municipal water treatment facilities, the ability of either operators or such plants to successfully obtain surface water discharge permits, and applicable regulations.

The trucking industry's role in bringing water and chemical additives to well sites and carrying away drilling muds, drill cuttings and wastewater is not risk free. At any of the locations where drilling muds and cuttings, chemical additives or produced water is handled, the potential exists for releases due to accidents, inadequate facilities management or staff training, or illicit dumping. Disposal of wastes could also result in regulatory violations, environmental contamination, human health exposure, and, in the case of wastewater disposed of in an injection well, earthquakes.

So, while the current energy boom is creating extraordinary business opportunities for the trucking industry, it also is generating potentially serious risks that need to be fully understood and appropriately managed and insured against.

- Yvonne Hennessey

3. Fracking-Related Decision

Some insurers have attempted to craft their policies to provide coverage for short-term, containable events arising from release of fracking wastewater, while excluding exposure for long-tail, wide-spread contamination. In *Star Insurance Co. v. Bear Productions, Inc.*, 2013 U.S. Dist. LEXIS 148559 (E.D. Okla.), the plaintiffs alleged that Bear transported and dumped "Produced Fluid Waste," or "PFW" (waste fluids and solids which are generated by operators during the course of oil and gas drilling completion operations) in an open, unlined dump site pit, and that it subsequently migrated to and contaminated their air, land and water. The complaint included six causes of action including (1) strict liability for abnormally dangerous activity, (2) public and private nuisance; (3) trespass, (4) negligence, (5) negligence *per se*, and (6) unjust enrichment. All six claims against Bear were based on alleged transport and disposal of PFW at the dump site.

The Star primary policy contained a standard pollution exclusion, but also included a rider that provided limited pollution coverage at designated well sites for bodily injury, property damage or environmental damage caused by a "pollution incident" "pollution incident" at a designated well site within the coverage territory that lasted only 72 hours, that was accidental, that was reported within 90 days, where the "bodily injury," "property damage,", or "environmental damage" first occurred during the policy period.

In this case, though, the pollution was alleged to have occurred between 2003 and 2009, the contract for disposal of the PFW at the dump site was dated 2004, and the policy period was March, 2006 to March, 2007. Accordingly, the exception provided in the rider was inapplicable, and the court had no trouble determining that the alleged damage from the PFW constituted pollution and was excluded from the policy.

See, also, the Cobra Trucking decision, discussed in Section 1 which dealt with the transportation of fracking sand.

- Phil Bramson

4. Carmack Amendment

Limitation of Liability

A number of cases decided under the Carmack Amendment in 2013 focused on the enforceability of limitation of damages provisions contained in a carrier's tariff or bill of lading. Courts read those limitations very narrowly and insist on strict compliance by a carrier seeking to enforce any such limitation.

Great American Insurance Co. v. USF Holland Inc., 2013 U.S. Dist. LEXIS 47049 (S.D.N.Y.), involved damage to a shipment of vaccine transported by Holland from Iowa to Illinois. Novartis and Holland had negotiated a master pricing agreement covering shipments that Holland handled for Novartis. The Pricing Agreement contained a limitation on liability of $25 per pound up to a maximum of $100,000. The Pricing Agreement also contained language in its General Terms and Conditions that liability was limited to $10 per pound, with a cap at $100,000 per shipment. The Pricing Agreement also incorporated a second tariff, Holland's Special Services Schedule. Included in the SSS was a Guaranteed Delivery Service. The SSS limited liability for failure to deliver within the specified time period to cancellation or refund of all shipping charges.

On February 7, 2011, Novartis tendered a shipment of animal vaccine to Holland for delivery in Illinois before noon the next day. Holland, however, had suspended Guaranteed Delivery Service that day because of inclement weather. Novartis had packed the shipment in crates marked "VACCINE-PERISHABLE

PRODUCTS" and "DO NOT FREEZE." and tendered the shipment to Holland. When the shipment was delivered on February 9, it was determined that at least a portion of the shipment had frozen while it was being held in Holland's terminal near O'Hare Airport. The shipment was declared a total loss and Great American paid Novartis, under its shipper's interest policy, $135,091.47, the value of the shipment plus the cost of testing and disposal. Great American then sought reimbursement from Holland.

After granting Great American's motion for summary judgment on the issue of liability, the court considered Holland's argument that its damages were limited by the provisions of the Special Services Schedule in light of the fact that Novartis had requested the Guaranteed Delivery Service on the bill of lading. The court first held that the Pricing Agreement governed any limitation on liability. That agreement also incorporated the provision of the Special Services Schedule whenever one of the special services contained in the SSS was selected. Great American argued that, although Novartis had placed the Guaranteed Delivery Service sticker on the bill of lading, Holland had never accepted Novartis's offer to purchase that service. The court agreed, holding that because it had suspended the Guaranteed Delivery Service on the date that Novartis requested such service, the placing of the label on the bill of lading was only an offer to purchase the service. As there was no evidence that Holland ever accepted that offer, there was no agreement with respect to Guaranteed Delivery Service. Absent an agreement to provide a service listed in the SSS, the limitation on liability contained in the SSS did not apply.

The court then addressed the apparent inconsistency between the various terms of the Pricing Agreement. The court applying an "holistic view" of the competing clauses, had no problem finding that the $25.00 per pound limitation applied. The General Conditions contained the usual default language that "the following limits of liability apply to all shipments hereunder unless otherwise modified herein." The court found that the specific provision limiting liability to $25 per pound overrode the default limitation of $10 per pound and awarded Plaintiff $100,000.

In *Verhoogan v. United Parcel Service, Inc.*, 2013 Ohio App. LEXIS 2236 (Fifth Judicial District) Plaintiff arranged with a UPS store in Spokane, WA, for the shipment of a stove top from Washington to Mansfield, Ohio. Defendant UPS shipped the parcel. When the stove top arrived damaged, Plaintiff sued for the amount of damage. UPS moved for summary judgment arguing that its liability was limited to $100 based on the Carmack Amendment. The trial court denied the motion and, after a bench trial, awarded plaintiff $4,183.54.

On appeal UPS argued that plaintiff lacked standing to sue UPS since his contract was with the UPS store, not UPS itself. In the alternative, if plaintiff had standing to sue, any damages were limited by the provisions of UPS's tariff that limited liability to $100.00 plus the cost of the shipment. The appellate court found that the agreement to ship the stove top was between Plaintiff and the UPS store, not UPS. There was no privity of contract.

The court then went on to address UPS's argument that the limitation of liability in its tariff applied to any shipment. The court held that the Carmack Amendment permits carriers to limit their liability so long as any such limitation was contained in its tariff, observing that such limitations are necessary in order for common carriers to provide affordable shipping services. UPS's tariff limited such liability to $100 plus shipping costs unless the Shipper declared a greater value and paid the applicable declared value charges. Although Plaintiff listed a declared value of $950.00 on the parcel shipping order to the UPS store, he did not purchase the declared value coverage. The appellate court reversed the trial court and limited the recovery to $159.19.

In *Latshaw Drilling Company, LLC v. SAIA Motor Freight Lines, LLC*, 2013 U.S. Dist. LEXIS 112960 (S.D. Tex.), plaintiff contracted with defendant, a motor freight carrier, for the transportation of a valve from Gene Autry, Oklahoma to Houston, Texas. The bill of lading for the shipment referred to Defendant's tariffs and contained a space for the shipper to declare the value of the shipment. Plaintiff did not declare a value in the space left on the bill for such declarations. Defendant subsequently lost the valve. Plaintiff sued for $14,155, plus tax and shipping to replace the valve. Defendant argued that Plaintiff's damages were limited to ten cents per pound, the limitation on liability contained in its tariff. Because the valve weighed 400 pounds, the damages should be limited, argued the trucker, to $40.00.

The parties may limit liability according to a carrier's tariff so long as the tariffs are incorporated in the bill of lading. If the shipper does not know the terms of the carrier's tariff, the shipper had the obligation to determine those terms.

In *Latshaw Drilling*, the carrier's tariff, which was available on line, contained a provision that if the shipper did not declare any value for the goods being shipped on the bill of lading, the carrier's liability was limited to ten cents per pound. The tariff was referred to and incorporated into the bill of lading for the shipment. Since the shipper had failed to fill out the blank for the value of the shipment, its recovery was limited to $40.00.

In *Certain Lloyds Underwriters Subscribing to Policy Number MC-13159 v. Baldwin Distribution Services*, 2013 U.S. App. LEXIS 18792 (9th Cir.), Lloyds insured Netgear, which had arranged with FedEx for the transportation of cargo. FedEx subcontracted with Baldwin to haul the shipment. The truck overturned during transit resulting in a total loss of the cargo. Lloyds paid Netgear for the loss and brought an action against Baldwin to recover the damages. The parties filed cross-motions for summary judgment on the issue of the amount of Baldwin's liability for the loss. The motions were heard on stipulated facts and documents. The district court ruled that Baldwin had failed to limit its liability.

Upon reviewing the limited evidentiary record before it, the appellate court concluded that, although the bill of lading issued for the shipment indicated that the parties had agreed on a limitation of liability of $5 per pound, there was no evidence that Baldwin would have provided Netgear with a copy of the applicable rates if Netgear had requested the rates. Nor was there any evidence that any such agreement to limit the carrier's liability had been in writing as required by the Carmack Amendment. The Court of Appeals affirmed the decision of the District Court.

In *Stephenson Equipment v. ATS Specialized, Inc.*, 2013 U.S. Dist. LEXIS 119751 (N.D.N.Y.), the issue was whether a limitation of liability contained in the carrier's tariff was enforceable. Stephenson had contracted with ATS to transport a large crane from Baltimore, Maryland to Troy, New York. The agreement called for five separate shipments of the parts of the crane to be delivered in assembly order between August 11 and August 13, 2008. The agreement also indicated that the consignee was a contractor working on the job site. ATS acknowledged that the crane parts were in good condition when its driver picked them up in Baltimore on August 11. The first three shipments did not arrive in Troy until August 14. ATS then combined the last two loads resulting in damage to certain parts of the crane. Plaintiff filed a complaint alleging damages under the Carmack Amendment, a state common law claim for breach of contract and a state common law claim for negligence. ATS's answer contained affirmative defenses including the limitation of liability provisions contained in the rate quote confirmation, bill of lading and rules tariff.

The parties made cross-motions for summary judgment on the issue of the limitation of liability. The court first addressed Stephenson's argument that any limitation of liability was rendered unenforceable pursuant to the "material deviation" doctrine, a maritime law concept, because the Defendant had breached the agreement to transport the crane in five separate shipments in assembly order, an agreement entered into to reduce the possibility of damage to the crane. The court held that although the courts within the Second Circuit have rejected the wholesale importation of the material deviation doctrine from admiralty cases into cases involving overland shipments, some courts had applied the doctrine in discrete cases when certain, narrow circumstances existed:

1. The shipper has requested specialized safety measures to reduce the risk of damage to its cargo;
2. The shipper has paid an additional charge to ensure those measures; and
3. The carrier failed to perform those very measures, resulting in damage to the cargo.

A separate payment is not required if the separate risk related promises are included in the rate negotiated between the parties. The court held that there was no admissible evidence that the Plaintiff had paid an additional charge to insure the specialized safety measures requested (the five separate shipments), and rejected Stephenson's argument that the limitation of liability was rendered unenforceable pursuant to the material deviation doctrine.

The court then considered Stephenson's argument that the limitation of liability contained in Defendant's tariff was unenforceable due to lack of reasonable notice. The court held that there were two requirements for a limitation of liability to be enforceable under the Carmack Amendment:

1. The limitation of liability must be the result of a fair, open, just and reasonable agreement

shipper for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of risk; and

2. The shipper must have been given the option of higher recovery in exchange for paying a higher rate.

The court then enumerated the factors to be considered in determining whether the requirements had been met:

1. Whether the carrier has given adequate notice of the limitation of its liability to the shipper;
2. The economic stature and commercial sophistication of the parties; and
3. The availability of "spot" insurance to cover a shipper's exposure.

Applying those factors the court found there were questions of fact as to whether Stephenson had ever seen the limitation-of-liability provisions in ATS's tariff and whether Stephenson was sufficiently sophisticated that actual notice was not required. Under the circumstances, the court denied ATS's motion for summary judgment.

The issue in *The Donna Karan Company LLC v. Airgroup*, 2013 U.S. Dist. LEXIS 151397 (D.N.J.), was whether the Defendant carrier could avail itself of the limitation of liability that was set forth in its tariff. Plaintiff had a transportation contract with Airgroup whose online booking system it used to arrange for transportation. Donna Karan entered information on a series of web pages and there were empty boxes for the declared value and the insured value of the shipment.

The only issue was whether the shipper had been given a reasonable opportunity to choose between two or more levels of liability. The court found that Defendant did not offer Plaintiff a reasonable opportunity to select from among alternate levels of liability. The evidence in the record showed that the charge for the shipment was not dependant on the value of the shipment but on the weight of the shipment. Defendant admitted that there would have been no change in the shipping charges if Plaintiff had completed the declared value box on the internet. The court also found the provision of the Defendant's tariff that allowed a shipper to purchase supplemental insurance did not satisfy the requirement that there be two or more levels of security. The court granted Plaintiff's motion for summary judgment and refused to enforce the limitation.

<u>Preemption</u>

It is well established that the Carmack Amendment completely preempts any state laws claims against carriers or freight forwarders for damage to shipments moving in interstate commerce. Such preemption provides a basis for those parties to remove any such claim to federal court. As demonstrated by some of the cases below, however, there are strict procedures that must be followed for removal and failure to follow those procedures will result in the case remaining in state court. In addition, federal courts are not willing to allow transportation brokers to rely on the Carmack Amendment to get into federal court.

In *Wise Recycling, LLC v. M2 Logistics*, 2013 U.S. Dist. LEXIS 64461 (N.D. Tex.), Plaintiff, a metal recycler, enlisted the services of defendant for the transportation of a load of recycled copper from Aurora, Colorado to McKinney, Texas. Defendant contracted with co-defendant, MPG Madean Trucking, LLC to transport the load. While en route to Texas, the tractor, trailer and shipment were stolen. Plaintiff sued defendant for damages under the Carmack Amendment and for breach of contract and negligence under Texas law. Defendant moved to dismiss plaintiff's claims arguing that plaintiff's complaint failed to state a cause of action.

Defendant argued that it was acting as a broker with respect to the shipment and that the Carmack amendment did not apply to brokers. The court, accepting the allegations of plaintiff's complaint as true, as it must on a motion to dismiss, held that complaint adequately pled a claim that defendant was acting as a common carrier subject to the Carmack Amendment and refused to grant the motion to dismiss. The court, however, did hold that plaintiff's breach of contract and negligence claims against defendant, in its capacity as a motor carrier, were preempted.

Plaintiff's complaint also alleged, in the alternative, claims for breach of contract and negligence against defendant as a transportation broker. Although the Court indicated that the Carmack Amendment would not apply to defendant as a broker, it went on to consider defendant's claim that plaintiff's state law claims against it as a broker were preempted by the Federal Aviation Administration Authorization Act ("FAAAA") 49 U.S.C. § 14501(c). That section of the FAAAA states that "a

State may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarded with respect to the transportation of property." Courts, including the United States Supreme Court, have applied jurisprudence developed under the Airline Deregulation Act ("ADA") to claims of preemption under the FAAAA. In cases decided under the ADA, the courts have held that the ADA does not preempt common law breach of contract action against transportation brokers. Applying that jurisprudence to plaintiff's complaint, the court dismissed Plaintiff's negligence cause of action against defendant in its capacity as a broker, but allowed the breach of contract action to remain. Under Texas law, a plaintiff can recover attorneys' fees in a breach of contract action, damages not available under the Carmack Amendment.

The issue in *Mitsui O.S.K. Lines, Ltd. v. Evans Delivery Company et al.*, 2013 U.S. Dist. LEXIS 81558 (D.N.J.), was the scope of preemption under the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"). Mitsui entered into agreements with various carriers to transport goods coming in from overseas to various inland destinations. Mitsui would issue the carrier a transportation order for each shipment, the carrier would then deliver the shipment and then invoice Matsui. After a period of years, Mitsui discovered that the carriers were actually delivering the shipments to destinations closer than the original destination but invoicing Matsui for the full mileage. Matsui filed a state court action for fraud, violations of the New Jersey Consumer Fraud Act, breach of contract, unjust enrichment, and conversion. The defendant carriers removed the action to federal court claiming that the plaintiff's state law claims were preempted by federal law.

Plaintiff moved to remand the action to state court arguing that there was no federal preemption. The court first examined plaintiff's complaint to determine whether the complaint itself pled any federal causes of action. Finding that there were no such causes of action, the court then considered whether the ICCTA "completely preempted the field" so that there would be federal jurisdiction even in the absence of a federal cause of action on the face of the complaint. The court found that the ICCTA did not preempt Mitsui's claims because Mitsui's causes of action were not predicated on any tariffs field by the various carriers but were for invoicing Mitsui for transportation services that were never provided. Because there was no dispute over a filed tariff on the face of the complaint, the ICCTA did not preempt Mitsui's state law claims. The action was remanded back to New Jersey state court.

In *Curb Technologies, LLC v. Somerset Logistics*, LLC, 2013 U.S. Dist. LEXIS 94554 (M.D. Ala.), defendant removed the suit to federal court arguing complete preemption of plaintiff's state law claims for breach of contract and negligence by the Carmack Amendment. Plaintiff had contracted with defendant to broker the transportation of roof adaptor curbs from Alabama to Florida. When the shipment arrived ten hours late, plaintiff filed a state law cause of action seeking damages in the amount of $13,600 for breach of contract and negligence. Defendant removed the case to federal court. Plaintiff moved to remand the action to state court.

In opposition to the motion, Somerset argued that the plaintiff had artfully pleaded its claims to avoid federal preemption and, that because the Carmack Amendment completely preempted the field of damages arising out of the interstate transportation of goods, there was federal jurisdiction. The court agreed with defendant that the Carmack Amendment completely preempted the field of damages in the transportation of goods in interstate commerce but noted that the Amendment applied to carriers, not brokers. Because both parties agreed that the Defendant was acting as a broker in this transaction, the Carmack Amendment did not apply and there was no federal jurisdiction. The case was remanded back to state court.

In *Olympian Worldwide Moving & Storage, Inc. v. Showalter,* 2013 U.S. Dist. LEXIS 105915 (D. Ariz.), Olympian, as the disclosed agent of third-party defendant Allied Van lines Inc., sued Showalter for unpaid charges arising out of the transportation of household goods from Arizona to Florida. Defendant counterclaimed against Olympian and filed a third-party complaint against Allied for the loss of a wedding ring during the move, alleging conversion, negligent hiring and supervision, breach of contract and breach of the covenant of good faith and fair dealing.

Third party defendant Allied move to dismiss the Defendants' third-party complaints arguing that the claims were preempted by the Carmack Amendment. The Court first determined that the defendant had, in fact, intended that the ring had been covered by the bill of lading for the transportation of the goods. Having made that determination, the Court quickly found that the defendant's claims, all arising out the interstate transportation of household goods, were preempted by the Carmack Amendment and granted Allied's motion to dismiss the third-party complaint.

The issue in *Mlinar v. United Parcel Service, Inc.*, 2013 Fla. App. LEXIS 15916 (Fourth Dist.) was the scope of the preemptive effect of the Carmack Amendment. Plaintiff, a painter, arranged to have two valuable paintings boxed and shipped from Florida to New York via UPS through a third party retailer, Pack Mail. When the shipment arrived in New York, the box was empty. Plaintiff reported the loss to UPS and Pack Mail. Months later, Pack Mail offered her $100 for the missing contents of the package. At some point, UPS sold the paintings to Cargo Largo, its lost goods contractor. Both paintings ended up being purchased at a Cargo Largo auction by third-party purchasers. Plaintiff was subsequently contacted by one of the purchasers who informed her that he had purchased the painting at the Cargo Largo auction.

Plaintiff filed a state court action against UPS, Pack Mail, Cargo Largo and the purchaser alleging that UPS had selectively located the contents of her container based on their nature, probable worth and lack of insurance and then sold the paintings to Cargo Largo for some undisclosed consideration. Plaintiff also alleged that UPS had used her contact information on the back of the paintings to catalogue, sell and distribute the paintings to Cargo Largo. Plaintiff alleged causes of action for conversion, profiting by criminal activity, unauthorized publication of name or likeness, a cause of action under the Florida Deceptive Practice Act against UPS. The trial court dismissed all the claim against UPS finding that they were preempted by the Carmack Amendment. Plaintiff appealed.

On appeal, the court held that the Carmack Amendment's preemptive scope supersedes all the regulations and policies of a particular state for loss or damage to interstate shipments and that a cause of action not within the ambit of the preemptive scope is the rare exception. Included within the preemptive effect are common law fraud, conversion, and unfair trade practices claims. Although the court recognized that there may be some situations where claims based on conduct separate from the delivery, loss of or damage to goods good escape preemption, in the plaintiff's case, her claims for conversion and deceptive trade practices were based on UPS's failure to deliver the paintings. As such, those claims were preempted. The court also found that plaintiff's claim for unauthorized use of her name or likeness was also preempted because the claim flowed directly from UPS's failure to deliver the paintings. The court affirmed the dismissal of the claims as against UPS.

In *Lion v. Echo Global Logistics, Inc.*, 2013 U.S. Dist. LEXIS 150377 (E.D. Cal.), Plaintiff contracted with Defendant for the transportation of certain property from Arizona to California. The property was damaged during the shipment and Plaintiff filed a one page state court complaint alleging a cause of action for negligence. Defendants removed the action to federal court arguing that the claim was totally preempted.

Plaintiff moved to remand arguing that the Carmack Amendment did not apply because defendants were transportation brokers and not common carriers. Defendants argued that the complaint, on its face, alleged damages arising out of the interstate transportation of goods and, therefore, was subject to complete preemption by the Carmack Amendment. The court held that because the defendants were arguing complete preemption, the court could look beyond the face of the complaint to see if removal was proper. Plaintiff's motion to remand showed that the defendant had acted strictly as a broker and that the shipment itself was handled by another company, not the defendant. Because the Carmack Amendment did not apply to brokers, there was no complete preemption and the court remanded the action back to state court.

The issue in *Harris v. All State Van Lines Relocation, Inc.*, 2013 U.S. Dist. LEXIS 157910 (W.D. Wash.), was whether the defendant had timely removed the action to federal court. Plaintiffs had contracted with All State for the transportation of belongings from Michigan to Washington state. Plaintiffs filed a complaint alleging various state laws claims involving the shipment including a breach of contract claim and a tort claim. All State moved to dismiss the complaint arguing that the Carmack Amendment preempted plaintiffs' state law claims. The state court judge denied the motion to dismiss finding that the Carmack Amendment preempted plaintiffs' contract claim but not their tort claim. The court also directed the plaintiffs to file an amended complaint setting forth their claims under the Carmack Amendment. When plaintiffs filed that complaint, All State removed the complaint to federal court.

Plaintiffs moved to remand the action the action to state court arguing that All State's removal was untimely. Under the Federal Rules of Civil Procedure a case must be removed to federal court within thirty days of the knowledge that federal jurisdiction exists. All State argued that federal jurisdiction was not apparent on the face of plaintiffs' complaint until plaintiffs filed their amended complaint. The plaintiffs argued that the time for All State to remove the action began when plaintiffs' original complaint was filed. The court accepted plaintiffs' argument and held that the time to remove the state court complaint began to run when plaintiffs originally filed their complaint because that complaint contained a cause of action for damages arising out of the interstate transportation of goods, a claim preempted by the Carmack Amendment. The action was remanded to state court.

<u>Carriage of Goods by Sea Act (COGSA)</u>

The following cases concern the Carriage of Goods by Sea Act, the statute that governs claims of damages to international shipments by ocean carrier, and in certain circumstances, the continuation of those shipments to their final destination, even if that destination is inland.

The issue in *LIG Insurance Co. Ltd. v. Inter-Florida Container Transport, Inc.*, 2013 U.S. Dist. LEXIS 120176 (S.D. Fla.), was whether the defendant was liable for the theft of a shipment of computer monitors that had been placed in a storage yard. The shipment had been transported from Indonesia and China to Florida and released to the defendant for local delivery. The Carmack Amendment did not apply to the shipment because the shipment originated overseas under a single through bill of lading. The court found plaintiff had proven a prima facie case under the COGSA by showing that the shipment had been delivered in good condition into defendant's possession, custody and control and that the shipment was lost while in defendant's possession.

It has been commonly understood for over twenty years that the terms of COGSA can be extended to the inland portion of the transportation, and the court found that this had been accomplished in this case by incorporation of a "Himalaya" clause. The court then held that once a shipper establishes a prima facie case under COGSA, the defendant has the burden of proof to show that it either (1) exercised due diligence to prevent loss or damage to the cargo; or (2) the harm was caused by an "excepted cause" listed in Section 4(2) of COGSA. One of the excepted causes listed in Section 4(2) is that a carrier is not responsible for loss or damage "arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier." 46 U.S.C. § 30701, sec. 4(2)(q).

The court, however, rejected defendant's attempt to avail itself of the defense that it was without fault in the loss of the cargo. The evidence showed that defendant had parked the trailer in the storage yard over a week end and left the keys in the tractors. Defendant also did not have any security at the storage yard although defendant's president had expressed some concern about the security of the yard and had requested an employee to check on the containers. Finally, although there were video cameras at the storage yard, defendant did not have anyone monitoring the cameras. Defendant was found liable for the loss under COGSA.

In *Al Good d/b/a Castle Rock Vineyard v. Nippon Yusen Kaisha*, 2013 U.S. Dist. LEXIS 82839 (E.D. Cal.), Plaintiff contracted with defendant for the transportation of grapes from California to Vietnam. The actual shipment was handled by NYK (North America), a corporation with a principal place of business in Secaucus, New Jersey. When the grapes arrived at their destination they suffered from dehydration, decay, rot development and stem browning. Plaintiff sued Defendant in California District Court alleging a claim for relief under the United States Carriage of Goods by Sea Act (COGSA), breach of the standard of care of common carriers under California and the Shipping Act of 1984 and breach of contract based on the Defendant's failure to keep the cargo properly stored and adequately cooled as required by the sea waybills.

Defendant served an answer to plaintiff's complaint and pled improper venue as a defense. The sea waybills covering the shipments contained a forum selection clause that required that any actions against the carrier had to be brought in the Tokyo District Court of Japan under Japanese law to the exclusion of the jurisdiction of any other courts. Defendant subsequently moved to dismiss the case based on improper venue. Plaintiff argued that Defendant had waived the forum selection clause by failing to follow the Japanese rules of civil procedure, that the forum selection clause was unenforceable as against public policy, that the forum selection clause was unreasonable, that the forum selection clause had been included in the sea waybills due to defendant's overreaching and that at least one of the defendants was not covered by the forum selection clause.

The court first held that a forum selection clause is "prima facie valid" and should not be set aside unless the party challenging the enforcement of the clause demonstrates that the clause is "invalid" or that its enforcement would be "unreasonable" under the circumstances.

The court also held that a forum selection cause would be enforced only if the clause was deemed to be mandatory. A permissive forum selection clause would not preclude an action in another venue. The court found the language of the clause in *Al Good* to be mandatory based on the language that the selection of Tokyo as a forum was "to the exclusion of the jurisdiction of any other courts." The court also rejected plaintiff's argument that the Defendant had waived the forum selection clause by failing to comply with the Japanese Rules of Civil Procedure holding that the plaintiff had not cited any statute or case law in support of that argument.

The court rejected plaintiff's argument that the forum selection clause violated public policy, holding that it had failed to meet its "heavy burden" of showing that the forum selection should be set aside. The court rejected plaintiff's argument that Tokyo was a remote forum with respect to the dispute because the shipment was an international shipment. The court also found that Japan's substantive law that would apply to the obligations of a common carrier would not reduce the carrier's obligation to below those guaranteed by the COGSA. Finally, the court rejected plaintiff's argument that the forum selection clause violated public policy by holding that any difference in pre-trial discovery procedures between the Japanese and American rules were insufficient to strike the forum selection clause.

Plaintiff also argued that enforcement of the forum selection clause would be unreasonable because it would be difficult and inconvenient it to litigate the action in Tokyo and the dispute had no nexus with Japan. The court rejected those arguments finding that the mere fact that it would be inconvenient for plaintiff to litigate the dispute in Tokyo did not render the forum selection clause unenforceable. The court also held that there was sufficient nexus with Japan because one of the defendants was a Japanese company and the shipment had, after all, travelled to southeast Asia.

Plaintiff's final argument involved the "Himalaya" clause. As noted earlier, a Himalaya clause is a provision in a bill of lading or sea waybill that extends the bill's defenses and limitations on liability to parties that sign subcontracts to perform services contemplated by the bills. The sea waybills in the *Al Good* case contained such a provision that extended any defenses and limitations to "any Person whomsoever by whom the carriage is performed or undertaken (including all Sub-Contractors)." Plaintiff argued that defendant NYK Line (North America), a corporation with a principal place of business in New Jersey, could not avail itself of the forum selection clause because it was not a party to the sea waybill. The court, however, rejected the argument, finding the NYK was a subcontractor of the defendant and, therefore, protected by the Himalaya clause in the sea waybill. The action was dismissed.

<u>Other Cargo Claim Issues</u>

<u>A. Recovery When Not Named On the Bill of Lading.</u>

In *Consolidated Pipe & Supply Co. v. Rowe Transfer*, 2013 U.S. Dist. LEXIS 173950 (E.D. Tenn.), plaintiff sued defendant for damage to pipe that it had purchased from the shipper. Defendant argued that the court lacked subject matter jurisdiction because the Carmack Amendment provided a remedy to shippers or persons listed on the bill of lading. Because Plaintiff was not listed on the bill of lading for the shipment (apparently the pipe was going to be delivered directly to one of plaintiff's customers), it could not recover under the Carmack Amendment and the court had no jurisdiction.

The court rejected defendant's argument that it lacked subject matter jurisdiction. There was no dispute that any claim that plaintiff had arose under the Carmack Amendment. Although the fact that the plaintiff may not have qualified as a party protected by the Amendment might have been the basis for a motion to dismiss for failure to state a cause of action, it did not deprive the court of subject matter jurisdiction. The court then held that Plaintiff, as the owner of the pipe involved in the shipment, had the right to step into the shoes of the shipper and to recover damages under the Carmack Amendment even though it was not named on the bill of lading.

<u>B. Interpretation of Policy Language</u>

The issue in *Central Marketing Associates Inc. v. Robert E. Cresap d/b/a Robert Cresap Trucking*, 2013 U.S. Dist LEXIS 114105 (E.D. Ohio), was the interpretation of an insurance policy obtained by defendant to insure against damages resulting from a defective refrigeration unit. Plaintiff had contracted with defendant to carry a shipment of cherries from Washington State to Ohio. The bill of lading specified that the temperature of the shipment had to be maintained between 32 and 34 degrees. The consignee rejected the shipment due to spoilage when the temperature monitor at the rear of the trailer showed that the temperature had been above 34 degrees. Upon investigation, it was discovered that there was no problem with the refrigeration unit itself but that a chute designed to direct refrigerated air to the rear of the trailer had become dislodged resulting in the higher temperatures in the rear of the trailer.

The insurance carrier that issued the policy disclaimed coverage of the $53,000 loss arguing that the refrigeration unit itself had not failed and that the chute involved was not considered part of the refrigeration unit. The Court held that interpretation of the insurance policy was a question of law for the court, that the Court should look to the plain and ordinary meaning of the language of the policy and that any ambiguity in the language should be construed against the insurer (these are, of course, well established principles in the interpretation of insurance policies). The court found that the insurance policy provided coverage for "malfunctioning of a temperature control unit and/or a refrigeration unit. According to the court, the "and/or" language indicated that the policy covered more than must the failure of the refrigeration unit and that the chute had to be considered a "temperature control unit" because it was necessary to control the temperature in the rear of the trailer. The loss was covered by the policy.

<u>C. Liability of a Broker Under The Carmack Amendment.</u>

In *Maass Flange Corp., USA v. All-State Hot Shot LLC*, 2013 U.S. Dist. LEXIS 77781 (M.D. La.), plaintiff and Defendant entered into a contract for the transportation of two forklift units from Mississippi to Texas. Defendants loaded the forklifts on a flat bed trailer owned by defendant National Truck Funding, LLC and operated by co-defendant Willie Wilson. En route to Texas, Wilson drove the vehicle under an overpass that did not have sufficient clearance for the load. One of the forklifts hit the overpass resulting in $60,000 in damages. Plaintiff sued the defendants for damages under the Carmack Amendment.

National made a motion for summary judgment arguing that the Carmack Amendment did not apply to claims against it because it was neither a common carrier nor a freight forwarder. The court found that National held itself out as a rental agency for independent drivers and granted National's motion for summary judgment finding that it was not subject to the Carmack amendment.

The issue in *Royal Consumer Transaction Products, LLC v. Access America Transport, Inc.*, 2013 U.S. Dist. LEXIS 173155 (W.D. Ky.), was whether plaintiff's complaint stated a cause of action under the Carmack Amendment. Plaintiff had brought the action seeking a declaration confirming certain debits it had taken against invoices from a broker for certain shipments. Plaintiff's second cause of action sought damages under the Carmack Amendment. Defendant moved to dismiss Plaintiff's second cause of action on the ground that it was a transportation broker, not a carrier. Therefore, the Carmack Amendment did not apply. Plaintiff argued that there could be circumstances where the Carmack Amendment would apply to a broker but did not identify any such circumstances. The court granted defendant's motion to dismiss the Carmack Amendment claim.

<u>D. Attorneys' Fees.</u>

The issue in *On A Roll Trucking, Inc. v. Armen Terpetrosyan d/b/a ATP Trucking*, 2013 U.S. Dist. LEXIS 159217 (E.D. Ill.), was whether Plaintiff was entitled to recover attorneys' fees incurred in bringing an action under the Carmack Amendment. Plaintiff, a transportation broker, had contracted with defendant, a motor carrier, to transport a shipment from Guadalupe, California to Secaucus, New Jersey. The shipment had to be maintained at 34 degrees. Defendant's truck broke down in Davenport, Iowa. The shipper agreed to extend the delivery date but when the shipment did not arrive by that date, the shipment was rejected. The broker attempted to sell the shipment but when it was determined that the 34 degree temperature had not been maintained, it had to sell the cargo for salvage value and sued ATP for the loss.

Plaintiff's first cause of action contained a claim for attorneys' fees. Defendant moved to dismiss that claim. The court cited the "American Rule" under which a party is normally required to bear their own attorneys' fees absent explicit statutory authority. The court recognized that the Carmack Amendment did not preempt the recovery of attorneys' fees when such fees were available under state law. The court granted defendant's motion because plaintiff could not cite to any provision under Illinois law that supported its claim for attorneys fees.

-Alan Peterman

5. Primary/Excess Coverage and the MCS-90 Endorsement

LM Insurance Corp. v. Canal Ins. Co., 523 Fed. Appx. 329 (6th Circuit) involved the interstate haul of aggregate (sand, gravel, crushed stone) by William Henderson d/b/a Henderson Trucking, who was insured by Canal. Henderson had a written agreement with Hinkle Contracting pursuant to which he agreed to transport construction materials from time to time as directed by Hinkle. As required by the contract, Henderson arranged for Hinkle to be added as a designated insured on the Canal policy. Hinkle separately purchased its own general liability and auto liability coverages from Liberty Mutual.

In October, 2008, while hauling a load at Hinkle's direction, Henderson collided with a vehicle operated by Charles Henney who was killed in the accident. Henney's estate filed suit against Henderson and Hinkle alleging various counts including negligence in operating the truck and negligence in overloading the truck. The suit was litigated for a bit more than a year before being settled for an undisclosed amount.

The declaratory judgment action concerned Liberty Mutual's attempt to recover $400,000 in legal fees it had expended in defending Hinkle. The trial court agreed that Canal should have defended Hinkle alongside Henderson, and Canal appealed.

Canal argued that it covered Hinkle on a co-primary basis with Liberty Mutual for the vicarious liability claim only, not for any claims involving allegations of direct negligence. Canal, thus, urged the court to find it responsible for only 25% of the defense fees, and only those incurred following a formal tender.

Canal's policy, though, included several endorsements which tripped up its argument. One contained the following additions to the "Who is an Insured Clause":

> No coverage is afforded to any person, firm or organization using the described 'auto' pursuant to any lease, contract of hire, bailment, rental agreement, or any similar contract or agreement either written or oral, express or implied."

This provision makes it quite clear that Canal's policy was not intended to cover companies such as Hinkle which contract with Henderson. A second endorsement, this one modifying the "Other Insurance" clause.

> . . . in the event the 'auto' described in the policy is being used or maintained pursuant to any lease, contract of hire, bailment, rental agreement, or any similar contract or agreement, either written or oral.

The meaning of these two provisions seems clear - when Henderson leases to or contracts to work for some other entity, no coverage is provided to the other entity, and only excess coverage is provided to Henderson himself. Canal did not argue that position, however, perhaps because of the separate endorsement, mentioned earlier, which specifically identified Hinkle as an insured. Instead, Canal argued that Hinkle was covered but that the coverage was excess pursuant to the endorsement to the "Other Insurance" clause.

The court pointed out that language of the excess provision, "the coverage afforded you" had to refer to the coverage afforded to the named insured Henderson and could not apply to Hinkle, since "you" could only refer to Henderson. (To be sure, as the court itself realized, this leads to an absurd conclusion as it means that Hinkle was entitled to primary coverage under Henderson's policy and Henderson himself would be entitled only to excess coverage when working for Hinkle.)

The court, in any event, found that Canal provided primary coverage for Hinkle and was obligated to pay all of Hinkle's defense costs including those incurred prior to the tender, and those relating to both vicarious liability and direct liability; Canal was also held responsible for pre-judgment interest.

Several decisions examined the scope of the MCS-90 endorsement. *Progressive Gulf Ins. Co. v. Estate of Jones*, 2013 U.S. Dist. LEXIS 108125 (W.D. Miss.), involved a truckers policy that Progressive had issued to Jones which listed only a single vehicle. Jones, while driving a 1991 Volvo not scheduled on his policy, was involved in a fatal two vehicle accident. On the date of the loss he was pulling a mobile home from Vicksburg, MS to Leland, MS. The issue before the court was whether Progressive was potentially exposed under the MCS-90 endorsement it had attached to the Jones policy.

The federal court summarized the case law on the question of the MCS-90 and intrastate loads, observing that there are two conflicting lines of cases. The district judge opted, as we might have expected, to follow the view of the Fifth Circuit in *Canal Ins. v. Coleman*, 625 F.3d 244 (5th Cir. 2010) (discussed in this space three years ago) adopting the trip specific approach to MCS-90 applicability. Under this view it is not relevant that the motor carrier itself is authorized to operate interstate, or that the individual owner-operator and/or rig is available for interstate loads, or even that the driver is sometimes dispatched interstate. The issue, rather, is whether, on the particular day in question, the driver was operating the rig in interstate commerce or not.

In order to answer that question (and there is a long string of decisions on this point), one needs to identify the shipper's fixed and persistent intent at the time of the shipment. Among the factors cited in the case law are whether the bill of lading is through to destination, whether the movement is continuous, how many carriers are involved and whether the goods are modified between one leg of the shipment and another.

Here the best that the claimant could do was argue that the raw materials and component parts of the mobile homes came from all over the country to the Mississippi factory which manufactured the mobile homes. The court pointed to well-established case law in defining interstate commerce which holds that manufacturing interrupts the stream of commerce. The mobile home, once completed, began a new journey in Vicksburg. Since the transportation to Leland was entirely intrastate, the MCS-90 did not apply.

Along the same lines was the decision in *Allstate New Jersey Ins. Co. v. Penske Truck Leasing*, 2013 N.J. Super. Unpub. LEXIS 2863. Dorfman rented a twenty-six foot truck from Penske for some personal use for twenty-four hours, purchasing only $15/30,000 in coverage. The vehicle did not leave New Jersey that day. Dorfman was involved in a collision with another vehicle and three of its occupants were injured. Allstate paid PIP benefits to the injured parties and then attempted to recover its payments from Old Republic, Penske's insurer. In response to Old Republic's point that its limits had been exhausted and there was nothing left on the policy to pay Allstate, Allstate pointed to the MCS-90 which was attached to the Penske policy. (Since the court did not address the question of why Penske had an MCS-90 we will defer any comment on that for now.) As Dorfman's use of the truck was local (intrastate in New Jersey) and personal (he was not a for-hire carrier) the trial court found that the MCS-90 did not apply.

The tricky issue raised on appeal was that in the past New Jersey courts have rejected the trip specific approach, favoring instead a broader analysis of what the truck at issue is used for on other occasions. *QBE Ins. Co. v. P&F Container Servs., Inc.*, 362 N.J. Super 445 (App.Div. 2003). The *Allstate* court acknowledged that the weight of recent authority from around the country, contrary to *QBE*, supports the trip specific view. However, instead of abandoning *QBE*, the court opted to distinguish it. Unlike the driver in *QBE*, Dorfman did not work for a motor carrier and was not even being paid for his use of the truck. Nor was he transporting property for hire. And finally, Dorfman used the vehicle entirely in New Jersey. In light of these factors, the MCS-90 was not applicable.

Query - in light of the *Allstate* decision, is *QBE* still good law in New Jersey? We will need to wait and see.

McComb v. National Cas. Co., 2013 U.S. Dist. LEXIS 156181 (N.D. Ill.) involved a rig leased by J.L. Shandy Transportation, a regulated motor carrier, from Jose Bugarin/Bugarin Trucking. The tractor was apparently covered under the policy issued to Shandy by National Casualty. Bugarin was involved in a fatal accident with another motorist, and the estate filed suit against Bugarin, Shandy and others.

National Casualty defended Bugarin and Shandy. Nonetheless the estate filed suit against National Casualty and Bugarin, apparently pursuant to a bizarre misreading of the decision in *Herrod v. Wilshire Ins. Co.* (10th Cir. 2012) discussed in this space last year. Essentially, the plaintiff was under the misimpression that owner-operators need their own filings and urged the court to find that National Casualty's policy should be subject to two different million dollar limits. Suffice it to say that the court sent plaintiff packing.

It is not uncommon for bodily injury claimants to argue that the limits of an insurance policy issued to a company they had sued should be modified to increase the limits. In *Grange Mut. Cas. Co. v. Pinson Trucking*, 2013 U.S. Dist. LEXIS 15215 (M.D. Ga.) it was the insured itself and its fellow defendants that tried the arguments. As is typical, the gambit failed.

Pinson Trucking owned a tractor, a pickup truck and a mobile home. It leased its tractor to Lumber Transport, a motor carrier, and separately purchased a policy from Grange for general liability and coverage for its pickup truck and mobile home. Grange was well aware that Pinson had a tractor and used it in Lumber's business. The Grange policy, of course, did not contain an MCS-90 endorsement and the limits (not provided in the decision) were apparently lower than $750,000.

Pinson's employee Boatwright was operating the tractor in Lumber's business when he was involved in an eight vehicle accident with multiple deaths and injuries. Since the $3 million was not sufficient to resolve all of the claims, Pinson, Lumber and their insurers took the position that the policy issued by Grange for its pickup truck should be reformed to include an MCS-90 and its limits increased to $750,000. In the alternative they asked that the state filing be added to the policy. The court rejected the argument, citing to the ample body of case law on point that one does not increase policy limits or deem an MCS-90 to be in existence where the insurer was not asked to make a filing prior to policy inception. Particularly where, as here, Grange had not undertaken to cover Pinson's motor carrier operations, there was no basis for reforming the Grange policy in the manner Pinson and the others demanded.

- Larry Rabinovich

6. UIIA

As noted by the court in *CMA-CGM (America), Inc. v. Empire Truck Lines, Inc.*, 2013 Tex. App. LEXIS 8328 (Court of Appeals of Texas, First District, Houston), the Uniform Intermodal and Facilities Access Agreement (UIIA) is a "standard contract drafted by and administered by an industry trade association, the Intermodal Association of North America (IANA), located in Maryland," among equipment providers (here, CMA), motor carriers (here, Empire) and facility operators. In that case, an employee/driver for Empire was injured while a chassis, owned by CMA CGM (America), Inc., was being attached to his truck. He sued Empire and CMA for his injuries.

At issue was whether a key provision in the UIIA governed the obligations as between Empire and CMA. The UIIA provided that Empire indemnified CMA for CMA's own legal fault, and designated that Maryland law be applied in construing the UIIA. However, the indemnification provision would not be enforceable under the Texas Transportation Code, which expressly "prohibits anyone from requiring indemnification from a motor carrier as a condition to the transportation of property for compensation or hire …"

Under Texas choice of law cases, the contractual designation of Maryland law is not enforceable if:

1. there is a state with a more significant relationship to the transaction,
2. applying the chosen law would contravene a fundamental policy of that state, and
3. that state has a materially greater interest in the determination of the particular issue.

The Court found all three to be true with respect to Texas. Accordingly, Texas law applied and enforcement of the indemnification provision was prohibited. The very important lesson of the *CMA v. Empire* case is that all three parties to a UIIA (carrier, equipment owner, facilities owner) must not assume that even the written indemnification provision will apply. Instead, the parties should check the law of the state(s) where they will be operating to determine whether, under that state's law, the indemnification provision will be enforced.

Willey v. DD TRANSPORT, 2013 N.J. Super Unpub LEXIS 2125 (App. Div.), related to the obligations of the insurance carrier (Zurich Insurance) to send a cancellation notice to the International Association of North America ("IANA").

Zurich provided liability insurance to the trucking company, New Start Shipping Service. New Start defaulted on premium payments to Zurich, Zurich canceled the policy, and there was a fatal accident involving New Start's truck after the policy was canceled.

Zurich did not send a notice of cancellation to HSNA, the owner of the container that was being carried by the New Start truck after the accident occurred, or to the IANA. HSNA was an additional insured on the New Start policy. HSNA was a defendant in the wrongful death suit that arose from the accident.

Zurich argued that the policy provisions did not require Zurich to give notice of cancellation to additional insureds or to the IANA. However, the New Jersey Appellate Division held that Zurich's policy was ambiguous on this point because, although the policy language did not specifically require notice of cancellation to additional insureds, a heading on a policy schedule created confusion. That heading stated:

> Additional Insured (Lessor) AS REQUIRED BY CONTRACT / AGREEMENT.

The contract that applied to the shipment at issue was the UIIA.

Under the UIIA, the carrier (New Start) had agreed to indemnify the container owner (HSNA) from all claims relating to the carriage. The UIIA also required that the carrier provide liability insurance coverage to the container owner. Therefore, the Court found an ambiguity between the part of the insurance policy that did not require Zurich to notify the additional insureds of cancellation and the part of the policy that referred to the requirements of the contract between the carrier and container owner (the UIIA).

Having determined that the policy was ambiguous with respect to Zurich's cancellation obligations, the Court then applied the law that construes ambiguous provisions in an insurance policy to be consistent with the insured's "objectively reasonable expectations of coverage." The Court concluded that New Start's objectively reasonable expectation of coverage was that the policy would satisfy New Start's obligations under the UIIA, including that its carrier provide the IANA with notice of intent to cancel. The Court explained:

> Evidence of New Start's expectations is the certificate of insurance that its broker sent to the IANA. That certificate stated that all of New Start's operations were insured under general liability and automobile liability policies with a combined single limit of $1,000,000 and that HSNA through HSAC Logistics was an additional insured on the trailer interchange coverage. The certificate, combined with the fact that New Start was a signatory to the UIIA, indicates that New Start believed that the Zurich policy satisfied its obligations under the UIIA. Those obligations included the requirement that Zurich provide the IANA with thirty days advance notice of any cancellation of coverage.

Accordingly, Zurich was required to provide coverage for the claim even though it had canceled the policy and notified the insured of the cancellation.

- Michael Ferdman

7. Jurisdiction

The Fourth Circuit held in *Gaines Motor Lines, Inc. v. Klaussner Furniture Industries, Inc.*, 734 F.3d 296 (4th Cir.), that a dispute between federally-certificated interstate motor carriers and their shipper over unpaid freight charges did not arise under federal law so as to invoke the jurisdiction of a federal court. In the past, motor carriers were limited to charging shippers based on tariffs filed with the Interstate Commerce Commission, and federal courts would oversee disputes over freight charges based on those tariffs. The court found, however, that with the sunsetting of the ICC in 1995, and the advent of contract carriage in which freight charges could be negotiated with each shipper, such disputes no longer pose federal questions.

Since the violation of federal motor carrier safety regulations does not create a cause of action under federal law, such violations are, at most, evidence to support an injured party's claims under state law. Accordingly, as noted in *Brown v. Simms*, 2013 U.S. Dist. LEXIS 145733 (M.D. Ala.), allegations of such violations do not present a federal question to support jurisdiction of a federal court.

As emphasized by the Supreme Court of the United States in *Wilton v. Seven Falls Co.*, 515 U.S. 277, 115 S. Ct. 2137, 132 L. Ed.2d 214 (1995), and *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491, 62 S. Ct. 1173, 86 L. Ed. 1620 (1942), federal courts have the discretion to refrain from exercising jurisdiction over actions brought under the Declaratory Judgment Act, 28 U.S.C. § 2201(a). In *Empire Fire & Marine Insurance Co. v. Gross*, 2013 U.S. Dist. LEXIS 19469 (D. Md.), one of Gross's employees misdelivered a load of fly ash, ruining the consignee's batch of concrete and ultimately causing $485,000 in damage at construction sites of the consignee's customers. Empire, which provided trucking insurance to Gross, commenced an action seeking a declaration of non-coverage, even though no actions for damages had been filed against Gross. The court agreed that the fact that some potential claims were still within the statute of limitations created a slim, but sufficient, "case or controversy" to create jurisdiction. Nevertheless, the potential for liability was so slight that the uncertainty the parties would face in the absence of a declaratory judgment on coverage was minimal. Accordingly, the court declined to exercise its jurisdiction and dismissed the case without prejudice.

- Phil Bramson

8. Punitive Damages

A number of decisions this past year illustrated the relative ease with which a plaintiff seeking punitive damages under state law can defeat a motion to dismiss a federal diversity action in the early stages of litigation. In *King v. Taylor Express, Inc.*, 2013 U.S. Dist. LEXIS 145939 (E.D. Mis.), the driver of a car struck by a tractor-trailer that was allegedly changing lanes improperly alleged that the tractor-trailer driver operated his rig in a careless and reckless manner which violated Missouri statutes regarding the regulation of traffic and federal regulations governing motor carriers. Under Missouri law, punitive damages may be awarded in a negligence action if the defendant showed complete indifference to or conscious disregard for the safety of others. Further, Missouri allows evidence of a failure to follow motor carrier regulations and statutes to support a claim for punitive damages. Since several of the plaintiff's claims were premised upon the defendants' failure to comply with applicable regulations, the Court held that the allegations were sufficient to state a claim and denied the defendants' motion to dismiss.

In *Hartung v. Yelverton*, 2013 U.S. Dist. LEXIS 81031 (S.D. W.Vir.), plaintiff struck a tractor-trailer that was traveling well below the minimum posted speed limit due to a heavy load it was hauling. Pointing to overloading, the plaintiff sued the driver and his employer and for punitive damages based on gross negligence, recklessness, and willful misconduct in exposing the public to a known safety risk. The Court held that the claim that the operation of the heavy load caused the speed of the vehicle to drop significantly on a major interstate highway was sufficient to set out a demand for punitive damages.

By contrast, the tractor-trailer driver in *Hendrixson v. Cassens Transport*, 2013 U.S. Dist. LEXIS 91878 (N.D. Ind.), was traveling in excess of the posted speed limit at the time of the accident which resulted in the injury and subsequent death of the plaintiff's spouse. The plaintiff sought punitive damages on a loss of consortium cause of action, but the defendants argued that punitive damages were unavailable for loss of consortium claims in a wrongful death case. The Court analyzed several Indiana Supreme Court decisions and determined that although punitive damages were unavailable under the wrongful death statute, they were available under a separate common-law loss of consortium claim where a death was attenuated.

In *Gula v. Advanced Cargo Transportation, Inc.*, 2013 U.S. Dist. LEXIS 64643 (M.D. Pa.), the plaintiff alleged that the truck driver with whom he collided was speeding at the time of the loss, was fatigued from operating his truck over the maximum legal operation time, and that his employer failed to instruct him how to safely operate the truck. A post-accident investigation revealed that the defendant driver's truck had defective brakes and a defective valve. The Court found that the plaintiff's allegations, in the aggregate, supported an inference that the tractor-trailer driver was aware of the risk he posed to other drivers at the time of the accident, and that his actions constituted willful, wanton or reckless conduct. Since the driver was acting within the scope of his employment at the time of the accident, the plaintiff's claim for *respondeat superior* also survived defendants' motion to dismiss.

In contrast, the Court granted the defendants' motion for summary judgment and dismissed the plaintiffs' request for punitive damages in *Riffey v. CRST Expedited, Inc. f/k/a CRST Van Expedited, Inc.*, 2013 U.S. Dist LEXIS 179594 (E.D. Ark.), a case involving a collision between two tractor-trailers. The plaintiffs alleged that the defendant driver caused the collision by driving too fast and following plaintiffs' tractor-trailer too closely on an icy and slick road. The court found that although the defendant driver, who admitted fault, knew that the road conditions were icy, he did not think that he needed to stop or put on snow chains. Noting, however, that the plaintiff was also driving on the same road at the same time, the court held that there was no evidence to suggest that the defendant driver maliciously disregarded a known risk.

In *Kuebler v. Gemini Transportation*, 2013 U.S. Dist. LEXIS 172769 (S.D. Ohio), the plaintiff directed the court to the employer's safety record, which revealed that the trucking company had repeatedly violated several safety measurements conducted by the Federal Motor Carrier Safety Administration, including failing to conduct random alcohol testing, failing to conduct controlled substance testing, and falsely reporting records of duty status. Nevertheless, the Court found that there was no of allegation of fraud and no evidence that the defendant driver had a malicious state of mind prior to the accident, nor any evidence that the defendant employer's own acts or omissions with respect to the hiring and retention of the defendant driver amounted to malice.

- Michelle K. DeKay

9. Negligent Loading

In *Aragon v. Wal-Mart Stores East*, 735 F.3d 807 (8th Cir.), plaintiff Benny Aragon, an experienced commercial motor vehicle driver employed by J.B. Hunt Transports, was dispatched to pick up a box trailer containing pallets filled with plastic containers from a Wal-Mart distribution center in Missouri and deliver it to an IFCO facility in Illinois. After arriving at the destination, Aragon opened the trailer doors, and the pallets fell on him and broke his leg. The trailer had been loaded by a third party and sealed with a "yellow seal." Aragon testified that he was never instructed to secure the pallets.

Aragon argued that there was a latent and concealed loading defect, specifically noting that the load was shrink-wrapped and that the security guard assured him the load was secured. He was unable to open the trailer which was sealed when he attached the trailer to his truck. For good measure Aragon himself was not used to hauling plastic pallets.

However, the trial court found, and the Eighth Circuit agreed, that Aragon had not been precluded from opening the seal for inspection, and that the vehicle was not loaded in a manner that rendered inspection impractical. Accordingly, it was held that Aragon had a clear chance to view and inspect the cargo before leaving the distribution center, that any negligence in loading was discoverable through a "reasonable safety inspection." Accordingly, Aragon had a duty under Federal Motor Carrier Safety Regulations to secure and inspect the cargo even if shippers had negligently loaded the cargo.

- Mengyi Melle Xu

10. Negligent Hiring/Training/Supervision

Under Missouri law there is no cognizable claim for negligent contracting, and claims of negligent hiring and retention require evidence of a dangerous proclivity by the employee and knowledge of that proclivity by the employer. In *Braxton v. DKMZ Trucking, Inc.*, 2013 U.S. Dist. LEXIS 176043 (E.D. Mo.), the court held that merely alleging that the trucking company was negligent in hiring, retention, and training did not state a viable claim.

Tennessee, similarly, recognizes a cause of action for negligent selection and retention of employees and independent contractors where the employer had knowledge of the employee's or independent contractor's unfitness for the job. In *Owens v. Anthony*, 2013 U.S. Dist. LEXIS 47333 (M.D. Tenn.), the court held it was for the jury to decide whether the company "knew or by the exercise of reasonable care might have ascertained, that the independent contractor was not qualified to perform the work for which he was contracted." The court denied the defendant's motion for summary judgment stating "although somewhat attenuated, a reasonable person could find that Defendant was negligent in selecting a carrier and that Defendant's negligence resulted in the hiring of an unsafe company with an unsafe driver whose carelessness caused the collision."

In *Wright v. Watkins and Shepard Trucking, Inc.*, 2013 U.S. Dist. LEXIS 131246 (D. Nev.), the court initially held that under Nevada law a plaintiff can recover on claims against an employer under <u>both</u> a theory of *respondeat superior* and negligent hiring/supervision when the employer admits the employee was acting in the scope and course of his employment. The court stated that vicarious liability makes the employer responsible for the normal risks of doing business while negligent hiring makes the employer responsible for any abnormal risks he creates himself and the conduct is not identical

On Oct 15, 2013, the court rejected the defendant's motion for reconsideration but clarified that a plaintiff may not maintain a direct action cause of action for negligent hiring/supervision where it is just an alternative theory and would impose no additional liability because a company already admitted vicarious liability. However, the court found that negligent hiring/supervision imposes liability beyond an underlying derivative negligence claim and merits full consideration apart from vicarious liability to determine whether punitive damages were available. The court stated that an employer's fault in hiring and training is different than an employee's fault in driving.

- Meredith Ireland

11. Auto Exclusions in General Liability Policies

With *Tudor Insurance Co. v. Golovunin*, 2013 U.S. Dist. LEXIS 140186 (E.D.N.Y.), we saw the conclusion of a matter that Larry Rabinovich and Phil Bramson had been litigating since 2005, arising out of a tragic motor vehicle accident that took the lives of four young summer campers, as well as another passenger and the driver, a counselor at the camp. Neither the employee driver nor the employer camp maintained an auto liability policy, and there was no recovery expected from the other driver involved in the accident who was not at fault. Nevertheless, the court agreed with Tudor that its general liability policy provided no coverage because (1) the standard CGL auto exclusion was applicable; (2) a manuscript endorsement, excluding losses arising out of the transportation of persons for the insured, was also applicable; and the endorsement limiting coverage to losses arising out of the use of the premises barred coverage for an off-site accident, even though that accident arguably arose in the course of the insured's business.

In *Cincinnati Insurance Co. v. Braun Milk Hauling, Inc.*, 2013 U.S. Dist. LEXIS 150665 (S.D. Ill.), a Braun truck was involved in an accident resulting in a diesel fuel spill. Subsequently, another Braun truck struck a flagman who was working at the cleanup site. The plaintiff alleged that Braun was liable, not only for the negligent operation of the vehicle, but also for its failures to maintain safe conditions at the cleanup site. The court, however, agreed with Braun's CGL insurer that the loss clearly arose out of the use of the truck, and that the plaintiff's injuries could not have resulted from any of the other alleged negligent acts, standing alone. Accordingly, the auto exclusion applied and the CGL policy provided no coverage.

In *Pioneer State Mutual Insurance for Publication Co. v. Dells*, 2013 Mich. App. LEXIS 1102 (Mich. Ct. App.), the defendant's trailer separated from his van and crashed into the plaintiff's vehicle. The defendant's homeowner's policy excluded coverage for losses arising out of the use of a motor vehicle, but contained an exception for a "trailer not towed." The court, however, found that the use of the van played an integral and indispensable role in the loss, and that the auto exclusion applied.

In *Atain Specialty Insurance Co. v. Tribal Construction Co.*, 912 F. Supp.2d 1260 (W.D. Okla.), the decedent was killed when his truck's tarp removal mechanism can in contact with an overhead electrical wire. The court found that coverage for the premises owner under its CGL policy was excluded since the loss arose out of the use of a motor vehicle. The court rejected arguments that the exclusion was inapplicable since there were no allegations in the complaint that the premises owner's liability was based on its use of a motor vehicle, or that the use of a tarp removal mechanism attached to the truck was distinct from a use of the truck itself. (Notably, the policy in question excluded coverage regardless of whether the auto in question was owned, maintained, used, rented, leased, hired, loaned, borrowed, or entrusted to others or provided to another by any insured.)

The Sixth Circuit engaged in a detailed factual analysis in *Hartford Casualty Insurance Co. v. Ewan*, 2013 US. App. LEXIS 18199 (6th Cir.), to conclude that a "tree spade" was not "permanently mounted" on a truck, so as to convert the truck into mobile equipment which would fall outside the CGL policy's auto exclusion. The court found further that the primary use of the truck was not to transport the tree spade (another element in the definition of "mobile equipment"), but rather to transport the insured landscaping business's employees and trees for planting to the job sites.

- Phil Bramson

12. Who is an Insured?

As the ISO motor carrier form gradually replaces the truckers form, and is issued to "motor carriers" and "owner-operators" alike, we expect to see more cases like *Northland Insurance Co. v. Barnhart Crane & Rigging Co.*, 2013 U.S. Dist. LEXIS 181045 (N.D. Ill.) interpreting those provisions in which there are substantive differences between the two forms. In that case, Barnhart leased a tractor from Diamond, and sought coverage under the Northland policy issued to Diamond. Since Barnhart's own policy (from Amerisure) did not provide primary coverage to the owners of vehicles leased by Barnhart, Barnhart failed to satisfy the "reciprocity clause" in Diamond's Northland policy. Barnhart argued that the written lease for the tractor provided that Diamond would hold Barnhart harmless – a recognized exception to the reciprocity clause in the Northland policy – and that Barnhart therefore qualified as an additional insured under the Northland policy.

The court, however, held that under Illinois law an indemnity agreement in a motor carrier transportation contract is void and unenforceable. Accordingly, the exception was read out of the reciprocity clause and, since the reciprocity clause otherwise applied, Barnhart was denied additional insured coverage under the Northland policy. (The court's focus on this issue is somewhat curious, given its determination that neither the tractor nor the trailer qualified as a covered auto under the owner-operator's policy.)

Marking a distinct change in direction, the Supreme Court of Maine modified the "minor deviation" rule, which it had employed since 1932, for determining whether a use of a covered auto is within the scope of permission extended by the named insured. *State Farm Automobile Insurance Co. v. Estate of Carey*, 68 A.3d 1242 (Me.). Considering that, in the intervening years, the legislature had mandated coverage for the named insured but not required omnibus coverage, the court held that, once the party seeking coverage establishes initial permission, the burden shifts to the insurer to prove that the operator breached an express restriction on the scope of permission established at the time permission was granted.

- Phil Bramson

13. Covered Auto?

In *Northland Insurance Co v. Top Rank Trucking of Kissimmee, Inc.*, 2013 U.S. Dist. LEXIS 130961 (M.D. Fla.), the court found that a leased vehicle had been deleted from a lessee motor carrier's policy upon the insured's written request that it be deleted "effective immediately," and not when the endorsement deleting the vehicle was actually processed. The court also held that the policy's MCS-90 endorsement was inapplicable, since the owner-operator was using the vehicle for personal reasons and not transporting property in interstate commerce at the time of the loss.

Progressive Premier Insurance Co. of Illinois v. Emiljanowicz, 991 N.E.2d 352 (Ill. Ct. App.). As noted below in our review of non-trucking cases, the court found that Progressive's contingent policy provided no coverage where the insured vehicle was taken to a mechanic at the behest of the motor carrier lessee. With regard coverage under to the Occidental policy issued to the motor carrier, the facts showed that the owner-operator leased his tractor to the motor carrier on May 12, 2004; the loss occurred on that same day; and the tractor was added to the "Schedule of Covered Autos You Own" on June 8, 2004 (fewer than 30 days after the lease was signed). The appellate court found that the tractor was entitled to after-acquired coverage on the Occidental policy under symbol "46" (specifically described autos).

Arguably, a vehicle which is leased is not actually "acquired" by the motor carrier in the same way as a vehicle that is actually purchased. The opinion, therefore, could be read, problematically, as endorsing that notion that any vehicle that is "specifically described" on a policy providing symbol "46" coverage is "acquired." Of course, the court also noted, almost in passing, that it was undisputed that the policy also covered all trucks the motor carrier leased to transport property. If all leased vehicles are covered, whether scheduled on the policy or not, the question of "after-acquired" coverage should not arise.

- Phil Bramson

14. Non-Owned Auto

Metzger v. Country Mutual Insurance Co., 986 N.E.2d 756 (Ill. Ct. App.). One of the owners of a close-corporation was involved in an accident while operating a pick-up truck that he owned personally. The other driver who was injured in the accident contended that the pick-up truck was a covered "non-owned" auto under the policy issued to the corporation. As the evidence showed that the pick-up truck's owner used the vehicle exclusively in the corporation's business, the court concluded that the business had "borrowed" the pick-up truck and that it therefore did not meet the policy definition of a "non-owned" auto.

Citing *Metzger, the National Interstate Insurance Co. v. Morgan & Sons Weekend Tours, Inc.*, 2013 U.S. Dist. LEXIS 139110 (M.D.N.C.) court also found that one corporation could borrow a vehicle from another corporation under common ownership when the principal of both companies testified that he had used the vehicle owned by one company in pursuit of the business of the other company. Since there was also evidence that the principal used the vehicle for his own personal pursuits, the court found a material question of fact as to whether the vehicle was covered as a "hired auto" at the time of the loss. Moreover, the court concluded that questions of whether the vehicle was being used in connection with the business of the named insured corporation overlapped with questions of vicarious liability being decided in the parallel state court bodily injury action, and accordingly stayed the declaratory judgment action until factual issues in the state court action were resolved.

Nuvell National Auto-Finance, LLC v Monroe Guaranty Insurance Co., 736 S.E.2d 463 (Ga. Ct. App.). Renaissance and Lenovo Services were both subsidiaries of the same parent corporation, and both were named insureds under a policy issued by Monroe. Renaissance argued that it was entitled to "non-owned" auto liability coverage when a tow truck owned by Lenovo Services struck and killed a pedestrian in the course of a repossession. Applying the "separation of insureds" clause, the court held that Renaissance could be entitled to non-owned coverage even though the vehicle was owned by another named insured. The court also found that the tow truck was being used in connection with the business of Renaissance, where the finance company Nuvell contacted Renaissance to handle the repossession, Renaissance contracted the job to Renovo Services, and Renovo Services hired an independent contractor to drive its tow truck and perform the actual repossession.

- Phil Bramson

15. Non-Trucking

Applying Georgia law, the Eleventh Circuit considered the meaning of an owner-operator being in his "regular work pattern or operational routine." *Occidental Fire & Cas. Co. of N.C., Inc. v. National Interstate Ins. Co.,* 513 Fed. Appx. 924 (2013).

Eugene Howard was an owner-operator under lease to C&K Trucking, a regulated interstate motor carrier insured by National Interstate. Howard had his own non-trucking policy with Occidental. Howard's standard work pattern was to drive some 30 miles from his home to C&K's terminal each morning (Monday through Saturday). He was never dispatched by phone - he was required to show up in person in order to find out whether C&K had any work for him. On the date of loss, a Saturday, Howard was assigned to haul empty trailers for C&K (giving the appellants C&K and National Interstate the benefit of the doubt, the court assumed that Howard completed the trailer assignment). While bobtailing home that Saturday, Howard was involved in an accident.

His dispatcher, with whom he spoke from the scene of the accident, told him to bring the accident report with him when he checked in for work after the weekend. Howard took Monday off and then, when driving to C&K's terminal on Tuesday morning, he was involved in a second accident. The coverage dispute reviewed by the Eleventh Circuit involved the second accident.

The court noted the existence of two potentially relevant policies, a bobtail (= non-trucking) policy issued by Occidental and what the court referred to as a "commercial general liability policy" issued by National, which for our purposes we should think of as a truckers policy. (The language cited by the court suggests that National utilized ISO's truckers form or a form with similar language.)

The bodily injury claimants filed suit against Howard (not against C&K apparently) in Georgia state court. Occidental, the non-trucking insurer, separately sought declaratory judgment against Howard, C&K, National, and the claimants in federal court. The federal district court granted summary judgment to Occidental, finding that Howard was operating in C&K's business. (The court cited to the Occidental exclusionary language as denying coverage when the covered auto is being "used to carry property in any business or en route for such purpose.")

Although Occidental's language was not the standard ISO language for non-trucking policies excluding coverage when the vehicle is being used "in the business" of the lessee motor carrier, the Eleventh Circuit, in affirming the District Court's decisions, treated Occidental's language as being functionally equivalent.

C&K and its insurer National Interstate argued that Howard could not have been acting in C&K's business at the time of the second accident since he had not been cleared by the company to return to his duties following the first accident. The court gave this argument points for creativity but was not persuaded, finding no evidence that anyone had told Howard that he was suspended or ineligible to haul for the company until he was reinstated. The loss happened as he drove from his home to the terminal, as per his standard operational routine. Citing to Georgia precedent, the court concluded that so long as a driver remains within his normal work pattern or operational routine he remains in the business of the motor carrier.

A different result emerged out of the coverage dispute in *Occidental Fire & Cas. Co. v. Soczynski*, 2013 U.S. Dist. LEXIS 2687 (D. Minn.). Occidental issued a non-trucking policy to Thomas Hipp (Hipp Trucking), who had worked exclusively for many years for Airline Transportation Specialists ("ATS"), a motor carrier insured by Great West. A written lease was in effect which complied with the USDOT leasing regulations.

On the date of loss, a Tuesday, Hipp had no dispatch instructions for ATS; he had completed delivery of a load the previous Saturday, had returned home, and had not yet received new dispatch orders.

Instead, on that Tuesday, Hipp opted to purchase certain equipment for his tractor. This included clean cable software which permits a driver to keep the engine running and thus keep the heat or air conditioning running. Without the special software there is a five minute limit on idling. ATS neither knew that Hipp was adding this software nor gave him any incentive to do so.

Hipp's second stop that day was for the purchase of outriggers, in particular outriggers designed for hauling components of wind towers. ATS was not hauling wind towers at the time and Hipp testified that he purchased the outriggers to make his rig more marketable, apparently in the event he decided to stop working for ATS. In fact, he continued to work for ATS and did not use the outriggers.

Plaintiff (the trustee for the woman killed in an accident with Hipp's vehicle that day) sued Hipp in state court, alleging that Hipp was negligent and also asserting that Hipp operated his rig under the authority of ATS and with ATS's permission and consent. ATS itself was not sued.

Plaintiff then demanded that both Great West, the truckers liability insurer and Occidental, the non-trucking insurer, pay their policy limits.

Great West did tender its limits, but Occidental, arguing that Hipp was engaged in ATS's business at the time of the loss, rejected the demand and filed an action for declaratory relief in federal court. The Occidental policy exclusion - different here than in the Eleventh Circuit decision - excludes coverage whenever, "the named insured (Hipp) is operating, maintaining, or using, or using a covered auto for or on behalf of any other person or organization."

The court struggled a bit with the language of the non-standard non-trucking endorsement which began by referring to autos leased to motor carriers "under a 30 day lease agreement." This language reflects language that was removed from the leasing regulations decades ago and its use in this context created some unnecessary ambiguity. (Are the underwriters telling the insureds that if the lease is for fewer than 30 days, then the policy applies even while the owner-operator is under load or otherwise in the business of the lessee?) The claimant in fact argued that the exclusion applied only if the lease was exactly thirty days. In the end the court concluded that the exclusion is potentially applicable to any lease of at least 30 days' duration.

Turning to the exclusionary language itself, the court focused on the following language:

> This insurance does not apply at any time that the Named Insured (=the owner-operator) is operating, maintaining, or using a covered auto for or on behalf of any other person or organization.

(The other exclusions – use of vehicle for transporting goods or merchandise, loading and unloading, use under direction, control or dispatch of another, and use while towing a trailer – were clearly not applicable to the facts of the case.)

Was Hipp acting "for or on behalf" of ATS when he picked up the outriggers? The court found it quite clear that he was not. ATS did not require its drivers to have outriggers and was unaware that Hipp was purchasing them. Hipp had no current assignment from ATS. This was not a case involving repair of the vehicle (which ultimately furthers the commercial interests of the lessee), nor was this a slight detour from a trip otherwise conducted for ATS. Since Hipp was engaged in his own business, rather than ATS's, the exclusion was inapplicable and coverage was provided by the non-trucking policy.

Progressive Premier Ins. Co. v. Krzysztof Emiljanowicz, 991 N.E.2d 352 (Ill. Ct. App.) considered the applicability of a non-trucking policy (called here contingent coverage) to a loss that occurred hours after the owner-operator leased his rig to a regulated motor carrier. The motor carrier required its contractors to have their equipment inspected and serviced by a mechanic before transporting freight for the company.

Some hours after signing the lease, and before he was ever dispatched, Emiljanowicz called a friend who agreed to come with him to a mechanic who would service and certify the rig. En route to picking up the friend, Emiljanowicz collided with a car whose driver was injured.

There was a coverage issue with respect to the trucker's insurance policy which is discussed in section 13. Here we will discuss only the non-trucking coverage.

The Progressive contingent policy excluded coverage "when an insured under this endorsement is operating, maintaining, or using the insured auto or any other auto for or on behalf of anyone else or any organization whether or not the insured is being compensated for such use." The court found it undisputed that the insured was taking the vehicle to a mechanic as required by the lessee. That, in the court's view, satisfied the requirement that it be operated "on behalf of" the lessee, and judgment for Progressive was appropriate.

- Larry Rabinovich

16. Uninsured/Underinsured Motorist Coverage

The two insureds in *Wehrle v. Cincinnati Insurance Co.*, 719 F.3d 840 (7th Cir.) sought to increase their UM benefits by arguing that the amount received from the tortfeasor's liability insurer should be deducted from their total damages, rather than from the maximum amount of UM coverage available under their policy. Alternatively, they argued that each was entitled to the maximum amount of UM coverage, less the amount each insured received separately from the liability insurer. The court, however, found that the UM policy unambiguously provided that the total amount received by all insureds from the tortfeasor and its insurer should be deducted from the per accident limit of UM coverage.

The Eighth Circuit similarly found no ambiguity in the UIM endorsement at issue in *Munroe v. Continental Western Insurance Co.*, 735 F.3d 783 (8th Cir.). The insured claimants argued that, because the UIM coverage selection form was not returned by the named insured employer to the insurer until after the loss, the selection of a coverage limit lower than the policy's bodily injury liability limit was uncertain. The court, however, looked to the UIM limit set out in the policy declarations and UIM endorsement, which matched the limit ultimately selected by the employer, and found no ambiguity. The court found further that the policy clearly stated a single per accident limit, which negated the claimants' attempt to stack limits based on the two of them each asserting claims against three other drivers involved in the loss. *See also Owners Insurance Co. v. Hughes*, 712 F.3d 392 (8th Cir.), in which the court found unambiguous the Owners policy's definition of "underinsured automobile" as an automobile covered by a liability policy with limits at least equal to the statutory minimum but less than the Owners policy's UIM limits. In that case, the Owners policy's UIM limits were equal to the other vehicle's liability coverage, and the court found that the other vehicle was not "underinsured."

On the "stacking" front, the plaintiff insureds in *Manfredi v. State Farm Mutual Automobile Insurance Co.*, 2013 U.S. App. LEXIS 24928 (11th Cir.), argued that they were entitled to collect the combine UM limits of two different State Farm policies that they maintained on two different vehicles. As permitted under Florida law, the two policies provided different UM coverage: The policy covering the vehicle involved in the loss permitting stacking, but the other "non-stacked" policy, covering a different vehicle, provided UM coverage only for an insured while driving the covered vehicle. Since the coverage of the two policies did not overlap, no stacking was permitted.

- Phil Bramson

17. Bad Faith

Insurers have an ongoing concern as to whether they can be held to have acted in bad faith by exhausting liability limits to settle claims against one insured, while leaving other insureds exposed. In *Pride Transportation v. Continental Casualty Co.*, 511 Fed. Appx. 347 (5th Cir.), both retained counsel for the insured driver and separate retained defense counsel for the named insured motor carrier agreed that the value of the plaintiffs' claims would at least equal the combined $5 million coverage limits of the primary and excess policies. The plaintiffs agreed to a policy limit settlement for the driver, but would not include the motor carrier in that settlement, despite the insurers' efforts to obtain releases for both insureds. Since the proposed settlement was otherwise reasonable, the court found (applying Texas law) that the insurers acted in good faith in accepting it. The court rejected the motor carrier's argument that the potential for a subsequent indemnification claim by the motor carrier against the driver raised a question of fact as to whether the plaintiffs' proposed settlement for the driver was reasonable.

In an interesting procedural move, the court in *Penn v. National Interstate Co.*, 2013 U.S. Dist. LEXIS 42000 (D. Mont.), struck the insurers' affirmative defense of "advice of counsel" in a bad-faith action brought by the claimant under the Montana Unfair Trade Practices Act ("UTPA"). Looking to the classic definition, the court found that an affirmative defense must be the defendant's assertion of facts and arguments which, if true, would defeat the plaintiff's claim even if all allegations in the complaint were true. Since relying on advice of counsel was only a factor to be considered in whether the insurers had acted in good faith, but was not an absolute defense to a claim under UTPA, the court struck the defense from the insurers' answers.

- Phil Bramson

18. Miscellaneous

The City of Los Angeles, operating the Port of Los Angeles, passed a law requiring “drayage” trucking companies moving cargo in and out of the port to enter into an agreement under which, among other things, the companies would develop off-site parking plans and display designated placards on their vehicles. The Supreme Court of the United States found unanimously in *American Trucking Associations v. City of Los Angeles, California*, 2013 U.S. LEXIS 4359, that the two requirements related to a price, route or service of a motor carrier with respect to transportation of property, and had the force and effect of law, rather than a private agreement, since transportation without entering the agreement or violation of its terms was punishable by criminal penalties. Accordingly, those requirements were deemed preempted by the Federal Aviation Administration Authorization Act of 1994. The Court declined to decide whether federal law governing licenses for interstate motor carriers prevented the city from penalizing violations of non-preempted provisions.

On the other hand, when an assistant store manager tripped over packages stacked by a United Parcel Service driver, the court in *Huertas v. United Parcel Service, Inc.*, 974 N.Y.S.2d 758 (Sup. Ct., Richmond County) held that her bodily injury cause of action was not preempted by either the FAAAA or the Airline Deregulation Act (“ADA”). In the court’s view, stacking packages is not a “service” provided by an airline or motor carrier which may be regulated only by the federal government.

In determining the admissibility of a trucking industry expert’s testimony in *Rutstein v. Cindy’s Trucking of Illinois, Inc.*, 2012 U.S. Dist. LEXIS 188963 (D. Wyo.), the court agreed that he could testify as to his knowledge and understanding of federal motor carrier regulations, but would not be allowed to testify as to whether the defendants’ actions constituted a violation of those regulations.

The plaintiff’s expert did not even get that far in *Raglin v. MSJ Trucking, Inc.*, 2013 U.S. Dist. LEXIS 176718 (S.D. Miss.). The court in that case deemed irrelevant the expert’s proposed testimony that the driver’s violation of various federal regulations should have resulted in him being placed out of service, finding that “[i]mposing liability for FMCSR violations under the theory that the truck or driver would not have been on the road at all removes legal cause from the equation and imposes strict liability.”

Under FMCSA’s hours of service (“HOS”) rules as promulgated in 2011, drivers are restricted in the number of hours they can drive in a seven day period, but they can restart the clock once a week by taking at least 34 consecutive hours off-duty, which period must include two consecutive periods of 1:00 A.M. to 5:00 A.M. While drivers are permitted to drive up to 11 hours in a day, they must take at least a 30 minute break after driving for 8 consecutive hours. *American Trucking Associations, Inc. v. Federal Motor Carrier Safety Administration*, 724 F.3d 243 (D.C. Cir.), is the latest in a series of challenges to these rules before the D.C. Circuit, going back to 1999. The court upheld the 34-hour rule, but agreed with the objectors that FMCSA had failed to adequately explain the rationale for applying the 30-minute break rule to short-haul truckers and therefore vacated the rule. (As reported in the Federal Register for October 28, 2013, the FMCSA responded directly to the court’s decision by formally amending the HOS rule to exempt from the mandated 30-minute break (1) all drivers, whether they hold a commercial driver’s license (“CDL”) or not, who operate within 100 air-miles of their normal work reporting locations; and (2) all non-CDL drivers who operate within a 150 air-mile radius of the location where the driver reports for duty.)

In *Starr Indemnity & Liability Co. v. SGS Petroleum Service Corp.*, 719 F.3d 700 (5th Cir.), the umbrella policy in question included an absolute pollution exclusion, but also a ‘buy-back” endorsement which provided coverage for pollution losses if certain conditions were met, including a condition that the insured notify the insurer within thirty days of learning about a discharge. After a release of toxic chemicals during unloading, the insured was advised that the expected damage was well within the limits of its primary coverage. When the estimates changed and it appeared likely that the damage would reach into its umbrella coverage, the insured notified the umbrella insurer – 59 days after first learning of the release. The court applied the endorsement’s notice provision as written and denied coverage. The court specifically rejected argument’s based on Texas jurisprudence imposing a prejudice standard on late notice provisions in general liability policies, reasoning that the notice provision in the “buy-back” endorsement was bargained-for and not subject to a prejudice standard.

In *EXP Logistics v. Kilgore*, 2013 U.S. Dist. LEXIS 98053 (E.D. Tenn.), the trailer portion of a rig caught fire on the highway, although the tractor portion was unharmed. The wrecker driver dispatched to haul away the burnt trailer urged the state trooper on the scene to order the tractor driver to take the tractor to the wrecker service's facility, to serve as collateral for the costs of towing and storing the trailer. The state trooper did so, and the wrecker service subsequently refused to release the tractor until its bill was paid. The district court refused to dismiss the tractor lessor's action under 42 U.S.C. § 1983, finding adequate allegations that lessor's driver had turned the tractor over to the wrecker service under state compulsion, and that the lessor's fourth amendment rights had been violated through unlawful seizure.

Mann v. Redmand Van & Storage Co., case no. 12-35373 (9th Cir.), is interesting for its holding, applying Montana law, that violation of a federal motor carrier safety regulation, as opposed to a statute, does not constitute negligence *per se*.

- Phil Bramson

19. MAP-21

The "Moving Ahead for Progress in the 21st Century Act," or "MAP-21," is a two-year transportation reauthorization bill enacted on October 1, 2012. Its basic purpose is to provide $561 million in funding for fiscal year 2013 and $572 million for fiscal year 2014.

On September 5, 2013, the Federal Motor Carrier Safety Administration published a regulatory guidance in the Federal Register (Vol. 78, No. 172, p. 54720-22) regarding the approach it envisions taking in enacting regulations to implement the broker/freight forwarder sections of MAP-21. Under the new regulations, both brokers and freight forwarders will be required to obtain federal operating authority. They will also be required, as a condition of obtaining operating authority, to file proof of financial responsibility for judgments up to $75,000. The new regulations provide civil penalties up to $10,000 for anyone who knowingly engages in interstate brokerage or freight forwarding operations without the required operating authority, and create a civil cause of action for any injured third party for all valid claims regardless of the amount.

A 60-day phase-in period began October 1, 2013, to allow the industry to obtain the appropriate operating authorities and to meet the new minimum financial responsibility requirements. complete all necessary filings. Beginning November 1, 2013, FMCSA was to mail notifications to all brokers and freight forwarders that have not met the $75,000 minimum financial security requirement. The regulations contemplate that FMCSA will provide 30 days advance notice before revoking the freight forwarder and broker operating authority registrations.

- Phil Bramson

20. Unified Registration System

On August 23, 2013, the Federal Motor Carrier Safety Administration (FMCSA) promulgated a Final Rule, amending its regulations to require every entity under FMCSA's commercial and/or safety jurisdiction, except for Mexico-domiciled motor carriers seeking authority to operate beyond the border commercial zones, to submit mandatory registration and biennial update information via a new electronic online Unified Registration System (URS). Notably, private carriers (that is, carriers that are not "for-hire") will be required for the first time to register with FMSCA. FMCSA is requiring that regulated entities fill out and update their registration information electronically using a web-based form in an effort to save costs for the applicants and FMCSA. The application process, which is currently being developed, will mimic the interactive, interview format of popular tax preparation software, rather than a static fillable format.

Under the URS application process, each new applicant will be issued an inactive USDOT Number. (The "MC" number formerly issued to for-hire interstate motor carriers and brokers, the "FF" number assigned to freight forwarders, and the "MX" number issued to Mexico-domiciled carriers operating in the US-Mexico border commercial zones, will no longer be used.) The inactive USDOT Number will be activated after FMCSA has determined that the applicant is willing and able to comply with applicable regulatory requirements and the applicant has satisfied applicable administrative filing requirements, such as evidence of financial responsibility, if applicable, and a process agent designation. An applicant with an inactive USDOT Number is prohibited from operating in interstate commerce.

In the past, we have encountered leasing companies which, while not operating as motor carriers themselves, leased vehicles to motor carriers and obtained their own USDOT census numbers. The presence of the leasing company's USDOT number on its vehicles, while being operated by others, often led to confusion as to who should face liability in the event of the loss. The Department's August 23, 2013, rulemaking makes it clear that this practice will be discontinued, no further USDOT numbers will be issued to leasing companies, and the existing leasing company census numbers will be deactivated before October 23, 2015.

Regulated entities must update their registration information every 24 months. Changes to an entity's legal name, form of business, or address must be updated sooner. FMCSA will issue a warning letter 30 days in advance of a biennial update deadline to notify the entity that its USDOT Number will be deactivated if it fails to comply with the biennial update requirement. The thinking is that these requirements will ensure the continuing relevance and viability of the USDOT Number as a unique identifier and repository for safety data associated with a particular entity. Specifically, this requirement will allow FMCSA to efficiently monitor informational changes affecting all regulated entities.

Beyond simple registration, the Final Rule also requires all for-hire motor carriers and private motor carriers that transport hazardous materials (HM) in interstate commerce, property brokers, and freight forwarders, to file evidence of financial responsibility as a condition of receiving authority. This is a marked change. Existing regulations require only non-exempt for-hire motor carriers, property brokers, and household goods freight forwarders to file evidence of financial responsibility. Certain private motor carriers transporting HM in interstate commerce are already required by statute and regulations to obtain and maintain Bodily Injury and Property Damage insurance; this final rule requires, for the first time, the filing of evidence of such insurance.

Another significant change to the law is that FMCSA will require all for-hire and private motor carriers, brokers, and freight forwarders to designate process agents via electronic submission as a precondition for receiving USDOT registration and/or operating authority registration. (Current regulations require only entities that must register under 49 U.S.C. chapter 139 (i.e., non-exempt for-hire motor carriers, property brokers, and freight forwarders) to designate a process agent.) The Final Rule also revises the regulations to provide greater certainty that process agent designations are accurate and that process agents are able to receive and serve on their client principals notices in court or administrative proceedings against regulated entities.

FMCSA will charge a $300 registration fee for all entities filing new registration applications. (Currently, only non-exempt for-hire motor carriers, property brokers, and freight forwarders must pay the $300 one-time registration fee.) Notably, this fee could increase as FMCSA develops more accurate estimates on appropriate fees to cover the full costs of operating its URS program.

At least in theory, this Final Rule establishing the URS streamlines the existing registration process and ensures that FMCSA can more efficiently track regulated entities to maximize safety, as well as increasing public access to data about the above carriers and entities. It will be essential for all regulated entities and their attorneys to be aware of the newly established URS and the various reporting and filing requirements detailed above. Counsel should take the time to read the full text, summary, and discussion of the Final Rule, which is available online at:

http://www.fmcsa.dot.gov/rules-regulations/administration/rulemakings/final/URS-Final-Rule.pdf

- Sanjeev Devabhakthuni