Transportation: 2012 Annual Year in Review

On behalf of my co-editor and other members of the Hiscock & Barclay Transportation Team, I am pleased to offer our annual survey of developments in the field of transportation law. As always we have selected significant decisions from around the country, summarized the key facts and legal holdings, and, in some cases, have offered editorial comments about the significance of, or strength or weakness of, a particular holding and how it may impact on future litigations.

Every year alongside the summaries we select one or more topics and treat them to a more detailed analysis suggesting new trends in the case law, or other developments of note that require a comparison of some of this year's cases with decisions from prior years. In this year's edition such an analysis may be found, for example, in section I, a review of liability issues arising out of the U.S.D.O.T. leasing regulations, and section V which deals, in part, with the question of whether transportation brokers may fend off suits seeking damages for alleged negligence, based on a preemption argument available, until recently, only for motor carriers.

This report is read every year by many leaders in the industry – underwriters, claims supervisors, risk managers – and we are grateful both for the kind words that many of you have expressed over the years about the quality of the analysis, and the suggestions that we hope have made the annual summary more user-friendly. We transmit the review primarily electronically, and those who read it electronically are able to link to the decisions that are being reviewed.

The attorneys of the transportation team stand ready to help with legal issues that may arise in your business: coverage questions, regulatory issues and defense work. Beyond our team, the firm offers a broad range of legal expertise. We welcome you to visit our website for more information at www.hblaw.com.

We look forward to hearing from you.

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I. IS A MOTOR CARRIER LIABLE FOR LOSS ARISING OUT OF EVERY USE OF A LEASED VEHICLE DURING THE TERM OF THE LEASE?

The leasing regulations, now codified at 49 C.F.R. Part 376, have generated a fair amount of litigation since they were promulgated by the Interstate Commerce Commission back in 1950. The United States Supreme Court upheld the regulations as a valid exercise of the I.C.C.'s authority in 1953 and, over time, courts around the country largely coalesced around the understanding that a motor carrier assumed complete control over the use of any owner-operator vehicle during the entire term of the lease. This was taken to be so not only while the owner-operator was under load or en route to a pickup but even when he was using the rig for his own purposes. The key language, which is still part of the regulation (¶376.12(c)) was this:

> (1) The lease shall provide that the authorized carrier lessee shall have exclusive possession, control and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

Under this majority view, which by the mid-to-late 1980's had become virtually the unanimous view, an owner-operator was often referred to as a statutory employee of the regulated motor carrier. This doctrine was sometimes called "placard liability" but as readers of this space know it should have been called "leasing liability."

There were some courts that were troubled by the broad scope of this liability – did the regulations truly require that the motor carrier face liability for *any* use of the leased rig? After all, if the same motor carrier owned a tractor and hired a driver to operate it, would it not be entitled to claim, where circumstances permitted, that the driver was operating outside the scope of his employment? Should a carrier face greater exposure for leased autos?

In recent years, as we have described in previous editions, a number of courts have suggested that changes made to the regulations by the I.C.C. in 1986 and 1992 had revoked the principle of full liability for the carrier during the entire term of the lease. Some of these courts have adopted the view that while there is a presumption that any use of the leased vehicle is in the business of the lessee motor carrier, the carrier has the ability to rebut the presumption and show that the use at the time of the loss was unrelated to its business. This trend, when examined in conjunction with several other developments, including language in many lease agreements that attempt to restrict the carrier's liability to time periods during which the leased vehicle is actually hauling goods in the carrier's business, and the absence of coverage in many, if not most, cases for the owner-operator under the motor carrier form, may signal that a significant shift is underway which is moving us away from the majority view.

The federal judge hearing the matter of *Jett v. Van Eerden Trucking Co,* *Inc.*, 2012 U.S. Dist. LEXIS 2688 (W.D. Okla.) began his discussion of the topic with this introduction:

> The law in this area is less than clear. It involves complexities arising out of the interplay of state law negligence standards and federal regulations applicable to interstate motor carriers. The federal regulations have themselves evolved or been clarified over the years, creating questions as to the continuing applicability of some of the cases which have articulated standards in the area.

Such uncertainty and doubt is a reflection of the current zeitgeist - until recently the case law in this area was seen as quite settled.

The *Jett* court was aware of the traditional view: it cites the language of 49 C.F.R. §376.12(c)(1) set out above, and that of the enabling statute giving the USDOT the right to issue leasing regulations, as well as examples of the case law which found the lessee strictly liable for the use of a leased vehicle during the term of the lease. However, *Jett* highlights language in a 1986 comment by the I.C.C. (found in ExParte No. MC-43 (Sub-No. 16), 3 I.C.C.2d 92) in which the Commission explained that it:

> … did not intend that its leasing regulations would supersede otherwise applicable principles of State tort, contract, and agency law and create carrier liability where none would otherwise exist.

The court also cited the 1992 I.C.C. rulemaking which added a new subsection to the regulations which provides that the leasing regulations are not meant to resolve the issue of whether the lessor/driver is an employee of the motor carrier (for purposes of worker's compensation).

Citing to these changes (from 1986 and 1992!) the *Jett* court concluded that the regnant view (of the 1970's and 80's, anyway) is no longer good law. The loss that the court was looking at arose out of a collision between a pickup truck pulling a horse trailer and a tractor-trailer rig. The occupants of the pickup were badly hurt and equipment in the horse trailer was damaged. These claimants filed suit against the driver of the rig, the owner of the tractor, and against Van Eerden Trucking, the motor carrier which also owned the trailer. Van Eerden did not, in fact, lease the tractor but the claimants argued that an implied lease existed. The court concluded a quick review of the case law involving "lease liability," but, as noted earlier, found the law to be uncertain, particularly in light of the 1986 and 1992 changes.

The court was not prepared to find a constructive lease as a matter of law – one wonders if counsel cited relevant case law which could have justified such a finding. More importantly, though, the court found that even the existence of a lease would not help plaintiffs, because the lease regulations "were not intended to create a federal theory of liability supplanting applicable state law concepts of agency, independent contractor and the like." This is a remarkable statement (even the decision in *Bays v Summit Trucking*, 691 F.Supp.2d 725 (W.D. Ky.), which we discussed in this space two years ago, does not go this far).

The decision in *Jett*, then, continues and even moves beyond the trend we have seen in recent years for courts to reconsider the common view that motor carrier lessees remain liable for virtually any use of the leased tractor during the term of the lease. Interestingly, this trend away from the consensus view did not begin in the years immediately following the changes made by the I.C.C in 1986, which are now cited as proof that the consensus view was incorrect and/or needs to be revised. The developing view holds that the leasing regulations either create no federal liability (as the *Jett* court held), or that they create only a rebuttable (rather than irrebuttable) presumption that the carrier is liable (as the *Bays* court held). It is primarily in the past decade that courts have begun to move in this direction. Among the other decisions in recent years that have challenged the consensus view were *C. Frances Thomas v. Johnson Agri-Trucking*, 802 F. Supp.2d 1242 (D. Kan. 2011); and *Harco National Insurance Co. v Zurich American Ins. Co.*, 2011 U.S. Dist LEXIS 110651 (M.D. Fl. 2011).

This is not the place for a detailed treatment of this issue, but we have some doubts about this trend. In its 1986 decision, the I.C.C. was responding to one narrow issue – owner-operators who leave their placards on after the lease has terminated – and the Commission modified the leasing regulations so that motor carriers were able to contractually terminate the lease (and their responsibility) even if the placards remained on the vehicle. There is, however, no suggestion that the

I.C.C. intended to criticize the then-majority view. We are a bit concerned that the decisions which cite from the 1986 rulemaking to challenge the consensus view are doing so completely out of context. They cite the language that the *Jett* court cited without informing the reader of the context in which they were made. After all the language of paragraph (c)(1) was not changed, and when one reads the entire decision one sees no evidence that the I.C.C. was saying anything at all about the consensus view.

The 1992 rulemaking, which added paragraph (c)(4) was narrowly focused on a second issue – that the fact that a motor carrier is responsible for the use of a leased auto (under (c)(1)), does not mean that the state worker's compensation court must treat the driver as an employee under state law. Were it true that the 1992 changes were intended to reverse the consensus view (that control = liability), then it would be very hard to explain why the I.C.C. decision included the following language:

> While most courts have correctly interpreted the appropriate scope of the control regulations and have held that the type of control required by the regulation does not affect "employment" status, it has been shown here that some courts and state workers' compensation and employment agencies have relied on our current control regulations and have held the language to be prima facie evidence of an employer-employee relationship.

The problem that the I.C.C. had observed did not relate to the control issue (i.e., that the motor carrier is vicariously liable for use of the leased vehicle), but that some courts and agencies were using that liability as a basis for determining the employment status of the driver and that was a mistake. The trend of cases now revisiting the basic liability issue may be misreading the 1986 and 1992 changes.

Driver as Employee

Another regulation that must be examined when considering whether an owner-operator or driver is an employee of the motor carrier is 49 C.F.R. §390.5 which defines the word "employee" for the surrounding subchapter as:

> Any individual, other than an employer, who is employed by an employer [also a defined term] and who in the course of his or her employment directly affects commercial motor carrier safety. Such term includes a driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle), . . .

Lancer Insurance Co. v. Newman Specialized Carriers, Inc., 2012 U.S. Dist. LEXIS 143652 (N.D. Ala.) (apparently now on appeal), concerned a bodily injury lawsuit by Jimmy Fowler – who was hurt while unloading cargo from a flatbed. The cargo had been strapped into place by the shipper; when Fowler unstrapped the load it fell on him. Fowler, an owner-operator, sued Newman, the motor carrier, and the shipper. The lease, in language which is fairly typical, insisted that Fowler was an independent contractor and not an employee.

Two insurers of Newman sought a declaration that they provided no coverage for the loss. QBE, which issued a CGL policy to Newman, successfully moved for summary judgment based on the auto exclusion. Lancer issued a commercial auto policy to Newman which contained the standard employee exclusion. In arguing that the exclusion applied, Lancer cited to case law which holds that a driver or lessee, even if formally independent, is deemed a statutory employee. While agreeing with Newman and the other defendants that the Lancer policy is interpreted in accordance with state, not federal, law, the court concluded that the regulation defining employee to include lessor drivers (49 C.F.R. §390.5) is a part of Alabama law because Alabama has adopted (for interstate purposes) the federal motor carrier safety rule, including Part 390. (Would the court have reached a different conclusion if Alabama had not incorporated the federal regulations?)

In the alternative, the insured and the other defendants argued, based on a 2003 district court decision from Connecticut (*Pouliot v. Paul Arpin Van Lines*, 292 F.Supp.2d 374), that a driver is an employee under §390.5 only when he is actually driving – Fowler was no longer driving at the time of the accident. The court disagreed with the *Pouliot* decision on a number of grounds, concluded that Fowler was a statutory employee and, accordingly, concluded that Lancer had no duty to defend or indemnify Newman.

Truth-in-Leasing

The leasing regulations impact not only the public's right against motor carriers, but also the relationship between motor carriers and owner-operators. In this guise the nomenclature "Truth-in-Leasing" regulations is sometimes used. A particularly instructive decision on this score was *Jones Express, Inc. v. Watson*, 2012 U.S. Dist. LEXIS 67416 (M.D. Tenn).

Watson was an owner-operator under lease to Jones, a U.S.D.O.T. motor carrier, who was driving in Jones's business when he ran a red light and caused a fatal accident. The estate of the victim filed a claim against Jones Express. Zurich American Insurance Company, Jones's insurer, settled the claim for just over $2 million securing the release of Jones and Watson.

At this point, the case turned interesting. Zurich, it turned out, had issued a $1 million policy with a $1 million deductible. Jones paid Zurich its deductible, then sued Watson for reimbursement under the terms of the lease agreement. Watson countered that he had never been told that Jones had a deductible that he would be expected to repay.

The case demonstrates, as an initial matter, some of the difficulties courts encounter in interpreting owner-operator lease agreements, beginning with the fact that the copy that was presented to the court was difficult to read – the print was "both minute and blurred."

The portion of the lease that the court was able to make out displayed another typical problem with these leases – the terms were not consistent. Pursuant to paragraph 4 the owner-operator agreed to pay all operating expenses as well as the first $500 of any cargo loss and the first $500 of any liability claim resulting from the negligence of the owner-operator; paragraph 9, entitled "Indemnification" required the owner-operator to indemnify and hold the lessee harmless for all losses caused by the owner-operator. This ostensible inconsistency is not uncommon in owner-operator leases and, as we shall see, the court made use of it to frustrate what it seems to have seen as the motor carrier's attempt to foist unexpected liability on the owner-operator.

The motor carrier's vice president for safety and risk management testified that owner-operators like Watson should have been aware that the company's policy included a $1 million deductible, but the practice was to give the owner-operator only a certificate of insurance, not a full copy of the policy. The certificate produced at trial made no mention of a liability deductible. Looking to the future, we can imagine well-run motor carriers being more careful about establishing a record by which the owner-operators acknowledge awareness that the motor carrier's policy has a large deductible.

The trial judge himself asked the vice president at trial whether the company made insurance available for the owner-operators to cover the liability for the $1 million deductible. Interestingly, the vice president responded that no such coverage was offered because Jones was concerned about moral hazard:

> We have also steered clear of that because we wanted to insure that the independent contractor had an interest and that they wouldn't operate with some sort of moral disregard if they had – forgive the term – no skin in the game.

What remains puzzling is why the company thought that its owner-operators were in financial circumstances permitting them to pay Jones up to $1 million out of pocket when so required by the terms of the contract.

Watson purchased his insurance through Jones which had told him that he could buy any coverage that he needed. He bought "everything they had," that is everything Jones made available for purchase. This included bobtail coverage and physical damage coverage. In fact, as the company acknowledged, Watson even paid a pro-rated amount to reimburse Jones for the expense of its coverage with Zurich. Watson testified that he was not told about the deductible or about his potential exposure to reimburse Jones for any deductible payments. In response to the Court's question about whether he considered separate insurance to cover any liabilities not covered by the policies secured through Jones, he replied that he believed himself to be "100 percent covered." He indicated that he never would have signed on with Jones had he known that he was on the hook for $1 million.

The court observed that the leasing regulations – in their manifestation as "Truth-in-Lending" regulations – have a primary goal of preventing large carriers from taking advantage of individual owner-operators due to the latter's weak bargaining position.

The court considered and rejected various arguments presented by Watson who argued that Jones was estopped from recovering on its claim for indemnification because it had violated one or another provision of the leasing regulations.

The court, though, found that the lease was out of compliance with the insurance requirement of the regulation set out at §376.12(j). The lease agreement, according to the regulations, must clearly specify the carrier's legal obligation to maintain insurance coverage for the protection of the public as set out in the U.S. Code. The court seems to have understood this to mean that the lease should describe how the carrier is meeting its insurance requirement. The lease included a recitation that Jones agreed to "maintain public liability insurance for the protection of the public naming [Jones] as the insured for vehicles while operating from and to points specified by [Jones]." (Note the limited scope). The court observed that the lease did not refer to the amount of $750,000 (or $1 million or $5 million – few if any leases we have seen over the years are that specific); more to the point, perhaps, the lease did not mention that the Jones policy with Zurich failed to satisfy the regulations since the coverage kicked in only after Jones paid its $1 million deductible. The court found that Jones's failure to have first level insurance coverage, or to inform Watson that he might be obligated to pay up to $1 million following a loss, was a violation of the spirit and the letter of the truth-in-leasing provisions.

One might certainly question the court's understanding that Jones had failed to secure insurance. The Zurich policy apparently included an MCS-90, so the fact that the policy included a large deductible did not prevent it from complying with the federal insurance requirements. The court, in any event, held that Jones was estopped from collecting anything beyond the $500 deductible mentioned in paragraph four of the lease.

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II. THE CARMACK AMENDMENT

Elements of a Claim Under the Carmack Amendment.

The court, in *Rush Industries, Inc. v. MWP Contractors, LLC*, 2012 U.S. Dist. LEXIS 170758 (M.D.N.C.), set out the elements that a shipper must prove to state a cause of action under the Carmack Amendment. In *Rush*, Plaintiff had purchased a piece of used industrial equipment and had contracted with Defendant to transport the equipment to Plaintiff's factory in another state. Defendant, in turn, contracted with a carrier for the transportation of the equipment. When the equipment arrived at Plaintiff's factory in a damaged condition, Plaintiff sued Defendant in state court for damages. Subsequently, Plaintiff voluntarily dismissed the state court proceeding and brought a federal court proceeding against the Defendant and the carrier under the Carmack Amendment. The court, after finding that any state law claims against the Defendant were preempted by the Carmack Amendment, held that to prove a claim under the Amendment, a plaintiff must establish (1) delivery of the goods to the carrier in good condition, (2) arrival in damaged condition, and (3) amount of damages. The court also held that a shipper making a claim under the Carmack Amendment has an obligation to mitigate any damages claimed. In *Rush*, the Court found that Plaintiff had proven its claim under the Carmack Amendment, but reduced the damage claim because the Plaintiff failed to take reasonable steps to minimize its damages by making possible repair to the equipment involved.

Preemption of State Law Claims.

In *Thorton v. Philpot Relocation Sys.*, 2012 U.S. Dist. LEXIS 6696 (E.D. Tenn), Plaintiff attempted to avoid the preemptive effect of the Carmack Amendment by arguing that her contract with Defendant Philpot Relocation Systems ("Philpot") called for Philpot to arrange for the pickup her household goods in Flowery Branch, Georgia and to deliver her goods to storage in Tucker, Georgia. She also arranged for Philpot to deliver the goods when she had established a new residence in Knoxville, Tennessee. The goods were picked up by Atlanta Moving & Storage in 1999 which issued its Uniform Bill of Lading covering the delivery of the goods into storage. In August, 2005, Plaintiff had

Philpot arrange for the transportation of her household goods from storage to her residence in Knoxville, Tennessee. Defendant Atlas Van Lines picked up the goods and transported the goods pursuant to its Uniform Bill of Lading. When the household goods were delivered damaged, Plaintiff sued Philpot, Atlanta Moving & Storage and Atlas Van Lines for the damage.

The Defendants argued that Plaintiff's state law claims for breach of contract, bailment and breach of warranty were preempted by the Carmack Amendment. Plaintiff argued that the goods were damaged while stored in Georgia and, because the goods had never left the state of Georgia before they were damaged, the Carmack Amendment did not preempt her state law claims. The court found that Plaintiff's state law claims were preempted holding that the Carmack Amendment's definition of "transportation" was quite broad, and encompassed, among other activities the storage and handling of citing 49 U.S.C. § 13102(21)(B). The court went on to hold that precisely when the Plaintiff's property was damaged was irrelevant in assessing the application of the Carmack Amendment and that the dispositive fact was that all of Plaintiff's claims were based on damages suffered to goods whose transportation and storage were covered by interstate bills of lading. Such claims were completely preempted by the Carmack Amendment and because Plaintiff did not file her claim within the two years statute of limitations contained in those bills of lading, her claims were time barred.

In *BNSF Logistics, LLC v. L&N Express, Inc.*, 2012 U.S. Dist. LEXIS 19811 (N.D. Cal.), the court rejected Plaintiff's attempt to hold Defendant liable based on a state law claim for breach of a Broker/Carrier Agreement. Plaintiff, a transportation intermediary that assisted customers with logistics, and Defendant, a common carrier, entered into an agreement under which Defendant agreed to provide transportation services to Plaintiffs' customers. On two separate occasions in March, 2011, Plaintiff received calls concerning the pickup of shipments from Plaintiff's customers from a driver who claimed to be working for Defendant. On each occasion, Plaintiff sent rate confirmation emails to Defendant, who did not respond to the emails. On each occasion the shipments, although picked up, were never delivered and never found. Plaintiff subsequently learned that Defendant had stopped using the driver prior to the first shipment but that Defendant had not notified Plaintiff of that fact. The consignee of the two loads made a claim against Plaintiff for the value of the loads.

Plaintiff filed a breach of contract and negligence action in state court. Defendant removed the action to federal court arguing that Plaintiff's state law claims were preempted by the Carmack Amendment and then filed a motion to dismiss Plaintiff's claims. Plaintiff argued that the claims were not preempted because the claim did not involve Defendant's failure involving the transportation of goods but Defendant's failure to fulfill its contractual obligation to update its contact information and to respond to Plaintiff's e-mails. The court, rejecting Plaintiff's attempt to draw a distinction between types of breach of contract claims, held that the Carmack Amendment preempted Plaintiff's state law claims because the contract involved the transportation of goods in interstate commerce and the claim involved the loss of two of those shipments.

In *Louisiana Transportation v. Cowan Systems, Inc.*, 2012 U.S. Dist. LEXIS 66294 (D.N.J.), the Plaintiff, a motor carrier, sued to collect payment for shipments that Plaintiff had performed at Defendant's request. Plaintiff alleged various state law claims including breach of contract, breach of a book account, breach of promise and quantum meruit. Defendants moved to dismiss Plaintiff's complaint arguing that Plaintiff's state law claims were preempted the Carmack Amendment and its eighteen month statute of limitations for actions to collect freight charges. Plaintiff argued that its state law claims survived because of language in the statute that stated that "[e]xcept as otherwise provided . . . the remedies provided under this part are in addition to remedies existing under another law or common law." 49 U.S.C. § 13103. The court rejected Plaintiff's argument finding that the Carmack Amendment preempted all state law claims related to the transportation of goods in interstate commerce. Because Plaintiff's claim for unpaid freight charges had accrued, at the latest, in January 2007, the action to collect those charges, brought on June 14, 2011, was timed barred.

In *Ranieri v. North American Van Lines*, 2012 U.S. Dist. LEXIS 121678 (D.N.J.), Plaintiff contracted with Defendant to transport her household goods from New Jersey to California. Plaintiff signed a bill of lading after the movers had loaded her belongings in New Jersey. The Defendant's agents did not load the goods by the date specified in the contract and failed to unload the shipment in California on the dates specified. Plaintiff filed an action in New Jersey state court to recover damages for payments she made to have her New Jersey residence cleaned and $6,000 she paid to the purchasers of the property for damage to the residence and delay. Defendants removed the action to federal court and moved for summary judgment arguing that Plaintiff's claims was preempted by the Carmack Amendment and barred by Plaintiff's failure to utilize Defendant's claim procedures.

Plaintiff argued that her claim to recover the payments that she made to have her residence cleaned and because of the delay and damage caused by Defendant's employees were not preempted because she was not seeking to recover for damage to her property. The court disagreed, finding that the Carmack Amendment preempted any state law claim related to the transportation of goods in interstate commerce. Because the damages claimed by Plaintiff were based on a claim that Defendant had failed to properly perform its obligations under a contract related to such transportation, her claims for damage to her residence and the delay caused by the move were preempted by the Carmack Amendment. Having found Plaintiff's state law claims preempted, the court granted Defendant's motion for summary judgment finding that Plaintiff had not complied with claim filing requirements contained in the Carmack Amendment and the Defendant's tariff that governed the move.

Limitations on Preemption

Last year's review discussed the case of *Excel, Inc., v. Southern Refrigerated Transport, Inc.*, 835 F. Supp. 2d 472, 2011 U.S. Dist. LEXIS 144566 (S.D. Ohio), in which the court held that the Carmack Amendment preempted Plaintiff's claim based on a breach of an agreement between a freight broker and a carrier. The court apparently had second thoughts about that decision, and, after requesting supplemental briefing from the parties, vacated its previous order and held that the Carmack Amendment did not preempt the claim for breach of contract based on a broker-carrier agreement. *See Excel, Inc., v. Southern Refrigerated Transport, Inc.*, 2012 U.S. Dist. LEXIS 104740 (S.D. Ohio). The court recognized that different courts had come up with different results on the issue but found that a broker-carrier agreement that required the carrier to indemnify the broker for any claims based on the carrier's transportation of goods was not the type of agreement preempted by the Carmack Amendment, in part, because the broker was not seeking damages under a bill of lading but under a separate agreement. Given the difference of opinion between the courts, precedent has to be researched before bringing such a claim.

In *Stabler v. Florida Van Lines, Inc.*, 2012 U.S. Dist. LEXIS 1637 (S.D. Ala.), the Plaintiff contracted with Defendant Pack & Load to have a portion of her belongings transported from her residence in Ono Island, Alabama to her new home in New Orleans, Louisiana. The Defendants also agreed to pack other of Plaintiff's goods in storage containers to be stored at a facility in Brookley Field, Alabama. The goods were actually transported by Defendant Florida Van Lines. Dissatisfied with the services provided, Plaintiff filed a state court action for breach of contract, negligence, wantonness, negligent supervision, conversion and a claim under the Carmack Amendment. The Defendants removed the case to federal court and moved to dismiss Plaintiff's state law claims on the ground that such claims were preempted by the Carmack Amendment.

The court had no problem granting the motion with respect to that portion of the transaction that involved the interstate transportation of the Plaintiff's goods from Alabama to Louisiana. That part of the transaction fell directly within the provisions of the Carmack Amendment and any state law claim based on that part of the transaction was preempted. The court, however, then considered separately that portion of the transaction that called for the Defendants to pack Plaintiff's belongings and transport those belongings to a storage facility within the Alabama. The court first found that the storage containers in which Plaintiff's belongings were packed were never intended to leave Alabama. The court then held that the Carmack Amendment did not apply to the intrastate transportation of goods by common carrier and, therefore, Plaintiff's state law claims based on damage to the goods in storage was not preempted by the Carmack Amendment.

In *McGinn v. J.B. Hunt Transport, Inc.*, 2012 U.S. Dist. LEXIS 5362 (E.D. Wis.), Plaintiff filed a personal injury action against Defendants when he was injured attempting to unload merchandise from a trailer delivered by J.B. Hunt to a Target distribution center. Defendants filed motions for summary judgment arguing that Plaintiff's common law negligence claims were preempted by the Carmack Amendment. The court stated that it was well established that the Carmack Amendment preempted state law claims with respect to carrier liability for the loss or damage of goods in interstate commerce. The court then held, however, that the Carmack Amendment did not preempt claims by shippers based on grounds separate and distinct from the loss or damage to property and that a cause of action for personal injury was separate and distinct from any claim based on the loss or damage to goods in transit. The court noted that, in fact, it was not even clear whether any goods were damaged in the course of Plaintiff's accident. Absent any claim for loss or damage to goods, the Carmack Amendment did not preempt Plaintiff's personal injury claim.

Finally, in *Dynamic Transport Co. v. Trans Pacific Ventures, Inc.*, 2012 Nev. LEXIS 118, Trans Pacific Ventures sued in state court for conversion when the Dynamic Transport Co. ("Dynamic") failed to deliver a car from Henderson, Nevada to Washington state. Trevor Small, the owner of Trans Pacific, had purchased a luxury sports car from a dealer in Henderson, Nevada and had contracted with Nex-Day Auto Transport ("Nex-Day") to have the car delivered to Washington using an enclosed carrier. Dynamic contacted Nex-Day and offered to handle the transportation. Nex-Day provided Small's address and contact information during the telephone call and, the next day, faxed a work order to Dynamic which required Dynamic to agree to Nex-Day's terms in writing and return a signed copy. This was not the first time that Dynamic had done work for Nex-Day. In fact, Nex-Day owed Dynamic $9,650 for past due invoices.

Rather than return the signed work order, Dynamic altered the work order to make the shipment payable upon delivery and to provide for transport in an unenclosed carrier. Dynamic then generated a bill of lading based the altered work order. Dynamic's driver showed up at the dealer the next day and, although informed that he was not authorized to transport the car, loaded the car on to an unenclosed carrier and transported the car to Washington. Once the car arrived in Washington, Dynamic demanded that Nex-Day pay all outstanding invoices prior to delivering the car. When Nex-Day refused to do so, Dynamic transported the car to a storage facility in Missouri. When Small filed his action in Nevada state court alleging fraud and conversion, Dynamic moved to have the claim dismissed arguing that the claim was preempted by the Carmack Amendment. The trial court denied the motion and, after a trial, awarded Small $52,500 in compensatory damages and $300,000 in punitive damages.

On appeal, Dynamic argued that Small's state law claims were preempted by the Carmack Amendment and its limitations on compensatory and punitive damages because the shipment was covered by a Bill of Lading, albeit obtained under fraudulent circumstances. The Nevada Supreme Court, relying on two cases from the United States Court of Appeals for the Ninth Circuit, held that the Carmack Amendment did not preempt state law claims where there had been a "true conversion." The Ninth Circuit held that where a carrier had appropriated the property for its own use and gain, it would be against public policy to permit the carrier to limit its liability and thus profit from its own misconduct. Because Dynamic had wrongly asserted dominion over Small's vehicle, the Carmack Amendment did not preempt Small's state law claim for conversion.

Claims under the Carmack Amendment

In *Bowman v. Mayflower Transit, LLC*, 2012 U.S. Dist. LEXIS 144961 (D. Mass.), Plaintiff hired Defendant to transport her household goods from California to storage in New Hampshire and then to her new residence in Massachusetts. Plaintiff discovered damages to her belongings when they were delivered and sent a letter to Defendant informing that Defendant of her claim and telling Defendant that she had not yet been able to determine the amount of damage. When Defendant refused to compensate Plaintiff the amount she felt that she was owed, Plaintiff filed an action against Defendant asserting a claim under the Carmack Amendment. Defendant moved for summary judgment seeking to dismiss the complaint based on Plaintiff's failure to comply with the Carmack Amendment's claim requirements.

The court granted Defendant's motion relying on the Carmack Amendment's requirement that any claim for loss or damage had to be submitted to the carrier in writing. In addition, under the regulations under the Carmack Amendment, a claim for loss or damage must demand "the payment of a specified or determinable amount of money." 49 C.F.R. § 370.3(b)(3). Plaintiff never submitted any such written claim and her claims were dismissed.

In *Ranieri v. North American Van Lines*, 2012 U.S. Dist. 121678 (D.N.J.), discussed above on the issue of preemption, the court, after determining that Plaintiff's claims were governed by the Carmack Amendment, also had to determine whether the Plaintiff's attempts to submit her claim to the carrier by e-mail were insufficient to comply with the requirements of the Carmack Amendment. Plaintiff had submitted several e-mails to Defendant concerning her claim. In response to those e-mails, Defendant informed Plaintiff that she had to submit her claim using its formal claim process found on the Defendant's website. Plaintiff argued that her e-mails, taken all together, were sufficient to constitute an enforceable claims.

The court pointed out that the Carmack Amendment required that claims be submitted to the carrier in the form of either a written communication or, when in a form agreed to by both the carrier and the shipper, an electronic communication. The court then held that Defendant had informed Plaintiff that she should use the claim form found on Defendant's website to submit her claims. There was no dispute that Plaintiff failed to do that and the court dismissed her claim for failing to satisfy the statutory requirements for filing a claim. The court also found that Plaintiff's e-mails, even if they could be considered a claim, provided insufficient information to allow Defendant to effectively investigate the claim.

Defenses under the Carmack Amendment

Another issue in *Stabler v. Florida Van Lines, Inc.*, 2012 U.S. Dist. LEXIS 1637 (S.D. Ala.), discussed above on the issue of preemption, was whether the carrier could avail itself of one of the statutory defenses contained in the Carmack Amendment. In *Stabler*, Plaintiff took an active part in determining which goods were going to be shipped to her new home, which goods were going to be placed in storage and which goods were going to be abandoned. The carrier argued that Plaintiff's participation in the packing process provided the carrier with a defense to Plaintiff's claims under the Carmack Amendment. The court acknowledged that there were five excusable factors to a claim under the Carmack Amendment: (i) an act of God; (ii) public enemy; (iii) act of the sender of the goods, (iv) public authority, or (v) the inherent vice or nature of the goods. Being in the nature of affirmative defenses, the carrier had the burden to prove the that one of the factors applied. The court also pointed out, however, that before a carrier could rely on one of the five factors, it also had to prove that it was not negligent. Because the carrier did not even allege that it was not negligent in the packing of the goods, the carrier could not avail itself of any of the statutory excuses contained in the Carmack Amendment.

In *Merchants Terminal Corp. v. L&O Transportation, Inc.*, 2012 U.S. Dist. LEXIS 56409 (D. Md.), the Defendant attempted to avoid liability under the Carmack Amendment by arguing that the shipper's negligence had caused the loss. Plaintiff (the shipper) had arranged with the Defendant for the transportation of frozen salmon from its warehouse in Delaware to the Plaintiff's Baltimore facility. The evidence at trial showed that the truck carrying the shipment had arrived at the Baltimore facility at 12:30 in the morning, when there was no one present. Pursuant to Plaintiff's policy, the truck driver unlocked the gate into the truck yard, positioned the trailer against the loading dock so the doors could not be opened and placed a king pin lock on the trailer after unhooking the tractor. The driver then left the yard, locked the gate into the yard and went to pick up two empty containers from another one of Plaintiff's warehouses. Upon returning to Baltimore, the driver dropped the empty container at Defendant's yard and returned to the truck yard to complete the paperwork on the delivery. The driver went to sleep about 5:30 but was awoken by the Plaintiff's loading dock manager who informed the driver that the lock on the gate had been cut and that the container of salmon was missing. Although the container was eventually recovered, Plaintiff had paid its customer for the lost shipment. In addition, the salmon was sold at a discounted price.

Plaintiff brought an action against Defendant for the damages stemming from the theft of the salmon. The court found that Plaintiff had proved the elements of a claim under the Carmack Amendment because the salmon had been delivered to Defendant in good condition, Defendant had not completed the delivery of the salmon as required by the bill of lading and that Plaintiff had suffered damages due to that failure. Among the defense raised by the Defendant was that the loss was due to Plaintiff's negligence in failing to adequately secure the truck yard. The court held that to prevail on the defense the Defendant had to prove that it was not negligent and that the negligence of the shipper caused the loss. The court found that Defendant failed to introduce any evidence that Plaintiff's security measures at the truck lot were not reasonable. Absent any such evidence, Defendant could not prevail on its defense and was liable under the Carmack Amendment for Plaintiff's damages.

In *Omega Apparel Inc. v. ABF Freight System, Inc.*, 2012 U.S. Dist. LEXIS 95161 (M.D. Tenn.), Defendant moved for summary judgment seeking dismissal of Plaintiff's claims under the Carmack Amendment arguing several bases to be relieved from liability. Plaintiff had contracted with Defendant for the transportation of fabric from Lansing, Michigan. Three days after the trailer carrying the fabric was delivered to Defendant's yard in Nashville, Tennessee, the yard, and the trailer with the fabric, was inundated by what turned out to be at least a 100 year flood. Concerned about the possibility of flooding in the lot where the trailer was located, Defendant's yard manager had all the trailers in the lot relocated to the Defendant's employee parking lot and told the guard to alert him if there were any problems. Subsequently the guard called the yard manager and told him that the water level was rising. The yard manager called other drivers in an attempt to relocate the trailers again before the employee parking lot flooded but was not able to get all of the trailers out of the lot in time.

Plaintiff sued to recover damages for the damage to the fabric. The court set out the elements of a claim under the Carmack Amendment: (1) delivery of the goods in good condition; (2) receipt by the consignee of fewer goods or damaged goods; and (3) the amount of damages and held that proof of those elements created a presumption of negligence on the carrier's part. The court then held that a carrier could overcome that presumption of negligence by demonstrating that the carrier was free of negligence and that the damage was due to the inherent nature of the goods or attributable to an act of God, public enemy, the shipper or public authority.

Defendant did not argue that Plaintiff did not have a claim under the Carmack Amendment but did argue that the fabric was lost due to an act by a public authority or an Act of God. The court then went on to question whether the action by the public authority, that the National Weather Service's failure to properly advise the Corp of Engineers of the extent of the rain that was expected, was the type of public action normally considered to be a defense under the Carmack Amendment. The court found, however, that it did not need to decide the question because ABF had not demonstrated that, as a matter of law, ABF was not negligent in reacting to the flood. The court did find that the flood, characterized by some as a 100 year flood, could qualify as an act of God. Once again, however, ABF had failed to prove that it was not negligent as a matter of law. The court, finding that whether, under the circumstances, ABF was negligent was a question of fact for a jury to decide, denied ABF's motion for summary judgment.

Liability of Agent of Disclosed Principal

In *Thorton v. Philpot Relocation Sys.*, 2012 U.S. Dist. LEXIS 6696 (E.D. Tenn.), discussed above, the court considered whether an agent that worked for a disclosed principal could be held liable for damages to goods transported in interstate commerce. Plaintiff had contracted with defendant Philpot Relocation Systems ("Philpot") in 1999 to arrange for the pickup of her household goods in Flowery Branch, Georgia, and the delivery of the goods into storage in Tucker, Georgia. The goods were picked up by Atlanta Moving & Storage which issued its Uniform Bill of Lading covering the delivery of the goods into storage. In August, 2005, Plaintiff requested that Philpot transport her household goods from storage to her residence in Knoxville, Tennessee. Defendant Atlas Van Lines picked up the goods and transported the goods pursuant to its Uniform Bill of Lading. When the household goods were delivered damaged, Plaintiff sued Philpot, Atlanta Moving & Storage and Atlas Van Lines for the damage.

Philpot argued that as the disclosed agent of Atlanta

Moving & Storage and Atlas Van Lines, it could not be held liable under the Bills of Lading issued by those carriers. The court agreed finding that the agent of a disclosed principal was not liable for damages under 49 U.S.C. § 13907(a) and that those agents were not parties to the bill of lading as a matter of law. The court also held that a person making or purporting to make a contract with another as an agent for a disclosed principal does not become a party to that contract. Philpot, as the disclosed agent of Atlanta Moving & Storage and Atlas Van Lines, therefore, was not a party to the Uniform Bills of Lading issued to cover the transport of the household goods and good not be found liable under the Carmack Amendment.

Alan R. Peterman

III. FEDERAL QUESTIONS AND A COURT'S DISCRETION TO ABSTAIN

As is common in tractor-trailer accident cases, the plaintiff in *Burgess v. J.H.O.C. Premier Transportation, Inc.*, 2012 U.S. Dist. LEXIS 144897, alleged in her complaint that the defendant motor carrier had violated a variety of federal safety regulations. The District of South Carolina found, however, that violation of those regulations did not, standing alone, create a private cause of action; rather, evidence of the violations went to the question of whether the motor carrier (or its driver) had acted negligently. Accordingly, the court found that the case did not "arise under" federal law, and denied "federal question" jurisdiction. (The Eastern District of Louisiana came to the same conclusion in *Lipscomb v. Zurich American Insurance Co.*, 2012 U.S. Dist. LEXIS 72955.)

Fabre v. Royal Freight, LP, 2012 U.S. Dist. LEXIS 28690 (M.D. La.) The victim in a motor vehicle accident sued the motor carrier in federal court, but did not sue the motor carrier's driver who was involved in the accident (as his inclusion would have thwarted diversity jurisdiction). The motor carrier argued that the driver was an essential party whose joinder was required under Fed. R. Civ. P. 19(B). Since the motor carrier would ultimately be vicariously liable for the driver's negligence, however, and the driver would be available for discovery as an agent of the motor carrier, the court found that he was not an indispensible party.

Collins v. Buddy Moore Trucking, Inc., 2012 U.S. Dist. LEXIS 16226. A trucker was involved in an accident while delivering pipe to a construction project. The injured other driver sued, among others, the general contractor on the project. The general contractor's presence as a defendant, if allowed to stand, would have destroyed diversity jurisdiction and the motor carrier's effort to remove the case to federal court. The Eastern District of Kentucky, however, found that the general contractor had absolutely no duty running to the other driver and dismissed the case against the general contractor, thus preserving diversity jurisdiction.

Wilton/Brillhart Abstention Cases

Following the guidance of the Supreme Court 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), a federal court has the discretion to abstain from hearing a case brought under the Declaratory Judgment Act, 28 U.S.C. § 2201(a), and is likely to exercise that discretion where there is a parallel state action between the same parties that can decide the same issues of state law. In *Hertz Corp. v. Willis*, 2012 U.S. Dist. LEXIS 54592, for example, a renter brought three state court actions seeking uninsured motorist coverage from the rental car company, and then Hertz brought a federal declaratory judgment action against the renter. In declining jurisdiction, the Northern District of California observed that the issues arose entirely under state law, that the state court actions would necessarily decide the question of coverage, and that Hertz was merely seeking a tactical advantage by bringing a parallel action in federal court.

The determination of whether to retain jurisdiction, however, is fact-sensitive, and often comes out the other way. In *Progressive Northern Insurance Co. v. Accident Insurance Co.*, 2012 U.S. Dist. LEXIS 22158 (D.S.C.), Progressive filed its federal declaratory judgment action, seeking to disclaim coverage based on its non-trucking exclusion, before the claimant commenced her state court action for damages against Progressive's insured. The court found that the insurance coverage action would revolve around whether the insured auto was being used in the business of the motor carrier, an issue which was irrelevant to the determinations of negligence and causation to be made in the state court action. The federal court therefore elected to retain jurisdiction.

Northland Insurance Co. v. Top Rank Trucking of Kissimmee, Inc., 823 F. Supp.2d 1293 (M.D. Fla.). The claimants filed a Florida state court action against the truck driver and the insured motor carrier. Northland then filed its federal declaratory judgment action. After noting that Northland was not a party in the state court action, the federal court went on to find that the state court action concerning issues only of the driver's negligence and the motor carrier's vicarious liability; neither of which, at least in the eyes of the court, related to the coverage issues raised in the declaratory judgment action. Jurisdiction over the federal coverage action was retained.

Similarly, the federal court in *United Financial Casualty Co. v. Proactive Transportation, Inc.*, 2012 U.S. Dist. LEXIS 52953 (W.D. Mo.), grounded its refusal to abstain, in part, on the grounds that the insurer was not a party in the parallel state court action. The court also observed that the insurer's duty to defend its insured would not, and could not, be raised in the underlying action. The court did hint, however, that it would consider staying any discussion of the insurer's duty to indemnify until its insured's liability was actually determined in the underlying state court action.

In *Progressive Gulf Insurance Co. v. Farve*, 2012 U.S. Dist. LEXIS 158910, by contrast, the insurer was named as a defendant in the Louisiana state court bodily injury action against its insureds (since Louisiana permits direct actions of this sort). The insurer filed a subsequent federal declaratory judgment action in the Southern District of Mississippi. Despite the identity of parties, the federal court held that abstention was not appropriate under the Fifth Circuit approach, which looks to *Colorado River Water Conservation District v. United States*, 424 U.S. 800, rather than *Brillhart*, whenever an action includes both declaratory and non-frivolous "coercive" claims for relief. Since the insurer sought injunctive relief, as well as declaratory relief, the federal district court chose to retain jurisdiction.

Phil Bramson

IV. KAWASAKI UPDATE

In *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433 (2010) the Supreme Court held the Carmack Amendment inapplicable to a shipment originating overseas and continuing by rail to a final inland destination in the United States under a single through bill of lading. In *Kawasaki Kisen*, a through bill of lading was issued for both the ocean transport of goods from China and inland rail transportation to the Midwest. The bill was issued under COGSA (Carriage of Goods By Sea Act) and contained a Tokyo forum section clause. The Supreme Court, reversing the Ninth Circuit, found the forum selection clause binding.

The Supreme Court held that the rail carrier was not a "receiving rail carrier" under Section 11706(a)(1) of the Carmack Amendment. The Carmack Amendment imposes liability for damage upon receiving rail carriers and delivering rail carriers regardless of which carrier caused the damage and additionally contains venue limitations. Carmack's purpose is to relieve cargo owners of the burden of searching out a negligent carrier and thus constrains carriers' ability to limit liability by contract. The Court held that a carrier does not become a receiving carrier simply by accepting goods for further transport from another carrier in the middle of an international shipment under a through bill.

The Court held that as long as a bill of lading requires "substantial" carriage of goods by sea, its purpose is to effectuate maritime commerce under COGSA. COGSA allows parties the option of extending certain terms by contract to cover the entire period in which the goods would be under a carrier's responsibility, including a period of inland transport. The Court thus upheld the parties' forum selection clause.

Kawasaki Kisen was considered in several decisions in 2012.

In *Atlas Aerospace, LLC v. Advanced Trans., Inc.*, 2012 U.S. Dist. LEXIS 157416 (D. Kan.), cargo was shipped from Canada to Nebraska. The court held that the Carmack Amendment applies to both transportation to and from a foreign country and the United States, not just from the United States into another country. The court in *Atlas Aerospace* noted that *Kawasaki Kisen* had expressly declined to decide whether the Carmack Amendment applies to goods initially received in Canada or Mexico, for import into the United States.

In *Blue Gulf Indus. Supply, Co. v. P. I. T. Trans., Inc.*, 2012 N.J. Super. Unpub LEXIS 115, the shipper sought recovery under the Carmack Amendment for shortages which occurred sometime between being loaded at the defendant's warehouse in Kearny, New Jersey, and delivery to Port Newark, from which the shipment was to be transported by ocean carrier to Nigeria. The court found the motor carrier was strictly liable under the Carmack Amendment even though its handling of the cargo was entirely within one state. If the final destination at the time the shipment begins is a foreign country, the Carmack Amendment applies throughout the entire portion of the shipment taking place in the United States.

In *Siemens Transformadores S.A. v. Soo Line RR Co.*, 2012 U.S. Dist. LEXIS 30165 (N.D. Ill.), a shipment originating in Mexico was sent to Texas and then to Canada. The court found that *Kawasaki Kisen* was not applicable as there were two separate bills of lading. The court found that the carrier had not demonstrated that it gave the shipper a reasonable opportunity to choose between full *Carmack* liability protection and a lesser contractual choice.

Two decisions concluded that *Carmack* was preempted.

In New York, a one year time bar and a Switzerland forum selection clause in a bill of lading was recently upheld in *Siaci Saint Honore v. Ironbound Express, Inc.*, 2012 U.S. Dist. LEXIS 112496 (S.D.N.Y.). The shipment of cargo from France to New Jersey was under a through bill of lading which extended into subcontracts. The court followed *Kawasaki Kisen* and held there was no receiving carrier under the Carmack Amendment and under COGSA the parties could select both the time bar and forum selection clause.

In *Norfolk S. Railway Co. v. Sun Chem. Corp.*, 2012 Ga. App. LEXIS 1019, a Georgia state court addressed a shipment from Kentucky to Brazil under a through bill of lading. The contract offered Carmack liability for a higher rate, which was declined by the shipper. The court thoroughly examined *Kawasaki Kisen* and found that the Supreme Court significantly limited the Carmack Amendment's application where there is a through bill of lading, to wit a domestic rail carrier not in privity with the owner of the goods cannot be subject to the Carmack Amendment's liability where it made alternate contractual agreements with the owner's agent. Although *Kawasaki Kisen* did not address a situation where goods were received in the United States for export, the court noted that *Hartford Fire Ins. Co. v. Expeditors Int'l of Washington*, 2012 U.S. Dist. LEXIS 96974 (S.D.N.Y.) characterized shipments originating in the United States but reaching overseas as essentially "maritime contracts" to which the Carmack Amendment does not apply.

Meredith Ireland

V. THE LIABILITY OF BROKERS

Federal transportation statutes and regulations, speak of motor carriers and freight forwarders, both of which are subject to the Carmack Amendment, and brokers which are not. Although the transportation industry has been transformed in recent years with the rise of logistics companies, some of which dwarf in size the shippers and carriers with whom they work, there is no separate regulatory category for these entities. Most register with the USDOT as brokers.

As we have noted in previous editions, entities such as C.H. Robinson, a logistics company registered as a broker, have been held liable on occasion as a motor carrier where either the company held itself out to its customers as a motor carrier or otherwise assumed control over the drivers who work for the motor carrier that it had hired.

Being outside of the Carmack regime and the near automatic responsibility for loss or damage to cargo that the statute imposes on carriers, brokers have, until recently, confronted relatively limited exposure on claims for lost or damaged cargo. The same had been true for liability claims. Unless the claimant can establish that the broker was negligent in selecting the motor carrier whose driver caused the loss, the broker was generally said to be off the hook.

It has generally been understood, though, that while the sword of the Carmack Amendment could not be raised against a broker neither could Carmack's preemption shield protect a broker from a claim for negligence. That remains the view of most courts that have examined the issue in recent years.

For instance, in *Laing v. Cordi*, 2012 U.S. Dist. LEXIS

101639, a federal district judge in Florida considered the various counts of a lawsuit filed against a motor carrier and a broker in which, as is not untypical, the plaintiff failed to specify precisely which allegations were applicable to which of the defendants. This was a "shotgun pleading" in which every antecedent allegation is incorporated into each subsequent claim for relief or affirmative relief. Finding this to be in violation of the rules of federal pleadings the court dismissed the complaint.

For our purposes, though, what was significant was the court's distinction between claims filed against broker and those filed against carriers:

> The Carmack Amendment applies to "carriers" and "freight forwarders," but not "brokers" … The distinction between a broker and a carrier is often blurry. The key distinction is whether the party has "accepted and legally bound themselves to transport" a shipment in which case it is considered a carrier … If the party is a carrier, the Carmack Amendment will apply and preempt any state law claims related to the delivery of the goods; however, if the party is a broker, the state law claims will not be preempted.

A New Jersey District Court reached the same conclusion in *Continental Casualty v. Quick Enterprises*, 2012 U.S. Dist. LEXIS 90680. Continental, the assignee of its insured, the shipper Computer Wholesales, Inc., brought an action against Quick, a motor carrier, and England Logistics, a broker, alleging negligence and strict liability, but failing to refer to the Carmack Amendment. The Court dismissed the action as against the carrier, but permitted the case to proceed against the broker (albeit in state court).

England Logistics had asserted that it, too, although it was a broker, had no exposure because Carmack, while not creating any liability for brokers, shields them from state law claims of negligence and the like. The court disagreed. Noting that there was no Third Circuit precedent on that issue, the court relied on decisions from other courts around the country which have held that Carmack does not preempt state law claims against brokers.

The Court in *Active Media Services, Inc. v. CAC American Cargo Corp.*, 2012 U.S. Dist. LEXIS 139785 (S.D.N.Y.) also concluded that the Carmack Amendment does not preclude state negligence claims against brokers – see footnote 5.

It is significant that at least one decision in 2012 came to the opposite conclusion: that federal law preempts state negligence claims against brokers. Since there is no federal cause of action against brokers, this new line of cases – the earliest case so holding appears to be a 2007 decision – holds that a shipper whose product is lost or damaged in the course of a brokered shipment has no legal remedy against the broker.

Since the Carmack Amendment does not refer to brokers, these courts look elsewhere in the U.S. Code to find that brokers are shielded from negligence claims. Thus the U.S. District Court of New Hampshire in *Ameriswiss Technology LLC v. Midway Line of Ill.*, 2012 U.S. Dist. LEXIS 138880 looked to the Interstate Commerce Commission Termination Act ("ICCTA") to support its ruling that the broker was protected from state negligence claims. Unlike the Carmack Amendment which does not mention brokers, the ICCTA explicitly does, and in just this context:

> 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 forwarder with respect to the transportation of property.

What sort of state law is precluded by the ICCTA? In 2002, the Second Circuit held that ICCTA, like the Airline Deregulation Act, was intended to prevent state economic regulation of the industry. As currently promulgated at 49 U.S.C. §14501(b)(i) the provision reads as follows:

<u>Freight Forwarders and Brokers</u>

> (i) General Rule. Subject to paragraph (2) of this subsection, no State or political subdivision thereof and no intrastate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to intrastate rates, intrastate routes or intrastate services of any freight forwarder or broker.

The Second Circuit, for instance, held in *Omya, Inc. v. Vermont*, 33 Fed. Appx. 581 (2002), that the statute did not preclude a state from restricting the number of daily round-trips permitted by tractor-trailer rigs through the state, and other non-economic regulation. Other courts, as well, have permitted states to enforce safety regulations, finding them not to be preempted by the ICCTA. In any event, ICCTA seems to preclude attempts by a state to enforce rules and regulations directed at truckers, brokers, and others in the transportation business. But does this have anything to do with private claims for damages against transportation entities pursuant to common law negligence claims? Are those also preempted?

A federal magistrate in Massachusetts thought so back in 2009, holding that §14501(c) preempts any negligence claim against a broker. (*Kashala v. Mobility Services Int'l*, 2009 U.S. Dist. LEXIS 64334 (D. Mass.)). A year later a federal court in Texas agreed in part, but held that there is no preemption for a routine breach of contract claim, since adjudication of such a claim does not amount to a state enactment or enforcement of any law. (And what of a routine negligence claim?) *Chatelaine, Inc. v. Twin Modal, Inc.*, 737 F.Supp.2d 638 (N.D. Tex. 2010).

The *Ameriswiss* case involved a loss of a shipment of used machines purchased by Ameriswiss for refitting and resale. Ameriswiss contracted with C.H. Robinson which hired Midway to haul the load. Ameriswiss sued C.H. Robinson as a broker, asserting that it had failed to select an appropriate carrier or secure proof of sufficient insurance. Ameriswiss also sued Midway as a carrier and Ameriswiss's insurer sued C.H. Robinson as a carrier – no wonder some courts have taken steps to simplify the cases arising out of brokered loads.

C.H. Robinson, in any case, argued that the claims against it, including the negligence claims, were preempted by federal law. C.H. Robinson, first, insisted that it was a broker, not a carrier. This is of interest since the company has been found several times in recent years to have acted as a carrier. In fact, the District Court in *Pelletron Corp. v. C.H. Robinson Worldwide, Inc.*, 2012 U.S. Dist. LEXIS (E.D. Pa.), found that there is a question of fact about whether C.H. Robinson acted as a carrier or broker in that case and denied the company's motion for summary judgment. That means that down the road a jury will decide whether C.H. Robinson held itself out, to its customers, as a carrier or, alternatively, whether it exhibited sufficient control over the drivers it hired to be deemed a carrier.

The court in *Ameriswiss* focused on the allegations that the company acted as a broker and held initially, that the Carmack Amendment precludes claims that a broker was negligent (even though brokers are not mentioned in the statute) since "transportation services" are defined broadly to encompass the sorts of activities that brokers do. Here the court relied on a Rhode Island federal decision from 2007 (*York v. Day Transfer Co.*, 525 F.Supp.2d 289), which held that Carmack preempted claims made against Day which was alleged to be a broker. We have some trouble with an attempt to build a line of cases on *York v. Day*, though, because Day Transfer was, in fact, a motor carrier, not a broker. We are, therefore, not convinced by the Ameriswiss court's contention, based on *York v. Day*, that the Carmack Amendment preempts claims against brokers.

As an alternative ground for its holding, the *Ameriswiss* court, relying on the analysis in Kashala, found that the ICCTA explicitly precludes any negligence claim against a broker. The court cites the *Chatelaine* decision, as well, but as noted above *Chatelaine* utilized a more restrained form of preemption. Some counsel for brokers are understandably excited about the *Kashala/Ameriswiss* line of cases, but we will want to watch how this version of the preemption argument fares in the coming years.

Larry Rabinovich

VI. UIIA/UIIE

The Uniform Intermodal Interchange & Facilities Access Agreement is (according to the website of the Intermodal Association of North America, www.uiia.org) "a standard interchange contract developed to promote intermodal productivity and operating efficiencies . . ." For many truckers, the agreement is their ticket to get work at the pier, but it comes at a price. The various amendments to the standard agreement have, over the past few years, imposed ever greater obligations on trucking companies (and their insurers as a result of the UIIE endorsement) vis-à-vis equipment (particularly container) owners.

There is an indication in some 2012 decisions that at least some truckers are beginning to push back. The federal district court in *Elite Logistics Corp. v. Hanjin Shipping Co., Ltd.*, 2012 U.S. Dist. LEXIS 86323 (C.D. Cal.) (one of a trio of cases decided that day by the court on the UIIA), looked first at the UIIA's choice of law provision which provides that Maryland law should be applied in interpreting the UIIA. Finding, though, that the parties had no connection to Maryland, the court applied California law.

Hanjin, an ocean carrier, contracts with motor carriers such as Elite for inland transportation. Hanjin charges a late fee (demurrage) to truckers that are late for scheduled pickups. Similarly, Hanjin charges a fee to truckers that do not return empty containers on time. The UIIA agreement provides terms under which a carrier may dispute the charges.

Elite filed suit against Hanjin claiming that in levying fines for late pickup or drop offs on weekends or holidays, Hanjin was acting in violation of provisions of the California Code. Hanjin moved the court to dismiss the lawsuit and to compel Elite to arbitrate the dispute as set out in the agreement. Elite responded that the UIIA's "imposition of arbitration is unconscionable" and thus unenforceable in California, claiming that the UIIA is a contract of adhesion (meaning that it is a "take it or leave it" contract – carriers like Elite have no opportunity to bargain for different terms). The court agreed, holding that "Elite had no choice but to join the agreement if it wished to conduct business as an intermodal carrier." The court was unmoved by Hanjin's argument that motor carriers are represented on the Association's Executive Committee and, as such, have a role setting the terms of the Agreement. This was, therefore, a contract of adhesion (although it was drafted by the Association and not by Hanjin), and it was "procedurally unconscionable."

Was it also "substantively unconscionable?" The court examined the arbitration provisions and found that they imposed various duties on the motor carrier (it was bound to provide written notice of Hanjin of any dispute, and failing to do so it had no remedy), and the terms operated solely for Hanjin's benefit. The court concluded that arbitration procedures lacked "even a modicum of bilaterality," and were therefore unconscionable. The court, accordingly, denied Hanjin's motion to compel arbitration.

Per diem charges to motor carriers under the UIIA for failure to timely return containers were also at issue in *Evergreen Shipping Agency Corp. v. Djuric Trucking, Inc.*, 2012 Ind. App. Unpub. LEXIS 951. Evergreen owned various containers which were utilized by Djuric to haul freight from Chicago to a Target Corp. facility in Indianapolis. Evergreen sued Djuric for $34,000 in unpaid per diem charges.

Here the court found for the trucker not by invalidating the UIIA but by reading it closely. The UIIA itself seemed to require that the parties execute a separate agreement or at least an addendum to set out the precise terms of the per diem charges, and the parties had no such separate agreement.

Larry Rabinovich

VII. NEGLIGENT HIRING

Where an accident involves a collision with a commercial trucker, it is common for the plaintiff to assert both that the trucking company is vicariously liable for its driver, and also that the trucking company is independently liable on a theory of negligent training/supervision/entrustment and/or retention ("negligent TSE/R") of the driver. In *Avery v. Roadrunner Transportation Services, Inc.*, 2012 U.S. Dist. LEXIS 171082, the defendant motor carrier was able to get a count of negligent TSE/R dismissed by stipulating to vicarious liability for its driver's negligence. The Western District of Oklahoma noted that the motor carrier could be held vicariously liable for punitive damages. By contrast, the Western District of Missouri found in *Kwiatkowski v. Teton Transportation, Inc.*, 2012 U.S. Dist. LEXIS 56478, that the motor carrier could be subject to punitive damages for its own conduct under a negligent TSE/R claim, even if its driver had not acted in a manner that would give rise to punitive damages for which the motor carrier was vicariously liable. The *Kwiatkowski* court, therefore, declined to dismiss the negligent TSE/R count simply because the motor carrier admitted that the driver was its employee and operating in the course and scope of his employment at the time of the subject accident.

Another recurring theme is the use of the negligent TSE/R claim to trigger the employer's general liability coverage, even though the loss arose out of a motor vehicle accident. In *Maryland Casualty Co. v. Gonzalez*, 2012 U.S. Dist. LEXIS 3536, the Eastern District of California examined contrasting lines of California state court decisions, and concluded that negligent TSE/R does not constitute a concurrent cause of the loss which is independent of the motor vehicle accident itself. (The court was clearly influenced by dicta from *Diaz v. Carcamo*, 51 Cal.4th 1148 (2011), in which the Supreme Court of California observed that "[n]o matter how negligent an employer was in entrusting a vehicle to an employee, however, it is only if the employee then drove negligently that the employer can be liable for negligent entrustment, hiring or retention.") Accordingly, the loss fell within the general liability policy's auto exclusion.

Phil Bramson

VIII. SHIPPER VS. MOTOR CARRIER DUTY TO LOAD

Morris v. Ford Motor Co., 2012 U.S. Dist. LEXIS 168423 (N.D. Ind.). Ford loaded the trailer, and the motor carrier's driver was injured when he opened the doors of the trailer and the cargo fell on him. The court followed the classic rule that the carrier is responsible for securing the load, and the shipper is not liable unless the defect in loading is latent and concealed and not discernible by ordinary observation by the carrier's agent. In this case, the driver conceded that he had multiple opportunities to inspect the load, but argued that Ford's "no touch" policy, which prevented him from touching the load or using forklifts to move it, put liability for negligent loading back on the shipper. The court, however, held that the shipper's "no touch" policy did not trump the driver's obligation (under federal regulations and much interpretive case law) to assure that the cargo was properly distributed and adequately secured.

Robert Shaddock

IX. THE MCS-90 ENDORSEMENT

Reforming the Policy

Whose responsibility is it to make sure that regulatory endorsements are included in a motor carrier's policy? In *Canal Insurance Co. v. Rebecca Herrington*, 846 F.Supp.2d 654 (S.D. Miss.), the court, relying on 5th Circuit precedent, held that it is the motor carrier's responsibility to comply with the USDOT's requirements including the insurance requirements. The court declined to reform the policy by adding the MCS-90, and since the vehicle involved in loss was not scheduled on the policy the court granted the insurer's motion and held that it had no obligation to pay a judgment that had been entered against the insured motor carrier.

On a related issue, the federal court in *Armwood v. North Carolina Farm Bureau Mutual Ins. Co.*, 2012 U.S. Dist. LEXIS 58073 (E.D.N.C.) held that plaintiffs were bound by the 2007 decision of the state's supreme court (361 N.C. 576, 653 S.E.2d 392) and could not argue that they were entitled to recover under the MCS-90. The insured, Jimmy Lee Best, operated a passenger bus (seating capacity of 30) and should have purchased a policy (or group of policies) with limits of $5 million. Instead, he purchased a $50,000 policy. Best negligently discharged an eight year old passenger, instructing him to run across five lanes of traffic to get to his home. The boy was struck by another vehicle and suffered serious bodily injury. He and his parents were awarded $525,000 in the tort action filed against Best and against the driver of the other vehicle. The insurer of the other vehicle paid $100,000 and Farm Bureau paid its $50,000 limits. The parents then sued in federal court to recover the remaining $375,000 under the MCS-90 (actually, it would have had to have been an MCS-90B endorsement). Of course there was no MCS-90 or MCS-90B on the Farm Bureau policy, but the plaintiffs' lawyer was prepared to argue that there should have been.

During the state court action the plaintiffs had argued, based on North Carolina statutes, that the Farm Bureau policy should have been issued with limits of $750,000 and asked the court to reform the policy to provide limits in that amount. The court declined to do so, precisely because it concluded, like the *Canal v. Herrington* court, that it is the insured's responsibility, not the insurer's, to comply with the relevant requirements imposed upon motor carriers. At oral argument at the appellate level in 2007, plaintiffs mentioned the MCS-90 endorsement (181 N.C. App. 407, 408 n.1), but the court declined to consider the argument because plaintiffs had failed to address it in their brief.

Five years later the plaintiffs tried the MCS-90 argument again, suing Farm Bureau in federal court on the theory that it should pay the unpaid portion of the judgment under the (nonexistent) MCS-90 endorsement. The Court granted Farm Bureau's motion to dismiss – the claim for relief was barred by res judicata arising from the state action. The plaintiffs, "could have, should have, and in some respects did litigate the issue of whether an MCS-90 endorsement compels coverage over and above the stated limits of the Farm Bureau policy in their state court declaratory judgment action."

UM vs. the MCS-90

In *Century-National Insurance Co. v Global Hawk Insurance Co.*, 203 Cal. App.4th 1458, Sebastian Padilla, a sanitation employee of Bluewater Environmental, was injured when his garbage truck was struck by a truck in the business of E&Z Express. E&Z's insurer Global Hawk denied coverage because the E&Z truck involved in the loss was not listed on the company's policy. Padilla, then, submitted an uninsured motorists claim to his employer's uninsured motorists insurer. Century National paid Padilla its $100,000 UM limit. No judgment was ever entered against E&Z. In the meantime Global Hawk filed suit to rescind its policy with E&Z retroactively. Century National cross-claimed against Global Hawk for reimbursement of its UM payment. Global Hawk responded that it had no policy coverage for the loss and that the MCS-90 was inapplicable because, it suggested, the MCS-90 is intended to assist injured members of the public, not other insurance companies. The case squarely hit an issue that has arisen in our experience often enough, but that has rarely, if ever, been tried.

The California appellate court affirmed the ruling of the trial court which had found that Global Hawk was required to indemnify Century National. The court cites a number of MCS-90 decisions decided in recent years (it refers repeatedly to the *Yeates* decision discussed below), but it is not obvious to us that the court had a firm grasp of the purpose and scope of the MCS 90. The court distinguished other cases in which MCS-90 exposure was limited in the face of other insurance by pointing out that the other insurance in those cases was issued to the motor carrier, not to the claimant. (The court missed the point that the policies in those cases were issued to various defendants, not just the motor carrier – but the court was correct in pointing out that the cases did not involve policies issued to the victim.) That, though, states the problem: it does not solve it. The court never does explain why the MCS-90 must respond in cases such as this.

In a sense the court missed the real issue. It criticized Global Hawk for "erroneously denying coverage." This, though, seems unfair. The loss was not covered by the Global Hawk policy, and the MCS-90 could not be triggered until a judgment was entered against E&Z. Global Hawk's declination of coverage was, then, entirely legitimate, and once coverage was declined, a UM claim was triggered which Century National properly responded to. Up to that point both insurers had acted properly. Since, on the facts as set out in the opinion, no final judgment was entered against E&Z, it is not clear how the MCS-90 would have been triggered. Now, to be sure, the result of the case seems equitable and, as the court pointed out when it reverted to California law with which it was more comfortable, a subrogation agreement gave Century National the right to sue E&Z. So there certainly could have been a way to trigger the MCS-90 – it is just not clear that it was properly done in this case.

Global Hawk was involved in another case which raised, but did not answer, another recurring MCS-90 question. In *Groat v. Global Hawk Ins. Co.*, 2012 U.S. Dist. LEXIS 130019 (N.D.N.Y.), the insurer issued a policy to R-Man Logistics, Inc., a trucker, which included an MCS-90. R-Man was required to provide driver data to Global Hawk which needed to approve any driver before he was dispatched by the insured. The insured did provide data for most of its drivers, including some hired after policy inception, but not for Carlos Victoria, the driver responsible for an accident which caused bodily injury to the plaintiff Groat. Groat and his wife sued R-Man and Victoria and were awarded a judgment in excess of $600,000.

Global Hawk filed suit in California seeking a rescission of the policy on the basis of the insured's failure to provide information about Victoria before dispatching him and for failure to cooperate. The

Groats concurrently filed a suit against Global Hawk in the federal District Court in New York, seeking to recover under the MCS-90.

This set the stage for an important question: if a policy is cancelled *ab initio* (that is retroactively), but the policy had contained an MCS-90 certifying to the federal government that the motor carrier had complied with the USDOT's insurance requirements protecting the public, would the issuing insurer need to pay a judgment entered against the named insured under the MCS-90? Based on state law parallels we have generally assumed that the answer is yes. We will never know, though, how the *Groat* court would have ruled, since the court found that, under California law, a policy could be rescinded only for misrepresentations or concealments prior to the issuance of the policy. Here any concealment would have taken place only after inception. Since the policy could not be rescinded the court directed Global Hawk to pay the judgment.

Revisiting Old Friends

There were developments during 2012 with respect to cases that we have discussed in earlier editions. *Catherine Herrod v. Wilshire Ins. Co.*, 2012 U.S. App. LEXIS 21057 (10th Cir.) was the appeal of a decision that we discussed briefly two years ago in our update on *Carolina Casualty Insurance Co. v. Yeates*, 584 F.3d 868. *Yeates*, decided in 2009, was a ruling by the federal Tenth Circuit that held that where a motor carrier's insurer had already paid an amount equal to the carrier's required limits, then an MCS-90 endorsement attached to a second policy (also issued to the motor carrier but providing no actual coverage for the loss) was not triggered. This case raised hopes among many in the industry that "stacking" of MCS-90 limits could be avoided going forward. In the years since, most, though not all, courts interpreting *Yeates* have limited it pretty much to its slightly unusual facts. In most cases the second (or third or fourth) policy whose MCS-90 is at issue has been issued to a different motor carrier.

In the *Herrod* case we now have the Tenth Circuit's own view of *Yeates* and, sure enough, the court has now seriously limited the reach of *Yeates*. The Herrods had previously settled for over $2 million with the motor carrier (DATS) whose tractor had caused a serious accident. That amount, which exceeded DATS's USDOT required limits was paid by DATS itself and its insurers. The Herrods also sued Espenschied Transport, which had leased the trailer involved in the loss to DATS. Espenschied's policy with Wilshire did not schedule the trailer leased to DATS, but the policy did include an MCS-90. A settlement agreement was reached between the Herrods and Espenschied as well which resulted in a confession of judgment for over $1 million. The Herrods then sued Wilshire to recover $1 million under the MCS-90. The trial court granted judgment to the Herrods and Wilshire appealed.

Relying on *Yeates*, Wilshire argued that since DATS and its insurers had already paid far in excess of DATS's required limits, the Wilshire MCS-90 issued to Espenschied was inapplicable. The Tenth Circuit shot down the argument as a misconstrual of *Yeates*. As the court explained, *Yeates* held that:

> Once the federally mandated maximum has been satisfied *as against a particular motor carrier*, either by virtue of the motor carrier's liability coverage or payment out-of-pocket, that particular motor carrier's MCS-90 endorsement does not apply. [The court should have made the point that this was true even for the MCS-90 on a different policy issued to that particular motor carrier]. But what Wilshire seeks is to be relieved of any MCS-90 surety obligation simply because the Herrods received payment from another motor carrier, even though the judgment against Wilshire remains unsatisfied.

Wilshire had success, though, with its second argument, and the matter has been remanded to the District Court. Since Espenschied was the lessor of the trailer, and had no role in DATS's operations, why should the MCS-90 apply at all? The court cited to the relevant regulations and held that the MCS-90 should apply only if Espenschied was acting as a carrier at the time of the loss. (Espenschied was authorized to act as a motor carrier, but in this case it arguably did not play that role.) The Tenth Circuit has asked the District Court to consider whether Espenschied was, in fact, acting as a motor carrier. The court, though, has certainly left the impression that it does not view Espenschied to have acted as a carrier. If the District Court so holds, then it will be required to find that Wilshire's MCS-90 is inapplicable.

In last year's edition we discussed the 2011 decision in *Fairmont Specialty Ins. Co. v. 1039012 Ontario, Inc.*, whose holding also focused on the meaning of *Yeates* for stacking the MCS-90.

On June 19, 2012, the District Court (2012 U.S. Dist. LEXIS 85277) took up the question of prejudgment (it may have been more accurate to refer to post-judgment) interest and the MCS-90. The plaintiffs had been awarded in excess of $5 million by a jury in the state tort action, which was brought against various defendants including 1039012 Ontario ("Ontario"), the lessee of a tractor trailer rig. Judgment was entered on November 18, 2009. The insurer for one of the other defendants paid $750,000, leaving much of the judgment unpaid, and plaintiffs sought to recover under the MCS 90 that Fairmont had issued to Ontario.

Fairmont's MCS-90 listed $1 million as the limit but Fairmont argued that since Ontario only required $750,000 for the load at issue, its exposure should be limited to $750,000 under the filing. The court rejected the argument but the rationale for the court's holding is potentially troubling. Instead of focusing on the fact that the limits listed on the MCS-90 were $1 million, the court harped on the fact that the policy had $1 million limits. Obviously we can not know what this court would have done had the face amount on the MCS-90 been $750,000 while the policy had limits of $1 million. For what it is worth, our view is that if payment is being made under the MCS-90, not the policy, then it is the amount typed onto the MCS-90 that is determinative.

We observe that Fairmont was presenting a truly tough question whose complexity the court may have underestimated. Think of a bus company, whose policy includes an MCS-90B endorsement, and whose fleet consists of 10 busses with seating capacity of 15 or under, and five busses with a seating capacity of over 16. The former require a filing with limits of $1.5 million, the latter require limits of $5 million. This is a challenge, indeed, to the underwriter on such a policy.

The second issue the court dealt with was whether Fairmont owed interest over and above the face amount of $1 million on the MCS-90 (or the policy). The Court held that Fairmont's obligation under the MCS-90 was triggered by a the judgment against Ontario (in November, 2009). The court was initially reluctant to deal with the issue, which it saw as a problem of post-judgment interest from the state court judgment. On November 13, 2012, though, following the plaintiffs' motion to amend the judgment, the court entered a new order directing Fairmont to pay interest from the date of the entry of judgment against Ontario. Fairmont, thus, paid not only the $1 million limit of the MCS-90, but also over $200,000 in interest.

Scope of the MCS-90 (or MCS-90B)

Lyons v. Lancer Insurance Co., 681 F.3d 50 (2d Cir.) might finally close the book on a coverage litigation stemming from a 1989(!) accident. (We say might – the plaintiffs are seeking certiorari from the United States Supreme Court, although that seems like a long shot.) TFD was, in 1989, an authorized interstate bus company. One of its drivers, Michael Thomas, was assigned that year to drive students in Yonkers, New York to and from their local school. On February 14, 1989, the bus collided with a car operated by Lyons. Lyons won a default judgment against TFD in 1992 which, for reasons not revealed in the opinion, was not reduced to a judgment for a sum certain until 2006. The award was $2.47 million plus interest running from 1992. Lyons and his wife then filed suit against Lancer seeking $5 million each under the MCS 90B endorsement that had formed a part of Lancer's policy with TFD

Plaintiffs discovered evidence that suggested that while Thomas usually drove the Yonkers school route, and did so on the date of loss, he had in fact been dispatched that day to take a group of senior citizens from Mount Vernon, New York to Armonk, New York. There was also evidence, some from Thomas himself, that had Thomas driven that day from Mount Vernon to Armonk he would have taken Interstate Highway 684 which, briefly, crosses over into Connecticut. Plaintiffs suggested that Thomas, besides driving the Yonkers school children that day, may also have driven the seniors in interstate commerce, triggering the MCS-90B. The factual investigation was presumably not aided by the long delay in adjudicating the matter, but it appears that Thomas may well have misunderstood his dispatch orders that day and took the bus intended for the Armonk-Mount Vernon run to Yonkers, instead.

Plaintiffs, who lost at the District Court level, argued on appeal that the question of whether a particular transportation was interstate or intrastate depended upon the fixed intent of the "shipper," analyzing the matter here, which dealt with a passenger carrier, to decisions around the county involving haulers of property. The Lyons suggested that TFD had a fixed intent to use the bus Thomas was driving on the "interstate" route thus triggering the MCS-90B. The court rejected this argument, noting that TFD was the carrier, not the shipper so "the fixed intent" of the shipper could not refer to TFD's intent. To the extent there was a "shipper" – the school, the parents – their intent was that the bus would stay in Yonkers and take the children home. Nor was there any evidence that the bus was going to pick up the seniors after dropping the children.

Interestingly, this argument assumed a trip-specific approach to the MCS-90. As we have discussed in the past, some courts have held that if a particular rig or driver sometimes operates interstate, or is on call for interstate work, then the MCS-90 does apply. Plaintiffs did make some attempt at that type of argument citing to two district court decisions. The Second Circuit was not impressed, and quickly distinguished the two cases. (Plaintiffs' attorney might have done a better job of alerting the court that this is a significant issue which courts around the country have struggled with.) In any event, we now have a Second Circuit decision which holds that, in most cases, the trip specific approach is the appropriate test. This is potentially a big deal.

Who is an Insured?

As we have discussed in previous editions, in the wake of a 2005 regulatory guidance from U.S.D.O.T., courts around the country have gone back to the traditional view that the MCS 90 is triggered only by a judgment against the named insured motor carrier. Judgment against some other entity – the driver, a lessor of the tractor or trailer, and so on, can not trigger the filing. The latest case to make the point is *Forkwar v. Progressive Northern Ins. Co.*, 2012 U.S. Dist. LEXIS 177208 (D. Md.), which devotes an extensive discussion to the recent developments. Other elements of the *Forkwar* matter are discussed in the non-trucking section. Larry Rabinovich of Hiscock & Barclay consulted with Progressive on this matter.

Larry Rabinovich

X. NON-TRUCKING/BUSINESS USE EXCLUSION

Grinnell Mutual Reinsurance Co. v. Moon, 2012 U.S. Dist. LEXIS 24607 (D. Minn.). A rancher insured his Freightliner tractor and a trailer under a personal auto policy which excluded use of the insured vehicles for any non-ranching business. An acquaintance who ran an auto parts operation asked the rancher to haul some crushed cars for him. The rancher agreed to do so, and in preparation obtained commercial license plates for his tractor-trailer. His driver completed several hauls, and was involved in an accident in the course of one of them. The court found the business use exclusion was applicable, rejecting the rancher's arguments that the hauling activities were only part-time and he did not hold himself out to the general public as a motor carrier.

In *Progressive Paloverde Insurance Co. v. Bishop*, 2012 U.S. Dist. LEXIS 87428 (S.D. Ind.), the insured used her personal auto while working as a pizza delivery person. Her personal auto policy excluded losses arising out of the use of any vehicle "while being used to carry … property for compensation or a fee…." The court found that the exclusion applied, notwithstanding the fact that the insured was returning after making a delivery, rather than while loaded on the way to the delivery, and had made a stop for gasoline on her way back to the pizzeria (a use which the court found inextricably tied to her job).

As we discussed in last year's review, the plaintiff in *Forkwar v. Empire Fire & Marine Insurance Co.*, 2010 U.S. Dist. LEXIS 98108 (D. Md.), conceded that the motor carrier should have no vicarious liability for the owner-operator's negligence, and, when the court granted the motor carrier's motion for judgment, argued that the owner-operator's non-trucking policy provided coverage since he could not have been operating "in the business" of the motor carrier. The trial court, however, found that there are distinctions between the tort issue of vicarious liability and the coverage issue of business use under a non-trucking policy, and that the decision on the first issue had no preclusive effect on the litigation of the second issue. In 2012, the Fourth Circuit affirmed (2012 U.S. App. LEXIS 13259), finding that an individual acting in the business of the motor carrier as an independent contractor, rather than an employee, could be subject to his policy's non-trucking exclusion without creating *respondeat superior* liability for the motor carrier. See, also, the discussion of a related case in the section devoted to the MCS 90.

Phil Bramson

XI. UNINSURED/UNDERINSURED MOTORISTS COVERAGE

"Occupying" a Covered Auto

A common theme in UM/UIM cases is the search for the outer limits of what it means to "occupy" a covered auto when injured by an uninsured or underinsured auto. In *Fjelstad v. State Farm Insurance Co.*, 845 F. Supp. 2d 981 (D. Minn.), three claimants were injured when struck by the same underinsured vehicle in a shopping center parking lot. The court found that two claimants, who were standing just outside the insured auto watching the third claimant load purchases into the trunk of her car were *not* occupying the car at the time they were struck by the underinsured car.

In *Mehlbrech v. Acuity*, 2012 U.S. Dist. LEXIS 142929, the driver of the insured escort vehicle stopped and exited to help remove ice from the brakes of the truck he was escorting. He was walking back to the escort vehicle when he was struck by on oncoming uninsured motorist. The court, using a four prong test under South Dakota law, found that he was "occupying" the escort vehicle because (1) there was a causal relation between the claimant's injury and the use of the insured escort vehicle; (2) the claimant was in a reasonably close geographic proximity to the vehicle (20-30 feet); (3) he was "vehicle oriented rather than highway or sidewalk oriented" at the time of the accident; *and* (4) he was engaged in a transaction essential to the use of the vehicle at the time.

In a case employing a similar test but reaching a different result, the claimant in *Pikeville Greenwich Insurance Co. v. Hall*, 2012 U.S. Dist. LEXIS 165371, was in his employer's truck when he drove by the scene of a serious accident. He and his co-workers then turned around and parked the truck with its hazard lights on before walking to the scene of the accident. The insured was injured when he was struck by an uninsured driver who lost control of his car while approaching the scene. The Eastern District of Kentucky found that the claimant could not meet the fourth prong of the test – that he was engaged in a transaction essential to the use of his own insured vehicle at the time of his injury.

The claimant truck driver in *South Carolina Farm Bureau Mutual Insurance Co. v. Kennedy*, 730 S.E.2d 862, parked his employer's truck, leaving the truck running, and entered a restaurant to deliver a message to a co-worker. Upon leaving the restaurant, the truck driver was talking to someone at the back of the truck and placed his hand on the truck. At that moment, there as a two car accident on a nearby road, which caused one of the cars to enter the restaurant's parking lot and head toward the truck driver. The truck driver pulled his hand away from the truck in an attempt to escape, but was struck by the car and pinned against his employer's truck. The Supreme Court of South Carolina refused to impose a requirement of physical contact on the scope of "occupying," reasoning that "holding a conversation outside of an automobile is commonplace and is to be expected in the ordinary use of a vehicle," and that any requirement that an insured remain in physical contact with the insured vehicle in the face of imminent danger was unreasonable and unconscionable.

On the other hand, physical contact with the insured vehicle may not be sufficient to establish a right to UM/UIM coverage. In *Westfield Insurance Co. v. Ken's Service*, 295 Mich. App. 610, a tow truck operator reported to the scene of an accident and helped pull a car out of a ditch. He was then injured when struck by another car while standing outside of his tow truck and hooking up the car to the tow. At the time, the insured had his hands upon the tow truck and was leaning against it. Nevertheless, the court denied UIM benefits because the claimant was not in the tow truck or getting in, on, out of, or off of the tow truck. The court stated that, "physical contact alone may [not] be sufficient to show that the person was 'upon' the vehicle so as to be 'occupying' the vehicle."

Stacking

Dooley v. Hartford Accident & Indemnity Co., 2012 U.S. Dist. LEXIS 86507. The insured obtained an automobile policy from Hartford containing underinsured motorist limits of $100,000 per person and $300,000 per accident, and renewed the policy five times. The per accident, and renewed the policy five times. The fifth renewal, however, contained an error and did not list the limits of underinsured coverage. When the insured was then involved in an accident with an underinsured vehicle, he argued that the ambiguity in the policy allowed him to stack his per person underinsured coverage for each of his three vehicles insured by Hartford. The District Court for the Western District of Virginia disagreed, finding that the error in the firth renewal did not create an inconsistency that would overcome the "anti-stacking" clause of the policy. (The court distinguished the holding of *Virginia Farm Bureau Mutual Insurance Co. v. Williams*, 278 Va. 75, 677 S.E.2d 299 (2009), which, in the facts before it, permitted the stacking of underinsured coverage because of internal inconsistencies in the policy.)

The insured in *Atlantic Mutual Insurance Co. v. Yates*, 2012 U.S. App. LEXIS 18460 (6th Cir.), was paid $500,000 in UM benefits, but claimed that he was entitled to another $500,000 because he insured two vehicles, and to another $1,000,000 on top of that because the insurer never obtained a waiver of such coverage with respect to his umbrella policy. In assessing whether stacking should be permitted, the court focused on how many items (or units) of UM coverage were purchased by the insured. The policy stated that "[r]ates for UM or UM/UIM and added PIP are applied on a *per policy basis*. The *same rate applies regardless of the number of vehicles insured on this policy*." Since the insured paid a single rate for UM coverage, regardless of how many vehicles he owned, stacking was not permitted. With respect to the claim under the umbrella policy, the court found that the entire insurance package provided to the insured was one policy, that the policy, taken as a whole, provided UM coverage twenty times the statutory minimum, and the insured had no reasonable expectation of UM coverage under the umbrella portion of his policy.

In *Travelers Commercial Insurance Co. v. Harrington*, 86 So.3d 1274 (Fla. D.C.A.), the claimant was injured while riding in her father's car which was insured under a policy issued by Travelers, and operated by a non-family member who was insured under a policy issued by Nationwide. After the accident, Nationwide paid the limits of its liability coverage, but the claimant sought further UIM benefits from Travelers, and argued that the UIM limit should be stacked in respect of the three vehicles insured under the Travelers policy. The insured's mother, who had purchased the Travelers policy, had expressly agreed to an anti-stacking endorsement. The court held, however, that the anti-stacking limitation was ineffective under Florida law unless accepted by the specific insured seeking coverage – in this case, the named insured's daughter. (The court also held that policy's exception from the definition of "uninsured motor vehicle" for any vehicle "owned by or furnished or available for the regular use of the named insured or any family member" was void as against public policy.)

Objects Fallen from Phantom Vehicles

Allstate Property & Casualty Insurance Co. v. Squires, 2012 U.S. App. LEXIS 1395. The question before the court was whether an accident caused by a box that fell from an unknown vehicle arose out of the ownership, maintenance, or use of an uninsured motor vehicle. The district court held that the instrumentality causing the accident was the existence of a box on the road and was not related to an automobile. On appeal, Court of Appeals for the Third Circuit reversed, holding that, since it was undisputed that the box came from an unidentified vehicle and the box was a "but for" cause of the accident, the insured was entitled to uninsured motorist coverage because the instrumentality that caused the accident was related to the maintenance, ownership, or use of an uninsured vehicle.

State Farm Mutual Automobile Insurance Co. v. Baldwin, 373 S.W.3d 424, was a consolidated case involving two separate incidents and two separate insureds. The first insured was injured when he slipped while exiting his truck to remove a large tarp that apparently blew off another truck and wrapped itself around his windshield. Under the first insured's policy with State Farm, uninsured coverage was provided when an uninsured vehicle "strikes" the insured's vehicle. The second insured was injured when a sheet of ice broke away from an unknown tractor and struck her vehicle. Under the second insured's policy with Safeco, uninsured coverage was provided when an uninsured vehicle "hits" the insured's vehicle.

The Supreme Court of Kentucky held that the "strike" and "hit" requirements are satisfied if the uninsured vehicle, or an integral part of it, makes physical contact with the insured's vehicle. The court granted summary judgment to both insurance carriers, finding that the "strike" and "hit" requirements were not met because the tarp and sheet of ice were not integral parts of the uninsured trucks. (the Court also found that the requirements could be satisfied if the uninsured vehicle exerts force upon an intermediate object, which then makes physical contact with the insured's vehicle as part of a chain-reaction event. The facts in the two cases, though, did not fit into that category of "strike" or "hit."

Exclusions

Henderson v. Nationwide Insurance Co., 2012 R.I. LEXIS 5. A limousine driver was struck by an uninsured motorist while unloading luggage from a limousine. He sought underinsured motorist claim under his own personal automobile policy. The court upheld the insurer's denial of coverage based on an exclusion for "use of any motor vehicle by an insured to carry persons or property for a fee." The Supreme Court of Rhode Island found that the exclusion was not against public policy, reasoning that the purchaser of a personal automobile insurance policy cannot reasonably anticipate coverage for losses that occur in the course of his employment as a professional driver.

In *Rivera v. Liberty Mutual Fire Insurance Co.*, 2012 N.H. LEXIS 68, the claimant was driving a vehicle when her passenger grabbed the wheel, causing the vehicle to strike a tree. Liberty Mutual, which insured the claimant's vehicle, denied liability coverage for the driver based on its "intentional acts" exclusion. At the same time, the insurer denied UM coverage since the vehicle owned by, or available for, regular use by the named insured or a family member did not meet the definition of an "uninsured motor vehicle." The court agreed that the passenger's action precluded liability coverage, but found that the "owned auto exclusion" violated New Hampshire's mandatory UM coverage statute to the extent it denied coverage to the claimant (a Class 1 insured under her parent's policy).

Selection of Lower Limits

P*rogressive Southeastern Insurance Co. v. McLeod*, 2011 U.S. Dist. LEXIS 139378 (E.D.N.C.). The insured selected an automobile insurance policy with UM/UIM limits of $50,000 per person and $100,000 per accident. She renewed this policy on eight occasions. Subsequently, the insured's daughter, who was covered by the policy, was killed in an automobile accident by an uninsured driver. The insured claimed that the insurer never notified her of her right to obtain higher UM/UIM coverage limits. The Court found the insurer failed to meet its burden of providing the insured with the options available to her. However, the insured's actions of selecting lower bodily injury limits, combined with her eight renewals, showed her intent of maintaining a low cost policy with lower UM/UIM limits.

Munroe v. Continental Western Insurance Co., 2011 U.S. Dist. LEXIS 139208 (E.D. Mo.). The selection/rejection endorsement provided that the insured had the right to select a lower limit of UIM coverage, but provided implicitly that failure to do so would result in the election of UIM coverage of $2,000,000 (equal to the policy's liability limit). The endorsement was never signed and thus the Court, finding the endorsement ambiguous, held that the intent of the policy was to provide the default amount of UIM coverage of $2,000,000.

Other

To be "legally entitled" to recover UM benefits under Tennessee law, a claimant must prove both damages and fault on the part of the uninsured motorist. The tortfeasor motorist is "uninsured" if the total amount of liability coverage is less than the amount of UM coverage available to the claimant. In *Collazo v. Haas*, 2011 Tenn. App. LEXIS 671, the claimant was able to identify the owner of the vehicle that injured her, but not the driver. The vehicle was insured under a $100,000 liability policy, the same limit as the claimant's UM coverage under her own policy. Nevertheless, since no allocation of liability between the other vehicle's owner and the unknown driver had yet been determined, the court held that it could not yet be determined whether the other vehicle was "uninsured." (If, for example, the driver was not a permissive user, he would be uninsured, and any liability allocated to him would reduce the amount of liability insurance available. On the other hand, if the named insured owner was allocated 100% of the liability, the full $100,000 liability limit would be available, and the other vehicle would not be "uninsured" because the liability insurance would equal the claimant's UM insurance.)

Artisan & Truckers Casualty Co. v. Thorson, 339 Wis.2d 346. The insured contacted the insurer's agent for quotes on adding UIM coverage to an umbrella policy. The agent quoted and bound the coverage, and informed the insured that he would receive a premium bill later on. When a loss occurred before the premium had been paid, the insurer sought a declaration that the policy had lapsed due to non-payment. The insured impleaded the agent on claims of negligence and misrepresentation. The insured settled with the agent, and the agent sought indemnification from the insurer. The court held that the insurer was bound by its own actions and those of its agent. Specifically, the court held that the insured had made a timely request to purchase UM/UIM coverage under his umbrella policy, that the agent had confirmed this fact with the insurer, and that neither the insurer nor the agent had advised the insured that this UM/UIM motorist coverage was dependent on him paying the premium. The court held that the insured could not recover UIM benefits from the insurer, since the agent had settled for the full coverage limit, but the insured was entitled seek "extra-contractual damages" from the insurer. The agent, however, was entitled to indemnification from the insurer.

Whitley v. Progressive Casualty Insurance Co., 2012 Ohio App. LEXIS 283, while not precedential because the appellate court found that the lower court's order was not final and appealable, is noteworthy for the lower court's finding that a tortfeasor's sovereign immunity from tort liability does not qualify the tortfeasor as an uninsured motorist within the meaning of the victim's policy.

In *Trout v. Apicella*, 2012 Fla. App. LEXIS 2895, the claimant was a passenger in a truck that was pulling a trailer. The driver of the truck lost control of the truck when the trailer started to sway. As a result, the truck separated from the trailer and struck a guardrail. No other vehicles were involved in the accident. The claimant asserted a right to uninsured motorist benefits under the policy covering the truck because the trailer was not insured. The lower court held that the trailer was part of the insured truck and that underinsured motorist coverage would not be available to the claimant. The appellate court, after reading the policy in its entirety, reversed and held that (1) the plain language of the policy treated the truck and trailer as two vehicles and (2) that the trailer was uninsured.

Kelly v. Scottsdale Insurance Co., 2012 U.S. App. LEXIS 3194, points out a subtle but important distinction between reimbursement and contribution. In that case, the claimant was injured by an uninsured motorist while in the course and scope of his employment, and sought to recover both workers compensation benefits from his employer and UM benefits from his employer's auto insurer. The employer subsequently paid the claimant $30,000 in workers' compensation benefits, and sought reimbursement from the UM insurer. The Fifth Circuit found that, since the employer and the UM insurer were solidarily obligated to the claimant, the employer could not stand in the claimant's shoes to seek reimbursement from the UM insurer. Under Louisiana law, the payer of workers compensation benefits could seek contribution from a UM insurer covering the same loss. Since the employer had failed to plead in terms of contribution, rather than subrogation and reimbursement, it was unable to recover. (The appellate opinion hinted that the employer would be free to bring a subsequent, properly-pled action for contribution.)

Kevin Hayden

XII. AUTO VS. GENERAL LIABILITY COVERAGES

Sunshine State Insurance Co. v. Jones, 77 So.3d 254 (Fla. D.C.A.). A teenage passenger grabbed the steering wheel of a moving car to annoy his girlfriend who was driving, causing her to lose control and collide with a concrete barrier on the highway. The court granted judgment in favor of the auto insurer and held that the passenger's homeowner's insurance provided coverage, finding that an accident caused by "teenage horseplay" did not arise out of the "use" of a motor vehicle within the policy's auto exclusion.

In *National Casualty Co. v. Western World Insurance Co.*, 2012 U.S. App. LEXIS 2109 (5th Cir.), the plaintiff was injured while emergency medical technicians loaded her into an ambulance. The court had no trouble finding that loading a patient into a covered ambulance was a "use" of the vehicle under the business auto policy issued to the ambulance company. The definition of "use" in the general liability policy included "loading or unloading," but "loading and unloading" was defined only in terms of the "handling of property." The court, therefore, found that the loss did not arise out of the "use" of the ambulance, as defined under the general liability policy, and held that both policies provided coverage.

Phil Bramson

XIII. BAD FAITH

UPS Freight v. National Union Fire Insurance Co. of Pittsburgh, 2012 U.S. Dist. LEXIS 19505 (N.D. Pa). After National Union refused to defend its insured in the underlying damages action, the insured sought reimbursement of both the costs incurred in defending itself in the underlying action and the costs of bringing the declaratory judgment action to compel reimbursement. The court agreed that National Union was obligated to pay all of the insured's defense costs incurred in the underlying action. On the other hand, the court held that the insured failed to show that National Union (i) did not have a reasonable basis for denying the benefits under its policy, and (ii) that it knew or recklessly disregarded its lack of reasonable basis in denying the claim; accordingly, National Union had not acted in bad faith in breaching its duty to defend, and the insured was not entitled to recover attorneys' fees in the declaratory judgment action.

In *Cargill, Inc. v. McDonald Trucking, Inc.*, 2012 U.S. Dist. LEXIS 72346 (S.D. Miss.), the insurer defended its insured in a bodily injury action while simultaneously pursuing a declaratory judgment action on coverage. The claimant asserted that he was a third-party beneficiary of the defendant's policy, and that the insurer had acted in bad faith by bringing the declaratory judgment action. Applying Mississippi law, the court rejected the claimant's argument, finding that the insurer had not actually denied coverage and was continuing to defend its insured in the underlying action under a reservation of rights, and that consequently there had been no breach of the covenant of good faith and fair dealing.

In *Phelps v. State Farm Mutual Automobile Insurance Co.*, 2012 U.S. App. LEXIS 11931, the Sixth Circuit reversed the Western District of Kentucky's dismissal of the claimant's case, and held that there was sufficient evidence from which a trier of fact could find that the insurer had violated Kentucky's Unfair Claims Settlement Practices Act (UCSPA) in its processing of her third-party insurance claim. The court noted that the insurer's initial offer of $25,000 was just barely above the low end of its own evaluation of the claim and the driver's documentation of medical costs and lost wages. Moreover, the insurer delayed nearly three years before settling the claim, even though (viewing the facts in the light most favorable to the non-moving party) the settlement package offered in March 2004 included all of the information needed to settle the claim.

The case of *Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W. 2d 544 (Tex. Ct. App. 1929), established that, under Texas law, the insurer has a duty to protect the insured by accepting reasonable settlement offers that are within policy limits when three prerequisites are met: (1) the claim against the insured is within the scope of coverage; (2) the demand is within the policy limits; and (3) the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment. In *One Beacon Insurance Co. v. T. Wade Welch & Associates*, 2012 U.S. Dist. LEXIS 87599 (S.D. Tex.), the insurer filed an action seeking a declaration that its policies were void or otherwise did not provide coverage for certain claims. The insured counterclaimed that the insurer had breached its *Stowers* duty by refusing to pay, delaying in paying or offering grossly inadequate sums to settle third-party claims that could exceed seventy-five million dollars. The court, however, found that a *Stowers* claim cannot accrue until the insured is actually exposed to the damages beyond the policy limit. Because there was no final judgment, the *Stowers* claim was not ripe and the insured's bad faith counterclaim was dismissed.

In *Ennen v. Integon Indemnity Corp.*, 268 P.3d 277 (Alaska), the insurer denied underinsured motorist benefits to the claimant, only to discover six years later that its UIM endorsement contained limitations which were unlawful under Alaska law (even though the endorsement had been approved by the Division of Insurance). Following the discovery, the insurer paid UIM benefits to the claimant. Nevertheless, the court held that the insurer had ample opportunities to discover for itself that its policy language was unlawful, and that the claimant could maintain an action against the insurer for bad faith failure to pay a claim. The court also dismissed the insurer's third-party action against the claimant's attorney, seeking to blame him for not discovering the illegality of the policy language sooner.

In *American Guarantee and Liability Insurance Co. v. United States Fidelity & Guaranty Co.*, 688 F.3d 991, an excess insurance carrier sued a primary carrier, alleging bad faith for failure to settle claims against their mutual insured within the primary limits. The Eighth Circuit affirmed the judgment of the Eastern District of Missouri rejecting the bad faith claim because the insured had never requested that the primary insurer settle the claims within its limits (a prerequisite under Missouri law for a claim of bad faith failure to settle).

Jennifer Castaldo

XIV. SPOLIATION

Sentry Select Insurance Co. v. Treadwell, 2012 Ga. App. LEXIS 1013. In an action arising out of a collision between a pickup truck towing a car and a tractor-trailer, the claimant sued the motor carrier and moved to strike defendant's answer due to alleged spoliation of the following: the tractor-trailer driver's log books, data from the GeoLogic system on his vehicle and data from the Electronic Control Module ("ECM") on his vehicle. The trial court granted the motion and struck the answer, but the appellate court reversed. The appellate court agreed that there was evidence to support the trial court's factual findings that the motor carrier destroyed the log books and the GeoLogic data, but found no evidence with respect to spoliation of the ECM data and the investigation results. Since the striking of the answer was based on improper findings of fact, the case was remanded to the trial court to consider the appropriate remedy under the circumstances.

Kraft Reinsurance Ireland, Ltd. v. Pallets Acquisitions, LLC, 843 F. Supp.2d 1318 (N.D. Ga.). In an action by an insurer against a manufacturer accused of providing wooden pallets that caused contamination of food, testimony by the insurer's expert that was arguably relevant to causation of damages was excluded as a sanction for spoliation of critical evidence. The court found that the insurer failed to preserve any portion of the evidence critical to the claims in dispute or to make any other arrangements for the manufacturer's inspection of a sample of the evidence.

Vanliner Insurance Co. v. ABF Freight Systems, 2012 U.S. Dist. LEXIS 30676 (M.D. Fla.). In an action arising out of an automobile accident involving a disabled ABF tractor-trailer, a defendant moved for spoliation sanctions against ABF due to ABF's alleged failure to download and/or save the Electronic Control Module ("ECM") prior to its destruction. The court held that the failure to preserve evidence only justifies sanctions where the alleged spoliation is the result of bad faith, which may be proved by circumstantial evidence in the absence of direct evidence. A review of the record showed no evidence that ABF had been put on notice of a claim that the tractor-trailer had been negligently maintained or that ABF could reasonably have foreseen such an allegation at the time the ECM data was downloaded. The maintenance record for the subject tractor was produced during discovery, so any notion that the ECM data was the only source of the maintenance records was belied by the record. Accordingly, the defendant failed to meet its burden of proving that the ECM at issue was crucial to its being able to prove its prima facie case for defense. Additionally, the fact that the defendant delayed filing of the motion until the eve of trial suggested to the court that it had been otherwise able to prepare itself for trial. The court denied the motion for sanctions and would not permit a negative inference jury instruction at trial.

In *Sedlar v. USAA Casualty Insurance Co.*, 2012 Cal. App. Unpub. LEXIS 3226, the insured incurred $700,000 in property damage when a defective massage chair caught fire. USAA paid him its first-party property coverage limit of $366,903.96, took possession of the chair, and brought a subrogation action against the manufacturer to recover the amount paid. The insurer lost the chair, however, and a stipulated judgment was entered against USAA. Since loss of the chair had compromised the insured's own action against the manufacturer to recover the uninsured portion of his damages, he sued the insurer. The court, following *Farmers Insurance Exchange v. Superior Court*, 79 Cal. App.4th 1400 (2000), held that a tort claim of negligent spoliation is not recognized in California. The court acknowledged that, under *Cooper v. State Farm Mutual Automobile Insurance Co.*, 177

Cal. App.4th 1400 (2009), spoliation could constitute a breach of contract if the party in possession of the evidence had made a promise to preserve it for the benefit of another. In the present case, however, the insured did not allege an express promise by the insurer to safeguard the evidence.

Jennifer Castaldo

XV. PHYSICAL DAMAGE

Great West Casualty Co. v. Universal Underwriters Insurance Co., 2012 Ill. App. Unpub. LEXIS 304. The buyer purchased trucks, but had not yet taken possession of them when they were damaged by a tornado while parked at the seller's lot. The buyer's insurer paid for repairs and then sought to recover from the seller's insurer. The court denied recovery, however, because the seller's policy excluded damage to a customer's vehicle which was not caused by the seller's negligence. The court also found that the buyer's insurer had no standing to pursue a breach of contract action against the seller's insurer, rejecting the argument that standing arose by being subrogated to the rights of the loss payee which was an additional insured under both policies.

In *American Auto Brokers, Inc. v. Canal Indemnity Co.*, 2011 La. App. LEXIS 1316, the physical damage policy issued to a used car dealership excluded loss to any covered auto "displayed or stored at any location not shown [in the declarations] if the 'loss' occurs more than 45 days after your use of the location begins." The insured parked one vehicle at a location four days, and four other vehicles at another location two days, before Hurricane Katrina struck and they were damaged beyond repair or lost. The court, however, interpreted "after your use of the location begins" as referring to any use made by the insured of the other locations, regardless of how long the lost or damaged vehicle had actually been displayed or stored there. Since the insured had been using one of the locations for about a year, and the other for about three years, the court found that coverage was excluded for vehicles that had been at the other locations for four days or two days.

Robert Shaddock

XVI. NON-OWNED AUTO COVERAGE

Whether a vehicle's owner is liable for the vehicle's operation by a person who does not own the vehicle, and similarly whether the vehicle's or driver's insurer must provide coverage if there is an accident, seems maddeningly fact specific and difficult to predict.

If you think that an agreement to rent a car that specifically prohibits drivers who are not identified on the agreement would settle the coverage issues, think again!

In *Garcia v. Geico General Insurance Co.*, 450 Fed Appx. 870, the Eleventh Circuit Court of Appeals examined the following facts: Miguel Baena rented a car from Enterprise Rent A Car, and did not tell the rental agent that his brother Edgar Baena would be a driver. The rental agreement therefore stated: "No other drivers permitted." Edgar Baena drove the car and was involved in an accident which killed Paola Penafiel.

Edgar's own Geico insurance policy stated as a condition of coverage:

> Such use [of the non-owned auto] must be with permission, or reasonably believed to be with permission of the owner and within the scope of that permission.

The Eleventh Circuit rejected the notion that Enterprise did not grant permission to Edgar to drive the car and therefore the Geico policy exception would disqualify coverage. Instead, the Court interpreted Florida law as providing that a car rental company has consented to the use of the car beyond its immediate control. Therefore, the Court reasoned, when the rental company gave consent to the <u>renter</u> (in this case Miguel) to rent the car, "that consent - in the absence of a breach of custody amounting to a species of conversion or theft - extended to any person that Miguel allowed to use the car." *Id.* at #9. The Court therefore reversed the lower court's determination that there was no coverage under the Geico policy.

In another coverage case that teaches us it is hard to know when coverage will actually be required, *Rother v. Erie Insurance Exchange*, 2012 Pa. Super. 228, the Supreme Court of Pennsylvania denied coverage where a son, who lived with his mother, regularly used his father's car to drive to work, but got in an accident when he picked up his friend who needed a ride late at night.

The mother's Erie Insurance's policy stated that it would not cover:

. . . .

> bodily injury to you or a resident using a non-owned motor vehicle or a non-owned miscellaneous vehicle which is regularly used by you or a resident but not insured for Uninsured or Underinsured Motorist Coverage under this policy.

. . . .

The father's vehicle was not insured for UM or UIM under the mother's Erie policy. Therefore, the issue to be decided was whether the son was "regularly" using his father's car.

The Court conceded that distinguishing "regular" use from "casual" use can be a "struggle" for a court and that each case turns on its own facts. Ultimately the Court concluded that the son "…routinely and habitually used the vehicle within the scope of his father's permission to go to and from work four days a week." Therefore, there was no coverage under the mother's Erie policy.

The lesson from these cases is that it is very difficult to predict whether insurance coverage for a non-owned vehicle will be affirmed or rejected by a court.

Michael Ferdman

XVII. MISCELLANEOUS

I.T.N. Consolidators, Inc. v. Northern Marine Underwriters Ltd., 2012 U.S. App. LEXIS 2799, involved construction of a type of cargo liability policy known as an "open cover" policy. An open cover policy provides coverage prospectively for future shipments, but coverage is only bound when the insurer is given notice of the particulars of a given shipment and a premium is established based on those particulars. At that point, a certificate of insurance is generated for the insured shipment. Coverage could arise automatically under the open cover policy even if the certificate of insurance was not generated until after a loss, but only if the loss was unknown to the shipper at the time the certificate was issued; in this case, both the shipper and the insurer were aware of the loss when the certificate was issued after the fact. (The fact that the insurer also knew was insufficient.) The Eleventh Circuit, however, remanded the case for findings as to whether the insurer had accepted premiums, thereby contracting even after the loss to provide coverage.

Integon National Insurance Co. v. MT&R Enterprises, Inc., 2012 U.S. Dist. LEXIS 170518 (M.D. Ala.). In its application, the insured failed to list one of its principals, who had a history of driving while intoxicated, as an approved driver. When the principal was involved in an accident while driving under the influence of alcohol, the court permitted the insurer to rescind the policy ab initio, finding that the insurer's ability to investigate potential drivers was material to its underwriting decisions. Rescission was permitted notwithstanding the outstanding claims of the injured third-parties.

West American Insurance Co. v. RLI Insurance Co., 698 F.3d 1069. The primary insurer West American rejected several offers to settle within its policy limits. The insured went to arbitration with the claimants, with the understanding that the claimants would seek to satisfy any award only from existing insurance. The arbitrator awarded the claimants $1.35 million, which exceeded the $500,000 West American limits and reached into RLI's excess coverage. The Eighth Circuit, applying Kansas law, held that the excess insurer was subrogated to, and could assert, the insured's bad-faith claims against the primary insurer, notwithstanding the fact that the insured's personal assets were not at risk.

United Financial Casualty Co. v. Abe Hershberger & Sons Trucking Ltd., 2012 Ohio App. LEXIS 489. This case is another in the line of Consumers County Mutual Insurance Co. v. P.W. & Sons Trucking, Inc. (307 F.3d 362), which have applied the federal regulatory definitions of "employer" and "employee" found in 49 C.F.R. § 390.5 to determine whether someone was the motor carrier's "employee" within the meaning of a liability policy. The individual in question had been hired by the motor carrier to ride along with and train a new driver. The court held that, although he never took the steering wheel himself, the trainer was a fellow "employee" of the new driver within the regulation and the policy, because (1) he was employed by the motor carrier, and (2) because, in the course of his employment, he affect-ed commercial motor vehicle safety.

Tom v. S.B. Inc., 2012 U.S. Dist. LEXIS 24910 (D.N.M.), is yet another cautionary tale on sanctions which may be imposed for abuse of the discovery process. In the course of a lawsuit over a motor vehicle accident, the motor carrier and its attorney, in response to the plaintiff's discovery requests, repeatedly withheld and/or lied about the existence of maintenance records, the insurer's investigation, the truck driver's disciplinary history, and data from the "black box" and the satellite tracking system. The court stopped short of granting a default in favor of the plaintiff, but imposed the costs of extended discovery on the defendants and ordered that the plaintiff could refer to the defendant's misconduct when introducing evidence at trial. The defendant's insurer apparently avoided sanctions for the misconduct of its retained defense counsel.

Brown v. Tokio Marine & Nichido Fire Insurance Co., 2012 Wisc. App. LEXIS 235. The liability policy issued to Nissan excluded coverage for lessees. The court agreed that the exclusions were enforceable. Nissan, however, violated a different statute applicable to lessors by failing to file a certificate of insurance with the Wisconsin Department of Transportation when it leased a vehicle to a customer. Under the circumstances, the court held that Nissan's insurer Tokio Marine was obligated to pay up to the statutory minimums of $25,000 per person/$50,000 per accident.

21st Century Insurance Co. v. Estate of Doubrava, 2012 Ohio App. LEXIS 2966. 21st Century issued a policy to Roberts, a construction company. The policy's "hired vehicle" endorsement covered any "vehicle that you [Roberts] rent or lease for a fee for a period of time not to exceed 30 days." Brenton, a Roberts employee, was involved in an accident driving his own pickup truck towing a Roberts trailer. Roberts had an arrangement with Brenton under which it made monthly payments to him for use of his truck in Roberts' business. Nevertheless, since Roberts exercised no control over the vehicle itself, the court found that it was not a "hired" auto.

Jeffries v. Jack Ahrold Agency, Inc., 2012 Iowa App. LEXIS 565. In another "hired auto" case, Reed Construction was doing asphalt work on a road construction project, and hired Reinier to deliver some asphalt. Reinier's driver got into an accident while returning from making the delivery. The driver could only qualify as an additional insured under the auto policy issued to Reed if he was a permissive user of a vehicle owned, hired or borrowed by Reed. The court found, however, that Reed did not hire or borrow Reinier's vehicle since it did not exercise, or have the right to exercise, any significant control over the vehicle.

West Coast Pizza Co. v. United National Insurance Co., 2011 Wash. App. LEXIS 2792. The case involved two corporations, West Coast Pizza and Mad Pizza, unrelated but with common ownership. National Continental issued a policy to West Coast Pizza, which did not named any other corporate entity as an insured but did list 21 locations, many of which were operated by entities other than West Coast Pizza. A Mad Pizza delivery driver was involved in an accident. Since the vehicle was not owned by a West Coast Pizza employee or used in West Coast Pizza's business, there was no coverage for Mad Pizza or its driver. Mad Pizza argued that the policy was intended to cover Mad Pizza, as evidenced by the listing of the location operated by Mad Pizza where its driver was employed. The court, however, noted that the application identified only West Coast Pizza as the operator of all 21 locations, and there was no evidence that National Continental ever intended to insure any other entity.

Salee v. L.B. White Trucking, Inc., 2012 U.S. Dist. LEXIS 11971 (N.D. Okla.). A number of states, including Oklahoma (as well as Louisiana and Georgia), permit victims of accidents involving commercial motor vehicles to implead the insurer of the commercial motor vehicle in an action against the commercial insured. In this case, the defendant motor carrier was a Kansas corporation with its principal place of business in Kansas, and the accident occurred in Oklahoma while the motor carrier was engaged in interstate commerce. The motor carrier's insurer argued that direct actions could only be brought against insurers of motor carriers subject to Oklahoma's regulation of intrastate commerce. Since the motor carrier held Oklahoma operating authority and had certified its insurance to the state of Oklahoma, however, the court held that the insurer was amenable to direct action even though the specific accident occurred in the course of interstate commerce.

Allstate Insurance Co. v. Ram Caterers of Flatbush LLC, 2012 N.Y. Misc. LEXIS 883. A parking valet attendant got into an accident while operating a customer's vehicle, causing physical damage. The customer collected on her Allstate policy, and Allstate brought a subrogation action against the parking company and the caterer which had hired it. Despite considerable documentary evidence, however, summary judgment for Allstate was denied because it failed to provide (1) a copy of its policy, or (2) acceptable proof, such as a canceled check or payment voucher, that it had actually made payment to its insured. (The motion was denied without prejudice, with leave to renew upon presentation of the required documents.)

Giraldo v. Washington International Insurance Co., 2012 N.Y. Misc. LEXIS 1543. Washington was the guarantor on a self-insurance surety body issued to a taxicab company. After an accident, the company was not sued but a default judgment was entered against the taxi driver. Washington argued that it had no obligations under the bond absent an unpaid judgment against the principal self-insured corporation for which it provided the bond. The court, however, held, pursuant to New York Vehicle and Traffic Law § 370(1)(b), that the bond inured to the benefit of anyone legally operating the motor vehicle in the business of the owner and with his permission.

Klonsky v. RLI Insurance Co., 2012 U.S. Dist. LEXIS 47333 (D. Vt.). At the time of the subject accident, the insurer had a practice of checking the driving records of every insured driver on a policy following an accident, whether they were involved in the accident or not and without obtaining their consent. The court agreed with one of the insureds that the practice violated the federal Fair Credit Reporting Act, which regulates access to an individual's "consumer reports." Since the motor vehicle record related to the insured's competence and responsibility as a driver, and because it was to be used by the insurer for underwriting purposes, the court deemed them a "consumer report" under the FCRA.

Wells Fargo Equipment Finance, Inc. v. State Farm Fire and Casualty Co., 2012 U.S. App. LEXIS 20846 (4th Cir.). Wells Fargo loaned money to RODO to buy three trucks, and Wells Fargo retained a security interest in the trucks. The loan contract and the trucks were assigned to Miriam Trucking, which obtained a State Farm policy naming Wells Fargo as the loss payee. Miriam Trucking then intentionally set a fire destroying two of the trucks. Since there was no conversion, secretion or embezzlement on the part of Wells Fargo, however, the court held that the loss payee was entitled to recover under the State Farm policy notwithstanding the arson committed by the named insured.

Travelers Indemnity Co. v. MTS Transport, LLC, 2012 U.S. Dist. LEXIS 127847 (N.D. Pa.). A truck spilled its cargo of asphalt on the Pennsylvania Turnpike, damaging the highway and the vehicles of over a thousand claimants. Travelers, the primary insurer, offered to pay its policy limit into court. The excess insurer denied coverage based on the pollution exclusion, but the insured asserted that there were no claims of damage or threat to land, water or person. The court found, applying Maryland law, that the pollution exclusion is intended to apply only to traditional environmental pollution. Finding no allegations of such environmental damage, the court held that the excess insurer was required to defend and possible indemnify claims falling outside the scope of the pollution exclusion.

Intransit, Inc. v. Travelers Property and Casualty Co. of America, 2012 U.S. Dist. LEXIS 151428. Load was stolen by individual who falsely represented himself to insured broker as a driver for a genuine motor carrier, and who provided a falsified certificate of insurance. Policy generally provided $300,000 of coverage for losses due to theft, but only $50,000 for loss through dishonest act of "carrier" to whom cargo was "entrusted." The Oregon federal court held that the policy was ambiguous and, since the cargo had not been "entrusted" to an actual "carrier" but to an imposter posing as the carrier's representative, the exclusion was not triggered and the full coverage limit was available.

Phil Bramson