HISCOCK & BARCLAY

ALERT

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Transportation: Annual Year in Review

Hiscock & Barclay's Transportation Team

Hiscock & Barclay's Transportation Team offers clients a broad range of services for claims relating to truck losses including coverage analysis and litigation, underwriting consultations, rapid response in the event of a loss, and defense of trucking companies in bodily injury and property lawsuits.

The members of the team that focus on coverage – Larry Rabinovich, Tony Piazza and Phil Bramson – are active on a nationwide basis in analyzing the full range of coverage issues that arise in the context of trucking risks. These include litigations, and appeals, on matters relating to all types of commercial auto and general liability policies including the business auto, truckers and motor carrier coverage forms, the federal and state motor carrier filings and endorsements (BMC-91, MCS-90, Forms E and F, BMC-32 and so on), uninsured and underinsured motorists coverage forms, the UIIE endorsement, and many other specialized or manuscript forms and endorsements.

Our defense attorneys, led by Matt Larkin, have considerable experience in the defense of transportation, trucking and automobile liability cases for private clients and insurance companies. We are regularly called upon to conduct pre-suit investigations and coordinate accident reconstructions and have defended trucking companies, common carriers, tour operators, manufacturers, and railroads in wrongful death, personal injury and property damage cases. Our experience trying innumerable transportation cases to verdict in New York state and federal courts gives us the background and skill necessary to provide exceptional results for our clients.

Included here is our *Annual Transportation Year In Review*. We have analyzed and summarized a number of important cases and have gathered them here to permit a quick and convenient review of cases that may impact your business. If you have questions or would like help on any of your legal transportation needs, please contact the Transportation Team lead, Larry Rabinovich.

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Transportation Team

Laurence J. Rabinovich
(212) 784.5824
lrabinovich@hblaw.com

Gary H. Abelson

Philip A. Bramson

Jennifer Nichols Castaldo

Erica M. DiRenzo

Michael E. Ferdman

William C. Foster

Kevin M. Hayden

Matthew J. Larkin

George G. Mackey

Alan R. Peterman

Anthony J. Piazza

Robert M. Shaddock

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I. Cargo Cases

Elements of a Carmack Amendment Claim

In *Dan Zabal Trading Co. v. Saia Motor Freight Line*, 2011 U.S. Dist. LEXIS 122107, the court laid out the long established elements of a claim by a shipper under the Carmack Amendment. The court noted that the Carmack Amendment was the codification of the common law principle that a carrier was liable for damage to goods it transports unless it can be shown by the preponderance of the evidence that the damage was caused solely by: (1) an act of God; (2) a public enemy; (3) the act of the shipper, pubic authority or (4) an inherent vice or nature of the goods. The court, citing the United States Supreme Court's decision in *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 137, 84 S. Ct. 1142 (1964), held that before the burden of proof can be imposed on the carrier, the shipper make out a prima facie case against the carrier by showing: (1) delivery of the goods to the carrier in good condition; (2) delivery by the carrier in damaged condition; and (3) damages. Proof of those elements shifts the burden to the carrier to prove one of the exceptions to liability.

Preemption of State Law Claims

The issue in *Straley v. Thomas Logistics, LLC*, 2010 U.S. Dist. LEXIS 53613, was whether the Carmack Amendment preempted possible state law claims against an interstate carrier. Plaintiff's original complaint contained state law causes of action against the shipper. When the defendant moved to dismiss based on preemption of such claims by the Carmack Amendment, plaintiff served an amended complaint that contained a cause of action under the Carmack amendment but maintained the state law claims.

The court held that the Carmack Amendment preempts all possible state law claims that arise exclusively from interstate transport services performed by a defendant and imposes "strict liability" of carriers to shippers. The court also held that the Carmack Amendment preempted any claim related to the claim process and the denial of claims.

A contrary result, however, was reached in *Daily Express v. Maverick Transportation, LLC*, 2011 U.S. LEXIS 121417. In that case, the plaintiff agreed with PPG to transport a shipment of glass from Pennsylvania to Massachusetts. PPG delivered the glass to plaintiff's trailer where an employee of the defendant Maverick secured the load pursuant to a Spotting/Security Agreement between defendant and PPG. When a portion of the shipment broke in transit, plaintiff paid the claim filed by PPG.

Plaintiff then filed an action in Pennsylvania state court against defendant for negligent loading of the glass. The defendant removed the action to federal court claiming that the claim was preempted by the Carmack Amendment. Plaintiff moved to remand the action to state court arguing that the defendant only loaded the shipment pursuant to the Spotting/Security Agreement; that defendant did not hire the plaintiff or issue a bill of lading; defendant did not transport the load but only secured the load and that the freight had actually been tendered to plaintiff by PPG not by defendant.

The Court held that the Carmack Amendment provides that a carrier is liable for the actual loss or injury to property by the receiving carrier, the delivering carrier or any carrier over whose line or route the property is transported. In order for the federal court to have jurisdiction, the defendant must have acted as a motor carrier, a water carrier, and a freight forwarder. Because defendant did not issue a bill of lading and did not provide commercial motor vehicle transportation for compensation, it was not acting as a motor carrier in this case and there was no federal jurisdiction. The case

was remanded back to state court.

Finally, in *Excel, Inc. v. Southern Refrigerated Transport, Inc.*, 2011 U.S. Dist. LEXIS 144566, the court considered the issue of whether the Carmack Amendment pre-empted a claim by plaintiff freight broker against defendant carrier for the loss of a shipment that was stolen during transit. The plaintiff argued that its causes of action for breach of contract and breach of bailment were based on the brokerage agreement between the plaintiff and the defendant and, therefore, were not preempted by the Carmack Amendment. The plaintiff relied on cases where the court had found that the broker's claims for indemnification based on a separate brokerage agreement were not preempted because the broker was seeking to enforce a contractual right independent of the defendant's duties as a carrier.

The court, however, pointed out that the plaintiff in the case before it was asserting the claim based on an assignment of the claim from the shipper, not to enforce an independent obligation under the brokerage agreement. In addition, the court held that to survive preemption, the complaint must assert a claim independent of the carrier's obligations as a shipper. The court found that plaintiff's claims that the defendant failed to deliver the shipment in good condition and had failed to adequately protect the shipment during transit, although a breach of the brokerage agreement, were also obligations of defendant as a carrier. The claims, therefore, were preempted by the Carmack Amendment.

Duty to Defend

When does an insurance carrier have a duty to defend a shipper against a Carmack Amendment claim? In *Great West Casualty Co. v. Flandrach*, 605 F. Supp.2d 955, a cargo of ground meat was damaged when the trucker, avoiding deer on the highway, overturned the trailer. The trailer split open when a tow truck operator attempted to right the trailer.

Great West, which insured the shipper, paid the damage claim and sued the motor carrier for reimbursement. The carrier, in turn, sought coverage under a Commercial Inland Marine Motor Truck Cargo Liability policy issued to it by OOIDA. OOIDA disclaimed coverage arguing that: (1) the cargo was not in carrier's custody or control at the time of the loss, but in the custody and control of the tow truck operator who was attempting to right the trailer; and (2) the damage occurred not when the trailer overturned but when the tow truck operator was attempting to right the trailer. The court held that coverage turned on whether the cargo was damaged when the trailer overturned or when the tow truck operator was attempting to right the trailer. OOIDA argued that the cargo was not damaged when the trailer overturned because the refrigeration unit was still operating but only after the trailer split when the tow truck operator was attempting to right the trailer. The carrier argued that the cargo was damaged when the accident occurred because dirt and debris had gotten into the trailer when it overturned, the accident prevented delivery on time and such delivery was not possible when the seal on the trailer was broken attempting to right the trailer.

The court pointed out that a party seeking coverage under an insurance policy had the burden of demonstrating that the claim was covered by the policy. The court also pointed out that if coverage did exist under a policy, the insurer disclaiming under an exclusion in the policy had the burden of proving that the exclusion applied to the claimed loss.

The court first addressed the issue of whether the claim fell within the grant of coverage. Reviewing the evidence in the record, the court found that there was a question of fact as to whether the meat was damaged or lost due to temperature variation when the trailer overturned. The court also held that there was a question of fact as to whether any dirt had entered the trailer or contaminated the meat that was shrink wrapped in plastic. The court also found a question of fact as to whether the customers would have accepted the cargo once the trailer had been laid over on its side. Based on those questions of fact, the court held that there was genuine issue of material fact as to whether the load was damaged when the trailer overturned. The court also found a question of fact as to whether the customers would have accepted a later delivery or a delivery with a broken seal. There was, therefore, a question of fact as to whether the claim was covered under the policy to be determined by a jury.

The court then went on to analyze OOIDA's argument that even if the claim fell within the coverage grant it was excluded from coverage under the policy. The exclusion relied upon by OOIDA excluded from coverage "loss or damage caused by spoilage, contamination, deterioration, freezing, rusting, electrical and/or mechanical failure and or damage to refrigerated and/or temperature controlled cargo." There was an exception to the exclusion if the loss was caused by the overturning of the truck. The court first held that all exclusions sought to be invoked had to be strictly construed against the insurer. The court also held that because the exclusion sought to be invoked by OOIDA contained an exception, the burden fell on the insurer to show whether the exception to the exclusion applied. The court, consistent with its earlier holding, found that there was a question of fact as to whether the cargo was damaged when the truck overturned (in which case the exemption from the exclusion would apply) or when the tow truck driver was attempting to right the trailer (in which case the exclusion would apply) and denied the carrier's motion for summary judgment.

Consequential Damages

The issue in *American Home Assurance Company v. RAP Trucking, Inc.*, 2010 U.S. Dist. LEXIS 38934, was whether a carrier could be held liable to a shipper for the cost of renting replacement equipment and increased transportation cost when the carrier failed to deliver a shipment of specialized equipment on time due to an accident involving the shipment. The shipment was audio visual equipment for a trade show. The carrier was an experienced carrier in trade show equipment and had previously handled time-sensitive shipments.

The court held that the Carmack Amendment allowed a shipper to recover damages from a carrier for "actual loss or injury to property" resulting from the transportation of property interstate commerce. The court also held that a carrier's liability under the Carmack Amendment included all reasonably foreseeable damages resulting from the breach of its contract for carriage including those resulting from non-delivery of the shipped goods as provided in the bill of lading.

The court explained that both general and special damages may be recovered as consequential damages. The court defined general damages as those damages that are reasonably foreseeable at the time of contracting. Special damages are those unusual or indirect costs that are beyond that which one would reasonably expect to the ordinary consequences of a breach. The court held that special damages are only recoverable from a carrier when the carrier has notice or knowledge of the special circumstances from which the damages would flow.

The court noted that defendant, an experienced carrier for trade show equipment had worked with plaintiff's insured before, and based on the fact that the bill of lading indicated that the shipment was time sensitive, should have known that a late delivery of the equipment would result in the extra costs claimed by the plaintiff's insured. The court also held that the affirmative defenses available under the Carmack Amendment did not include third-party negligence. The defendant also invoked the defense of "act of public authority" in response to plaintiff's motion for summary judgment. The court rejected that defense to the motion because the defendant failed to plead it in its answer to the complaint.

Apportionment of Damages

In *Pacific Indemnity Co. v. Atlas Van Lines, Inc.*, 642 F.3d 702, the Ninth Circuit Court of Appeals, in a case of first impression at the Circuit Court level, analyzed Section 14706(b) of the Interstate Commerce Act, which allows a shipper who recovers damages from a carrier to also recover costs reasonably incurred in bringing the action. The court awarded those costs even though the shipper ended up paying almost twenty times the amount that the shipper recovered from the carrier to its customer.

Plaintiff's insureds sought to move their household goods, consisting mainly of fine art and paintings, from Chicago and Phoenix. They contacted co-defendant Pickens Kane Moving & Storage ("Pickens") for a quote. Pickens, in turn, approached Atlas Van Lines ("Atlas") through TCI, a freight broker. TCI obtained the quote, which did not include insurance, and forwarded it on to Pickens. Pickens, in turn, supplied a quote to the plaintiff's insureds. When plaintiff's insureds requested one million dollars in insurance coverage, Pickens adjusted the rate accordingly and plaintiff's insureds signed the contract. Pickens, contracted with TCI, which contracted with Atlas. Pickens, however, never informed TCI or Atlas of the request for insurance.

Atlas picked up the shipment at the Pickens warehouse. The bill of lading indicated that Pickens was the shipper and Atlas was the carrier. Although the bill of lading contained a section for the shipper to declare the value of the shipment, Pickens did not complete that section of the bill of lading. Pickens also had a bill of lading for warehouse labor that showed Atlas as the shipper and Pickens as the carrier. That bill of lading also contained a valuation section that was not completed.

The plaintiff's insureds' property was destroyed by fire. Plaintiff paid the claim in its entirety and was subrogated to its insureds' interests. Plaintiff sued Pickens and Atlas in federal district court for carrier liability under the Carmack Amendment. Atlas and Pickens cross-claimed against each other. Plaintiff moved for summary judgment against Atlas and Pickens. Atlas and Pickens cross-moved for summary judgment on their cross claims. The district court held that Atlas was liable for $52,500 ($5.00 per pound) to both plaintiff and Pickens and that Pickens was liable to plaintiff for one million dollars. The court also granted Pickens' motion to recover reasonable expenses from Atlas as a prevailing party under the Carmack Amendment.

On appeal, the Ninth Circuit affirmed the district court's limitation of damages due Pickens from Atlas because Pickens had not completed the valuation section of Atlas's bill of lading. The court found that Pickens' failure to complete that section resulted in Atlas's liability being limited to the amount set forth in its tariff, $5 per pound. The court also affirmed the district court's award of costs to Pickens. Pickens was successful in its claim against Atlas, at least up to the $52,000 it recovered. Atlas had argued that Pickens was not a prevailing party because it only recovered a small portion of the amount sought. The Ninth Circuit, analyzing the language of the section, held that, unlike the section regarding an award of attorney's fees, the concept of "prevailing party" did not apply

to the recovery of costs under the Carmack Amendment. The Ninth Circuit also rejected Atlas's argument that Pickens had to be free of fault to recover costs because there was no such language in the statute. Similarly, the court rejected Atlas's argument that the award of costs should be proportioned in accordance with the amount of the recovery in relation to the amount that Pickens paid to the shipper on the claim. The court rejected that argument because Pickens was not the carrier in possession of the shipment when it was destroyed.

Statute of Limitations

In *Daybreak Express, Inc. v. Lexington Insurance Co.*, 342 S.W.3d 795, a Texas Court of Appeals engaged in a conflict of laws analysis to determine whether an insurance company's subrogation claim was barred by the statute of limitations. Burr Computer Environments, Inc. ("Burr"), hired Supor & Sons Trucking and Rigging ("Supor"), defendant's insured, to transport electronic equipment from New Jersey to Texas. Stupor issued a bill of lading to Daybreak, a New Jersey company, to transport the shipment. The shipment arrived in Texas damaged. Burr presented the claim to Daybreak.

Daybreak's adjuster submitted a report to Daybreak indicating an agreed upon value for the claim of $166,655. Daybreak informed Burr that it would pay Burr only $5,420 for the claim. Burr also filed a damage claim with Supor. Supor paid Burr $5,000 (its deductable under the policy). Lexington paid Burr $87,500 to settle the claim.

Lexington filed a breach of contract action against Daybreak in Texas state court alleging that daybreak breached its contract with Burr by refusing to pay the agreed upon settlement amount. Daybreak removed the case to federal court arguing that the claim was preempted by the Carmack Amendment. Lexington argued that its action was for breach of contract, not a damage claim. There was, therefore, no federal jurisdiction. The federal court remanded the case to Texas state court. More than two years after the case was sent back to state court, Lexington amended its complaint adding, among other things, a claim under the Carmack Amendment.

After a bench trial, the court found that New Jersey's statute of limitations governed the action, that the action was timely and that Lexington was entitled to damages under the Carmack Amendment in the amount of $85,800, less the equipments salvage value plus attorney's fees.

On appeal, Daybreak argued that Lexington's claims were barred by the applicable statute of limitations. The appellate court held that although the Carmack Amendment allows the parties to a shipping contract to agree on a statute of limitations, the parties had not done so in this case and the court had to identify the source of the applicable statute of limitations. Daybreak argued that the Carmack Amendment contained a two-year statute of limitations. In the alternative, the catch all federal statute of limitations of four years applied. In either case, Daybreak argued, Lexington's claim was barred because the Carmack Amendment claim had not been filed within four years of the date that Daybreak rejected Burr's claim in writing.

The court rejected Daybreak's argument that the Carmack Amendment supplied two year statute of limitations finding instead that the section relied upon by Daybreak established a minimum time period of two years for a statute of limitations, not a statute of limitations itself. The court also held that the catch all statute of limitations did not apply because it was enacted to apply to post-1990 enactments and the Carmack Amendment was enacted in 1935. The court then held that because there was no federal statute of limitations, it had to "borrow" the most applicable state law statute of limitations.

The court then engaged in a conflict of laws analysis to determine whether New Jersey's six year statute of limitations for action for damage to property or Texas's two year statute applied. The court had to determine whether a statute of limitations was procedural, in which case, under Texas law, the law of the forum state applied, or substantive, in which case the state with the most contacts with the claim would apply. The court started with the proposition that, under Texas law, statutes of limitation were considered procedural, and adopted the two-year Texas Statute of limitations.

The court then addressed the issue of accrual of the cause of action and whether Lexington's Carmack Amendment claim related back to the filing of its original complaint. The court found that accrual of the cause of action was governed by federal law because the Carmack Amendment contained a provision that a cause of action accrued when the carrier gives a person written notice that it is disallowing any part of the claim. 49 U.S.C. § 14706(e)(1). The court acknowledged that Lexington had filed its original complaint within two years. The issue was whether the Carmack Amendment claim, not contained in the original complaint, related back to the filing of the original complaint.

The court first found that there was no conflict between Texas law and federal law on the issue of relation back and, therefore, applied Texas law. The court held that under Texas law, the issue of whether a time-barred claim related back to a timely filed complaint was whether the cause of action alleged in the amended pleading is wholly based upon and grows out of a new, distinct, or different transaction or occurrence. The court found that the Carmack Amendment claim was based on the interstate transportation of electrical equipment from New Jersey to Texas. In contrast, the breach of contract claim alleged in the original complaint was based on the negotiations between Burr and Daybreak and had nothing to do with the

actual transportation of the equipment. The court pointed out that Lexington had successfully argued on remand that its breach of contract claim was not preempted by the Carmack Amendment. Because Lexington's Carmack Amendment claim did not relate back to its original complaint, it was time-barred under Texas's two year statute of limitations.

- Alan R. Peterman

II. The MCS-90 Endorsement and Filing Exposure

This section looks at issues arising when a motor vehicle liability policy issued to a motor carrier is certified to the federal or state government as proof of the motor carrier's financial responsibility, thus exposing the insurer to judgments against the motor carrier notwithstanding an otherwise valid defense to coverage.

Who is "the insured" under the MCS-90?

One cutting edge issue with respect to the MCS-90 endorsement is whether the scope of the endorsement obligates the issuing insurance company to pay judgments entered against a truck driver operating a vehicle owned by or leased to the motor carrier. This becomes significant in cases such as *McClurg* (described below) in which the claimant sues only the driver, often for the tactical reason that a driver is more likely than a motor carrier to default.

As many of our readers know the MCS-90, promulgated at 49 C.F.R. § 387.15, is a form endorsement that is meant to be attached to auto liability policies issued to motor carriers. The issuing insurer will be obligated to pay any judgment entered against the motor carrier - with only very limited exceptions - in spite of the existence of policy exclusions or limitations, or a deductible, although the insurer does have the right to seek reimbursement from the insured for amounts paid in losses that would not have been covered under the basic policy. A group of decisions from 2000 to 2002 held that this broad exposure applies as well to judgments entered against individuals or entities other than the named insured motor carrier. A 2005 guidance by the USDOT seems to have stopped this line of cases in its tracks, and courts around the country have been returning to the view that prevailed from about 1940 through 2000 that the endorsement applies only to judgments entered against the motor carrier.

The most recent pronouncement on this issue comes from the federal district court for the Northern District of Indiana in *Illinois National Insurance Co. v. Temian*, 779 F. Supp.2d 921. The loss arose out of the collision of two tractor-trailer rigs, one of which was under lease to Sunny Express and being driven by Ionut Temian. Sunny was insured by NICO, but the vehicle that Temian was operating was not scheduled on the policy. NICO, though, had attached the federal motor carrier endorsement (a predecessor form to the MCS-90) to its policy with Sunny Express. Illinois National had issued a policy to CDN Logistics, the owner of the tractor under lease to Sunny. The Illinois National policy covered the tractor and, like the NICO policy, contained the federal endorsement. A lawsuit for bodily injury was filed against Temian and Sunny by the occupants of the other rig who asserted that their injuries were caused by Temian's negligence.

The decision we are reviewing stems not from the tort case but from a declaratory judgment action filed by Illinois National in federal court. Illinois National asked the court to declare that it had no duty to defend or indemnify Temian under its policy (issued to CDN) or under the MCS-90.

Although the tractor qualified as a covered auto under the Illinois National policy, and there was no question that Temian was a permissive user, Illinois National successfully argued that no coverage attached because of the policy's reciprocity clause. Since NICO did not cover hired vehicles, its insured Sunny, and Sunny's agents (including Temian) were excluded from coverage under the Illinois National policy under the "reciprocal coverage provision," which is enforceable under Illinois law.

That left only the MCS-90 as a potential exposure for Illinois National. The injured claimants and Temian insisted that Illinois National would need to pay any judgment entered against Temian in light of the MCS-90.

The court, though, agreed with Illinois National that the MCS-90 does not extend to judgments entered against anyone other than the named insured motor carrier (CDN). The court referred to the 2005 USDOT guidance which corrected some earlier decisions and pointed out that the regulations themselves defined "insured" for purposes of the MCS-90 as referring only to the motor carrier. The court observed that since the 2005 guidance courts have consistently held that the MCS-90 is not applicable to judgments entered against anyone else.

The U.S. District Court in *Great West v. General Casualty*, discussed below, also held that the MCS-90 applies only to judgments entered against the named insured motor carrier.

"Stacking" Filing Exposures

Another hot-button issue relating to the MCS-90 is the scope of the 2009 decision by the Tenth Circuit Court of Appeals in *Carolina Casualty Insurance Co. v. Yeates*, 584 F.3d 868. That decision has been read by some to hold that so long as someone has paid $750,000 (or $1 million or $5 million depending upon the required USDOT limits) to the claimant(s) in partial satisfaction of a judgment, no payment need be made by an insurer whose sole exposure is the MCS-90. This is potentially a big deal, but cases since have tended to

distinguish *Yeates*, almost limiting it to its own slightly unusual facts.

Fairmont Specialty Ins. Co. v. 1039012 Ontario, Inc., 2011 U.S. Dist. LEXIS 93796, arose out of a collision between a tractor-trailer owned by Hummer Transportation, and leased to Ontario, Inc., and a passenger car. The occupants of the car were awarded over $5 million in the bodily injury action that they filed against both Hummer and Ontario. Hummer was insured under a $750,000 policy issued by National Continental Insurance Company whose terms included an MCS-90 endorsement. National Continental paid its $750,000 limits thus satisfying its obligations. (The court observed that it was unclear whether National Casualty paid because it viewed the Hummer rig as a covered auto, or on some other basis.)

Ontario, the lessee, was insured under a policy issued by Markel of Canada, but the $1 million MCS-90 endorsement was issued not by Markel but by Fairmont Specialty. Fairmont filed a declaratory judgment action, arguing that its MCS-90 did not apply to the judgment won against Ontario and Hummer in light of National Casualty's payment of $750,000, the limits required for both motor carriers.

The court concluded, though, that Fairmont's reliance on *Yeates* was unavailing. In *Yeates* the Tenth Circuit was considering a case in which two insurers had issued policies to the same motor carrier. In that context, payment by the first insurer of an amount at least equal to the amount of coverage required by the regulations satisfied the public interest and excused the second insurer's responsibility under its MCS-90. Here, though, where the second policy, with its MCS-90, was issued to a second motor carrier which required its own coverage and which was also found liable to the plaintiffs, the MCS-90 applied.

The *Yeates* decision was found relevant, though, in *Great West Casualty Co. v. General Casualty Co. of Wisconsin*, 734 F. Supp.2d 718, where a regulated carrier secured a liability policy from one insurer and a "filings only" policy from a second insurer.

Nathan Peterson, an owner-operator insured by Progressive, leased his tractor to Holicky Bros., a Minnesota-based carrier. While engaged in delivering freight interstate in Holicky's business and under Holicky's authority, he was involved in a single vehicle accident overturning the rig. Peterson's passenger suffered serious bodily injury.

The applicability of the Progressive policy was not at issue, and Progressive paid its limits. Holicky had purchased several policies, and the issue before the court was how those policies interacted. General Casualty had issued a $1 million policy to Holicky covering "any auto." Peterson's tractor was not scheduled on the policy (though it should have qualified as a hired auto) but the court noted that the Holicky trailer that was attached to the tractor was listed, so General's policy applied to the loss, albeit on an excess basis as the court observed. General Casualty also issued a $1 million umbrella policy.

Much of the court's focus, though, was on the policy issued to Holicky by Great West Casualty. The application by Holicky to Great West referred to a "filings only" policy, and the phrase "filings only" appeared throughout the policy. Great West argued, and the court agreed, that the policy did not provide true coverage as there was no underwriting done by Great West and the $250 paid by Holicky was characterized as an administrative fee, not a premium. Filings only policies (like the filings themselves!) were intended, Great West argued, only as sureties in the event the claimant was unable to recover from some other source. Although the court did not comment on this, it appears that General Casualty did not make a filing for Holicky which is why Great West's "filings only" policy was necessary. (If no filing is in place the USDOT will shut the motor carrier down.)

To be sure, the Great West policy contained a truckers form and thus bore at least the appearance of a standard policy. The definition of covered auto, though, was modified to preclude the possibility of actual policy coverage. While the policy language cited by the court is difficult to parse, the thrust of the provision is the insured's agreement to reimburse Great West in the event the latter was obligated to pay under the filing Great West made with the USDOT. Oddly, the MCS-90 form itself was left off the policy, but the court pointed out that it is deemed to be part of the policy in light of the filing (i.e., the filing of the certificate of insurance form) made by Great West with the USDOT

Citing repeatedly to the *Yeates* decision, the court observed that the purpose of the MCS-90 is to ensure the protection of the public from risks created by motor carrier operations and to ensure collectability of judgments against motor carriers. Great West's filing exposure could kick in but only if other insurance issued to Holicky was unavailable or insufficient to satisfy the USDOT minimum limits (which, depending upon the nature of the carrier's business could be $750,000, $1 million or $5 million. Holicky was required to maintain $750,000 in coverage).

Since Peterson had already collected in excess of $750,000 from Progressive, the public policy interests of the USDOT regulations mandating the MCS-90 had been satisfied, and Great West had no obligation to pay anything under its filing. Nor does the MCS-90 require the insurer to pay for the defense of its insured. Finally, the court rejected arguments that a filings only policy was illusory, or that Great West's declination of coverage was in conflict with the insured's reasonable expectations.

The MCS-90 as a Tool for Creative Lawyering

In *McClurg v. Deaton*, 716 S.E.2d 887, a case closely watched by trucking lawyers in and beyond South Carolina, that state's Supreme Court affirmed the rulings by the Court of Appeals which left in place a default judgment against Harrell Deaton, a truck driver who was driving for his employer New Prime, Inc., at the time of the loss (2002!). Zurich had insured New Prime under a policy which had a $2 million deductible (and, although not mentioned by the court here, an MCS-90 endorsement).

As negotiations proceeded in 2004 and 2005 (plaintiff at one point demanding $170,000 in full settlement), plaintiff's lawyer, without telling New Prime, drafted a complaint naming only Deaton as defendant, and served an address in Texas, purportedly that of Deaton, located by an investigator, by certified mail. The return receipt was signed, ostensibly by Deaton, although Deaton later denied ever receiving the summons and complaint. In September, 2005, the trial court entered judgment against Deaton for $800,000 and the default was affirmed by the appellate court. Mincing no words, Chief Justice Toal in his dissent refers to the default judgment as having been obtained by trickery and deception. Quite intentionally, plaintiff had sued only the driver, not the trucking company in the hope that the driver would default. New Prime was permitted to intervene and attempted to set aside the default. (Once the default was entered, plaintiff presumably intended to collect under the MCS-90 in line with the now discredited *Nueva* decision which was, back in 2002, a new and powerful tool for plaintiffs. Plaintiff's lawyer admitted that in suing Deaton alone while negotiating with New Prime he was "trying to fly under the radar.")

The technical focus of the arguments at the Supreme Court was whether a court could set aside a judgment, under Rule 60 of the state's rules of civil procedure, when the defendant asserted that it had a meritorious defense as to damages, but made no effort to claim a meritorious defense as to liability. In the meantime, McClurg's lawsuit against Zurich American to collect under the MCS-90 is proceeding in federal court.

The MCS-90 endorsement, refers to liability resulting from the use of vehicles subject to Sections 29 and 30 of the 1980 Motor Carrier Act (by now more than a bit out of date). Courts have long struggled with the question of whether the motor vehicle involved in the loss needs to have been engaged in for-hire interstate commerce at the precise moment of the loss in order for the MCS-90 to apply or whether it is sufficient for the vehicle to be available for such commerce or at least sometimes used for such commerce.

The Scope of the MCS-90

The facts of *Canal Insurance Co. v. YMV Transport, Inc.*, 2011 U.S. Dist. LEXIS 115089, were a bit complicated, but we can summarize them as follows. Canal insured YMV on a policy which listed only a single truck as a covered auto. The loss involved a different vehicle and there was no evidence that the vehicle qualified as a temporary substitute or after-acquired auto. If Canal was going to have any exposure it could only be on the basis of the MCS-90.

The unscheduled truck was used primarily to transport trailers manufactured by M&H, a company that was owned by an individual who also owned stock in YMV. On the date of loss, though, the vehicle was being used not in YMV's business or M&H, but to transport vehicles from Omaha to Washington State on behalf of someone known to the owner only as "Ivan" reportedly for no charge.

Canal argued that since the truck was being operated as a favor to a friend, YMV was not acting as a for-hire carrier and the MCS-90 is not available. The court, though, found a question of fact: it found it unlikely that a trucker would transport four vehicles some 1500 miles for someone whose last name the trucker's principal could not recall.

More to the point, the court held that even were it clear that the service was offered for free, the MCS-90 could still apply. Here the court pointed to the split of authority on whether one uses a "trip specific" test to determine if the MCS-90 is applicable, or some broader test. Most of those cases dealt with the question of interstate/intrastate use which the court found to be fundamentally different than the question of whether it was operating in a for-hire capacity. (The former involves a question "of jurisdiction and federalism," the latter a "legislative choice.")

Ultimately the court held that the applicability of the MCS-90 should not turn on the type of cargo being carried, or whether services were performed on a particular day without charge. The court rejected the trip-specific approach in determining whether a carrier is "for hire" under the Motor Carrier Act.

The court in *Newman v. State Farm Mutual Auto Insurance Co.*, 62 So.3d 808, limited the scope of exposure created by the MCS-90 (and the older BMC-90 form that some insurers are apparently still using). The principal of Arrow Mobile Home Movers drove his personal pickup truck to a hardware store to pick up materials that he expected to use in setting up a mobile home that his company was hauling with one of its trucks. State Farm insured the pickup, but plaintiff sought coverage under a policy issued by Clarendon to Arrow. The pickup was not a covered auto under the Clarendon policy but plaintiff asserted that the MCS-90 should apply. Clarendon moved for summary judgment which the trial court granted and which the appellate court affirmed.

This court, unlike the court in *Canal v. YMV*, was willing

to accept the argument that the insured was not acting as a for-hire carrier in driving to a hardware store. (This, even though there was no question that the insured was acting as a for-hire carrier with respect to moving the customer's house.) The court also noted that the trip to the hardware store was completely within the state of Louisiana. The *Newman* and *YMV* decisions are not necessarily inconsistent - the *YMV* court suggested that it would have granted summary judgment to Canal if it could have been proven that the particular truck had never been operated for hire - but it appears that the question of whether the applicability of the MCS-90 should or should not turn on a "trip specific" analysis is far from resolved.

- Laurence J. Rabinovich

III. Non-Trucking ("Bobtail") Coverage

As the motor carrier form, which in many cases will exclude the driver from coverage, continues to replace the truckers form we may begin to see greater hesitation by courts around the country toward enforcing the terms of non-trucking policies, which purport to provide coverage only when the covered tractor is being used by the named insured owner-operator for personal purposes. We will certainly keep an eye on that change over the next few years. In cases decided this past year, though, we see no evidence of any hesitation.

Forkwar v. Empire Fire & Marine Insurance Co., 2010 U.S. Dist. LEXIS 98108, presents a fascinating and detailed analysis of the question of the relationship between the question of *respondeat superior* and vicarious liability that may arise in a tort case in which an owner-operator and a lessee-motor carrier are both defendants, and the question of whether the vehicle was being used in the business of the motor carrier for purposes of the applicability of a non-trucking policy. The case arose out of a collision on Route 95 in Maryland between a semi-tractor operated by Hameed Mahdi and a passenger van operated by Augustine Forkwar who was injured in the accident. The semi-tractor bore the placards of J&J Logistics, Inc., a regulated motor carrier.

Forkwar's attorney's theory of the case was that since Mahdi was not under load at the time of the loss, J&J was not responsible for his actions and the damages should be paid by Empire which had issued a non-trucking policy to Mahdi. In prelitigation correspondence Empire denied that it provided coverage for the loss. Their communications - and Empire's investigation which the court documents - displays, incidentally the difficulty with the phrase "under dispatch" which is not a term of art nor a term used in non-trucking policies and which clouds rather than clarifies the application of law to the underlying facts.

Mahdi indicated in a recorded statement (which the court, presumably to circumvent questions of hearsay, claimed to be using purely to provide chronological background) indicated that he worked for J&J only about three days a week, but did no work for any other motor carrier. On the day before the loss he was told by his J&J dispatcher to drive to a Giant Foods facility in Jessup, Maryland to pick up a load. Mahdi's appointment on the date of loss was in the afternoon and he was intending to stop first for lunch. After his lunch break he was intending to drive to Giant's facility. J&J's placards were on the tractor that Mahdi was driving bobtail at the time of the loss: he was to pick up a loaded trailer at Giant.

Empire repeatedly declined coverage so Forkwar filed suit in state court against Mahdi, J&J and his own uninsured motorist insurer. In his opening statement Forkwar's attorney adopted the unusual strategy of telling the jury that he believed that the defendant J&J had nothing to do with the loss and that he assumed that the judge would dismiss J&J. He made clear that his client believed that the loss was the responsibility of Mahdi and his insurer, not J&J. Counsel was clearly unfamiliar with the leasing regulations promulgated by the I.C.C. sixty years ago and now maintained by the USDOT (as well as extensive case law) which require motor carriers to assume responsibility for the operation of leased vehicles during the entire term of the lease, regardless of language in the agreement insisting that the driver was an independent contractor. When J&J's counsel offered evidence that J&J considered Mahdi to be an independent contractor Forkwar's counsel admitted that he had no basis for suing J&J and the court granted J&J's motion for judgment. With that decision, Forkwar's ability to recover for his injuries was fatally compromised. The case, in any event, continued against Mahdi and the jury, finding that Mahdi's negligence caused the loss, awarded Forkwar judgment of about $180,000. At that point counsel demanded that Empire satisfy the judgment, and Empire refused, again insisting that it provided no coverage for the loss. Forkwar filed suit in federal court against Empire.

Forkwar's initial argument in favor of coverage was that Empire, after failing to defend Mahdi in the state court action although it had every opportunity to do so, was collaterally estopped from denying coverage. (Collateral estoppel is one of the classifications of the principle better known as *res judicata*). The decision of the state court, in Forkwar's view, had already resolved that Mahdi was not operating in J&J's business.

Applying Maryland law the court observed that Forkwar needed to satisfy a four part test in order for collateral estoppel to apply: 1) the issue decided in the prior case must be identical to the issue in the present case; 2) there must be a final judgment on the merits; 3) the party against whom collateral estoppel is invoked must be in privity with a party in the prior case; and 4) the party against whom collateral estoppel is asserted must have been given a fair

opportunity to be heard. The court found that none of these conditions had been met and thus rejected Forkwar's first argument. Of particular interest is the court's finding that the issue in the tort action (was J&J liable for Mahdi's negligence?) was fundamentally different than the issue in the insurance litigation (was the vehicle being used to further J&J's business?). Since the parties (and court) were apparently unaware of the leasing regulations they assumed that proving that J&J was liable would require proving a greater level of control by J&J than would be necessary to establish that Mahdi was operating in J&J's business. In fact, the state court was dead wrong on this issue and, according to the long established majority view, motor carriers are automatically liable for virtually any use of a leased tractor. And yet, we think that the court was correct in concluding that the question of the motor carrier's liability is different than the question of whether the non-trucking insurer's policy exclusion has been satisfied.

The court then moved on to the interpretation of Empire's policy. Forkwar argued that since Mahdi was heading for a food establishment at the time of loss and had neither punched in at the Giant warehouse, nor been told which load he was to haul, he was not acting in J&J's business.

The court, though, agreed with Empire that once Mahdi began to drive toward the Giant warehouse - even though he had no trailer attached and was planning to stop for lunch first - he was furthering the business interests of J&J. So long as a driver is not "pursuing leisurely engagement" nor "engaged in some frolic and detour, heading somewhere for his own purpose and no other," the non-truckling coverage did not apply.

The Seventh Circuit turned back another creative attempt to neutralize the exclusion in a non-trucking policy in *Clarendon National Insurance Co. v. Medina*, 645 F.3d 928. Here there was no doubt that the driver was operating in the business of the regulated motor carrier Town Trucking Company at the time of the loss, and Town's insurer Occidental Fire paid its $1 million limits as part of a settlement agreement. Judgment was entered against Town and against its driver Guillermo Medina in the amount of $2 million, but plaintiff agreed that it would collect the second million only if it were judicially determined that Clarendon's non-trucking policy applied.

As noted, there was no doubt that the vehicle was being used in Town's business, so the traditional analysis found in most non-trucking cases is completely absent from this decision. Rather, the legal issue turned upon a factual quirk. The tractor that had been leased by Medina to Town Trucking was actually titled to Medina's wife Marie who had no commercial license and no intention of driving the truck. Her name, though, did not appear on the lease agreement. The estate of the victim Michael Schulman argued that since Medina was not the owner, he was not entitled to lease the truck to Town, or anyone else. Accordingly, the Clarendon exclusion - which excluded coverage when the vehicle was being used in the business of someone to whom the vehicle was being rented - could not apply, suggested the estate. The estate pointed to language in the leasing regulations which spoke of the lease being between the authorized carrier and the owner, suggesting that if some other person leased the vehicle to the carrier, there was no lease within the meaning of the regulations.

The court, though, observed that the regulations elsewhere define owner to include someone with the exclusive use of the equipment. Moreover, the regulations also permit leases to be executed by authorized representatives of owners, and the evidence clearly indicated that Medina was authorized to enter into a lease, even though there was no written authorization. Hiscock & Barclay's Larry Rabinovich wrote the brief for Clarendon.

There are times, of course, when the non-trucking policy must provide coverage, and the Sixth Circuit Court of Appeals found such a scenario in *Carolina Casualty Insurance Co. v. Panther II Transportation, Inc.*, 2010 U.S. App. LEXIS 22929.

This case presented a more traditional type of dispute. The motor carrier Panther leased a tractor from W.H.E., Inc., and Panther pre-qualified Michael Eades to drive the tractor to a three day driver orientation. Qualification as a driver was possible only after completion of the orientation. Had Eades completed the orientation it was the intention of W.H.E. and Panther that Eades would become a Panther driver.

Before setting out, Eades was directed to cover up the placard bearing Panther's name and USDOT number. Eades tried, but his attempt to tape cardboard over the name was frustrated by the rain. He ultimately drove toward Panther's location with the Panther placard fully visible. En route to the orientation Eades was involved in a collision with a second vehicle causing bodily injury to its operator.

The non-trucking insurer Carolina filed a declaratory judgment action against Panther and Zurich Insurance which had issued a truckers policy to Panther.

The District Court found coverage under the non-trucking policy and the Sixth Circuit affirmed. The Sixth Circuit, quite unlike the *Forkwar* court, was well aware of the USDOT leasing regulations and the irrebuttable presumption that the motor carrier is liable for the negligence of the driver. That presumption, though, applies to liability claims filed by the injured party against the motor carrier, not to the interpretation of the non-trucking policy. (If it were dispositive in interpreting non-trucking policies such policies would be completely illusory as they could never apply.)

The Sixth Circuit observed that courts interpreting Ohio

law have taken an expansive view of what constitutes the lessee motor carrier's commercial interests. Here, though, where Eades had not been hired and had not even been qualified to drive the Panther, the operation of the truck could not be said to be in Panther's business. Any benefit that Panther might have derived was so remote as to be legally irrelevant. Under the circumstances, the non-trucking policy applied to the loss.

In a different case, the Sixth Circuit distinguished the *Panther II* case, and held that no coverage was available under a non-trucking policy where an owner-operator was heading back home after a week on the road in the motor carrier's business. *Illinois National Insurance Co. v. Ohio Security Insurance Co.*, 2011 U.S. App. LEXIS 25796. Illinois National, which had issued a policy to the motor carrier paid its $1 million limit, then sued Ohio Casualty, the non-trucking insurer, arguing that owner-operator Terry Moon was not operating his tractor in the motor carrier's business at the time of the loss.

The Court agreed with Ohio Casualty, though, that Moon was acting in the motor carrier's business and, accordingly, that the Ohio Casualty policy did not apply. Moon, as was his custom, had spent the weekend at home, then, during the work week, was assigned from one pickup/delivery to the next. On Friday morning he delivered a load in West Virginia then headed to pick up a load in Ohio, not far from his home. His intent was to pick up the load, drive it home, and then haul it to the customer after a weekend layover. At the last minute, though, the shipper decided that the now loaded trailer should remain on its premises until the weekend was over. Moon bobtailed home for the weekend, detouring once briefly in a failed search for a truck wash. The accident occurred before Moon reached his home.

The court concluded that the facts here were well within the parameters of the Frankart decision - an oft-cited 1977 decision which holds that a driver remains in the business of the motor carrier until he returns to his starting point. That starting point was Moon's home where he started his work week the previous Sunday night. Nor did the detour to look for the car wash take Moon out of the carrier's business.

Larry Rabinovich and Phil Bramson represented Ohio Casualty.

- Laurence J. Rabinovich

IV. Uninsured/Underinsured Motorist Coverage

Is workers' compensation the exclusive remedy when a claimant is driving the car of a self insured employer at the time of the accident? In *Elrac Inc. vs. Birtis Exum*, 2011 N.Y. LEXIS 3565, the defendant was driving his employer's vehicle, which was self insured, at the time of an accident. The driver of the other car did not have liability insurance. As a result, the defendant told his employer that he intended to seek uninsured motorist benefits from the employer through arbitration. The employer then sought to stay the arbitration. The trial court granted the petition to stay but the appellate court reversed and allowed the arbitration to proceed. The employer then appealed to New York's highest court, the Court of Appeals, arguing that defendant was only entitled to workers' compensation benefits and was barred from recovering uninsured motorist benefits.

New York State law states that workers' compensation benefits shall be "exclusive and in place of any other liability whatsoever." The Court of Appeals, however, found that this wording "cannot be taken literally." Instead, the Court of Appeals ruled that, "the statute cannot be read to bar all suits to enforce contractual liabilities." Thus, the Court of Appeals found that there was no policy reason to justify decreasing the defendants' uninsured motorist protection just because he happened to be driving the car of a self-insurer. Therefore, the Court of Appeals upheld the appellate court's decision and allowed the arbitration to proceed.

Bethke v. Auto-Owners Insurance Co., 2011 Wisc. App. LEXIS 808, looked at whether an individual is entitled to UM coverage from her own insurance carrier after being involved in an accident while driving a rental car. Frederick Goodard was driving a rental car owned by Avis at the time of a motor vehicle accident that resulted in multiple deaths. Goddard did not have his own automobile insurance coverage at the time. The plaintiff, Bethke, collected the policy limits from Avis, which was self insured. The plaintiff then sought underinsured motorist benefits from her own insurance carrier, Auto Owners. The Auto Owners' policy, however, excluded vehicles owned by self-insured entities from the definition of "underinsured motor vehicles."

The plaintiff argued that the exclusion was invalid because it was ambiguous and "functioned as an impermissible reducing clause." The Wisconsin Court of Appeals disagreed and held that the Auto Owners' provision was a proper definitional exclusion and not a reducing clause. The court also noted that, unlike uninsured motorist coverage, underinsured motorist coverage is not mandatory. The court concluded that the provision did not violate Wisconsin law.

In *GuideOne America Insurance Co. v. Shore Insurance Agency, Inc.*, 2011 OK CIV APP 69, the court held that an insurer was not entitled to contribution or indemnification from its agent for bad faith damages paid by the insurer. The insured reported a motor vehicle accident to her insurance agent, Shore Insurance Agency, Inc. ("Shore"). Shore then called the insurer, GuideOne America Insurance Co. ("GuideOne"), to investigate coverage issues. Shore later incorrectly told the

insured that GuideOne's underinsured motorist coverage would not apply until the other driver's liability insurance "paid everything." The insured later spoke directly with a GuideOne representative and relayed the wrong advice received from Shore about when her underinsured motorist coverage applied. The GuideOne representative, however, failed to correct the advice given by Shore.

The insured filed suit against GuideOne for breach of contract and bad faith. GuideOne settled the suit and sued Shore for indemnity and contribution. Shore then moved for summary judgment, which was granted by the trial court. The Court of Civil Appeals found that the agent contract between Shore and GuideOne contained no provision requiring Shore to indemnify GuideOne. In addition, the Court of Civil Appeals held that there could be no claim for implied indemnity because GuideOne's representative knew that the insured was operating under a misimpression but failed to correct it. With respect to contribution, the court held that joint liability could not exist because the settlement paid by GuideOne was never a legal obligation owed by Shore. Further, GuideOne's duty to act in good faith was non-delegable. The Oklahoma Court of Civil Appeals also rejected the negligence claim because the bad faith claim brought by the insured required a showing above mere negligence. In summary, the Court of Civil Appeals concluded that Shore and GuideOne were not and could not be jointly or severally liable to the insured. Thus, the granting of summary judgment to Shore was affirmed.

The recurring debate in New Jersey on the enforceability of "step-down" clauses was revisited in *Sexton v. Boyz Farm, Inc.*, 780 F. Supp. 2d 361, a case in which the clause was contained in a policy written *before* the State of New Jersey prohibited such clauses but the accident took place *after* the law was enacted. Plaintiff, a truck driver, was driving his employer's tractor-trailer, which collided with an uninsured motorist in December of 2007. Plaintiff's employer's insurance policy provided $1,000,000 in uninsured/underinsured motorist coverage, but the policy also involved a "step-down" clause, wherein the amount available to plaintiff would be capped at plaintiff's own personal policy, which was only $15,000. The State of New Jersey, however, passed a law in September of 2007, prohibiting such "step-down" clauses. Plaintiff then brought an action against his employer's insurer, claiming that the "step-down" clause was not enforceable. The United States District Court for New Jersey agreed, holding that the clause was not enforceable because the accident occurred three months *after* the law went into effect and because the policy allowed the insurer to cancel for any reason. The court held that there would be no manifest injustice in applying the law prohibiting the "step-down" clause, even though the policy was written before the law was passed.

In another "step-down" case, *Ruoff v. Risnychock and Associates, Inc.*, 2011 U.S. Dist. LEXIS 67170, plaintiff was involved in an automobile accident while operating his employer's truck. Plaintiff was struck in the rear by a vehicle operated by Roni Michaels, which was insured with liability limits of $100,000/$300,000 by State Farm Indemnity Co ("State Farm"). Plaintiff settled with State Farm and then sought uninsured/underinsured motorist coverage from his employer's carrier, Pennsylvania Mutual Insurance Co., which carried $1,000,000 in uninsured/underinsured coverage. This policy, however, included a "step-down" provision. Plaintiff's life insurance policy, issued by Hanover Insurance Co., also provided uninsured/underinsured coverage in the amount of $100,000. Thus, plaintiff's employer's policy was "stepped-down" to $100,000.

Plaintiff next sought to recover underinsured motorist coverage from his employer's umbrella insurance policy, Insurance Company of the State of Pennsylvania ("ISOP"). This claim was denied by ISOP, who argued that the umbrella policy does not provide underinsured coverage because it is a "third-party liability policy that does not provide first party coverage." The court agreed with ISOP and held that the umbrella policy did not provide underinsured coverage for first-party claimants. In doing so, the court noted that underinsured coverage is optional in New Jersey and that umbrella policies generally do not provide uninsured/underinsured motorist coverage.

UM/UIM endorsements commonly place the burden on the insured to prove that he or she was injured by an uninsured phantom vehicle. *Brown v. Philadelphia Indemnity Insurance Co.*, 2011 OHIO 2217, addressed ways in which the insured could meet that burden of proof when he or she has no independent recollection of the accident. Plaintiff was involved in an automobile accident in 2007 in Ohio while working for his employer. The accident involved an unidentified vehicle that ran plaintiff off the road and injured him. Plaintiff does not remember anything about the accident, except what he later learned he told police officers and doctors shortly after the accident. Plaintiff subsequently brought an action against Philadelphia Indemnity Insurance Co. ("Philadelphia") based upon a policy of insurance issued to his employer at the time of the accident. Plaintiff claimed that he was entitled to uninsured motorist coverage under the policy. Philadelphia moved for summary judgment arguing that plaintiff failed to prove that his injuries were caused by a phantom vehicle. The trial court granted summary judgment on the grounds that there was no proof to support plaintiff's allegation that his injuries were caused by a phantom vehicle.

Philadelphia's underinsured motorist policy, which mirrored

Ohio law, required a claimant to prove his claims through "independent corroborative evidence, other than the testimony of the 'insured' making a claim under this or similar coverage, unless such testimony is supported by additional evidence." The Court of Appeals of Ohio affirmed the decision, holding that plaintiff failed to present any "independent corroborative evidence" or "additional evidence" required to defeat the motion for summary judgment. Plaintiff was only able to rely upon statements that he apparently made to the police and physicians. This did not amount to "independent corroborative evidence" or "additional evidence."

Can a worker who walks behind a dump truck while filling pot holes be considered a covered individual for UM/UIM purposes? In *Ohio Casualty Insurance Co. v. Herring-Jenkins*, 2011 U.S. Dist. LEXIS 133919, Jenkins was killed by an uninsured motorist while repairing potholes on Interstate 80 in Indiana on March 16, 2010. At the time of the accident, Jenkins was walking behind a dump truck that was employed by a company (C. Lee) that contracted with Jenkins's employer (Walsh). The plaintiff, Ohio Casualty Insurance Co. ("Ohio Casualty") insured the dump truck, which was owned by C. Lee. Jenkins's estate made a claim against Ohio Casualty, arguing that Ohio Casualty's uninsured motorist policy issued to C. Lee provided for coverage to Jenkins. Ohio Casualty then filed a declaratory judgment action and the Estate filed a counter claim. Both parties then moved for summary judgment.

The disputed issue was whether Jenkins, who was an employee of Walsh and not C. Lee, was "using" or "occupying" the vehicle insured by Ohio Casualty at the time of the accident. This would make Jenkins an insured. If Jenkins was not an insured, then the court had to decide if Ohio Casualty was required to extend uninsured motorist coverage to the Estate.

The Court held that Jenkins was not "in or upon" the dump truck because he never obtained the requisite physical contact with the dump truck. Further, the court held that Jenkins was not "getting in, on, out or off" the dump truck. As a result, the court ruled that Jenkins was never "occupying" the dump truck as required by the Ohio Casualty policy.

The court, while mentioning that its analysis was "highly fact specific," also ruled that Jenkins was not an insured because he was not directing the dump truck or operating it. As a result, the court granted summary judgment to Ohio Casualty, finding that no uninsured motorist coverage was afforded to Jenkins.

- Kevin M. Hayden

V. Primary/Excess ("Other Insurance" Clause)

In *Lexington Insurance Co. v. National Oilwell NOV Inc.*, 2011 Tex App LEXIS 3613, the insurer requested in its reservation of rights letter that the insured provide notice at such time as it appeared likely that the policy's $100,000 self-insured retention would be exhausted by the defense of the insured in a product liability action. The court held that such a unilateral request imposed no obligation on the insured, and the insurer was obligated to reimburse the insured for over $700,000 in legal fees although the insured failed to notify the insurer that the SIR was likely to be exhausted.

As a "family member," the insured driver in *Integon National Insurance Co. v. Phillips*, 712 S.E.2d 381, was entitled to liability coverage for an accident under separate policies issued to her mother and her stepfather. The driver was operating a rental vehicle which was a temporary substitute for an owned vehicle under the mother's policy. Nevertheless, the court held that the vehicle was not "owned" by either the mother or the stepfather, and that the two policies (which purported to provide excess coverage for non-owned autos) provided pro rata coverage.

DeMeo v. State Farm Mutual Automobile Insurance Co., 2011 U.S. Dist. LEXIS 75679. The insured had four policies, each covering one of his vehicles. Each policy provided (1) coverage was limited to the highest limit of any of the policies applicable to the same accident; and (2) if a non-owned car has other liability insurance coverage, this insurance is excess over "such insurance." The court held that "such insurance" unambiguously referred to a policy actually covering a non-owned vehicle, and not the four policies covering the four vehicles owned by the insured. Accordingly, when he was involved in the accident while driving his daughter's truck, the insured was entitled to coverage under only one of his own policies (as well, of course, as the policy covering the truck).

SAFECO Insurance Co. of Illinois v. Country Mutual Insurance Co., 2011 Wash. App. LEXIS 2413. The policy issued to the driver provided that "any insurance we provide with respect to a vehicle you do not own will be excess over any other collectible insurance." The policy issued on the vehicle involved in the loss provided "if there is other applicable liability insurance available any insurance we provide shall be excess over any other applicable liability insurance." The court held that the two policies attached at the same level and provided co-primary coverage.

- Philip A. Bramson

VI. Scope of GL Coverage vs. Auto Coverage

Federal Insurance Co. v. American Home Assurance Co., 639 F.3d 557. A tow truck driver, responding to a call by an AAA member, rear-ended a stalled vehicle on the way. Federal issued a $500,000 business auto policy, a $1,000,000 primary CGL policy, and a $25,000,000 CGL umbrella policy to AAA-Mid Atlantic. American Home issued a $1,000,000 CGL policy, and National Union issued a $25,000,000 CGL umbrella policy, to AAA National, which included member clubs as additional insureds only with respect to liability arising out of the national organization's operations or premises. The Court of Appeals found that the loss did not "arise out of" the organizational operations of AAA National, as compared to the operations of AAA-Mid Atlantic which directly involved providing roadside assistance to members.

Lancer Insurance Co. v. Garcia Holiday Tours, 345 S.W.3d 50. Bus passengers caught tuberculosis from the bus driver and sued the bus company. The court held that the injuries did not "result from" the ownership, maintenance or use of the bus because the bus, in its capacity as a mode of transportation, did not produce, and was not a substantial factor in producing, the passengers' injuries. (The opinion hints that the outcome might have been different if the policy provided coverage for injuries "arising from" use of the bus, rather than "resulting from.")

- Philip A. Bramson

VII. Policy Exclusions or Limitations

Great West Casualty Co. v. Terminal Trucking Co., 2011 U.S. Dist. LEXIS 121417. Wellman sold bales of polyester fiber to Milliken, and hired Terminal Trucking to transport the product. A Milliken employee was injured when a bale fell out of a loaded trailer which had been delivered and left by Terminal pursuant to Milliken's instructions. Terminal conceded that its job was completed when its driver left the Milliken premises (although Terminal asserted at another time that its job was not complete until the trailer was unloaded and the empty trailer removed from Milliken's premises); accordingly, the court found that the "completed operations" exclusion barred coverage for Terminal. The court found that Wellman could qualify as an insured under the auto policy issued to Terminal but only to the extent it was held vicariously liable for Terminal's conduct.

West v. American Standard Insurance Co. of Wisconsin, 2011 Il App (1st) 101274. The named insured had two policies: one covering her pickup truck, and one covering her passenger car. Both policies provided that the total under all policies issued to the named insured would not exceed the highest limit under any one policy. When the named insured's son was involved in an accident while operating the pickup truck, the court found that only the policy covering the truck provided coverage. The court found a second ground for denying coverage under the policy covering the passenger car, in that the policy excluded coverage for another vehicle (such as the pickup truck) used regularly by a member of the named insured's household (such as her son).

Mulford v. Neal, 2011 OK 20. Separate policies issued to mother and father for different vehicles both contained endorsements excluding coverage for accident where son was operating vehicle. In the 1995 case of *Pierce v. Oklahoma Property & Casualty Insurance Co.*, the Supreme Court of Oklahoma had found that a named driver exclusion based on the poor driving record of the excluded individual was specifically permitted under the state's fault-based financial responsibility statutes. The court, however, found that such an exclusion is inconsistent with the state's compulsory insurance law, which is not fault-based and which requires omnibus coverage for permissive users of a covered auto. (The court declined to determine under what conditions an unemancipated teenager with a drivers license could be excluded from the parents' policy.)

By contrast, the Missouri compulsory insurance statute at issue in *Yates v. Progressive Preferred Insurance Co.*, 331 S.W.3d 324, was amended in 1999 to allow the exclusion of a named driver who is a member of the named insured's household. In that case, the insurer argued that the amendment permitted complete denial of coverage where the accident involved an excluded driver; the claimant argued that the amendment only permitted the insurer to exclude coverage above the statutory minimum ($25,000 per person). The court sided with the insurer, and found that the named driver exclusion was enforceable under the statute.

Empire Fire and Marine Insurance Co. v. Jones, 739 F. Supp. 2d 746. Drumheiser was working for Jones trash collection business. After tossing a bag of garbage into the back of the truck, Drumheiser fell as he was trying to jump aboard the outside of the truck, and Jones ran over his leg. The court found that, while Drumheiser was generally employed by another employer, that employer did not have control over Drumheiser and consequently did not "furnish" Drumheiser to Jones. Accordingly, Drumheiser was not a "temporary employee" of Jones, but simply an employee, and the employers liability exclusion barred coverage for Drumheiser's claim against Jones.

Palp v. Williamsburg National Insurance Co., 200 Cal. App.4th 282. The bucket of an excavator operated by Excel Paving struck the cab of an REH truck, injuring the driver and

damaging the truck, while loading a different truck. Excel sought coverage under the Williamsburg truckers liability policy issued to REH. The trial court granted summary judgment to Williamsburg on the grounds that the loss fell under the policy exclusion for movement of property by mechanical device. The appellate court disagreed, finding that the exclusion applied only when the mechanical device was being used to load or unload a covered auto.

- Philip A. Bramson

VIII. Graves Amendment

In *Vargas v. Enterprise Leasing Company*, 60 So.3d 1037, the Florida Supreme Court examined the question of whether the Graves Amendment preempts a Florida statute (section 342.021(9)(b)2), which, in part, imposed vicarious liability upon short-term lessors of motor vehicles solely on the basis of ownership.

Enterprise Leasing Company ("Enterprise") leased a motor vehicle to Elizabeth Price for a period of less than one year. During the rental period, Ms. Price's son crashed the rental vehicle into the rear end of a car driven by the plaintiff. The plaintiff filed suit against Ms. Price, her son, and Enterprise. The only claim against Enterprise was for vicarious liability on the basis of ownership of the motor vehicle as provided for by the statute. The circuit court granted Enterprise's motion for summary judgment ruling that the federal Graves Amendment (49 U.S.C. § 30106) preempted the Florida statute. The plaintiff appealed the decision.

The District Court of Appeal, over a lengthy and impassioned dissent, determined that section 342.021(9)(b)2 is neither a financial responsibility statute nor an insurance requirement that would be exempt from preemption under the savings clause found in the Graves Amendment. Rather, the statute is an outgrowth of the dangerous instrumentality doctrine that codifies and caps the vicarious liability imposed on lessors of motor vehicles. Based on this conclusion, the district court held that the Graves Amendment preempts section 342.021(9)(b)2 and affirmed the trial court's order granting summary judgment for the rental car company, but certified the question for review by the Supreme Court.

The Florida Supreme Court likewise rejected plaintiff's contention that section 342.021(9)(b)2 is the type of financial responsibility statute that Congress intended to exclude from preemption. Under the Graves Amendment, states may not impose vicarious liability on rental car companies for the negligence of their lessees. It is true that under the provisions of the savings clause, they may still require insurance or its equivalent as a condition of licensing or registration and may enforce such requirements by imposing penalties. The Florida statute at issue, however, preserves Florida common law vicarious liability by deeming short-term lessors to be "owners" for vicarious liability purposes while at the same time limiting their exposure to damages for such claims. The statute, therefore, conflicts with and is thus preempted by the Graves Amendment.

- Jennifer Nichols Castaldo

IX. Negligent Entrustment

In *Weber v. Budget Truck Rental, LLC*, 254 P.3d 196, a pedestrian who was injured when she was struck by the driver's rental car brought a negligent entrustment suit against the rental car company ("Budget") which furnished the vehicle.

On May 20 , 2008, the customer entered the rental location around noon to rent a moving van. Although he had smoked methamphetamine at around 5:00 a.m. that morning, none of the three rental agents who had interacted with him noticed any signs of intoxication or other unusual behavior. The driver presented a facially valid, out-of-state driver's license. Because he had no credit card, the rental company required a cash deposit for the rental. The driver left the office and returned two hours later with the money, completed the rental paperwork, inspected the van for damage and left with the vehicle. The following afternoon he drove into the plaintiff as she attempted to cross the street at a crosswalk.

The driver was arrested and charged with vehicular assault and driving under the influence. His blood tested positive for both methamphetamine and amphetamine. Following his arrest it was discovered that his driver's license had been suspended for failure to pay a traffic ticket. The pedestrian subsequently filed a negligent entrustment suit against the rental car company.

Negligent entrustment of a vehicle occurs when the person entrusting the vehicle knows or should have known at the time that that the driver is not competent to operate the vehicle. The plaintiff contended that (1) the driver must have appeared intoxicated when he rented the vehicle and that Budget's agents should have recognized his condition if properly trained and (2) even if he displayed no symptoms of intoxication at the time of the rental the agents should have recognized him as an addict who was likely to drive the van while intoxicated. The court found no evidence that the driver showed any signs of intoxication at the time he rented the vehicle and disregarded plaintiff's expert's testimony that made a impermissible inferential leap along the lines of 'driver's BAC was X, so he *must have* appeared drunk."

The plaintiff also alleged that Budget was negligent by failing to follow its own policies and pertinent Washington State law, and that if Budget's agents had done so, they

would have recognized the driver's incompetence. Budget's internal policy required that customers present a "valid driver's license" before renting and state law RCW 46.20.220 makes it unlawful to rent a vehicle to a person who is not "then duly licensed." Budget argued that it complied with these provisions by looking at the face of the license, confirming it is unexpired and belongs to the person presenting it, and that it bears no marks indicating it has been suspended or revoked. The plaintiff argued that Budget should have consulted an electronic license verification service before renting the van to the driver. The court found no evidence that such a service was available in Washington State that could verify the status of driver's licenses issued in Oregon. Thus, even if Budget had a duty to electronically verify the driver's license status, its failure to do so was not the proximate cause of the pedestrian's injuries because doing so would not have revealed the suspension or prevented the rental.

Because the plaintiff failed to show a genuine issue of material fact with respect to whether Budget should have known the driver was incompetent at the time of rental, the appellate court affirmed the lower court's decision granting summary judgment to the rental car company.

- Jennifer Nichols Castaldo

X. Truck and Bus Liability Issues

Duty to Passengers

In *Davis v. Dionne*, 26 A.3d 801, the court confronted a claim for negligence against a bus company (Cyr Bus Lines) and the companies which chartered the bus for a fishing and dinner outing for its employees and business partners. Dionne, an employee of one of the sponsoring companies, brought along beer and rum for the outing and one of the guests Edwin Rodriguez drank more over the course of the day than he could handle. When the participants returned back to the starting point, Rodriguez entered his truck and began to drive off, whereupon he struck Davis, another guest who was a pedestrian at the time of the loss. Cyr Bus Lines and its driver did not supply the alcohol and, in fact, had a rule against consuming alcohol on its buses.

The duty of a common carrier is to exercise "the highest degree of care compatible with the practical operation of the machine in which the conveyance was undertaken." *See id.* at P 10 *citing* *Mastriano v. Blyer*, 2001 ME 134, P 13, 779 A.2d 951, 954. "This heightened standard of care continues until the common carrier has given its passengers a reasonably safe discharge at a reasonably safe location." *Id.*

Here in *Davis*, the Supreme Judicial Court of Maine in affirming the lower court's decision, declined to extend this duty of a common carrier to include an "in loco parentis" type of responsibility wherein the common carrier would be charged with such a duty as to intervene in an intoxicated passenger's life to ensure that the passenger did not harm himself after the common carrier had given the safe exit that the law requires. Likewise, the Supreme Judicial Court declined to extend the duty of the common carrier to include the protection of one passenger from another after the common carrier provided a safe exit for both.

As for the business and its employee, the Supreme Judicial Court declined to recognize a generalized fiduciary duty on the part of the business, that organized and led the trip, to protect the trip participants from one another.

Statutory Liability Under the Leasing Regulations

The court in *Carroll v. Kamps*, 795 F. Supp.2d 794, considered the relevance of the USDOT's leasing regulations to a shipper/food producer which has a USDOT census number but no docket number and, thus, no authority to haul regulated commodities in interstate commerce. Michael Carroll was injured in a collision with a tractor-trailer rig operated by Calvin Kamps, an owner-operator under lease to T&L Trucking, a Michigan-based federally certified common carrier. There was no question that under the leasing regulations (49 C.F.R. Part 376) T&L was vicariously liable for the negligence, if any, of Kamps, pursuant to the majority view interpreting the regulations, which eliminates the distinction between employees and independent contractors.

Carroll argued, though, that there was a second entity with vicarious exposure for Kamps, namely High Lean Pork, Inc. High Lean is in the business of raising and selling hogs and pork products. The court noted that it was uncontested that High Lean "uses the trucks and drivers" of others to deliver its hogs, although it contracts to have its own trailers used in the transportation. High Lean is not a for-hire carrier, and thus has no docket number, but it was registered with the USDOT as a private carrier and had been assigned a USDOT (census) number. That number, though, was not displayed on its trailers (nor, we can assume, on the tractors of the motor carriers that it hires).

The court concluded that there was no basis for finding that High Lean was subject to the USDOT leasing regulations and the resulting liability (sometimes, inaccurately referred to placard liability). High Lean was not paid to carry goods - to the contrary it paid T&L to act as the carrier. High Lean filed its own motion for summary judgment which the court granted (even though it observed that such motions generally require a finding by a jury), on the basis that High Lean, as shipper, had hired T&L as its independent contractor and was not liable for the contractor's negligence.

Negligence vs. Wantonness

The plaintiff in *Zatarain v. Swift Transp., Inc.*, 776 F. Supp.2d 1282, was killed when the vehicle he was driving struck the rear of a truck owned by the defendant truck company which was being driven by its employee. Plaintiff's expert opined that at the time of impact the defendant's truck was traveling at approximately 10 to 15 mph in a 55 mph zone when the plaintiff, who was traveling at 55 mph, struck the rear of the defendant's truck. Thus, the plaintiff argued that, at the time of the accident, the plaintiff was driving within the speed limit and that defendant driver was driving at an excessively slow speed. Plaintiff filed state law claims against the trucker for: (1) negligence; (2) wantonness; (3) negligent and/or wanton entrustment; (4) negligent hiring, training, retention, and supervision; and (5) wanton hiring, training, retention and supervision.

Defendant's experts opined that the defendant's truck was traveling at 40 mph and that the plaintiff was traveling in the upper 70 mph to low 80s mph. Thus, defendant argued that the plaintiff was speeding and driving inattentively at the time of the accident. Defendant moved for summary judgment based upon its experts' findings, contending that the plaintiff could not establish a breach of duty or proximate cause sufficient to establish negligence.

The United States District Court for the Middle District of Alabama denied the defendant's motion for summary judgment on the plaintiff's negligence claims holding that there were issues of fact regarding plaintiff's claims of negligence that needed a resolution by a jury.

However, while denying the defendant's motion for summary judgment on the plaintiff's negligence claim, the District Court did grant the defendant's motion for summary judgment on the plaintiff's claims of wantonness. Wantonness is a distinct theory of liability from negligence and requires evidence of a reckless or conscious disregard of the rights and safety of others. The District Court found that even construing the facts in favor of plaintiff, there was simply no evidence before the court by which a reasonable jury could find wantonness—i.e. a conscious or reckless disregard of the rights or safety of others, as opposed to mere inadvertence.

Negligent Hiring, Retention and Supervision

In *Mann v. Redman Van & Storage Co.*, 2011 U.S. Dist. LEXIS 132513, the plaintiffs alleged that they suffered injuries in an automobile accident when they collided with a tractor trailer owned by the defendant and being driven by the defendant's employee. Plaintiffs claimed that the accident occurred because the tractor trailer's brake lights and turn signals were not operable. Along with claims of negligence against the defendant's employee, the plaintiffs also brought claims against the defendant for punitive damages and negligent hiring, retention and supervision of its employee.

The majority rule in the United States is that a direct claim against an employer for the negligent hiring, training and/or supervision of an employee is duplicative and should be dismissed when the employer has accepted vicarious liability for the actions of its employee. There is a well established exception to this majority rule in cases where the plaintiff has asserted a valid claim for punitive damages.

While Montana's highest court has yet to take a position on this issue, the United States District Court for the District of Montana, Missoula Division has previously predicted that Montana's highest court would follow the majority rule. Where, though, the plaintiff has asserted a valid claim for punitive damages, then the negligence claims against the employer are not merely duplicative of the vicarious liability claim since the negligent hiring claim could lead to a punitive damages award. So long as the claimant had pleaded sufficient facts to create an issue of fact on the availability of punitive damages, the claim would not be dismissed.

Statutory Cap

In *Henisse v. First Transit, Inc.*, 247 P.3d 577, the plaintiff was injured by a bus operated by a private company which had contracted with the Regional Transportation District ("RTD") to provide bus driving services. The private company argued that it was a public employee and therefore was entitled to the cap on liability as provided by the Colorado Governmental Immunity Act ("CGIA"). The Supreme Court of Colorado disagreed and found that the private company was an independent contractor of RTD, not an employee and was therefore not entitled to the CGIA cap.

Heightened Standard of Care for School Bus

Common carriers in Connecticut are subject to a heightened standard of care. Pursuant to Connecticut General Statute § 52-557, owners and operators of any school bus are held to the same standard of care applicable to common carriers of passengers for hire. In *Coleman v. Dattco, Inc.*, 2010 Conn. Super. LEXIS 2364, one of the plaintiffs worked as a monitor on a school bus, and her child rode along with her on the bus in accordance with the terms of the mother's employment. The bus struck the child after she and her mother exited. The bus company argued that it should not be held to the standard of care applicable to a common carrier, since neither the mother nor the injured child had engaged the school bus to transport them. The court, however, focused on the statutory definition of "school bus" as a motor bus regularly used to transport school children "whether or not for compensation or under contract to provide such service."

The court reasoned from this definition that the legislature intended a heightened standard of care to apply to all school busses, regardless of whether the claimant was a "for hire" passenger.

Doctrine of Sudden Emergency Not Applicable

In *Sawyer v. Marjon Enterprises*, 2011 Ga. App. LEXIS 1001, the defendant lost control of his tractor trailer rig and struck the plaintiffs' vehicle. The defendant argued that he had been faced with an emergency situation when he drove through standing water causing the tractor trailer rig to hydroplane. The trial court charged the jury on sudden emergency as follows: "One who is confronted with a sudden emergency that was not created by one's own fault and is without sufficient time to determine accurately and with certainty the best thing to be done, . . . is not held to the same accuracy of judgment as would be required of that person if he had had more time for deliberation." The jury rendered a verdict in favor of the trucking company. The plaintiffs appealed and argued that the trial court erred in giving the jury the sudden emergency charge.

The appellate court reversed, finding that under the circumstances the sudden emergency jury instruction was inappropriate. The charge is appropriate only when a sudden peril offers a defendant a choice of conduct without any time for thought. Here, though, the hydroplaning occurred even before the driver realized the danger. Plaintiffs, accordingly, are entitled to a new trial.

- Erica M. DiRenzo

XI. Miscellaneous

Regulatory Alert

At the very end of the year, the USDOT made significant changes in its hours of service ("HOS") regulations, although trucking companies and their drivers have until July 1, 2013, to be in complete compliance. Under the old rule, truck drivers could work on average up to 82 hours within a seven-day period. The new HOS final rule limits a driver's work week to 70 hours. Truck drivers who maximize their weekly work hours must take at least two nights' rest from 1:00 a.m. to 5:00 a.m. This rest requirement is part of the rule's "34-hour restart" provision that allows drivers to restart the clock on their work week by taking at least 34 consecutive hours off-duty. The final rule allows drivers to use the restart provision only once during a seven-day period

The final rule retains the current 11-hour daily driving limit, although the USDOT will continue to conduct data analysis and research to determine potential risks created by driving for that period of time. The regulations mandate that truck drivers cannot drive after working eight hours without first taking a break of at least 30 minutes. Drivers can take the 30-minute break whenever they need rest during the eight-hour window. Trucking companies that allow drivers to exceed the 11-hour driving limit by 3 or more hours could be fined $11,000 per offense, and the drivers themselves could face civil penalties of up to $2,750 for each offense.

Owner-Operator Class Actions

Federal appellate decisions were rendered by three different circuits in class actions brought by the Owner-Operator Independent Drivers Association, Inc. ("OOIDA"), a non-profit trade organization:

In re Arctic Express Inc., 636 F3d 781. A motor carrier filed for bankruptcy and, in a class action, a group of owner-operators sued a motor carrier to recover excess funds which had been deducted from their pay and escrowed, but never used, for maintenance on vehicles leased to the motor carrier. The motor carrier had not segregated these funds, but had rather comingled them in an account providing collateral to secure a loan from the depositary bank. The court, in a case of first impression, held that the Truth-in-Leasing regulations of the Motor Carrier Act imposed a constructive trust on the maintenance funds, and that the owner-operators were allowed to seek recovery directly from the bank.

Owner-Operator Independent Drivers Association v. Supervalu, Inc., 651 F.3d 857. A supermarket required proof of insurance from truckers who utilized their own helpers ("lumpers") to unload cargo at the supermarket's facilities, rather than utilizing the unloading service personnel retained and provided by the supermarket. The truckers argued that the supermarket's insurance requirement effectively violated of 49 U.S.C. § 14103(a), which requires that truckers be compensated whenever a shipper or receiver requires them to use lumpers. In a case of first impression, the court held that the statute contemplates that the trucker can be compensated by either the shipper or the receiver, and the supermarket was entitled to judgment because OOIDA provided no evidence that any trucker had not been compensated by a shipper. (The court left unanswered the questions of whether the supermarket's insurance requirement constituted a de facto requirement that OOIDA truckers pay for lumpers, and whether only injunctive relief, as opposed to restitution and disgorgement, is available for a violation of 49 U.S.C. § 14103(a).)

Owner Operator Independent Drivers Association v. Landstar System, Inc., 622 F.3d 1307. (The class was decertified by the district court.) OOIDA's suit against Landstar asserted that the motor carrier's lease agreements failed to disclose a number of different fees and charge-backs (deductions from owner-operator compensation for amounts paid initially by

the motor carrier to third-party vendors for services provided to the owner-operators) with sufficient specificity. In a case of first impression, the court ruled that the motor carrier was not prohibited under the regulations from earning a profit on charge-backs. Moreover, the court held that the motor carrier was not obligated to disclose the breakdown between costs and profits, but merely had to provide the owner-operators with settlement statements showing that the amount charged to the owner-operators matched the charges identified in the lease. (This was of particular concern in this case, because the motor carrier had agreed to keep confidential the prices it paid to a vendor of satellite communications.) Finally, the court addressed the question left open by the *Supervalu* court, and held that restitution and disgorgement are not remedies provided for violations of the Truth-in-Leasing regulations.

Other Cases

Adrean v. Lopez, 2011 U.S. Dist. LEXIS 141802. Injured plaintiff brought an action against other driver, the motor carrier, and the motor carrier's trucking liability insurer. The court held that a direct action against the insurer was not authorized under either Oklahoma or federal law.

Turner v. Perdue Transportation Inc., 2011 U.S. Dist. LEXIS 124320. The court denied the motor carrier's motion to dismiss a claim for punitive damages, finding that the claim could be supported if the motor carrier had either actual or constructive awareness that its driver violated hours of service regulations and falsified his log books.

L.S. v. Scarano, 2011 U.S. Dist. LEXIS 120457. The tractor-trailer's Electronic Control Module ("ECM") provided evidence of the driver's hours of service which were in conflict with the driver's logs. In a pretrial motion in limine, the driver argued that any evidence of hours of service violations was inadmissible since there was no contention that driver fatigue contributed to the accident. The court held, however, that the conflicting evidence was potentially probative on the issue of the driver's truthfulness, and agreed to admit the evidence subject to a limiting instruction to the jury.

Northland Insurance Co. v. Top Rank Trucking of Kissimmee, Inc., 2011 U.S. Dist. LEXIS 131004. In the leading cases of *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491, 62 S. Ct. 1173, 86 L. Ed. 1620 (1942), and *Wilton v. Seven Falls Co.*, 515 U.S. 277, 115 S. Ct. 2137, 132 L. Ed.2d 214 (1995), the Supreme Court of the United States emphasized that federal district courts have the discretion to reject hearing a declaratory judgment action on insurance coverage while the underlying bodily injury action is pending in a state court. Nevertheless, the Middle District of Florida reasoned that Northland was not a party in the underlying action, and that the issues presented in the underlying action (negligence and liability) were not the same as the issues presented in the declaratory judgment (coverage). Accordingly, the court exercised its discretion and allowed Northland's declaratory judgment action to proceed. (Notably, Northland had argued that it could not be joined in the underlying action under Florida law.)

Amberge v. Lamb, 2011 U.S. Dist. LEXIS 42251. The intoxicated (and uninsured) tortfeasor driver rear-ended the plaintiffs' vehicle twice, pulled in front of them and backed into them, and then reared ended them one more time, all within the space of about seven minutes. The plaintiffs were covered under an uninsured motorist policy with limits of $500,000 per accident. The court agreed with the plaintiffs that four separate accidents had occurred since: (1) the tortfeasor maintained control of his vehicle between each collision; (2) the impacts occurred several minutes apart over a span of several miles; and (3) there were four separate impacts.

Cassaro v. Horton, 2011 N.Y. App. Div. LEXIS 8126. A truck driver injured in a one vehicle accident asserted that he was an employee of the (apparently one-man) trucking company under New York's workers' compensation law. The appellate court upheld the administrative law judge's decision that the driver was not an employee, weighing the facts that: the claimant did not have a set schedule; was paid a percentage of each load with no taxes taken out; was not supervised by the trucking company; was free to choose how many loads he transported and the time it took him to deliver (as long as he arrived before closing, had and agreement with the trucking company that he was to be regarded as an independent contractor and that the trucking company would take out no insurance for him). The court apparently discounted the fact that the driver used the company's vehicle (generally an indication of an employment relationship), and may have been swayed by the fact that the driver represented that he was self-employed on his tax return.

Johnson v. Liberty Mutual Fire Insurance Co., 648 F.3d 1162. After the insureds were rear-ended, the insurer had their taillights tested and disproved the other driver's allegation that they were not working. Six years later, the insureds decided to bring a bodily injury action against the other driver and asked the insurer to return the taillights, which were long gone. The court dismissed the insureds' action against the insurer for spoliation, finding that there was no duty to preserve the taillights for six years under the insurance policy, under statute, or under common law in the absence of any evidence that the insureds' decision to initiate litigation six years after the loss was reasonably foreseeable. The court noted that, even if the insurer had an internal policy to retain such evidence for six years, violation of that policy created no liability to the insureds.

James River Insurance Co. v. Maier, 795 F. Supp. 2d 1378. When the decedent was killed in a collision with a tractor-

trailer, his estate sued, among others, Kannon, the entity which had done a background check on the tractor-trailer driver and cleared him for hire by the motor carrier. Kannon's insurer, James River, disclaimed coverage. The policy excluded coverage for any claim "based on or directly or indirectly arising out of any actual or alleged 'bodily injury' ...." The court upheld the disclaimer, finding that the claims against Kannon, however couched, originated from the death of plaintiff's decedent in the motor vehicle accident.

Norton v. Budget Rent A Car System, Inc., 307 Ga. App. 501. A rental truck was apparently stolen and damaged after the renter had returned it to the rental company after hours. The court held that, having followed all proper procedures for an after-hours return, and having presented evidence that the vehicle was not damaged while in her possession, the renter was not liable for the damage.

De Leon v. Great American Assurance Co., 2011 Fla. App. LEXIS 16154. The insured's truck was stolen; when it was recovered, it was damaged and was missing nine expensive tires. The insured brought suit when his physical damage claim was denied. The insurer eventually settled the claim; even so, the appellate court went out of its way to overturn the lower court and award attorney's fees to the insured and criticized heavily the abusive manner in which the insurance company representative conducted an examination under oath of an insured. The examination was described as "unwarranted and intrusive inquiries into the personal life [including a prior, totally unrelated criminal conviction and the person with whom the claim was then living] of [an] insured who has the temerity to make a claim against [the insurer]."

Nationwide Mutual Insurance Co. v. Erie Insurance Co., 2011 N.C. App. LEXIS 2508. Nationwide paid PIP and physical damage benefits to its insured who had been involved in a motor vehicle accident, and then brought an action in subrogation against the tortfeasor driver. When the tortfeasor's liability insurer disclaimed coverage and Nationwide obtained a judgment against the tortfeasor, Nationwide brought a declaratory judgment action against the liability insurer more than three years after the accident. The court held, however, that in subrogation Nationwide stood in the shoes of its insured, and that the three-year statute of limitations on its action either against the tortfeasor or its liability insurer ran from the date of the accident. The court found further that Nationwide was not an "innocent victim" of the accident and therefore had no statutory right to seek reimbursement from the liability insurer.

Western Heritage Insurance Co. v. Superior Court of Los Angeles County, 199 Cal. App.4th 1196, 132 Cal. Rptr.3d 209. Western Heritage provided a defense to the named insured company and the company's employee for claims arising out of a motor vehicle accident. The employee, in violation of the trial court's orders, failed to provide verified discovery responses or to appear for her deposition. When the court learned further that Western Heritage had filed an answer for the employee without having been in contact with her, the answer was stricken and default judgment entered against the employee. The trial court granted Western Heritage's motion to intervene, but held that the insurer could dispute damages but not the employee's liability. The Court of Appeal reversed, holding that, as an intervenor, Western Heritage had a right to assert on its own behalf all defenses that would be available to the insured parties whether as to liability or damages. (The result would arguably have been different if Western Heritage had sought to intervene after denying coverage and refusing to defend.)

Stover v. Matthews Trucking, Inc., 2011 U.S. Dist. LEXIS 141788. A truck driver was injured when his hand caught on the rear door handle as he was unloading a shipment of mail. He sued the trucking company that employed him, asserting that, under West Virginia's workers' compensation statute, the exclusive remedy bar was inapplicable because the trucking company had knowledge of the unsafe condition of the door handle. This "deliberate intent" exception to the exclusive remedy bar was only available if both the employer and the employee were subject to the West Virginia statute. (The exclusive remedy provisions in Pennsylvania, where the trucking company was headquartered, have no such express exception.) The court agreed that, since the driver began work each day in West Virginia, spent 15 minutes at a mail distribution center in West Virginia, and drove through West Virginia to reach destinations in other states, he was "regularly employed" in West Virginia, and both he and the trucking company that employed him were subject to West Virginia's workers' compensation law.

In a case more notable for its subject matter than its holding, *In re Bill of Lading Transmission and Processing System Patent Litigation*, 2011 U.S. Dist. LEXIS 143751, involved alleged infringement of a patent (held by R&L Carriers, Inc.) on an automated system for producing bills of lading from the cab of a truck. As described by the court, the method involves (1) placing a package on a transporting vehicle, (2) scanning an image of the package's documentation data with a portable scanner, (3) providing a portable image processor; (4) using the portable image processor to wirelessly send an image of the documentation data to a remote processing center, (5) receiving an image of the documentation data at the remote processing center, and (6) prior to the package being removed from the transporting vehicle, using the documentation data received at the remote processing center to prepare a loading manifest which includes the package for further transport on another vehicle.

- Philip A. Bramson