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RESUMÉ

2004 REVIEW AND A LOOK AHEAD TO 2005

MOTOR CARRIER INDUSTRY

The continued war in Iraq and the presidential election dominated the news this year. At year's end the Americans continues to be divided in their response to both of these events. With the re-election of George W. Bush the country now moves to find ways to reunite, end the war and return our soldiers to our shores. While security concerns remain a part of everyday life, they have, in so many ways, come to seem normal. Only a few short years ago such a concept would have been unbelievable.

As the president settles into his second term, changes in the Administration are underway. Many cabinet posts have been vacated, including Secretary of the Department of Homeland Security. Norman Mineta, the head of the Department of Transportation (DOT), appears at this point to be one of the few cabinet officials who will remain in place during President Bush's second term of office. Whether this will ensure a consistency in the operations of the DOT remains to be seen. As one of only a few Democrats in the Administration, many were expecting Secretary Mineta to resign and be replaced with a Republican. We also will have a former truck driver in the cabinet, as Carlos Gutierrez, a former driver for Kellogg's, has been named as Secretary of Commerce. Trucking interests hope that his knowledge of transportation will benefit the industry.

Safestat, the Federal Motor Carrier Safety Administration's (FMCSA) scoring system for a carrier's safety performance came under fire this year. It was found to have such material weaknesses that even the FMCSA warned that reliance upon the data was not recommended. CAB reports continue to include the portion of the Safestat data which FMCSA still releases, with a warning of its potential problems. The FMCSA is working to clean up the information in its system so that that data can be properly used to evaluate the safety of a motor carrier.

Economic indicators for the trucking industry remain strong, with some roller coaster activity. Total tonnage is expected to rise 31% between 2003 and 2015. In years past, the trucking industry would have responded quickly to increased demand by increasing truck availability, and then suffered when demand failed to keep up with the aggregate increase in capacity. However, more carriers have now indicated a slower move to increase capacity in order to ensure that they will continue to operate at maximum efficiency, even in the event of some reduced capacity needs down the line. This move is partially caused by capacity constraints the trucking industry itself faces.

Fuel costs substantially increased during 2004. By mid-summer, Standard and Poor's reported that fuel costs had boosted shipping charges 7-14%. While diesel prices moderated somewhat after that time, overall the average cost of diesel fuel was 58.9 cents higher than in 2003, further reducing trucking profits.

Driver shortages continue to be a major concern in the transportation industry. Low pay scales, the retirement of experienced drivers, tougher rules for hours of service and increased insurance rates for inexperienced drivers have all contributed to this problem. Motor carriers have begun to face up to the issues and many carriers have implemented substantial salary increases in order lure good drivers back into the fold. These increased costs, together with high diesel costs, have impacted profitability but generally not to such a degree as to impair most companies ability to operate effectively.

The trucking industry continues in its efforts to assist the country by helping to protect us from potential terrorist activity. The Transportation Safety Administration gave a two year grant totaling $41 million to the American Trucking Associations (ATA) to continue its Highway Watch program. The program, initially begun to create a traveling watchdog for terrorist activity, looks to expand over the next few years to provide other forms of assistance, including amber alert notifications.

After 20 years of battle, the Supreme Court ruled unanimously that no further studies were needed to open the Mexican border. For such a long battle, the win appears to have no real impact on the economy. Fewer than 300 Mexican trucking operations have applied for U.S. operating authority. The slow process

of obtaining U.S. approval, and the need to comply with all U.S. regulations on driver and vehicle safety, have prevented any real influx of Mexican carriers. It is expected that another decade will pass before there is any significant impact on the U.S. economy.

Last year we reported that various organizations had petitioned the DOT for removal of the financial reporting requirements for large motor carriers. Although all comments have been filed with the DOT, no ruling has been issued on this petition. We would note that since the filing of the petition, the DOT has transferred the oversight of the processing and handling of the Form M from the Bureau of Transportation Statistics to the FMCSA and has indicated that it will be looking to use this information more efficiently in the coming years. This bodes well for future requirements that carriers disclose financial information.

The BMC - 32 endorsement remains in the news this year. The petition which was filed seeking to increase the BMC - 32 endorsement has not been docketed and so no increase can be expected for some time. An action is currently on appeal before the Second Circuit Court of Appeals to determine whether the existing endorsement is applicable to contract carriage. This case is discussed in greater detail in our legal section. As this is a critical issue for cargo underwriters, we will report on the status of this litigation as soon as a decision is reached.

In President Bush's second term of office, tort reform at the federal level is expected to be one of his key issues. Meanwhile, states continue their push forward with changes in state tort laws. In 2004, Mississippi, long considered one of the most difficult jurisdictions in which to be a defendant, enacted sweeping changes, including pure allocation of fault, non-economic damage caps and punitive damages tied to a defendant's net worth. Reform of class action law suits, which have dominated public attention in recent years, is expected to lead the pack in the coming year. Several anti-tort reform proponents left office at the end of the year, paving way for easier changes to existing laws, which is welcome by truckers and insurers alike.

Government Activity

We began last year's resumé with the news that the new Hours of Service rules were now fully implemented and advised that a burgeoning business in training and monitoring of hours of service rule compliance had begun. It had appeared that the battle over the changes to hours of service rules had ended. However, shortly after its initial application, the Fourth Circuit Court of Appeals ruled that the DOT had failed to determine the impact of the rules on driver fatigue and invalidated the rules. For a number of months it remained unclear as to whether the old rules or the new rules would remain in place pending completion of this study. After much political maneuvering by interested parties, the new rules remain in place, at least for some period of time, pending the outcome of the study.

As the study continues, the FMCSA looks for ways to enforce the new rules. Shortly before the end of the year the FMCSA issued a proposal to permit carriers to use electronic data to verify driver compliance with the rules. Both the ATA and the Owner-Operator Independent Drivers Association have come out against the use of electronic data transmission in the truck, arguing that "black boxes" will not help reduce hours of service violations.

Despite early pushes for resolution of the Highway Appropriations bill, Congress ended the year with yet another extension. The 109th Congress will now have to start from scratch. As much of the battle is over efforts to implement environmental streamlining for required reviews of regulations, this battle may be contentious when Congress returns to work this year.

Although the driver shortage is a paramount concern in the industry, the FMCSA has moved forward to ensure that new drivers are not put on the road without adequate training. During 2004, the FMCSA issued mandatory regulations which require newly hired entry level drivers to complete training in driver qualifications, hours of service, driver wellness and whistleblower protection.

The responsibility for accidents and cargo damage caused by defective containers came to the head of the line as a hard fought trucking issue this year. While early in the year the DOT indicated that it would not become involved in the issue, it later reversed that decision. The FMCSA had initially indicated that the rulemaking would be in place by year's end, but most rulemaking, including the container issues, was pushed ahead to 2005 as the year's end drew near. Various organizations have been jockeying for position, with some steamship and rail lines offering voluntary acceptance of some levels of liability to avoid possible passage of a law which would resolve the issue against them. The trucking industry and most insurers continue to push for clear legislation to address the issue and reduce the risk to motor carriers.

Security issues continue to be of paramount concern to government regulators, with business interests mostly

cooperating to meet common goals of importance to all. We continue to see implementation of mandatory security guidelines and notice of voluntary guidelines which quickly become derigeur in the community. The U.S. Department of Agriculture and the Agricultural and Food Transporters Conference have issued the Guide for Security Practices in the Transportation of Agricultural and Food Commodities. At year's end the Food and Drug Administration, as part of the Bioterrorism Act, issued its regulations concerning record keeping for food transporters. The records must include the names of the transporter's immediate previous source and the transporter's immediate subsequent receipt, origin and destination points, date shipment received and date released, number of packages, description of the freight, route of movement during the time the food was transported, and transfer point through which the shipment moved. The maximum record retention period for all types of food is one year. Truckers will be allowed to use bills of lading and expense bills as acceptable forms of record keeping.

Transporters of hazardous materials have been a major focus of security measures as both the FBI and the Department of Homeland Security view trucks as a prime vehicle for terrorist activity. The newest FMCSA rule requires companies that haul toxic inhalants, liquefied natural gas, explosives, or radioactive materials to apply for permits. The FMCSA will issue permits to the trucking companies that have a satisfactory safety rating and a "satisfactory security program in place." These requirements include a communication plan that allows the trucks to maintain contact with their companies at all times, whether via radio and telephone, or real-time tracking devices. Although the TSA had planned to meet its latest deadline of January 31, 2005, to begin its background checks on all drivers of hazardous materials, the TSA has now indicated that it will only be able to check new drivers.

The new household goods regulations finally went into effect in May, 2004. Carriers have substantially increased obligations toward consumers and failure to comply with the regulations could greatly impact the motor carrier's liability for loss and damage to goods. As we have reported in previous months, underwriters are urged to address their insured's compliance when evaluating the risk to be undertaken.

The Motor Carrier Industry

From one perspective, conditions have not been exactly ideal for the trucking industry. Fuel prices are high, carriers are having trouble recruiting and retaining qualified drivers while insurance premiums and new regulations continue to drain carrier profits. However strong demand for shipping services may be more than compensating for those problems.

By the third quarter, shipments were up 18% above the September 2003 level, while comparable spending on delivery services climbed 21%, with the peak season approaching. Carriers have been raising rates and shippers have reluctantly accepted the rate increases, having little alternative with such tight capacity. Overall trucking stocks have triple the gains of the overall stock market this year, having gained nearly 25%, compared with an 8% rise for the Dow Jones Industrial Average. Other transportation related companies have also shown increase above market averages.

National highway fatality figures indicate that trucks accidents continue to be a problem. The good news is that overall accidents are not increasing substantially, even with more vehicles on the road. According to the National Highway Traffic Safety Administration, truck-related fatalities rose from 4,939 in 2002 to 4,986 last year. The total remained below 5,000 for the second year in a row. The 1 percent increase occurred at a time when total vehicle miles traveled in the United States increased to 2.88 trillion, up from 2.86 trillion in 2002. It should be noted that passenger car driver error is cited as the cause of about 75 percent of all car-truck crashes, according to government statistics.

This year has not shown any significant increase in bankruptcies and closings for trucking companies. Although a certain number of carriers did cease operations, the numbers are fairly standard and simply reflect ordinary business percentages. Publicly traded motor carriers may also begin seeing some of the many problems faced by the corporate sector. The end of the year saw a class action suit against Swift Transportation seeking damages because of the alleged failure to disclose information to permit adequate evaluation of stock values, including allegations that the conditional safety rating given to the Company by the FMSCA was not an error, but rather a true representation of the carrier's performance.

Insurance Underwriting

The beleaguered insurance industry began the year with continued concerns over inadequate reserves. Many insurers moved toward more conservative reserving practices, impacting profit margins as the year began. By the end of the year, the insurance industry had become the target for increased scrutiny following allegations of price fixing and broker commission irregularities. Insurers scrambled to bring

all issues to the public attention to avoid any appearance of impropriety.

The U.S. property/casualty insurance industry's net income after taxes rose 28.3 percent to $26.7 billion in the first nine months of 2004 from $20.8 billion in the first nine months of 2003. Its surplus, or statutory net worth, increased $22 billion, or 6.3 percent, to $369 billion at the end of the third quarter, according to reports released by ISO and the Property Casualty Insurers Association of America (PCI).

On the whole, rates have stabilized this year and, according to some, the market has begun to soften. Analysts estimate that rates will continue to decline in the coming years. As has historically been the case, improved profitability results in increased competition and lower rates. The Council of Insurance Agents and Brokers third-quarter 2004 rate survey indicates commercial insurance prices fell an average of 5.9 percent for accounts of all sizes. Premium growth through the third quarter fell 2.2 percentage points short of the 6.7 percent increase levels one year ago. Also, as many buyers report paying more money for less coverage they are retaining a greater portion of the risk. The combined ratio for 2005, is projected to be 99.0, little changed from the 100.0 estimated for 2004 and the 100.1 recorded in 2003. Although third quarter results reflected loss ratios of approximately 98, the unprecedented number of hurricanes and storms in the fall will increase the overall number by the time year end reports are filed.

On a more positive note, the internet has opened a new base for many property/casualty insurers. A majority of insurers now use the internet to handle billing and claims inquires and to quote certain types of commercial coverage. Preliminary studies indicate that overall job performance is up and costs are down with the use of the internet.

The Terrorism Risk Insurance Act will be back in the forefront of the news this coming year as the existing program is scheduled to expire on December 31, 2005. Initial reports had indicated that the purchase of terrorism insurance was minor but in a more recent study conducted by AON found that 57 percent of the companies studied have decided to "take up" some kind of terrorism insurance - an increase over the 24 percent found earlier this year.

Central Analysis Bureau

This has been an exciting year at Central Analysis Bureau. We have listened carefully to your concerns and recognize the need to provide you with more information at affordable prices so that you collect adequate premium, reduce overall risk analysis expenses and fully analyze the risk you are assuming. We continue our search for new sources of valuable information. As always, our goal is to help with the underwriting of specific motor and passenger carriers, to give companies the tools to improve the quality of their transportation insurance programs and to guide underwriters through the complex legal and regulatory environment in which transportation insurance operates.

Our financial analysis service remains the cornerstone of our operations and provides an important tool for underwriters. As the scope of regulatory filings are broadened by the courts, and monetary judgments get higher and higher, it is imperative that underwriters minimize the risk of exposure by assuring that financially stable carriers make up the bulk of their book of business. As part of this resumé, there is a breakdown of the distribution of our ratings over the past ten years. While the breakdown changes each year along with the health of the overall economy and the specific health of the trucking industry, between 25 and 30 percent of carriers fall within categories which should be of concern to underwriters and an additional 30 to 35 percent are of marginal financial strength. Without knowledge of a carrier's financial condition many will appear, at least in the application, to be an acceptable risk.

To allow subscribers to screen all submissions, subscribers have unlimited access to CAB's web and telephone "clearinghouse". There is no charge until you actually bind that risk. In addition, CAB will review and analyze any financial information you send to us, again without charge, unless a policy is bound. Our statistics show that on average subscribers to our service will screen five risks and write only one of those risks after reviewing the information which we provide.

CAB is not just about financial analysis. Detailed information about all aspects of a company's operations are important to your risk assessment. In this time of quick decisions and immediate turn around on applications, we have expanded our information to provide you with virtually all relevant information on a motor carrier, both during the application and renewal process, and during the policy term. Information on out of service reports, revocation proceedings, filing cancellations, and improper filings are just some of the important information which is provided to you.

During 2004 we reorganized our analysis report and website to further highlight this information. For your ease in locating relevant information, the notifications denoted by ****ALERT have been summarized at

the beginning of the report. On our subscriber website these notification now pop up as soon as you request information on the carrier. These notifications highlight the anomalies noted above.

We recognize that financial information is oftentimes unavailable or sketchy at best, or that preliminary decisions need to be made before the financial analysis is reviewed. As a value added benefit to our subscribers, we are excited to advise that we have now put together a growing and up-to-date database of information on carriers which will be displayed on the website even if a financial analysis has not yet been completed. Compare this information to your application and ensure that you know what you are writing.

Our monthly e-mail newsletter, "Bits and Pieces" has expanded this year. This newsletter, which is sent free of charge to all subscribers, now keeps you abreast of the news of the month in transportation and insurance, provides a heads-up on regulatory activities and provides information on the latest court battles over issues which effect your exposure. The feed back over this newsletter has been excellent and each month we get more requests for copies. As these are the current issues that can have a direct impact on your book of business you need to know this information to keep your policies up to date. Your competitors are getting this information. If you do not currently receive this newsletter but would like to please e-mail Mark Schweber at mschweber@cabfinancial.com.

Over the years insurance companies have sought, with limited success, to make sure that they controlled the status of filings. We have found, repeatedly, that regulatory filings are not cancelled, are made with greater limits than required, or made for carriers that did not even require filings. With great success, CAB has introduced a new service to help you control this problem. For a yearly fee, substantially discounted for subscribers, insurance companies can now obtain, up to twelve times a year, a detailed listing of all of current U.S. Department of Transportation filings for the company. The list will include the motor carrier name, Motor carrier (MC) number, operating authorities, effective filing date, and required and posted filings and limits. The list highlights those carriers where filings that were not required were made, where filings have higher than required limits and where the filing is very old to allow a company to quickly see those filings that might be a problem. If you are interested in learning more about this service please contact Alex Bentsen at (212) 244-6575, ext 225 or abentsen@cabfinancial.com.

At year's end we were pleased to complete negotiations to obtain information from the state of Texas on all vehicles, including VIN numbers, that a motor carrier registers with the state to operate in or through the state. This will provide a wealth of information to underwriters which is otherwise unavailable without substantial time and effort and will better enable you to verify application information and ensure proper premium collection. We are working to integrate this information onto our report and web site so watch *Bits and Pieces* in coming months for further announcements. During 2005 we will be meeting with various other states to seek to gain access to their information for you.

Our affiliate, Transportation Technical Services, Inc., is America's foremost publisher of transportation directories, both on the web and in print. Its subscription-based web directory, *fleetseek.com*, has information on over 177,000 for-hire motor carriers, private fleets and owner-operators in the U.S., Canada and Mexico, and is updated continuously throughout the year. To become a subscriber or get further information phone (888) ONLY TTS or visit their website at *ttstrucks.com*. The senior staff of TTS (and CAB) are recognized transportation experts with many years of experience and are available for litigation, consulting or other purposes.

The entire staff of CAB wishes you the best for the coming year. Please do not hesitate to contact us with any questions regarding specific motor carriers, the industry in general, regulatory issues or coverage questions. There is always someone here to help you.

We would be pleased to furnish you with additional copies of this resumé upon request. It is also available on our web site.

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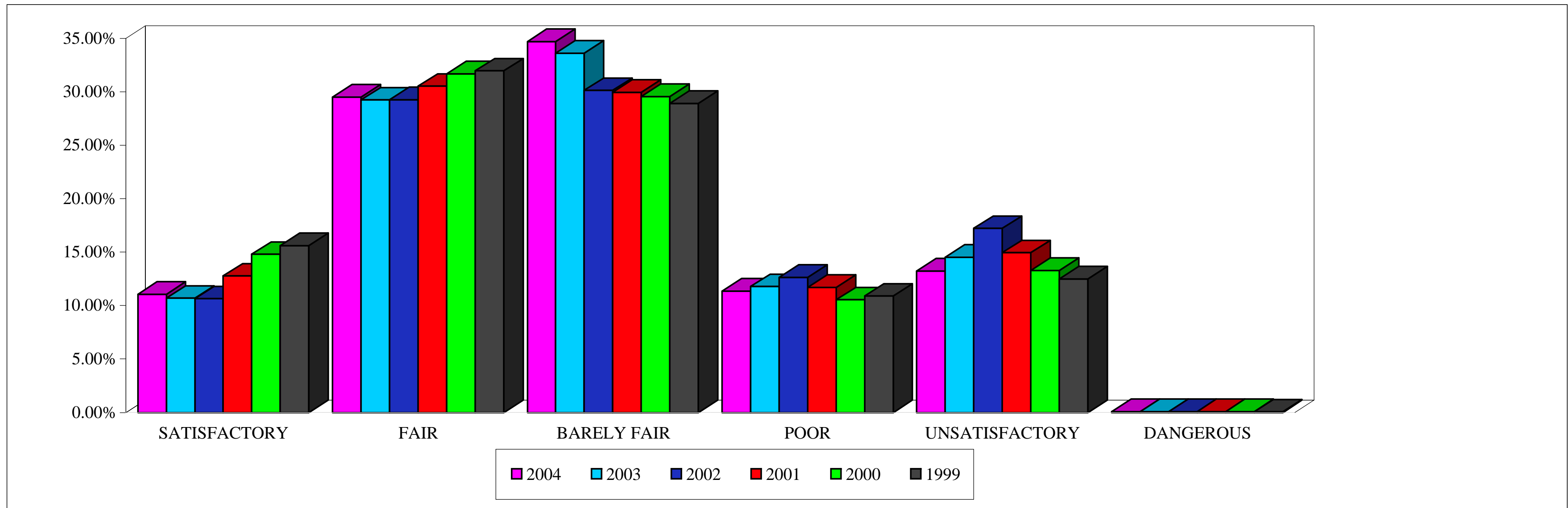
Ratings

Breakdown of ratings for the year 2004 and prior:

	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994
SATISFACTORY	11.08%	10.69%	10.64%	12.77%	14.81%	15.63%	16.11%	15.65%	15.61%	17.43%	17.04%
FAIR	29.52%	29.26%	29.28%	30.54%	31.70%	31.98%	30.77%	30.70%	31.33%	31.29%	29.14%
BARELY FAIR	34.71%	33.63%	30.14%	29.96%	29.57%	28.94%	28.49%	27.53%	27.98%	26.68%	25.04%
POOR	11.38%	11.79%	12.64%	11.71%	10.54%	10.90%	11.42%	12.04%	11.24%	11.16%	12.02%
UNSATISFACTORY	13.23%	14.53%	17.23%	14.95%	13.30%	12.49%	13.15%	13.97%	13.66%	13.32%	16.60%
DANGEROUS	0.08%	0.07%	0.07%	0.07%	0.08%	0.06%	0.06%	0.08%	0.15%	0.09%	0.13%



Reference to CAB ratings

SATISFACTORY	Excellent financial condition
FAIR	Adequate financial condition
BARELY FAIR	Limited financial condition
POOR	Weak financial condition
UNSATISFACTORY	Inadequate financial condition
DANGEROUS	Distressed financial condition

Our firm is pleased to present our annual summary of legal decisions that we feel are of interest to our clients and friends. All of the cases referred to, and several others of interest, are available on the firm website *sfl-legal.com*.

RECENT DEVELOPMENTS IN TRANSPORTATION AND INSURANCE LAW

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MCS-90 ENDORSEMENT

The Supreme Court of Vermont adopted what we view as a reasonable interpretation of the MCS-90 endorsement in holding that the endorsement did not impact on the priority of coverage in Fireman's Fund Ins. Co. v. CNA Ins. Co., ___ A.2d. ___. CNA insured P&C, the owner of a tractor. P&C's employee was driving the tractor with an attached milk tank pup trailer leased from AMI. AMI was insured by Fireman's Fund. The issue before the court was the order of priority of the policies.

It was not disputed that CNA's coverage was primary; CNA, though, argued that Fireman's Fund's policy was also primary and that the two policies were to be pro-rated. The court compared the two policies' "other insurance" clauses and found that they were reconcilable. The CNA policy provided primary coverage for the tractor and trailer, while the Fireman's Fund policy, which included a fleetcover endorsement, provided for excess coverage. In passing, the court noted that "other insurance" clauses are not construed against the insurer. Only provisions which may benefit the insured are read, in the event of ambiguity, against the insurer. The principle does not apply to disputes between insurers.

CNA's alternative argument was that the Fireman's Fund policy was co-primary because of the MCS-90 endorsement attached thereto. Fireman's Fund made three separate arguments: its second argument was that the MCS-90 had no applicability to the loss in question which involved the transportation of milk, an exempt commodity; the third argument noted that the transportation was purely intrastate and, for that reason the MCS-90 did not apply. The court did not reach these two arguments.

Instead, the court focused on the first argument: the MCS-90 does not apply to disputes between insurers. The MCS-90 endorsement exists to ensure that injured members of the public will be able to seek recovery from a reputable insurer once they have won a judgment against a motor carrier. However, the MCS-90 is completely irrelevant in determining the priority of coverages; that is determined by state law (the language of the policies or, in some states, statutory mandate.) The court accepted this reasoning which, it noted, constituted the majority view of the circuits. To be sure, the court was troubled by the fact, which has misled at least one other court, that Fireman's Fund checked the box in the MCS-90 which provides that the policy "to which this endorsement is attached provides primary . . . insurance." The court ultimately discounted the significance of the fact that the primary box was checked. The only alternative was the excess box which describes an umbrella type policy and, therefore, was not an appropriate choice.

In fact, the "primary" and "excess" boxes derive from the D.O.T.'s 1981 decision to permit aggregation of limits by two or more insurers. (The D.O.T. had been told that the insurance industry could not provide the mandated coverage without aggregation — in retrospect this may have been an overreaction by the industry to the higher limits imposed by the D.O.T. following passage of the 1980 Motor Carrier Act.) There was never any intent to imply that the insurer which provided the first layer of the MCS-90 was a primary insurer vis-à-vis insurers that issued policies to other insureds. The Vermont Supreme Court did not apparently unearth the history, but it arrived at the correct conclusion.

The court in Thompson v. Harco Nat Ins. Co., 120 S.W. 3d 511, held that the MCS-90 did not apply to a shipment that was being transported intrastate. As we pointed out in previous years, this remains a controversial issue. Many decisions have held that if the vehicle is ever used in interstate commerce the MCS-90 applies.

In Elmore v. Kelly, __ So. 2d __ (Dec. 15), the Louisiana Court of Appeals held that the third party tort victim had no right of action against a truck company's insurance agent for alleged failure to procure insurance for the trucker in the amount required by law. The agent's duty ran to the company, not the claimant. In any event, the court held that since the rig was not for-hire, but was being used to haul scrap metal interstate in the trucker's own business, 49 C.F.R §387.9 did not apply and the required limits were only $300,000 pursuant to state law.

FILING AND SERVICE VEHICLES

In Hartford Cas. Ins. Co. v. Smith, 603 S.E.2d 298, the Georgia Court of Appeals held that where the policy and the Georgia Form E filing denote different named insureds, it was the version contained in the filing that controlled even when the issue before the court involved interpretation of policy terms.

The insured limousine company was granted a certificate of public convenience and necessity by the Georgia Public Service Commission after Hartford sent a Form E filing to the state. The policy scheduled one vehicle. At the time of the accident James Nathaniel, principal of the insured, was operating a pick-up truck titled in his name and insured on a personal lines policy issued by Allstate. The use of the pickup was connected, albeit indirectly, with the limousine company's business. The court noted that while the policy

was issued to Nathaniel d/b/a JRJ Limousine, the Form E was filed in the name of 3N Enterprises, Inc. d/b/a JRJ Limousine.

Hartford pointed out that the policy excluded coverage for vehicles owned by the named insured and not listed on the policy. Hartford argued that since Nathaniel was the named insured, owned the vehicle and had not listed it, the pick-up did not constitute a covered auto. Hartford insisted that it had simply erred when it filled out the name of the insured on the filing.

The court, though, concluded that Hartford was bound by its error; it was estopped from arguing that 3N Enterprises was not the named insured. Accordingly, the court concluded that the pick-up truck qualified as a non-owned auto (since it was not owned by 3N) and coverage attached.

Hartford also argued that Nathaniel failed to give prompt notice of the loss. The court apparently agreed with Hartford that this waived coverage under the policy (thus, in truth, making it irrelevant whether the pick-up constituted a covered auto or not!). However, Hartford was obligated to pay the judgment under the Form E filing. The obligation imposed by the filing applied even though the insured was not transporting people for hire. The court, though, did not indicate whether there is any limit to the scope of the Form E. Presumably there needs to be some connection between the use being made of the vehicle at the time of the loss and the operations of the insured motor carrier. The court did not specify that this was the case, but we would argue that this is what the court meant. We are not surprised, though, that the court found that use of a service vehicle implicated the filing.

NON-TRUCKING

The District Court in Canal Insurance Co. v. Underwriters at Lloyd's London, 333 F. Supp.2d 352 (E.D. Pa.) considered an interesting variation on the theme of the interaction of non-trucking policies and regular business auto policies; here, one person controlled both insured entities. Canal issued its business auto policy to an individual, a Mr. Singh, and added Singh's motor carrier operation, known as BIR, as an insured. Underwriters insured Mr. Singh as well, under a non-trucking policy; Singh, however, was not wearing his BIR hat when he purchased the Underwriters policy. Instead, the court concluded, the latter policy was issued to Singh in the guise of a leasing company. Singh, apparently, leased his fleet, including the accident vehicle, to BIR. Singh had decided to sell the tractor and purchase a new one, and assigned a driver to take the tractor to a dealership in Chester, Pennsylvania. Singh, now wearing his BIR hat, instructed the driver to attach a trailer to the tractor in case a load became available. If one did, the driver would haul it to destination with the newly purchased tractor. The Underwriters policy included coverage when the covered auto was "engaged in Business Use, such as proceeding to any location, pursuant to the request, direction, control and/or dispatch, of any person or entity other than the Insured." Business use was defined to include any use of the auto that promotes the business purposes of the insured. The court concluded that since the loss contributed to the growth and prosperity of the leasing company, Underwriters provided no coverage. Ironically, Canal, which insured the motor carrier, had to foot the bill for activity primarily intended to benefit the leasing company. The result may have been different under the ISO non-trucking form.

BROKER LIABILITY

The growing sophistication of logistics operations presents the courts with the challenge of analyzing the potential liability of these entities with the limited tools set out in the existing case law. In Schramm v. Foster, 341 F. Supp.2d 536 (D. Md.), Jasper Products asked C.H. Robinson, the logistics giant, to arrange for the transportation of a load of soy milk in interstate commerce. Robinson had an ongoing contract of carriage with Groff Brother, a motor carrier. Groff dispatched its employee Foster to haul the shipment. Foster was driving in excess of the D.O.T.'s maximum driving hours and negligently contributed to an accident with a pick-up truck.

Robinson does not own transportation equipment; instead it has brokerage contracts with 20,000 licensed motor carriers. Robinson markets itself as providing "one point of contact" service to shippers. In the event of cargo damage, Robinson writes the shipper a check directly. Robinson also promises to insulate the shipper in the event of an action for bodily injury in three ways: 1) Robinson only works with carriers who have the D.O.T. — required insurance coverage; 2) in the event of an accident, the carrier indemnifies both the shipper and Robinson; 3) if coverage exceeds the motor carrier's insurance limits, Robinson's insurer will pay the remainder of the loss. The contract between Robinson and Groff insisted that Groff was an independent carrier and Groff was responsible for operating the transportation equipment and paying the salary of Foster, the driver. There was no evidence that Robinson controlled Foster's performance.

In light of these factors, the court concluded that Robinson was not vicariously liable for Foster's negligence. The court was not impressed by the fact that Foster called Robinson directly to receive dispatch information, nor by the requirement that Foster call Robinson periodically to provide updates on his progress. Nor was Robinson liable for negligent entrustment of the vehicle to Foster, since the truck was provided by Groff. Finally, the court denied that Robinson was liable as the motor carrier under federal law. Even though Robinson was an authorized carrier and could have hauled the shipment itself, the shipper understood that Robinson's role was a broker for this transportation. It was true that the bill of lading identified Robinson as the carrier, but the court found that to be an error. There was no evidence that Robinson solicited the load for its own carrier business, and the shipper's employees testified that they understood that Robinson was acting as a broker. The court did permit the case to go forward on plaintiff's claim

against Robinson for negligent hiring. The Court's closing comments suggest some level of discomfort with the current state of the law as it relates to logistics companies.

LATE NOTICE AND PREJUDICE IN NEW YORK

In recent years nearly all states have adopted the view that an insurer can properly deny coverage for late notice only if it can establish that it was prejudiced by the insured's delay in providing notice. One of the last holdouts was New York where traditionally no assertion of prejudice has been required (although, in a separate line of cases, New York courts have insisted that the declination is valid as to third party claimants only if the claimant knew or should have known the identity of the tortfeasor's insurer and also failed to provide notice to that insurer).

In a 2002 decision New York's Court of Appeals (the state's highest court) may have hinted in a footnote that the question should be re-examined, and several courts around the state have gone so far as to hold that the insurer was not justified in denying coverage absent prejudice. In Great Canal Realty Corp. v. Seneca Ins. Co, 2004 WL 2952794, (the decision is apparently not being officially reported) two of the five judges on the intermediate appellate court panel voted to affirm the trial court's denial of the insurer's motion to dismiss on the basis that the insurer had offered no proof of prejudice. Two other judges dissented, holding that until and unless the Court of Appeals decides that the "no-prejudice" standard is no longer good law, it remains the operative rule in New York. The fifth judge agreed with the trial court's decision on the basis that the claim may have been made on a timely basis under the circumstances.

Until the Court of Appeals rules on the issue insurers may well feel uncomfortable relying upon a late notice declination in New York absent colorable evidence of prejudice. In close cases a declaratory judgment action may provide cover.

OTHER CASES OF INTEREST

Imre v. Lake States Ins. Co., 803 N.E.2d 1126 (Ind. App.) - the court held that the insured was not entitled to recover both uninsured and underinsured motorist coverage on the same claim.

Butzberger v. Foster, 151 Wash.2d 396 - The Supreme Court of Washington abandoned the "vehicle orientation" test utilized by some courts to determine whether an insured is entitled to UM coverage; instead, the court concluded that even if the UM coverage form does not contain the phrase "use of" or "using" a vehicle, the test for determining whether UM coverage applied would be the traditional factors applied when analyzing liability coverage as to whether the vehicle was being used. (Contrast, Petika v. Transcontinental Ins. Co., 855 A.2d 85 (Pa. Super.) which upheld the vehicle - oriented test).

Stevens v. Fireman's Fund Ins. Co., 375 F. 3d 464 (6th Cir.) - (applying Florida law). The court held that trucker's general liability policy was inapplicable to claim that trucker had negligently dispatched its driver who was over hours; any such negligent dispatch was inextricably linked with use of an auto.

LIMITED LIABILITY

In Emerson Electric Supply Co. v. Estes Express Lines Corp., 324 F. Supp 2d 713 (W.D. Pa.), the court refused to enforce a motor carrier's tariff limitation of liability because the tariff did not provide for a choice of rates. The pro-sticker attached to the shipper's bill of lading by the pick-up driver stated that the carrier's rules tariff applied to the shipment. The tariff terms, which were available on the carrier's website, provided that uncrated new machinery was released to a value not exceeding $.10 per pound, and that the shipment would not be accepted if the shipper designated a greater value. The court reasoned that "the requirement that a carrier must provide the shipper with a fair opportunity to choose between two or more levels of liability derives from common law," and concluded that the Interstate Commerce Commission Termination Act did not alter the common law rule. The court correctly observed that prior to ICCTA, the Carmack Amendment provided that the Interstate Commerce Commission could require carriers whose tariffs limited liability to offer a full-value alternative, and that this statutory language was deleted by ICCTA. The court said that the elimination of the ability of the ICC to require a full-value rate did not eliminate the common law requirement that there be at least two options. As we observed in this column last year, it makes no sense to require a choice of rates unless one of the choices is full value. Since the courts agree that a full-value choice is required, no practical purpose is served by offering only a limited choice of limited values.

In Bullocks Express Transportation, Inc. v. XL Specialty Insurance Company, 2004 WL 1748934 (D. Utah), the bill of lading, consistent with the carrier's tariff, provided for a released value of $5 a pound if no value was declared on the bill of lading. However, the parties had previously entered into a contract for LTL shipments which limited the liability of the carrier to $5 a pound, and further provided that the carrier would be liable for full value if the loss was caused by "severe negligence" as defined in the agreement. Although there was a question of fact as to whether the LTL agreement was meant to apply to a truckload shipment, the court held that regardless of the intent of the parties, the tariff would prevail over the contract, and that, in any event, the "severe negligence" provision could not be enforced because it is prohibited by the Carmack Amendment. The court reasoned that the Carmack Amendment pre-empted recovery for negligence and required that the tariff, which the shipper was deemed to have knowledge of, would govern the transaction.

Frankly, none of this makes much sense, and this decision

may stand as an example of the difficulties of litigating limitation of liability issues. To begin with, the decision makes no reference to 49 U.S.C. §14101(b), which presumably would permit the parties to enter into a contract "to provide specified services under specified rates and conditions." There would appear to be no good reason why the parties could not contract under §14101(b) to limit liability subject to an exclusion for severe, or any other kind of negligence. Pre-emption is not an issue insofar as the remedy would not be in tort, but under the contract. A contract which sets negligence as a standard for liability provides for a contractual, not a tort, remedy. Curiously, the court notes that at oral argument, counsel for the carrier stated that it would not have accepted the shipment if the shipper had declared full value. The court failed to recognize that this would void the tariff limitation inasmuch as the carrier would not have in fact offered a choice of liability levels.

In Atlantic Mutual Insurance Company v. Yasutomi Warehousing and Distribution, Inc., 326 F.Supp.2d 1123 (U.S.D.C.C.D.CA, 2004), the court enforced a limitation of liability established by "course of dealing." The parties had previously completed many shipments in which the carrier issued bills of lading which on their face limited liability to "$50.00 per shipment or 50 cents per L.B. Excess valuation charges will be 10 cents per $100.00 valuation." The bill of lading for the lost shipment was "misplaced." Correctly, we suggest, the court held that the parties had entered into a §14101(b) agreement which was established by the prior dealings in the absence of the actual bill of lading. The court also stated that the fact that the shipper had its own insurance established that it was aware of the limitation of liability and that it chose to not declare a value.

A limitation of liability based on prior practice, where no bill of lading was issued at pick-up, was also enforced under state law in Rational Software Corp. v. Sterling Corp., 311 F.Supp.2d 203 (D.Mass. 2004).

OTHER CARGO CASES OF INTEREST

In connection with the appeal taken from the decision of the District Court that the BMC-32 Endorsement applies to contract carriage in M. Fortunoff of Westbury Co., v. Peerless, 260 F.Supp.2d 524 (E.D.N.Y., 2003), the panel of judges who heard oral argument asked the Federal Motor Carrier Safety Administration to file an amicus brief. The brief which they filed in mid-December takes the position that the BMC-32 Endorsement does not apply to a carrier's contract carrier operations when the carrier is registered as both a contract carrier and a common carrier. The brief also reports that the USDOT expects to issue a proposed rule with respect to unified carrier registrations in February, 2005.

The Seventh Circuit rule that the requirement of a written claim to a motor carrier is satisfied by the carrier's mere awareness of the loss was followed by the court in Mitsui Sumitomo Insurance Co. Ltd., v. Watkins Motor Lines, Inc., 2004 WL 2325421 (N.D. Ill.) On the other hand, in S&H Hardware & Supply Co., 2004 WL 1551730 (E.D. Pa.), the court, citing authorities in the First, Second and Fifth Circuits, held that "the filing of a written claim within the prescribed time period is a strict condition precedent to the filing of a lawsuit." The court dismissed an action on a claim which the motor carrier had investigated because a written claim was not presented to the motor carrier within nine months. Pennsylvania is in the Third Circuit. Similarly, in Siemens Power Transmission & Distribution, Inc. v. Norfolk Southern Railway Company, 336 F.Supp.2d 1201 (M.D. Fla. 2004), a District Court in Florida, noting that the Sixth, Seventh and Ninth Circuits apply a "substantial compliance" rule, and that the First, Second and Fifth Circuits apply a "strict compliance" rule, observed that the Eleventh Circuit (which includes Florida) had not taken a position. The court fell in with the strict constructionists and dismissed the plaintiff's action on the grounds that the claim did not seek a determinable amount of money. This proves, again, that you have to be in the right place at the right time to win.

Attempts by plaintiffs to use violations of federal safety regulations to establish cargo claims were unsuccessful in Lustig v. Brown, 2004 WL 1244147 (N.D. Ill. 2004), and in Castine Energy Construction, Inc., v. T.T. Dunphy, 861 A2d. 671, 2004 ME 129 (Maine, 2004). In Lustig, which involved transit damage to a yacht, the federal court in Illinois dismissed causes of action which alleged violations of federal regulations relating to highway transportation on the grounds that the regulations do not provide for a private right of action. The court did not say if these claims would also be barred by the Carmack Amendment. In Castine, the loss was caused by the failure of cross bars which the shipper had welded to assist in the loading of the cargo. The driver ran his chains through the cross bars, which the shipper claimed were not intended to be used to secure the load. Apparently, the method of chaining violated federal safety regulations. The court rejected the shipper's contention that the violation constituted negligence per se. Noting that the carrier was responsible to secure the cargo, the shipper requested a jury instruction that the shipper had no duty to advise the carrier that the cross bars were not intended to secure the cargo in transit. Affirming the trial court's decision not to give the instruction, the Supreme Judicial Court of Maine stated that had the defect been latent (which would be a question of fact), the shipper may have had an obligation to warn the carrier not to use the cross bars to secure the load.

Transportation Seminar - Schindel, Farman & Lipsius and CAB will hold their fifteenth Annual Transportation Seminar in the New York City area on April 11and 12. Registration is limited and we have been over-subscribed each year in the past. We suggest that you submit your application by March 1. For applications or additional information please call Pauline Hylton at (212) 563-1710, Ext. 217. Information and an application form are also available on our web site.