

January 17, 2006

Whether it was because of diesel price fluctuations, hurricanes, security concerns, driver shortages or simply the economic stress of rising operating expenses, the transportation industry went on a roller coaster ride this year. Of course, the fury of Mother Nature and the battering of Hurricanes Katrina, Rita and Wilma left the biggest mark on the country. On the up side, the post hurricane months have once again shown the resilience of Americans as we begin the climb back from a national tragedy and look to make changes to avoid the same mistakes in the future.

While there was a severe economic setback following the hurricanes, the transportation industry, as it has done historically, has risen above each trauma and continued to help the economy recover. The industry is widely viewed by economic experts as a leading indicator of the economic swing. There is every reason to believe that will continue to be the case as we see truck tonnage rise and freight capacity again hitting crunch levels at year end. The Census Bureau issued its 2004 report in December 2005, showing that truck transportation reached \$186 billion in 2004, with general freight trucking bringing in 2/3 of that revenue and specialized freight making up the balance. Motor carrier revenues were up 10.5% overall, with hazardous material transportation showing an increase of 9.4% to \$10 billion. Final numbers for 2005 will not be available for some time, but while freight tonnage was down substantially at mid-year, in part because of the delays associated with the hurricanes, it began a steady increase in the fall, lending hope to the possibility that numbers will equal last years numbers. The ATA reports that September, October and November all saw freight tonnage increases, the first consecutive increases in well over a year. This bodes well for future economic growth.

As the year drew to a close, fuel costs were also finally beginning to slow down after jet rocket increases. At the start of the year the country was aghast at the fact that diesel fuel prices had reached \$1.96. Looking back we would be most happy to have those numbers today. By the end of October the average price in the U.S. had spiked to \$3.158, and reports and studies were flying as to how many companies would be put out of business by year's end. It is amazing that we are thankful that we closed the year at \$2.448, a substantial increase from the price at the beginning of the year that was so shocking at the time. The ATA increased its estimate on the cost of fuel purchased to \$85

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2005 REVIEW AND
A LOOK AHEAD TO 2006
MOTOR CARRIER
INDUSTRY

billion this year, a \$23 billion dollar increase.

Driver shortages still continue to plague the industry. A study released this year indicated that 20,000 drivers are currently needed to make up the short fall. If the numbers continue to follow this pattern, by 2014 the anticipated shortfall is expected to reach 111,000. By mid-year 2005

driver turnover rate for large truckload carriers had jumped to 129%. The past year has seen a number of organizations begin a push toward winning government approval for increased truck weights and use of triple trailers as a proposed solution to the driver shortage. However, as the ATA has not indicated support for those changes they are unlikely to be a viable option for trucking companies anytime soon.

Few people stop to recognize the importance of the Department of Defense as a customer of the transportation industry. It is by far one of the largest shippers, as it moves equipment, products, personal and household goods throughout the world. The Military Traffic Management and Command, which long governed the movement of household goods, has now evolved into the Surface Deployment and Distribution Command. This organization completes over 500,000 moves annually at a cost of \$2 billion. One of the major initiatives of this organization is the implementation of Families First, a program designed to assure, among other things, that service personnel obtain full replacement cost recovery for any goods lost or damaged in transport. Underwriters of these accounts should be aware of the additional exposure now taken on by the motor carrier. The Department of Defense also appears to be moving forward on the Defense Transportation Coordination Initiative which seeks to shift management of large shipments to one third party logistics provider. Transportation groups are opposed to implementation of this protocol fearing that a single coordinator will reduce the number of vendors and impact the Department of Defense supply chain.

Tort reform continues to be a critical issue for insurers and truckers, who often face enormous judgments based solely on the fact that an accident involved a truck. The top five judicial hellholes for 2005 were located in Rio Grande Valley and Gulf Coast, Texas; Cook County, Illinois; West Virginia; Madison County and St. Clair Counties, Illinois; and South Florida. In 2005, the President signed into effect the Class Action Fairness Act, while South Carolina and Missouri passed anti-forum shopping statutes. In early fall the House approved the Lawsuit Abuse Reduction Act which would

require sanctions against attorneys who file frivolous lawsuit. On the downside, the Pennsylvania Supreme Court held that state's effort at tort reform were unconstitutional. A recent Guy Carpenter & Company study indicates that overall the courts have been less hostile to corporate defendants and insurers this year.

No CAB yearly resumé would be complete without some mention of the fact that the Mexico/U.S. border is still not open for full operation. While most of the hurdles have been jumped, the two countries still need to reach accord on the transportation of hazardous materials and the type of inspections to be conducted at the border.

Government Activity

The Highway Spending Act was finally enacted, two years after the last bill expired. In addition to a \$286.4 billion dollar budget, the Act contains a number of items which will affect the insurance and transportation industries, hopefully in a positive way. The hard fought ban on state liability without fault laws was authorized, freeing truck leasing and rental companies from liability for accidents caused by drivers. The Federal Motor Carrier Safety Administration (FMCSA) was instructed to come up with a rulemaking within the year which will address the responsibility for container safety, hopefully taking the onus off truckers. They were also instructed to implement additional rules to permit greater penalties and monitoring of household goods carriers.

The House of Representatives introduced the Cargo Theft Prevention Act this year. The act is designed to coordinate cargo theft crime data collection and make improvements relating to cargo theft prevention. During the year the Act was incorporated into the USA Patriot and Terrorism Prevention Reauthorization Act. Although the Reauthorization Act was substantially modified, by year end the final approved version did include the Cargo Theft Prevention Act. The new Act will increase the criminal penalties for cargo theft and create an all-inclusive database regarding cargo theft to allow state and local law enforcement to coordinate reports of cargo theft. In addition, cargo theft will be reflected as a separate category in the Uniform Crime Reporting System used by the FBI which should hopefully enable tracking and monitoring of trends in cargo theft, which is estimated by the government to be up to \$30 billion a year.

The FMCSA was on a roll this year. After years of delays in implementing rulemaking and procedures for transportation operations, the FMCSA has begun to dig itself out of the hole by issuing a substantial number of proposed rulemakings to address the issues left open by the ICC Termination Act in 1996. 2006 will see many organizations jockeying for their position in response to the proposed rules.

The most significant of all is the proposed rulemaking for a Unified Registration System. This rulemaking seeks a

complete overhaul of government regulation over motor carrier operations and could have a substantial impact on carriers and insurers alike. One extremely contentious proposal is the elimination of the BMC-32 cargo filing. The battle lines have been drawn on that issue, as shippers, brokers, and many carriers oppose its removal. Insurers were divided on whether they wanted the filing rescinded. MC numbers, freight forwarder and Mexican carrier's numbers may also be eliminated and insurance filing requirements may be extended to exempt for hire motor carriers, passenger carriers and private hazardous materials carriers. Comments have been filed by various organizations on all of these issues and we await the next step by the FMCSA.

The FMCSA has indicated that the coming year will focus on driver issues in order to insure road safety. The FMCSA is currently considering a network of approved physicians who will be trained to properly complete driver examinations and will also look to join CDL licenses with medical certifications.

In 2005 the FMCSA published its new rules for driver training of new drivers. However at year's end the court had struck down the rules because they failed to address on-the-road training. As it did with the hours of service rules, the new rules remain in effect while the FMCSA considers amendments to comply with the court's directive.

Hazardous material carriers saw some of the biggest changes in their operations this year. Background checks are now standard for those seeking new or renewal licenses but there are many problems with the program as it has been implemented. Various cities began implementing bans on hazardous materials being shipped within their jurisdiction. A legal attack is underway in D.C., which has banned hazardous materials within 2.2 miles of the U.S. Capitol building.

The Hours of Service rules continued to be an issue. Last year the Fourth Circuit Court of Appeals had rejected the rules after concluding that the FMCSA had failed to comply with its statutory mandate to evaluate the rules in relation to driver fatigue. The FMCSA attempted to have the rules codified as part of the highway bill, but that effort was rejected. By the fall the FMCSA had completed its study on driver fatigue and the rules were back in place, but not without continued attack by various groups. The FMCSA has rejected most requests for reconsideration, agreeing only to consider the effect of the rules on team drivers with sleep berths. A year end study by the Insurance Services Office indicates that the new rules have done little to reduce driver fatigue, a major factor in accidents.

In analyzing the operations of the FMCSA, the Government Accountability Office issued a recent report indicating that the FMCSA needs to improve its enforcement programs. While the FMCSA does implement various means of enforcement of rules, its evaluation of the effect of the enforcement does not meet its mandated goals of determining whether the programs actually accomplish the goals of the U.S. Department of Transportation (USDOT) in improving road operations. The FMCSA has indicated that steps will be taken in the coming year to correct this operating concern.

The insurance industry was greatly concerned at the end of 2004 when it appeared that Congressional action had been taken to eliminate financial reporting for motor carriers. Through our efforts, in conjunction with other organizations with these concerns, Congress mandated that the DOT address the issue. By the end of this year funding had been restored for the collection of the financial data and we expect that things will get back in line in the early part of the year. We urge you to continue to require financial reporting by your insured; and to submit those statements to us for evaluation by our team of analysts.

While the country coped with natural disaster issues, terrorist threats remain a viable concern. Regulations continue to be enacted to protect the stream of commerce and assure the safety of the country. The Greenlane Maritime Cargo Security Act was proposed late in the year. The Act is designed to implement protocols and procedures to prevent the use of cargo containers as arsenals to bring weapons and terrorists into the country. It would offer competitive advantages to shippers who voluntarily comply with the highest security standards and would also create and fund a new Office of Cargo Security Policy within the Department of Homeland Security.

The Motor Carrier Industry

Initially trucking was severely impacted by the hurricanes and the economic fallout that followed but the full effects will not be known for some time. But the hurricanes were not the only challenges faced by the industry in 2005. By the beginning of the 4th quarter trucking failures had already reached 1,680, well above last year's totals. Much of this is tied to the rising fuel and insurance prices, as well as the driver shortage.

Motor carriers, once again, showed that they continue to exemplify the values of America in their response to the national disasters this year. There were emergency suspensions of many trucking regulations in order to permit truckers to aid in disaster relief. They responded in a big way, providing trucks, supplies and money and reaching out to help the lives of many in small ways. We applaud all those companies and drivers who took time out to help their fellow countrymen.

Transportation, as an industry, has continued to evolve to meet the needs of commerce. In early years each company fell into one category – be it warehousing, brokerage, short-haul, long-haul or dedicated service, among others. In today's global economy, those companies which look to survive have expanded to provide multi-service operations. There were a number of large mergers this year as LTL carriers and third party logistics providers looked to join operations to gain market share and extend their operations. This combination of services requires underwriters to focus on the over-all operations and evaluate the various risks which the insured has in all its different operations before determining the proper coverage to be provided. In the coming year the transportation industry has indicated

As a whole, trucking has placed a strong focus on safety and reducing accidents. There is recognition that money spent on safety is well spent to insure a company's health. A recent FMCSA study has determined that a motor carrier operating at a 2% profit margin needs revenues of \$2.5 million to offset every \$50,000 in accident losses, with the average crash costing \$62,613 (2003 dollars). Understanding the relationship between accidents and revenues becomes even more important when considering the fact that even only a few small accidents can so substantially impact a motor carrier's operations that it will be put out of business. This year, built-in-stability control systems, collision avoidance radar technology, in-truck cameras and sensors, and lane departure warning systems were being marketed and tested by various truckers and insurers. The cost of these systems, when considered in light of the savings for each accident, makes the systems even more attractive. Many of the new truck models will include some of these features. While in the long term trucking companies will save money as a result of the new safety features, the cost of these features will require trucking companies to have sufficient resources. This is yet another reason to closely monitor the financial condition of insureds; to make sure they have the resources to be using the best equipment. Truck sales are expected to be high this year, as new regulations on emissions standards go into effect with vehicles manufactured in 2007. Many carriers have indicated that they will look to replace older equipment with tractors still available under the older standards.

Despite the unprecedented surge and volatility in diesel prices during the third quarter, the nation's publicly traded trucking companies saw revenues grow at the same rate as expenses, and operating profits grew at about the same rate as in the second quarter. For the three months ended Sept. 30, public carriers posted revenues that were 12.8 percent higher than the same 2004 period. Expenses also were about 12.8 percent higher and operating profits grew 12.6 percent. Third-quarter growth in revenues, expenses and operating profits were very close to the growth reported in the second quarter. Mergers and acquisitions also continued this year, with some large carriers swooping up smaller regional carriers or simply purchasing other large carriers.

Truck fatalities are on the rise. The National Highway Traffic Safety Administration indicates that for a second straight year the numbers have increased. In mid year, the NHTSA revised its prior report which indicated that fatalities may have decreased. It was later determined that in 2004 there were 5,190 truck fatalities. An end of the year study showed that most of those occurred in rural areas, with rollovers and multiple deaths more likely on the rural roads.

This year saw the Teamsters break from the AFL-CIO, an historical move for the labor movement. The Teamsters and six other unions have joined together to form a new coalition called Change to Win. The initial focus of the new coalition will be to organize drivers and other transportation sector employees.

that it will focus its legislative efforts on the need for a new

national transportation strategy, involving truck, rail and air carriers. Attention will also be placed on the continuing challenges to the hours of service rules, the proposal to cut the required stopping distance, planned rulemaking on the use of electronic onboard recorders and the possible imposition of security regulations which will require inspection and tracking requirements for shippers and carriers.

Insurance Underwriting

As the year began many insurers were under attack by various state attorneys general about their insurance practices. Brokers and insurers have entered into settlement agreements during the course of this year and attention seems to have moved away from some of those issues. Following the hurricanes most insurers were focused on evaluating catastrophe models and coverage issues related to wind and flood losses. The various state regulators most substantially impacted by the hurricanes have shifted their eyes to finding ways to obtain coverage for all losses suffered in the hurricanes, regardless of policy exclusions.

The insurance industry was hit hard with worldwide catastrophic losses this year, even without the possibility of increased losses if coverage issues are resolved against insurers. Advisen Ltd. estimated worldwide insurance and reinsurance losses related to the three major hurricanes that hit the United States this year would amount to \$57.6 billion, making the cumulative catastrophe losses the largest on record. Advisen projects pretax insured losses per hurricane to be \$40.4 billion for Katrina, \$6.4 billion for Rita and \$10.8 billion for Wilma.

Although the exact amount of losses will not be known for awhile, the industry as a whole seems to have withstood the onslaught. At year end the P & C industry's net income after taxes is stated to have risen 4.4%, or \$1.2 billion, to \$28.8 billion in nine-months 2005 from \$27.6 billion in nine-months 2004. Overall the combined ratio rose 2.2 percent to 100% during the first nine months of the year. While that number would appear high it must be considered that the combined ratio was the second best nine month ratio since 1986. These figures were released by ISO and Property Casualty Insurers Association of America.

Prior to the hurricanes the market had continue to soften from the last few harder years. It is predicted that the costs of the hurricane will drive premiums higher, as reinsurance premium increases. LTL carriers are expected to be hit harder as they tend to have greater risks, with more terminal exposure than a truckload carrier. Umbrella and excess coverage is also expected to increase for these carriers.

Under an amended Terrorism Risk Insurance Extension Act (TRIA) law, insurance companies' loss retention will grow incrementally over the next two years, but will vary depending on the severity, location and timing of the attack and on the insurer's overall exposure. The Act was signed into law as the year drew to a close and extends the

Terrorism Risk Insurance Act of 2002 (TRIA) through the end of 2007.

Central Analysis Bureau

Now, more than ever, Central Analysis Bureau is the one stop source for the information you need to "know your insured". During the past year we have introduced two new programs to help underwriters by providing the information they need when they need it in a user-friendly format.

These programs are still works in progress as we listen to our early subscribers and make refinements based on their feedback. As always, Central Analysis Bureau is dedicated to meeting the needs of underwriters and we will continue to work to expand and improve these programs in the year ahead. However, the current subscribers to these programs are already reaping the benefits of being able to make better decisions and minimize their liability under regulatory filings.

We urge all the subscribers to our financial analysis service who are not familiar with these new programs and those who do not subscribe to any CAB service currently to learn more about these valuable programs. To get more information about these programs or to schedule a demonstration please contact Judy Silpe at (212) 244-6575, extension 206 or jsilpe@cabfinancial.com

The first of our new programs is the *Insurance Filing Monitoring* program. Monthly, we scan through all the outstanding filings that an insurance company has registered with the U.S. Department of Transportation. Each individual filings is analyzed to determine whether or not it falls under any of the following categories which can potentially mean an insurance company is exposed to unnecessary liability: Filings with effective dates 5 years old or older; filings on behalf of carriers whose authority has either been revoked or never granted; filings utilizing a form that results in an effective filings with no dollar limit; filings for amounts in excess of the USDOT required limit; unnecessary cargo filings on behalf of contract carriers; filings for brokers (a broker does not require a filing); filings on behalf of Mexican carriers (filings not required for Mexican carriers). We then send subscribers reports which list all the potentially problematic filings, specifically highlighting new filings just made, and all outstanding filings for the subscribers insurance companies. Since an insurance company's liability under a filing can range from \$10,000 per accident for a cargo filing to up to \$5,000,000 for a BIPD filing, avoiding even one payout from an unnecessary filing or limit will pay for the cost of this program for many years.

The second new program is the *Safety Monitoring Program*. The USDOT now collects a large amount of safety related information about motor carriers. This information comes from USDOT audits, roadside inspections, accident reports

and other government operations. However, this information is spread over a number of different databases and some of the information is not available on any government website. The *Safety Monitoring Program* compiles this information all together on one report. It consists of three parts. First is a baseline report on all insureds that gives all the available data. Second is an update report that highlights changes in information that may indicate a problem or deterioration. Third is a report that is provided prior to the policy renewal date so that the underwriter will have a fresh report in an easy to understand format just at the time it is most needed. This program is designed to give underwriters the tools to be alerted to possible safety problems quickly so that action can be taken before there is a serious impact on underwriting results.

In our excitement over these new programs and how they can help underwriters to know their insureds and to make better decisions we certainly do not want to neglect our bedrock financial analysis service. In fact, in the current climate of high energy prices, monitoring the financial condition of your insureds, which is always important, is essential. As we wrote about in *Bits and Pieces* during 2005, a recent study has shown a correlation between fuel prices and bankruptcies and the conclusions of this report are supported by indications that trucking company failures increased substantially during 2005.

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.

Also, at renewal time automatic subscribers can use our "clearinghouse" to access the most current information in our files and can send us updated financial information for our review. Even for written accounts there is only one charge per year, regardless of how many times you use the "clearinghouse" to access information on that account or how often a subscriber asks us to review updated financial information received from an insured and send to us. Our service is structured this way to encourage underwriters to get frequent updates to their insured's financials statements because financial condition can change rapidly.

For insurance companies who are subscribers both to our financial analysis service and our safety monitoring program we are planning to integrate our most recent financial analysis into the renewal report. This will allow underwriters at renewal time to have together financial and safety information. Where current financial information is not available this will be highlighted and the underwriter will have the time to secure this information, send it to us and have it analyzed before a decision is made on renewal.

Automatic subscribers to our financial analysis service get substantial discounts on our two new programs.

We continue to be gratified by all the positive comments we receive about our monthly e-mail newsletter, "*Bits and Pieces*". We all get way too many e-mails in our inbox but this is one that we have been told many await every month and find to be a "must read". This newsletter, which is sent free of charge to all subscribers, 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. As the government issues or changes rules and as the various courts of the land opine this newsletter gives underwriters the information to keep policies up to date. If you do not currently receive this newsletter but would like to please e-mail Mark Schweber at mschweber@cabfinancial.com.

In 2006 we have plans for more ways to help underwriters "know their insureds" so watch "*Bits and Pieces*" for further updates. For example, we have secured from the USDOT detailed information on individual inspections and accident reports and are working on ways to best present this information to underwriters.

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 tstrucks.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.



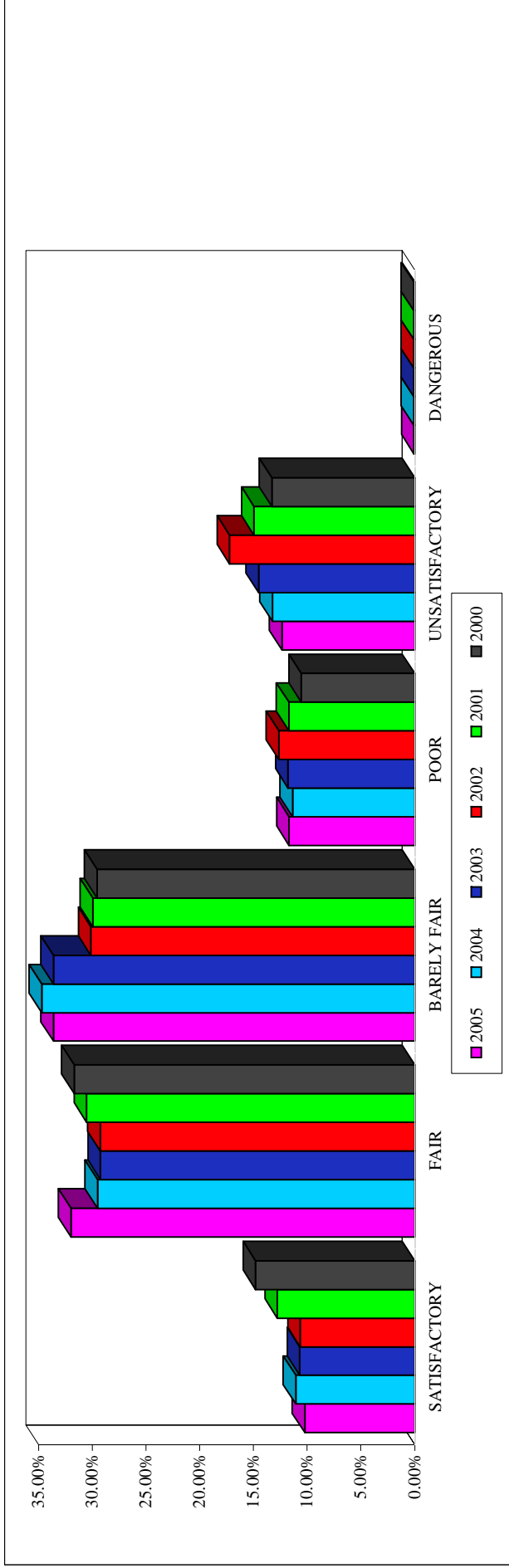
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Ratings

Breakdown of ratings for the year 2005 and prior:

	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995
SATISFACTORY	10.24%	11.08%	10.69%	10.64%	12.77%	14.81%	15.63%	16.11%	15.65%	15.61%	17.43%
FAIR	32.00%	29.52%	29.26%	29.28%	30.54%	31.70%	31.98%	30.77%	30.70%	31.33%	31.29%
BARELY FAIR	33.64%	34.71%	33.63%	30.14%	29.96%	29.57%	28.94%	28.49%	27.53%	27.98%	26.68%
POOR	11.69%	11.38%	11.79%	12.64%	11.71%	10.54%	10.90%	11.42%	12.04%	11.24%	11.16%
UNSATISFACTORY	12.34%	13.23%	14.53%	17.23%	14.95%	13.30%	12.49%	13.15%	13.97%	13.66%	13.32%
DANGEROUS	0.06%	0.08%	0.07%	0.07%	0.07%	0.08%	0.06%	0.06%	0.08%	0.15%	0.09%



Reference to CAB ratings

- SATISFACTORY
 - FAIR
 - BARELY FAIR
 - POOR
 - UNSATISFACTORY
 - DANGEROUS
- Excellent financial condition
 - Adequate financial condition
 - Limited financial condition
 - Weak financial condition
 - Inadequate financial condition
 - 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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limits recovery for cargo loss and damage in regulated interstate transportation to the actual value of the cargo, claimants have an incentive to allege claims which may result in punitive or other extra-contractual damages. For example, in Miracle of Life, LLC v. North American Van Lines, Inc., 2005 WL 1005988 (D.S.C.), the plaintiff alleged eight separate causes of action, including fraud,

BMC-32

As we reported in Bits and Pieces, the Second Circuit Court of Appeals has ruled that the BMC-32 Endorsement does not apply to contract carriage for shipments taking place after January 1, 1996, the effective date of the ICC Termination Act. In M. Fortunoff of Westbury Corp. v. Peerless Insurance Company, 2005 WL 3387698 (December 13, 2005), in which Schindel, Farman & Lipsius represented the insurer, the Court approved the practice of the FMCSA to apply the BMC-32 Endorsement to common carriage only. The Court held that the Termination Act “gave the FMCSA discretion to require cargo liability insurance for some types of motor carriage and not others.”

The Court also said that the authority of the FMCSA to issue both common carrier certificates and contract carrier permits under the “transition rule” of 49 U.S.C. §13902(d) expired in 1998 when the rulemaking to revise the registration system under 49 U.S.C. §13908 was due. The FMCSA, apparently in the belief that the transition rule was in effect until it actually issued a rulemaking, has continued to issue separate common and contract authorities. The effect of the court’s ruling is that all authorities issued by the FMCSA after the end of 1997 would be deemed simply general carrier authorities. A carrier with this general carrier authority may perform both common and contract carriage. If there is a BMC-32 Endorsement on the cargo liability policy of the carrier, it will apply only to common carriage services provided by the carrier. It is not entirely clear how it will be determined if carriage is common or contract. It would appear, however, that this issue may provoke continued litigation. In this case, the Court remanded the case to the District Court, presumably for a finding as to whether the shipper and the carrier actually agreed that the shipments would be contract transactions. This should not be an issue insofar as the contract between the shipper and the carrier specifically states that all services are to be provided under the contract carrier permit.

Meanwhile, the FMCSA has not issued new regulations which could resolve these issues. The ICC Termination Act, in 49 U.S.C. §13908, gave the DOT two years from January 1996 to issue new registration rules. Knowing that this was not done, Congress amended §13908, effective August 10, 2005, giving the DOT a year from that date to establish a new registration system.

PRE-EMPTION

Many court decisions in 2005 dealt with the issue of pre-emption of state law claims by the Carmack Amendment. Because the Carmack Amendment

civil conspiracy, negligence, promissory estoppel and violation of the South Carolina Unfair Trade Practices Act. The court held that all of these claims were prohibited by the Carmack Amendment. In Vitramax Group, Inc., v. Roadway Express, Inc., 2005 WL 1036180 (W.D. Ky.), the court held that a claim for fraud which occurred prior to the actual transportation was pre-empted. Similarly, in The Mapes Piano String Co. v. USF Dugan, Inc., 2005 WL 1924184 (E.D. Tenn.), the court held that state law claims arising out of misrepresentations which took place prior to the receipt of the cargo are pre-empted. State law claims for loss of business damages were held to be pre-empted in AIG Aviation, Inc., v. On Time Express, Inc., 2005 WL 2416382 (D.Ariz.).

On the other hand, in Schwarz v. National Van Lines, Inc., 2005 WL 1498463 (N.D. Ill.), state common law claims for intentional and negligent infliction of emotional distress were held not pre-empted. In Ducham v. Reebe Allied Moving and Storage, Inc., 2005 WL 1383183 (N.D. Ill.) the same court held that a claim for fraud related to freight charges was not pre-empted. In Hewlett-Packard Co. v. Brother’s Trucking Enterprises, Inc., 2005 WL 1524920 (S.D.Fla.), the court denied the defendant’s motion to dismiss state law claims on the grounds that there was a question of fact as to whether the defendant was acting as a carrier or as a broker. The Carmack Amendment does not pre-empt claims against brokers. Similarly, in Nebraska Turkey Growers Cooperative Association v. ATS Logistics Services, Inc., 2005 WL 2600235 (D.Neb.), the court permitted remand to a state court because claims against a broker are not pre-empted by the Carmack Amendment.

BROKER-CARRIER

The proclivity of transportation providers to act as both brokers and carriers continues to provoke litigation. In addition to the Hewlett-Packard and Nebraska Turkey cases referred to above, we direct your attention to the decision in Just Take Action, Inc. v. GST (Americas), Inc., 2005 WL 1080597 (D.Minn.), in which a defendant sought to avoid Carmack liability by claiming that it acted as a broker. The opinion sets forth the considerations a court will make to determine broker and carrier activity. Another useful case discussing the carrier-broker issue is Mach Mold Inc. v. Clover Associates, Inc., 2005 WL 2007249 (N.D.Ill.).

OTHER CARGO CASES OF INTEREST

There were a number of interesting cases this year dealing with damages. Although the Carmack Amendment provides that the cargo owner’s sole

remedy is for “actual loss or injury to the property,” the courts have consistently held that consequential or special damages are included. In The National Hispanic Circus, Inc., v. Rex Trucking, Inc., 2005 WL 1484773 (5th Cir.), the circus was awarded damages for its missing bleachers, including rental cost, lost ticket sales and the cost to replace the custom-made bleachers. The circus was able to show that the carrier, because of its experience in moving the circus’ equipment could have had notice of the special damages which would result from non-delivery. Likewise, in the Mach Mold case referred to above, the court held that “lost profits and all reasonably foreseeable consequential damages” are recoverable under the Carmack Amendment.

Two cases dealt with the issue of the proper measure of damages where the owner obtained the cargo in a bargain purchase. In Delta Research Corporation v. EMS, Inc., 2005 WL 2090890, (E.D.Mich.) the claimant demanded the cost to buy a new machine to replace the damaged one it bought cheaply. The court awarded the claimant its purchase price because that best reflected the actual market value. On the other hand, in CPCI v. Technical Transportation, Inc., 2005 WL 1354662 (W.D.Wash.), the claimant purchased used television sets for \$400 each and sold them for \$2,800 each. The court held that the re-sale price was the proper measure of damages.

In Crown Express, LLC., v. Ozark Trucking, Inc., 2005 WL 1657064 (E.D.Ca.), the court refused to dismiss a suit against a motor carrier on the grounds that no written claim was made within nine months of the date of delivery. The carrier presented evidence that it was its practice to issue the uniform straight bill of lading, but it did not show that a bill of lading was issued for the shipment in question. The court held that the nine-month claim period would not apply unless there was a bill of lading which specifically provided for the claim time. As for what constitutes a claim, the 11th Circuit Court of Appeals held that a written claim which specified a range of damages satisfied the requirement of 49 C.F.R. §370.3(b) for a claim for a “specified or determinable amount of money.”

NO RECOVERY FOR DRIVER UNDER MCS-90

Canal Ins. v. A&R Transportation and Warehouse, LLC, 827 N.E.2d 942 (Ill. App.) arose out of a one vehicle accident. The driver Boyd lost control of the rig, allegedly due to brake failure, and suffered bodily injury. He sued the tractor owner A&R, and others. Canal defended its insured A&R under reservation and separately sought a declaration that it provided no coverage since neither the tractor nor trailer was scheduled on the policy. Boyd argued that even if the basic policy did not apply he was entitled to recover under the MCS-90 attached to the A&R policy. Canal argued, and the court agreed, that the MCS-90 explicitly excludes from coverage the insured’s employees while engaged in the course of their employment. Boyd responded that he was an independent contractor, not an employee. The court concluded, though, that the regulatory language defined employee, for purposes of the MCS-90 to include independent contractors.

Periodically lay people, and sometimes even insurance professionals, misunderstand what certificates of insurance are for. The decision in T.I.G. Insurance Company v. Via Net, ___ S.W.3d ___ (Tx. App.), might not do much for clarifying the matter. Via Net, insured by Lumbermens Mutual, was a vendor for Safety Lights, a manufacturer insured by T.I.G. A Via Net employee was injured while making a delivery to the Safety Lights location and sued Safety Lights. Vendors were required to have Safety Lights named as an additional insured on their policies.

Via Net’s broker had provided Safety Lights a certificate of insurance which identified the latter as a certificate holder for the Lumbermens coverage. The certificate had the standard, printed language to the effect that it was issued for information purposes only and conferred no rights upon the certificate holder. The broker, though, typed in language directly conflicting with the printed language to the effect that the certificate holder was added as an additional insured. Lumbermens, nonetheless, took the position, correct in our view, that Safety Lights was not an insured under the policy issued to Via Net. T.I.G. and Safety Lights then settled the claim of the deliveryman.

Safety Lights sought a declaration in federal court that it was an insured under the Lumbermens policy, but the court agreed with Lumbermens that it was not. Then Safety Lights and T.I.G. sued Via Net in state court for breach of contract, fraud and misrepresentation in failing to add Safety Lights as an additional insured. Via Net responded that Safety Lights should have discovered the breach as soon as it received the certificate with the printed language denying that it was an insured. The trial court agreed and granted summary judgment for Via Net on the basis that the claims were time barred.

Safety Lights appealed, arguing that it could not reasonably have discovered that it was not an insured until Lumbermens actually denied coverage. The appellate court agreed that, in light of the typed language in the certificate, Safety Lights could reasonably have believed that it was an insured. The court pointed out that even some of the printed language in the certificate could lead the certificate holder to believe that it was entitled to coverage. The matter was remanded.

The decision is troubling on several grounds. It is not clear, for instance, whether the appellate court disagreed with the federal court and would, in fact, have found that Safety Lights was an insured had that question still been at issue. It is certainly possible that the decision will be read that way in the future, or that some will argue that that is how it should be read. All of this confusion arises simply because an industry professional used a certificate of insurance when it should have asked the insurer to simply issue an additional insured endorsement.

STATUS OF OWNER-OPERATORS

The historical tension between owner-operators, as a class, and motor carriers, that generally lies just beneath the surface of a close working relationship

periodically bubbles up as it did in Rivas v. Rail Delivery Service, Inc., 423 F.3d 1079 (9th Cir.). The matter involves a class action brought by California owner-operators who entered into written leases with motor carriers between 1991 and 1995, that is before the Interstate Commerce Commission was sunsetted. The owner-operators sought relief under the leasing regulations enacted in 1979 by the I.C.C. (which continue to exist in virtually the same form under D.O.T. jurisdiction.) The district court threw out several of the claims: for instance, it held that federal law did not require owner-operators to be considered employees: they could be independent contractors. The district court also found no evidence that the motor carriers had sold the owner-operators insurance without a California license to do so. The court, though, did issue an injunction directing the motor carriers to comply with the leasing regulation (now found at 49 C.F.R. §376.12 (c) (1)) which requires the lease to specifically provide that the motor carrier assumes complete responsibility for the operation of hauling equipment for the duration of the lease.

On appeal the Ninth Circuit concluded that the owner-operators lacked standing to bring suit. A plaintiff must have suffered injury in fact to have standing to sue. The initial complaint had alleged that owner-operators had suffered financial harm by the carriers' mischaracterization of them as independent contractors and extraction of hidden charges through the selling of insurance and other provisions of the contract. Those claims, however, had been thrown out by the trial court and were not appealed. The owner-operators lacked standing to complain about the alleged failure of the motor carriers to assume responsibility for the leased equipment.

UM AND THE STATE GUARANTY FUND

In Johnson v. Braddy 869 A.2d 964 (N.J. App.) (currently on appeal to the New Jersey Supreme Court) the court clarified the responsibilities of various entities when a state guaranty fund becomes involved in a claim and the value of plaintiff's claims exceeds the fund's limit of exposure. Braddy, who was operating his rig in the business of Walsh Trucking, struck Johnson as he was exiting his vehicle. Walsh was insured by a \$1 million primary policy issued by Reliance Insurance Company and a \$25 million excess policy issued by A.I.G. Johnson filed suit against Walsh and Braddy. When Reliance was declared insolvent, however, the trial judge entered a consent order dismissing the complaint subject to restoration after disposition of plaintiff's UM claim against his own insurer. That insurer ultimately paid Johnson the full UM limit of \$300,000. By coincidence \$300,000 is also the maximum recoverable under the New Jersey Guaranty Association's rules. On that basis, Walsh and Braddy sought summary judgment arguing that they could not be subject to liability in excess of the Association's limits.

This argument was rejected by the trial court and the appellate court. The appellate court noted that a basic thrust of the law is to permit an injured party to recover the full amount of his or her damages from the tortfeasor. Thus, if the damages exceed the tortfeasor's insurance limits, the tortfeasor remains personally liable for the difference. The same should therefore be true of an award in excess of the Association's limits. In so holding the court

disagreed with its own reading of the guaranty association statute in an earlier case. Braddy and Walsh, thus, remained liable for any judgment over \$300,000. The umbrella policy would not drop down. Accordingly, the defendants bore direct exposure for the portion of any judgment between \$300,000 and \$1 million.

FREIGHT FORWARDERS AND NVOCCs

In Scholastic Inc. v. M/V Kitano, 362 F.Supp.2d 449 (S.D.N.Y.) a consignment of books burned on board the M/V Kitano at sea as a result of the combustion of another container on board packed with impregnated activated carbon. The carbon had been prepared and packed by General Carbon Corporation and had not been marked "hazardous." In heavy seas moisture seeped in to one of the containers containing the carbon and a fire broke out. General carbon settled the claims by Scholastic and others and then sought reimbursement from the international freight forwarder Navtrans International.

The court distinguished between freight forwarders, described as intermediaries who secure cargo space on the ocean vessel, give advice on government licensing requirements and letters of credit and arrange for ground transport to meet the vessel, and NVOCCs (non-vessel operating common carriers) which assume the responsibility of delivering the goods and issue a bill of lading. (This is similar to the distinction between forwarders and brokers in domestic transportation, although there it is the forwarder which issues a bill of lading and assumes responsibility for delivering the goods.)

General Cargo argued that Navtrans was both an NVOCC and a forwarder. The court concluded that under either theory Navtrans was not liable. Navtrans had issued a bill of lading which provided, inter alia, that if the shipper failed to disclose that its goods were flammable or unstable it would be responsible to indemnify the carrier (Navtrans) for any resulting loss.

Nor was Navtrans liable as a forwarder. International forwarders are obligated to act reasonably in selecting the carriers who perform the transportation. There was no evidence of negligence in selecting carriers. The court rejected General Carbon's argument that a forwarder has additional duties which Navtrans performed negligently. It was not the job of the forwarder to select a low-moisture container, or to ask the shipper to put in writing that the cargo was not hazardous.

MCS-90

In a statement published in the Federal Register and dated October 5, 2005, the DOT issued formal agency guidance for the interpretation of the MCS-90 endorsement. In so doing, the DOT declined a petition filed by several insurers for a rulemaking modifying the language of the endorsement. The guidance is set out in question and answer form:

Q.- Does the term "insured" as used on Form MCS-90, Endorsement for Motor Carrier Policies of Insurance for Public Liability, or "Principal", as used on Form MCS-82, Motor Carrier Liability Surety Bond, mean the motor

carrier named in the endorsement or surety bond? Guidance: Yes. Under 49 C.F.R. §387.5, “insured and principal” is defined as “the motor carrier named in the policy of insurance, surety bond, endorsement, or notice of cancellation, and also the fiduciary of such motor carrier.” Form MCS-90 and Form MCS-82 are not intended, and do not purport, to require a motor carrier’s insurer or surety to satisfy a judgment against any party other than the carrier named in the endorsement or surety bond or its fiduciary.

By implication, the DOT is disagreeing with such decisions as John Deere Ins. Co. v. Nueva, 229 F.3d 853 (9th Cir. 2000) and Pierre v. Providence Wash. Ins. Co., 286 A.D. 2d 139 (2001) which are referred to in a footnote.

We hope that this will encourage courts to change course on this issue. A change in the language of the MCS-90, of course, would have been harder to ignore. For what it is worth, we are disappointed that the D.O.T attorneys appear to have missed the fact that the Pierre case went up to the New York Court of Appeals. Had the D.O.T. read the Court of Appeals decision, it may have been more specific about which “fiduciaries” are included within the definition of “insured” in section 387.5. We have a feeling that this “guidance” may not be dispositive.

There were a large number of reported cases relating to the MCS-90 this year, several of which our firm was involved in. Among the most important were:

In Ross v. Wall Street Systems, 400 F.3d 478 (6th Cir.), the motor carrier had unilaterally terminated the lease on one day’s notice just days after it had been executed because the driver had failed to pick up the very first load that had been assigned to him. The lease permitted the carrier to terminate the lease and the court held that the termination did not violate the federal motor carrier laws. The company’s placards were still attached to the vehicle a month later when it collided with plaintiff’s vehicle and caused injury. Based on the unanimous case law the court had no trouble concluding that the lease was cancelled. Similarly, the court rejected the possibility that the motor carrier could be liable on a negligent entrustment theory.

Plaintiff’s final theory focused not on the motor carrier’s exposure but on the MCS-90. He noted that the endorsement has a 35 day grace period (that, of course, is not quite accurate) and argued that the MCS-90 endorsement remained in effect for 35 days after the lease was terminated. The court pointed out that the argument was simply incorrect. The rule is that the MCS-90 remains in effect for 35 days after the notice of cancellation is sent to the insured: cancellation, that is, of the policy. The rule does not relate to the cancellation of any particular lease. Once the lease was no longer effective its motor carrier had no responsibility for the driver and neither the policy nor the MCS-90 applied to the loss.

It seems likely that underlying plaintiff’s theory is the assumption, wrongly adopted in recent years by some important courts, that the MCS-90 relates to the liability of individual drivers. In a statement issued this year, the D.O.T repeated that unless judgment is entered against the motor carrier for which the filing was made, the MCS-90 does not apply. We will see if the judiciary is willing to accept the D.O.T’s definitive explanation and reverse the decisions in Nueva (9th Circuit) and Pierre (N.Y. Court of Appeals).

Two decisions, one by a District Court in Michigan, one by a District Court in Maryland, reached conflicting conclusions about the applicability of an MCS-90 allegedly attached to an umbrella policy in a somewhat bizarre factual scenario. Both cases involve Builders Transport which had been certified by the I.C.C (and later the D.O.T.) as a self-insurer; in other words, there was no need for the company to secure a filing and, in fact, none of the insurers made a filing with the D.O.T.

Builders provided self-insurance for the first million dollars. Reliance Insurance provided the next million of coverage, but that policy was itself subject to a separate million dollar aggregate deductible. Above that lay a \$13 million umbrella policy issued by Gulf Insurance. For no apparent reason, the underwriters at both insurance companies prepared MCS-90 endorsements (both of them were marked identically: \$1 million excess over \$1 million), although it remains in dispute whether the endorsement was actually attached to the policy. In short, the factual background is problematic and the underwriters were not at the top of their game, at least with respect to the MCS-90.

In the Michigan case, Kline v. Gulf Insurance Co., 2002 U.S. Dist. LEXIS 12628 (W.D. Mich. July 10, 2002), a judgment of \$3.2 million was entered. Reliance, which defended the claim took the position that its coverage attached at \$2 million and paid its \$1 million limit. Gulf then paid the remaining \$200,000. Kline argued that, in fact, Reliance should be deemed to have paid the first million of the judgment, and that Gulf should pay the next \$1 million under its MCS-90. The court held that Gulf’s attachment point under both the policy and the MCS-90 was \$3 million and the MCS-90 did not drop down.

In the Maryland case, McGirt v Royal Insurance Co. of America, Case No. RWT 02cv3455 (Md. Nov. 8, 2005), the insurance case was tried before the underlying case, so there is, as yet, no judgment against Builders. Since Reliance is no longer solvent, McGirt will not be able to collect anything from Reliance. That fact, held the court, distinguished McGirt from Kline. The court held, therefore, that Gulf will be required to pay the first \$1 million of any judgment because the MCS-90 drops down to protect McGirt. Then, held the court, there will be a gap and further recovery will not have been possible (since Reliance and Builders are defunct) until the attachment point of the Gulf policy is reached. Gulf would be responsible for the next \$13 million (i.e., its full policy limits). This construction is difficult to accept, even apart from the issue of whether excess MCS-90 drops down, since Gulf will end up having a \$14 million exposure (at least theoretically since it is unlikely plaintiff will win a \$16 million judgment even though the policy has liability limits of \$13 million. The McGirt case is on appeal to the Fourth Circuit, while Kline is on appeal to the Sixth Circuit. Our firm has advised Gulf in both matters.

Transportation Seminar - Schindel, Farman & Lipsius and CAB will hold their sixteenth Annual Transportation Seminar in the New York City area on April 12 and 13. Registration is limited and we have been over-subscribed 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 are also available on our web site.