January 2016

Transportation: Annual Year in Review

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Barclay Damon's Transportation Team

Our team is once again pleased to present to our clients and colleagues our annual summary of developments in the field of transportation law.

There were a great number of decisions in 2015 dealing, in one way or another, with the status of truck drivers as employees or independent contractors, and related employment law issues. Jonathan Bard deals with the employee exclusion in section 2; Phil Bramson deals with the FLSA in section 3, workers' compensation cases in section 4, alleged unfair labor practices in section 5 and other employment issues in section 7; while Matt Rosno addresses the vicarious liability of motor carriers in section 6. The undersigned will be discussing employment issues in the context of owner-operators in a panel at the CLM Annual Conference in Orlando in April.

Our team has been enriched with some major new talent over the past few months. Vince Saccomando discusses jurisdictional issues (section 18), punitive damages (section 19), spoliation (section 20), and the line between auto and GL coverages (section 21). Vince and Tom Drury, both based in Buffalo, joined the team when Hiscock & Barclay joined forces with the Damon Morey firm this past June.

Also new to our team is Jesse Dunbar who has contributed a piece on punitive wrap coverage (section 13). Jesse, based in our NYC office, has a great deal of experience working with reinsurers.

My thanks, as ever, to co-editor Phil Bramson and to Robert Lazzaro and Elaine Knecht for their technical assistance.

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Transportation Annual Year in Review

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1. The ISO Motor Carrier Form

The ISO motor carrier form was unveiled in 1993, although it did not get much traction in the industry until ISO announced in 2009 that it would no longer support its truckers form. Much of the case law in the succeeding years, though, has continued to involve the truckers form and its equivalents, or those sections of the motor carrier form which are not markedly different from parallel provisions in the truckers form. This year's summary begins with two decisions which wrestled with terms that are unique to the motor carrier form. If these cases are typical, the motor carrier form might not be as easy to apply as has been advertised – one case was won through clever lawyering and the other appears to have been wrongly decided or at least wrongly reasoned.

The structure of *Great West Casualty Co. v. National Casualty Co.*, 53 F. Supp 3d 1154 (D.N.D. 2014), aff'd 2015 U.S. App. LEXIS 21129 (12/7/15) is familiar enough – it was a dispute between the non-trucking insurer (Great West here) whose insured, Steven Heinis, had leased his rig (both tractor and trailer) to a motor carrier (National Casualty's named insured Avery Enterprises). Under the terms of the lease, Heinis agreed to maintain the equipment and keep the rig in compliance with USDOT regulatory standards. Heinis was responsible for the cost of repairs, maintenance and fuel. Days before the accident, Heinis, who hauled wastewater from fracking sites, had noticed a leak in the trailer. Heinis brought the rig to Avery's own repair shop (he could have selected any shop), backed the trailer into the shop and detached the tractor (as he recalled), and Avery's mechanics started to work on a crack in the trailer's loading valve. Jesse Miller was welding the pipe when an explosion occurred, causing Miller to suffer significant bodily injury. He recovered workers' compensation benefits, but also filed a lawsuit against Heinis for negligence. Suing his employer Avery was, of course, not an option.

Great West had little trouble convincing either the District Court or the Eighth Circuit that its non-trucking policy did not apply. Both courts concluded that the North Dakota Supreme Court would adopt the reasoning of the Eighth Circuit's own decision in *National Continental Ins. Co. v. Empire Fire & Marine Ins. Co.*, 157 F. 3d 610 (1998), which held that even though repair was a duty of the lessor under the lease, the lessor was acting in the business of the lessee while having the rig repaired thus triggering the key exclusion of the non-trucking policy. Great West, then, had no coverage for the loss.

National Casualty would provide coverage under these circumstances only if it insured the owner-operator Heinis, the sole defendant. Under the truckers form that would not have been controversial – in almost all cases, the owner-operator of a covered auto qualified for coverage under the lessee/motor carrier's policy as a permissive user (subsection (b) of "Who is an Insured"). The motor carrier form, though, has blocked that route to coverage for owner-operators. Now an owner-operator may qualify as an insured as the tractor lessor only if there is a written lease agreement with no hold harmless running to the motor carrier, and even then only if the vehicle is being used in the lessee's business as a for-hire carrier at the time of the

loss (subsection (d)).

In arguing that National Casualty provided coverage, Great West opted to focus not on subsection (d), with its multiple requirements, but on subsection (c), which covers the owner of a leased or borrowed trailer. In this case Heinis had, in fact, leased both the tractor and the trailer to Avery, and Great West exploited the significantly lower bar of subsection (c). Even under (c), though, the trailer had to be either connected to a covered power unit or, if not connected, needed to be in use "exclusively" in Avery's business. Since there was a dispute in the testimony as to whether the tractor and trailer were attached while Miller was working on the leak, the district court turned to the question of whether the trailer was being used in Avery's business. The court pointed to case law involving bobtail policies and interpreting the phrase "in the business," which focuses on whether the particular use furthers the business interests of the lessee (of course a non-trucking policy excludes coverage under those circumstances to the owner-operator while the motor carrier form grants coverage). The court predicted that the North Dakota Supreme Court would accept that interpretation, and find that it is in furtherance of the lessee's business for the lessor to keep his vehicles in good running order.

National Casualty pointed out that, unlike the non-trucking language, its motor carrier form required the trailer to be used "exclusively" in Avery's business in order for the owner-operator to qualify for coverage. The court, though, found that so long as the vehicle was not under lease to more than one motor carrier, or was not being used by the owner-operator for personal reasons, the vehicle was being used exclusively in the lessee's business.

Since Miller, the claimant, was an employee of the lessee Avery, the court also dealt at length with the implications of that relationship. With respect to the employee exclusion, National Casualty argued that Miller was ineligible to be paid under its policy since he was an employee of "the insured," its named insured Avery. The court acknowledged that this was a close question, and highlighted a potential ambiguity in the form which would be held against National Casualty. It found that the exclusion would have been enforceable only against the insured seeking coverage; since Heinis was obviously not Miller's employer the exclusion did not apply.

The court also rejected National's argument that Heinis and Miller were fellow employees of Avery which would have prevented a recovery. In so doing, the court looked to what Heinis was doing (or rather not doing – driving, for instance) at the moment of the loss, and rejected the idea that the employee exclusions are to be read as though they incorporated the definition of employee in the federal regulations.

The Eighth Circuit recently upheld the District Court's holding agreeing that coverage was available to Heinis under subsection (c). The appellate court based its holding, though, not on the exclusive use issue – which the court left for another day – but on the basis that the tractor and trailer were legally connected. The question did not turn on whether the trailer had been unhooked, as Heinis had testified, since a tractor and trailer would be deemed connected so long as they were functioning as a unit. If the trailer, for instance, were detached while the driver took the trailer to a gas station to refill the tank, the tractor and trailer would still be operating as a unit and be deemed "connected."

Heinis was required by the lease to remain in "constant contact" with an Avery dispatcher, and used the same tractor and trailer day after day and only in Avery's business. Under the circumstances the tractor and trailer were functioning as a paired unit, and they were separated – if they were separated – only to make it easier to do the repair work. They, were, then, "connected," while Miller was working on the trailer and Heinis qualified as an insured lessor. (Query – would the court have reached a different decision if Heinis's trailer were attached to different tractors from one day to the next? We suspect not, but if so, why mention this factor at all? We also repeat the observation that it seems odd to us that the lessor of a tractor and a trailer qualifies as an insured only because of the trailer – but that points to the oddity of ISO's policy provisions rather than to any weakness in the court's reasoning.)

The Eighth Circuit also agreed with the District Court's ruling that Great West's non-trucking exclusion was applicable (that is, that the vehicle was being used in Avery's business) and that National's employee and fellow employee exclusions did not apply. Here, too, we detect some inconsistency in the court's approach. In finding that the Great West's exclusion was enforceable, the court looked to the broad intent of the parties in trucking policies and in bobtail policies and the context in which those policies are purchased. But in finding that Heinis was not a fellow employee of Miller's, the court declined to read the exclusion in the context of the regulations defining what an employee is

for purposes of interstate trucking. The court was on firmer ground in concluding that the employee exclusion applies only if the insured seeking coverage employed the plaintiff. Since Miller was not an employee of Heinis, the exclusion did not apply.

The terms of the motor carrier form were also examined in *Daniel v. National Casualty Insurance Co.*, 2015 U.S. Dist. LEXIS 129563 (D. Md.). H&F Bros., LLC, a motor carrier insured by Northland, hired R&H Trucking to haul a load from Pennsylvania to North Carolina. Derrick Hines, the driver for R&H (and brother of R&H's owner Aaron Hines) was driving a tractor that R&H had leased from Basic Trucking. The tractor was pulling a Ryder trailer that was owned by Hotchkiss Trucking. In Queen Anne's County, MD, the rig collided with a passenger car causing the death of its driver.

The driver's widow Kara Daniel filed suit against the various companies and individuals with a connection to the tractor or the trailer. Northland paid its $1 million limits and settled on behalf of its insureds; Northland and the other settling entities also assigned to Daniel their rights against National Casualty for failing to defend or indemnify them. Daniel then sued National Casualty. National Casualty argued that its policy was not in effect at the time of the loss. The court apparently agreed and could have stopped there. (Or it could have stopped even earlier when it concluded that Northland had not suffered any loss as a result of National Causality's acts or omissions.) But had it done so, we would have learned nothing about the motor carrier form. The court opted to continue and assume, for purposes of the discussions, that the National Casualty policy was in effect at the time of the loss.

In considering Northland's claim for indemnification against National Casualty, the court observed that indemnification or contribution is possible when one insurer sues another only if the two insurers insure the same interests. (As stated, this is not quite accurate. The court was referring to the narrower principle relating to an insurer which pays a claim that it owes, but believes a different insurer owes on a primary basis.)

National Casualty's coverage (assuming that it applied at all) covered Aaron Hines, Derrick Hines and R&H. In order for Northland to successfully seek indemnification from National Casualty it, too, needed to insure those parties. (The court did not address the possibility that National Casualty covered the Northland named insureds.) The court then analyzed the motor carrier form's "Who is An Insured" provision subsection by subsection to see whether, in fact, Northland covered R&H and the Hines brothers. The Northland policy covered hired autos so the R&H vehicle, which had been leased to Northland's named insured H&F was a covered auto. Subsection (a) covered the named insured(s) with respect to any covered auto. R&H and the Hines, though, were not named insureds under the Northland policy, so (a) was not applicable.

Subsection (b) covered permissive users, but excluded the lessor and its agents. (As noted earlier, this is one of the key differences between the truckers form and the motor carrier form.) R&H and Aaron were the lessors while Derrick was their employee, so all three fell out of coverage under subsection (b). Northland did cover the trailer owner Hotchkiss under subsection (c), but R&H and the Hines brothers were not involved in the lease of the trailer, so again they do not qualify as insureds.

Subsection (d) covers the lessor of the tractor and its agents, and might have offered the best chance for R&H and the others to qualify as insureds. However, as noted above, subsection (d) comes with strict conditions. It does not apply, for instance, if there is a hold harmless running from the lessor to the lessee. There was, in fact, a hold harmless and that should have short-circuited this subdivision. The court concluded, in fact, that (d) does not apply, but it misinterpreted the provisions and may have therefore reached the wrong decision.

The court observed that the hold harmless running from R&H to H&F was located in the portion of the lease agreement titled "Bobtail Liability and Insurance". The court did not set out the full language of that section of the lease, so we cannot know whether the court's reading was plausible, but the bottom line was that the court concluded that the hold harmless was a limited one applying only while the driver was bobtailing. Since Hines was not bobtailing at the time of the loss the court found subsection (d) to be inapplicable. If you have been reading carefully you will observe that this does not follow.

The court misread subsection (d) Here is the text:

> (d) The lessor of a covered "auto" that is not a "trailer" or any "employee", agent or driver of the lessor while the "auto" is leased to you under a written agreement if the written agreement between the lessor and you does

not require the lessor to hold you harmless and then only when the leased "auto" is used in your business as a "motor carrier" for hire.

Here the tractor was leased from R&H to H&F under a written agreement so R&H and its agents were potentially insured. The existence of a hold harmless running from the lessor to the lessee would remove R&H from coverage. If there was no hold harmless running from the lessor to lessee (either because there was no hold harmless to because it ran the other way) then the lessor can qualify as an insured, so long as the lessor or its agent is using the vehicle in the carrier's business as a motor carrier.

In this case, there was a hold harmless, which could have disqualified R&H – except that the court found that the hold harmless did not apply since it was a limited hold harmless applying only while the tractor was bobtailing. Once the court made that decision, though, it should have found that since the vehicle was being used in H&F's business as a for-hire motor carrier at the time of the loss, R&H and the Hines brothers did qualify as insureds. But the court got tripped up and somehow concluded that, since there was no hold harmless, R&H and the others did not qualify as insureds. The court apparently lost track of the convoluted language of the provision.

Moving on to subsection (e) the court found that there was no basis for concluding that R&H or the Hines were vicariously liable for the actions of any of the people or entities who did qualify as Northland insureds. And finally, the court ruled that Wisconsin law, which might have required Northland to cover the driver, did not apply. Accordingly, Northland and National Casualty did not cover the same insureds so indemnification was not available.

The court played one final card; even if Northland had insured R&H and the Hines brothers, the indemnification claim would have failed because the Northland policy was primary. The court analyzed the primary/excess clauses of National Casualty's truckers policy and Northland's motor carrier form. Here, too, the court misread the policy, citing the wrong clause of the motor carrier policy (V(B)(5)(b) instead of V(B)(5)(a)) – since the vehicle was leased by the Northland named insured to H&F and, again, assuming the hold harmless was inapplicable, Northland should have been found to be the excess policy. For good measure, the court also misinterpreted the National Casualty primary/excess clause.

The court's conclusion (if not its reasoning) can be defended if the National Casualty policy had been terminated before the loss. But it should be disconcerting to ISO that a federal district court could so completely misinterpret the terms of the motor carrier policy in one of the first cases to directly deal with the terms of the motor carrier form that diverge from the truckers form. For insurers using the form, a new element of uncertainty may be introduced – is the form too complicated to be understood properly?

- Larry Rabinovich

2. Truck Driver as Employee

Employer's Liability Exclusion

One of the recurring problems with respect to the employee exclusion in the context of trucking or motor carrier policies is whether or not to classify owner-operators as employees – over the years we have reported on many such cases. Some of these found owner-operators to be independent contractors, some of them found them to be employees. We suggested in last year's review that insurers might be able to avoid the uncertainty addressing this issue by incorporating the definition of employee found at 49 C.F.R. §390.5 into their policies. The underwriters at Canal Insurance Company had the same idea and it has paid immediate dividends in a case heard in federal court in the Eastern District of Tennessee. *Canal Insurance Co. v. Moore Freight Services, Inc.*, 2015 U.S. Dist. LEXIS 77426. This declaratory judgment action arose out of a wrongful death action filed by the wife and administratrix of the decedent Jerry Wilson. According to the allegations in the underlying action, Moore Freight Services ("Moore") hired Mr. Wilson to haul a shipment of glass, and provided him with a trailer. During the run, Mr. Wilson encountered problems with the truck's braking system. The complaint alleged that Mr. Wilson "pulled to the side of the road, got out of his vehicle and while responding to the stressful emergency," suffered a heart attack and died.

Canal Insurance Company ("Canal"), which insured Moore, asserted that it had no duty to defend or indemnify Moore in the underlying wrongful death action in light of its employee-indemnification exclusion. Canal alleged that Mr. Wilson was an employee to whom this exclusion applied. The policy at issue excluded coverage for "bodily injury" to "[a]n 'employee' of the 'insured' arising out of and in the course of: (1) [e]mployment by the 'insured'; or (2) [p]erforming the

duties related to the conduct of the 'insured's' business." The exclusion applied "[w]hether the 'insured' may be liable as an employer or in any other capacity."

Mr. Wilson's widow argued that the exclusion was not applicable because her husband had not been an "employee" insofar as he "could not have been 'operating a commercial vehicle' at the time of his death" as he "was not in the vehicle." The court rejected this argument, finding that "many courts have held injured non-drivers fall within the definition of 'employee.'" This includes drivers who are injured "while outside of the vehicle." Thus, "one need not be driving the commercial motor vehicle to be 'operating' it." As the court observed, Mr. Wilson "got out the vehicle so that he could ensure the vehicle's operability." The court also rejected the argument that Mr. Wilson was an independent contractor for Moore, a common-law distinction which has effectively been "eliminated" by federal regulation "to discourage motor carriers from using the independent contractor relationship to avoid liability exposure at the expense of the public." Based on these findings, the court held that Canal had no duty to defend or indemnify Moore.

Canal and Moore Freight Services were involved again in *Lopez v. Canal Insurance Co.*, 2015 U.S. Dist. LEXIS 114373 (W.D. Tex.). On August 17, 2010, a tractor trailer accident took the lives of Roger Franceware and Lorenzo Munoz. An action was commenced on behalf of the Estate of Lorenzo Munoz ("Munoz Estate") in state court, naming the Estate of Roger Franceware ("Franceware Estate") as a defendant. Jessica Lopez intervened in that action as the administratrix of Mr. Franceware's estate. The underlying action resulted in a state court verdict. The jury found that Mr. Franceware "was acting as an employee in the scope of his employment for [Moore]" at the time of the accident. On June 9, 2014, the state court entered its judgment, ordering that the Munoz Estate and Franceware Estate were entitled to damages against Moore.

Canal declined coverage, and Mrs. Lopez commenced an action against Canal for (1) breach of contract, (2) breach of the duty of good faith and fair dealing, (3) violations of the Texas Insurance Code, (4) violations of the Texas Deceptive Trade Practices Act, and (5) gross negligence. Canal filed a counterclaim seeking a declaratory judgment that coverage did not exist under the policy based on an employee exclusion. More specifically, Canal asserted that it had no duty to indemnify Moore "for the damages awarded to Lopez in the Underlying Judgment '[b]ecause Franceware was either an employee or statutory employee of Moore.'" Mrs. Lopez responded that this issue was not ripe for determination given that the state court judgment was under appellate review.

Under the policy's employee exclusion, Canal had no duty to provide coverage for "'bodily injury' to…[a]n 'employee' of the 'insured' arising out of and in the course of…[e]mployment by the 'insured' [or while] [p]erforming the duties related to the conduct of the 'insured's' business." Canal argued that the jury's finding – that Mr. Franceware was an employee acting within the scope of his employment – precluded coverage under the policy. The court accepted Mrs. Lopez's argument that Canal's motion was premature insofar as the judgment in the state court action, including the jury's finding that Mr. Franceware was an employee, had been submitted for appellate review. Accordingly, the facts established in the state court action were "not sufficiently determined at this time to rule on Canal's duty to indemnify."

Nevertheless, the court addressed Canal's argument that Mr. Franceware was an "employee," as that term is defined in the Federal Motor Carrier Act ("FMCA"). The FMCA only governs "the meaning of terms under insurance policies designed to comply with the federal requirements for motor carriers." In this case, the policy "strongly" indicated that the parties intended for it to conform to the federal regulations. In that regard, the court observed that "a passenger in a covered vehicle need not be driving at the time of an accident in order to qualify as an 'employee' of the insured." However, Canal was unable to cite any authority for the proposition that "*any* passenger in a covered motor vehicle, simply by virtue of their physical presence in the vehicle, qualifies as an employee" under the federal regulations. In order for a passenger to be considered an "employee," he or she must have been "in the vehicle for the purpose of operating that vehicle, even if not doing so at the time of the accident." Here, Lopez had "consistently" maintained that Mr. Franceware "was a mere passenger at the time of the wreck and not 'in the course and scope of employment' for Moore." Accordingly, the court denied Canal's motion without prejudice to re-file after resolution of the state court appeals.

Progressive Mountain Insurance Co. v. Madd Transportation, LLC, 2015 U.S. Dist. LEXIS 39558 (S.D. Ga.), aff'd, 2015 U.S. App. LEXIS 21191 (11th Cir.) focused on Madd Transportation, LLC ("Madd"), a "Georgia-based interstate motor carrier in the business of transporting goods for other companies on its tractor-trailers." Madd did not own any tractor-trailers, but instead leased them from its president (Mark Williams) and operational manager (Andre Doyle). The rigs were used by drivers to pick up and transport loads pursuant to assignments they received from Madd. A driver was free to accept or reject any assignment. Madd did not withhold taxes from their drivers' wages, nor did it purchase workers' compensation coverage for its drivers.

This case arose out of an injury sustained by Ted Owens, a truck driver. Mr. Owens had accepted an assignment from Madd to haul large metal pipes from defendant Ipsco Koeppel Tubulars, LLC's ("IPSCO") facility in Pennsylvania. Mr. Owens drove from Georgia to IPSCO's facility, where one of the IPSCO's employees used a crane to load the metal pipe on the flatbed. After the bundles of pipe were situated on the bed, Mr. Owens "moved between the loading platform and the trailer flatbed to throw securement straps over the bundles." The top bundle of pipe, which had remained stationary on the flatbed for only 45 to 60 seconds, fell and struck Mr. Owens.

Madd had in place a Commercial Auto Policy with Progressive. Among other provisions, the policy provided an exclusion for "[b]odily injury to an employee of any insured arising out of or within the course of that employee's employment by any insured; or [p]erforming duties related to the conduct of any insured's business…" The policy further stated that the exclusion applied "whether the insured may be liable as an employer or in any other capacity." The policy also excluded coverage for "[b]odily injury or property damage resulting from or caused by the movement of property by a mechanical device, other than a hand truck, not attached to an insured auto."

Mr. Owens' guardian initiated an action against IPSCO, and Madd was added as a third-party defendant. Progressive agreed to defend Madd in the underlying action, albeit under a reservation of rights. However, Progressive then sought a declaratory judgment that it had no duty to defend or indemnify Madd under the policy, citing the aforementioned exclusions.

With respect to the mechanical device exclusion, Madd claimed that any declaration was premature insofar as it was presently impossible to determine what caused the bundle to fall. As it concerned the employee exclusion, Madd argued that Mr. Owens was an independent contractor and, in any event, the determination of his employment status should be left for the underlying action. In response, Progressive contended that Mr. Owens' employment status was governed by the Federal Motor Carrier Safety Regulations ("FMCSR"), which include independent contractors as "employees" for insurance purposes. However, the FMCSR definition of employee had not been explicitly incorporated into the policy.

As an initial matter, the court found that the policy should be interpreted pursuant to Georgia law, under which a duty to defend exists unless the complaint's allegations are unambiguously excluded under the policy. The court also held that Georgia's common-law distinction between employees and independent contractors had no bearing on the terms of the policy. In this regard, the Court observed that "a majority of the courts" rely on "the FCMSR's language to interpret provisions of insurance policies drafted in compliance therewith, particularly employee exclusions," an approach deemed appropriate by the court given Georgia's adoption of the federal regulations. Based on the FMCSR's inclusion of independent contractors in its definition of "employees," the court held that Mr. Owens' was, for purposes of the exclusion, an "employee." The court also observed that "federal law creates a statutory employment relationship between interstate carriers and the drivers of the trucks leased to them." Thus, even if the distinction urged by Madd was correct, Mr. Owens would still be considered a statutory employee and therefore excluded from the policy.

In affirming, the Eleventh Circuit approved importing the regulatory definition of "employee" in 49 C.F.R. § 390.5 into the policy exclusion, citing *Consumers County Mutual Insurance Co. v. P.W. & Sons Trucking, Inc.,* 307 F.3d 362 (5th Cir. 2002), a leading authority for this approach. Interestingly, the appellate court also noted the inclusion of an MCS-90 endorsement in the Progressive policy, and reasoned that the definition of "employee" in the rest of the policy should be consistent with the definition in the endorsement.

Canal Insurance Co. v. National House Movers, LLC, et al., 414 S.C. 255, 777 S.E.2d 418 (Ct. App.), concerned the employment status of truck driver Kevin

Jones. National House Movers, LLC ("National"), is in the house-moving business. Ron Hewes, identified by the court as the only permanent employee of National, conducted all of the company's operations. He hired workers on a project-by-project basis, depending on the requirements of a particular job.

In February 2012, David Johnson, who had worked on National projects at various times, contacted Mr. Jones about assisting National in a house move. Before he contacted Mr. Jones, Johnson asked Hewes whether additional help was needed for the job, to which Hewes responded: "One more probably wouldn't hurt." Johnson picked Mr. Jones up and transported him to the jobsite. At the jobsite, Mr. Jones was tasked by Hewes with facilitating the movement of nonelectrical cable and telephone wires over the roof of the house to prevent the wires from getting snagged and causing damage. Although no one witnessed the accident, at some point Mr. Jones' arm made contact with a power line, causing him in serious injury.

Because National had not purchased workers' compensation coverage, Mr. Jones initiated a direct action against the company. National was insured under a commercial automobile insurance policy issued by Canal Insurance Company ("Canal"), which excluded coverage for any bodily injury sustained by an employee arising out of and in the course of the employee's work with National. The policy included the standard employee exclusion which included a "leased worker" defined as someone who was "leased to [the employer] by a labor leasing firm to perform duties related to the conduct of [the] business." By contrast, a "temporary worker," defined as "a person who is furnished to [the employer] to substitute for a permanent employee on leave or to meet seasonal or short-term workload conditions," was not included in the definition of "employee."

Canal asserted that the policy excluded coverage insofar as Mr. Jones was an employee of National. National, on the other hand, argued that Mr. Jones was a "temporary worker" and that coverage was therefore not excluded.

The first issue addressed by the court was whether Mr. Jones "was hired to 'meet seasonal or short-term workload conditions,'" a condition expressly included in the definition of "temporary worker" under the policy. Based on Mr. Jones' testimony and the parties' concessions that he "was one of the casual employees who worked only when short-term working conditions involving moving or raising a house required extra help," the court found that the first prong of the "temporary worker" definition was met.

Next, the court addressed Canal's argument that Mr. Jones was not "furnished" to National by a third-party since National had hired him directly. The policy did not define the term "furnished," thus requiring the court to look "to the usual and customary meaning" of the phrase. After consulting various dictionary definitions and decisions from other jurisdictions interpreting the term, the court found that "third party action is implicit in the meaning of 'furnish.'" However, the policy was silent regarding "who this third party must be." Because there were several reasonable interpretations as to who must "furnish" the worker, the term was rendered ambiguous.

Unlike a "leased worker," there was no express requirement in the policy that a "temporary worker" be furnished by a staffing or leasing agency. Based on this distinction, the court held that "the definition of 'temporary worker' is not qualified by the existence of any agency or employment relationship." Therefore, the court found that Mr. Jones was a temporary worker and that National was entitled to coverage.

- Jonathan Bard

3. Fair Labor Standards Act

The issue in *Rojas v. Garda CL Southeast, Inc.*, 2015 U.S. Dist. LEXIS 114571 (S.D. Fla.), was whether the class action plaintiffs, drivers or messengers for an armored car company, were covered employees entitled to overtime pay for work beyond forty-hours a week, as required under the Fair Labor Standards Act ("FLSA") , or were exempt employees subject to the Motor Carrier Act ("MSA"), in which case the employer's policy of unpaid overtime over fifty hours a week was permitted. The determination is based on a two-part test: (1) is the employer subject to USDOT jurisdiction, and (2) do the employee's duties directly affect the operational safety of vehicles used in transportation of property or passengers in interstate or foreign commerce? In this case, the employer satisfied the first prong by demonstrating that the overwhelming majority of its fleet was comprised of commercial motor vehicles (gross vehicle weight in excess of 10,000 pounds) used as transportation for compensation, that it held FMCSA motor carrier authority, submitted annual reports to the USDOT and was required to report safety incidents to the USDOT. The drivers were found to be involved in

interstate commerce, even if their own activities were confined to the state of Florida, because the shipments originated outside the state. The court did find a question of fact, though, as to which members of the class worked, at least in part, on vehicles weighing 10,000 pounds or less, in which the MCA exemption did not apply.

The FLSA also mandates a minimum wage for covered employees. In *Petrone v. Werner Enterprises, Inc.*, 2015 U.S. Dist. LEXIS 101053 (D. Neb.), the issue was not whether the truck driver trainees were exempt from this requirement, but whether the motor carrier employer had properly accounted for time spent in the sleeper berth in calculating compensable hours. The court looked to USDOT regulations and guidelines and found that, where a driver is on a tour of duty of fewer than 24 continuous hours, time spent in the sleeper berth should be regarded as time worked. Since the employer did not include any time spent in the sleeper berth as hours worked, judgment was entered in favor of the plaintiffs. The court also found that, while the motor carrier's policy on payment for short rest periods complied with the law, in practice the employer improperly failed to compensate trainees for rest periods shorter than 20 minutes.

Corporate officers of an enterprise subject to the FLSA can be held individually liable for failure to pay mandated wages if they have operational control over the enterprise. In *Collado v. J. & G. Transport, Inc.*, 2015 U.S. Dist. LEXIS 50899 (S.D. Fla.), the president and vice-president of the defendant motor carrier supervised the company's dispatcher/coordinators who interacted with drivers, hired and fired drivers, had signatory authority on the company's bank accounts, were empowered to contract on the company's behalf, and set the company's hours of operation. Under the circumstances, the court agreed that the president and vice-president were personally liable for FLSA wage violations. The court also found, however, a question of fact as to whether the plaintiff driver qualified as an "employee" under the FLSA, rather than an independent contractor, since he could choose the hours he worked, used his own cell phone to communicate with the company, controlled the routes taken to or from customer locations, had the ability to decline loads, and could use his own truck (if he had one) and was permitted to haul for motor carriers or customers other than the defendant.

In 2008, the Safe, Accountable, Flexible, Efficient Transportation Equity Act ("SAFETEA-LU") Technical Corrections Act ("TCA") limited the MCA exemption to the FLSA, broadening the definition of a "covered employee" to include persons working with vehicles weighing 10,000 pounds or less; there is an exception, however, where such vehicles are used to transport hazardous materials requiring placarding. In *Childress v. Ozark Delivery of Missouri L.L.C.*, 95 F. Supp.3d 1130 (W.D. Mo.), the court found that the drivers in question spent more than a *de minimis* amount of time working on lighter trucks, even if they also spent time working on heavier trucks. Moreover, the employer conceded that, even though the lighter trucks were used on occasion to haul hazardous flammable materials, the small amounts transported did not require placarding. The court also found that, alongside the motor carrier, a personnel service qualified as a joint-employer since it maintained the drivers' employment records, assured that drivers were paid according to federal wage-hour laws, processed payroll, drafted employment policies governing a number of the drivers' day-to-day activities, and provided administrative services on behalf of the motor carrier.

The plaintiff in *McMaster v. Eastern Armored Services, Inc.*, 780 F.3d 167 (3d Cir.), also qualified as an FLSA employee, for purposes of overtime pay, under the 10,000 pound vehicle exemption, since she spent 51% of her total days working on heavier vehicles and 49% of her total days working on lighter vehicles. Notably, the court of appeals did not reach the question of whether the plaintiff was only entitled to overtime for hours worked on the lighter vehicles, since the defendant had not raised this argument in the court below.

In *Bilskey v. Bluff City Ice, Inc.*, 2015 U.S. Dist. LEXIS 10687 (E.D. Mo.), the court found that the plaintiff drivers' time spent "on call" need not be included in calculating compensable hours for purposes of FLSA overtime rules, since there was no evidence as to how quickly the drivers were required to respond to a call, and generally insufficient evidence to show that being on-call had a significant effect on the drivers' personal activities.

The defendant logistics advisor/shipping broker in *Koehler v. Freightquote.com, Inc.*, 2015 U.S. Dist. LEXIS 89691 (D. Kan.) classified various of its employees as exempt from the provision of the FLSA. The court found a question of fact as to how much time the Account Representative/Freight Brokers and Customer Activation Specialists spent on purely administrative duties (which were exempt), compared

with time spent on selling the defendant's services (which was not exempt). It was a closer question with regard to the Truckload Coverage Specialists, whose function was to find a motor carrier and negotiate with it to move a load; still, since the evidence could have supported a finding that their other duties were principally administrative in nature, summary judgment for the plaintiffs was denied.

In *Mazzarella v. Fast Rig Support, LLC*, 2015 U.S. Dist. LEXIS 84275 (M.D. Pa.), the plaintiffs were truck drivers transporting water to natural gas drilling sites (which utilized the technique known as "hydraulic fracturing," or "fracking"). They sued their motor carrier employers for overtime pay after 40 hours a week, as mandated by the FLSA, as opposed to 45 hours as required by the employers. The MCA exemption turned on whether the water being carried qualified as "property." The court found that the water in question was indeed "property," and its transportation governed by the MCA, since (1) the gas drilling companies owned the water and retained the rights to use and transfer it as they chose; (2) the transported water was accounted for by the gallon; and (3) the drilling companies had the responsibility to dispose of the water in accordance with specific state and federal regulations.

In *Resch v. Krapf's Coaches, Inc.*, 785 F.3d 869 (3d Cir.), only 1.3% of the plaintiff drivers' trips required them to cross state lines; sixteen plaintiffs never crossed state lines, eight crossed state lines only one time, and five crossed state lines fewer than five times. Since, however, 6.9% of all trips for the motor carrier were interstate, the carrier earned as much as 9.7% of its annual revenues from interstate hauls, and all of the drivers were presumed to be available for interstate work, the court found that the drivers fell within the MCA exemption and were ineligible for FLSA overtime wages.

- Philip A. Bramson

4. Workers' Compensation

In *Black v. Dixie Consumer Products LLC*, 2015 U.S. Dist. LEXIS 105642 (W.D. Ky.), an employee of the consignee ran over the plaintiff truck driver with a forklift while unloading dunnage (inexpensive or waste material used to load and secure cargo during transportation) from the driver's trailer at the consignee's location. The plaintiff collected workers compensation benefits through his motor carrier employer, and then brought an action for damages against the consignee. The consignee argued that it was a statutory employer of the driver as a matter of Kentucky law, and that the damages action was barred under the exclusive remedy provisions of Kentucky's workers' compensation statute. The court found that the motor carrier's contract with the consignee called only for transportation of cargo, not loading or unloading and certainly not unloading of dunnage. Since the motor carrier had not been hired to perform this regular and recurring part of the consignee's business, the motor carrier's driver was an independent contractor and not an employee of the consignee. (Interestingly, the court also held that, by impleading the motor carrier and alleging that the driver's negligence contributed to the accident, the consignee had raised a question as to whether its sole negligence caused the loss and was contractually entitled to a defense from the motor carrier, even though the driver's pleading alleged only the consignee's negligence.)

In *Collins v. Seko Charlotte*, 412 S.C. 283, 772 S.E.2d 510 (S.C.), Seko Charlotte was a motor carrier which "subcontracted" a load to West Expedited, the motor carrier employer of the plaintiff who was killed while on a return trip after delivering a subcontracted load. The South Carolina Workers' Compensation Commission had found that the driver was an independent contractor, and not an employee of Seko Charlotte, because West Expedited had the exclusive right to control his activities once the delivery was completed. The South Carolina Court of Appeals, though, determined that the proper inquiry was whether the driver was a statutory employee of Seko Charlotte and, finding that he was, overruled the Workers' Compensation Commission.

In affirming, the Supreme Court of South Carolina agreed that the statutory employee test, rather than the employee/independent contractor test, was appropriate, noting that active control of the worker is not the focal point of the statutory employment relationship. South Carolina's workers' compensation act contemplates that a subcontractor's employee is deemed an employee of the primary contractor while performing the subcontract, and that Seko Charlotte must have contemplated that the subcontracted transportation would involve not only the delivery but a return trip (most likely without a load from anyone other than Seko Charlotte). Accordingly, the driver qualified as an employee entitled to workers' compensation benefits from Seko Charlotte.

We reported last year on *Max Trucking, LLC v. Liberty Mut. Ins. Co.*, 2014 U.S. Dist. LEXIS 104509 (W.D.

Mich.), in which a Michigan-based motor carrier entered into written agreements with its drivers who were located all around the country; the contracts asserted that the drivers were independent contractors, and they were to use trucks that they own or that they had leased from Max Trucking. Nonetheless, the court found that the 18 Michigan drivers who leased their trucks through Max Trucking were employees under Michigan law, as none of them maintained a separate business, held themselves out as motor carriers or themselves qualified as employers. In affirming, 802 F.3d 793 (6th Cir.), the Court of Appeals reiterated the District Court's findings on these three points and added that the facts demonstrated the drivers' economic dependence on Max Trucking. The court also noted that Max Trucking's elimination of the position of employee-trucker, and the institution of the lease-to-buy program, contributed to a business model designed (arguably) to avoid workers' compensation responsibilities.

- Philip A. Bramson

5. Unfair Labor Practices

In challenging the motor carrier's denial of overtime pay in *Arlington v. Miller's Trucking, Inc.*, 378 Mont. 324, 343 P.3d 1222 (Mont.), the driver argued, and the Supreme Court of Montana agreed, that the employer was responsible for keeping records of hours worked and could not blame its failure to do so on the employee's failure to record his own hours. Even if the hours claimed by the employee (and not directly contradicted by evidence from the employer) lack credibility, the remedy is to ask the court to reduce the hours, rather than dismiss the claim for overtime pay outright. The court did agree with the administrative hearing officer, however, that the motor carrier had never guaranteed the driver a salary of $60,000 or more.

In *Anderson v. United Parcel Service, Inc.*, 2015 U.S. Dist. LEXIS 33550 (W.D. Pa.), UPS maintained that it had terminated a part-time driver because she had been involved in an accident driving a company vehicle and had deliberately failed to report the accident to the company. The driver maintained that she had been wrongfully terminated because UPS objected to her taking time off to which she was entitled under the federal Family Medical Leave Act ("FMLA") (or, alternatively, that her firing was in retaliation for complaints filed with the Department of Labor). Since her failure to report the accident was a clear breach of the collective bargaining agreement between UPS and its employees and recognized grounds for termination, the court found that the plaintiff had failed to show that UPS's asserted basis for termination was only a pretext. The court was also unimpressed by the argument that a different employee (who had not taken time off under the FMLA) had failed to report an accident but had been reinstated after being discharged, since the manager who reinstated the other driver was different than the manager who fired Anderson. (It was also noted that another employee accused of abusing FMLA leave was actually promoted to a managerial position shortly before the plaintiff's termination.)

In *Carlson v. FedEx Ground Package Systems, Inc.*, 787 F.3d 1313 (11th Cir.), another in a series of class actions around the country debating whether drivers for Federal Express are employees or independent contractors, there were some undisputed facts supporting a determination of independent contractor status: the drivers themselves could hire replacement drivers, did not lease their trucks or any equipment from FedEx, and were not required to use their trucks exclusively in FedEx's business; FedEx did not withhold taxes or social security, and it was not clear that FedEx had complete discretion in terminating employment. There were other undisputed facts supporting a finding of employee status: drivers had to maintain logs and daily inspection reports to be submitted to FedEx, and had to conform to FedEx standard of uniforms and grooming or risk being denied the right to service customers. The Eleventh Circuit, applying Florida law, declined to weigh the evidence and concluded that this task was best left to the jury.

- Philip A. Bramson

6. Vicarious Liability

Is a motor carrier vicariously liable for the negligence of a truck driver where the truck is owned by someone else and the driver is employed by the truck owner? Two courts came to different conclusions. In *Delaney v. Rapid Response, Inc.*, 81 F. Supp.3d 769 (D.S.D), the driver was hired, supervised, paid and managed by Rapid Response, Inc., the owner/lessor of the truck. The truck was leased to Rapid Response 1, LLC, a federally-certificated motor carrier, and the lease (in accordance with federal law) gave Rapid Response 1, LLC, exclusive possession, control, and use of the truck (even though the lessor Rapid Response, Inc. retained the ability to use and control the truck, without limitation). The district court found that the lessee

Rapid Response 1, LLC, was the statutory employer of the driver and vicariously liable for his negligence, since the lease was in place and the truck bore the lessee's placards at the time of the loss. (The court also noted that the driver met the federal statutory and regulatory definitions of an employee.)

Compare *Peninsula Logistics, Inc. v. Erb*, 159 So.3d 301 (Fla. Ct. App.), in which the claimants, while conceding that the driver was an independent contractor, argued that the motor carrier which assigned the load was vicariously liable for the driver's negligence, because he should be considered an employee of the motor carrier under 49 C.F.R. § 390.5 (as incorporated into Florida regulations). Since, however, the truck was owned by an owner-operator, and the owner-operator assigned the driver, the court found that the motor carrier did not qualify as an "employer" of the driver within the meaning of the regulations.

In *Tichacek v. Jones Motor Group, Inc.*, 2014 U.S. Dist. LEXIS 156590 (S.D. Tex.), the company leasing a truck to a trucking company was not the employer of the trucker's drivers and was entitled to summary judgment in plaintiff's lawsuit against it for allegedly failing to provide a safe workplace. The court found that the leasing agreement between the leasing company and the lessee expressly listed the drivers, including plaintiff, as employees of the lessee, not the leasing company. In addition, the court found that plaintiff had obtained his own insurance coverage as an independent contractor. The court also found that the leasing company did not exercise the requisite control over the plaintiff's work, specifically at the time of the accident, to be considered an employer. The court noted that the leasing company's control consisted merely of training plaintiff to obtain a required certification and scheduling the plaintiff's trips; there was no nexus between the leasing company's control and plaintiff's conduct that caused his injury.

In *Vargas v. FMI, Inc.*, 233 Cal. App.4th 638, 182 Cal. Rptr.3d 803 (Cal Ct. App.), two co-drivers, hired by owner-operator Eves, were hauling a load for the motor carrier/truck lessee FMI. One of the drivers, while in the sleeper berth, was injured when the other driver rolled their tractor-trailer rig. FMI argued that it could not be held vicariously liable for the negligence of a driver supplied by the owner-operator, an independent contractor.

The court found that the entire scheme of federal regulation of motor carriers has two prime purposes – to protect shippers and members of the public, and to ensure the safety of commercial motor vehicle drivers. Accordingly, the court found that FMI's federal operating authority imposed a non-delegable duty to provide a safe working environment for drivers of vehicles it leased. (In order to reach this conclusion, and impose vicarious liability on the motor carrier, the court reasoned that, while federal financial responsibility regulations (embodied in the MCS-90 endorsement) did not extend to injuries to a motor carrier's "employees," nothing relieved the motor carrier from being financially responsible for injuries to "independent contractors." Notably, however, the court did not address the fact that, under 49 C.F.R. § 390.5, independent contractors who drive commercial motor vehicles for authorized motor carriers <u>are</u> considered employees of the motor carrier, by definition.)

The owner-operator itself argued that, as the lessee of the tractor, it was shielded from vicarious liability for the driver under the Graves Amendment. The court rejected this argument in short order, finding that a single truck lease did not establish that the owner-operator was "engaged in the trade or business of renting or leasing motor vehicles."

- Matthew J. Rosno

7. Other Employment Issues

In *Jackson v. Morse Moving & Storage, Inc.*, 2015 U.S. Dist. LEXIS 50728 (S.D. Ind.), an African-American truck driver argued that his employer's refusal to raise his salary constituted racial discrimination. Since the driver had indicated on his application that he would accept an initial salary of $11 per hour (which he received), and since he produced no evidence that any other employee received a raise while he did not, the court granted summary judgment in favor of the employer on the discrimination count. The court did find a question of fact, however, on whether the plaintiff had been terminated in retaliation for his complaining about racial discrimination.

In *Massachusetts Delivery Association v. Coakley*, 769 F.3d 11 (1st Cir. 2014), the Court of Appeals looked at whether the Federal Aviation Administration Authorization Act ("FAAAA") pre-empts a section of the Massachusetts Independent Contractor Statute. The law had been challenged by a non-profit trade organization representing same-day delivery companies, who argued that the Massachusetts law

compelled them to treat all of their couriers as employees, rather than independent contractors, since the couriers perform delivery services within "the usual course of business of" the delivery companies. The plaintiffs asserted that, by forcing them to treat their couriers as employees, the Massachusetts statute had a profound effect on the prices, routes and services that they offered to customers (as well as doubling their annual labor costs). The First Circuit remanded the case to the District Court to determine whether the statute's effect on prices, routes and services was sufficient to rise to a level for FAAAA preemption.

On remand, 2015 U.S. Dist. LEXIS 88537 (D. Mass.), the District Court reversed its original decision and found that the Massachusetts statute was, indeed, pre-empted by the FAAAA. The court found that (1) the use of company vehicles (industry standard where couriers are employees), as well as the need to institute statutorily-mandated meal breaks, would significantly affect the routes taken by the drivers and the prices the delivery services would charge; (2) that the delivery companies' ability to provide "on-demand" services would be affected if they were required to pay employees for time spent "on call," rather than utilizing a pool of flexible independent contractors; and (3) that the delivery companies' increased costs (such as minimum wages and statutorily-mandated benefits) would inevitably result in higher prices for customers.

The focus on the flexible scheduling of the plaintiff drivers led the court in *Villapando v. Exel Direct Inc.*, 2015 U.S. Dist. LEXIS 118065 (N.D. Cal.) to distinguish *Coakley*, finding that that the defendant motor carrier Exel generally scheduled deliveries in advance, providing a list of stops that drivers must complete every day at morning meetings, and did not rely on having a pool of on-call but uncompensated drivers. In rejecting Exel's FAAAA pre-emption argument, the California District Court found that the Massachusetts statute imposed a test which intentionally made it more difficult to qualify for independent contractor status, which, when applied to motor carriers, could be seen as an attempt by the state to impose its own public policies or theories of competition on a motor carrier. In contrast, the plaintiffs' meal and rest break claims in *Villapando* turned on California's well-established test for independent contractors to assert claims under general wage and hour laws that the Ninth Circuit had already found are not preempted by the FAAAA.

- Philip A. Bramson

8. Fixing America's Surface Transportation (FAST) Act

In December 2015, Congress passed, and President Obama signed into law, the Fixing America's Surface Transportation (FAST) Act, which is five-year legislation intended to improve America's roads, bridges, public transit, and rail transportation systems and reform federal surface transportation programs. Secretary of Transportation Anthony Foxx said, "After hundreds of Congressional meetings, two bus tours, visits to 43 states, and so much uncertainty – and 36 short term extensions – it has been a long and bumpy ride to a long-term transportation bill. It's not perfect, and there is still more left to do, but it reflects a bipartisan compromise I always knew was possible." The House of Representatives passed the bill by a vote of 359-65 on Dec. 3, and the Senate passed the bill by a vote of 83-16 that same evening.

The Owner-Operator Independent Drivers Association ("OOIDA") expressed optimism that the Act would slow any regulatory movement toward raising levels of minimum financial responsibility, since the USDOT will be required to first analyze how higher insurance limits would impact costs of medical care, compensation, and how often claims exceed the current minimum levels. OOIDA also applauded the fact that the bill did not increase the size of trucks permitted on the nation's highways, and that it expanded the states' rights to regulate non-consensual towing.

Below is a summary of the legislation, provided by the House of Representatives website at http://transportation.house.gov/fast-act/#top1:

Roads & Bridges

- Facilitates commerce and the movement of goods by refocusing existing funding for a National Highway Freight Program and a Nationally Significant Freight and Highway Projects Program
- Expands funding available for bridges off the National Highway System
- Converts the Surface Transportation Program (STP) to a block grant program, increases flexibility for states and local governments, and rolls the Transportation Alternatives Program into the STP Block Grant
- Streamlines the environmental review and permitting process to accelerate project approvals
- Eliminates or consolidates at least six separate

offices within the Department of Transportation and establishes a National Surface Transportation and Innovative Finance Bureau to help states, local governments, and the private sector with project delivery

- Increases transparency by requiring the Department of Transportation to provide project-level information to Congress and the public
- Promotes private investment in our surface transportation system
- Promotes the deployment of transportation technologies and congestion management tools
- Encourages installation of vehicle-to-infrastructure equipment to improve congestion and safety
- Updates research and transportation standards development to reflect the growth of technology

Public Transportation

- Increases dedicated bus funding by 89% over the life of the bill
- Provides both stable formula funding and a competitive grant program to address bus and bus facility needs
- Reforms public transportation procurement to make federal investment more cost effective and competitive
- Consolidates and refocuses transit research activities to increase efficiency and accountability
- Establishes a pilot program for communities to expand transit through the use of public-private partnerships
- Eliminates the set aside for allocated transit improvements
- Provides flexibility for recipients to use federal funds to meet their state of good repair needs
- Provides for the coordination of public transportation services with other federally assisted transportation services to aid in the mobility of seniors and individuals with disabilities
- Requires a review of safety standards and protocols to evaluate the need to establish federal minimum safety standards in public transportation

- Sanjeev Devabhakthuni

9. FMCSA Watch

2015 was a busy year for the Federal Motor Carrier Safety Administration in terms of proposing new rules, enacting regulations, and offering regulatory guidance. One of the more notable developments, though, involved what did not happen in 2015.

On August 23, 2013, the Federal Motor Carrier Safety Administration published its final rule creating the Unified Registration System, an online mechanism for regulated entities (motor carriers, brokers, freight forwarders, intermodal equipment providers, cargo tank facilities) to register, apply for operating authority, and file proof of financial responsibility. At that time, it was expected that the system would be up and running by October 23, 2015.

Technical delays slowed the process, however. To be sure, certain aspects of the URS are in effect, and new applicants, which have never been assigned a USDOT, Motor Carrier (MC), Mexico owned or controlled (MX), or Freight Forwarder (FF) number, have been required to use the new online application when requesting registration and a USDOT number since December 12, 2015.

Nevertheless, the system will not be available for use by those entities which have already been assigned such numbers until (as estimated) September 30, 2016. Accordingly, FMCSA announced on October 21 (80 Fed. Reg. 63,695) that the new regulations, including amendments to existing regulations, would not be published completely in the Code of Federal Regulations until September 30, 2016. There will be an additional three month grace period after that for private hazardous material carriers and exempt for-hire carriers, who have registered by that date, to file evidence of financial responsibility. All entities registered by September 30, 2016, will also be given an additional three months to file designation of an agent for service of process.

(We have been informed that, until the whole system is up and running on 09/30/16, new for-hire motor carrier registrants obtaining interstate operating authority will still be issued “MC” docket numbers. Ultimately, though, as we have noted in previous years, only census numbers will be assigned and MC numbers will be discontinued. The new forms to be used when applying for operating authority have not been finalized yet, but the most likely forms will be a variation on the filing and MCS-90 endorsement currently in use for for-hire motor carriers, revised to reflect application to

exempt motor carriers and private motor carriers (with financial responsibility limits yet to be determined). It has also been suggested that self-insurance might be phased out across the board as an acceptable form of financial responsibility, leaving only liability insurance policies and surety bonds.)

In other FMCSA news:

80 Fed. Reg. 7814 (Feb. 12) – announcing the appointment of members to the Entry-Level Driver Training Advisory Committee (ELDTAC) established to complete a negotiated rulemaking on Entry-Level Driver Training (ELDT) for individuals who want to operate Commercial Motor Vehicles (CMVs). (Meeting schedule announced at 80 Fed. Reg. 12,136 (Mar. 6).)

80 Fed. Reg. 15,913 (Mar. 26) – regulatory guidance stating that crashes in which motorists strike attenuator trucks (highway safety vehicles equipped with an impact attenuating crash cushion intended to reduce the risks of injuries and fatalities resulting from crashes in construction work zones) while they are deployed at construction work zones are not covered by the definition of "accident," and such occurrences will not be considered by FMCSA under its Compliance, Safety, Accountability Safety Measurement System (SMS) scores, or Safety Fitness Determination for the motor carrier that controls the attenuator truck. This guidance will provide the motor carrier industry and Federal, State, and local law enforcement officials with uniform information for use in determining whether certain crashes involving attenuator vehicles must be recorded on the motor carrier's accident register and considered in the Agency's safety oversight programs.

80 Fed. Reg. 18,146 (Apr. 3) – making adjustments to civil penalty amounts assessed to those who violate the Federal Motor Carrier Safety Regulations (FMCSRs) and Hazardous Materials Regulations (HMRs), in order to keep up with inflation.

80 Fed. Reg. 22,790 (Apr. 23) – requiring certified medical examiners (MEs) performing physical examinations of commercial motor vehicle (CMV) drivers to use a newly developed Medical Examination Report (MER) Form, for the Medical Examiner's Certificate (MEC); and report results of all CMV drivers' physical examinations performed (including the results of examinations where the driver was found not to be qualified) to FMCSA by midnight (local time) of the next calendar day following the examination. For holders of CLP/CDLs (interstate and intrastate), FMCSA will electronically transmit driver identification, examination results, and restriction information from examinations performed from the National Registry to the State Driver's Licensing Agencies (SDLAs). The Agency will also transmit medical variance information for all CMV drivers electronically to the SDLAs.

80 Fed. Reg. 30,163 (May 27) – regulatory guidance explaining that a commercial driver's license (CDL) passenger endorsement is required for drivers of certain custom motorcoaches designed or used to transport fewer than 16 passengers, including the driver, where the vehicle is intended to transport passengers rather than cargo.

80 Fed. Reg. 30,164 (May 27) – adopting regulations governing the lease and interchange of passenger-carrying commercial motor vehicles (CMVs) to: (1) identify the motor carrier operating a passenger-carrying CMV that is responsible for compliance with the Federal Motor Carrier Safety Regulations (FMCSRs); and (2) ensure that a lessor surrenders control of the CMV for the full term of the lease or temporary exchange of CMVs and drivers. The regulations are intended to ensure that unsafe passenger carriers cannot evade FMCSA oversight and enforcement by entering into a questionable lease arrangement to operate under the authority of another carrier that exercises no actual control over those operations. This rule will enable the FMCSA, the National Transportation Safety Board (NTSB), and the Administration's Federal and State partners to identify motor carriers transporting passengers in interstate commerce and correctly assign responsibility to these entities for regulatory violations during inspections, compliance investigations, and crash investigations. It will also provide the general public with the means to identify the responsible motor carrier at the time transportation services are provided.

80 Fed. Reg. 32,861 (June 10) – amending its own Rulemaking Procedures by adding a new section establishing the standards and procedures that FMCSA will use regarding the submission of certain confidential commercial or financial information that is referred to in this rule as "confidential business information" (CBI). This rule also sets forth the procedures for asserting a claim of confidentiality by parties who voluntarily submit CBI to FMCSA in connection with a notice-and-comment rulemaking and in a manner consistent with the standards adopted in this rule.

80 Fed. Reg. 35,253 (June 19) – announcing plans to utilize the Safety Measurement System (SMS) as part

of the Hazardous Material Safety Permit (HMSP) review process and institute an ongoing requirement to conduct compliance reviews for HMSP motor carriers with insufficient data to utilize SMS. FMCSA will use SMS scores to provide enhanced oversight of HMSP holders, to identify poor-performing carriers for a safety fitness compliance review, and to provide grounds for suspension or revocation. Both of these processes provide more flexibility to HMSP holders attempting to correct identified deficiencies, affording the motor carrier the right to administrative review and the opportunity to present corrective action.

80 Fed. Reg. 59,664 (Oct. 2) – regulatory guidance making it clear that, within certain limits, a driver must be allowed to review his or her automatic on-board recording devices (AOBRD) records, annotate and correct inaccurate records, enter any missing information, and certify the accuracy of the information. The AOBRD must retain the original entries, and reflect the date, time, and name of the person making edits to the information. Drivers' supervisors may request that a driver make edits to correct errors, but the driver must accept or reject such requests. Driving time may not be edited except in the case of unidentified or team drivers, and when driving time was assigned to the wrong driver or no driver.

80 Fed. Reg. 60,592 (Oct. 7) – proposing regulations to add a definition of "major tread groove;" revise the rear license plate lamp requirement to provide an exception for truck tractors registered in states that do not require tractors to have a rear license plate; provide specific requirements regarding when violations or defects noted on a roadside inspection report need to be corrected; amend Appendix G to the FMCSR's "Minimum Periodic Inspection Standards," to include provisions for the inspection of antilock braking systems (ABS), automatic brake adjusters, and brake adjustment indicators, speed-restricted tires, and motor coach passenger seat mounting anchorages; and amend the periodic inspection rules to eliminate the option for motor carriers to use a violation – free roadside inspection report as proof of completing a comprehensive inspection at least once every 12 months.

80 Fed. Reg. 74,695 (Nov. 30) – adopting regulations that prohibit motor carriers, shippers, receivers, or transportation intermediaries from coercing drivers to operate commercial motor vehicles (CMVs) in violation of certain provisions of the Federal Motor Carrier Safety Regulations (FMCSRs), including drivers' hours-of-service limits, the commercial driver's license (CDL) regulations, drug and alcohol testing rules, and the Hazardous Materials Regulations (HMRs). In addition, the rule prohibits anyone who operates a CMV in interstate commerce from coercing a driver to violate the commercial regulations. This rule includes procedures for drivers to report incidents of coercion to FMCSA, establishes rules of practice that the Agency will follow in response to reports of coercion, and describes penalties that may be imposed on entities found to have coerced drivers.

80 Fed. Reg. 76,649 (Dec. 10) – proposing requirement that passengers in property-carrying commercial motor vehicles (CMVs) use the seat belt assembly whenever the vehicles are operated on public roads. The proposed rule would hold motor carriers and drivers responsible for ensuring that passengers riding in the CMV are also using the seat belts required by the Federal Motor Vehicle Safety Standards (FMVSS).

80 Fed. Reg. 78,292 (Dec. 16) – establishing minimum performance and design standards for hours-of-service (HOS) electronic logging devices (ELDs); requirements for the mandatory use of these devices by drivers currently required to prepare HOS records of duty status (RODS); requirements concerning HOS supporting documents; and measures to address concerns about harassment resulting from the mandatory use of ELDs.

80 Fed. Reg. 81,503 (Dec. 30) – withdrawing a June 17, 2015 (80 Fed. Reg. 34,588) notice of proposed rulemaking (NPRM), which would have required each commercial motor vehicle (CMV) operated by a United States-domiciled motor carrier engaged in interstate commerce to display a label applied by the vehicle manufacturer or a U.S. Department of Transportation (DOT) Registered Importer to document the vehicle's compliance with all applicable Federal Motor Vehicle Safety Standards (FMVSS) in effect as of the date of manufacture. Because the FMVSS critical to the operational safety of CMVs are cross-referenced in the Federal Motor Carrier Safety Regulations (FMCSR), FMCSA determined that it can most effectively ensure that motor carriers maintain the safety equipment and features provided by the FMVSS through enforcement of the FMCSRs, making an additional FMVSS certification labeling regulation unnecessary.

- Philip A. Bramson

10. The Carmack Amendment/Cargo Claims

Preemption

In *American Home Insurance Co. v. A.P. Mollermaersk A/S*, 609 Fed. Appx. 662 (2d Cir. 2015), defendant A.P. Mollermaersk A/S ("Maersk"), an ocean carrier, agreed to transport a shipment of goods from Illinois to Australia pursuant to a single shipping contract that covered the entire journey (a "through bill of lading"). Maersk subcontracted with BNSF Railway Company to transport the cargo by rail from Illinois to California where it was to be loaded onto defendant's vessels for transportation to Australia. The shipment derailed on the way to California. Plaintiff paid the damage claim and sued Maersk and BNSF.

In a previous decision, the District Court had held that the Carmack Amendment applied to that portion of the shipment being handled by BNSF. A second decision expanded the scope of that holding and held that the Carmack Amendment applied to the entire scope of plaintiff's claims against BNSI. The court, though, dismissed the claim as against Maersk, finding that ocean carriers were not governed by the Carmack Amendment.

On appeal, plaintiff argued that Maersk had assumed BSNF's obligations under the Carmack Amendment as a matter of contract. The court rejected that argument finding that plaintiff had waived the contract argument by earlier arguing that that shipment was governed by the Carmack Amendment. Because the District Court had correctly held that Maersk was not covered by the Carmack Amendment as it was neither a rail carrier nor a freight forwarder, the decision of the District Court dismissing the claim as against Maersk was affirmed.

At issue in *Muzi v. North American Van Lines, Inc.*, 2015 U.S. Dist. LEXIS 33542 (D. Neb.), was whether the Carmack Amendment preempted a state law tort claim for bad faith based on the defendant's refusal to settle a damage claim in connection with a policy of insurance that it had issued on a shipment of household goods. Defendants moved to dismiss the state law claim on the ground that the Carmack Amendment preempted the claim. Plaintiff alleged that she had procured insurance on the shipment from the defendants that would provide her with an additional payment if her goods being handled by the defendant were damaged.

The court stated that the Carmack Amendment preempts state law claims against interstate motor carriers and provides the exclusive cause of action for loss or damage to goods arising from interstate transportation. When, however, a plaintiff alleges liability on a ground that is separate and distinct from the loss, or damage to, the goods, the claim is not preempted. Similarly, a claim that did not arise from the same conduct as the claims for delay, loss or damage to shipped property will not be preempted. The court noted that the Interstate Commerce Act allowed carriers of household goods to offer shippers supplemental insurance coverage if the shipper elected a release rate for a shipment. The court then held that if the plaintiff's bad faith claim arose not out of the transportation of goods, but under the obligations arising separate and apart from the loss or damage to the goods, the state law claim may not be preempted.

The issue in *Air Liquide Mex. S. de R.L.de C.V. v. Hansa Meyer Global Tranps. USA, LLC*, 2015 U.S. Dist. LEXIS 103525 (S.D. Tex.), was whether a third-party defendant could remove a state law claim for damage to a shipment to federal court based on the preemptive effect of the Carmack Amendment. Plaintiff had contracted with the defendant for delivery of a piece of refinery equipment from India to Mexico by way of Magnolia, Texas. The shipment was damaged when the equipment was struck by a train at a grade crossing. The plaintiff sued defendant for the damage to the shipment. The defendant then sued the third-party defendants who handled the shipment under the Carmack Amendment. The third-party defendants removed the case to federal court arguing that the Carmack Amendment preempted the claims as against them. The plaintiff moved to remand the case back to state court.

The court held that the third-party defendants could not remove the case to federal court because the removal statute, 28 U.S.C. § 1441, only permitted removal by defendants, not third-party defendants. In addition, the court held that the third-party defendants had not demonstrated that the third-party claims were separate and independent from the principal claims which, in certain limited circumstances, would permit removal. The claims by the defendant/third-party plaintiff were closely related to the claims by the plaintiff against the defendant. Removal, therefore, was not available to the third-party defendants and the case was remanded to state court.

Interestingly, plaintiff in this case sued the third-party defendants directly in Texas state court in *Air Liquid*

Mexico S. de R.L. de C.V. v. Talleres Willie, Inc., Civil Action No. H-4-211, (July 31, 2015), a case that is discussed below on the issue of what entity can be considered a motor carrier under the Act. The defendants in that case removed the case to federal court arguing preemption by the Carmack Amendment. Plaintiff moved to remand but the motion was denied in that case.

Definition of "Motor Carrier"

In *AXA Corporate Solutions Assurance v. Great American Lines, Inc.*, 2015 U.S. Dist. LEXIS 171369 (D.N.J.), the court addressed several issues in determining which party was liable for the theft of a load of pharmaceuticals valued at over $9,000,000. Plaintiff had insured the load for the consignee and, after paying the claim, sued defendant Great American Lines and MVP, the carrier that Great American had hired to transport the shipment for the loss. The first issue the court had to address was MVP's argument that it was not a "motor carrier" as the term is defined for the purpose of the Carmack Amendment. The Carmack Amendment defines a "motor carrier" as "a person providing motor vehicle transportation for compensation." 49 U.S.C. §13120(14). The definition of "transportation" under the Act includes "a motor vehicle" and "services related to that movement, including arranging for, receipt, delivery ... of ... property." 49 U.S.C. § 13120(21). MVP argued that it was not a motor carrier because the driver was assigned to work for Great American, was operating under Great American's carrier authority and because the truck bore Great American's placards. In addition, all dispatching and accounting for the freight was handled exclusively through Great American's refrigerated division. The court found that it was undisputed that MVP had hired the driver and had owned the tractor trailer that was carrying the freight. Those facts were sufficient to support a finding that MVP was a "motor carrier" under the Carmack Amendment. (The shippers have moved for reconsideration of the District Court's decision.)

Air Liquid Mexico S. de R.L. de C.V. v. Talleres Willie, Inc., 2015 U.S. Dist. LEXIS 100650 (S.D. Tex), looked at whether a defendant that had been dismissed from an action could be considered a "motor carrier" under the Carmack Amendment. Plaintiff had contracted with Hansa Meyer, a non-party to the action, to transport a piece of refinery equipment from India to Houston and then on to Mexico by way of Magnolia, Texas. The shipment was damaged when the equipment was struck by a train at a grade crossing. The plaintiff sued various defendants (but not the carrier with whom it had contracted) in state court for the damage to the shipment. The defendants removed the case to federal court arguing that the Carmack Amendment preempted the claims as against them. The plaintiff moved to remand to state court, but the federal court denied the motion.

The defendants then moved to dismiss the complaint arguing that the plaintiff's state law claims were preempted by the Carmack Amendment. The court granted the motion but allowed the plaintiff to file an amended complaint against certain of the defendants based on the Carmack Amendment. Plaintiff also moved for reconsideration of the court's order dismissing the complaint as against one of the other defendants arguing that newly discovered evidence demonstrated that the defendant was a motor carrier subject to the Carmack Amendment. The defendant allegedly supplied advice to the driver of the truck involved in the transport and provided such equipment as orange flags and 'oversized' signs to the carrier of the shipment. The court held that the *de minimis* involvement of the defendant in the shipment was insufficient to establish liability as a "carrier" under the Carmack Amendment.

Which Carrier is Liable Under the Carmack Amendment?

Dedicated readers of this newsletter may remember last year's discussion of *The Mason-Dixon Lines, Inc. v. Walters Metal Fabrication, Inc.*, 2014 U.S. Dist. LEXIS 129285 (S.D. Ill.), a declaratory judgment action in which the court held that Mason-Dixon Lines was a motor carrier under the Interstate Commerce Act. In the 2015 version of the dispute, *Walters Metal Corp. v. Universal Am-Can, Ltd.*, 2015 U.S. Dist. LEXIS 53474 (S.D. Ill.), the remaining defendants in the action for damages brought by Walter Metals argued that the court's holding that The Mason-Dixon Lines was a motor carrier under the Interstate Commerce Act precluded any claim against them for damages suffered to the shipment involved.

The court, though, held that the Carmack Amendment was enacted to "relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods." The court went on to hold that to be entitled to relief, the shipper may sue the carrier

issuing the bill of lading or the carrier that actually delivers the goods to the final destination as an alternative to suing the entity which was transporting the goods at the time of the loss. Either of those two carriers can then seek to recover from the carrier that was actually in possession of the cargo at the time of the loss. The court found that the plaintiff had alleged that each of the defendants remaining in the action had issued a bill of lading covering the shipment and that nothing in the Carmack Amendment precluded a shipper from alleging claims against more than one potential motor carrier.

Waiver of Carmack Amendment Claims

As noted above, the court determined in *AXA Corporate Solutions Assurance v. Great American Lines, Inc.*, 2015 U.S. Dist. LEXIS 171369 (D.N.J.), that MVP, the carrier with whom Great American had contracted to transport a shipment that was stolen, was a "motor carrier" under the Carmack Amendment. The Carmack Amendment, however, allows the parties to a transportation contract to waive any and all rights and remedies under the Carmack Amendment. *See* 49 U.S.C. §14101(b)(1). To waive rights under the Carmack Amendment, the shipper and carrier must have a written waiver that "expressly waives any and all rights under Part B of Title 49." The transportation contract between the shipper and Great American contained such a waiver. MVP argued that the waiver provision bound the plaintiff, the insurer of the shipment for the consignee. The court held, based on the language of the transportation contract that provided that the contract "shall be binding upon . . . the parties hereto *only*," that the plaintiff, as the subrogee of the consignee of the shipment, who was not a party to the transportation contract, was not bound by the waiver.

Limitation of Liability

In *Fubon Insurance Co., Ltd. v. Travelers Transportation Services, Inc.*, 2015 U.S. Dist. LEXIS 2978 (N.D. Ill.), Acer America Corp. retained Schenker Logistics to arrange transportation for a shipment of goods from Joliet, Illinois to Brampton, Ontario, and insured the shipment with plaintiff. Schenker, in turn, hired defendant to transport the goods. Defendant picked up the shipment in Joliet and signed a straight bill of lading that had been prepared by the shipper. The bill of lading did not contain any declared value for the shipment. Defendant never delivered the shipment. Plaintiff paid Acer $191,000, the value of the lost shipment, and then sued Travelers.

Travelers argued that any recovery by Fubon was limited by the $2.00 CAD per pound limitation of liability contained in the agreement between Acer and Schenker. Fubon argued that there was never any such agreement and that Schenker lacked the authority to agree to any limitation on Acer's behalf.

The court held that parties are free to negotiate limitations to liability under the Carmack Amendment. A carrier may limit its liability "to a value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances." In order to limit its liability, a carrier must "(1) obtain the shipper's agreement to a choice of liability; (2) give the shipper a reasonable opportunity to choose between two or more levels of liability; and (3) issue a receipt or bill of lading prior to moving the shipment." The court found that there was no evidence that Schenker had provided Acer with a reasonable opportunity to make a choice between different levels of liability or that Acer had agreed to any limitation in writing. There was, therefore, no enforceable limitation of liability.

Household Goods Carrier

The court in *Muzi v. North American Van Lines, Inc.*, 2015 U.S. Dist. LEXIS 33542 (D. Neb.), explained the difference regarding limitations of liability between a motor freight carrier and a household goods carrier. The plaintiff contracted with defendant to transport household goods from Alabama to Nebraska. Plaintiff alleged that she purchased additional insurance on the shipment through defendant. The bill of lading indicated that the value of the shipment was $125,000. The bill of lading also contained an insurance surcharge. Plaintiff alleged that her shipment was damaged by water and mold.

The court observed that claims for damage to goods shipped in interstate commerce were preempted by the Carmack Amendment. The court then explained that a carrier could limit its liability if it took certain steps, including giving the shipper a reasonable opportunity to choose between two or more levels of liability, obtaining the shipper's agreement as to the choice of liability, and issuing a receipt or bill of lading prior to moving the shipment. The court noted that there were additional requirements for a carrier of household goods to limit liability. Under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), which Congress passed in 2005, *see*

Public Law 109-59, 119 Stat. 1144 (Aug. 10, 2005), *codified at* 49 U.S.C. §§ 13102-14104, a carrier of household goods could petition the Federal Motor Carrier Safety Administration to establish "release rates" under which the carrier's liability for the property is limited to a value established by a written declaration of the shipper. The shipper, however, had to waive any claim for the full value of the shipment in writing.

Under the Act, there are currently two generally applicable options for interstate household goods moves. The first reimburses the shipper for the replacement value of his or her goods (the "full value Option"). The second reimburses the shipper at a lower rate, currently 60 cents per pound, and is referred to a the "release rate" option. A carrier may offer to sell to a shipper who elects the release rate, separate liability insurance for a shipment. The carrier must (1) issue to the individual shipper a policy or other appropriate evidence of the insurance purchased by the shipper; (2) provide a copy of the policy or other appropriate evidence to the individual shipper a the time it sells or procures the insurance, (3) issue policies written in plain English, and (4) clearly specify the nature and extent of coverage under the policy. If the carrier procures the insurance but fails to provide the required policy or evidence of insurance, the carrier will be liable for the full liability for any claims to recover for loss or damage attributable to the carrier.

The court held that it could not determine whether the plaintiff had agreed to the release rate or had purchased insurance or whether the defendant had procured any such insurance. Accordingly, the court denied defendant's motion to dismiss plaintiff's state law claim for bad faith as preempted.

Published Tariff v. Bill of Lading

The issue in *Hisense USA Corp. v. Central Transport, LLC*, 2015 U.S. Dist. LEXIS 102852 (N.D. Ill.), was whether a limitation of liability contained in a carrier's tariff could be incorporated by reference into a bill of lading that was prepared by the shipper. Hisense manufactures and sells electronic goods to retailers across the country. When Walmart discovered that four pallets of Hisense computer tablets that it had received were defective it made arrangements to return the goods to Hisense. With Hisense's authorization, Walmart made arrangements with Central Transport to return the goods to Hisense. Walmart prepared a bill of lading that identified the goods as electronics, and specified that "All shipments are hereby released to the value at which the lowest freight charges apply." Central's driver placed a PRO sticker on the bill of lading which indicated that Central was receiving the goods "subject to NMFC 100 CTII Rules Tariff." When the shipment arrived at Hisense, a pallet of 715 tablets, weighing 822.25 pounds, was missing.

Hisense sued to recover the value of the tablets. Central argued that the limitation on liability for electronics contained in the Rules Tariff, ten cents per pound, limited Hisense's recovery to $82.23. The court was asked to determine whether the reference to Central's Rules Tariff, contained in the bill of lading, was sufficient to incorporate the limitation of liability found in the tariff.

The court first noted that a carrier is permitted limit its liability under the Carmack Amendment if it: (1) maintained an appropriate tariff pursuant to 49 U.S.C. § 13710(a)(1); (2) obtained the shipper's agreement as to her choice of liability; (3) gave the shipper reasonable opportunity to choose between two or more levels of liability; and (4) issued a receipt or bill of lading prior to moving the shipment. Central fulfilled the first requirement because it maintained an appropriate tariff which was available online and upon request. Central had also properly issued a bill of lading covering the shipment. The issue was whether Central had obtained Hisense's agreement to the limitation of liability contained in its tariff.

Central argued that the language of the bill of lading and the PRO sticker was sufficient to incorporate the limitation into the bill of lading. Hisense argued that there had to be actual notice of the limitation and the mere reference to a tariff was insufficient. The court agreed with Hisense, holding that in order for a bill of lading to effectively incorporate a limitation of liability contained in the tariff, the bill of lading not only had to refer to the tariff but must also contain additional language that demonstrated notice and agreement to the limitation. The bill of lading also had to contain a space to declare the value of the shipment and for the shipper to sign. Absent those attributes, the mere reference to a tariff was insufficient to incorporate any limitations of liability contained in the tariff.

Carriage of Goods by Sea Act

As noted in last year's newsletter, damage to shipments that originate under a through bill of lading that covers both ocean and inland portions of the transport in a single document are governed by the Carriage of Goods by Sea Act ("COGSA"), not the

Carmack Amendment. The issue in *G&P Trucking Co., Inc. v. Zurich American Insurance Co.*, 2015 U.S. Dist. LEXIS 109951 (D.S.C.), *reconsideration denied*, 2015 U.S. Dist. LEXIS 162133 (D.S.C.), was whether a carrier could avail itself of the limitation of liability contained in COGSA because the contract between the shipper and the original carrier contained a Himalaya clause. The shipment in question was transported by ocean carrier from Spain to Savannah, Georgia and then by truck from Savannah to Crossville, Tennessee. The bill of lading for the shipment, however, did not contain a delivery address, only the address of the consignee. When the shipment arrived in Crossville damaged, Zurich paid the consignee's freight claim and then filed a claim with the trucking company. The trucking company filed an action in federal court seeking a determination that it had no liability under the through bill of lading issued for the shipment.

Plaintiff argued that the shipment was covered by a through bill of lading and governed by the COGSA, and, therefore, it could avail itself of a waiver of liability contained in COGSA pursuant to the Himalaya clause in the shipping agreement between the shipper and the original carrier. A Himalaya clause is a provision in the contract that extends the defenses of a carrier to third parties including a subcontractor that handles the inland portion of a shipment. The clause also states that a merchant will not make any claim or demand against any party other than the carrier that is party to the through bill of lading. The defendant argued that because the bill of lading did not specify the delivery address, that portion of the shipment between Savannah and Crossville was governed by the Carmack Amendment and not COGSA and, therefore, COGSA's limitation on liability did not apply.

The court determined that the bill of lading involved was a through bill of lading based on the course of conduct of the parties in the past that all shipments from Spain always entered the country in Savannah but were then transported to Crossville. The court also found that the cost of the entire shipment, including that portion between Savannah and Crossville had been prepaid before the shipment left Spain, indicating that the parties considered the shipment as one movement, not two as argued by the defendant. Because the shipment was covered by a through bill of lading, and, therefore, was governed by the COGSA, the Himalaya clause in the shipping contract precluded any claim against the motor carrier that handled the inland shipment from Savannah to Crossville.

Incidental Damages

The issue in *New Son Yeng Produce LLC v. United One Transport, Inc.*, 2015 U.S. Dist. LEXIS 40863 (E.D. N.Y.), *adopted by, judgment entered by* 2015 U.S. Dist. LEXIS 39528 (E.D.N.Y.), was the scope of consequential damages that a shipper could recover from a carrier under the Carmack Amendment. Plaintiff purchased 768 cartons of fresh lychee from a Texas grower at a total cost of $34,560. Defendant agreed to transport the shipment from Texas to New York City and to deliver the produce by May 28, 2013. The shipment did not arrive until May 31, 2013. Plaintiff accepted the shipment under protest and had it immediately tested by the U.S. Department of Agriculture's Agricultural Marketing Service. The USDA Service found that about 30 to 86 percent of the fresh lychee had brown to black surface discoloration and that the lychee was in early to moderate stages of decay. The Service inspected the shipment again in June, 2014, when plaintiff was trying to sell the lychee and found the shipment in much worse condition. Plaintiff ended up selling the shipment at distressed prices for a total of $6,484.74, and sued the defendant for damages.

The court held that a plaintiff seeking to recover from a carrier for damage to a shipment under the Carmack Amendment must establish a *prima facie* case by showing delivery to the carrier in good condition, arrival in damaged condition, and the amount of damages that resulted from the transportation. The bill of lading was sufficient to prove delivery of the shipment in good condition because it did not list any problems with the shipment. The court also held that plaintiff had established the damaged condition of the shipment upon arrival based on the inspection by the USDA Service which, under the law, was *prima facie* evidence of the truth of the statements contained therein.

The court then went on to assess the damages recoverable under the Carmack Amendment. After holding that a party is entitled to recover the actual loss or injury to its property by a carrier's unreasonable delay in shipment, the court then held that the actual loss is measured as the difference between the sound market value and the value at destination. For fruit, an appropriate measure of damages was the invoice value of the fruit minus the salvage value. Plaintiff was entitled to recover $28,075 in actual damages.

Plaintiff also sought additional damages including the cost of inspection, a 20% handling fee and the costs in bringing the action. The court held that the Carmack

Amendment incorporates the federal common law on incidental damages. That law holds that an injured party may recover incidental damages if those damages were foreseeable and within the contemplation of the parties at the time the contract was made. The court held that, given the fact that defendant was in the business of shipping fresh produce and the admissibility of the USDA Service Inspection Reports, it would be foreseeable that plaintiff would request such an inspection if there was a problem with the shipment. The court awarded those costs to plaintiff. The court, however, found that plaintiff did not offer any substantiation or explanation for the 20% handling fees and denied recovery of that fee.

- Alan R. Peterman

11. Bad Faith

In *Blankenbaker v. Progressive Casualty Insurance Co.*, 620 Fed. Appx. 579 (9th Cir.), the court found that Progressive's insured did not think she was at fault for the subject accident, did not want Progressive to settle the claims against her, and was unconcerned about the possibility of a judgment in excess of Progressive's liability limits because she had no assets (and had been assured by the plaintiffs' attorney that they had no interest in pursuing her personally). Accordingly, even if Progressive was late in notifying its insured of the plaintiffs' policy limit demand, the insured was not prejudiced by the delay, and Progressive did not act in bad faith by rejecting a policy limit offer which (at the time it was made) would not have insulated the insured from excess liability.

Under Oklahoma law, a primary auto liability insurer has an affirmative duty to initiate settlement negotiations if the insured's liability is clear and the claimant's injuries make a judgment in excess of policy limits likely. In *SRM, Inc. v. Great American Insurance Co.*, 798 F.3d 1322 (10th Cir.), however, the court refused to extend that same duty to an excess insurer until the primary insurer had already tendered its policy limit. The excess policy in fact provided unambiguously that the insurer had no duty to investigate, defend or settle any claim until the primary policy limits were exhausted. Accordingly, the court rejected the insured's claim that the excess insurer had acted in bad faith, forcing the insured to front $500,000 of its own money to the settlement which the insured maintained could have been achieved with the combined primary and excess policy limits (which were, ultimately, tendered by the respective insurers).

In some jurisdictions, only the insured has standing to bring a direct action against the insurer for bad faith claims handling. In 1971, the Supreme Court of Florida reasoned in *Thompson v. Commercial Union Insurance Company Of New York*, 250 So. 2d 259 (Fla. 1971) that a claimant is a third-party beneficiary of the tortfeasor's liability insurance, and held that "that a judgment creditor may maintain suit directly against tortfeasor's liability insurer for recovery of the judgment in excess of the policy limits, based upon the alleged fraud or bad faith of the insurer in the conduct or handling of the suit." In *Mesa v. Clarendon National Insurance Co.*, 799 F.3d 1353 (11th Cir.), the insurer was faced with multiple claims against its insured, and advised the claimants collectively that it was prepared to offer its $20,000 per accident limit in a global settlement. Three of the four claimants accepted the offer; claimant Mesa did not and demanded $10,000 (the policy's per person limit) for himself. When Clarendon National agreed to pay Mesa the $10,000, however, Mesa rejected the offer and brought an action against Clarendon for bad faith (having obtained a judgment against Clarendon's insured in the meantime for $750,000). The court found that Clarendon had acted in good faith by pursuing a global settlement for its per accident limits with as many claimants as possible, rather than simply tendering its per person limits to Mesa (notwithstanding the evidence of his substantial injuries). Moreover, although Clarendon was negligent in failing to keep its insured advised of Mesa's demand, that negligence alone did not equate to bad faith, and no bad faith on Clarendon's part had caused the excess judgment against the insured in any way. The case suggests that a liability insurer faced with multiple claims from a single accident should be on safe ground in Florida if it (1) keeps its insured advised regarding all settlement offers; (2) makes an effort to settle as many claims as possible within its policy limits; and (3) exhausts its policy limits in settling some, but not necessarily all, of the competing claims.

In *Coulter v. State Farm Mutual Automobile Insurance Co.*, 614 Fed. Appx. 998 (11th Cir.), State Farm made three attempts to tender its $50,000 policy limits to the claimant, the first offer coming two weeks after the accident. Five months after the accident, the claimant's attorney (hired four months after the accident) demanded that State Farm provide him with (1) mandatory policy disclosures pursuant to Florida Statute § 627.4137; a summary of all information State Farm received from the claimant's son; an affidavit from

the insured confirming the absence of any other insurance coverage; and payment of the State Farm policy limits. Plaintiff asserted that State Farm had acted in bad faith by failing to comply with all of these demands in a timely fashion (even though State Farm promptly tendered its policy limit). The court, however, found that State Farm had acted reasonably in trying to comply with the plaintiff's demands, and was not obligated to pay the $2 million consent judgment entered into by the insured.

- Philip A. Bramson

12. MCS-90

In *Fowler v. Canal Inc. Co.*, 2015 U.S. Dist. LEXIS 102910 (N.D. Ala), the claimants filed suit against Canal and its motor carrier insured seeking declaratory judgment that the loss triggered the MCS-90 endorsement attached to the Canal policy. (The accident vehicle was not scheduled on the policy.) Canal removed the action to federal court and moved to dismiss on the basis that under Alabama law a claimant may not file suit against the tortfeasor's insurer until he or she wins a judgment against the insured.

The court first concluded that it had jurisdiction over the matter, though not on the basis of federal question jurisdiction as Canal had suggested, since the courts are split on the question of whether the fact that the MCS-90 is a sufficient basis for federal jurisdiction. The court, though, found that it had diversity jurisdiction by re-arranging the parties (a rarely used but permissible mechanism in declaratory judgment actions.) Had the claimants alone sought a declaration, the court would have dismissed the action as premature. Since the insured, though, was also seeking a ruling on the MCS-90, the court permitted the declaratory judgment action to continue. (For what it is worth, we point out that the insured does not really have any rights under the MCS-90 since it has to repay the insurer for any money paid by the insurer under the MCS-90.)

In our experience insureds or brokers sometimes ask that an MCS-90 endorsement be added onto a policy even where no filing was made and even though the insured is not a motor carrier or is not subject to the FMCSA, and unsuspecting underwriters sometimes go along with the idea. It is, of course, a terrible idea – the MCS-90 is a very powerful weapon for third party claimants as the decision in *Park Insurance Co. v. Lugo*, 2015 U.S. Dist. LEXIS 45034 (S.D.N.Y.) shows.

Park Insurance had issued a $500,000 business auto policy to Sav-On Waste Services, a company which offers consulting services to help clients save money on disposal expenses. We checked and found no evidence that Sav-On is registered with USDOT in any capacity, a fact that the judge may not have been aware of. Nonetheless, Park attached to its policy a $750,000 MCS-90. No explanation is offered as to why the endorsement was attached, nor is there any mention of a filing with USDOT. Sav-On did own ten semi-trailers and two trucks-tractors. Sav-On's principal testified that the company hired owner-operators to haul municipal solid waste from transfer stations to landfills. It also acted as a broker advising truckers where to get loads and received commissions for services rendered to its municipality clients. It was not apparently operating in a for-hire carrier operation of any kind, let alone operating as an interstate motor carrier.

There was a loss involving a covered auto operated by Eco America, a trucker hired by Sav-On; there was no evidence that Sav-On itself was acting as a carrier. Nonetheless, the federal court concluded that the MCS-90 applied and that Park was responsible to pay a total of $750,000 to clients rather than its $500,000 policy limit. The court ruled (correctly) that the MCS-90 does not apply to any judgment entered against the co-defendants Eco or its driver. (The decision does not discuss what insurance, if any, was available to Eco.) The relationship between Eco and Sav-On was difficult to characterize and the court surmised that this was not accidental, as Sav-On was designed to operate "off the record" (we might have called it off the books). The tractor was titled in the name of Sav-On but Eco was making payments on it in order to purchase it. Eco had registered the vehicle with the Department of Motor Vehicles. The trailer involved in the loss was one of a group of trailers that Eco had leased from Sav-On. Eco hauled municipal waste under contracts awarded to two companies, Tully Environmental and Margiotta Enterprises – this happened to be a Margiotta load – but neither Tully nor Margiotta appears to have been a party. Eco's customers (the municipality? Margiotta?; the decision does not make this clear) would receive a bill from Sav-On. Sav-On would then, supposedly, deduct expenses and pay Eco the difference, but the court noted that no records of any kind had been produced. Municipal waste is a dirty business.

Under these facts the court concluded that Sav-On was a motor carrier. The statutory definition of motor carrier is a person providing motor vehicle transportation for compensation (49 U.S.C. §

13102(14)). The regulations add that a motor carrier means a for-hire motor carrier or a private motor carrier and includes the carrier's agent, officer or representative. 49 C.F.R. § 387.5. The court held that since Sav-On was the owner of the rig and received compensation, it was a motor carrier. Permit us to observe that this is hard to swallow – every lessor of a truck used in interstate commerce would qualify as a motor carrier under such a test. The court might have been thinking that a regular lessor would be paid by the lessee, not the lessee's customer. But Sav-On, supposedly, was merely deducting the charge that it was due and passing the rest on to Eco which was the motor carrier. The fact that the Sav-On policy contained an MCS-90 helped convince the court that it was a motor carrier, a decision that appears to have been a mistake.

National Specialty Ins. Co. v. ABS Freight Transportation, Inc., 91 F. Supp. 3d 1258 (S.D. Fla.) involved two trucking companies with similar names, ABS Freight Transportation owned by a Mr. Bojkovski, and ABS Transport, Inc., owned by his ex-wife. Each was insured separately under a liability policy issued to it by National Specialty with limits of $1 million and an MCS-90. Each had interstate motor carrier authority. ABS Transport had leased a tractor from Deen, LLC, and a trailer from ABS Freight and had assigned Deen's driver, Andrii Plys, to operate the rig. Plys was involved in an accident that caused the death of another motorist while hauling beach pebbles from California to Florida. There appears to have been no disagreement that the ABS Transport policy (or filing) applied, but the plaintiff sought to recover under the ABS Freight policy as well, and that was resisted by the insurer.

There were some inconsistencies in the testimony and the paperwork, as there often are: the contract with the freight broker had been signed by Freight, not Transport, and there were suspicions that the trailer lease may have been post-dated. The court concluded, though, that this was a Transport load hauled under Transport's authority. National Specialty attempted a *Yeates* argument that since Transport's policy applied, the MCS-90 issued to Freight could not be triggered. The court declined to rule on that basis but found for National Specialty on two alternative grounds. First, no judgment had been entered against Freight to that point, so it was not possible for the MCS-90 to be triggered. Moreover, since the haul was being conducted under Transport's authority, Freight was not using its trailer in for-hire transportation. That, for us, is the key holding here and shows that this court, unlike the *Lugo* court, had a firm understanding of how the MCS-90 fits into the federal regulatory framework.

Nova Casualty Co. v. MJR Messenger, Inc., 2015 U.S. Dist. LEXIS 113612 (E.D. Pa.) involved an insurer which made both state and federal filings for its insured but forgot to attach the MCS-90 endorsement and the Form F to the policy. The insurer paid the claim, then demanded reimbursement from the insured. The court agreed that the failure to attach the endorsement to the policy did not preclude the insurer from recovering its payment under the filing from the named insured.

New York's appellate division, in *Carlson v. AIG*, 130 A.D. 3d 1477 (4th Dep't), is the latest court to hold that the MCS-90 is triggered only by a judgment against the named insured. Judgment against any other party cannot trigger the MCS-90. The significance of the decision lies in the fact that the court recognized that the 2002 decision by New York's highest court in *Pierre v. Providence Washington*, 99 N.Y. 2d 222, is no longer good law.

The Eighth Circuit, 781 F.3d 408, affirmed the decision in *Tri-National Inc. v. Yelder*, discussed in last year's edition.

We cite approvingly the comments of the Montana Supreme Court about the MCS-90 in *Westchester Surplus Lines Ins. v. Keller Transport, Inc.*, 2016 MT 6, a complicated matter involving the spillage of thousands of gallons of gasoline affecting multiple nearby homeowners. The technical dispute concerned the meaning of the phrase "general aggregate limit" on an excess policy – for our purposes the point is that the court held that the lower court had erred by concluding that the MCS-90 endorsement was a basis for finding the policy terms ambiguous. Importantly, the Supreme Court held that the MCS-90 "necessarily is not part of the policy for interpretational purposes."

- Laurence J. Rabinovich

13. Punitive Wrap Coverage and Transportation Matters

In many states, punitive damages are deemed uninsurable as a matter of public policy, case law, statutory or other regulatory considerations. Insurance policies themselves often specifically exclude punitive damages for some or all of these reasons. Nevertheless, as many underwriters, claim professionals, and risk managers know, there are a

variety of the so-called punitive wrap insurance and reinsurance contracts in existence in certain markets, especially Bermuda. This punitive wrap insurance and reinsurance product has been in existence since at least the 1990s, and is underwritten by many different reinsurers and insurers throughout the world.

Liability limits will vary depending on the nature of the underlying business insured or reinsured, among other considerations, but the limits are usually not higher than $25 million. There may, in fact, be several layers of punitive wrap coverage involving different insurers and reinsurers in a tower of coverage.

In contrast to other sections of this review, a discussion of punitive wrap coverage underwritten on a reinsurance basis is likely to offer few citations to litigated case law. Such reinsurance typically includes a private alternative dispute resolution provision, which makes it difficult to obtain public information, such as court decisions, which might otherwise provide insight into how punitive wrap policies apply in transportation and other industry related claims. Coverage is generally provided on an indemnification basis only, triggered by a judgment against the insured in a court of law. Moreover, the insurance and reinsurance punitive wrap coverage contracts are not usually meant to provide an additional limit of coverage per se, in the sense of providing coverage to the in/reinsured in excess of the policy or contract providing the main coverage. Instead, punitive wrap coverage is available to cover punitive damages judgments up to the limit of the companion "wrapped" policy or contract where punitive damages are excluded, or where there is a preclusion in covering punitive damages as a matter of law. In any case, the mechanisms by which such coverage is provided, and how claims are ultimately resolved, are rarely on display for public consumption.

The transportation industry is an important market for punitive wrap coverage, since injuries to person and property can be significant, and policyholders and reinsureds may face punitive damage exposure as part of a runaway jury verdict. Moreover, motor carriers generally operate across state lines, which creates the possibility that they may be faced with a punitive exposure which cannot be insured, even if their "home" state has more favorable case law. This uncertainty, particularly if there has been any experience with punitive damages, encourages consideration of punitive wrap coverage and other alternatives.

Punitive wrap coverage underwritten on a reinsurance basis will often be provided through captive insurance companies created by transportation companies themselves (or through "rent-a-captives" set up by brokers to serve more than one transportation company insured). Reinsurance also comes into play when the primary coverage is merely a fronting arrangement. Punitive wrap reinsurance coverage is especially a good fit for foreign markets, in which there is significant experience with captives, fronting and similar types of arrangements. Many of the well-known punitive wrap insurers and reinsurers have a significant presence in Bermuda and other off-shore locations. Alternatively, a domestic insurer or reinsurer may provide this coverage through an offshore affiliate.

While punitive wrap insurance and reinsurance coverage can be an important part of a risk management program for transportation companies and their insurers, there are also some alternatives, to the extent permitted by regulators, including what is often described as "most favorable jurisdictions [or venue] endorsements." While there are many variations of this "MFJ" or "MFV" endorsement, the parties will agree by contract to apply the law of the jurisdiction most favorable for purposes of determining the insurability of punitive damages. This effectively expands the number of jurisdictions to determine the venue that is "most favorable" to the insurability of punitive damages. This is yet another means for the insurance and reinsurance industry to seek to provide coverage for punitive damages.

- Jesse R. Dunbar

14. Broker Liability

In *Complete Distribution Services, Inc. v. All States Transport, LLC*, 2015 U.S. Dist. LEXIS 37379 (D. Ore.), the shipper sued the broker after cargo was damaged in an accident; the broker paid the shipper and took an assignment of the shipper's rights against the motor carrier transporting the goods at the time of the loss. The appellate court dismissed the motor carrier's counterclaim that the broker was negligent for not informing the carrier of the value of the cargo, finding that, if a carrier accepts a load without asking either the shipper or the broker about the value, it may not later shift to the broker the responsibility for an underinsured loss. On the other hand, the court refused to dismiss the motor carrier's affirmative defense that the broker had an affirmative <u>contractual</u> duty, based on their course of dealing and industry practice, to advise the carrier of the value.

In *Montes De Oca v. El Paso-Los Angeles Limousine Express, Inc.*, 2015 U.S. Dist. LEXIS 33707 (C.D. Cal.), the issue was whether a negligence claim against a freight broker, for bodily injuries incurred by a victim of the motor carrier hired by the broker, was preempted by the Interstate Commerce Commission Termination Act because it was, in effect, an attempt to regulate the services offered by the broker. The court found no preemption, since plaintiff's action was unrelated to rates, routes or services associated with transportation of cargo, and remanded the action to California state court.

The Carmack Amendment imposes strict liability for cargo losses on motor carriers which accept the responsibility for transporting a shipper's goods safely, but imposes no liability on a broker who merely arranges for a motor carrier to transport the goods. Whether an entity's role in a given transaction was that of a motor carrier or that of a broker, though, is often uncertain and the subject of litigation, particularly where the entity operates in both capacities at different times. In *ASARCO LLC v. England Logistics Inc.*, 71 F. Supp.3d 990 (D. Ariz.), a single principal (Plumley) owned two companies, a freight broker and a motor carrier, and the operations of the two companies were heavily intertwined (same website, same 100% owner, same phone number, same building). It was unclear whether, when negotiating with England Logistics, the Plumley representative was wearing her broker hat or her motor carrier hat. Accordingly, when a shipment of copper anodes went missing, there was a question of fact as to whether the load had been brokered by Plumley to the delivering motor carrier (which would create no Carmack Amendment liability for Plumley), or whether Plumley had accepted responsibility as a motor carrier for transporting the load and had merely subcontracted the actual transportation to another motor carrier (which would not have relieved Plumley of liability under the Carmack Amendment).

The shipper ASARCO also sued Plumley under state common law for negligently hiring an unsuitable delivering motor carrier. The court, however, found that this claim was pre-empted under the Federal Aviation Administration Authorization Act, 49 **U.S.C.** § 14501 ("FAAAA"), which, unlike the Carmack Amendment, pre-empts state regulation affecting the services of both motor carriers and brokers. The court acknowledged that the plaintiff might have no recourse, if Plumley acted as a broker and had no Carmack Amendment liability, and the state law claims that it was a negligent broker were pre-empted, but assumed that Congress had accepted the possibility of such an anomaly when passing the FAAAA.

- Philip A. Bramson

15. UIIA

The year saw successful statutory challenges in two state courts of appeal to the enforceability of the Uniform Intermodal Interchange and Facilities Access Agreement (UIIA), which was created primarily for the protection of steamship lines and other owners of containers or chasses used in intermodal transportation. Truckers are usually required to submit to the terms of UIIA in order to be permitted to work at the pier. In *Elite Logistics Corp. v. Wan Hai Lines, Ltd.*, 2015 Cal. App. Unpub. LEXIS 3914 (Cal. Ct. App.), two motor carriers claimed that equipment providers had improperly charged per diem fees for the use of the shippers' intermodal trailers on weekends and holidays, in violation of California Business and Professions Code section 22938. The equipment providers argued that, under the UIIA, the parties had agreed to submit disputes over such fees to arbitration. The trial court agreed with the equipment providers, and had kicked the dispute to an arbitrator who ruled in their favor because the motor carriers' claims were brought after the 30-day limitations period provided under the UIIA. The California Court of Appeal, however, held that the arbitration provisions of the UIIA were unconscionable because (1) equipment providers had the ability to amend the terms of the contract, while it was presented to the motor carriers on a "take it or leave it" basis; and (2) the 30-day notice period was unreasonable because it required the motor carriers to dispute per diem charges before they could consult with counsel and determine the legal standing of their claims.

In *CMA-CGM (America), Inc. v. Empire Truck Lines, Inc.*, 416 S.W.3d 495 (Tex. Ct. App.), an interchanged chassis came loose from the truck to which it had been attached and injured the truck driver. When the driver sued the chassis provider, it sought indemnification from the motor carrier pursuant to the UIIA. The motor carrier argued that the UIIA indemnification provision, which requires the motor carrier to indemnify the equipment provider even for the equipment provider's own negligence, was unenforceable under section 623.0155 of the Texas Transportation Code, which prohibits anyone from requiring indemnification from a motor carrier (except for claims arising out of the carrier's negligence) as a condition to any service

incidental to transportation of property for hire. The court agreed that the UIIA indemnity provision was unenforceable under Texas law. (Interestingly, Maryland Courts & Judicial Process Code § 5-401 also makes such contracts unenforceable, but carves out an express exception for the UIIA, which was drafted in Maryland and which provides that Maryland law should control its application.)

- Philip A. Bramson

16. Graves Amendment

Pacelli v. Intruck Leasing Corp., 128 A.D.3d 921, 922-25 (N.Y. 2d Dep't 2015), involved numerous related actions for personal injury arising out of a motor vehicle accident involving, among other vehicles, a tractor-trailer driven by Jose Alfredo Garcia Ortiz. The trailer was owned by defendant EMH Consulting and leased to New Brothers Transport Corp., which employed Ortiz. EMH moved for summary judgment dismissing the complaints in the various actions as against it, asserting, among other things, that the causes of action for vicarious liability for the conduct of New Brothers and Ortiz were barred by the Graves Amendment (49 USC § 30106). Supreme Court, Nassau County, denied EMH's motion, and EMH appealed. The Appellate Division, Second Department, reversed, holding that the Graves Amendment shielded EMH from vicarious liability as a commercial lessor of motor vehicles that was free from negligence in maintaining the subject vehicle.

In *Gachlin v. Coastal International Trucks, LLC*, 2015 Conn. Super. LEXIS 520 (Conn. Super. Ct.), a personal action arising from an accident involving a vehicle driven by Robert Andrews and owned by Coastal International Truck, LLC, Coastal denied that Andrews was Coastal's agent and denied that he was authorized to use the vehicle. Coastal filed a motion for summary judgment on the ground that the Graves Amendment bars recovery against a vehicle leasing company solely on the basis of the negligence of its lessee. The court held that Coastal had established that the Graves Amendment was applicable by submitting proof that Coastal was engaged in the business of renting or leasing motor vehicles; Coastal had leased the truck in question to another party; and the plaintiff had not alleged any independent negligence or criminal wrongdoing by Coastal.

The personal injury action *Fisher v. National Progressive, Inc.*, 2015 U.S. Dist. LEXIS 1386 (W.D. Okla.), arose out of an accident involving a tractor-trailer driven by Gerardo Bedolla, an employee of Best-1 Trucking, and owned by and leased from Vida Corporation. Vida moved for summary judgment on the basis that the Graves Amendment preempts any state law that would impose vicarious liability on Vida as the lessor. The plaintiff argued that Vida was liable because the Graves Amendment's "savings clause" applied, i.e., that Vida could be held liable for the negligent actions of its affiliate, Best-1. The court denied Vida's motion, holding that there was an issue of fact as to whether Vida and Best-1 were affiliates, as defined by the Graves Amendment.

In *Garcia v. Georges*, 434 Fed. Appx. 791 (11th Cir. 2011), a personal injury action arising from a motor vehicle accident, judgment was entered in favor of Alamo Financing, LP, which had leased a vehicle to Gregory Georges. The plaintiff filed a complaint against Alamo seeking damages for, among other things, vicarious liability under a Florida statute for Georges' negligence in operating the vehicle. Alamo's motion to dismiss, on the basis that the Florida statute is preempted by the Graves Amendment, was granted, and the Eleventh Circuit Court of Appeals affirmed.

- Sanjeev Devabhakthuni

17. Negligent Hiring

In *Prescott v. R&L Transfer, Inc.*, 2015 U.S. Dist. LEXIS 12002 (W.D. Pa.), Prescott was injured when Mead, operating his tractor-trailer in the course of his employment with motor carrier R&L, ran Prescott's vehicle off the highway. Prescott sought recovery from R&L on the alternative theories of vicarious liability for Mead's negligence, and direct liability for negligent training, supervision, and entrustment. There was no evidence that Mead had operated his vehicle outside the scope of his employment. On the other hand, the evidence did show that Mead was an experienced, licensed commercial truck driver, and that R&L had performed a background check, conducted a road test evaluation, and provided training to Mead before hiring him. In the absence of any evidence the Mead was an incompetent or unsafe driver, R&L was granted summary judgment on the negligent hiring and related claims.

In *Kyles v. Celadon Trucking Services, Inc.*, 2015 U.S. Dist. LEXIS 141636 (W.D. Mo.), the motor carrier defendant argued that the direct liability claims (including negligent hiring) should be dismissed as a

matter of law since it had admitted vicarious liability for its driver's negligence (if any). Stated generally, this had been the holding of the Missouri Supreme Court in *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995), reasoning that, "[i]f all of the theories for attaching liability to one person for the negligence of another were recognized and all pleaded in one case where imputation of negligence is admitted, the evidence laboriously submitted to establish other theories serves no real purpose." The federal court, however, found that the *McHaffie* court had intended to carve out an exception for punitive damage claims against the employer arising out of negligent hiring/training/supervision/entrustment, which are not merely derivative from the employee's negligence. Accordingly, the motion to dismiss was denied.

- Philip A. Bramson

18. Jurisdiction

The issue in *Tobin v. Federal Express Corp.*, 775 F.3d 448 (1st Cir. 2014), was whether the plaintiff's claims for invasion of privacy, infliction of emotional distress, and negligence were preempted by the federal Airline Deregulation Act (ADA). After a package was delivered to a drop-off facility, a FedEx employee inputted the information from a handwritten label into a computer incorrectly, causing the package to be mistakenly sent to the plaintiff, who was shocked when she opened the package with her eleven year old daughter and found two large bags of marijuana inside. The plaintiff called the police, who contacted FedEx to flag the shipment to prevent disclosure of any information regarding the actual delivery address. Although FedEx scrupulously denied that any employee provided the actual delivery information, a man came to the plaintiff's door to ask whether she had received the package while two other men sat in a car in the plaintiff's driveway. She was terrified and subsequently brought suit against FedEx for her distress.

On appeal the court determined that, although this was a difficult case, the plaintiff's claims were preempted by the ADA. The court noted that the fact that the plaintiff was a stranger to the contract (she was not the sender or intended receiver) did not insulate her claims from preemption. The court further noted that where a breach of the air carrier's duty could "effect fundamental changes in the carrier's current or future service offerings," the plaintiff's claims are preempted by the ADA. Focusing on the definition of "service," the court determined that package handling, package labeling, address verification, and delivery "comfortably" fit under the wide purview of the definition, regardless of the fact that the plaintiff herself did not contract with FedEx. This decision is significant in widening the reach of ADA preemption with respect to carrier services.

In *Schwann v. FedEx Ground Package System, Inc.*, 2015 U.S. Dis. LEXIS 13826 (D. Mass.), the court determined that the Massachusetts Independent Contractor Law was preempted by the Federal Aviation Administration Authorization Act (FAAAA). In granting summary judgment in favor of FedEx, the court looked to the newly issued First Circuit decision in *Massachusetts Delivery Association v. Coakley*, 769 F.3d 11 (1st Cir. 2014) discussed earlier in the Truck Driver as Employee section), which held that the FAAAA preempted the same state law in question, noting that the FAAAA expressly preempts state laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." The state law, a labor law which labeled as independent contractors those who perform services outside the usual course of the employer's business, was held to be in direct conflict with the FAAAA because it governed "the classification of the couriers for delivery services, [and] [i]t potentially impacted the services the delivery company provides, the prices charged for the delivery of property, and the routes taken during this delivery." As a result, the court held that "[t]he law clearly concerns a motor carrier's 'transportation of property,'" and thus summary judgment was granted for FedEx; the company's drivers were held to be independent contractors and not regular employees.

Remington v. J.B. Hunt Transport, Inc., 2015 U.S. Dist. LEXIS 13825 (D. Mass.) involved the same issue as *Schwann, i.e.*, whether the Massachusetts Independent Contractor Law was preempted by the FAAAA. In resolving the question in the affirmative, the court issued an identical opinion to that in *Schwann*. In this case, however, the plaintiffs argued that even though the Massachusetts law was preempted under the second prong of the law as decided in *Coakley* and *Schwann* discussed above, the law was not preempted under the other provisions of the law. In rejecting this argument, the court noted that under Massachusetts common law severability is governed by legislative intent. In examining the statute as a whole, there was no indication that the provisions were be severed. Thus, the court reinforced the principle that delivery truck drivers are independent contractors in

Massachusetts, and solidified the victory for the transportation industry.

James v. Werner Enterprises, Inc., 2015 U.S. Dist. LEXIS 25163 (S.D. Ala.), involved the removal to federal court of a personal injury action resulting from a motor vehicle accident. The plaintiff claimed he was injured when an employee driver of a Werner Enterprises truck collided with his vehicle as he pulled into a Dollar General store lot. The plaintiff filed negligence claims against Werner Enterprises and the delivery driver.

The defendants argued that removal was appropriate because the plaintiff and Werner Enterprises were diverse, and that although the plaintiff and the driver were not, the plaintiff fraudulently sued the driver to eliminate diversity. The defendants also argued that the $75,000 amount in controversy requirement was satisfied even though the plaintiff's complaint did not specify a monetary amount; in support of this argument, the defendant attached five cases with settlement and/or verdict values in excess of $75,000.

The court rejected the defendants' arguments, determining that they had not met their burden to establish that the plaintiff sued the driver to destroy diversity of citizenship. The court noted that the driver had a duty to the plaintiff and had breached that duty in the operation of the company's vehicle. Furthermore, although the defendant had presented evidence of similar motor vehicle accidents with verdicts in excess of the amount in controversy limit, the defendant did not proffer specific facts regarding the similarities of the plaintiff's injuries to those cases cited by the defendant. As a result, the court determined that removal was not appropriate, cautioning practitioners that in order to rely on similar jury verdicts to satisfy the amount in controversy requirement, similar injuries to the plaintiff's must be pled specifically.

The issue in *Midwest Trading Group, Inc. v. Globaltranz Enterprises, Inc.*, 2015 U.S. Dist. LEXIS 27095 (N.D. Ill.) was whether certain tort claims were preempted by the Interstate Commerce Commission Termination Act (ICCTA). Midwest had retained an agent that contracted with the defendant, Globaltranz, for the shipping of Android tablet computers. The agent had hired the defendant for shipments on at least 100 other occasions. Based on this prior experience with Globaltranz, it was the agent's understanding that insurance was normally included in the quoted shipment price. Globaltranz brokered the shipment to a third party, V & R. While V & R's driver was eating lunch, the tractor trailer was stolen. The shipper contacted the defendant to confirm that the tablets were insured; Globaltranz asserted that there were no discussions regarding insurance when the parties entered into the contract and thus refused to pay for the stolen shipment. Midwest sued, alleging that Globaltranz fraudulently induced it to enter into the contract by misrepresenting that insurance would be provided, negligently allowed the tablets to be stolen, and breached their contract for failing to obtain insurance.

On its motion for summary judgment, Globaltranz argued that the plaintiff's tort claims were preempted by the ICCTA, which provides: "[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." The plaintiff argued the brokering of services occurs before the transportation of property and, thus, the arranging for pre-transport services does not involve the actual transport of goods as required for the ICCTA to apply.

The court first rejected the plaintiff's arguments by concluding that, although a broker arranges for the movement of property before it is moved, the service is nonetheless within the scope of transportation, and that in order for the ICCTA to apply, the state law merely has to relate to the service. The court went on to note the term "service" is interpreted broadly, and encompasses "all elements of the motor carrier service bargain." The court determined that obtaining insurance was one of these elements, and as such the plaintiff's tort claims were preempted by the ICCTA. With respect to the breach of contract claim, the court held there was a question of fact as to whether there had been a breach, and denied Globaltranz's motion on that cause of action.

National Casualty Co. v. Thomas & Sons Trucking, L.L.C., 2015 U.S. Dist. LEXIS 6601 (D. Kan.), involved a declaratory judgment action by the insurer, National Casualty, against its insured, Thomas & Sons, Trucking. Thomas & Sons Trucking filed a motion to stay the declaratory judgment action, arguing that the underlying personal injury action in state court would determine whether the injured plaintiff-employee was acting within the scope of his employment at the time of injury, as the policy included an employee exclusion provision.

In deciding to stay the declaratory judgment action, the court noted that a district court should not entertain a declaratory judgment action if "the fact-dependent issues are likely to be determined in another proceeding." The court weighed the five factors set forth in the Tenth Circuit's decision in *State Farm Fire & Casualty Company v. Mhoon*, 31 F.3d 979 (10th Cir. 1994), namely: "(1) whether a declaratory action would settle the controversy; (2) whether it would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of procedural fencing or to provide an arena for a race to *res judicata*; (4) whether use of declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective."

The court focused particularly on the fourth factor, noting that the issue to be determined is whether the injured employee was injured within the scope of his employment. This issue is "intertwined" with the issues raised in the state court action, including who was at fault and any affirmative defenses the defendant may raise. As a result of its hesitation to encroach upon state jurisdiction, the court granted the motion to stay the declaratory judgment action.

Grubb v. Day to Day Logistics, Inc., 2015 U.S. Dist. LEXIS 86543 (S.D. Ohio), addressed jurisdictional as well as choice of law issues. The case involved a motor vehicle accident on a Virginia interstate in which one plaintiff was killed and the other injured after the defendant's truck rear-ended another truck, causing it to cross over the yellow line into oncoming traffic and hit the plaintiffs' vehicle. The plaintiffs, residents of Ohio, filed a negligence and wrongful death suit in Ohio; the defendant was a Canadian carrier organized under the laws of Ontario that operates in Ohio. Potential witnesses to the accident were residents of Virginia, North Carolina and Florida.

The defendant moved to dismiss the case for lack of personal jurisdiction, or in the alternative, to transfer venue to Virginia, and argued that Virginia law was controlling. The defendant argued that it did not consent to jurisdiction by designating an agent for service in Ohio as required by the Federal Motor Carriers Act, and that the Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), limited personal jurisdiction based on general jurisdiction to those states that include the corporation's principle place of business or are the place of incorporation. In rejecting the defendant's arguments and upholding a finding of personal jurisdiction, the district court noted it was bound by the decision in *Shapiro v. Southeastern Greyhound Lines*, 155 F.2d 135 (6th Cir. 1946), which expressly held that designating an agent for service pursuant to a federal statute constitutes consent to be sued in a motor vehicle accident. The court also cited the broad remedial purpose of the Motor Carrier Act in holding that the statute does not limit the designation of service to suits where the injury occurred within the state.

The court also declined to transfer venue to Virginia, noting that neither private interests (such as the location of the witnesses or the parties) nor public interests (such as Virginia's interest in the litigation) weighed in favor of transfer. The court did agree with the defendants, however, that Virginia law should apply to the case. The court noted that federal courts sitting in diversity apply the forum state's choice of law provisions; Ohio law prescribes that a party may overcome the presumption of *lex loci delicti* (that the law of the place of the accident should apply) if it can demonstrate that another state has a more significant relationship to the action. In weighing the factors adopted by the Ohio courts, the court found that the injury occurred in Virginia and the conduct causing the injury occurred in Virginia and, thus, Virginia had a more significant relationship to the case than Ohio. As a result, the court ultimately dismissed the plaintiffs' negligent training claim as Virginia law only recognizes a negligent training cause of action in certain circumstances, none of which were present in this case.

At issue in *California Tow Truck Association v. City & County of San Francisco*, 797 F.3d 733 (9th Cir.), was a San Francisco permit scheme that required tow truck drivers and towing firms to obtain permits in order to conduct business in the city. During the permit process, drivers were required to disclose any past criminal history and were required to submit fingerprints, a small photograph, a letter from his or her employer and a filing fee. The driver was also required to keep the permit with him or her at all times, and to renew the license every year. The California Tow Truck Association (CTTA) brought suit against the city, claiming that the permit scheme was preempted by the Federal Aviation Administration Authorization Act (FAAAA), which provides: "a State may not enact or enforce a law, regulation, or other provision having the force and effect of law related to price, route, or service

of any motor carrier . . . with respect to the transportation of property." The city contended that the permit scheme was not preempted because it fell within the statute's safety exception, which mandates that the preemption clause "shall not restrict the safety regulatory authority of a state with respect to motor vehicles." The city further argued that the permit scheme was developed as a result of safety concerns.

In its decision, the court first noted that the FAAAA preemption provision applies to state safety regulations generally, not just to the narrow circumstance of the manner in which tow trucks are operated. The court then moved on to a two-step inquiry to determine if a state law falls within the safety exception: (1) whether there is legislative intent to support the safety exception, and (2) whether there is a "logical" or "genuine" connection between the regulation and safety justification, or whether the purported justification is a pretext for undue economic regulation.

The court found that it was "reasonable to conclude" that the purpose of the permit scheme demonstrated a clear safety concern. Furthermore, the court determined that the nexus to the safety concern was more than sufficient, noting the evident logical relationship between the permit scheme and safety. The court went on to note that the permit requirement is a "tool for policing misconduct in the towing industry." In rejecting CTTA's argument that the city presented no evidence that the permit scheme in fact increased safety, the Court emphasized that the safety exception is concerned with legislative intent, not effectiveness. This is another example of a local regulation falling outside the scope of the FAAAA due to the statute's safety exception.

- Vincent Saccomando

19. Punitive Damages

In *Gregg v. Lonestar Transportation*, 2015 US Dist. LEXIS 27680 (W.D. Pa.), the plaintiff sought punitive damages in a case where it was alleged that a tractor-trailer jackknifed due to negligent operation by the driver, blocking four lanes of traffic during dense fog and causing a fatal accident. The court noted that to support the extreme remedy of punitive damages in Pennsylvania, the defendant must have a subjective appreciation of the risk of harm to which the plaintiff was exposed and that he acted, or failed to act, in conscious disregard of that risk. As the plaintiff failed to allege sufficient facts to establish a plausible claim that the driver had an subjective appreciation of the risk of harm and that he consciously disregarded that risk, the court dismissed the damages claimed.

In *McCullough v. Peeples*, 2015 US Dist. LEXIS 27683 (W.D. Pa.), another case in which the plaintiff sought punitive damages due to a jackknifed tractor trailer, the court dismissed the punitive damages claim noting that the facts alleged did not support a claim for negligence, despite plaintiff's claim that the driver was speeding. The court also rejected the plaintiff's claims that the tractor-trailer owner failed to enforce sufficient policies and procedures regarding state regulations, driving time for drivers, and maintenance of vehicles, and failed to adequately train, monitor and assign responsibilities for its drivers.

- Vincent Saccomando

20. Spoliation

Williams v. Werner Enterprises, Inc., 770 S.E.2d 532 (W.Va.) involved a single vehicle accident in which a driver for Werner Enterprises lost control of a tractor-trailer while crossing a snow-covered bridge, causing it to tumble down a 30 foot embankment where it become engulfed in flames, resulting in the deaths of the driver and his driving partner who was in the sleeper berth. Within hours, an adjuster for Werner concluded that the accident was caused by weather conditions and advised that the only potential claims were by the estates for workers' compensation death benefits, by the State for damage to the guardrail and cleanup, and by the cargo owner for loss of property. The towing company hauled the remains of the tractor-trailer to its garage, and 48 hours later Werner directed the towing company to dispose of the wreckage, which it then towed to a landfill. A month later, attorneys for the estate of the driving partner who had been in the sleeper berth requested that Werner preserve the remains of the tractor-trailer to which Werner responded that it had already been disposed of. The estate then brought a "hodgepodge" of claims, only two of which the court found relevant to the spoliation issue: a product liability claim against the manufacturer of the tractor-trailer and a claim of negligent or intentional spoliation of evidence against Werner, a cognizable stand-alone tort in West Virginia. The Estate, however, did not oppose the manufacturer's motion for summary judgment based on the argument that the spoliation made it impossible to prove a defect.

In dismissing the plaintiff's spoliation claim against

Werner, the court rejected the plaintiff's argument that Werner is a sophisticated trucking company with an in-house legal department and, therefore, should have been aware of a potential product liability claim. Nor did the court find two references in the driver's log book to mechanical breakdowns prior to the accident to be of any relevance to the spoliation issue. The court found that "only with hindsight," could it be said that Werner "should have known" of the potential for a product liability claim because between the time of the accident and the disposal of the tractor-trailer and 48 hours later, Werner understood only "that two of its employees had died in a horrific accident likely triggered by nothing more than snow and ice." As demonstrated by this decision, analysis of a spoliation issue is fact-specific and, in this case, concerned "the degree of proof necessary to say that a spoliator 'knew' of a pending or potential claim." In fact, two dissenting justices believe that the decision "abolishe[s] the tort of spoliation" in West Virginia. Because decisions on spoliation are often close calls, the best approach is to preserve the evidence for a reasonable period of time.

Ross v. Kopocs, 2015 US Dist. LEXIS 26197 (E.D. Tenn.), a case involving alleged spoliation of the driver's log book, addresses a limited but significant issue holding that spoliation of evidence does not need to be pled as an affirmative defense.

Cook v. Tarbert Logging, Inc., 360 P.3d 855 (Wash. Ct. App.) is an example of how the law involving spoliation is still in flux and continues to develop across the country. The case involved an accident between the plaintiff's pickup truck and a Tarbert Logging truck in 2009. The plaintiff's expert inspected the pickup truck approximately a month later but did not remove the air bag control monitor or preserve its data. The plaintiff filed a complaint against Tarbert Logging and the County in December 2010. The first request for an inspection of the pickup truck came from the County's attorney in 2012, but it had been "parted out" and sold between 2009 and 2011. The appellate court rejected any general duty to preserve evidence, holding that negligent failure to preserve evidence relevant to foreseeable litigation is not sanctionable spoliation. Rather, the duty must arise from a specific source, such as an adversary's request to preserve evidence. As the court noted, although the duty to preserve evidence is well-settled in federal courts, there is no uniformity on the issue among state courts. The court conceded that "[g]iven developments in the federal courts and elsewhere, it might be time for Washington to reexamine whether it should recognize the existence of a general duty to preserve evidence," but such a question involved many issues which were not briefed by the parties and, under the circumstances, the court declined to consider departing from the established precedent in this case.

In *Smith v. Williams*, 2015 Texas App. LEXIS 5461 (Tex. Ct. App.), the defendant was driving a tractor-trailer carrying cargo for Medallion Transport on April 4, 2011, when he struck the plaintiff's motor vehicle. Within a week of the accident, the plaintiff's attorneys advised Medallion of their representation and requested various documents. Medallion's insurance carrier advised Medallion to preserve the evidence requested including the eight days of logs and dispatch records prior to the accident. The plaintiff filed suit in October, 2012, and subsequently requested logs, dispatch records and waybills from March 1, 2011, to the date of the accident. By this time, a number of these documents were no longer in existence because the plaintiff's counsel's original correspondence did not specify a time period and Medallion preserved the documents for only eight days prior to the accident. On a spoliation motion, the trial court rejected Medallion's arguments that the initial letter provided no time frame for the preservation, that the records requested were too remote to be probative on the issue driver fatigue on the day of the accident and that the plaintiff had suffered no prejudice. Instead, the trial court found that there was spoliation which merited a jury charge permitting the jury to draw an inference that the requested documentation would have been unfavorable to Medallion or favorable to the plaintiff. The plaintiff obtained a nearly $4 million verdict. The appellate court, following a detailed discussion, found that the trial court's jury instruction was improper and that the evidence did not support a finding under the applicable standard that Medallion either acted with intent to conceal discoverable evidence or acted negligently and caused the plaintiff to be irreparably deprived of any meaningful ability to present a claim. To avoid this type of dispute, a recipient of a preservation request would be well advised to clarify the time period for the request and exactly what documents are being requested.

- Vincent Saccomando

21. Auto or GL

Griffith Energy Services, Inc. v. National Union Fire Ins. Co. of Pittsburgh, 2015 Md. App. LEXIS 104 (M.D.) addressed the significance of complementary exclusion

provisions in auto and commercial general liability policies issued by the same carrier. One of Griffith's employees mistakenly delivered oil to the wrong address, causing the driver to pump oil into the basement of the center home in a triplex of houses, all of which shared a roof and foundation. Immediately recognizing his mistake, the driver ceased pumping oil before the delivery was complete. The center home showed immediate signs of damage, and within four hours the two other homes in the triplex showed traces of contaminants. Eventually, all three homes were condemned, and Griffith was charged with extensive remediation costs.

At the time of the incident, Griffith was a named insured on an auto policy and on a CGL policy, both issued National Union Fire Insurance Company. The auto policy provided $1,000,000 in liability coverage, and included an exclusion for "Completed Operations." Under that exclusion, there was no liability coverage for property damage "arising out of work after that work has been completed or abandoned." The auto policy also included a "Wrong Delivery of Liquid Products" endorsement, which *excluded* liability coverage for property damage occurring after delivery is complete. The CGL policy contained a complementary "Misdelivery of Liquid Products Coverage" endorsement that *provided* coverage for property damage if the damage occurred after delivery was complete or the site was abandoned. The CGL policy also contained an excess rider that provided an additional $1,000,000 in liability coverage.

At issue was whether the property damage occurred during the mis-delivery, and was thus covered under the auto policy, or after the mis-delivery, which would be covered under the CGL policy and afforded excess coverage. The insurer maintained that coverage was afforded under the auto policy, arguing that the triplex was a single structure that sustained damage during the mis-delivery, and that the seepage and spread of the oil from the center house into the end houses was merely a continuation of the damage that occurred. Griffith took the opposite position in its declaratory judgment action, asserting that although the damage to the center home occurred during the mis-delivery, the damage to the adjoining homes did not manifest until hours later and was thus covered under the CGL policy.

Ultimately, the court agreed with the insurer and the court below, holding that the damage to the properties occurred *during* the oil delivery. The court noted that the owners of the properties experienced immediate loss of use of the premises, and that all three homes were condemned. Thus, property damage was occurring, although unseen and undiscovered, to all three homes as oil was being pumped into the center house. Consequently, the CGL policy was inapplicable to the incident. This was particularly significant for Griffith, since the policy limits on the auto policy were exhausted months before the decision was rendered. As a result, the insurer's duty to defend was terminated upon exhaustion of the policy limits, and Griffith was forced to foot the bill for the remainder of the remediation costs.

In *A & W Maintenance, Inc. v. Charter Oak Fire Ins. Co.*, 91 F. Supp.3d 113 (Mass.), the issue was whether coverage for a personal injury action was excluded because it resulted from an accident that "arose out of the use of any auto owned or operated by any insured." An A & W employee sustained injuries after falling into an open clarifier tank while guiding a truck operated by an employee of Hart, a subcontractor working with A & W. At the time of the incident, A & W had two relevant insurance policies: a CGL policy with the defendant and a commercial auto policy with a third party insurer. The A & W employee sued for his injuries resulting from the incident, and the company made claims with both insurers for defense and indemnification which were subsequently denied. Charter Oak, the CGL insurer, argued that coverage was excluded because the incident resulted during loading and unloading, i.e., from the use or operation of a motor vehicle.

The court noted that in order to be excluded under the use or operation clause of the agreement, there must be a reasonably apparent causal connection between the use of the vehicle and the injury. In its conclusion that causation was lacking, the court determined that the accident was not a result of the use or operation of the truck but rather the presence of the open fuel tank. The court further determined that merely guiding or spotting a vehicle does not rise to the level of use or operation of an automobile; a spotter can only be considered a user if the driver gives up a significant degree of control to the spotter. Finding that the employee was not a "user" under Massachusetts law, the court held that the use or operation of an auto exclusion did not apply, and ordered the defendant CGL insurer to defend and indemnify the plaintiff. As a result, the defendant was also required to defend and indemnify the third party subcontractor as an additional insured.

- Vincent Saccomando

22. Duty to Defend

We reported last year on the primary/excess dispute analyzed by the First Circuit Court of Appeals in *Old Republic Insurance Co. v. Stratford Insurance Co.*, 777 F.3d 74 (1st Cir.). One issue left unresolved in that decision was whether, under New Hampshire law, an insurer found to provide excess coverage is obligated to share in the costs of defense with the primary insurer. A 1991 decision by the Supreme Court of New Hampshire has been interpreted by some as requiring an excess insurer to share in the defense; the First Circuit certified a question to the New Hampshire court asking it to comment on the defense obligation (if any) of an excess insurer.

As we went to press the Supreme Court of New Hampshire issued its opinion, 2016 N.H. LEXIS 8, concluding that under New Hampshire law an excess insurer's duty to defend is triggered only when the primary insurer's limits are exhausted. Accordingly, as the primary insurer Old Republic had the sole duty to defend. Larry Rabinovich and Phil Bramson represented Stratford Insurance Company.

The Seventh Circuit Court of Appeals issued a stern warning to insurers which fail to fulfill their duty to defend in *National American Insurance Co. v. Artisans and Truckers Casualty Co.*, 796 F.3d 717. By not defending its insureds in the underlying bodily injury action, Artisan was estopped from raising coverage defenses and was liable to reimburse National American which defended and indemnified the parties.

Writing for the court Judge Kanne referred to plaintiffs as "smart" for suing various defendants under alternate theories of liability. Unlimited Carrier, whose placard was attached to the doors of the tractor, was insured by National American. Victor Barengolts, who was allegedly operating the tractor, was insured by Artisan. In some of the counts of the complaint, plaintiffs argued that another person was driving the tractor and that either Barengolts, or his father who owned the tractor, was the principal vicariously liable for the negligence of the driver.

The Barengolts were insured under the Artisan policy and the tractor was a scheduled auto. However, the policy excluded all coverage when the insured auto is used for or on behalf of any other person or organization. Since the tractor displayed Unlimited's placard, Artisan took the position that it had no coverage and it declined to defend the Barengolts.

National American did defend the Barengolts under a reservation of rights and ultimately settled the case on behalf of all of the defendants and in return was assigned rights to recover under the Artisan policy. In the meantime, the developing evidence showed that the lease with Unlimited Carrier had been backdated and that the Unlimited placard may not have been authorized. The court, though, was more interested in the counts of the complaint that alleged that Barengolts were vicariously liable.

Artisan made reference to the FMCSA leasing regulations and placard regulations to argue that the rig was being operated under Unlimited's authority, but the Court insisted that "placard liability" is not exclusive. The court seems to have understood the exclusion to apply only when the vehicle was being used exclusively in the business of another. In any event, the court held that even if it would have ultimately succeeded in avoiding a duty to indemnify, Artisan should have defended its insureds. It gambled and ended up paying for both defense and indemnification. (Compare the move by National American here with the attempt by the insureds in *Daniel v. National Casualty*, discussed in the section on the motor carrier form, to assign the rights of an insured under one policy to another insurer.)

In *Castlepoint National Insurance Co. v. Insurance Co.* of the State of Pennsylvania, 2015 U.S. Dist. LEXIS 62525 (M.D. Pa.), the same principal operated two motor carriers – Single Source and East-West. When one of Single Source's tractors experienced mechanical difficulties in the course of a haul, the principal directed an East-West driver to take a tractor that East-West had leased from Kasablanca and complete the haul. After the tractor was involved in an accident, a dispute arose between Castlepoint (which insured East-West) and ISOP (which insured Single Source) over the duty to defend Kasablanca and another trucker, E&K (whose USDOT number appeared on the tractor doors). The ISOP policy included as an insured "the owner or anyone else from whom you [Single Source] hired or borrow a covered auto." Since Single Source had obtained the tractor from the lessee East-West, and not from the owner/lessor Kasablanca, the court found that Kasablanca did not qualify as an additional insured under the ISOP policy. As for E&K, although its USDOT number appeared on the tractor, there was no allegation or evidence that E&K was a permissive user of the tractor, loaned the tractor to Single Source, or was in any way liable for the conduct of another

insured. Consequently, E&K was also not entitled to a defense under the ISOP policy.

In *National Specialty Insurance Co. v. Mehalchick*, 2015 U.S. Dist. LEXIS 97896 (M.D. Pa.), National Specialty paid its policy limit to settle bodily injury claims against the insured motor carrier and driver. The claimants then brought an action against the shipper on theories of negligent entrustment and negligence arising out of the shipping agreement with the motor carrier. The shipper brought a third-party action against the motor carrier and driver, which sought a defense from National Specialty. The court agreed with National Specialty, however, that the unambiguous language of its policy terminated its duty to defend once it paid its policy limit to settle claims arising out of the same accident.

Georgia-Pacific, LLC v. Western Express, Inc., 2015 U.S. Dist. LEXIS 115663 (W.D. Va.) did not involve insurers, but examined the duty to defend in the context of an indemnification agreement between a shipper and a motor carrier. The agreement provided that the carrier Western Express would defend, save harmless and indemnify the shipper Georgia-Pacific against certain liabilities arising out of Western Express' performance under the agreement. When a Western Express driver was injured while loading his vehicle at the Georgia-Pacific plant, he sued Georgia-Pacific only, and Western Express refused to defend Georgia-Pacific on the grounds that the claims arose out of the shipper's sole negligence. Georgia-Pacific argued that the specific language in the agreement created the "sole negligence" exception only for Western Express' obligations to "hold harmless" and indemnify. The court, however, with the support of two earlier cases interpreting similar Georgia-Pacific contracts, found that the sole negligence exception was intended to apply to the duty to defend as well.

- Larry Rabinovich/Philip A. Bramson

23. Use of an Auto

In *Gradillas v. Lincoln General Insurance Co.*, 792 F.3d 1050 (9th Cir.), the federal court of appeals certified to the Supreme Court of California the question of the appropriate standard to apply to determine whether a loss arises out of the use of an auto – must the vehicle be a "predominating cause/substantial factor," or need there only be a "minimal causal connection" between the vehicle and the injury? The facts of the particular case involved a bus driver who drove a passenger to an empty, dark parking lot and then raped her. Lincoln General, which issued two policies to the bus owner, denied coverage under the business auto policy and initially agreed to defend under the commercial general liability policy; it later denied coverage under the CGL policy as well. Whether the passenger's injuries arose out of the "use" of the bus was the sole issue on appeal (Lincoln General apparently having failed to raise below whether the bus was a covered auto or the loss qualified as an "accident"). The court of appeals found a conflict in California decisions applying the "predominating cause/ substantial factor" test with the Supreme Court of California's footnote observation in *State Farm Mutual Automobile Insurance Co. v. Partridge*, 10 Cal.3d 94 (1973), that the "vehicle need not be, in the legal sense, a proximate cause of the injury…." We will continue to follow this case and report how the certified question is decided.

It is long-established that "use" of a vehicle includes loading and unloading. Where, though, does "loading" start, and where does "unloading" end? In *Landmark American Insurance Co. v. VO Remarketing Corp.*, 619 Fed. Appx. 705 (10th Cir.), the insured's employees were carrying exercise equipment up the claimant's stairs when they dropped it and it fell on her. Landmark denied coverage under its CGL policy on the grounds that the loss arose out of the "use" (i.e., the unloading) of an auto, and was therefore excluded. Under Colorado law, "unloading" includes the complete operation from the time the goods are given into the insured's possession until delivery is complete. Since delivery was not yet complete at the time of the loss, the loss arose out of the use of the vehicle and the CGL policy's auto exclusion applied.

In *Wolfe v. Ross*, 115 A.3d 880 (Pa. Super. Ct.), the plaintiff's decedent was killed while riding a dirt bike owned by the insured homeowner's son, but the accident occurred after the decedent had gotten drunk at a party at the insured's home. The plaintiff argued that coverage was available under the homeowner's policy, notwithstanding the auto exclusion, for the claims arising out of the negligent furnishing of alcohol to a minor. The court agreed with the insurer, however, that the exclusion turned on the cause of the accident – the use of the dirt bike – rather than on the insured's conduct – serving alcohol to a minor, and/or negligently entrusting the dirt bike. (The court also acknowledged that the insurer's duty to indemnify, which was the only issue concerning the plaintiff, might be distinct from the

duty to defend, which could be triggered by allegations of social host liability separate from negligent entrustment of an auto.)

- Philip A. Bramson

24. UM/UIM

A recurring issue in UM/UIM litigation is whether an insured, having purchased coverage for multiple vehicles, is entitled to collect multiple policy limits for a single loss ("stacking"). In *Midwestern Indemnity Co. v. Brooks*, 779 F.3d 540 (8th Cir.), the insured paid five separate premiums for UIM coverage on her five vehicles. The policy provided expressly that a single limit applied regardless of the number of vehicles or premiums shown in the schedule or the declarations. When she was struck by an underinsured motor vehicle while riding her bicycle, the insured sought to stack UIM coverage for her various covered autos. The court enforced the unambiguous anti-stacking language of the policy (carefully noting, however, that Missouri public policy would invalidate an insurer's attempt to prohibit stacking of mandatory UM coverage).

In *Montgomery v. Progressive Advanced Insurance Co.*, 2015 U.S. Dist. LEXIS 27820 (E.D. Va.), the plaintiff was injured while riding as a passenger in an all-terrain vehicle ("ATV") designed for off-road use only. The Progressive policy defined the phrase "uninsured motor vehicle" to include "a land motor vehicle or trailer of any type." Although the definition of "motor vehicle" was narrower in the Virginia UM/UIM statute, and would not have included the ATV in which the plaintiff was injured, the court found that the ATV qualified as a motor vehicle under the broader language of the Progressive policy. (It may also have been significant that the owner of the ATV in question had modified it, registered it and insured it so that it could be operated on public highways.)

The case of *Bartlett v. Commerce Insurance Co.*, 167 N.H. 521 (N.H.) began with four policies providing a potential $1,750,000 in UIM coverage, but that amount was whittled away by the Supreme Court of New Hampshire. The claimant was injured when struck by an underinsured motor vehicle while occupying a motorcycle covered under a New Jersey policy issued by Foremost; the court applied the New Jersey statute of limitations for UIM actions, and found that the claimant's action for coverage under the Foremost policy was untimely. The claimant insured her own motorcycle, which was registered and garaged in New Hampshire, with Progressive; since she had settled her claim against the tortfeasor without Progressive's consent, she had forfeited excess UIM coverage under the Progressive policy. (The court found that Progressive had not waived its policy "consent-to-settle" provision simply by not responding to the insured's letter requesting consent.) The claimant insured her other vehicles with Commerce, which provided excess UIM coverage; the court refused to require the Commerce policy to "drop-down" to fill in the gap left by the insured's failure to assert a timely claim for primary UIM coverage under the Foremost policy, and held that the Commerce policy would attach after the first $250,000 of the claimant's damages. Finally, the court remanded the questions of whether a Commerce umbrella policy would provide UIM coverage, and at what point that coverage would attach.

In *Braithewaite v. Progressive Casualty Insurance Co.*, Index No. 5464/2012 (N.Y. App. Div. 2d Dep't), a Progressive policy delivered in Pennsylvania defined "uninsured motor vehicle" to exclude both a vehicle owned by the named insured and a covered auto. When the named insured's vehicle was involved in a New York accident and a passenger was injured, however, the court held that the exclusion violated New York's mandatory UM law (since the law did not expressly permit such an exclusion). Moreover, since the policy did not limit coverage to the applicable statutory minimum (in this case, $25,000) if a policy provision was deemed unenforceable, the appellate court held that Progressive was obligated to provide UM coverage up to its $300,000 policy limit.

The IDS policy in *Gambrell v. IDS Property Casualty Insurance Co.*, 357 P.3d 1221 (Ariz. Ct. App.), provided UIM coverage when the named insured was a pedestrian, or was occupying a passenger car or a "utility car," defined as one "not used in a business or occupation other than farming or ranching." Accordingly, the court upheld the insurer's declination of UIM coverage since the insured was injured while driving a semi-tractor tanker transporting milk for his employer. The court held that the policy limitation was consistent with the Arizona UIM statute, Ariz. Rev. Stat. § 20-259.01(C), which makes it optional for an insurer to offer UIM coverage for a motor vehicle used in the business of transporting property or equipment.

Since most UM/UIM endorsements limit coverage for class 2 insureds to situations where that insured is "occupying" a covered auto, the scope of what constitutes "occupying" is a frequent topic of litigation.

In *Bratton v. Selective Insurance Co. of America*, 776 S.E.2d 775 (Va.), a company pickup truck was outfitted with a safety strobe light to warn oncoming traffic away from company employees engaged in a road paving project. A company dump truck would carry hot asphalt to the jobsite, where the asphalt would be poured from the dump truck into a front-end loader which would then be used to pour it onto the road where needed. The truck driver had just dumped some asphalt into the front-end loader, and had stepped down out of the dump truck and walked to the rear of the vehicle where the front-end loader was sitting, when two drunk drivers crashed into the jobsite. The dump truck driver was killed when pinned between one of the drunk driver's vehicles, the rear blade of the front-end loader, and the dump truck's left rear tires.

The Selective policy in question defined "occupying" to include "using" and "getting out of." The Supreme Court of Virginia refused to impose a physical contact requirement on the definition of "getting out of," and held that the decedent was "getting out of" the dump truck because he was still "vehicle-oriented" and did not begin a new activity in the thirty-second interval between unloading the asphalt and the collision. The court went further and held (over a vigorous dissent) that the decedent was also using the pickup truck, because it had its safety strobe light on and was being employed to protect the workers at the jobsite. Since the decedent was "occupying" two covered autos, the majority held that his estate was entitled to collect two UIM policy limits.

Where UM/UIM coverage must be offered by the insurer but may be rejected by the insured, the specifics of the rejection form can be critical to a coverage determination. In *Douglas v. Discover Property & Casualty Insurance Co.*, 2015 U.S. Dist. LEXIS 131601 (M.D. Pa.), *reconsideration denied*, 2015 U.S. Dist. LEXIS 131601 (M.D. Pa.), the claimant was injured while operating a vehicle owned by his employer. Discover argued that the employer had waived UIM coverage when purchasing its policy. The claimant argued, and the court agreed, that the rejection form was invalid because it did not track precisely the language set out in 75 Pa. Cons. Stat. § 1731(c) (since, under prior Pennsylvania case law, even minor deviation from the statutory language nullifies the form). Since, however, Discover had a good faith (if rejected) argument that the statute did not apply because its policy was not "delivered" in Pennsylvania, the court granted Discover summary judgment as to the plaintiff's bad faith claim.

- Philip A. Bramson

25. Additional Insured

In *Stephens v. Progressive Gulf Insurance Co.*, 2015 U.S. Dist. LEXIS 104473 (N.D. Miss.), the plaintiffs' decedent was standing outside a vehicle when he was struck and killed by a loaded log truck; the bodily injury plaintiff sought recovery from Darryl Holcomb, James Holcomb, IC Trucking, and Holcomb Logging, LLC, alternatively, as the purported owners and/or operators of the log truck (the court made no finding as to which defendant actually owned or operated the vehicle). For various reasons, the plaintiffs' judgments against Darryl, James and IC Trucking were all dismissed, and when it came time to determine coverage under the Progressive policy, the only judgment debtor left was Holcomb Logging.

Holcomb Logging was not a named "insured" under the policy. The court found that Holcomb Logging, as a limited liability company, could not be a "person" using the log truck with the named insured's permission. Finally, since there was no valid judgment holding any person liable for the accident, Holcomb Logging could not qualify for coverage as an organization legally liable for the acts or omissions of another insured. Accordingly, Holcomb Logging did not qualify for additional insured coverage under the Progressive policy. Of course, the court also found that the log truck did not qualify as an insured auto, so no person or entity would have been entitled to liability coverage under the policy for the subject loss. (The MCS-90 was not available for several reasons: the court focused on the absence of a judgment against the named insured.)

In *Selective Insurance Co. v. Sullivan*, 2015 U.S. Dist. LEXIS 129079 (W.D. Ky.), parents Curtis and Sharon Sullivan owned a company, Omni Custom Meats, Inc., and a 1999 Mercedes sedan which was scheduled on the Selective business auto policy issued to Omni. The Sullivan's daughter, Davida, had previously worked for Omni, and when she left the company her severance package included the right to use the Mercedes. Since her use of the vehicle at the time of the subject accident (and at all other times) was strictly personal, and not in the business of Omni, there was no basis for concluding that Omni had "borrowed" the vehicle, and consequently Davida did not qualify for additional insured status as a permissive user of a covered auto borrowed by the named insured. (Since most commercial auto policies list vehicles on a "Schedule of Covered Autos You Own," it is curious that the court did not analyze why the Mercedes should not have been treated as an owned auto under the Selective policy.)

- Sanjeev Devabhakthuni

26. No Fault

Delaware's no-fault statute, 21 Del. C. § 2118, mandates a minimum of $15,000 per person/$30,000 per accident of coverage. In *State Farm Mutual Automobile Insurance Co. v. Kelty*, 2015 Del. LEXIS 550 (Del.), the policy did not provide no-fault coverage above the statutory minimum for any person injured while a pedestrian except the named insured, the named insured's spouse, or any relative. The claimant did not fall into any of these categories, and the Supreme Court of Delaware agreed with State Farm that the limitation did not offend the state's public policy because no-fault coverage in excess of the minimum is optional. (Unfortunately for the claimant, his argument that he was an occupant of the covered auto, rather than a pedestrian, was not raised below, and the Supreme Court refused to consider it.)

- Philip A. Bramson

27. Miscellaneous

In *Dakter v. Cavallino*, 358 Wis.2d 434, 856 N.W.2d 523, which has drawn a lot of industry attention, the Supreme Court of Wisconsin drew a fine distinction between two principles relative to the liability of a truck driver whose negligence results in bodily injury or property damage to others. On one hand, the court found that a professional truck driver – as any person engaged in a profession or trade - is deemed to have special knowledge and skills, and is expected to exercise that knowledge and those skills as a reasonably prudent professional truck driver would do under like or similar circumstances. On the other hand, the court found that a truck driver is not held to a higher standard of care than any other driver; i.e., the truck driver is not required to be any more careful than any other person operating a vehicle on the highway.

The dispute on this point arose over a particular jury instruction; the plaintiff argued that the instruction merely stated the "profession or trade" standard, while the defendant argued that the instruction misled the jury into thinking that professional truck drivers should be held to a higher standard of care. The majority of the court agreed with the defendant. Two justices also agreed that the instruction was correct on the law applicable to professions or trades, since the defendant was actually operating a tractor-trailer at the time of the accident, but wrote to emphasize that certain treatises quoted by the majority did not necessarily state the law of Wisconsin. One justice disagreed that a "profession or trade" instruction is appropriate for a truck driver but felt that the error was harmless, since numerous other instructions given to the jury made it clear that the truck driver was to be held to an ordinary standard of care. Moreover, the evidence in the trial was sufficient for the jury to have found that the truck driver's operation of his tractor-trailer violated an ordinary standard of care. The concern that some have expressed about the decision is that jurors may not fully understand the fine distinctions and impose a higher standard of care on truck drivers than on other motorists.

Having purchased primary coverage for its entire fleet, the motor carrier in *General Star Indemnity Co. v. Withrow*, 2015 Ky. App. Unpub. LEXIS 591 (Ky. Ct. App.), purchased an excess policy to provide additional coverage for 21 of its vehicles used for one particular customer. The 21 vehicles were identified on a separate schedule, and the excess policy defined "covered auto" to include those vehicles identified "Per schedule on file with insurer." When a loss involved one of the motor carrier's vehicles which was not on the list of 21, however, the court held that the excess policy provided coverage because Kentucky law prohibits incorporation by reference in insurance contracts and the list was not deemed part of the excess policy.

In *Otterbacher v. Snyder*, 2015 S.C. App. Unpub. LEXIS 411 (S.C. Ct. App.), the court found that the claimant's action seeking a declaration of liability coverage under the tortfeasor's policy was not justiciable, because the claimant had not obtained a judgment against the tortfeasor or established the tortfeasor's liability for the loss in any other way.

While Georgia law permits a claimant to bring a direct action against a motor carrier's liability insured, the statutory definition of "motor carrier" in OCGA § 40-1-100(12)(B)(vii) excludes privately owned and operated vehicles "capable of transporting not more than ten persons for hire when such vehicles are used exclusively to transport persons who are elderly, disabled, en route to receive medical care or prescription medication, or returning after receiving medical care or prescription medication. In *Mornay v. National Union Fire Insurance Co. of Pittsburgh, PA*, 331 Ga. App. 112, 769 S.E.2d 807 (Ga. Ct. App.), *cert. denied*, 2015 Ga. LEXIS 474 (Ga.), the court found that the insured was not a "motor carrier" within the statutory definition because the vehicle involved in the loss was not capable of carrying more than ten persons (although before retrofitting it had been capable of carrying twelve persons), and it was used exclusively to transport individuals to receive medical

care (even though those individuals were not necessarily elderly or disabled).

The policy in question in *Schuster v. Occidental Fire and Casualty Co. of North America*, 391 Ill Dec. 188, 30 N.E.3d 458 (Ill. Ct. App.), *appeal denied*, 396 Ill. Dec. 185, 39 N.E.3d 1011 (Ill.), provided coverage for specifically-described autos and also provided automatic coverage for vehicles "acquired" after policy inception but not yet scheduled on the policy. The court held that a vehicle leased the day before the loss by the named insured had not been "acquired" within the meaning of the policy, as "acquired" meant "owned." The insured's attempt to schedule the vehicle 3 1/2 hours after the loss occurred was not valid.

In *Lucero v. Northland Insurance Co.*, 2015 N.M. LEXIS 100 (N.M.), although both the tractor and the connected trailer were scheduled on the policy, the court limited coverage to a single $1 million policy limit, enforcing the policy's standard provision that the limit was $1 million regardless of the number of covered autos involved in a single accident.

In 2012, California enacted regulations governing emissions from diesel-fueled motor vehicles to fulfill its obligations to enforce federal air pollution controls under the Clean Air Act. In *Owner-Operator Independent Drivers Association, Inc. v. Corey*, 2015 U.S. Dist. LEXIS 89597 (E.D. Cal.), the district court rejected a challenge to the regulations by an association of independent owner-operators on the procedural grounds that the Clean Air Act provides expressly that such challenges must be brought in a federal Court of Appeals.

In *Bentlejewski v. Werner Enterprises, Inc.*, 2015 U.S. Dist. LEXIS 88524 (W.D. Pa.), a motor carrier terminated a driver's provisional employment upon receiving an unfavorable driving history from a prior motor carrier employer. The driver sued the prior employer for slander and demanded production of the unfavorable report. The court, however, found that the report was conditionally privileged under Pennsylvania law, and found no good cause to pierce that privilege.

Illinois law permits recovery of wrongful death damages by all of a decedent's children, adult as well as minor, while Indiana restricts such recovery to minor children. In *Rexroad v. Greenwood Motor Lines, Inc.*, 36 N.E.3d 1181 (Ind. Ct. App.), the court held that the issue of wrongful death damages would be controlled by Indiana law since the loss occurred in that state and, in the case of auto accidents, the law of the state where the accident occurs governs the conduct of the parties. The plaintiffs argued that, even if Indiana law applied to liability, damages should be determined under Illinois law since the defendant had admitted liability. The court declined, though, to engage in depecage – the process of analyzing different issues in the same case under the laws of different states – because Indiana courts do not accept that practice.

In *Jones Motor Group, Inc. v. Hotard*, 2015 U.S. Dist. LEXIS 130202 (E.D. La.), the court agreed that profits lost because the plaintiff could not use its damaged trailer to deliver cargo was a legitimate element of damages that could be asserted against the defendant whose vehicle damaged the trailer.

In *Carolina Casualty Insurance Co. v. Travelers Property Casualty Co.*, 90 F. Supp.3d 304 (D.N.J.), a tractor-trailer driver was injured while his rig was being loaded at a shipper's facility. The shipper had primary insurance through Travelers (which provided excess coverage for any covered loss arising out of the use of an auto) and excess insurance through Illinois National. The motor carrier (which owned the trailer and leased the tractor) had primary coverage through Carolina Casualty (which provided primary coverage for a tractor hired by the motor carrier and used exclusively in its business, and insured a connected trailer on the same basis as the connected tractor); and excess coverage through Lexington. The owner/lessor of the tractor had both a primary and excess policy through Old Republic; the primary policy provided only statutory minimum coverage to insureds other than the owner/lessor. The shipper's insurers settled the driver's action against the shipper for $5 million and then sought contribution from the other insurers.

The court found that the Travelers, Carolina Casualty, and Old Republic primary policies were primary-type policies, even if they included excess "other insurance" clauses; Travelers and Carolina Casualty had to contribute their policy limits and Old Republic had to contribute the New Jersey statutory minimum of $15,000, before any contribution was required from the true excess policies. The Illinois National and Lexington excess policies had mutually repugnant "other insurance" clauses, and attached at the same point above the contributions from the primary policies. No coverage was provided under the Old Republic excess policy, which followed the form of the primary policy and provided no coverage for the shipper above the statutory minimum which had already been contributed. (The matter was decided on October 22,

2014; on February 25, 2015, the court denied Carolina Casualty's motion for reconsideration, while granting the request of Travelers and Illinois National for attorneys' fees, costs, and prejudgment interest, 2015 U.S. Dist. LEXIS 22674 (D.N.J.).)

In *State v. Bickford*, 117 A.3d 686 (N.H.), the defendants argued that the State's action charging unlicensed operation of a taxicab business was preempted under federal law. The court disagreed, finding that Congress specifically exempted local and properly licensed taxicab services from FMCSA jurisdiction, and finding further that purely intrastate passenger transportation for hire is outside federal jurisdiction.

In *National Liability & Fire Insurance Co. v. Itzkowitz*, 2015 U.S. App. LEXIS 16387 (2d Cir.), a dump truck struck and damaged a highway overpass. After hitting the overpass, the dump box separated from the truck and landed on the highway. Between thirty seconds and five minutes later, a passenger vehicle struck the dump box; between a few seconds and twenty minutes after that, a second passenger vehicle struck the dump box. The court found that three separate accidents had occurred: the collision with the overpass was not temporally or spatially proximate to the first vehicle's collision with the dump box, and there was no causal connection between the first vehicle's collision with the dump box and the second vehicle's collision with the dump box. Accordingly, each accident potentially and separately exposed National Liability up to its policy limit.

- Philip A. Bramson